

Introduction Dispute Resolution Processes

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Construction Industry

- Different Stakeholders Working Together
 - Employer, Consultants, Contractors, Subs, Suppliers etc
- Different Goals
 - Employer : Speed & Cheap & Quality
 - Consultants: Quality & Efficiency & Completion
 - Contractors: Payments & Other Financial Contingencies & Avoiding Liability
 - Subs & Suppliers: Payments

Differing Main Objectives

- Owner : Performance
 - Timely
 - Within or Under the Budgeted Cost
 - Satisfactory Design & Fit for Purpose
 - Performance Criteria Met
- Contractor: Perform & Profit from Contract
 - Get the Contract: Compromise on Cost & Time?
 - Claims Orientated: Increase the Profit
 - Value Engineering and who keeps savings
 - Complete the Job and Reputation Intact?
- Sub-Contractor: Profit or Relationship?

Recipe for Disputes

- Different needs, wants, goals etc
- Foresight of Risk
- Non-exhaustive Risks Possibilities
- Risk Allocations in Contract
- Ambiguity of Language in Contract
- Unfair Allocations of Risk & Contingencies
- 3rd Party & Neutral Impacts

Risks Allocations

- Owner should recognize
 - If more risk than what is fair is allocated to the contractor, the tender price will escalate
 - If tender price does not escalate, you better worry (the integrity of the contractor)
 - If more risk than what is fair is accepted by the contractor without tender price escalation, the contractor may go bust
 - If more risk than what is fair is allocated to the contractor, there will be delays, claims and problems at the site
 - Eventually the project and the owner will suffer

Risks Allocations

- Contractor should realize
 - If tender price too high with too much contingency pricing, no award
 - If you are claims driven note the standard form conditions of contract are better developed at ensuring the risk stays with you
 - If you are claims driven note that the legal system is starting to recognize a higher standard of proof is required
 - If you are claims driven note that a proper managed project will catch you out
 - If you are claims driven note that you will have to bear the cash flow problem initially until recovery

Risks Management

- Identify your weaknesses and strengths related to the risk
- Where the strengths surmounts the weaknesses take on the risk
- If you are capable of controlling and shouldering the risk, assume the risk
- If you are able to influence the magnitude of the risk then you are able to minimize the risk, assume the risk (least cost risk bearer)

Risks Management

- Where you assume the risk, use it as a motivation towards managing the risk
- Where the risk can be transferred to 3rd parties, this should be the case
- Where the risk is wholly outside the parties' control, then it should be shared
- If you have an overall objective which is imperative, assume as much risk as possible in order to achieve this overall objective

Risks

Sir Michael Latham

“no project is free of risk. Risk can be managed, minimized, shared, transferred or accepted. It cannot be ignored.”

Create a System

- Create a System soon!
- Surveys on good risks management: save up to 20% of cost exposure
- It has to become the company's philosophy, attitude and procedure among all your key personnel from contract planning to contract estimating to contract management to contract close out

Tender & Risk Allocations

- Appreciating the various risks - before it is too late
- When is it too late ?
- Owner - When the ink on the invitation to tender has dried up
- Contractor – When the ink on the bid document has dried up

Identifying Risks

- Identify the Risks Allocations in the Tender Documents
- Identify the Other Technical, Non-Technical, Commercial and External Risks
- Literatures & Research
- Senior and experienced personnel knowledge
- Company History

Identifying the Risks

- Form a task force of project knowledgeable stakeholders (consultants, experts and experienced personnel)
- Always involve the intended project team in the process
- Obtain as much literature and information on the intended project including site conditions, comparative studies of previous projects involving the parties, similar projects carried out by your organization and projects near the vicinity

The Intended Contract

- Commercial and Technical Terms
- Express Obligations and Duties for both Parties
- Risks Allocations between the Parties
- Claim Processes and Mechanisms
- Administrative Requirements
- Dispute Resolution
- Choice of Law
- Implied Terms

Risks Uncertainty

- Conditions of contract uses an imperfect tool i.e. language
- Ambiguity or uncertainty: contra proferentum will transfer the risk back to the Party that dictated the terms of Contract
- Conduct of the parties can switch the risk allocations
 - The waiver principles
 - The estoppel principles
 - Luckily we do not have the good faith/reasonableness principles or do we ?

Risks Planning

- Set up a workshop to identify and predict frequency and severity of the various risks
- Prioritize the risk based on your organization's weaknesses
- Transfer Risks according to objective and Best Control Basis
- Draft working papers to be circulated to various experienced personnel in the organization for further comments or thoughts

Risks Planning

- Set up separate workshops to develop specific risk management, implementation plans
- Carry out contract administration and contract familiarization training for project team
- Try to maintain same personnel involved in negotiation on the contract during the construction period

Risk Analysis Software :-

- Primavera Monte Carlo
- Pertmaster Project Risk / Risk Expert
- Intaver Risky Project
- Palisade @RISK for Project
- Crystal Ball
- Projistic & etc.

Common Techniques Used In Software :-

- Monte Carlo Simulation
- Latin Hypercube Sampling
- Petri Net Simulation
- What-If Approach
- PERT Approach
- Probability Distribution & etc.

Disputes In Construction Industry

- Murphy's Law
- Specialist Lawyer's : Playground or Minefield
- Common Disputes
 - Variations : Design & Work Scope
 - Delay & Extension of Time & LAD & Prolongation Claims
 - Disruptions
 - Termination & Performance Bonds
- Dispute Resolution Processes

Legal Risks

- Choices of Law
 - Substantive Law Governing Relationship (*Lex Causae* or *Lex Contractus*)
 - Jurisdictional Law Governing Forum of Dispute Resolution
 - Procedural Law Governing Procedure Applicable to the Dispute Resolution Process
 - Law/Rules Applicable when there is a Conflict of Laws (*Lex Loci*)
- Changes in the laws
- Familiarity legal & industry standards on EPC contract
- Unclear Contract Terms & Drafting Language

Disputes Resolution Process Win-Win

Negotiation

- As part of Trouble Solving & Mitigation of Effects
- Per Potential Dispute when Risk Arises
- Per Potential Dispute when Effect of Risk Known
- Per Potential Dispute when Effect of Risk Concluded
- Global All Disputes

Negotiation

- Horse Trading & Trade-offs: Bona Fide or Bullying?
- Success Depends on:-
 - Philosophy of Company
 - Glass Half Full v Glass Half Empty: Cutting Losses v Making Losses, Reducing Profits v Making Profits
 - Middle & Lower Management Invested in Mitigation & Solving Disputes
 - Partnering Attitude

Negotiation

- Multi-Tiered Dispute Resolution Provision in COC: Compulsory before Arbitration
- Is Contractual Mandated Negotiations Binding
 - Is it a clear condition precedent?
 - Has it fixed any prescribed procedure?
 - Has it fixed a compulsory time-frame?
- Clause 20.5 FIDIC Red Book – 56 days for attempt at amicable settlement even if not done

Assisted Negotiation Conciliation

- Facilitative Using Respected Industry Players
- Evaluative: Determining Strength & Weakness of Positions
 - Early Neutral Evaluation
 - Expert View
 - Mini-Trial
 - Rent-a-Judge
 - DRB

Assisted Negotiation Conciliation

- Early Neutral Evaluation
 - A respected specialist gives an opinion on the strengths and weaknesses on each party's position
- Expert's View
 - A respected expert provides an overall view on the dispute

Assisted Negotiation Conciliation

- Mini Trial
 - A respected adjudicator and 1 mandated member from each party sit as panel hearing the dispute and evidence on fixed limited time basis
 - Then the 3 deliberate to attempt a settlement
- Rent-A-Judge
 - A respected arbitrator sits and hears the dispute and evidence on fixed limited time basis and provides a non-binding award

Assisted Negotiation Conciliation

- Dispute Review Board
 - Panel Appointed from Commencement or Early Point of time by Agreement
 - Active throughout the entire Period of Works or Project or DLP
 - Periodically Updated on Progress and Issues
 - Specific reference of dispute with presentation
 - Board makes constructive recommendations
 - If made temporarily binding, then effectively equal to DAB

Assisted Negotiation Conciliation

- No Recommendations on Actual Settlement
- Senior Management to Assess and arrive at Negotiated Settlement
- Settlement Agreement: Binding in Usual Manner
- Enforceable through Court Action (Summary Proceedings)

Assisted Negotiation Mediation

- Facilitative or Evaluative or hybrid
- Contractual Mediation
 - PAM 2006: Clause 35
 - Concurrent with Adjudication or Arbitration
 - PAM Mediation Rules
 - Can be terminated by parties or mediator or 90 day expiry subject to parties extension
- Ad Hoc Mediation: confidentiality agreement & choice of mediator: Now Governed by Statute

Assisted Negotiation Mediation

- Statutory: Mediation Act 2012
 - Invitation to Mediate must be accepted (14 days otherwise deemed rejected)
 - Mediation Agreement & Choice of Mediator or Institution to Appoint Mediator
 - No Prescribed Time Frame but any Party or Mediator may terminate the mediation
 - Settlement Agreement Enforceable Like other Agreements through Court Action (Summary Proceedings)
 - If Court Proceedings concurrently held: Settlement Agreement may be recorded as consent judgment or judgment of Court

Assisted Negotiation Mediation

- High Court directed Mediation
 - Distinct from High Court conducted mediation
 - High Court has power to direct parties to KLRCA Mediation
- Institutional Mediation: KLRCA Mediation Rules
 - Still needs acceptance of request for mediation (30 days otherwise deemed rejected)
 - 30 days for parties agreed choice of mediator or Director of KLRCA will appoint
 - Any party or mediator can terminate mediation or 3 month expiry period subject to parties agreed extensions

Assisted Negotiation Mediation

- Multi-tiered Dispute Resolution Process: Compulsory 1st stage or after reference to SO/ER
- Caucus Based Discussions & Deliberations
- Recommended Settlement by Mediator
- Requires Settlement Agreement: Enforceable through Court Proceedings (Summary Proceedings)

Disputes Resolution Process Determinative

Expert Determination

- Contractual or by Ad-Hoc agreement
- Technical or Quantum based Disputes
- Appointment Qualification, Choice & Fees as set out in Contract/Agreement
- Adopt Institutional Expert Determination Process
 - WIPO Rules, Academy of Experts Rules, CEDR
- Totally Informal & Inquisitorial
- Reasoned or Unreasoned Decision

Expert Determination

- Decision binding due to Agreement of Parties
- Enforceable through Court Proceedings (Summary Proceedings)
- Not Enforceable if outside jurisdiction, no natural justice or fraud, lack of impartiality or independence
- Agreement of Parties can reduce grounds for non-enforcement: jurisdiction or lack of natural justice
- Agreement can make it temporarily binding

Contractual Adjudication

- Dispute Adjudication Board (Cl.20 FIDIC)
 - Panel Appointed from Commencement or Early Point of time by Agreement
 - Active throughout the entire Period of Works or Project or DLP
 - Periodically Updated on Progress and Issues
 - Specific reference of dispute with presentation
 - Board makes decision temporarily binding
 - Can be reversed by reference to Arbitration or Court within fixed time frame: Cooling Off Period?

Contractual Adjudication

- PAM 2006 Clause 34.1 – 34.4
 - Limited to only some types of dispute: set-off by Employer under Cl.30.4
 - Limited to only on-the-job disputes and not after CPC
 - Parties agree on adjudicator or President of PAM appoints
 - PAM Adjudication Rules
 - 21 days for decision or such extension agreed by parties. No legal representation at conference.

Contractual Adjudication

- Decision Enforceable under Agreement
- PAM Rules: Parties agree can be summarily registered and entered as court judgment but do the Courts have the appropriate Rules to allow this?
- Temporarily Binding but can be reversed by Arbitration (6 weeks for reference) or Court
- Court: Jurisdiction, Natural Justice and Lack of Impartiality or Independence
- Cooling Off Period: Arbitration after CPC

Statutory Adjudication

- CIPAA 2012
- Compulsory Adjudication
- Unpaid Party: sums due for work done or services rendered in construction contract
- Payment Claim – Payment Response (10 working days)
- No Payment Response: Deemed Disputed but No Set-Offs or Counterclaim, challenge Unpaid Party's proof of due payment

Statutory Adjudication

- Limited Payment Response: Non-Paying Party limited to issues raised in Payment Response
- Jurisdiction of Adjudicator: Payment Claim & Payment Response (parties can agree to extend)
- Adjudicator has power to allow amendments?
- Notice to refer dispute to Adjudication
- Freedom to agree to Adjudicator, failing which, appointed by Director of KLRC

Statutory Adjudication

- Adjudication Claim – Adjudication Response – Adjudication Reply
- 45 working days from Adjudication Reply for decision unless parties agree to extend
- Adjudicator free to fix Procedure
- Can allow further submissions, can ask for clarifications, can be inquisitorial, can ask to interview witnesses, can hold hearings, can determine purely on documents

Statutory Adjudication

- Can be run concurrently with arbitration or litigation
- Decision temporarily binding until reversed in arbitration or litigation
- Decision: if unpaid: can suspend or reduce works and/or seek payment from principal (must pay if sums due from principal to non-paying party) and/or enforcement as if judgment by Court Order

Statutory Adjudication

- Court Stay of Enforcement: very difficult only if financially impecunious and cannot perform obligation under construction contract
- Court Setting Aside: Lack of Jurisdiction, Independence or Impartiality, breach of natural justice, improperly procured decision
- Right Question Decided Wrongly Not Set Aside
- Other Jurisdictions with Statutory Adjudication: UK, Singapore, Australia & NZ

Arbitration

- Longer Process, More Detail & Thorough, More Expensive but Final Determination
- Only if Parties Agree to Arbitration by Contract or Ad-Hoc Agreement
- Distinction between International and Domestic Arbitration
- Domestic Arbitration: Can be set-aside, varied or remitted by High Court for error in law
- International Arbitration: No

Arbitration

- Parties Freedom to Agree:
 - 3 arbitrators or single arbitrator
 - seat of arbitration (determines the law governs the arbitration)
 - Venue of arbitration
 - Language of arbitration
 - Procedure for Arbitration: Rules for any Institution or Ad-Hoc Rules
 - Institution Administrated or Ad-Hoc
 - Powers & Jurisdiction of Arbitrators

Arbitration

- Arbitration Act 2005:- if parties fail to agree
 - International arbitration: 3 arbitrators
 - Domestic arbitration: 1 arbitrator
 - Procedure for appointment or appointing authority: then Director of KLRCA
 - Seat: determined by Arbitral Tribunal
 - Venue: determined by Arbitral Tribunal
 - Language: determined by Arbitral Tribunal
 - Procedure: determined by Arbitral Tribunal

Arbitration

- Institutional Administered: KLRCA, SIAC, ICC, CITEC, LIAC etc.
- Rules of Procedure:
 - ICC Rules will apply if ICC administered
 - KLRCA Rules: Normal Rules or Fast Track Rules
 - UNICITRAL Rules
 - SIAC or LIAC Rules
- Institutional Rules: Initial Procedure, Time Limits, Scale Fees for Arbitral Tribunal, Vetting of Award etc.

Arbitration

- Court Assisted Interim Measures
- Emergency Arbitrator for Interim Measures
- Arbitral Tribunal have power to grant Interim Measures
- Award Enforceable as if Court Judgment in Seat and all countries that are signatories to the New York Convention

External Risks

- Host Country or Location of Project
 - Political Risks
 - Logistics
 - Access
 - Support : Labour & Materials & Sub-Contractors
 - Working Environment
 - Legislative & Authority Requirement

Political Risks

- Political & Social Economic Condition Changes & Political Instability
- Creeping Expropriation of Assets with evolving tax, labour, environmental and socio economic measures
- Outright Expropriation of Assets
- Culture of Breach of Contracts
- Protectionist Legal Systems
- Currency Inconvertibility
- Economic Restrictions & Sanctions

Treaty Protection

- Bilateral or Multilateral Investment or Free Trade Agreements with Investment chapters
- Investor from Member Countries Protected
- Protections Can Include:-
National Treatment, Most Favoured Nation Treatment, Public Interest Expropriations + Compensation Including Creeping Expropriation, Freedom to Repatriate or Transfer Funds & Capital, Fair & Equitable Treatment & Full Protection and Security

Arbitration against State

- Arbitration
 - ICSID Convention
 - ICSID Additional Facility Rules
 - UNICITRAL Arbitration Rules
 - Enforcement : New York Convention
 - Adoption of Model ICSID Law
 - ASEAN Protocol on Enhanced Dispute Settlement Mechanism (Jakarta Protocol)
- Using Public International Law > Private Law

Litigation

- Court Proceedings
- Specialist Construction Court
- Court KPIs & Time
- Court Controlled Mediation
- Court Directed Mediation
- Court Appointed Referee
- Court Directed Arbitration



Sample Letter

Work Shop & Discussion



The End

Thank You

Q & A