

Insights

EFFECTIVE DISPUTE AVOIDANCE IN CONSTRUCTION AND INFRASTRUCTURE PROJECTS

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SUMMARY

In this article, BCLP partner Shy Jackson and Aluko & Oyeboade partner Ngo-Martins Okonmah are collaborating to discuss the most effective means by which to avoid disputes relating to construction and infrastructure projects or, where that is not possible, to manage them more efficiently.

Disputes seem to be an inevitable feature of complex construction and engineering projects, whether they concern delay, payment, or quality issues, and often a combination of all three. It should also be common ground that such disputes tend to be expensive, lengthy and require substantial management resource without any certainty as to the ultimate outcome.

It is therefore not surprising that in recent times there is a focus on pro-active contract management, with the aim of avoiding disputes or, where that is not possible, managing them more efficiently, to limit the impact on the project and the risk of a substantial post completion arbitration. Just as importantly, this also ensures that a party has all the necessary evidence to put it in a strong position, if the dispute proceeds to arbitration.

The other benefit of resolving issues contemporaneously is that parties are still familiar with the facts, and it may also be possible to take steps in mitigation. This avoids the common problem of disputes being considered long after a project has completed, when the people with the relevant knowledge may no longer be available and when nothing can be done to mitigate costs.

This approach is reflected in the 2017 FIDIC suite of contract, which has introduced the role of the Dispute Avoidance/ Adjudication Board (DAAB), which on the parties' request can assist and informally discuss any issues that have come up. Similarly, the DAAB can raise with the parties any issues that it becomes aware of. Any advice given is not binding but it will clearly carry weight and may be an indication of the likely outcome, if a dispute is later referred to the DAAB for a binding

Decision. Used effectively, a DAAB can be very useful but it will still be necessary to present a credible and persuasive case.

What this means in practice is that it is now even more important to ensure that projects are managed well and in accordance with the contractual terms. This will not only ensure that a party is well placed to deal with any issues during the life of the project, especially when a DAAB is involved, but it will also help identify issues in advance so that the impact can be mitigated, as well as providing more clarity on the commercial impact. There is often a temptation to focus on delivery and leave any contractual issues until the final account stage, but the risk with that approach is that by then it may be too late to take the steps that can avoid risk.

In that respect, there are several steps that a party can take to ensure that it is in a good position to manage commercial issues or present a strong position in an arbitration.

UNDERSTANDING THE CONTRACT

Even when standard forms are used in construction and infrastructure projects they are often amended, and it is therefore very important to understand how risk has been allocated in relation to issues such as design or ground condition and what contractual processes govern entitlement and assessment. A party that fails to comply with contractual time periods or to base its position on the correct contractual ground, risks being unable to demonstrate entitlement. A review of the contract at project commencement to identify risk areas, or a workshop for the project team, helps reinforce the importance of the contractual terms.

USING CONTRACT TEMPLATES AND PROJECT MANAGEMENT SYSTEMS

Large projects tend to involve many contractual forms, such as variation instructions or cost and time assessment. There are now also several software systems that include such templates, as well as automated reminders of any applicable contractual periods. On large projects it is worth investing in such a system, as it helps to ensure that all the necessary information is provided and it provides a reliable electronic data base, which can be accessed later. In any event, using pre-agreed templates ensures that any notices or other communication include the required information, for example relevant contract clauses and the position on time and cost impact.

ENSURING CONTRACTUAL PROCEDURES AND SPECIFIED TIME PERIODS ARE FOLLOWED

Contracts will often specify what must be included in communications and a deadline for submitting them. A failure to comply with such provisions is likely to have an adverse impact on any entitlement and will be difficult to explain at a later stage. It is important to ensure that all team members have a full appreciation of the need to comply with such procedures and deadlines.

MAINTAINING GOOD RECORDS

Tribunals place more reliance on contemporaneous records, and they are crucial for ensuring that the true factual position can be identified years later, when the relevant employees are no longer available. Ensuring such records are maintained and include the necessary information is easier to do at the time but if not done this is likely to have a serious impact. It is also useful to regularly check the quality of records being kept, to ensure they contain the necessary information.

RAISING ANY ISSUES AS SOON AS THEY ARE IDENTIFIED

If an issue has a serious impact, it is best not to ignore it and notify the other party as may be necessary. This ensures that there is a contemporaneous record of both parties' positions. Any lack of response from the other party is something that may help an argument at a later stage. Just as importantly, this may help mitigate issues and reduce their impact, or at the very least provide clarity as to the other party's position and ensure that any dispute is narrowed, and the parties know what the real issues in dispute are.

PRESENTING A CREDIBLE AND CONTRACTUALLY BASED POSITION

A position which is presented based on the correct contractual provisions and with the appropriate factual evidence will be more persuasive and will be taken more seriously by the other party. Claims are often rejected because they are poorly presented and that prolongs and makes it more difficult to resolve matters. It may require more effort but investing in preparing a credible claim to start with, rather than seeking to improve it at a later stage, should help achieve quick resolution.

Whether and to what extent each of the above steps can be taken on each project will depend on the circumstances. Some of the steps will require additional investment and resources, which need to be weighed against the potential benefits. In other cases, it would be useful to undertake a legal review to ensure the correct contractual and legal position is presented. There may also be other factors that affect the management of the contract that influence to what extent a party will take the above steps, for example if there is a wider relationship over several projects.

An overall strategy that is based on all such issues will help deliver a better outcome. That will include recognising that a pro-active approach to commercial management, based on the contractual terms, is likely to help resolve issues and, where that is not possible, provide certainty as to the subject matter of the dispute. Indeed, any tribunal or DAAB will expect parties to comply with the contractual provisions and doing so in good time helps present a credible and persuasive case in any proceedings. A project team that has had the benefit of training on the contract and support where necessary from its professional advisers will be in a better position to present its case.

This Insight was co-authored by Shy Jackson of BCLP and Ngo-Martins Okonmah of Aluko & Oyebode.

RELATED PRACTICE AREAS

- Construction Disputes
- Commercial Construction & Engineering

MEET THE TEAM



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