How to prevent & resolve disputes

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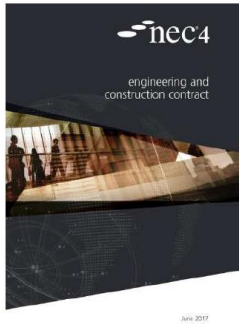
Frequent issues:

- Effective communications
- Cultural differences (project directors must be selected in order to facilitate communications and to avoid personality clashes)
- Typical management problems: frequent change of key personnel
- Knowing your contractual rights/make a honest assessment of your position
- If necessary get an independent expert review of your case (possible third party litigation fund involvement)
- If a dispute cannot be avoided, face it well prepared. If your case appears strong, you are more likely to settle the dispute.
- Get <u>any</u> communications archived (including informal email messages exchanged by operative personnel)
- Anything communicated orally must be recorded in writing in an email/letter/minutes of meeting
- Take record/evidence of all events affecting the project (video, photos and send them to your counterpart so that the date/time cannot be challenged. Referring to an event in a letter may not be sufficient)
- Maintain good relations with your employees after they resign
- If you participate in negotiations, be aware that in some jurisdictions the “Without Prejudice” principle is not binding.

Standard Form of Contracts

FIDIC: *Fédération internationale des ingénieurs-conseils*



NEC: New Engineering Contract

Standard Form of Contracts

➢ FIDIC 2017 Contracts provide for a **limited collaborative approach:**

- There is **no general duty of fairness** in the FIDIC 2017 contracts.
- The FIDIC 2017 contracts **do not provide a process for the main contractor and/or subcontractors to integrate their design work** with that of the design consultant prior to the start of construction.
- There is **no provision for mutually agreed and measurable targets** in FIDIC 2017 contracts
- **Financial incentives are limited** in FIDIC 2017 contracts
- FIDIC 2017 Contracts **provides for an early warning mechanism but does not provide for joint risk management**

Standard Form of Contracts

- NEC4 contracts promote a collaborative approach as they include:
  - a specific obligation for all parties to deal fairly with each other (Clause 10.2)
  - early involvement of subcontractors (Option X22)
  - mutually agreed and measurable targets for productivity improvement (Options X12 and 20)
  - shared financial incentives (Options X6 and X12)
  - early warning and joint risk management (Clause 15)

Allocation of risks: joint risk management

- Joint risk management team that **establishes the joint risk management process**
- Joint risk **register review at planned intervals and identification of appropriate actions to be taken**
- **Each party contributes to the overall risk management activities**
- **All parties share responsibility, to the extent possible, for supporting the parties' individual risk**

Avoidance of disputes

- Avoidance of dispute between the members of a collaborative team:

  - Early involvement of contractors: early identification of inaccurate designs, assessment of schedules during the preconstruction phase, allocation of risk through joint risk management during the preconstruction phase

  - Collaborative team: create a channel for resolving differences in perspective, promote negotiations between parties

  - Early warnings: early identification of problems that can be solved before they escalate, rather than assigning blame afterwards

Selecting a Dispute Resolution Method

Multi-tier procedure

- Potential advantages of a multi-tiered mechanism:
  - May lead to a faster resolution of the dispute
  - May lead to a cheaper resolution of the dispute
  - May preserve relationships between the parties
  - Increased likelihood of success
  - Flexibility

- Potential disadvantages:
  - Waste of time
  - Waste of money
  - Complex drafting could lead to procedural difficulties
  - Limitation issues

Multi-tier procedure

- The English Technology and Construction Court decided in *Ohpen Operations UK Ltd v Invesco Fund Managers Ltd* [2019] BLR 576:

O'Farrell J: '*There is a clear and strong policy in favour of enforcing alternative dispute resolution provisions and in encouraging parties to attempt to resolve disputes prior to litigation.* ***Where a contract contains valid machinery for resolving potential disputes*** *between the Parties, it will usually be necessary for the Parties to follow that machinery, and* ***the court will not permit an action to be brought in breach of such agreement****.*' (para. 58)

Multi-tier procedure

- **The English courts have also been reluctant to enforce a bare agreement to negotiate as a condition precedent to arbitration**: Lord Ackner, in *Walford v Miles* [1992] 2 Ac 128, 138, opined that *'[a]* ***duty to negotiate in good faith is as unworkable*** *in practice as it is inherently inconsistent with the position of a negotiating party'* .

- **By contrast, the condition precedent that parties '*attempt in good faith to resolve the dispute or claim*' was enforceable** in *Cable & Wireless v IBM* [2002] EWHC 2059 (Comm), where **parties agreed to use an ADR procedure prescribed by the Centre for Dispute Resolution**.

Multi-tier procedure

- Whether the clause constitutes condition precedent to another form of dispute resolution, such as arbitration:

- **Conditions precedent must be clear to be enforceable**.
- For instance, the Singapore courts in *Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] SGCA 24 **have refused to enforce a condition precedent for parties to hold '*friendly consultations*' because the clause did not contain specific instructions or provisions as to how such '*friendly consultations*' may be carried out**, between which parties, and on what specified timeline. The court held that such a tiered provision is vague, subjective and difficult to buttress a mandatory injunction order upon.

Avoidance of dispute through mediation or conciliation

- A voluntary process where an independent neutral third party (a mediator or conciliator) assists the parties in working towards a negotiated settlement.
- A mediator or conciliator does not decide the case, but facilitates a settlement.
- The parties decide whether to settle and on what terms.

Over 180 construction organizations have joined the Royal Institution of Chartered Surveyors (RICS) Conflict Avoidance Pledge.

- According to the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018:

"[M]ediation means a process, whether referred to by the expression mediation, conciliation or an expression of similar import, whereby parties request a third person or persons ("the mediator") to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The mediator does not have the authority to impose upon the parties a solution to the dispute."

Expert determination

- An independent expert renders a binding or non-binding decision.
- Advantages :
  - The third-party can have technical expertise
  - The expert can clarify a dispute without lengthy legal proceedings
  - Flexible procedure
  - Cost-effective
  - Less confrontational
  - Confidential
- Disadvantages of expert determination:
  - Might be unsuitable for complex disputes given the cost of expert determination and the possibility of unavoidable dispute resolution
  - Not suitable for resolving legal issues nor fact-based disputes
  - Procedural flexibility might leave uncertainty
  - Expert has no statutory immunity from suit
  - No appeal and limited grounds for challenging expert's determination (only jurisdiction and natural justice, fraud and collusion)
  - Parties can agree that 'manifest errors' will defeat the determination

Statutory adjudication

- Key features of the UK system.
- Parties have a **statutory right** to refer disputes arising under the construction contract to adjudication (see **section 108, Housing Grants, Construction and Regeneration Act 1996**).
  - It is not mandatory to refer a dispute to adjudication, but if a party refers the dispute to adjudication, the process is mandatory for the other party.
  - Supplemented by the Scheme for Construction Contracts (England and Wales) Regulations 1998 – adjudication rules.

- **Interim binding nature of decisions**
  - Can be referred for final determination to litigation or arbitration: '***pay now argue later***'
  - Summarily enforced by courts subject only to jurisdictional and natural justice defences (*Macob Civil Engineering v Morrison* [1999] BLR 93; *Bouygues v Dahl-Jensen* [2000] BLR 49)

Statutory adjudication

- **Aimed at supporting cashflow**. Lord Denning MR in *MR Dawnays v FG Minter* [1971] 1 WLR 1205 said that cashflow was '*the very lifeblood of the enterprise*'.
  - At the time, construction sector insolvencies were soaring
  - Small and medium sized enterprises represent 90% of the sector

- **Any dispute can be referred at any time**
  - Including fraud or disputes relating to contract amendments
  - However, only one dispute can be referred per adjudication

- **Quick procedure**
  - Default 28 days to render a decision, subject to a 14-day extension of time from the referring party (or longer if both parties agree)
  - Quality of decisions might suffer

Contractual Adjudication

- If the contract contains an adjudication clause (such clauses are contained in the JCT and NEC standard forms of contract), the parties are bound to follow the procedures in the contract.

- Typical disputes referred to adjudication include: payment disputes, valuation of variations, delay and disruption of the works, extensions of time and liquidated damages.
- For instance, the **2017 version of the New Engineering Contract ('NEC4') (**Option W1) **contain an adjudication clause** in Clause W1.3.
- **If a party disagree with an adjudicator's decision, it can refer the dispute to litigation/arbitration. See, for instance,** Clause W1.4 of the NEC4 (Option W1)

Dispute Boards

- Dispute adjudication boards issue decisions that are binding unless or until they are overturned by the ultimate dispute resolution forum, such as a court or arbitral tribunal.

- Dispute review boards issue non-binding recommendations (as opposed to binding decisions)

- Combined dispute boards are hybrid dispute boards that can issue both recommendations and decisions

Arbitration vs litigation:

- Arbitration and litigation are viewed as the final tier (and alternative) dispute resolution mechanisms in construction disputes.
- They are mutually exclusive – choice expressed through an arbitration clause .
- Both lead to a final and binding decision.

Arbitration vs litigation

- **Arbitration is private and confidential**. Court litigation is usually not.
- **Arbitration costs** can be considerable whereas in litigation the parties do not pay for the hearing venue, the judge or other administrative costs – although filing fees generally apply and vary from jurisdiction to jurisdiction.
- The **arbitrators are voluntarily appointed** by the parties according to an agreed appointment procedure.
- **Arbitrators often possess specific industry experience** and can be non-lawyers. In some jurisdictions though, there are specialist construction courts. Judges are though typically all lawyers.
- **Jurisdiction of an arbitral tribunal is derived from the arbitration agreement**. Jurisdiction of the courts is defined by laws.
- Arbitration binds only the parties to the arbitration clause: **no procedure for joining non-consenting parties unlike in litigation and multiplicity of arbitral proceedings concerning the same or similar subject matter**.
- Arbitration proceedings **can be shorter** than court proceedings.

Arbitration vs litigation:

- Arbitration is characterised by **procedural flexibility**. Judicial procedure is derived from statute.
- **Courts must give reasons for their decisions whereas parties can in some cases permit the arbitrators not to do so** (although this is rare). The decision-making process undertaken by the arbitrators usually involves judicial reasoning, where they apply laws and rules pleaded to the facts of the case at hand. The procedure undertaken by the arbitrators must comply with the rules of natural justice, and also reflect the disputing parties' choice of law and procedure of the arbitration.
- An international arbitral award is easily enforceable abroad through the **New York Convention**, unlike national court judgments.
- An arbitral award needs **court recognition and enforcement** if the losing party does not comply with it.
- **Arbitration gives only limited rights of appeal or review**: English law is rare in that it allows appeals on a point of law (s69, English Arbitration Act 1996) that can be opted out from, and rights of appeal are quite generous in litigation
- Arbitral tribunals lack coercive powers to enforce a specific decision.
- **Courts are generally supportive of arbitration in case of ambiguity**. See for instance Section 1 of the English Arbitration Act 1996.

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