

2 Dispute Avoidance

It is obviously preferable to avoid disputes arising in the first place. This chapter looks briefly at three areas of dispute avoidance:

- 1) Negotiation
- 2) Schemes aimed at minimising and managing risk
- 3) Alternative dispute resolution (ADR) filter mechanisms

1) Negotiation

The parties to a potential dispute can seek to avoid their disagreement becoming a full-blown dispute by negotiating. Discussions aimed at resolving differences are perhaps one of the most obvious methods of dispute avoidance.

2) Schemes Aimed at Minimising and Managing Risk

A common thread can be seen in steps taken in various industries around the world aimed at avoiding disputes arising, i.e., schemes aimed at minimising and managing risk. These steps include the following.

Planning

- ensuring that contractual documents are clear, precise and fair;
- maintaining accurate records;
- anticipating potential problem areas;
- defining problems when they arise.

Schemes to lessen the risk of disputes arising

One example of schemes to reduce the risk of disputes is partnering. This is a concept used originally in the construction industry. The aim is to establish a working relationship between the contracting parties involved in a project: through co-operation and teamwork the parties should achieve their mutual goals. Good faith is obviously a vital component.

Resolving disputes before they escalate

Contracts can include provisions for dealing with disputes as they arise, in an effort to stop them escalating:

- *Dispute Review Boards (DRB)*. A number of respected professionals are nominated prior to the commencement of the project. These professionals familiarise themselves with the project and keep abreast of developments as work proceeds. Disputes are referred to the DRB for a non-binding ruling. If that does not resolve the dispute, the matter is referred to a further dispute resolution process.

- *A Standing or On-Site Neutral.* This is a similar concept involving an industry professional / expert in whom both parties have confidence and who will serve in an informal capacity to resolve disputes by, for example, conducting neutral fact-finding exercises.
- *Multi-step ADR.* One example of this is the 'wise men' procedure used in the oil and gas industry. The wise men will be respected executives in the companies concerned (but who are not involved in the particular project). They investigate the dispute. If they are unable to resolve the matter, it proceeds to the next stage. This might be arbitration.

Dispute avoidance schemes can be used for all aspects of a project. For example, an Oil and Gas Industry Bulk Liquid Terminal Scheme for the avoidance of industrial disputes provides for a step-by-step process for settling labour grievances. Work is to continue during the period of negotiations.

3) ADR Filter Mechanisms

These mechanisms are considered in Chapter 19, which deals with ADR. It may be arguable whether such mechanisms are a form of dispute resolution or whether they are actually an example of dispute avoidance. Whatever label is put on them, they are certainly aimed at avoiding the full-scale conflict involved in both litigation and arbitration. An example of ADR filter mechanisms in action is given in Box 1.

Box 1: ADR Filter Mechanisms in the Boston Central Artery / Tunnel Project

Provision for ADR 'filters' was made in the Boston Central Artery / Tunnel Project. The Boston Project was one of the largest and most complex highway projects ever undertaken. The original estimate for the Project was for a duration of 10 years and a cost in excess of US\$6 billion. The Project was located in the middle of downtown Boston in a tight circle of land about one mile in diameter known as the 'Hub'. The area was bounded on three sides by waterways: the Charles River Basin to the North, Boston's Inner Harbour to the East and Fort Point Channel to the South. Downtown Boston was full of skyscrapers, narrow streets and many 19th century buildings. The Project included a four-lane tunnel under Boston Harbour, three complex major highway interchanges within the city of Boston limits, a new highway to be constructed under 10 active railroad tracks, a depressed multi-layered artery through the centre of Boston and a billion-dollar bridge located in the centre of a multiple highway interchange.

It was expected that about 100 construction contracts would be involved in the Project. Some of the larger of these were in the range of US\$200-300 million. In addition, there were several hundred sub-contracts, together with contracts for construction management and geotechnical services.

Clearly the potential for disputes in a project of such complexity was considerable: however careful the managers of the Project might be, disputes were bound to arise. Any one dispute might bring the entire Project to a standstill. A scheme for

avoiding disputes, or at least ensuring that disputes did not escalate into full-scale litigation or arbitration battles, was therefore vital.

An ADR scheme was devised aimed at dealing with potential problems. This involved the following series of 'filters' designed to resolve disputes before they escalated:

- partnering;
- the presentation of a dispute to an 'authorised representative';
- a Dispute Review Board (DRB);
- a mediation or ADR programme, which might be triggered during the DRB process.

Under the first filter – the partnering scheme – contractors were invited to enter into a process that consisted of efforts by trained facilitators to educate all participants in the Project in the mutual benefits of working towards common goals. The programme comprised off-site conferences that were to be repeated throughout the course of the Project.

Under the second filter, disputes were put to an 'authorised representative' to make a decision on the claim in question.

The third filter involved the establishment of a DRB. Three panellists, technically qualified in the type of construction work involved in that particular contract, were selected for the DRB at the outset of each contract. They were to be familiar with the scope of the contract and able to begin the dispute resolution process immediately a claim was put to the Board. The standard procedure to be followed at a meeting of the DRB did not involve the usual trial practices such as cross-examination of witnesses. The process required the DRB panellists to keep abreast of construction developments during the progress of works in question.

The fourth filter involved a provision for mediation or some other form of ADR. This might be triggered during the period of the DRB. Again, the filter was designed to resolve disputes before they reached the stage of formal arbitration or litigation.

Source: Anthony Connerty, 'The Role of ADR in the Resolution of International Disputes' [1996] 13 *Arbitration International* 121.

In an ideal world, disputes would be avoided. But experience shows that, despite all the precautions taken by the parties to contracts (and similar arrangements), disputes will nevertheless arise. It is therefore worthwhile to provide efficient mechanisms for resolving them.

The following chapters look at dispute resolution and at some of the international bodies involved in resolving such disputes.