

Contract dispute prevention & dispute management

Seminar overview

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Richard Crawford presented on methods of preventing contract disputes, covering dispute avoidance procedures (**DAPs**), dispute resolution mechanisms and seven golden rules of contract administration.

Mike Hayles discussed key considerations in managing a construction dispute, including early preparations, cost controls and the preparation of evidence.

Part 1 - Preventing Contract Disputes

Dispute Avoidance Procedures

The goal of DAPs is to address conflicts at an early stage so that they do not escalate into disputes. The parties appoint an independent third party for the life of project. DAPs operate at three levels:

- 1) an initial contract review and early project meetings ensure the parties have reached agreement on key matters, and have a contract that reflects their consensus;

- 2) the independent third party conducts early site visits and advises on solving foreseeable problems; and
- 3) the parties can move to hearings and other alternative dispute resolution procedures to resolve the dispute in real time.

Dispute Resolution Boards

A Dispute Resolution Board is a panel of 3 independent experts appointed by the parties at the commencement of a project. The board uses its technical, contractual and dispute resolution knowledge to assist the parties in resolving conflicts before they escalate into disputes.

Dispute Resolution Boards have been used on 25 projects in Australia, and on 15 there were no disputes at completion. They stop conflicts escalating by meeting regularly to proactively identify and resolve conflicts or potential conflicts.

Similar DAPs include Dispute Resolution Advisers, Combined Dispute Boards or Independent Dispute Avoidance Panels.

Dispute Resolution Mechanisms

The contract does not need to provide a dispute resolution mechanism.

If a contract does provide a dispute resolution mechanism and a party commences legal proceedings in breach of that contractual obligation, indemnity costs may be awarded against that party. For example, in *Pipelines Services v ATCO* [2014] WASC, a party which commenced proceedings in breach of an arbitration clause was obliged to pay the other party's indemnity costs of applying to stay the arbitration proceedings.

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Contract Administration

Seven golden rules of contract administration:

- 1) (Understand the role)** Legally, the independent third party has a dual role as both an independent and as an agent of the principal. In practice, the principal must decide whether they want a champion to protect their interests or if they want someone who is able to chaperone the project to a successful conclusion.
- 2) (Provide the tools)** The contract, common law and statutory background do not provide a complete picture of the parties' consensus. Consider including an administration manual and guidance notes.
- 3) (Virtual contract)** Parties may be tempted to apply their experience and assumptions as overlays to the contract, and treat the package as the actual contract. It is not. Workshops, administration manuals and guidance notes help avoid this effect.
- 4) (RFIs)** RFIs are a control and comfort mechanism. However, they are not contractually recognised, and answers do not form a part of the contract. RFIs are a permeable barrier – reassurance can pass through, but the terms of the bargain and the allocation of risk are unaffected.
- 5) (Correspondence)** The default position should be to respond to correspondence, including RFIs, in an intelligent and consistent manner. It puts the ball back in the other party's court.
- 6) (Commercial indulgence)** The parties may be inclined to tolerate and forgive contractual non-compliances. This may be a good idea in some situations, but the parties must adhere to the contract when doing so.
- 7) (Exercise the guillotine)** If the parties leave conflicts unresolved, the parties' memories of history will diverge, and the cost of resolution will rise. The parties should consciously and regularly sever past disputes to re-establish a mutual understanding of each party's rights and position in respect of the project.

Part 2 - Managing Construction Disputes

Early Preparations

At the outset, turn your mind to who your witnesses and experts may be, and what they know and can contribute. Begin identifying and collating relevant documents early, and consider using a data room. Ensure you establish and maintain legal privilege over appropriate documents from the outset.

Objectives and Strategy

Are your objectives realistic in terms of the facts, the law and timing. Ask how your objectives can be achieved, and consider the risk/reward tradeoffs involved.

Budgeting and Controlling Costs

Prepare a budget. Consider the internal external division of work, technology costs and legal process outsourcing.

Use regular reporting to keep an eye on costs.

Evidence

(Documents) When undertaking discovery, identify all sources of documents, appoint someone to take responsibility and create a written discovery plan. Use technology to assist the process.

(Witnesses) When arranging your witnesses, consider who they will be, what access you will have to them, and whether you need to issue subpoenas. Get witness statements early.

(Experts) Identify the issues that require expert evidence. Ensure your expert is an 'expert'. Properly brief your expert, and control the output. Think about hot tubbing of experts.

Alternative Dispute Resolution

Consider both the method and timing of the alternative dispute resolution process. You must have enough information to make an informed decision at to process. Arbitration is flexible and especially useful with international parties.