

# Large construction project arbitrations: Tips and tricks

The presentation will begin shortly

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# Large construction project arbitrations: Tips and tricks



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# **Before the Notice to Arbitrate**

## Key Considerations

# Dispute Resolution Procedure

- What does your Dispute Resolution Procedure say?
- Understand and follow it – is it mandatory or permissive?
- Tiered Dispute Resolution: expert determination, mediation, litigation or arbitration
- Consider whether it is useful to agree a process above and beyond the dispute resolution procedure to allow flexibility to negotiate

# Forum

- Governing Law?
- Forum (arbitration or litigation)?

# External Counsel

- When should you retain external counsel?
- Considerations include:
  - interim merits advice – understand strengths and weaknesses before you start proceedings
  - strategic advice to avoid litigation
  - preparation for litigation
  - appointing experts ? Which disciplines? What expertise?

# Project Knowledge

- Dramatis Personae
  - Retention of witnesses: key executives
  - Project Team: “boots on the ground”
  
- Document Retention
  - Project Database (e.g. Aconex)
  - Document Custodians
  - Other messages/texts/communications
  - Litigation Holds
  - Legal/Limited Access Database



# Claims Preparation

- Considering appointing claims consultants to assist with claims preparation
- Resource Management – how do you continue with the project and manage claims simultaneously?

# Key Issues

- Think about the purpose of starting proceedings
- What do you want to achieve (aside from winning!)?
- Develop a litigation budget (consider time and cost)
- What is your risk appetite?

# Tolling Agreements/Standstill Agreements

- Do any statutory limitation periods apply?
- Could impede the ability to make substantive claims

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# **After the Notice to Arbitrate**

## So now what?

# Building Your Case

## Case Theory / Objectives

- Spend some time really developing your theory of the case
- Map out your primary objectives – what are you really looking for?
- What are the key messages you want to / need to deliver to your decision maker? How will you prove that?
- Incompetent Contractor? Meddling owner? Extraneous factors? Force majeure?

# Building Your Case

## What are the skeletons?

- Every case has “skeletons in the closet” (Hint if you don’t know yours, you haven’t found them yet)
- EG → project executive bemoaning team’s poor workmanship / delay
- EG → over eager promises made from customer and client
- EG → owner painting a rosy picture in the press
- EG → not always leading with your “best and brightest”
- Your mission is to hunt down the skeletons and neutralize them
- Enable candid conversation with counsel

# Setting Your Procedure

## DIY vs Established?

- Really get to know your procedure
- If possible, setup a “Terms of Reference” with the other side (you should **ALWAYS** take the pen on the first draft if possible)
- Manage timelines and expectations both internally and externally
- Set clear expectations for document exchange
- Set back-doors for production

# Setting Your Procedure

## ADRIC vs ICC

- Benefits and disadvantages to both – what does the Contract say?
- How close to a litigation process do you want to be?
- (Much more can be said on this topic, so stay tuned!)



# Dealing with Documents

Take control, segregate and know what you have

- All major arbitration files will inevitably be document intensive
- Was there a project database? (EG Acconex, Disco etc) What is the access?
- Control document access → legal share drives with controlled access
- Control document distribution → monitor who gets what (disclosure vs internal vs expert)
- Prepare “issue binders”

# Dealing with Experts

## Know what the Tribunal needs to know

- What sort of expert do you want?
  - Seasoned testifying experts vs practicing experts
  - Local experience vs state of the art knowledge
  - Standard of care (discipline) vs delay/damages
- How do you find them?
  - Experts for hire
  - Business relationships
  - Industry referrals
- Must-haves
  - Technical knowledge
  - Independence
  - Experience

# Role of the Project Team

## Don't ignore your own resources

- Get a core team together of internal people who lived the project or at least understand the project
- Make sure to have the project team download their wealth of information to the legal team
- Perform the analysis early on – who is supporting the legal team and who might be called upon to provide evidence? (Or who might be both?)

# Role of Witnesses

Documents build cases, witnesses can knock them down

- What does your procedure say? (Limit on witnesses? Witness statement? Cross examination?)
- Select your witnesses carefully → want both credible executives and “boots on the ground”
- Be selective – more is not always better
- Prepare your witnesses properly

# Type of Hearing

## Virtual Hearing

- Benefits of a clear virtual protocol
- Use of an experienced virtual case manager for more complex proceedings
- Preparation is key

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## Questions



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# Thank you