REPRINT

CD corporate disputes

MANAGING AND RESOLVING CONSTRUCTION SECTOR DISPUTES

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ONE-ON-ONE INTERVIEW

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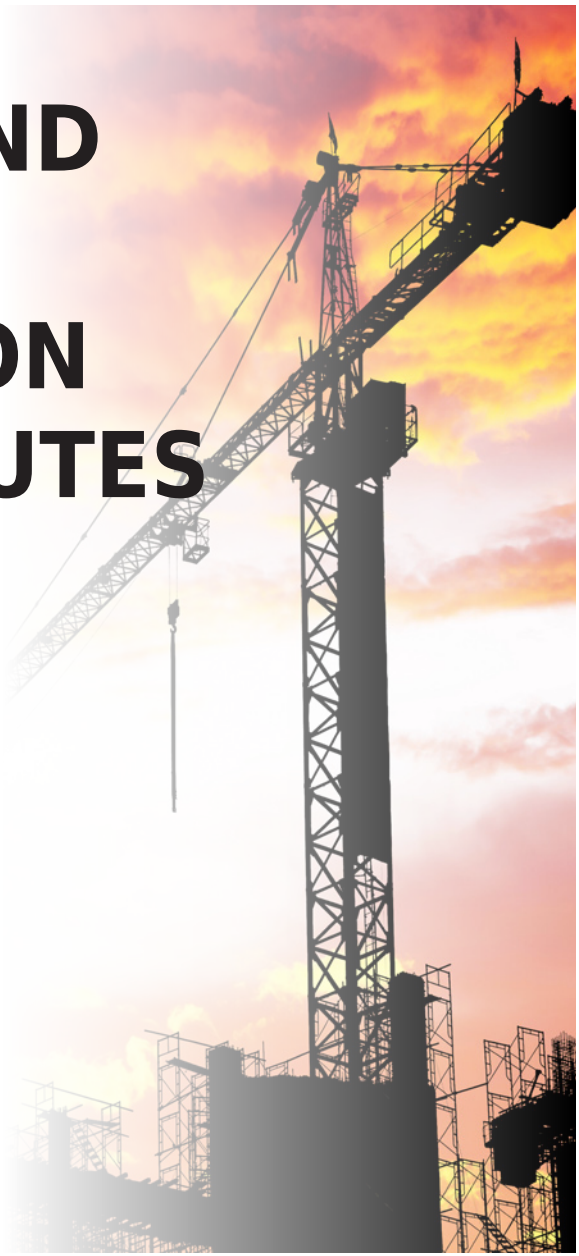

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Phil White is a construction lawyer who has counselled clients around the globe on how to achieve the best outcomes and overcome their most difficult challenges on major construction projects for more than 25 years. Mr White's experience ranges from helping clients take projects from the drawing board through completion to final resolution of disputes. He has represented clients on projects in every major construction sector.

CD: What key trends have you seen in construction sector disputes over the last 12-18 months?

White: The most striking trend is the decline in the number of disputes that have led to formal dispute resolution proceedings. Typically, during tough times, we notice a marked upturn disputes. That has not happened in this cycle. I also see greater attention to the identification and management of risks that can lead to disputes as the new cycle of projects has begun.

CD: What types of disputes seem to emerge regularly in this sector?

White: Commercial disputes typically fall into three categories: delays, defects and scope changes. The industry also concerns itself with personal injury and safety claims as well.

CD: Speed is a key concern in construction related disputes – without cash moving down the payment line, projects can grind to a halt. With this in mind, to what extent are parties involved in construction projects willing to sacrifice an optimal resolution for a quick resolution?

White: There is a growing trend toward that kind of dispute resolution, though only as an interim measure. Players in the construction market for large projects recognise that delay in resolution of a dispute is often the worst thing for a project. So, the use of DRBs and interim resolutions, with money moving under programs like the UK's adjudication process, are growing in popularity. Those procedures call for a quick and dirty resolution of the issue, with money moving and a reservation of rights to appeal or otherwise contest the interim ruling after project completion. It is interesting to note that very few projects have involved post-completion reviews of the interim ruling. We also see the growing use of 'standstill agreements' where the parties agree to work to overcome a problem under an agreement that information exchanged, statements made and steps taken cannot be used in a subsequent dispute proceeding.

CD: What are some effective settlement techniques? Before the case is filed? After the case is filed?

White: By far the most effective settlement technique is to get the issue fully briefed, with contemporaneous cost records and schedules involved. I find that the biggest impediment to resolution is the dance that parties to a dispute will often engage in when the claim is weak. For this reason, I advise clients to include provisions in their

contracts that require notice of the claim as soon as it arises and that the contractor provide detailed and complete evidence of its costs as soon as possible. Once a case is filed, the same rules apply. Being well prepared is the best way to get a dispute settled.

CD: What methods of dispute resolution are popular in the construction sector? Does the complexity of such disputes make alternative dispute resolution a preferred option, at least as a starting point?

White: Arbitration and mediation are the preferred means of dispute resolution. Recently, expedited interim resolution as described above is growing in popularity. In international projects – projects where capital and skill are likely to come from a number of countries like large mines, ports, oil & gas facilities, transport or other major infrastructure – arbitration and mediation are really the only means of dispute resolution. I have become a big fan of the concept embodied in the UK adjudication process and often incorporate it in contracts when I am consulted early in a project. I also see a desire to streamline the arbitration process to reduce the time and cost of resolving disputes. This has led to the growing use of devices like non-binding expert evaluation, limited discovery, written direct testimony and expert panels – even in the US, where such devices are not usual in judicial proceedings.

CD: The cost of disputes is a major concern, especially in times like these when margins are thin. Is there any advice you can offer on how to manage cost or at least put some boundaries on it?

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Philip R. White, Dentons US LLP

White: In most markets the cost of disputes is driven by the intensity of information needed to support the arguments made by all sides. The best way to manage cost is to identify the proof required to support a claim in the contract documents. This is less of a risk than most people think. Construction claims experts all know the documents that are at the core of establishing or defending a claim – CPM

schedules, job cost reports, progress reports and the like. Throughout the project, executives make business decisions based on these documents. Why not resolve disputes on the same information? Another way to manage these costs, is through fee shifting to discourage the assertion of unjustified claims or resistance of well established ones. A final idea is to use a fast track dispute resolution procedure. The cost of construction disputes is closely linked to the time it takes for the resolution process to conclude. Thus, shortening that process reduces the cost. I have inserted these provisions into contracts, negotiated them after a dispute resolution process begins to get expensive and used fast track rules available from several of the major arbitration agencies.

CD: What is the latest innovation you have seen in efficient and effective construction dispute resolution?

White: Hands down, the use of UK style adjudication or similar practices. We have also seen success with the 'standstill agreement' approach mentioned above. They really are variations on the same theme: put the dispute aside, keep the project moving and the heat will be taken out of the dispute.

CD: Have you seen an increase in the use of arbitration to resolve construction related disputes? What are the advantages of this process for the parties involved?

White: This actually varies by geography. In many places around the globe, there isn't a notable increase because arbitration is the only available mechanism. In the US and UK, I see a trend toward greater use of the courts because arbitration has become so unpredictable in terms of both outcome and expense. In Canada, we saw a trend away from arbitration that has reversed itself as construction professionals have worked to curb some of the practices that drive arbitration costs up. Where a good court system is available – federal courts in the US and several notable states like Delaware – I am not convinced that arbitration is advantageous. Where a court is not available, the benefits of arbitration are obvious – it's better than combat.

CD: The ability to avoid disputes is perhaps even more important than managing them. What steps can be taken at the pre-contract stage to minimise disputes and enhance the resolution process? Do you believe that firms pay enough attention to this during contract negotiations?

White: I think both contractors and owners are beginning to pay more attention to these issues at the beginning of a project. I see more discussion

about identification of project risk, project controls, risk mitigation or management techniques and dispute resolution mechanisms. This is good practice because a robust discussion about risk allocation and management deals with problems before they cascade into a big dispute. In the event of a dispute, this kind of thinking helps shape the issues and decrease the cost of resolving them by keeping a sharper focus.

CD: What general advice can you give to construction firms on managing disputes? On the whole, do firms need to do more to adequately prepare for the eventuality of a dispute arising down the line?

White: Disagreements are a normal part of business; the trick is preventing a disagreement from becoming a dispute. Doing that successfully is a combination of taking the issues straight on as they arise and having realistic expectations about how they will be seen through the eyes of a third party charged with the duty to resolve disputes. This means thorough and thoughtful assessment when the issue is first recognised is key. Generally, our industry is not great at this; we tend to hope that other events will alleviate the issue and want to avoid the cost of a thorough analysis. However, this is one of those times when I tell clients: "You can pay a little now or an awful lot later". Sadly, they do not take me at my word often enough. CD