NYSBA International Section
European Conference 2015 / Winterthur/Zurich
Construction Law | International Dispute Resolution Methods – Best Practices
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Dispute Boards:
An Effective Tool for Dispute Reduction and Prevention

Nancy M. Thevenin

"On average Dispute Boards settled disputes within 90 to 180 days at a costs of 2% of the contract value"

"DBs will likely expand … as an alternative rapid, real-time dispute resolution process in mid- to long-term commercial contracts."

I. Introduction

II. What are Dispute Boards?

III. Types of Dispute Boards

- **A. Dispute Review Boards (DRBs)**
- **B. Dispute Adjudication Boards (DABs)**
- **C. Combined Dispute Boards (CDBs)**

IV. How DBs Operate

V. Real World Application

VI. Conclusion

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Alternative Dispute Resolution In Construction Disputes – European Perspective

Petr Koblovsky

Introduction - the European construction market

Arbitration as major ADR method to resolve construction disputes

Advantages - neutrality, enforcement, flexibility, confidentiality, commercial competence and expertise of the tribunal

Disadvantages - costs, delays, limited powers, adjudication

Does the excessive length of proceedings affect the amount of construction cases resolved in arbitration? Statistical data

Examples of case law

Awaited improvements?

Other forms of ADR in Europe

Conclusion

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Dispute Resolution before State Courts from a Swiss Perspective

Thomas P. Siegenthaler

"Out of 252 cases in the Commercial Court of Zurich 162 (64 %) were settled (2013)."

I. Introduction

II. No Pre-Trial Discovery of Documents

The Code of Civil Procedure's overriding objective is not to discover the "truth". It is more about keeping the peace.

Consequence: Do not bother other people and the court system if you cannot prove your case with your own means.

III. No Evidence Taking by Parties / Court Appointed Experts

Influencing a witness is contrary to the professional ethics of (Swiss) advocates, which means no written witness statements, no "training" of witnesses, and no cross-examination of witnesses (just "additional questions" submitted to the witnesses via the judge).

A party may submit an expert report of a party-appointed expert, but this would be regarded as a (biased) statement of that party – not as evidence. Experts are appointed by the courts and they answer questions submitted by the court. These experts are also paid by the court (with the fees taken from the parties) and they submit their reports as auxiliaries of the court.

Consequence: It is difficult to anticipate the outcome of evidence taking proceedings.

IV. Courts are Relatively Expensive

In 2013, the average amount in dispute at the Zurich Commercial Court was CHF 1,441,296.50. The court fee (not including costs of experts appointed by the court) for this amount in dispute would be between CHF 35,000 and CHF 46,000.

Consequence: Do not go to court if you do not have to.

V. Commercial Courts are composed of Professionals from the Industry

The Construction Chamber of the Zurich Commercial Court is composed of five judges. The chairperson is a full-time judge. All other members are active professionals from the construction industry (architects, contractors, engineers) who are elected by the parliament of Zurich (canton).

Consequence: Do not expect to be able to fool them with technical issues.

VI. Cost Allocation Proportionate to the Outcome

Example: If you sue for CHF 100,000 and you get CHF 33,000, you have won regarding one third, but lost regarding two thirds. This means that you have to pay two thirds of your opponent's lawyer's fees while the opponent has to pay a third of your lawyer's fees. For this matter, the fees are determined by a tariff edited by the court. This means that the fees of both parties are the same and that a set-off is possible: This leads to you paying one third of the other party's fees (2/3 – 1/3 = 1/3). The same rule applies to court fees.

Consequence: Be careful to claim realistic amounts.

VII. A Need for Extremely Detailed Briefs

The Commercial Court does not like to go to the hassle of evidence taking proceedings (in 2013 evidence taking proceedings took place in 19 cases out of 252 cases). Most cases are decided without evidence taking. To accomplish this, the Commercial Court has developed very high requirements with regard to the level of detail in the briefs. If factual allegations are not sufficiently detailed or if the defendant does not respond to each and every allegation, this might be fatal.

Consequence: Accuracy and completeness are pivotal. This means that briefs are large – and the amount of (legal) work for an average construction claim can hardly be overestimated.

VIII. Settlement Negotiations directed by the Court

After the first exchange of briefs, the chairman of the court (assisted by a clerk and one judge who is a professional from the construction industry) will summon the parties to a settlement hearing. Usually, the chairman will provide the parties with an analysis of the case and of the likely outcome ("without prejudice"). The judge will then submit a settlement proposal, which usually is the starting point of intense haggling. 64 % of all cases at the Commercial Court are settled this way.

Consequence: You know from the start that the most likely outcome is a settlement. A settlement usually means that you will get at least something (10 % or 20 %) – so it is worth trying.

IX. Summary

The Swiss state courts are not particularly welcoming institutions: The system makes it very clear that it is better to find solutions without the courts. But if, nevertheless, the parties go to court, the system still offers many in-built incentives for the parties to settle their dispute in court.

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Mediation – Bridging The Gap

Marc Beaumont

Mediation is a well-developed dispute resolution tool in construction and many other types of commercial disputes in common law legal systems, such as the US and UK. Why should it be relevant to practice in mainland Europe? Why is it desirable to "spread the word" about Mediation? How can Mediation interact with Arbitration? How exactly does it work? Does it have limitations?

Marc Beaumont will unravel the mysteries.

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Key Elements in Selecting a Dispute Resolution Mechanism: The Point of View of the Industry

German Grüniger

I. Introduction

The Implenia Group is the leading Swiss construction and construction services company. The company is nationally and internationally active. Implenia is listed on the SIX Swiss Stock Exchange.

Running about 5'000 projects worldwide at the same time, disputes with employers, sub-contractors, suppliers or joint-venture partners are unpreventable. Dispute resolution is a core task of Implenia's Legal Department. To select the appropriate dispute resolution mechanism is almost an everyday decision to take.

II. Time Factor

Business is running fast. Disputes have mostly an impact on both the execution of the current work and/or the annual operating profit result. However, in the construction industry, the speed of a dispute resolution is always an issue. A delay in execution of the work leads to higher production costs and a reduction of the annual operating profit due to ongoing disputes might have an impact on further investments.

An average mediation lasts 1-2 days, whereas state court trials and arbitrations are usually long winded and can be delayed by the opponent party by exploiting every opportunity provided by the proceeding rules to slow down the litigation procedure. Additionally, in a state court trial or arbitration it may takes month or even years before the parties are in a position to mediate effectively.

III. Cost Factor

Disputes arising from construction work are mostly complex and cause easily unreasonable costs. In the construction sector, the EBIT margin of an average project is compared to other industries very low. An expensive dispute resolution can quickly consume the EBIT margin and makes the single project unprofitable.

A short mediation by a single mediator is cheaper than a state court trial or arbitration. Sometimes lawyers are not very helpful in the process and therefore a further cost saving is made.

IV. Flexibility

Arbitration and state court litigation are based upon the rights and obligations of the parties to the dispute. Contrastingly, a mediated settlement focuses on the parties' interests and needs. The mediator encourages the parties to search for a commercial solution that meets with both parties' needs.

V. Confidentiality

No one in the industry business (and probably in every business) likes to be in the spotlight of a trial. However the outcome of a trial might be, the fact being involved in a court trial has a negative impact on the company's reputation.

State court litigation is in the public domain and also arbitration may become public if there is an appeal. On the other hand, the proceedings of mediation are confidential. Confidentiality is an advantage as usually companies wish to keep their disputes from the public domain.

VI. Business Relationship

Business is generated by business partners. Therefore, maintaining a business relationship may values more than to win a dispute.

Processes such as mediation can maintain existing business relationships as the parties are aided towards a settlement.

VII. Satisfaction

The outcome of a dispute resolution can be satisfactory in many ways. Satisfaction is an inner process.

The state court's Code of Civil Procedure's overriding objective is not to discover the "truth;" it more about keeping the parties' peace. Apparently, the reaching of a settlement by consensus is viewed as producing high levels of satisfaction for the parties. A mediated outcome is still more satisfactory than other forms of imposed decisions such as litigation or arbitration.

VIII. Pressure to Settle?

It might be a situation at a certain stage in a dispute resolution process that for some business or other reasons the management rather prefers an imposed decision by state court litigation or arbitration than a settlement.

However, mediation can put a pressure on the parties to settle their dispute. This is no doubt borne out by the fact that many mediations are over during the course of one day and that frequently the parties and the mediator will work late into the evening in order to forge a settlement.

IX. (Too) Early Disclosure of Strength?

As a company facing a dispute, you are frequently concerned that you may disclose some important aspect of your argument that will then aid the opponent side in the event that the mediation is not successful and the matter proceeds to trial.

X. Summary

In conclusion, the use of mediation has become more widespread in the construction industry. The reasons for the increase in mediation may be the speed, the low cost and the flexibility as well as the confidentiality of a mediation opposing to state court litigation or arbitration. A quickly reached settlement might maintain a business relationship rather than an imposed decision by a state court or an arbitration court. On the other hand, mediation may forces a party to close an undesired settlement or to disclose its position before trail.

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Resolving Construction Disputes: Plea for a Multi-Tiered Scheme

Blaise Carron

I. The particularities of construction disputes

Disputes in construction law are often characterized by the following **particularities**:

1. A **technical knowledge** requirement. In order to understand and resolve a problem concerning construction law, one must have certain technical knowledge.
2. **Several distinct factual situations**. During a construction dispute, often multiple, and different, contested facts are invoked. On one side the employer faults the contractor for delays and defects. On the other side the contractor exercises claims relating to a change in the agreed upon construction order or disturbances to the performance of the construction.
3. The **wide variety of legal questions**. In order to process the diverse claims behind the dispute, many legal rules must be applied. For instance, the legal regime applicable to delays is quite different from the one for defects. Thus, an overall resolution of the dispute involves the application of different rules.

II. The weaknesses of the classic method of resolving disputes before State courts

The classic method of resolving disputes before State courts presents the following notable **weaknesses**:

1. The State judges must work in a wide variety of areas and, due to a lack of specialization or overwork, **do not have the necessary technical knowledge**. In general, they must request expert opinions from technical specialists.
2. The proceedings usually **last** several months, or more often several years if the case is brought before higher courts. This length is not appropriate for construction projects, which will often be finished before proceedings draw to a close. This creates an undesirable legal uncertainty.
3. Construction law litigations involve **exorbitant efforts and costs**. Given the number of facts to assert and prove, and the number of relevant legal rules needed to grasp the entirety of the dispute, in proceedings before State courts lawyers often must file pleadings of several hundred pages and prepare several dozen binders worth of evidence. This preparation also monopolizes important resources within the company's party to a construction dispute, resulting in significant strains on their business activities.

III. A critical (and summary) appreciation of alternative dispute resolution methods

Simplifying greatly, here is an **overview of four alternative dispute resolution methods**, which takes a critical look at each one (by examining features such as the nature and certainty of an outcome, the method, the procedural complexity, and the enforceability). We will not elaborate further on other mechanisms such as expert determination, dispute adjudication boards, or dispute review boards.

1. **Settlement agreements**. A settlement is a contract in which the parties provide mutual concessions in order to amicably end a dispute or an uncertainty that they have concerning their legal relations. The settlement is said to be "private" when it stems from discussions that only the parties participated in. The outcome is contractual in nature; the method is consensual; the procedure is simple, rapid, and less costly than legal proceedings. However, there is no guarantee that an agreement will be reached, and in that case the parties must go before the courts. Additionally, a successful agreement does not prevent either party from challenging the validity of the agreement or refusing to enforce it. The other party, unable to obtain enforcement, must go before the State courts or chose arbitration.
2. **Mediation**. Mediation is an extrajudicial process in which the parties are in a horizontal relationship with the mediator who, while having no decision power, structures the communication process in order to enable the parties to settle their dispute through cooperative negotiations based on their respective interests. The mediation aims to secure an "assisted" settlement since a third party, is solicited to facilitate the resolution of the dispute. The outcome is contractual in nature; the method is consensual; the procedure is simple, rapid, and less costly than legal proceedings. However, there is no guarantee that an agreement will be reached. Additionally, a mediation ending with a settlement agreement does not prevent either party from challenging the validity of the agreement or refusing to enforce it. The other party, unable to obtain enforcement, must go before an ordinary court or an arbitral tribunal.
3. **Conciliation**. In the case of conciliation, the parties, assisted by a neutral specialist (legal and/or technical), seek to reach an agreement, failing which the conciliator will decide on the facts or legal questions and make a non-binding determination after listening to the parties. The involvement of neutral specialists, rather than a judge or an arbitrator, allows for the quick finding of solutions that take into account the interests of the parties in avoiding a deterioration of the working environment, an escalation of the dispute, and large financial and personnel expenditures. The outcome is contractual in nature; the method is consensual; the procedure remains relatively simple; an outcome is in principle guarantied to the extent that the conciliators make a proposal. However,

either party can still challenge the validity of the proposal or refuse to enforce the conciliator's proposal which means the other party must go before the courts (State or arbitral).

4. **Arbitration**. The parties can agree in advance to give jurisdiction to an arbitral tribunal. This is an alternative dispute resolution method. The sentences have the same value and weight as those in a State judgment. The outcome is legal in nature; the method is adversarial; the procedure is difficult, but an outcome is guarantied. In principle a party cannot challenge the validity of the sentence; if a party refuses to apply the sentence the other can request enforcement.

IV. A proposed solution: a multi-tiered approach

Given the above-mentioned particularities of construction disputes and the weaknesses of not only the State courts, but also the previously mentioned alternative dispute resolution methods, we argue for a **multi-tiered approach**:

1. An **on-site decision making process**. The first, often informal, contacts are held between representatives of the parties directly involved in the construction project. If they are not able to reach an agreement within a defined period of time (e.g. the next site meeting), each party may submit the case to a group of higher-ups, who have thus far not been directly involved with the project. If this phase ends with an agreement, the parties record the agreement in a contractual amendment. If the parties cannot reach an agreement, either party may move onto the next step.

2. A **conciliation process** (or a mediation process, if it is more suitable). If an agreement is not reached in the first step, either party may request conciliation. The conciliation body is composed of one or several persons, neutral, and paid in equal parts by the parties. Nominated by the parties, the conciliators are specialists – either legal specialists with a good understanding of construction, or technical specialists with decent legal knowledge. For big projects, these persons can even be named in advance and kept up to date on developments with the construction work via regular written reports as well as regular participation in site visits. These factors provide a framework for conditions that promote rapid and efficient action by the conciliators when a disagreement surfaces. The actual conciliation takes place in four steps: the first is a preparatory phase in which the parties provide written explanations to the conciliators; the second one is a conciliation session; after which the conciliator submits a non-binding determination, which is either accepted or not by the parties. In the case of a successful outcome, the parties conclude an amendment. If not, the conciliator stipulates, in writing, that the process has failed.

3. **Trial proceedings**. If the disagreement is not resolved during the conciliation process, either party may appeal to an arbitral or ordinary court.

In order to be efficient and attractive and to avoid certain pitfalls, this type of solution must respect the **following principles**:

1. A **clear order for escalation process.** A multi-step process necessitates a clear explanation of the various steps. This should be done in writing. This explanation can be in either a contractual escalation clause covering dispute resolution, or a separate convention concluded after the dispute arises. If such a scheme is agreed on by the parties, there is a strong chance the courts or an arbitral tribunal will recognize it as being binding on the parties and enforceable (see Swiss Supreme Court, 4A_124/2014, July 7, 2014 in relation to clause 20 of the current standard form contracts of the FIDIC).
2. Specific attention must be given to the **scheduling of the process**. Combinations of dispute resolution methods that permit either of the parties to use delaying tactics must be avoided. Consequently, the escalation process, the maximum duration of each step, and the transitions from one step to another must be clearly stated.
3. A usage within the context of **respect of the good faith principle**. The binding nature of a dispute resolution clause must be tempered by the exceptions resulting from the good faith principle, which also governs the procedural conduct of the parties. Depending on the circumstances, this principle could prohibit a party acting in bad faith from refusing arbitration simply because one of the proceeding steps was missed.