

FIDIC Latin America Users' Conference

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International Federation of Consulting Engineers



AMICABLE SETTLEMENT & ARBITRATION

PURPOSE OF THE PRESENTATION

1. Amicable settlement.

- The advantages of ADR in the context of the FIDIC contracts and how it might work.

2. Arbitration

- A strategic vision of arbitration in dispute resolution, and its advantages.



ADR in the Context of Amicable Settlement

GC Sub-Clause 20.5: Amicable Settlement

"Where notice of dissatisfaction has been given under Sub-Clause 20.4 above, both Parties shall attempt to settle the dispute amicably before the commencement of arbitration. However, unless both Parties agree otherwise, arbitration may be commenced on or after the fifty-sixth day after the day on which notice of dissatisfaction and intention to commence arbitration was given, even if no attempt at amicable settlement has been made."

- Why amicable settlement?
- The nature of amicable settlement.
- How to Amicably Settle?
 - Conventional methods
 - ADR methods
- Case studies



Why Amicable Settlement

"... both Parties shall attempt to settle the dispute amicably before the commencement of arbitration."

- Voluntary – requires party agreement.
- Cooling-off period – provides the parties breathing space and to take stock of their positions after a DB decision.
- Final opportunity for the parties to settle.
- Without prejudice – off the record, allows open and frank discussions, evidence may not be reproduced in arbitration or litigation.
- Non binding – if no agreement then arbitration or litigation may proceed.
- Brevity – shouldn't aim to be a re-run of the past but should be given time to succeed.
- Cost – negates the cost of formal dispute resolution.



The nature of amicable settlement

- Requires the parties to conclude a settlement agreement between themselves.
- The aim is to bring the parties closer, to understand the other sides position, and to help the parties see the weakness of their own case.
- Should in principle enable the parties to seek settlement, with or without 3rd party help.
- If agreement not reached then arbitration / litigation available.



Conventional Methods

Negotiation.

- Straight forward negotiations between the parties or their advisors most obvious and least easy way of reaching consensus.
- Parties – directed method.
 - Using the DB Decision and/or Notice of Dissatisfaction,
 - Ground rules and timetables.
- Party resources – mostly.
 - Changing the teams and the venue.
 - Working and Management group approach (Team A / Team B),
 - Employing semi-independent counsellors/advisors.
- On failure the parties may resort to other methods of dispute settlement including mediation / arbitration / litigation.



ADR Methods

Mediation.

- The process where a mediator i.e. a 3rd party neutral works with the parties to resolve their dispute by agreement rather than imposing a solution.

Evaluative: Mediator proactive.

Facilitative: Mediator more a conciliator. Occasionally called conciliation.

- Mediator suggests grounds for agreement or forces the parties to recognise weaknesses in their cases.
- The nature of the case.
- Finding a mediator.
- Rules and pleadings.
- Your team and the use of experts.
- Finding and making a settlement agreement.
- Non binding (but may be converted if parties agree).



Case Studies

Case 1

- Project: Mine
- Scope of Works : Pre-mining and infrastructure activities.
- Contract Price: circa USD 560m, unit price.
- Duration: 4 years.
- Dispute: Termination for convenience (change of Owner and policy to self develop).
- Claims: Under-evaluation of performed works and disputed costs of termination, value circa USD 20m
- Terms of settlement: Confidential.
- Law: Non location of work. Common law system.
- Dispute Resolution: Negotiation, mediation, ICC arbitration.



Case Studies

Case 1 (cont'd)

- Duration of Mediation: 1 day
- Procedural Orders: 1
- Pleadings: 2 exchanges.
- Type of Mediation: Evaluative.
- Mediator: Retired judge.
- Attendees: Counsel, management, project team
- Approximate cost of mediator: USD 25k USD (50%) incl. cost of venue.
- Settlement: 10 days after signed agreement.
- Agreement: By-hand on the day.
- Cost of the Mediation: Circa 0.015% of the settlement amount including counsel costs.



Case Studies

Case 2

- Project: Hydro.
- Scope of Works: Rockfill dam, intake, outlet, spillway, underground powerhouse and shafts, tunnelling, H-mech, switchyard, roads.
- Contract Price: circa USD 300m, unit price.
- Duration: 4 years.
- Dispute: Termination for default.
- Wrongful termination, liability for events (late possession and site occupation by others, late design and variations, changed Geology. Costs and damages. Return of bonds. Claim circa USD 120m
- Terms of settlement: confidential.



Case Studies

Case 2 (cont'd)

- Law: Non location of work. Common law system.
- Dispute Resolution: Negotiation, mediation, ICC arbitration.



Case Studies

Case 2

- Duration of Mediation: 2.5 days
- Procedural Orders: 1
- Pleadings: 1 exchange (with expert reports geology and time)
- Type of Mediation: Evaluative.
- Mediator: Retired judge.
- Attendees: Counsel, experts, management, project team.
- Approximate cost of mediator: USD 50k USD (50%) venue free.
- Settlement: 10 days after signed agreement.
- Agreement: By party counsel. Approximately 1 month.
- Cost of the Mediation: Circa 0.015% of the settlement amount including counsel costs.



Arbitration and the Strategic Vision – STRATEGIC USE OF THE PROVISION?

- The Arbitration provision may be used a continuation of the DR process.
- Resorting to arbitration can be used in strategic manner to force an early settlement.
 - Only by the fact of referral.
 - Contemplation of the costs versus the entitlement.
- Efficient management of the process.



Arbitration and the Strategic Vision – WHY ARBITRATE?

- When parties enter into an arbitration agreement they give up their constitutional right to a trial in a court of law. But, this is for a reason:
 - Confidentiality (as opposed to national courts open to public)
 - Parties' control over their dispute resolution mechanism: they can choose and tailor the form, structure, system and other details; in accordance with the specifics of the project
 - Impartiality against the national prejudice
 - Expertise: arbitrators have specific knowledge and ability to handle disputes specific to the project at hand (as opposed to not-specialized national judges)
 - Cost and Time
 - Full and final nature of an award
 - Easy enforcement



Arbitration and the Strategic Vision – HOW TO ARBITRATE?

- Elaborate the project's specifics and tailor the dispute resolution mechanism:
 - Language? Seat? Institution? Time limits?
 - In case of complex projects, such elaboration shall take into account multiple contract structures and actors.
- Arbitration shall not prevent the amicable settlement. Even through the arbitration process, until the hearing takes place (and before the final adjustment of the costs) settlement offers may be exchanged by the parties. Arbitration submissions help the parties to understand comprehensively the other party's position and strength.



Thank You!



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