

Construction contracts and dispute resolution



CONSTRUCTION CONTRACTS & DISPUTE RESOLUTION

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1. Introduction

1. 1 Aim and scope of this report

Within this report you will find a small consultation being offered to Dong Intel, a client who has had on going communication with the services that I provide. Prior to this report, Dong Intel approached me for a different report

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to advise them on a suitable form of contract to form part of the tender, contract documents for the works contract. In regards to their project requirements, the contract in which was recommended to accommodate all specific brief requirements was the full, and un-amended use of the NEC4 ECC. This was regarded as one of the most suitable forms of contracts that are to be included as one of the tender, contract documents of the works contract. Dong Intel highlighted the fact that they noticed the report that was produced for their consultation didn't disclose any contract complications, which could stem from the adjudicate-first technique to resolve disputes. In this report Dong Intel would like a consultation that considers mediation as their approach in which they wish to take in regards to resolving any issues, which could occur between them and the main contractor. I will carry out the desired report and also recommend some alternatives, which may be in the better interest for Dong Intel.

2. Adjudication

1. What is Adjudication?

Adjudication is a contractual or legal procedure for any contract dispute resolutions. Usually delivered by a third party, commonly known as the adjudicator. Both disagreeing parties involved usually appoint the adjudicator. Commonly kept to a exact timetable adjudication may be based solely on documentary submissions. The adjudicator is obliged to keep a neutral but inquisitorial role, this usually means taking the initiative within determining facts and the law. (Designingbuildings. co. uk, 2018)

Adjudication decisions are legally binding except if they are revised by arbitration or litigation. The grant of legal costs is in the prudence of the <https://assignbuster.com/construction-contracts-dispute-resolution/>

adjudicator unless it has been eliminated by the terms and conditions of the contract. (Designingbuildings. co. uk, 2018)

The entire process can take up to 28 days, based on the information provided by both parties involved. The adjudicator can get up to 14 days added onto this time providing that the party who the dispute was referred from gives permission for this to happen. On completion the decisions are binding. The processes for adjudication with in contracts must be compliant with Section 108 of the Housing Grants, Construction and Regeneration Act.

Some of the advantages of Adjudication are:

- The parties involved are able to assign the adjudicator or the specific characteristics of the adjudicator (i. e. the background of their work discipline ‘ Lawyer’, ‘ Quantity Surveyor’)
- The adjudicator can act as an investigator for the case
- Fewer arguments from ones opinions. Its based solely on facts and not formal evidence
- Financially works out cheaper than other routes
- It’s rational, usually its quick and also there are flexible procedures which are agreed between both parties involved

(Designingbuildings. co. uk, 2018)

Some of the disadvantages are:

- Although the adjudicator can act as an investigator for the case, they can not venture beyond the jurisdiction specified within the contract

- Law does not support the adjudicator's determination. (The adjudicator's determination is a type of alternative way to resolve a dispute. It's when the adjudicator is an expert in their field and can be assigned to decide the dispute. (Designingbuildings. co. uk, 2017))
- The adjudicator's powers are also limited
- If the adjudicator's determination is used to solve the dispute between the two opposing parties then it must be enforced by the court

(Designingbuildings. co. uk, 2018)

3. Consultation

1. Why a mediation clause may not be suitable in these circumstances

In my professional opinion I think that as far as adjudication is concerned, in the Housing Grants, Construction and Regeneration Act 1996 also referred to as HGCRA 1996, section 108. 5 means that the clause for 'mediation' requested to be put in by the client Dong Intel will be struck out and the contractor who is being used for the client will be entitled to adjudicate despite what has been put into the contract. According to the HGCRA 1996, section 108. 5 explains that:

If a contract does not conform to the requirements of subsections 1 - 4 in section 108 then the adjudication requirements of the Scheme for Construction Contracts applies. (Legislation. gov. uk, 2019)

The Scheme for Construction Contracts is a scheme that operates when construction contracts are not in agreement with the Housing Grants, Construction and Regeneration Act (HGCRA).

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What the scheme does is, it either provides the requirements of the contract where the contract has deficits in regards to the requirements of the HGCR or supersedes the contract where it is non compliant. This process allows construction contracts in particular to remain capable of performance, whilst allowing regulatory control over their requirements.

(Designingbuildings. co. uk, 2017)

The scheme is designed in a way that the first part of it makes precaution for adjudication where the contract does not conform to the requirements for adjudication in the HGCR. The second part substitutes those provisions in relation to payment that do not comply with the HGCR. (Designingbuildings. co. uk, 2017)

The fact of the matter is that the ‘ mediation’ clause wanted by the client Dong Intel can still be drafted into the contract, however, as a professional I have to make it very clear to the client, Dong Intel that if they do decide to keep this clause in the contract it will not survive an adjudication notice. To give extra clarity on the non-feasible idea of adding a mediation clause within this type of contract, Dong Intel may find that they could have a similar conversation with their lawyers if they decide not to take on board the advice given in the consultation that they have requested. All that will happen is the lawyer, who would be hired to solve the contract query, will give Dong Intel the advice or the recommendations they would need to avoid any complications. If the client, Dong Intel is still very adamant to have a ‘ mediation’ clause put in and the lawyer hired doesn’t illuminate the risks with vigor to Dong Intel for them to change their desired route for the contract, the lawyer is free to agree with Dong Intel and put the clause in.

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They will agree because by telling Dong Intel about the risks and implications of adding the mediation clause in, Dong Intel won't be able to go after the lawyer for negligence. A warning would've been made.

In the worst case scenario, what could happen is that two years later on into the project, everything goes horribly wrong and it would be on Dong Intel as the clients as the consultancy from myself and the recommendations from the lawyer which was hired prior to the worst case scenario had warned numerous times about the knock on effects.

In highlighting all the information which has been shared mediation is not a bad thing, in fact it is great, the only issue here is that a mediation clause within the contract chosen to be used will offend against section 108. To confer again it isn't worth putting in to the contract. On the other hand, what could happen is you could draft mediation in to the contract to encourage people to mediate first however, if the other party decides that they choose not to be encouraged to mediate first and go straight to adjudication, they will in fact be able to, because as highlighted earlier the clause will get struck out and replaced by The Scheme for Construction Contracts.

3.2 Section 108 of the Housing Grants, Construction and Regeneration Act

Please see below for all the information that is included in the Section 108 of the Housing Grants, Construction and Regeneration Act 1996. Which should give more clarity on why mediation should not be used in these current circumstances.

1 – Each party to a construction contract has the right to discuss a dispute occurring under the contract for adjudication under a procedure complying with this section.

For this particular purpose “ dispute” involves any difference.

2 – The contract shall:

(a) – Allow a party to give notice at any time of their intention to raise a dispute to adjudication

(b) – Specify a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within 7 days notice

(c) – Necessitate the adjudicator to come to a decision within 28 days of the referral or a longer period which would be agreed by both parties after the dispute has been referred

(d) – Agree for the adjudicator to extend the period of 28 days by up to 14 days, with the permission of the party who the dispute was referred from

(e) – Enforce a duty on the adjudicator to act neutrally

(f) – Empower the adjudicator to take the initiative in determining the facts and the law.

3 – The contract will specify that the decision of the adjudicator is binding until the dispute is conclusively resolved by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement.

The parties may agree to accept the decision of the adjudicator as finally determining the dispute.

4 – The contract will also specify that the adjudicator is not liable for anything done or absent in the discharge or alleged discharge of his functions as the adjudicator unless the act or oversight is in bad faith, and that any employee or agent of the adjudicator is also protected from liability.

5 – If the contract does not conform to the requests or requirements of subsections 1 – 4, then the adjudication requirements of the Scheme for Construction Contracts apply.

6 – For England and Wales, the Scheme may apply the provisions of the Arbitration Act 1996 with such variations and adjustments as appear to the Minister making the scheme to be appropriate.

For Scotland, the Scheme may include provision-consulting powers on courts in relation to adjudication and provision relating to the enforcement of the adjudicator's decision. (Legislation. gov. uk, 2019)

There are however some alternatives that can be explored. You have arbitration and there is litigation, however litigation is likely to be public and if you don't like that type of publicity then arbitration is generally the better option should both parties wish to keep their dispute private.

4. Arbitration vs. Litigation in construction contract disputes

1. Arbitration

Arbitration is another form of contractual dispute resolution. It's private and it provides for the solution of contractual disputes by an arbitrator or arbitration panel, they are known as the third party involved in these cases. The two parties involved in the dispute usually select them. The way arbitration solves disputes is on the basis of material facts, documents and the relevant principles of law. (Designingbuildings. co. uk, 2018) The legal costs are generally awarded to the party who is successful.

4. 2 Litigation

Litigation is the procedure of engaging in or contesting legal action in court as a means of resolving a dispute. The court is able to implement or enforce a party's rights or obligations. In regards to the construction industry litigation is not unusual because of the confrontational nature of the construction industry, which leads for disputes to arise. In this instance, different issues can lead to construction disputes; these can range from forced majeure, behavioral factors, environmental factors or a combination of all. (Designingbuildings. co. uk, 2017)

4. 3 Arbitration vs. Litigation

In most construction situations, if there has been any type of breach in contract or an issue that has occurred which simply can't be overlooked such as professional negligence the vindicated party will usually want to launch certain procedures to regain for any type of losses which have occurred as a result. There are different ways in which construction disputes can be resolved, but the two options, which could be explored, are litigation or arbitration. Both summarised briefly in points 4. 1 and 4. 2; both arbitration

and litigation have various advantages and disadvantages. The following information should give insight into the advantages and disadvantages of both arbitration and litigation and examine the conditions in which it may be more appropriate to issue a claim in one forum rather than another (Redmans. co. uk, 2012)

In order to examine the conditions to see whether arbitration or litigation is appropriate in this current circumstance is to see whether there is a clause for arbitration in the contract between the two parties involved in the dispute. If there is a clause for arbitration then both parties must use the process for arbitration unless both parties agree otherwise. If there is no arbitration clause then both parties are free to choose exactly which method is considered suitable in the current circumstances. A direct comparison between litigation and arbitration is difficult to make, as there are many different types of arbitration. (Redmans. co. uk, 2012)

Arbitration and Litigation advantages and disadvantages are examined below in regards to:

- Cost

In regards to costs, it is known that Litigation is an expensive process, the total fee accumulates, the lawyer fees, courtroom fees and also expert witness reports. These can all quite quickly build up the total costs, as well as the actual trial itself. Arbitration on the other hand can actually offer a much cheaper route to resolving a contractual dispute. (Redmans. co. uk, 2012) For example, a formal hearing is not needed due to a short informal process. However, if the issue at hand is very complex then potentially the

process of arbitration can far exceed the cost of litigation, which is already expensive. This is only because both parties must pay for the arbitrator's time and also the hiring of the venue in which arbitration takes place.

- Duration of Time

Concerning the duration of time, litigation can potentially be an elongated process, very arduous and extremely time-consuming, especially in cases that deal with complex facts. Arbitration however, can offer a possibly quicker means of resolving a contractual construction dispute. On a wider perspective, it is in fact the specific facts of the cases, the readiness of both parties to adhere to the set timetable and also the character of the arbitrator, which will determine the speed in which a case gets dealt with. If both parties are regularly missing deadlines and the arbitrator is not willing to take measures to compel compliance then it will unnecessarily make the process longer. (Redmans. co. uk, 2012)

- Convenience

Convenience is only really relevant in the more simple construction disputes. Arbitration can be organized to convenience both parties, i. e. (evening or weekend hearings). The convenience is usually invalidated when there are lawyers and experts working for both parties involved in the dispute. (Redmans. co. uk, 2012)

- Expediency

In hindsight arbitration is less confrontational than litigation. If both parties have a continuing working relationship (contractual or professional) then it is

most likely to be preferred to resolve the dispute without any animosity.

(Redmans. co. uk, 2012)

5. Conclusion

To conclude this report a sensible alternative to the mediation clause, which was requested by Dong Intel to be put into the contract would be arbitration. Arbitration when done correctly allows for a quicker and private resolution, as well as cheaper, with the means to still hold onto any continuous contractual or working relationships. It's not exactly the same as the mediation clause but I will allow you to resolve dispute with out much hassle as requested in the brief specifications.

6. References:

- Legislation.gov.uk. 2019. Housing Grants, Construction and Regeneration Act 1996. [Online]. [16 January 2019]. Available from: <http://www.legislation.gov.uk/ukpga/1996/53/section/108>
- Designingbuildingscouk. 2017. Scheme for Construction Contracts. [Online]. [16 January 2019]. Available from: https://www.designingbuildings.co.uk/wiki/Scheme_for_Construction_Contracts
- Designingbuildingscouk. 2018. Adjudication in construction contracts. [Online]. [18 January 2019]. Available from: https://www.designingbuildings.co.uk/wiki/Adjudication_in_construction_contracts
- Designingbuildingscouk. 2017. Expert determination. [Online]. [18 January 2019]. Available from: https://www.designingbuildings.co.uk/wiki/Expert_determination

- Designingbuildingscouk. 2018. Arbitration in the construction industry. [Online]. [18 January 2019]. Available from: https://www.designingbuildings.co.uk/wiki/Arbitration_in_the_construction_industry
- Designingbuildingscouk. 2017. Construction litigation. [Online]. [18 January 2019]. Available from: https://www.designingbuildings.co.uk/wiki/Construction_litigation
- Redmanscouk. 2012. Arbitration vs litigation in construction disputes. [Online]. [19 January 2019]. Available from: <http://www.redmans.co.uk/arbitration-vs-litigation-in-construction-disputes/>