



The Best of All Possible Worlds? Multi-tier Dispute Resolution Clauses in Tunnel Construction Projects

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Introduction

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Arbitration

Arbitration

- **Private dispute resolution process**
 - Arbitral award is binding and recognized by national courts
- **Now the standard means of dispute resolution in international construction projects**
 - Neutral
 - Choice of arbitrator(s)
 - Choice of place of arbitration
 - Choice of language of arbitration
 - Access to arbitrators with required experience & expertise
 - Private / can be (but not always) confidential
- **Misconceptions about arbitration**
 - Informal?
 - “Split-the-baby” decisions based on equitable considerations?
 - Cheaper?
 - Faster?

“Multi-Tier” Dispute Resolution Clauses

“Multi-Tier” Dispute Resolution Clauses: Basic Concept

- **Multi-tiered clauses require that an attempt first be made to resolve the dispute through one or more alternative dispute resolution (ADR) processes**
- **Goal: make arbitration a last resort**
- **Clauses can be relatively simple or quite complex**
- **Multi-tiered clauses are usually mandatory**
 - Pros and cons of mandatory vs optional

Typical Tier: Negotiation

- **Negotiation**
 - Must be confidential
- **Assisted / escalated negotiation**

Possible Tier: Mediation

- **Involves neutral third party to facilitate negotiations and settlement**
- **Flexible**
- **Low cost**
- **Can be fast**
- **Confidential**
- **No binding outcome**
- **Effective?**

Possible Tier: Dispute Boards

- **Definition**

- Panel of one or several persons to which a dispute between the parties is referred under a procedure that generally concludes with a determination by the panel
- “DAB” vs “DRB”
- “Full term” vs “*ad hoc*”

- **Features**

- Expert decision makers
- Relatively informal
- Encourage significant direct contributions from the parties
- Focus on speed of resolution of disputes
- Function in a manner which is intended to maintain relationships and encourage the completion of the project

Golden Rules

Golden Rules

- **Do use a model clause, but make sure it is adapted to your project**
- **Don't copy and paste from another contract without carefully checking**
- **Key is to ensure that each party understands what will be required of it**
 - “may” vs “must” or “shall”
 - Difficulty with *subjective* concepts such as “good faith”, “best endeavours”, “reasonable efforts”, etc.
 - Example of language to be avoided:
 - “The Employer and the Contractor shall *in good faith* and using *all reasonable efforts in the spirit of cooperation* take *all steps as may be necessary or desirable* to settle amicably any dispute through negotiations *and other constructive discussions*.”
- **Delineate clearly when the parties must pass from one dispute resolution level to the next**
 - Avoids misunderstandings / dilatory tactics: have *objective* transition triggers (*i.e.*, time limits) between each tier of the clause

Consequences of Non-Compliance

Consequence of Non-Compliance With Pre-Arbitral Tiers

- **Compliance can be waived**
- **Are the pre-arbitral steps conditions precedent to arbitration?**
 - Will depend on applicable law
- **Consequence of non-compliance with condition precedent**

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