The Projects and Construction Review

Sixth Edition

Editor
Júlio César Bueno

Law Business Research

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THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE BANKING REGULATION REVIEW

THE INTERNATIONAL ARBITRATION REVIEW

THE MERGER CONTROL REVIEW

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TELECOMMUNICATIONS REVIEW

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CONTENTS

EDITOR'S PREFACE

> *La meilleure façon d'être actuel, disait mon frère Daniel Villey, est de résister et de réagir contre les vices de son époque.* Michel Villey, *Critique de la pensée juridique modern* (Dalloz (Paris), 1976).

This book has been structured following years of debates and lectures promoted by the International Construction Law Committee of the International Bar Association (ICP), the International Academy of Construction Lawyers (IACL), the Royal Institution of Chartered Surveyors (RICS), the Chartered Institute of Arbitrators (CIArb), the Society of Construction Law (SCL), the Dispute Resolution Board Foundation (DRBF), the American Bar Association's Forum on the Construction Industry (ABA), the American College of Construction Lawyers (ACCL), the Canadian College of Construction Lawyers (CCL) and the International Construction Lawyers Association (ICLA). All of these institutions and associations have dedicated themselves to promoting an in-depth analysis of the most important issues related to projects and construction law practice and I thank their leaders and members for their important support in the preparation of this book.

Project financing and construction law are highly specialised areas of legal practice. They are intrinsically functional and pragmatic and require the combination of a multitasking group of professionals – owners, contractors, bankers, insurers, brokers, architects, engineers, geologists, surveyors, public authorities and lawyers – each bringing their own knowledge and perspective to the table.

I am glad to say that we have contributions from four new jurisdictions in this year's edition: India, Portugal, Saudi Arabia and Thailand. Although there is an increased perception that project financing and construction law are global issues, the local flavour offered by leading experts in 26 countries has shown us that to understand the world we must first make sense of what happens locally; to further advance our understanding of the law we must resist the modern view (and vice?) that all that matters is global and what is regional is of no importance. Many thanks to all the authors and their law firms who graciously agreed to participate.

Finally, I dedicate this sixth edition of *The Projects and Construction Review* to the International Society of Construction Law, a worldwide federation or alliance of national or

regional Society of Construction Law (SCL) organisations that aim to foster the academic and practical legal aspects of the construction industry. We now celebrate the hosting of the International SCL's Biennial Conference for the first time in Latin America (13 to 15 September 2016, in São Paulo, Brazil). I thank the leaders of SCL International for all their support in the organisation of this event.

Júlio César Bueno
Pinheiro Neto Advogados
São Paulo
July 2016

Chapter 3

DISPUTE RESOLUTION IN CONSTRUCTION PROJECTS

Robert S Peckar and Denis Serkin[1]

Disputes are as integral to the construction process as the preparation of plans and the placement of concrete. For the more cynical among construction industry participants, the ribbon-cutting ceremony signals the beginning of the dispute resolution process. However, most industry participants yearn for the reduction – if not the elimination – of project disputes. They correctly argue that disputes disrupt the good working relationships between project participants that are essential to project success. Furthermore, disputes take on a life of their own and usually result in further exacerbation of the underlying project problems, themselves causing delays and costs. Certainly, the dispute resolution processes involve expenditure and diversion of valuable company resources – attention, time and cost. All that having been said, why are construction disputes, particularly in the international arena, so prevalent?

I CONSTRUCTION DISPUTES IN DOMESTIC AND INTERNATIONAL PROJECTS

Complications are a normal, everyday component of the construction process; indeed, it is the constant challenge of diverse problems on construction projects that makes the process as exciting as it is. The nature of those problems and the need to solve them quickly at the significant risk of making a mistake provides insight into the people who lead the process. These people are, usually, strong personalities, resolute in their beliefs and insist that others agree. The problem is that each party has such a person in charge and the inevitable confrontations between these titans, much more often than not, significantly complicate any possibility of reaching an amicable resolution.

1 Robert S Peckar is a founding partner and Denis Serkin is a partner at Peckar & Abramson PC.

Resolving disputes at the project level typically prevents negative impacts to both schedule and budget. When disagreements escalate from 'problem' to 'claim' and then to 'dispute' status, those potentially valuable project-level benefits are lost to processes that have little to do with the construction process and tend to take on a life of their own.

On an international project, where the strong people who represent their companies come from different cultures, speak different languages and consider contractual issues against the backdrop of different legal systems, the challenge to work through problems to solution at the project or even at the executive level is challenging, but critically important.

II SOLVING PROBLEMS AT THE PROJECT LEVEL

The people who lead international projects tend to be tough, demanding and self-confident. It should therefore be no surprise that disagreements among them can often be difficult to resolve.

On projects where the parties fail to regularly resolve issues at the field level whenever they arise, unsolved problems tend to quickly accumulate in substantial numbers. The larger the number and value of unresolved problems, the greater the amount of money in, dispute the more difficult it becomes for the parties to resolve them amicably without a formal dispute resolution process. Hence, it is extremely important to construct a well-thought-out dispute resolution mechanism that will, if necessarily effectively, quickly and economically resolve disputes while permitting the parties an opportunity to cool down and reassess.

III THE ROLE OF ADR IN EARLY PROBLEM-SOLVING AND DISPUTE AVOIDANCE

Fortunately, participants in international construction are sophisticated and not afraid to use the various dispute resolution techniques that have proved to be effective in achieving an early solution to problems – processes that are timely, cost-effective and provide addedvalue. These processes fall within the moniker of 'ADR' (alternative dispute resolution). The 'alternative' in ADR refers to alternatives to arbitration and litigation. These processes may occur as early as during pre-construction and may occur as late as the eleventh hour before formal hearings are held in arbitration or court. To address concerns of cost and efficiency, most of the national and international arbitral bodies have adopted expedited resolution processes for both small and large projects. The key is to understand the many available options and properly match them to specifics of a particular project.

i Partnering

Despite its name, 'partnering' does not create an economic or legal partnership among the project participants. Rather, it is a process led by a trained neutral facilitator in which the representatives of project participants (e.g., the employer, the main contractor, the professional design team) gather together for a day or perhaps more with their counterparts to create personal relationships and understandings that should result in collegiality and dispute avoidance, notwithstanding the different responsibilities and risks that each has in the project. Although partnering was born in the United States, it is a process with enormous potential on international projects where culture, language, personal history, business conduct and other essential differences can lead to disharmony.

The parties will typically adopt a project 'treaty' or 'credo' in which they express their dedication to the goals they set to work together in the best interests of the project and to avoid disputes. That document is signed by each of the participants and posted in their project and regular offices. There have even been circumstances when a partnering 'logo' has been adopted. From a practical perspective, the best value and results are achieved where participants meet on a regular basis to review past and current project issues. These meetings, if properly guided, will result in increased collaborative effort and camaraderie among the participants. Ultimately, success is measured by issues resolved or discussed and prepared for future resolution. An added value of partnering is the end-of-project review and lessons-learned evaluation to improve future processes.

The process of partnering should result in fewer disputes when properly carried out (with a trained professional facilitator). There is anecdotal evidence of partnering being utilised on complex major projects that were closed out without a single dispute. There are also examples where this process was not conducted in a serious way and little benefit was gained. For the international project, partnering's potential value is clear.

ii The decision-tree analysis

Whether the result of partnering or otherwise, each project should benefit from the establishment of a 'decision tree' in which the key project participants set out the names of their decision-makers at project level, project executive level, company executive level and then the chief executive officer of the company, on the understanding that resolution of problems should be made at the lowest possible level. In the absence of such resolution within a stated time, however, the problem-solving responsibility shifts upwards to the next level for a stated time until it reaches the level of the company CEO. This process has enjoyed success for a number of reasons:

a decision-makers at each level are identified at the beginning of the project;

b decision-makers at each level tend to get to know each other before they are confronted with a problem to solve;

c decision-makers at each level are reluctant to see problems go to a higher level as many such situations could reflect poorly on their performance;

d the mere imposition of time limits at each level assures focused prompt attention rather than deferral to a later time (which often leads to no resolution at all);

e the successful resolution of problems becomes part of each participant's responsibility, rather than the creation of claims as a measure of success; and

f the successful resolution builds upon itself and creates an atmosphere of success that benefits the project.

iii Alliancing

Alliancing is the delivery method pursuant to which the diverse key parties to a project create a project team from among their best people with the most important experience and challenge that team to operate with the singular purpose of on-time, on-budget completion of a quality project. It has its genesis in Australia and has enjoyed some success there and in other parts of the world. While project participants can readily see advantages to participating in an alliance, it requires a major leap of faith on the part of the employer as the traditional separation of responsibilities with their attendant contractual protections must yield to the more collaborative model in which greater trust must be placed in the alliance team to achieve quality performance at the best cost based upon the best interests of the project. While there

will likely be a project budget that may not be exceeded, the team members are not limited to fixed-price contracts for their work and the project budget will be utilised by the team members as they decide collaboratively. Thus, the selection of the alliance team members is perhaps the most important decision that the employer can make as they must not only bring leading technical expertise to the table, but they must be capable of working effectively in this collaborative team arrangement, placing the interests of the team and the project ahead of what would normally be their own interests.

Because of the nature of the contract between the project employer and the alliance team, and because of the collaborative relationships that must be formed by the team members to work together to achieve the project goals, this model encourages the resolution of any and all disputes among the project participants in a prompt and business-like fashion, rather than through the customary dispute avoidance and dispute resolution techniques relied upon by parties in traditional contractual relationships. This result is enhanced by the presence of an alliance leadership team with each participant represented by a senior representative and the inclusion of the employer's senior representative as well. While alliancing is not yet a standard practice with clearly defined parameters, one parameter that has been used with success is the requirement that decisions among these senior representatives must be unanimous – a feature that, of course, places the interests of the project, rather than those of particular team members, at the very core of all discussions and (with unanimity) places aside blame for issues in favour of solutions. Disagreements, even acknowledged mistakes, are solved, and not placed into a dispute resolution context.

iv Dispute review boards

The use of dispute review boards (DRBs) has become more prevalent. Indeed, in some of the more complex projects where there are multiple layers of significant legal exposure, more than one DRB may be in place, dealing with specific contractual relationships.

The DRB model can be whatever the parties want it to be. However, a typical model would look something like the following:

a Two parties each select a member of the DRB who may be independent and neutral (independence and neutrality are preferred, even for the party-appointed members).

b Those two appointed parties select a third who must be independent and neutral.

c The DRB will meet either at the call of either party, or periodically, to hear and resolve disputes between the parties that the parties have not resolved themselves. For best results it is preferable to keep the DRB members apprised of project developments through regular, planned updates and, if possible, site visits.

d The DRB 'hearing' is usually informal and may or may not include attorneys; the purpose of the hearing is for the DRB panel to understand the dispute sufficiently to render a decision.

e The DRB will promptly render a decision. That decision will be binding on the conduct of the parties while the project is under construction, but not binding upon their legal rights. In other words, if the DRB directs the employer to pay the contractor additional compensation for claimed extra work, the employer must do so; however, at the conclusion of the project, the employer may assert that it had no legal obligation to make that payment and seek reimbursement from the contractor. Experience indicates that few project participants challenge DRB decisions at the end of the project simply because there have been no unresolved disputes, and the

incentive to go to arbitration or litigation, with all the accompanying disruption and expense, is far less attractive under those circumstances. Additionally, if the DRB functions as it should, its decision will likely be respected by the parties.

f The parties can also ask the DRB to issue advisory opinions to engender project-level negotiation and resolution.

The use of DRBs has become so prevalent that the Dispute Review Board Foundation – an organisation to promote the use of DRBs and advance the technique and quality of DRBs – was formed. It has published a practices and procedures manual, and holds conferences and seminars, maintains a database of members who offer their services for DRBs and offers counsel to those employers who might consider this dispute avoidance technique.

v Planned early negotiation

Planned early negotiation (PEN) is unique in that the parties agree to negotiate at the outset instead of focusing on contentious resolution. This approach is atypical because offering to negotiate at an early state of a dispute is traditionally considered a sign of weakness. Parties committed to PEN agree to forgo the typical posturing and instead agree to focus on early case assessment, business concerns, costs and time, and ways to resolve disputes (i.e., mediation, a neutral or a conciliator). To avoid derailing the process, the parties are best served by entering an agreement to negotiate that should set forth the parties' desire to negotiate and the steps and mechanisms the parties will utilise to achieve that goal. Key to a successful PEN process is the parties' understanding of their respective positions as well as a joint effort to identify potential third-party claims and similar other obstacles to a negotiated resolution.

vi Mediation

Mediation is an extremely valuable process, which, while not adjudicative, is basically an enhanced negotiation aided by a neutral facilitator known as the 'mediator'. The mediator assists the parties in their negotiation and helps them achieve resolution and closure. The key advantage of mediation is that the process focuses on finding a practical resolution of a dispute as opposed to adjudicating the parties' contentions and rights.

Unless agreed otherwise by the parties, a mediator makes no rulings and has no power to command that the parties act in a particular way. The process is voluntary and, when properly established, is completely confidential so that what is said by the parties during the process is not allowed to be repeated in arbitration or litigation. Often mediation is designated as a prerequisite to arbitration to provide a non-contentious resolution mechanism before the parties harden their positions.

With the soaring costs of litigation, even in arbitral forums, mediation is becoming more important as parties seek to avoid contentious dispute resolution when possible. In 2014 the American Bar Association (ABA) Dispute Resolution Section and the International Chamber of Commerce (ICC) both made substantial efforts to promote mediation. The ABA held meetings and conferences around the world bringing together international practitioners, government officials, as well as mediation and arbitration professionals to discuss and further encourage mediation in the international setting.

For its part the ICC renamed its Amicable Dispute Resolution Rules to Mediation Rules, and issued Mediation Guidance Notes, which, as the name suggests, 'provide guidance on issues that deserve attention when choosing and organising mediations'.

The new mediation rules complement the 2012 revision to the ICC's arbitration rules that encourage arbitrators to help parties always consider different settlement scenarios. The Mediation Guidance Notes continue this trend and encourage arbitrators to actively guide the parties towards non-contentious resolution of disputes.

Similarly, the American Arbitration Association's (AAA) latest revision of the Construction Industry Arbitration Rules, effective 1 July 2015, added a mediation step to cases involving claims in excess of US$100,000. However, the AAA does not have authority to force this step unless the parties' underlying contractual agreement's ADR clause mandates mediation – if it does not, any party can unilaterally withdraw from the mediation 'step' by notifying the AAA and all participating parties.

In the international construction world, the fact that parties speak different languages and bring different cultural attitudes and prejudices (particularly as to the obvious need for a commitment to compromise) adds to that scepticism as one or more parties refuse to believe that a mediator not from their country and culture can lead them fairly through a negotiation process; many reject mediation because they refuse to accept that what they tell the mediator in confidence will remain in confidence.

vii Ad hoc ADR

An *ad hoc* arbitration is a creation of the participating parties. It can be modelled on and follow the rules and procedures of a particular ADR organisation, such as the ICC but without the actual administration and oversight – or the participants may choose their own script. For example, the parties may determine the number of arbitrators, process for appointing the arbitrators, as well as the conduct and procedure of the arbitration by looking to a particular organisation's rules and procedures. The immediate, and most obvious benefit of the *ad hoc* process is the lack of a, generally substantial, filing fee and the subsequent maintenance fees. Naturally, this process places a heavy burden on the project participants to adequately describe the ADR mechanism in such a way so that the locale, the composition or identity of the tribunal, the applicable law, procedures, as well as method for negotiation arbitration fees, are adequately encapsulated in the underlying contract documents. The *ad hoc* approach places a significant burden on the arbitrator, and to some extent the parties, to make sure that the proceeding is adequately, timely and thoroughly administered – functions usually handled by an ADR organisation's professional staff.

IV CONCILIATION

Conciliation is an ADR mechanism whereby the parties retain the services of a conciliator. The conciliator, unlike a mediator, will typically work with parties individually in an attempt to frame relevant issues and come up with a list of ranked, desired outcomes to be reconciled in a negotiated settlement agreement. Typically the parties never meet face to face, which can be helpful in an industry such as international construction, which is dominated by strong personalities.

V NEUTRAL EVALUATION

As the name suggests, the parties can retain the services of a neutral evaluator, either independently or through one of the several international ADR organisations, to evaluate

their dispute. Typically this permits the parties to quickly exchange their claims and back-up materials without fully committing to a contentious proceeding. Normally, the neutral will evaluate the parties' positions and issue either a binding decision with an explanation or a non-binding report that can serve as a framework for a negotiated settlement. Alternatively, a neutral could also be tasked with evaluating the parties' position before providing a recommended course of action that is least disruptive to the project and the parties' relationship. Using a neutral is especially beneficial on construction projects where long-term cooperation between participants is especially important. As with any ADR method, it is important to make sure that the proceeding and any generated report are kept in confidence.

VI ARBITRATION

The preceding sections have addressed methods designed to avoid the necessity of submitting a matured dispute to a finder of fact, be that an arbitrator or a judge. All the foregoing methods have in common the ability of the project participants to control the resolution of problems without yielding that control and authority to the ultimate adjudication of a binding award or judicial edict. However, there are some circumstances that, for a vast variety of reasons, must turn to an arbitrator or judge for resolution. There is little point to discussing litigation in the international construction context here as treatises have been written about litigation in each jurisdiction. However, there are some observations that should be made about international arbitration of construction disputes.

The complexities of international arbitration continue to expand as contracting practices change. In this ever-developing global world of construction, many international arbitration proceedings are faced with challenges that in some respects can make the process more complicated, time-consuming and expensive than had been the case in past decades. There are many reasons for this, which include the following:

a Many project teams now comprise parties from around the globe, not only regional participants. It would not be unusual for engineering and design to be performed by a team of, say, US, French or British designers together with designers in the country where the project is being built, while construction is led by a consortium of Spanish, French, Brazilian, Italian, Chinese, Korean, Japanese, US or other lead contractors with subcontractors also coming from diverse countries.

b Because of the variety of languages and experience brought by companies from around the globe, it is not unusual for contracts to be some form of the International Federation of Consulting Engineers (FIDIC) contract, but modified by local practice and local legal perspectives. Contractual choice-of-law clauses may designate a jurisdiction that may have as one of its prime virtues the fact that it is not the law of any of the participating parties. Thus, for example, it is not unusual to read 'New York' as the choice of law when none of the project participants is from the United States, no less New York State. It is also not unusual for project participants to have little more than a very generic understanding of what 'New York law' or the law of any other designated jurisdiction really means in the context of disputes that may arise until they are at the point of facing arbitration. The designation of locales for hearings that are not home to any of the project participants or the law of arbitration may not have been considered by the parties when the designation was made. Indeed, it is not unusual for those locales to be different from the jurisdiction of the national law of the choice of law clause. However, recently, not in a construction context, the German

courts have held that an arbitration clause providing for a place of arbitration outside the European Union (EU) is void if one of the parties is based in the EU, the activity is mainly related to EU and there is a risk that the arbitral tribunal will disregard mandatory EU law. It is important to note that at least one court found that a non EU choice-of-law clause is proof that there is a risk that the tribunal may disregard mandatory EU law. It bears noting that while this is a recent development, at this time limited to Germany, and the cases to date do not involve construction-related disputes – unless successfully appealed (possibly violative of the New York Arbitration Convention), it is probably a matter of time before a 'New York law' clause may invalidate an EU project-related arbitration agreement. Hence, it is very important to consider local laws when drafting and negotiating an ADR clause.

c Many arbitration clauses are customised by the parties and may include party-appointed arbitrators with no reference to their independence or neutrality; schedules for the hearing process that bear no resemblance to reality; and references to standard arbitration rules (such as the ICC, International Centre for Dispute Resolution (ICDR), London Court of International Arbitration (LCIA), China International Economic and Trade Arbitration Commission (CIETAC) and the many other providers of arbitration throughout the world) but with customised clauses inconsistent with those rules that create ambiguity or confusion as to how the process will indeed work.

d The variety of nationalities participating in the project team among whom the disputes arise is accompanied by very different perspectives on the arbitration process and the role of lawyers in that process can result in the creation of complex procedural and substantive issues that interfere with the efficiency of the arbitration process.

e Arbitrators who may be selected may know nothing of the law of the choice of law jurisdiction and may not speak the 'language' (both the idiom and the culture) of the other arbitrators, much less the participants.

f Although it could be argued that the development of document management through electronic databases, and software that can sort and facilitate analysis of documents and other electronic communications, aids the fair resolution of project disputes, it can also be convincingly argued that this development has added to the complexity of arbitration as some parties seek to engage in large-scale 'document' and 'communication' discovery within the arbitration process and other parties passionately resist such discovery. This confrontation over discovery is understandable in the international context, particularly as practitioners from common law countries tend to be far more accepting of discovery in arbitration while those from civil law countries consider broad discovery invasive and unacceptable in arbitration. When emails are included in the scope of what a party seeks to obtain from the other, the volume and associated costs of the electronic data that could be exchanged and then analysed can result in very substantial expense and the consumption of many months of discovery, all of which is part of the debate over this issue. The existence of this issue tends to be one of the challenging complexities facing project arbitration.

In January 2016, in an effort to streamline its processes, the ICC announced that, with respect to cases filed after 1 January 2106, (1) it would publish the names and nationality of arbitrators engaged in its cases on its website and, (2) it would reduce the arbitrator's fees if there is an unjustifiable delay in submitting an award to the court. The disclosure of panellists

assigned to particular cases will give potential parties a preview of the qualifications and past engagements of potential arbitrators – as well as indicate potential conflicts. However, arbitrating parties, by mutual consent, can opt out of the disclosure process altogether. The second change, involving reduction in arbitration fees based on the delay in rendering an award, should certainly prove beneficial. Typically, for a three-person panel, ICC requires that a draft award be submitted within three months of the last hearing – in practice, draft awards are generally delayed. Under the new scheme, the arbitral fee will be reduced, at the extreme end by as much as 20 per cent, if the award is late. However, ICC now also has discretion to increase arbitration fees if the award is submitted expeditiously.

Clearly, international construction arbitration has not become a more complex process by its own nature, but rather as a reflection of the increased complexity of global construction projects and the differences brought to the table by parties from different nationalities and different legal systems. Thus, the need for the parties and their legal counsel to reflect on the challenges specified above, as well as others that may be more specific to the particular project and its participants, is key to creating an arbitration process that can be efficient, effective, responsive and one that will credibly resolve their disputes.

Furthermore, perhaps the time has come for greater standardisation of the international construction dispute arbitration with a single arbitration provider taking the lead in developing well thought-out rules, procedures and administration that will respond to the new model of the truly international project.

VII COSTS AND CONFIDENTIALITY

There are several considerations that must be taken into account before utilising mediation and arbitration to resolve project disputes. An agreement to arbitrate by its very nature is a contract; this means that the parties can agree and define the terms of the arbitration or mediation proceeding beforehand.

One of the criticisms of ADR is its cost. To conduct mediation or use DRBs, the parties must retain – and pay – a neutral or several neutrals, depending on the contract agreement and the size of the dispute, and retain lawyers and experts in most cases. While that cost can be significant, it is generally lower than the costs associated with formal legal processes before the courts. More importantly, however, is the 'value added' by those processes when they successfully resolve disputes in a timely manner that benefits the project and helps avoid the true 'costs' of formal dispute resolution in the courts, which go beyond fees, and may include an adversarial relationship between the parties as the project progresses, which in turn may lead to yet more disputes.

Arbitration, while known as an ADR process, is a substitute for litigation with many benefits. Cost savings, however, may or may not be among them depending upon the manner in which the arbitration is administered by the sponsoring organisation (e.g., the ICC or the ICDR), or by the conduct of the parties and their lawyers. Notwithstanding that fact, the parties do have the advantage of being able to control these costs through their contracts. The parties can agree to limit the number of hearings, witnesses and neutrals, and – especially – the extent of discovery. Similarly, a contractual provision can be negotiated to determine, based on the size of the dispute, how the aforementioned factors will be addressed.

Another issue to consider when engaging in ADR is confidentiality. While in many jurisdictions the record of court proceedings may be obtained by a third party, because of the contractual nature of ADR, the parties can provide that the proceeding will be confidential.

The extent of confidentiality could range from an agreement that the proceeding will not be recorded in any way, to destruction of exhibits and documents exchanged after conclusion of the hearings, to a full-blown confidentiality agreement binding all parties including any neutrals. Depending on the nature of the dispute, potential benefits of true confidentiality are numerous, especially where trade secrets, pricing information and other proprietary data are involved.

VIII INTEGRATED PROJECT DELIVERY SYSTEMS AND BUILDING INFORMATION MODELLING

The use of integrated project delivery systems, where project designs, data and other information previously segregated among the various project team members in a manner consistent with their contractual responsibilities and rights are now shared through a secure website, is considered by many to be a revolution in the industry likely to reduce disputes simply by reason of increased communication and collaboration among those team members. Similarly, the use of building information modelling, where team members collaborate by inputting designs and information traditionally communicated through shop drawings into a common database resulting in three-dimensional renditions and analyses of those locations where elements are in conflict with each other, is also expected to reduce disputes significantly. Notwithstanding the virtues attributed to these developments, the legal landscape in terms of contractual and other legal responsibilities among the project participants when there is a disagreement is largely untested in the courts and arbitration. When an employer elects to pay for the use of such systems, with the goal of increasing collaboration and reducing or eliminating disputes, the benefits of using an ADR process when problems and disagreements are encountered seem all but self-evident.

IX THE ROLE OF CONSTRUCTION LAWYERS

When it is clear to a project team member that an arbitration or litigation must be commenced, there is no doubt in their minds that they must retain legal counsel to represent them. However, this timing hardly presents that party with the best value they can achieve with their legal counsel: that best value occurs when their legal counsel is part of their team from the very beginning of the project, as a guide through the various options and processes set out in this chapter, while at the same time guiding the client to the appropriate protection of their contractual and legal rights so that they are positioned to obtain the relief to which they are entitled. Much is said and written about the unhappiness of the construction industry with the costs associated with legal processes and thus with their lawyers; however, the simple reality is that sound legal advice from qualified construction lawyers who are familiar with all these processes and who share with their clients a passion for successful construction projects is the least expensive and best use of construction lawyers.

X CONCLUSION

As stated early on in this chapter, problems on construction projects should not automatically develop into claims and disputes. Methods are available to assist the project team avoid this escalation from solvable problems to formal dispute resolution processes. These methods

allow the participants, indeed with the aid of their attorneys, to maximise the opportunities to solve problems efficiently from the first days of the project, to build on those solutions to establish problem-solving as the norm for the project, and to focus more of their efforts on the achievement of a successful project rather than successful arbitration or litigation.

Appendix 1

ABOUT THE AUTHORS

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Robert S Peckar is a founding partner of Peckar & Abramson PC, one of the largest and leading construction law firms, with eleven offices in the United States and affiliated offices in the United Kingdom, China, India, Mexico, Brazil and Peru. He has been a leading construction practitioner for 45 years. He has been integrally involved as a legal adviser and advocate for major contractors and projects throughout the world. He is highly respected for his unique ability to guide project participants through troubled projects and difficult relationships to solutions that do not require formal dispute resolution, while having major success as a litigator of construction disputes when efforts to avoid formal dispute resolution are not successful. In addition to providing project specific advice, in recent years, Mr Peckar's practice has focused on counselling both international and US contractors in the formation of joint enterprises, including consortia and other collaborations in the United States and abroad, and guiding construction companies in the formation, implementation and oversight of corporate integrity programmes that comply with domestic and international requirements. Mr Peckar is a fellow of the American College of Construction Lawyers and a member of industry and professional associations, including serving as general counsel of several US associations as well as a legal adviser to others. He is an author and a frequent lecturer.

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Denis Serkin is a partner in the construction law practice at Peckar & Abramson. He focuses on construction law, representing construction managers, general contractors, specialty contractors, owners, developers and subcontractors in the resolution of disputes through litigation, arbitration and mediation. He regularly assists clients in a number of market segments including construction management, general and EPC contracting, real estate development, power/energy and infrastructure. Mr Serkin has specifically represented and advised clients in the areas of construction defect, delay and disruption claims; change-order

and extra-work claims. In addition, Mr Serkin advises clients in the drafting and negotiation of various levels of construction agreements. Prior to entering the legal profession, Mr Serkin worked as a project engineer.

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