DISPUTE RESOLUTION MANAGEMENT: FINDING THE MORE EFFECTIVE CONCILIATION FROM THE PRE-CONTRACT PHASE TO RESOLUTION PHASE

PAOLA PROVENZANO and GIUSEPPE IDDAS

GQI Associates, Milan, Italy

Construction projects are usually involved in disputes, the management of which causes a considerable cost increase and time delay. New research frontiers regarding methods able to guarantee a rapidly agreed settlement, reducing time and costs, are suggesting lawyers new criteria to assign earlier the most effective alternative dispute resolution methods in the precontract phase. For this purpose, different criteria were analyzed, alternatives were selected and translated in legal contract language to bring the cumulative experience to being inserted as a clause into construction agreement. Other impulsive increase in research also occurs when bringing disputing parties together and when suggesting possible solutions to reach an agreed settlement during the conciliation steps. The authors, exposing some cases histories, analyze the common claims between the parties in construction contracts: delays, changes, unforeseen circumstances, insufficient information, and conflicts. Even though the claims must be properly constituted and documented, and the causes and effects must be clearly demonstrated, the quantification usually overestimates the loss due to inefficient productivity, which is extremely difficult to assess. The authors underline the role of the technical expert in forensic engineer as specialized in analyzing causes and effects by contemporaneous records and in verifying additional costs that must be supported by the regarding documents.

Keywords: Alternative dispute resolution, Contract, Civil law, Construction.

1 ADR: THE NEW FRONTIERS IN CIVIL LAW LITIGATION MANAGEMENT

In construction projects, especially in public mega projects, there can be several stakeholders and managing them is a crucial aspect in project contract management. This is mandatory to control critical conflicts between owners, designers, contractors and subcontractors. In civil law systems the inability to settle conflicts causes both the failure of projects (Mikhail and Serag 2019) and the increase in costs for the Judicial Authority. Recently, in European civil law Countries the average delay in construction projects is reducing, compared to the first decade of this millennium (Rangone 2007). This can be attributed to the ability to settle conflicts and preliminarily resolve disputes also with the entail of several advantages in terms of costs for all parties.

For the above, it is essential that the inevitable disputes are expertly managed and resolved. The authors believe that, to prevent or optimize the conflict, it is necessary to start from the contractual phase, where the parties must be familiar with the alternative technique, in order to adopt the more effective dispute resolution criteria, in accordance with the nature of the contract.
Although a dispute can be resolved through Court litigation, parties are, with increasing frequency, settling disputes through negotiation, mediation, arbitration or other alternative dispute resolution (ADR) procedures. In addition to already existing mediations and arbitrations, new conflict resolution methods, used to refer to disputes in Courts, have recently been introduced in the Italian legal system.

With Decree no. 132/2014 the Italian Government has started enacting specific changes, to reduce the amount of work that goes through the Italian civil courts, mainly by allowing the parties (i) to refer a pending Court proceeding to arbitration, or (ii) to proceed with an informal attempt to settle their dispute, which should work as a conflict resolution method prior to the referring of the matter to Court.

Decree no. 132/2014, in fact, introduced the principle for which, at any time during the civil litigation, each party is allowed to invite the other to settle the dispute. In this eventuality, one party will invite the other to seek an amicable resolution between the parties. The conflict resolution agreement will contain, at least the due date in which the parties will attempt the dispute resolution and the matter object of the dispute.

Also in the Public construction project, since 2006 with the Decree no.163, a Dispute resolution board has been introduced, becoming mandatory in 2016 with the Decree n.50. In 2020, with the Decree no.76, a Permanent Dispute resolution board was introduced for mega public projects, in order to create a board able to resolve the claims that could occur during the implementation phase of the projects.

Figure 1. Percentage of settlements for a sample of 490 civil litigation cases (Provenzano and Iddas 2020b).

In the Italian Civil litigation, in order to reduce the resolution time of disputes tackled by the Justice system, Law n.80/2005 was introduced, under Article 696, to nominate an expert at the beginning of the proceedings, to attempt to reach a settlement. The technical expert must assess and determine the credits deriving from a deficiency of respect of monetary obligations and the...
execution of the last. The innovative role that the expert takes on as mediator, requires accurate examination of all the available documents, by carrying out experimental and numerical analyses to identify the cause of the failure. Before filing the official report, the expert must try to reconcile the parties. If the expert succeeds, he must draft the minute of the conciliation, which is to be signed by the parties and filed with the office clerk of the judge. In the Italian civil law system, the recently introduced mandatory settlement handled by the expert, at the beginning of the proceedings, has led to a reduction in the number of lawsuits. Figure 1 shows the results of the research obtained by analyzing a sample of 490 civil litigation cases, in terms of percentage of reached settlements (Provenzano and Iddas 2020a, Provenzano and Iddas 2020b). The examined data shows settlements more frequently occur in presence of the insurance party; however, their percentage is less than 25% of total civil litigation disputes.

Considering the high costs of civil litigation, for the parties and for the Government resources, several studies have been developed to resolve conflicts in a preliminary phase, not only after the dispute occurs, but also in the precontract phase of the project. The aim is to find a risk management tool, able to suggest the most effective contractual clauses in construction contracts.

Recent research (Kalach et al. 2019, Faraji et al. 2021) proposed some criteria to develop a framework able to systematically evaluate and select the path of a decision models (prescriptive framework). The suggested approach can be transcribed into legal language and extended to contract documents.

From the experience of 25 years in forensic engineering, as third technical experts, the authors have applied the framework tool in several forms of ADR procedures, exploring the main aspects of disputes to classify them and subsequently analyze the ADR results.

In particular, the disputes can be classified in:

1. Technical engineering disputes: related to the designing of the project, they deal with mistakes in estimating and predicting requirements stated by contractors, along with incorrect timing and cost estimate, lack of transparency of bidding documents, and incomplete definition of the needs of the client. These kinds of disputes are usually related to project documents and to the global information provided by the project consultant.

2. Technical executive disputes: they originate in the construction phase of a project and are the consequence of the complexity and unpredictability of construction projects, material and furniture defects, life cycles, and external parties (change in orders of the client, disagreement on construction details, performance deficiencies, delay in obtaining approvals from the client, failures of site supervisors etc.).

3. Legal–contractual disputes rooted in contract clauses: they originate from differentiated interpretations of contractual clauses, contradictions in contract documents and vague definitions in contracts, such as a lack of description of proportionate sanctions or gaps (changes in contract terms and conditions, site position, starting date of the work, construction/commissioning/testing responsibilities, disputes related to property etc.).

4. Legal–regulatory disputes: they originate from changes to or deficiency of governing laws and regulatory requirements.

The framework tool suggests both non-judiciary methods (negotiation, mediation, conciliation), quasi-judiciary methods (expert judgment, dispute board, arbitration) and hybrid methods (mediation-arbitration and arbitration-mediation). The authors applied this framework tool to projects and dispute resolution procedures used in Italy, but it is able to be applied in similar ADR procedures in other Countries.
2 TECHNICAL ENGINEERING DISPUTES

In civil law systems the contract with project consultants usually has a clause proposing dispute resolution by civil litigation in a commonly chosen Court. Alternatively, the contract can include the arbitration clause. The authors, appointed by the Court of Milan as technical experts, analyzed several cases of civil litigation originated in the design phase of the project, including disputed estimations and predictions of sources required by contractors, incorrect time and cost estimations or incomplete definition of the needs of the client. The technical expert, in these disputes, is entitled to assess and determine the credits originated from the failure to conform to accepted standard construction, rules, monetary obligations and the execution obligations. The construction assessment and the technical explanation of the critical aspects of the contract, of the project design and of the construction management frequently helped the authors to favorize the reconciliation of the parties, both for the mutual perception of the amount of the impact on interests and for the relationship between parties. Normally, in fact, the project consultant wishes to reach settlement.

Due to the nature of such disputes, expert judgment is deeply suggested at a preliminary level, alternative to civil litigation, in order to allow minimum time and costs expenses. Also, because these disputes usually originate in the early phases of a project, they can be resolved in a mutually agreed approach in presence of a third party.

In conclusion, to manage possible technical engineering disputes, the contract between owners and project consultants should include a resolution clause to define preliminary disputes entrusted to an expert judgment. In case of no resolved dispute, the civil litigation can be chosen as upper level, entrusting the Tribunal expert with the attempt at conciliation.

3 TECHNICAL EXECUTIVE DISPUTES

The case regards a building recently constructed in Milan (Italy), designed by an international company for which, a month before the end of the construction works, client and contractor developed a “snagging list”, to register the construction defects. The contract includes a clause for which an expert is appointed to define the remedial works for the defects listed in the snagging list. The expert must also decide if some building systems (thermal plant, air conditioning system, acoustic isolation, kitchen ventilation system) were following the design, also in comparison with the UNI codes. The client asked for a refund of 882,877,93 € to repair the architectural defects, and more than 2M € to repair defects in building systems.

The dispute regards engineering and executive disputes. Executive disputes have three characteristics—high frequency, remarkable time impact on projects, and considerable financial impact on both parties. In the examined case, because the snagging list had been written in agreement between the parties, the expert only had to estimate the cost of repairing the shared defects, which amounted to 625.000,00 €. To repair the defects in the building system a cost of 780.000,00 € was estimated.

Because a surety guarantee has been included in the contract clauses, the dispute has been resolved by paying the surety.

The example confirms that the most opportune procedure to resolve technical executive disputes is to predict, in the precontract phase, a two-step resolution procedure: a lower level consisting of a technical expert or a dispute board and an upper level consisting of a hybrid alternative of arbitration–mediation. Usually, early engagement of the technical expert or of the dispute board in the design of the project can prevent future disputes. Following the same criteria, in Italy the Permanent Dispute resolution board has been introduced for mega public
projects, to resolve the claims during the implementation phase of projects with minimum costs. These conclusions should be pointed in the precontract phase.

4 LEGAL–CONTRACTUAL DISPUTES

The following dispute regards the interpretation of some clauses in the contract for the tunnelling construction in a big city in the South of Italy. After the transfer of credits to a new contractor, the original assignor (original contractor) asked more credits for the value of 6M€ to the assignee (third party who has been later included in the contract, receiving the rights and obligations of the contract assignment).

The dispute has been conciliated by a Court-appointed technical expert, in a civil litigation. The expert, in fact, suggested a convenient interpretation of the contract.

Contractual disputes make up several disagreements in the late phases of the contract execution. These disputes should be resolved, at a preliminary level, by the impartial assessment of contractual and legal experts who can prognosticate court decisions within it. The second step for resolving contractual disputes is mediation–arbitration or civil litigation, this having more force against parties. Usually, non-formal and non-binding first phase induce the parties to general flexibility and, consequently, the chances of offer acceptance are likely increased.

5 LEGAL–REGULATIVE DISPUTES

The last case is related to a regulative dispute that has been managed by mediation, a dispute resolution criterion in which a third party, the mediator, helps both claimant and respondent to find an acceptable agreement. Mediation is usually defined ‘evaluative’, when he gives an assessment of the legal strength of a case, or ‘facilitative’, when the mediator focuses on assisting the parties to resolve the issues.

The author has been engaged as technical expert by the mediators, to resolve an administrative question during the design development of a new building. The conflict is about the distance of an existing building in the adjacent site, constructed in 2016. The shape of the existing adjacent building, in fact, needs to be considered for the distance of the new building. The Local Administration imposed that for the new building the design must change from the Figure 2(a) to Figure 2(b), that brought to a dispute. After a detailed analysis of the documents and the administrative authorization, the expert explained the Local Administration point of view and the actual lack of documents able to demonstrate the disputed irregular aspects in the existing building.

The mediation failed. This is a typical case of Legal–regulatory disputes for which revolving dispute boards and, in case of failure, arbitration or civil litigation must be used, considering the nature of these disputes is legal based and related to governing laws. Nevertheless, mediation was a low-cost criterion able to show to the parties the actual documental resources in the denied hypothesis to start a civil litigation.

6 CONCLUSIONS

The authors, exposing some cases histories, apply recent framework approaches to resolve dispute in construction industry. A critical analysis of multiple criteria opened prospective in the precontract phase of projects as risk management tools, to forecast potential conflicts between parties and to minimize time and costs.
Figure 2. (a) First design (2019), (b) Second imposed design (2020).

References


