



## **Strategies to Avoid and Resolve Construction Disputes**

Michael Skene and Rick Shaban

Prepared for a conference held in Vancouver, B.C. hosted by Pacific Business & Law Institute, March 6, 2002

### **I. INTRODUCTION**

The only good construction dispute is one that is avoided. This paper provides strategies to avoid and resolve construction disputes. Some disputes will require the dispute resolution provisions of the contract including arbitration or litigation. However, this should not deter the participants in a construction project from examining the means and methods to avoid or minimize disputes before or during the course of the project. This paper presupposes that the parties to the dispute have a collective and genuine interest in resolving, in good faith, the matter in a fair and cost effective way. It also presupposes that the nature of the dispute is not one that requires a legal interpretation or decision before it can be resolved which in many cases will require litigation.

For those disputes which cannot be resolved by agreement, this paper will generally discuss certain alternative dispute resolution ("ADR") mechanisms. A good example of a dispute resolution mechanism is that introduced in 1994 by the Canadian Construction Documents Committee in Part 8 of the Standard Construction Documents CCDC 2 Stipulated Price Contract. Part 8 provides a mechanism with stipulated time frames for the speedy resolution of the dispute. In addition to these ADR options, there are other types of dispute resolution approaches used in the construction industry such as the use of a Dispute Review Board, Project Neutral, Mini-Trials, and Rent-a-Judge concepts.



BORDEN  
LADNER  
GERVAIS

Although this paper will generally discuss ADR concepts that are available to deal with a dispute, the main focus of the paper will be to consider a construction dispute avoidance strategy that will prevent the differences between the parties from arising or becoming a dispute. The objective of these strategies is to avoid the need to resort to the formal dispute resolution mechanisms in the contract or otherwise.

## **II. CONSIDERATIONS TO AVOID DISPUTES**

Based on years of experience in dealing with construction disputes and the research material considered for this paper, the following considerations are suggested as part of any strategy to avoid construction disputes. They are:

- A. Early consideration and allocation of project risks;
- B. Communication of potential problems or claims at the earliest opportunity;
- C. Realistic assessment of the value and impact of a claim;
- D. Appropriate attitude and commitment;
- E. Education;
- F. Early negotiations; and
- G. "Thinking outside the box".

### **A. EARLY CONSIDERATION AND ALLOCATION OF PROJECT RISKS**

Many disputes on a construction project can be avoided if the risks and responsibilities of the parties are clearly defined, in unambiguous terms, so as to avoid any misunderstandings. In fact, ambiguities in contracts and unreasonable allocation of risks between project participants are among the leading causes of disputes in construction projects.<sup>1</sup> The factors that should be considered when allocating risk are:

1. Identify the risks;

---

<sup>1</sup> Donald L. Marston, Project Based Dispute Resolution: ADR Momentum Increases in the Millennium, (2000), 48 C.L.R. (2d) 221.



2. Determine which risks can be insured;
3. Determine which party can most easily and economically obtain cover for insurance risks;
4. Determine which party is best able to control and minimize the risks which cannot be insured;
5. Let the employer accept as his own responsibility, and allow his budget for, all risks which are not insurable and which the contractor cannot influence.<sup>2</sup>

In order to avoid disputes it is necessary to have some appreciation for the reasons that disputes may arise on a construction project and to consider the steps that can be taken to minimize the likelihood of such disputes. The careful consideration of potential disputes in the context of the terms and conditions of the contract can assist to identify potential problem areas that require attention. Attached as Appendix A to this paper is a list of some of the main reasons that disputes arise on a construction project.<sup>3</sup> It will assist to avoid disputes if at the outset of the project the parties consider the potential reasons for dispute to ensure that the risks are properly allocated in the contract and to give attention to the means and methods to avoid the occurrence of the matter.

#### B. COMMUNICATION OF POTENTIAL PROBLEMS OR CLAIMS AT THE EARLIEST OPPORTUNITY

The longer a potential problem or claim is allowed to go on the more likely it is to escalate and the less likely it is that the matter will be resolved without a dispute. The advance warning of a potential problem or claim has the advantage of avoiding surprise by the other side and it enables the parties at the earliest opportunity to consider solutions to avoid or minimize the impact of any potential claim.

---

<sup>2</sup> John K. Sykes, *Claims and Disputes in Construction: Suggestions for the Timely Resolution* (1996), 12 Construction Law Journal 3.

<sup>3</sup> P. Campbell, ed., *Construction Dispute Avoidance and Resolution* (Latheronwheel: Whittles Publishing, 1997) at 51.



One approach expressly provided for in The Engineering and Construction Contract, standard form, prepared by the Institute of Civil Engineers (1995) in the United Kingdom is a procedure called the “early warning” meeting.<sup>4</sup> This process requires the owner or the contractor to give the other “an early warning as soon as they become aware of any matter that can give rise to an increase in price, delay completion or impair performance of the work” and to demand the attendance of the other party at an “early warning meeting”. Any party may invite other interested parties such as the consultant or subcontractors to the early warning meeting subject to other party’s right to veto their attendance.

The “early warning” meeting does not change the basic responsibility of the parties for the problem under the contract. Rather, it provides a contractual duty to raise and consider potential problems at the earliest opportunity.

#### C. REALISTIC ASSESSMENT OF THE VALUE AND IMPACT OF THE CLAIM

Although a realistic assessment of the claim may not guarantee its resolution, an unrealistic assessment is almost certain to result in a dispute. In fact, it is not unusual to incur a significant amount of time, effort and expense to deal with unsubstantiated or inflated claims during the examination for discovery process in construction litigation or arbitration.

In any event, a realistic claim presented with the necessary supporting documentation and information to satisfy the consultant or other party may avoid a dispute. Like most construction contracts, CCDC 2 provides the Consultant (project architect or engineer) with the first opportunity to resolve disputes by making a finding in respect of matters in which the Consultant has authority under the contract. Disputes presented to the Consultant do not happen in a vacuum. Careful attention to collecting the information (including the

---

<sup>4</sup> P. Campbell, ed., *Construction Dispute Avoidance and Resolution* (Latheronwheel: Whittles Publishing, 1997) at 30.



BORDEN  
LADNER  
GERVAIS

observations of those directly involved) and documents necessary to prove to the Consultant the validity of the claim may provide the Consultant with sufficient information to recommend to the other party that the matter be resolved by agreement. This may avoid the necessity to formally refer the dispute to the Consultant under the contract for a finding or to begin the time sensitive dispute resolution procedure in Part 8 of the contract.

In order to properly assess the entitlement and quantum of the claim, legal or technical assistance may be required. This advice should be sought early to assist in the presentation and negotiation of the claim. In addition, consideration should be given to the costs in pursuing the dispute resolution mechanisms in the contract. These costs should be considered together with the prospect of success of the claim and the extent to which the expenses to be incurred in pursuing the claim further will not be recovered. Consideration of a net position to resolve the matter will enable the appropriate compromises to be made early in the process.

There are quantified risk assessment approaches which can vary from a simplistic analysis<sup>5</sup> to a more sophisticated analysis using computer simulations. These approaches attempt to quantify the risk of pursuing the dispute in litigation or arbitration.<sup>6</sup> A discussion of the utility of these risk assessment models is beyond the scope of this paper. However, the articles cited below provide a discussion of the manner in which such an approach may be used to assist the parties in quantifying the extent of compromise a party may wish to make based on the anticipated costs and prospects of success.

---

<sup>5</sup> M. O'Reilly, *"Risk, Construction Contracts and Construction Disputes"* (1995), 11 Construction Law Journal, p. 343.

<sup>6</sup> M. O'Reilly & M. Mawdesley, *"The Management of Disputes: A Risk Approach"*, [1994] The Arbitration and Dispute Resolution Law Journal, p. 260.



#### D. ATTITUDE AND COMMITMENT

The adversarial attitude and approach to problem solving in a construction project can prevent the resolution of a dispute. In an interim report prepared by Sir Michael Latham for the Joint Government/Industry Review of Procurement in Contractual Arrangements in the United Kingdom Construction Industry, he stated:

It is widely acknowledged that the industry (construction) has deeply ingrained adversarial attitudes. Many believe that they have intensified in recent years. There is also general agreement that the route of seeking advice and action from lawyers is embarked upon too readily. While a relatively small number of these legal disputes actually reach formal court hearings, the culture of conflict seems to be embedded, and the tendency toward litigiousness is growing. These disputes and conflicts have taken their toll on morale and team spirit.<sup>7</sup>

To address concerns regarding attitude in a commitment to dispute resolution without litigation, the concept of “partnering” was developed by the U.S. Army Corps. of Engineers.<sup>8</sup> Partnering has been described as:

“the principle whereby all the people and organizations who are involved with the project will agree to work together as a team, for their mutual benefit and the benefit of the project.”<sup>9</sup>

“Partnering” is not to be confused with the legal concept of partnership where two persons join in a venture to share profits and risks. Rather, partnering in the context of a construction project is an approach by the parties to express their commitment to a Charter or mission statement of common objectives. The

---

<sup>7</sup> P. Campbell, ed., *Construction Dispute Avoidance and Resolution*, (Latheronwheel: Whittles Publishing, 1997) at 20.

<sup>8</sup> B. I. Colangelo, “Partnering on the Municipal Construction Project: Focusing on Dispute Avoidance”, (Dec. 1999) 5 *The Digest of Municipal & Planning Law*, p. 181.

<sup>9</sup> P. Campbell, ed., *Construction Dispute Avoidance and Resolution* (Latheronwheel: Whittles Publishing, 1997) at 21.



partnering agreement ordinarily contains language to the effect that the parties' performance of the contract will proceed in accordance with certain stated common goals including, among other things, cooperation, shared objectives, adherence to common principles, team work, trust, fairness, honesty and professionalism - all in the interest of avoiding litigation. Generally, the partnering commitment is not intended to create any legal enforceable rights or duties although it is important to make this clear in the partnering agreement.

The basic requirements of a successful partnering program have been described as follows:

1. The tender and contract documents must state that partnering principles will be applied;
2. The top people in each company must take the initiative and lead by example;
3. The initial partnering meeting, or workshop must be properly planned and conducted;
4. The partnering agreement must be negotiated and signed by all the companies who are engaged on the project;
5. The agreement must state whether the claim notification procedures in the contract are still required;
6. The application and operation of the partnering agreement must be monitored and reviewed.<sup>10</sup>

For the most part, partnering is a concept to create an attitude on the project of harmonious relations with the expectation that this attitude will assist to avoid the adversarial approach to disputes and project delivery.

---

<sup>10</sup> P. Campbell, ed., *Construction Dispute Avoidance and Resolution* (Latheronwheel: Whittles Publishing, 1997) at 21.



Although there was much enthusiasm surrounding the development of partnering in the early and mid 1990's, a number of concerns have arisen. In particular, some legal issues arise out of the relationship between partnership commitments and contractual obligations. However, it is beyond the scope of this paper to canvass these issues in any detail. Whether or not full "Partnering" is appropriate for any particular project, a consideration of its component parts (considering possible areas of conflict, acting pro-actively, developing lines of communication and resolution) can be useful both to avoid and to minimize some sources of dispute.

For a detailed discussion of the partnering process and its benefits reference should be made to the U.S. Army Material Command, Partnering for Success - a Blueprint for Promoting Government - Industry Communication and Teamwork.

#### E. EDUCATION

Disputes may be avoided by an up front investment to educate those responsible for the administration of the contract on the rights and obligations of the parties involved in the project. A thorough understanding of the contractual relationship extends beyond the owner and the contractor. It should include other stakeholders such as the consultant, subcontractors, surety and insurer.

Disputes can be avoided if the persons administering the contract know the types of claims that may be covered by an insurer under a Course of Construction or Comprehensive General Liability Policy or a surety under a Performance Bond or Labour and Material Payment Bond. In addition, an understanding of the duties of an insured to an insurer or the obligee to the surety can avoid disputes that may provide a financial solution to the claim. For example, it is important that any material variation of the contract or underlying risk assumed by the surety or insurer is communicated and their consent obtained in order to avoid a subsequent dispute.





BORDEN  
LADNER  
GERVAIS

Many construction disputes begin with the on site personnel of the parties. It will assist in avoiding disputes if the initial on-site decision makers have been educated on how to address a potential problem. For example, a potential dispute can result from an inflexible or intransigent attitude towards resolution.

The following approach should be considered:

Any action which results in an entrenched position must be discouraged. When a problem starts to develop into a claim the contract procedures should encourage people to listen to the other person and answer the points which have been raised. Many disputes arise because both sides are concentrating on developing their own cases, rather than trying to understand the reasons for the other person taking a particular attitude. Proper understanding requires discussion, rather than an exchange of written statements.<sup>11</sup>

In addition, providing basic training on negotiating techniques may assist the negotiators to take an approach which favours an amicable resolution. Attached as Appendix B is a list of basic negotiating techniques for consideration.

#### F. NEGOTIATIONS

As stated earlier, the dispute resolution mechanism in Part 8 of CCDC 2 provides in GC 8.2.3 that “the parties shall make all reasonable efforts to resolve their dispute by amicable negotiations.” However, there is no reason that the negotiations need to await the sequence of events provided for in Part 8. The parties, including the consultant should make every reasonable effort to anticipate problems that could develop into a claim and to raise such matters for consideration by the parties before it becomes a dispute under the contract. The involvement of an experienced, knowledgeable, impartial and credible consultant can be invaluable in anticipating and resolving potential disputes.

---

<sup>11</sup> P. Campbell, ed., *Construction Dispute Avoidance and Resolution* (Latheronwheel: Whittles Publishing, 1997) at 29.



In addition, the parties may wish to consider the use of a “step negotiating” process as an express term of the contract. The step negotiation process is one that will require the parties to refer the dispute to a higher level of authority that may not personally be responsible for the problem. The step negotiation approach can serve to get the dispute in the hands of the person with the real decision making authority or perhaps the person that will suffer the financial consequence if the dispute escalates. It also tends to alleviate any personality conflicts that may exist between on-site personnel directly involved in the matters giving rise to the problem.

In any event, it is important to have the right personalities with the appropriate level of authority negotiating the resolution of the dispute at the earliest opportunity. It is also important to appreciate that there is an art to conducting successful negotiations which requires the representatives negotiating to have an appropriate level of negotiating skills.

#### G. THINKING OUTSIDE THE BOX

There is no dispute avoidance strategy that can be scripted for every dispute on a construction project. Disputes vary and not all may be suited for the dispute resolution mechanism that may be provided for in the contract. The parties should be prepared to consider potential solutions or options that may not be referred to in the contract such as the use of a reservation of rights or mitigation agreement. Such arrangements allow the parties to agree, to an interim solution, on a without prejudice basis, and to defer the resolution of the dispute to a later time. The parties may wish to consider this approach for disputes that are incapable of resolution at an early stage because of the uncertainty of the claim or its quantum. By deferring the claim to a later time when the actual expense or costs associated with the claim is known, the parties may be more amenable to resolving the dispute.



### III. DEALING WITH THE DISPUTE

In the event the matter cannot be resolved by agreement and it evolves into a dispute, the parties should carefully consider the dispute resolution provisions of the contract and the stipulated time requirements to make and advance the dispute. The parties may also wish to consider a mechanism which is not prescribed by the contract. In addition to the process in Part 8 of CCDC 2 for the resolution of disputes by Negotiation, Mediation and Arbitration, the following are other mechanisms that the parties may wish to consider:

- A. Dispute Review Board/Project Neutral;
  - B. Mini trials;
  - C. Rent-a-Judge.
- 
- A. DISPUTE REVIEW BOARD/PROJECT NEUTRAL

A Dispute Review Board ("DRB") is a type of mediation process which is a non-binding mechanism that may be provided for in the contract. The DRB may be a single person agreed to by the parties (sometimes referred to as a "project neutral") or a three member panel. The DRB member or project neutral is ordinarily an independent professional who is knowledgeable and experienced in the type of project involved and agreed to by the parties. This person is "engaged to stay abreast of developments on the project with a view to offering advice and decisions on an unbiased basis".<sup>12</sup>

The DRB or project neutral is not intended to displace the need to negotiate a resolution to the dispute. Rather it is intended to provide the parties with a mechanism in the event direct negotiations fail.

During the course of the project, the DRB or project neutral may be provided with regular progress reports and from time to time will visit the project so as to stay

---

<sup>12</sup> Donald L. Marston, *Project Based Dispute Resolution: ADR Momentum Increases in the Millennium* (2000) 48 C.L.R. (2d) 221.



informed as to the current developments and progress. In addition, the parties may hold regular meetings with the DRB or project neutral to generally discuss their views on the status of the work and any potential problems that may be developing. The DRB after consideration of the dispute makes a recommendation which is non-binding. The recommendation is intended to assist the parties to resolve the dispute without the need for formal arbitration or litigation.

#### B. MINI TRIALS

The American Bar Association standing committee on dispute resolution, describes mini-trials as follows:

A private, conceptual proceeding where counsel for each party to a dispute makes a truncated presentation of his or her best case before the top official with settlement authority for each side, and usually, also, a neutral third party advisor. At the conclusion of this exchange (which usually lasts a day or two), the principals attempt to settle the underlying dispute. If they are unable to do so, the advisor renders a non-binding opinion as to the probable litigated resolution of specific legal, factual, and evidentiary issues as well as the probable overall court outcome of the dispute. Armed with this traditional data, the disputants enter into further confidential settlement negotiations in an attempt to reach mutually acceptable agreement.

Alternative Dispute Resolution, an ADR Primer. (American Bar Association)

A mini-trial will ordinarily require some limited examination for discovery by the parties which is done on a voluntary basis. Because of the truncated nature of the process, the examinations for discovery are ordinarily limited to an agreed upon stipulated time period. For the process to succeed, the lawyers and the parties will be required to cooperate and provide full and open disclosure of information.



### C. RENT-A-JUDGE

In the United States, certain states such as California, have introduced a privatized court system which enables the litigants to “rent-a-judge” to adjudicate the dispute.<sup>13</sup> The “rent-a-judge” is a person agreed to and appointed by the litigants with the same power and authority as an ordinary judge of the court. The only difference between a public court system appointed judge and the rent-a-judge is that the rent-a-judge is paid by the litigants rather than the state. This procedure allows the parties to agree on the person with the appropriate knowledge and expertise to adjudicate the dispute. The rent-a-judge process remains adjudicative in nature.

In Ontario, there is a “rent-a-judge” type mechanism provided for in Section 58(1) of the Ontario *Construction Lien Act*<sup>14</sup> for lien proceedings brought under the Act and a similar mechanism for ordinary civil proceedings brought under the Ontario *Rules of Civil Procedure* in Rule 54. These procedures afford the litigants an opportunity to have the dispute resolved by “a person agreed on by the parties” rather than a court appointed Judge. The advantages of doing so have been described as follows:

The power to select one's judge is the principal advantage of proceedings to adjudicative ADR. The parties can select a person in whom they repose confidence, with whose reputation they are comfortable and who has proven expertise in the area of their dispute and whose behaviour and conduct of the proceedings will be impeccable. The court system guarantees none of the above.

The advantages of an adjudicator who is both well-suited to the task at hand and whose conduct of the proceedings will ensure satisfaction of the principle that justice must not only be done, it

---

<sup>13</sup> Martin Teplitsky, *The Privatization of Adjudication*, [paper presented at the Niagara-on-Lake Symposium, June 1997] (Sept. 1998), 15 C.I.P. Rev. 1.

<sup>14</sup> Benzion Sischy, Q.C., “*Resolving Construction Disputes Through the Use of Consent References: An Underused and Potentially Effective Tool*”, (2000), 1 C.L.R. (3d) 308.



must be seen to be done, cannot be overstated. I have also found that knowing your adjudicator in advance increases predictability of results, and therefore, enhances the opportunity of early settlement.<sup>15</sup>

#### IV. CONCLUSION

Although litigation or arbitration may be necessary for certain construction disputes, for the most part these alternatives to dispute resolution are inadequate. As stated by Lord Denning (Master of the Rolls, House of Lords):

Cash flow is the lifeblood of the construction industry. It might be added that when the circulation is impeded by clots the consequence is thrombosis!

One of the greatest threats to cash flow is the incidence of disputes. Resolving them by litigation is frequently lengthy and expensive. Arbitration in the construction context is often as bad or worse.<sup>16</sup>

This paper is a general discussion of considerations for a construction dispute avoidance strategy and the alternative dispute mechanisms available in the event of a dispute. At Appendix C to this paper is a checklist of considerations for a construction dispute avoidance strategy which is by no means exhaustive. This checklist is intended for quick reference when considering a potential claim or dispute.

It is in the best interests of the project and the financial success of the parties that a reasonable effort be made on a regular basis during the course of a project to anticipate, avoid and address construction claims or disputes.

---

<sup>15</sup> Martin Teplitsky, *The Privatization of Adjudication*, [paper presented at the Niagara-on-Lake Symposium, June 1997] (Sept. 1998), 15 C.I.P. Rev. 1.

<sup>16</sup> As it appears in P. Campbell, ed., *Construction Dispute Avoidance and Resolution* (Latheronwheel: Whittles Publishing, 1997).



## **V. APPENDICES**

- A. MAIN REASONS FOR DISPUTES
- B. BASIC NEGOTIATING TECHNIQUES
- C. CHECKLIST OF CONSIDERATIONS FOR DISPUTE AVOIDANCE



BORDEN  
LADNER  
GERVAIS

## APPENDIX A

### MAIN REASONS FOR DISPUTES

#### 1. General

- a) Adversarial nature of contracts
- b) Poor communication between the parties:
  - i) communication on site;
  - ii) understanding terms of contract and expectations of the parties.
- c) Proliferation of subsidiary contracts and warranties including those with consultants.
- d) Fragmented nature of the industry.
- e) Contractual documentation.
- f) Tender systems and government policy on tendering encouraging low tenders followed by claims.
- g) Inability or reluctance to pay.
- h) Erosion of contract administrator's role as quasi-arbitrator in contracts.
- i) Knock-on effect of third party interests.

#### 2. Consultants

- a) Design errors.
- b) Design inadequacies.
- c) Lack of appropriate competence.
- d) Failure to define brief.
- e) Failure to define conditions of engagement and fees.
- f) Delay in settling claims.
- g) Late information.
- h) Incomplete information.
- i) Ambiguous specifications.
- j) Variations and late confirmation of variations.
- k) Lack of coordination of information from different sources.
- l) Under-certifying.
- m) Statutory Authority requirements.
- n) Briefing client on implications of contract and building process.
- o) Checking contractor's programme and method statement.
- p) Unclear delegation of responsibilities.
- q) Inexperience.

#### 3. Client

- a) Poor briefing.
- b) Expectations at variance with contract documentation.





- c) Changes of mind during construction.
- d) Changes to standard contract conditions and additional non-standard conditions.
- e) Poor financial arrangements leading to late payments.
- f) Rigid budgets
- g) Reluctance of public bodies to reach decisions which might be criticized.
- h) Interference by administrators outside the contract process.
- i) Interference by client in contractual duties of the contract administrator.

#### **4. Contractor**

- a) Inadequate site management.
- b) Poor programming.
- c) Poor workmanship.
- d) Disputes with subcontractors/suppliers.
- e) Late payment of subcontractors/suppliers.
- f) Deliberate manufacture of claims premeditated or at conclusion of contract.
- g) Coordination of sub contractors.
- h) Unforeseen items.

#### **5. Subcontractors**

- a) Terms of subcontract and/or mis-match with main contract.
- b) Coordination of design input in non-design main contracts.
- c) Failure to follow conditions of contract.
- d) Inability to substantiate costs at the appropriate time.

#### **6. Manufacturers and suppliers**

- a) Failure to define performance or purpose.
- b) Failure of performance

Taken from: Peter Campbell, *Construction Dispute Avoidance and Resolution*, 1997, Whittles Publishing at p. 51.



BORDEN  
LADNER  
GERVAIS

## APPENDIX B

### ELEVEN BASIC NEGOTIATING TECHNIQUES

1. **Appreciate that the negotiation is a process.** It usually involves more than one exchange, sometimes it involves many. Still, these exchanges can occur in a short time. Good negotiation is not an “all or nothing” confrontation at the first contact.
2. **Plan the negotiation.** Not all disputed items are dealt with in the same way. Select a method of negotiation: person-to-person meetings, letters, or a combination. One must assess how long one can afford to negotiate before a resolution, the deadlines imposed, and the effects of delays on oneself and others.
3. **Prepare the negotiation.** There is no substitute for thorough and structured preparation. It is absolutely essential to prevent claims, to negotiate them, and to advance them through ADR and litigation. This must be done at the earliest stage, to improve one’s prospects, to save time and money, and to avoid complications later on. Be complete in the preparation; one will not make much progress in a meeting by saying that some of the supporting material is back at the site office. Paper and material don’t tell the whole story; before negotiating, one should check with the persons who were actually involved for additional information. In preparing the negotiation position, one must take the time to prepare the calculations and arguments.
4. **Choose negotiators carefully.** One should make a considered decision as to who should represent one either at various stages or all the way. Consider whom the other side is likely to present and whether there is some other person who is likely to be important in the proceedings. Assuming that one’s negotiator has good negotiation skills, there is still a distinction in face-to-face negotiations between having the “facts person” and the “decision person” there. In commercial negotiations and labour negotiations, the decision person is often excluded from the room for obvious purposes.
5. **Decide how much to say.** Since construction has specific time frames, dispute negotiations requires one’s “best shot” at the outset. In protracted commercial negotiations parties frequently hold some arguments in reserve; construction doesn’t lend itself to that. Also, if the dispute is heard by a third party later on, something may well turn on the completeness of one’s first presentation to the other party.



BORDEN  
LADNER  
GERVAIS

6. **Cover all the elements.** In one's preparation and presentation at the meeting, there are at least four elements that must be addressed every time - even if their significance is nil.
  - the work - labour, material, supervision;
  - the money involved or, if not determinable at the time, a formula or way to determine it;
  - the nature and extent of effect on others;
  - the time fact - what is necessary, what is allowable.
7. **Give and take.** Event though one may be irrefutably right on one's position, one must be prepared for a little or perhaps a lot of give and take. Although neither side likes to admit it is wrong, if they are to keep working together, usually there should be at least some small element of credit to the other side. Too rigid an approach can paint a party into a corner from which it can't escape. As well, one may entrap oneself with defensive nitpicking. One may not have to give, but one must be prepared to wait and see.
8. **Develop a last position.** Even before negotiating, the parties should develop some sense of what result they can live with and what they cannot. At the same stage, each should consider what the other side's last position might be.
9. **Watch for signals.** Gut reactions tend to create far more problems than solutions. A good negotiator will develop a skill of truly listening, rather than busily thinking about its next response. A good negotiator will read material carefully and will read the significant parts more than once.
10. **Allow for pauses.** Negotiations can develop heat, and they may raise a point on which one wishes to reflect. If either of these or another factor presents itself, the parties should take a break. If they are meeting face to face, another meeting should be suggested. Any excuse will do, but the most tactful one is "You've given me something to think about".
11. **Recognize the end.** It's crucial to know when one has reached the end of negotiations. A negotiator will know whether it has a deal or whether it has come to an impasse. The skilled negotiator will not waste time flogging a hopeless cause but will rather terminate the procedure and proceed to a preplanned alternative.

Taken from a paper by John C. Carson, Q.C. entitled *Dispute Resolution: Negotiation, Mediation and Arbitration in Ontario*, (Ont. 92) 11 Advocates Society Journal



BORDEN  
LADNER  
GERVAIS

## APPENDIX C

### CHECKLIST OF CONSIDERATIONS FOR A CONSTRUCTION DISPUTE AVOIDANCE STRATEGY

- ☐ Consider possible sources and types of claims and consider providing a mechanism for resolution in the contract.
- ☐ Consider potential risks associated with the project and address the responsibility for the risk in the contract.
- ☐ Are obligations clearly and unambiguously reflected in the contract documents?
- ☐ What is the real cost of negotiation/mediation/arbitration/litigation?
  - ☐ What is the number and magnitude of the claim(s)?
  - ☐ What is the complexity of the claim?
  - ☐ Is scientific or expert evidence required and at what expense.
  - ☐ What is the real claim (hard costs/soft costs)?
  - ☐ What will the claim become if not resolved (litigation inflation)?
  - ☐ Are there any practical considerations (repeat business/working relationships)?
  - ☐ What is the likelihood of success in arbitration or litigation?
  - ☐ What is the level of confidence in the process and the decision maker?
  - ☐ What is the impact of any delay in the resolution of the claim (financial hardship/additional cost/aggravation/collectability)?
  - ☐ What are the procedural complexities (number of parties, Rules of Civil Procedure and lien legislation rules, number of witnesses)?
- ☐ What is the net value of the claim (prospects of success, unreservable costs, loss of opportunity, cash flow, and financing costs)?
- ☐ What is the level of certainty in the legal and technical advice relating to the claim?



- ☐ What mechanisms are available to resolve the claim before it becomes a dispute?
- ☐ Is the claim one that should be resolved by “step negotiations”?
- ☐ Is the claim one that is better resolved at the end of the project or partially resolved under a reservation of rights or without prejudice arrangement (thinking outside the box)?
- ☐ Who should conduct the negotiations (personalities, level of authority, experience, knowledge of the circumstances)?
- ☐ If the claim must proceed to arbitration or litigation what is the best mechanism for resolving the dispute (rigid or flexible procedures, time involved, legal or technical decision maker, formality required (credibility issues), public versus confidential proceedings, costs, relationship between the parties)?
- ☐ What is the plan to negotiate a resolution of the claim and what is a reasonable time to resolve the claim by negotiation before proceeding with an alternative resolution mechanism?
- ☐ What documents and what information from persons directly involved is necessary to negotiate the claim?
- ☐ What is the acceptable settlement amount of the claim?
- ☐ Is the claim one that may be resolved by obtaining the view of an independent, knowledgeable, experienced and impartial person respected by the parties?
- ☐ Is there insurance, a bond or other source of recovery for the claim?
- ☐ Will the claim increase or expand if not resolved quickly (example, does it affect the work being done on-site)?
- ☐ Are the key on-site personnel experienced, trained and encouraged to look out for potential problems which can be averted?
- ☐ Ensure that the on-site personnel know the expectations of the parties and the contract terms at the outset to avoid any misunderstandings.
- ☐ Is there a need to deviate from the contract dispute resolution terms to devise a mechanism or suitable to the claim (thinking outside the box)?



- ☐ Will the timing to enforce contract rights and remedies have an adverse impact on the resolution of the claim (invite other disputes, disrupt working relationship)?
- ☐ Will the project be best served by requiring the involvement of a third party intervenor, mediator or dispute review board to resolve disputes during the course of the work?