

General

22 Key issues for dispute resolution

Investing in Energy Transition Projects
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Introduction

The complexity of major projects with their propensity for errors and misunderstandings makes them susceptible to disputes. Disputes are costly, disruptive and traumatic and their occurrence has the potential to undermine project success.

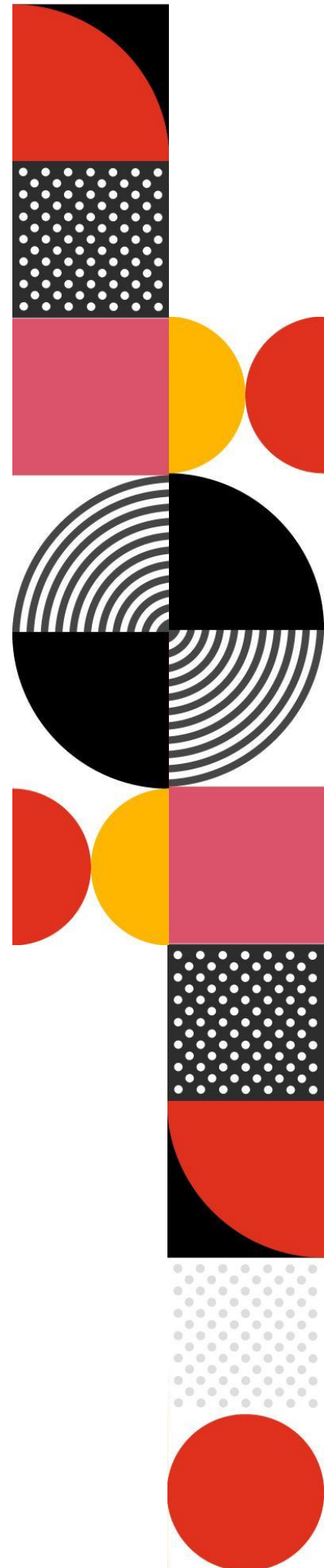
Disputes can also be an indication that there are serious problems with the project.

Purpose

The purpose of a well drafted dispute resolution clause should be to establish a system that enables the parties to identify the underlying issues and deal with them. An effective system is much more than guideposts to litigation.

More specifically, a dispute resolution system should:

- maximise the possibility of resolution without recourse to a formal dispute process
- minimise costs
- minimise disruption
- minimise damage to relationships
- identify and resolve underlying issues
- minimise reputational damage
- be consistent with bankability requirements
- lead to genuine, sustainable resolution.



Key issues

The following issues should be considered in devising a dispute resolution system for a major project.

- **What are the purposes of the system? Usually the purposes will include:**
 - the identification of the existence of a dispute
 - the identification of the nature and scale of the dispute
 - the identification of the legal basis of the dispute
 - giving the parties the opportunity to discuss and resolve the underlying issues
 - resolution of the engineering and/or commercial issues that are involved
 - stipulating the manner in which the dispute will be finally determined by a third party in a binding manner in the event that all of the preceding steps do not resolve the dispute
 - accordingly, a key element of the dispute resolution process is establishing an effective communication process.
- **What is the project context? For example:**
 - Is more than a single jurisdiction involved?
 - Are there binding legislative processes, such as SOPA, that are relevant?
 - Are there special Statute of Limitations issues?
 - If the parties are international, what is the position relating to the enforcement of judgements and awards?
 - What are the reputational issues associated with the project and a dispute?
 - What are the applicable liability caps?
 - What is the role of insurance?
- **Disputes and mechanisms. Should all disputes be the subject of the same process?**
 - What are the categories of potential disputes?
 - What are the best mechanisms for resolving each category?
 - What is the distinction between urgent/non-urgent and complex/simple disputes?

As a general rule, the project will be most susceptible to disputes in those areas where scope certainty is at its lowest. Special focus should be placed on those areas.

Dispute categories

All disputes are not the same. In fact, their nature, extent and urgency are extremely varied. It should be clear then that a single dispute resolution process is unlikely to be suitable for all disputes, especially in a major, multi-party project.

While all disputes will ultimately have a financial impact, the sources of disputes will vary and will include:

- the valuation of financial claims, such as variations, delay costs and provisional sums
- design gate achievement
- the existence of Defects
- the extent of extensions of time
- the achievement of Completion
- the existence of latent conditions
- the quality, timing and extent of Principal inputs
- the performance of third parties.

Within each identified category, the dispute might be urgent or non-urgent, substantial or minor or complex or simple.



Dispute resolution mechanisms

Two fundamental questions must be answered in relation to each category of disputes:

- What is the best way to expose and resolve the underlying issues
- If they are not resolved, at what point is a binding third party determination to be made?

The exposure, understanding and resolution of disputes is critical.

The processes will include discussions between groups on a technical level, a project level and an executive level that is beyond the project. The purpose of each level should be to create a greater understanding of the issues and to narrow the areas of dispute.

For example, the process might include:

- the project nominated representatives
- the project control group
- specialised groups, such as those involved with a particular scope of work or technology
- varying levels of company management.

At some level, an external party will be involved, such as the independent certifier or the project dispute avoidance board.

Even if the dispute has not been resolved after those processes have been exhausted, the parties should have a clear understanding of the issues that are contentious.

Consideration of the process must include the role of external parties and the pit at which their intervention is:

- to assist
- to provide an advisory opinion
- to make a final and binding determination.

Those distinctions might be made by reference to the nature or size of the dispute or by whether it is a matter that needs to be resolved quickly in order for the project to proceed.

Such intervention should also consider legal obligations that arise at common law or under statute. For example, many projects, such as transport projects, are governed by regulatory authorities or requirements that impose statutory obligations that cannot be overridden by the contractual dispute resolution mechanisms.

The critical issue is the point at which a binding determination is made. At one end of the spectrum that can be the determination of the Principal's representative or the project engineer, while at the other end it might be court or arbitral proceedings.

The range of possible resolution mechanisms will usually include:

- Principal's representative
- project engineer
- independent certifier
- dispute avoidance board
- expert determination
- domestic/international arbitration
- court of a nominated jurisdiction.

Notice requirements

Every step in the process will require the delivery of notices. The content and timing requirements for those notices might vary between levels and dispute types. It is important however to ensure that all requirements are feasible, sensible and informative. Requirements that provide for unrealistic time bars or unnecessary information will not fulfil the purposes of a good dispute resolution system; and can result in the Principal being subjected to administrative burdens as it is deluged with notices. Notices should be part of the dispute's resolution, not an additional source of disagreement.

The following matters should be addressed when considering notices:

- What information should the notices contain?
- When will that information be available?
- When should the notice be given/to whom should it be given?
- What happens if it isn't given in time or does not contain the required information?





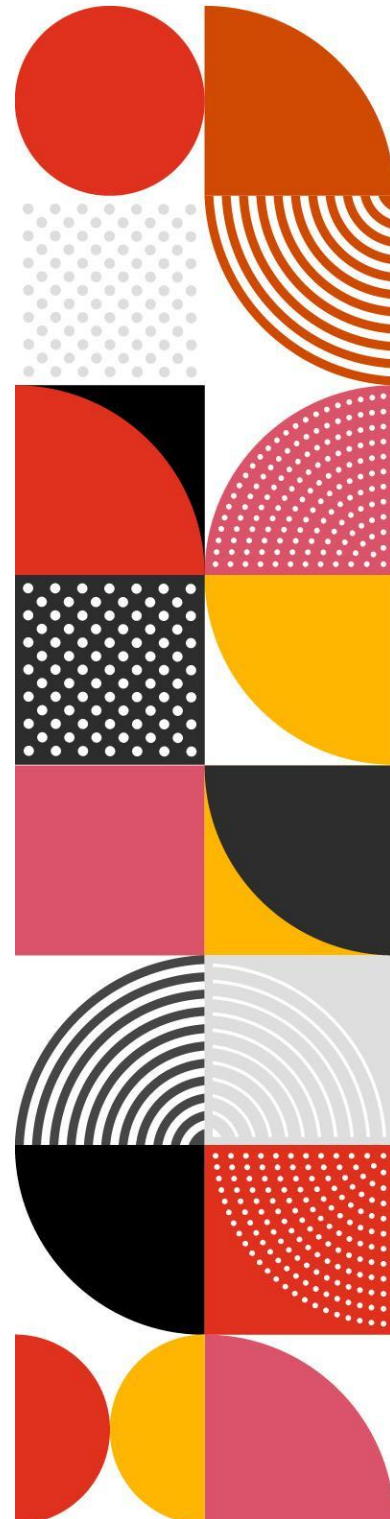
Broader considerations

There are number of general considerations to consider when developing a dispute resolution system.

- **Cost and time:** How much will the full process cost and how long will it take?
- **Experience:** Contractors are usually more experienced when it comes to disputes because they are in the business of construction. Is the Principal truly prepared for a dispute that might take years and tens of millions of dollars to resolve?
- **Sustainability:** Will the process result in an outcome that is accepted, albeit reluctantly, or will it be a source of ongoing discontent and mistrust?
- **Changing attitudes:** At the point at which the contract is signed the parties often think that there won't be any disputes or that they can be resolved amicably. All of that can change very quickly: when money goes out the door, love usually goes out the window.
- **Arbitration:** Arbitration is confidential but expensive.
- **Caps:** What level of dispute resolution do they justify?

Sample matrix

The optimal way to take instructions and develop a comprehensive dispute resolution system is by working through an options matrix, such as the sample matrix provided in Appendix 1 of this paper.



How to contact us



If you have any questions about this paper, please contact the editor, Damian McNair, Partner, Energy Transition.

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Appendix 1

Sample dispute resolution matrix

| Dispute Category | Contractual mechanisms | | | | External mechanisms | | | | Comments |
|---|----------------------------|--------------------------------|----------------------------------|-----------------|---------------------|----------------------|-------------|-------|--|
| | Principal's representative | Representatives of the parties | Senior executives of the parties | Dispute board** | Mediation | Expert determination | Arbitration | Court | |
| Satisfaction of CPs | | 1 | 2 | | | | | 3 | Decision will have to be made as to whether primary method of dispute resolution is by way of litigation or arbitration. This is a threshold question that applies to all Dispute Categories that escalate through external mechanisms. Minimal contractual mechanisms prior to litigation due to nature of dispute – if CPs are not satisfied, contract is not effective. |
| Variation claim (up to \$AU10M) – merits + value | 1 | 2 | | | | 3 | | | Threshold is proposed to illustrate how different values may necessitate different resolution strategies. Further consideration is required to specify this threshold (for example, monetary limits, DOA, technical, other strategic/interface indicators). Threshold may also be dictated by Financiers. |
| Variation claim (\$AU10M to \$AU25M) – merits + value | 1 | 2 | | 3 | | 4 | | | As above. |
| Variation claim (greater than \$AU25M) – merits + value | 1 | 2 | | 3 | | 4 | 5 | | As above. |
| Payment Claim – merits + value* | 1 | 2 | | 3 | | 4 | 5 | | *Security of payment legislation will operate alongside the Works Contract and will be available to a Works Contractor where any amount claimed in a payment claim is less than the amount proposed to be paid by the Principal. Payment disputes are resolved by way of adjudication under this legislation, which is subject to a separate process and is binding. Accordingly, these steps may be displaced, in whole or in part, in circumstances where a Works Contractor elects to enforce the legislation. See: <i>Security of Payment Briefing Paper</i> |
| Injunction (call on security, actions by regulators, breach of IP, breach of confidentiality) | | | | | | | | 1 | Injunctions will be determined by a court. |



| Dispute Category | Contractual mechanisms | | | | External mechanisms | | | | Comments |
|--|----------------------------|--------------------------------|----------------------------------|-----------------|---------------------|----------------------|-------------|-------|--|
| | Principal's representative | Representatives of the parties | Senior executives of the parties | Dispute board** | Mediation | Expert determination | Arbitration | Court | |
| Principal proposed call on security | 1 | 2 | 3 | | | | | 4 | |
| Breach of IP obligations | 1 | 2 | | 3 | | 4 | | | Resolution depends on nature of the breach (for example, whether there is a technical element requiring expert determination) |
| Breach of confidentiality obligations | 1 | 2 | | 3 | | 4 | | | Resolution depends on nature of the breach (for example, whether there is a technical element requiring expert determination) |
| Breach of obligations re key personnel | 1 | 2 | | 3 | | 4 | | | |
| Breach of subcontracting obligations | 1 | 2 | | 3 | | 4 | | | |
| Breach of testing/commissioning obligations, determination of performance guarantees and performance LDs | 1 | 2 | | 3 | | 4 | | | Resolution depends on nature of the breach (for example, whether there is a technical element requiring expert determination) |
| Breach of warranty | 1 | 2 | | 3 | | 4 | 5 | | |
| Provisional sums* | 1 | 2 | | 3 | | 4 | 5 | | As above Dispute Category 'Payment Claim – merits + value' |
| EOT claim (up to 30 days) – merits + length of time and amount of delay costs | 1 | 2 | | 3 | | 4 | | | Threshold is proposed to illustrate how different values may necessitate different resolution strategies. Further consideration is required to specify this threshold (for example, length of EOT claimed as compared against overarching Programme, DOA, technical, other strategic/interface indicators). Threshold may also be dictated by Financiers. |
| EOT claim (30 to 60 days) – merits + length of time and amount of delay costs | 1 | 2 | | 3 | | 4 | 5 | | As above. |
| EOT claim (up to 60 days) – merits + length of time and amount of delay costs | 1 | 2 | | 3 | | 4 | 5 | | As above. |
| Delay to the Works and Delay LDs liability | 1 | 2 | | 3 | | 4 | | | Likely overlap with EOT claims and Interface Claims |
| Force Majeure Event claimed by Contractor or Principal | 1 | 2 | | 3 | | 4 | | | |
| Suspension by Contractor or Principal | 1 | 2 | | 3 | | 4 | | | |
| Liability | | 1 | | 2 | 3 | | | 4 | 4 |
| Liability to Indemnify | 1 | 2 | | 3 | | 4 | | | |
| Insurance | 1 | 2 | | 3 | | 4 | | | |
| KPIs | 1 | 2 | 3 | | | 4 | | | |



| Dispute Category | Contractual mechanisms | | | | External mechanisms | | | | Comments |
|--|----------------------------|--------------------------------|----------------------------------|-----------------|---------------------|----------------------|-------------|-------|---|
| | Principal's representative | Representatives of the parties | Senior executives of the parties | Dispute board** | Mediation | Expert determination | Arbitration | Court | |
| Site conditions – whether there are latent conditions entitling relief | 1 | 2 | | 3 | | 4 | | | Likely only arises as a dispute as an EOT or variation claim. |
| Design gates – entitlement to progress | 1 | 2 | | 3 | | 4 | | | As above |
| Defects – technical existence | 1 | 2 | | 3 | | 4 | 5 | | As above |
| Interface disputes | 1 | 2 | | 3 | | 4 | | | |
| Whether Completion/ Acceptance has been achieved | 1 | 2 | | 3 | | 4 | | | |
| Other breach of contract | | 1 | | 2 | 3 | 4 | 5 | 5 | |
| Equitable remedies (injunctions, restitution) | | | | | 1 | | 2 | 2 | |
| Termination | | | | | 1 | | 2 | 2 | |





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