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NOTE on dispute resolution in the building industry

In the current version of the JBCC Principal Building Agreement (Series 2000, Edition 5.0 Code 2101, July 2007), the process of resolving disputes arising in the course of the contract is described at clause 40.

Clause 40.1 defines the parties to any dispute that may arise – these being:

1. The employer, including his principal agent or any other agents, and
2. The contractor, which would include his subcontractors and, as provided for at clause 40.8, may also be joined by the nominated- and selected subcontractors.

This clause is clearly not intended for the resolution of disputes that may arise between the employer and his various agents, nor between the contractor and his subcontractors. Such disputes would be resolved in the terms of the agreements between the various parties.

Clause 40.1 allows either party to give notice to the other. The dispute would be recognised in terms of the contract only once such notice has been properly served. Clause 1.5.2 provides that any notice in terms of this contract shall be in writing; clause 1.2 defines the address at which the notice is to be served, while clause 1.6 prescribes the manner in which notice is to be served.

Clause 40.2 states that a dispute shall be deemed to exist if the matter at issue is not resolved between the parties within 10 working days of the receipt of the notice. In this context it is important to be aware of the deemed delivery periods prescribed at clause 1.6 for the various forms of delivery of such a notice.

The JBCC Principal Building Agreement, at clauses 40.2 and 40.5, allows for three forms of dispute resolution, being:

1. Adjudication
2. Arbitration
3. Mediation



ADJUDICATION

Normally, adjudication would only be an option where both parties want to settle the dispute in good will. It can be very quick and cost-effective. The efficiency of adjudication relies on both parties' confidence in the adjudicator, and the selection of this appointment is, of necessity, crucial to the success of this process.

The contract is silent on the selection of an adjudicator, except insofar as that the process needs to be carried out in terms of the JBCC Rules for Adjudication current at the time of declaring the dispute (clause 40.2.1), and that the individual selected would be disqualified from acting later as an arbitrator in the same dispute. The Cape Institute for Architecture may be approached to provide a list of suitable persons from their panel for selection as potential adjudicators. Should adjudication fail, the dispute is then referred to arbitration.

ARBITRATION

The process is in terms of the Arbitration Act, Act 42 of 1965, and has a high level of credibility, with the same force as a High Court judgement. The award obtained in terms of this process is, furthermore, not subject to appeal to a higher court, and this provides some level of certainty.

Arbitration is, in essence, a private Civil Court action. The contract requires that the current rules of the Association of Arbitration shall apply to the procedure. These rules are mainly a matter of common sense and good practice, and may be amended by the arbitrator to suit the specific application, albeit within clear limits. Parties may agree on whether or not they are represented, and can also agree on the level of any such representation. It is, however, quite usual to see parties represented by Counsel, or even Senior Counsel, should the value of the claim warrant the attendant expense.

Arbitration has the advantage that it is a private and confidential process, so the dispute may only be reported by agreement of the parties. It is also not subject to the long delays in scheduling a hearing currently being experienced by the courts.

In terms of the Act, the arbitrator is selected and appointed by both the parties, and they are jointly and severally liable for his/her fees. The contract prescribes that the Chairman of the Association of Arbitrators appoints the arbitrator. This is done on the chairman's behalf by a sub-committee formed from a panel of the senior members (Fellows) of the Association.

This may pose some problems for people in Cape Town, as the Association is resident in Johannesburg and may not be fully acquainted with influencing factors in other centres. Should parties to the contract wish to alter this arrangement, clause 41.3 of the contract needs to be completed and an alternative dispute resolution body selected, for example The Cape Institute for Architecture.

The Cape Institute for Architecture has a panel of members who have offered their services as arbitrators. When approached for an arbitrator, a number of candidates are offered to the parties, from whom they make a selection. Should they fail to make a selection, a request for the nomination of an arbitrator is forwarded to the relevant sub-committee, which will make the selection on behalf of the parties.

Parties can to some extent control the cost and speed with which a dispute is resolved by arbitration. The Act anticipates that the dispute is resolved and an award made within four months of the date on which the arbitrator enters the reference. This time limit is, however, frequently exceeded. There are known instances where a reference has dragged on for a number of years – as it happens, the writer is currently involved in a matter that remains unresolved five years after the dispute was declared.

In the normal course of events, once there is an arbitration agreement in place, a dispute cannot be referred to the courts. The exceptions are the State, which normally insists that the court system be used, and instances where the arbitration agreement, or parts thereof, has either been set aside by the courts in terms of section 3.2 of the Act, or where both parties have agreed to do so.

Prescription in the matter is stayed as long as an arbitration reference is current, just as is the case in court proceedings.

MEDIATION

The process of mediation to resolve disputes appears to have been something of an afterthought in the current version of the building agreement. The process is aimed at achieving a settlement and finding a solution to the problem, rather than resolving a dispute, in the shortest time possible. The mediation process relies on the goodwill of the parties and the negotiating skills of the mediator. The Cape Institute for Architecture may be approached for suggestions for suitable candidates.

Although the building agreement is silent on what happens if mediation fails, it can safely be assumed that the dispute is then referred to arbitration as is the case for adjudication.

DISPUTE RESOLUTION BOARDS

This is a relatively new concept, and seems to be gaining popularity for resolving or, even better, avoiding disputes on large projects, especially multi-national contracts.

The JBCC Principal Building Agreement makes no provision for this process, so it will have to be described in detail in the contract documents and referred to as an amendment to the agreement at clause 6.0 of the Contract Data EC.

The concept involves appointing a panel of eminent and independent practitioners at the commencement of the contract, and by agreement between the parties, who are kept up to date on the progress of the project, including regular meetings on site. The Dispute Adjudication Board (DAB) can also be appointed on an ad hoc basis for a specific dispute.

In order to maintain neutrality, the panel members would normally be paid by the employer and contractor jointly. Typically a DAB may consist of an architect, engineer and lawyer or an engineer and a lawyer on large engineering contracts. The main focus of the DAB is to avoid disputes between the parties by their involvement during the whole building process.

Any dispute that arises in the course of the contract is then referred to this panel for resolution. The DAB may assume an inquisitorial role. In certain circumstances this may work very well where the value of the contract warrants the employment of such a panel.

APPOINTING AN APPROPRIATE ADJUDICATOR / ARBITRATOR

The law on arbitration requires only that the arbitrator is of sound mind and requires no further qualifications. It is the custom to allow the arbitrator to apply his own expertise and experience to avoid, or at least reduce, the reliance on expert witnesses and the mistakes that arise over the interpretation of such evidence. It therefore makes sense to appoint as arbitrator someone who has appropriate expertise.

In the case of disputes arising in the course of the building process, it would therefore be appropriate to appoint an experienced building professional, preferably one qualified in the particular aspects of the matter in dispute.

If this matter is purely one of valuation, it may be more appropriate to use a quantity surveyor, or in the case of a specialised technical issue, an engineer may be appropriate.

Building disputes tend to be more nuanced and an understanding of all the various processes and disciplines, how they co-operate and interlink tend to be required. This professional would logically be an architect.

The Cape Institute for Architecture has enrolled a panel of suitably qualified and experienced members who have offered their services as arbitrators. When approached for an arbitrator, a number of candidates are offered to the parties, from whom they make a selection. Should the parties fail to make a selection, a request for the nomination of an arbitrator is forwarded to the relevant sub-committee, which will make the selection of behalf of the parties.

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