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A Step Forward in Dispute Avoidance

Dispute Avoidance and Alternative Dispute Resolution in Francophone Africa and the Future of Dispute Boards

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Legal and Practical Background for Construction Contracts in Francophone Africa

- Construction contracts are a particular form of contracts regulated mainly by the Civil Code.
- The main rights and obligations between the contractor and the owner deriving from the Civil Code and related case law are widely accepted and permit to limit time in lengthy negotiations and detailed contractual clauses.
- In some situations it is not possible to contract out of the Civil Code and public contract laws.
- This situation has an important practical impact on contract performance and avoidance of disputes.

Key Features of the Civil Code on Construction Contracts

- Construction contracts are categorized as “entrepreneurship contract”. Consequently:
 - The obligation of the contractor is to reach the established results.
 - The contractor has very limited excuses for non-performance.
 - When he has accepted to perform based on a set of engineering and design documents he has the duty to advise the owner if he is not in agreement with the documents or with the engineer directions during contract performance.
 - If the engineer imposes designs not agreeable to him the contractor may be excused for non-performance.
- Construction contracts trigger strict, joint and decennial liability:
 - The architect, the engineer and the contractor are jointly and strictly liable towards the owner for any structural default or substantial deficiency in fitness for purpose for 10 years after delivery.
 - This cannot be contracted out.

Key Features of the Public Contract Law for Public Contracts

- Public contracts are contracts concluded between a contractor and a Public Authority (state, ministries, sub-sovereign institutions of any kind).
- Public contract law adds to the civil code and supersedes it in some important areas in construction and civil works matters.
- Public contract law is not codified: it derives from a long series of highly authoritative rulings often originating from the French Supreme Administrative Court (Council of State).
- Public contract law is based on equitable principles which have impact on various risk allocation provisions.
- The “equitable Public Contract Law” sometimes supersedes contractual clauses to the contrary when considered equitable , ex: change in economic circumstances, unforeseeable ground conditions, etc.

Practical Consequences on the Occurrence and Resolution of Disputes for Public Contracts

- The wide-ranging obligations and risks transferred to the contractor by the Civil Code and the mitigation of such risks in equitable situations deriving from public contract law defuse in practice many potential disputes.
- When an issue arises reference is generally made to well known standard conditions of contracts often published as well as other publications and industry usages which in accordance with the Civil Code must play a decisive role in contract interpretation.
- If dispute arises the widely used standard conditions of contracts generally part of the procurement process and sometimes published by administrative orders provide for a several step procedure.
 - ✓ An “amicable recourse” to the head of the Public Authority.
 - ✓ In case of disagreement the claim is generally submitted to a conciliatory committee made of civil servants and industry representatives including a “rapporteur” who plays a major role in practice.
- This system is rather efficient and as a result very few claims are decided by courts or arbitration.

Francophone Africa: changing situation 1

- Changes are occurring in Francophone Africa due to a number of international projects often financed by the multilaterals.
- New players are coming to Francophone Africa but are not fully aware of the intricacies of the civil and public contract law provisions and of their practice.
- As a result more and more players must adapt and well appraise for instance the benefits and pitfalls of detailed clauses, of well-established industry practices and of the relationships to develop with the owner and other project participants.

Francophone Africa: changing situation 2

- This cannot be done over night and the experience shows that the occurrence of misunderstandings in contract interpretation, contract administration and contract performance are growing.
- The use of well accepted standard conditions mostly designed for the common law world and practice, such as the FIDIC MDB contract standards, is not always sufficient to resolve important issues. Some of those issues are sometimes better resolved in standard conditions of contracts for civil works in Civil Law countries as also published by the World Bank. (This is altogether a delicate appraisal)
- As a result, the benefit of an efficient dispute avoidance and alternative dispute board becomes more and more advisable for maximizing project performance on time and on budget.

The Future of Dispute Boards: rationale

- The rationale for developing Dispute Board in Francophone Africa has been well identified and promoted by the World Bank.
- In addition to the FIDIC MDB, the World Bank is also promoting Dispute Boards above a certain threshold in the civil law standard conditions for civil works.
- The civil law standard conditions, which provided already for a two step recourse before arbitration (hierarchical recourse and conciliation), have been amended in 2007.
- This framework provides for a useful range of options for optimizing contract performance.

The Future of Dispute Boards in Francophone Africa: some consideration for discussion 1

□ Efficiency

- ✓ In addition to engineering and industry practice and local knowledge, the Board must be in the position of reconciling the underlying civil code and public contract law provisions for large projects with the contract conditions and their interpretation in the civil law system.
- ✓ The Board must integrate the cultural tradition of Francophone Africa in terms of representation, contact, seniority and French mother tongue at least for the main spokesman of the Board in relation with the owner's team.
- ✓ The authority of the Board should generally not go beyond the Dispute Review Board's Status since from a legal point, a dispute adjudication board may trigger complex enforcement issues.

The Future of Dispute Boards in Francophone Africa: some consideration for discussion 2

□ Costs

- ✓ For some time the cost of Dispute Boards will be considered unnecessary by the owners and the lenders: this need to be reassessed in many situations.

□ A way forward?

- ✓ A useful route to consider would to design and publish appropriate guidelines in French on Board appointment conditions and costs, site visits and proceedings taking into account local culture and practices and limiting as much as possible costly travels.

Thank you !

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