



09 DECEMBER 2022

DRBF THE HAGUE REGIONAL CONFERENCE

DBs in the Nordics - Finland
A Kavaleff

ALTERNATIVE DISPUTE RESOLUTION FOR SUSTAINABILITY IN PROJECTS – a Finnish view

Anette kavaleff





Project examples



Nordic laws – brief background

- The Nordic countries have had a close co-operation with joint legislation in many fields since the beginning of the 20th century. Above all, it has resulted in a common contract law. It is not a detailed legislation like the continental civil laws.
- Case law and established legal principles are generally applied as legal sources when detailed statutory norms are not available.
- The legal principles include freedom of contract, *pacta sunt servanda*, the duty of loyalty, reasonableness, bonae fide protection, protection of the weaker party.
- For example, the general principles of Finnish contract law correspond in broad terms with the UNIDROIT Principles and the application of the latter would not necessarily lead to materially different results.

Introduction

- Alternative Dispute Resolution (ADR) in Finland
- Dispute Resolution Stages and Steps ~ Challenges
- Experience of ADR and DB's in practise
- Some lessons

Alternative dispute resolution (ADR) in Finland - background

There is no statutory obligation in Finland to use ADR means before resorting to court procedure (pre-court facilitation is an option).

Party autonomy is respected.

Arbitration under the Finnish Arbitration Institute (FAI) Rules is widely used in commercial disputes, albeit less frequently in construction disputes where court procedures are used in a majority of cases.

Dispute Boards (DB) are not used in domestic disputes in Finland but different “task forces” with similar objectives are used on a voluntary basis.

Dispute Boards (DB) have been and are used some large scale projects with international parties.

Mediation (eg under FAI Rules) and expert evaluation is used in parallel with other ADR means.



Alternative dispute resolution (ADR) in Finland – General conditions

Court proceedings are the basis in the General Conditions for Building Contracts YSE 1998 (RT 16-10660), unless the parties agree on arbitration

The General Conditions for Project Management (RT 80359) include more alternatives:

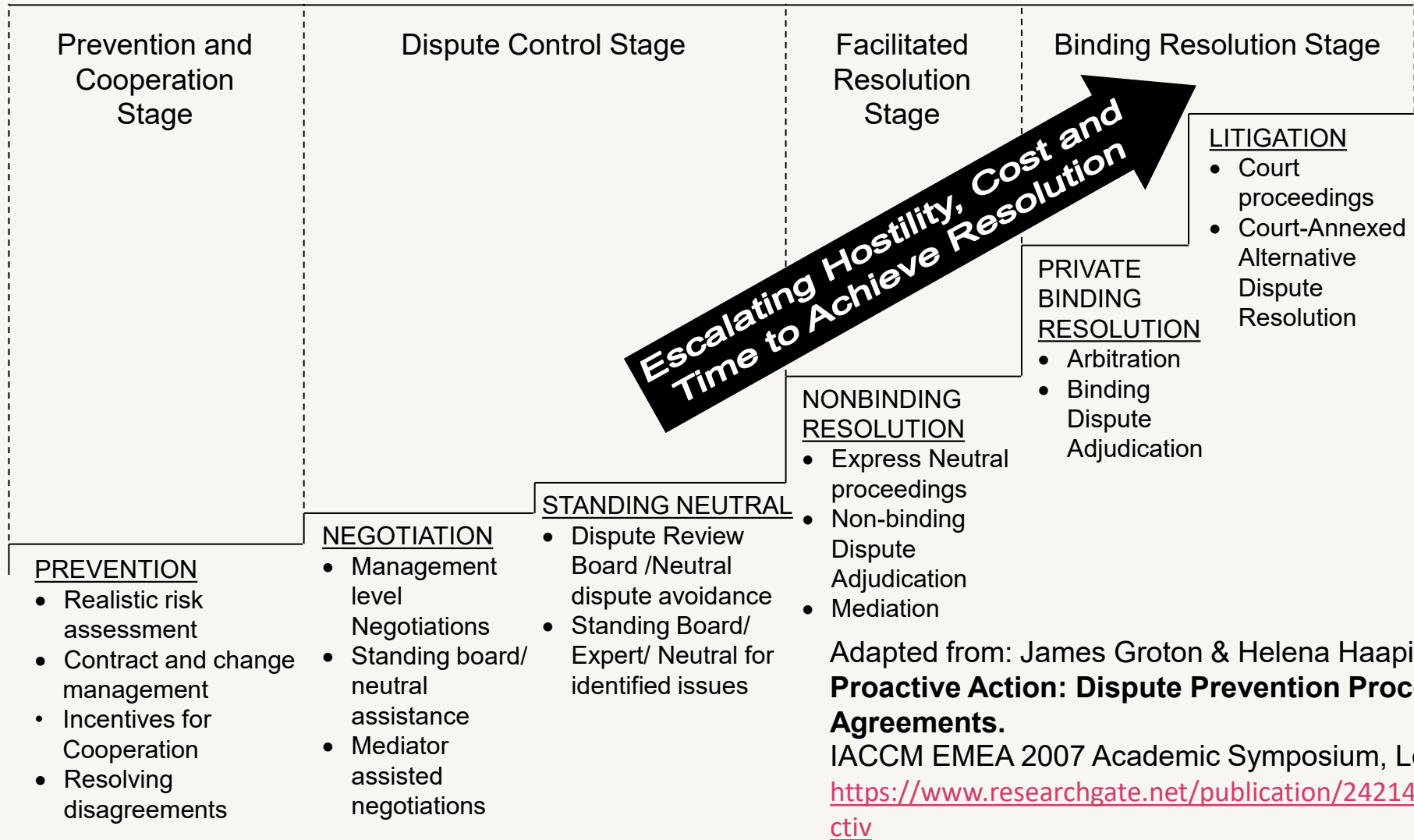
- Settlement can be sought on the basis of a reconciliation presentation by an experienced expert selected and approved mutually by the parties,
- If the parties do not approve the reconciliation presentation as a basis for settlement the dispute will be settled by a court of arbitration / district court should either party so demand

Alliances – the general conditions encourage use of outside 3rd party expert (RT 103199)

Mediation is used for assisting negotiations and achieving settlement



Dispute Resolution Stages and Steps ~ challenges



Proactive dispute prevention – focus on the three first steps on the ladder

- Sustainability is ensured by careful consideration of the mutual objective of the project, the contract balance and the application of a realistic risk allocation in distributing the responsibilities
- As disagreements inevitably will arise, tools for dispute prevention should be used in order to avoid disagreements to escalate to disputes (negotiations, change procedures, joint steering groups, partnering, cooperation incentives, standing neutrals or boards)
- An efficient dispute resolution framework should be installed for the disputes which may remain after the prevention measures have been exhausted

Experience of ADR and DB's in practise

An *ad hoc board* can be efficient:

- For specific limited issues with respect to the scope of the dispute
- When avoidance of arbitration/court proceedings is a true interest of the parties
- experiences



Experience of ADR and DB's in practise

- **Standing neutrals** (engineer/ lawyer as required) have been used in projects in Finland, merely on ad hoc basis.
- Evaluative mediation by engineer/lawyer in large domestic projects have lead to avoidance of court proceedings in some few known cases (PM/alliance/YSE)

Experience of ADR and DB's in practise – Standing boards

Important features of a Standing board:

- Access to project reports and site visits keep the board well informed for engagements
- Board members know the project people which are encouraged to appear as proactive in the interest of the project (not only the individual party they represent)
- The set-up offers opportunity to facilitate amicable solutions and distill issues in dispute
- Quick access to decisions which minimizes costs and negative impact on project performance
- Decisions can be made in an accessible form understandable for project people (eg answers to questions relevant for the project)



Experience of ADR and DBs in practise –the procedure

Bespoke conditions based on ICC 2015 Dispute Board Rules

The procedure can be tailored to be informal and inquisitorial (compare with arbitration) as the board can:

- use Q&A sessions on site,
- issue questionnaires and to do lists etc whilst ensuring impartiality and equal possibilities to present views,
- listen to and interact with project people (in the presence of all sides),
- encourage cooperative behavior in the best interest of the project ...

In summary, an engaged standing DB is free to be positively proactive and to support achieving project completion successfully.



Some lessons

- There is a clear need in Finland to move from court proceedings as the main option in domestic construction disputes towards ADR (Neutrals, DBs)
- This means *inter alia* that public sector projects must open up for other proceedings than courts
- DBs/Neutrals must be discussed and installed upfront, at the inception of a project, because disagreements and disputes inevitably arise
- Integration of business, engineering and legal to support proactivity in management of disagreements and disputes is necessary
- In smaller projects it may be wise to promote ADR "light"
- The advantages of ADR and DB's should be made known to the business communities

THANK YOU!

Anette Kavaleff

LL.Lic

email: anette@kavaleff.fi

phone: +358 50 3619763

<https://www.linkedin.com/in/anette-kavaleff-1515b3a4/>



Weblinks

- <https://www.rakennustieto.fi/en/products-and-services>
- <https://iccwbo.org/dispute-resolution-services/dispute-boards/rules/>
- <https://arbitration.fi/>
- <https://sccinstitute.com/our-services/rules/>
- <https://fidic.org/>
- <https://www.worldcc.com>
- <https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016/>