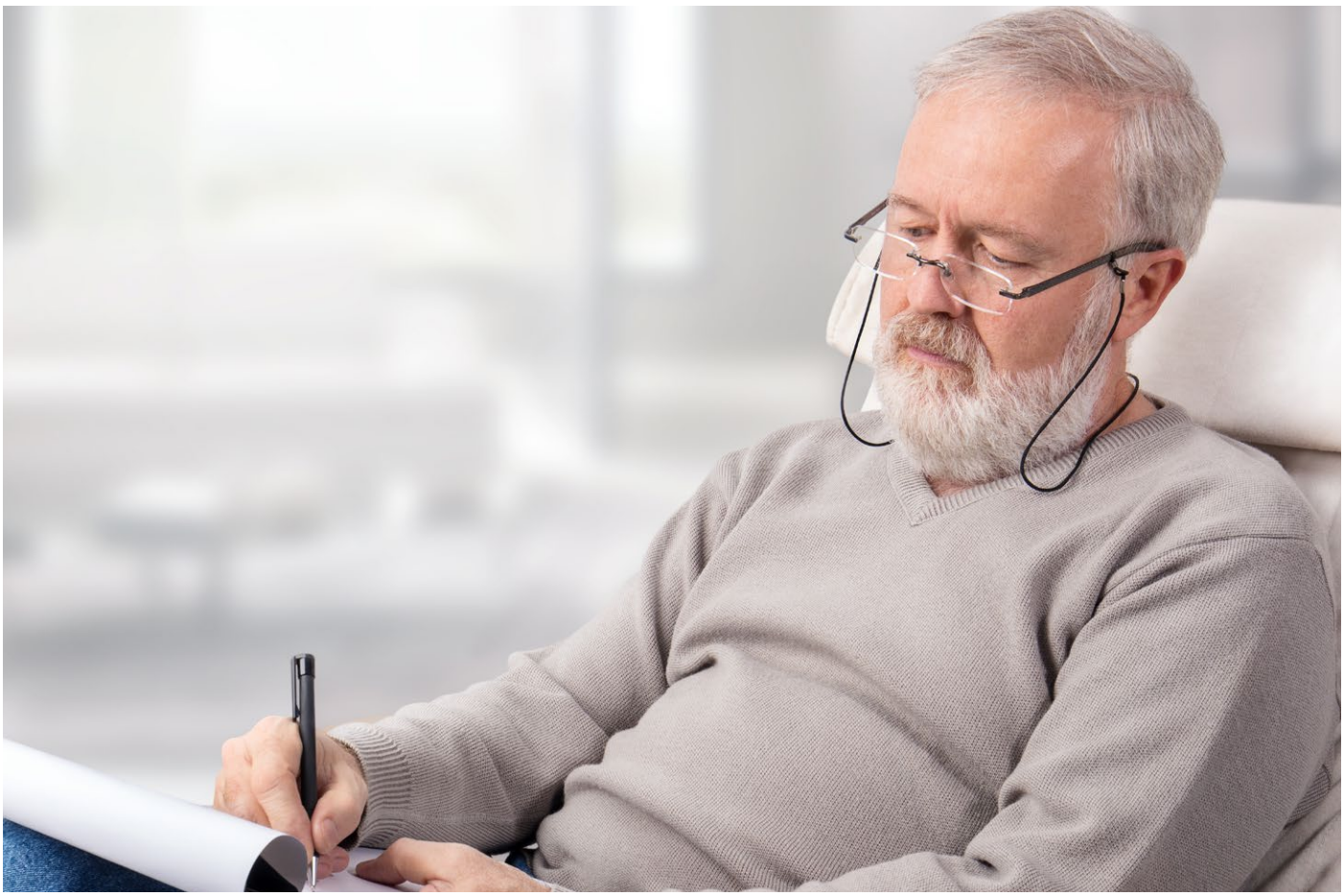

A 'grey haired' view on dispute avoidance and resolution in mainland Europe

MARK CASTELL – REGIONAL MANAGING DIRECTOR AND DELAY AND QUANTUM EXPERT HIGHLIGHTS SOME OF THE KEY NUANCES OF CONTRACT MANAGEMENT IN MAINLAND EUROPE AND ITS EFFECT ON THE REGION'S CONSTRUCTION DISPUTES.

'Grey hair' is sometimes a term that is associated with consultants, although its use is perhaps unfair given that there are many who retain their original hair colour by natural or other means. It is however, also the name given to a type of work undertaken by consultancies.

David Maister, who until his retirement in 2009 was widely acknowledged as one of the world's leading authorities on the management of professional service firms (such as law, accounting and consulting firms), defined 'grey hair' consultancy as being one of three types of client work. He said that 'grey hair' consultancy was based on knowledge exploitation, whereby the consultant would solve problems using their knowledge, experience and judgement[1] .

Unfortunately, I have not retained my original hair colour. This is probably due to the effect of working for 34 years within the construction and engineering industries, the last 14 years of which have been spent in consultancy, based in the Netherlands, doing a variety of work including that of being an expert witness. With this background, the term 'grey hair' is probably appropriate for me. Therefore this article draws on some of my personal experience and looks at some aspects of dispute avoidance and resolution from a mainland European perspective.

Non-adversarial nature of contracting

The construction industry in the Netherlands, and elsewhere in mainland Europe, is generally not adversarial by nature. Many contractors will still proceed on the basis of good faith ("execute a good job and we'll be able to agree commercial settlement at the end.")

This attitude has cultural foundations

and defined how business was conducted for many years. Despite the introduction of different commercial and contractual conditions that require a greater focus on more formal contract administration (i.e. the FIDIC standard forms), the increased domestic and international competition since the creation of a single European market, and the more recent move towards globalisation, this view is still held today.

As a result, the various parties involved in a construction or engineering project (i.e. employer, employer's representative, contractor, subcontractor) may have different views on the importance of contract administration to the avoidance and, if required, the resolution of disputes. This may not be the case on projects in the UK, the Americas, the Middle East, and across Asia Pacific.

This potential difference in attitude or understanding is often not explored or considered at the tender stage, or at the outset of the execution stage. The result is that this difference itself can cause issues and strained relationships, which are then exacerbated if the project encounters problems such as unforeseen conditions, or if significant change is required.

Effect on dispute avoidance

It is not always understood that proper administration of contracts is helpful to the avoidance of disputes. Furthermore, that contract management is a fundamental part of the commercial strategy that should be put in place at the outset of a project, for minimising risk and (for a contracting party) maximising the possibility of securing commercial return (i.e. profit).

This can manifest as follows:

- A lack of practical understanding of the contract provisions dealing with day-to-day matters (i.e. covering submission of time schedules and progress updates, correspondence and reporting, the management of change, and interim payments).

Without knowing what the contract administration requirements are, a party simply cannot adhere to them.

- Not having the specific processes and procedures that are required to be put in place at the commencement of the project.

If set up, these processes and procedures are then often not consistently followed.

- A reluctance to submit written communications, especially when concerning the identification of change (i.e. notices) or other potentially 'contentious' matters.

The importance of proper written communication cannot be underestimated. Doing this well means that an organisation has to firstly create awareness and appreciation of this issue across the project and management teams. Individuals must then understand the need to bring relevant matters to the attention of those who are more qualified to investigate, then draft and submit the required communication. It should be appreciated that it is generally better to address potentially 'contentious' matters at the time, but using appropriate language.

- A hesitancy in recognising the need to reply to written communications on potentially 'contentious' matters that are received from another party.

The importance of making your position clear in the written records is sometimes not appreciated by parties. This can be a time consuming activity and divert key project staff from other priorities, like progressing the works, and so additional resources sometimes need to be contemplated.

- The absence of sufficient relevant and appropriate records.

The importance of records is well known even if, for example, there is no agreement between the parties as to whether a change has taken place and where the liability for the change rests. In practice however, and notwithstanding that many contracts require them to be kept and submitted, and the burden of proof rests with the party asking for time and money, the quality and extent of record keeping is sometimes found to be lacking.

- An unwillingness or inability to identify and then quantify the time and money impact of any changes.

This needs to be considered at an early stage of the project in order that appropriate processes and record keeping systems are set up. The systems then need to be followed, because change will surely occur and the output will need to be properly used to maximise a contractor's chances of substantial recovery. Furthermore, the contract may also specify a time frame for the submission of such evaluations, with a failure to achieve those time frames often acting as a bar to recovery. Notwithstanding that it may be possible to argue that such time bars are unenforceable under many civil law jurisdictions, this may not be an ultimately successful argument.

- A reluctance to prepare and then submit a detailed claim that addresses entitlement, cause, and effect. This is not the same as a conscious decision to only prepare a more general document for commercial discussions.

Detailed claims are sometimes seen as a barrier to amicable settlement rather than a way in which a party can positively set out its case, or position, in advance of any discussions. In fact, the absence of a detailed submission and understanding of the respective party's strengths and weaknesses, prior to amicable settlement discussions, can often prevent agreement.

In my experience, if one party has not followed the contract (i.e. notice provisions), or set out its case in sufficient detail and at the appropriate time, then the other party may use this as the prime reason for not coming to an amicable settlement, or even not entering into discussions in the first place.

A failure to properly administer the contract can therefore often be the cause of a dispute.

> ...a party who has not properly administered the contract is likely to be in a weaker position, in the event of a dispute.

Impact on dispute resolution

Clearly, a party who has not properly administered the contract is likely to be in a weaker position, in the event of a dispute, regardless of whether it is a common or civil law jurisdiction. This would also include the situation where there is only a more general document that was prepared for commercial discussions (that is perhaps global in nature), or even no such document in existence.

In such a scenario, a detailed claim that addresses entitlement, cause, and effect will need to be put together prior to referral to formal dispute resolution. The required level of detail will be high, it will clearly be more difficult to achieve this if it is prepared sometime after the events that will be relied upon occurred, or if insufficient records were retained.

In the alternative scenario that a party proceeds to formal dispute resolution on the basis of a more general document that was only prepared for commercial discussions, it is again likely that this will need to be re-visited and challenged, sometimes by a more objective 'outsider', or a formally appointed expert witness.

Both scenarios will often involve an extensive forensic exercise, which may require a reconstruction of particular aspects of the project, based on the documentation and the outsider's or expert's judgement. Such an exercise is more difficult to do, and more costly, than if it had been undertaken at the time of the events that are being relied upon.

Conclusion

The requirements of today's construction and engineering industry demand more focused attention to the need for proper contract administration. This does, and will continue to, create cultural and attitude challenges to individuals and businesses within many parts of the world, including mainland Europe.

It starts with awareness and consideration by both project and management teams and should be an inherent part of a contracting party's commercial strategy.

In many cases, the early involvement of external objective assistance, or even an expert, can assist both the avoidance of disputes and then, if required, their resolution. ■

[1]Managing the Professional Service Firm by David H Maister.