Book Review

Best Practice in Construction Disputes – Avoidance, Management and Resolution

Paula Berger and Brennan Ong, 2013, LexisNexis Butterworths, Australia
ISBN – 9780409333077, Price – AU$110.00

Best Practice in Construction Disputes – Avoidance, Management and Resolution provides practical strategies and recommendations to transform construction conflicts which potentially escalate into destructive disputes into opportunities, through mechanisms such as Dispute Avoidance Processes (DAPs), Alternative Dispute Resolution (ADR), adjudication, arbitration and litigation.

At first glance, the book appears to have features of a handbook, a term which is no longer in popular use. However from Chapters 1 to 3, the book's author carefully ensures that readers appreciate the differences between a conflict and a dispute.

This book delves into the difficulty of definitions of keywords, for example 'conflicts' and 'disputes', devoting a section of three paragraphs (1.8 to 1.10) to differentiating between the two. This section acknowledges that the two words have been used interchangeably in construction dispute resolution literature. However, a few pages further on, the meaning of disputes as interpreted by the Australian and English courts is also provided. At 1.11, the book introduces the meaning of 'claims' and later at 1.16 argues that, "Claims should be distinguished from disputes…"

The section dedicated to "The escalation of conflicts into claims and disputes" has 6 paragraphs listed from 1.11 to 1.16.

A quotable quote at paragraph 1.21 which reflects on the competency of the players in any project must certainly hold some truth, ie *"Disputes will inevitably arise only if parties do not have the skills to resolve conflicts and prevent their escalation into disputes."* This reviewer would dare add that another contributory factor would be the lack of skill or experience to identify potential conflicts.

There is a corresponding differentiation between causes of conflict and causes of disputes. Three of the more commonly cited causes of conflict are discussed in 8 paragraphs from 1.22 to 1.29. The three causes are latent conditions, variations/change in scope, and quality of the works. Four factors are identified as playing a causal role in conflicts escalating into disputes, and these are provided in the 15 paragraphs from 1.31 to 1.45. These four factors are noted as: competitive tendering, lopsided risk allocation, bias of superintendent, and failure to comply with the contract.

On the topic of competitive tendering, the book appears to this reviewer be slightly muddled in the following examples. First, at paragraph 1.32, the book attributes the industry practice of strongly discouraging communication during the bidding process thereby making it more difficult for a contractor to assess the time, costs and risks associated with undertaking the project to competitive tendering. This might have been better dealt with under lopsided risk allocation.

Second, the book mentions '*claimanship*' as an apparent consequence of the shift away from quality design and build project towards complex and costly projects without explaining the link between this and competitive bidding shown at paragraph 1.33.

The book takes a serious view of lopsided risk allocation. At paragraph 1.39 it states that, "The outcome of inequitable risk allocation is that a party either pays too much for a project or will not be able to recover any losses, which could mean insolvency and job losses."

Under the topic of perceived bias of superintendent:

a) On page 29, paragraph 1.41, the book's author cites the comment of Warren CJ in the Victorian Supreme Court case of *Kane Constructions Pty Ltd v Sopov [2005] VSC 237 at [623], "the superintendent may lose independence without actually intending to do so or even without knowledge they have done so"*;

b) On page 29, paragraph 1.42, the book's author, relying on named empirical studies, noted that "the lack of procedural fairness" as the fundamental reason why claims rapidly escalate into disputes that require "resolution through the courts or arbitration".

The book's author then captures the essence of the origin of the bias by reiterating on page 30, paragraph 1.43 "*the perception of bias …emanates from the dual-role of the superintendent*."

As far as the failure to comply with the construction contract is concerned, only one paragraph was devoted to this topic. It was noted by the author that, "*Notwithstanding the importance of the construction contract, it is far too common for parties to enter into a contract without full commitment and understanding of its terms*…"

The conclusion page 32, paragraph 1.46 sounded a very clear message as to why disputes will be around for a long time, with the position taken that, "*the nature of traditional construction contracting, [is] where one party's profit is made at the other's expense*."

After the first four chapters, the book begins to resemble a handbook, and contains much information on three mechanisms relating to disputes with an Introduction chapter preceding each mechanism. First, it introduces what the author terms Dispute Avoidance Processes (DAPs) (page 89, 4.2). From Chapters 5 to 7 inclusive, the DAPs cover Dispute Resolution Boards (DRBs), Dispute Adjudication Boards (DABs), and Dispute Resolution Adviser (DRA) respectively, and these chapters form part of Part 1. Each chapter is accompanied by a case study.

Following this, the book goes into more familiar territory in Part 2, from Chapters 9 to 14 inclusive, where five types of ADR are covered including a chapter each on Negotiation, Mediation, Senior Executive Appraisal/Mini trials, Expert Determination and Early Neutral Evaluation, and ADR Hybrids.

In the third section the usual binding dispute resolution methods are discussed from Chapters 15 to 18, including a chapter each on Adjudication, Arbitration, and Litigation.

Had the book stopped at Chapter18, it would have caused controversy regarding the title, but Chapter 19 has been added and appropriately titled "*Chapter 19 Best Practice in the Avoidance, Management and Resolution of Construction Disputes*."

To avoid, this reviewer supposes, any disputes, the book's author acknowledges (page 457, 19.3), that the term 'best practice' is itself a source of contention. This chapter seeks to explore what best practice means. The book's author coined the phrase, '*research validated best practice*' based on the following features:

> *The first feature of best practice is one that addresses a common problem experienced by a broad array of organisations. The second feature is one that works effectively to address the problem, and has been proven to work in more than one instance. The third is one that has shown that it can be replicated; and the fourth is one that is supported by positive data from internal assessments and external evaluations.*

The final chapter ends on a hopeful note by introducing three reforms. First, there is a call for widespread and comprehensive education and training to overcome low levels of understanding of the many techniques available for the avoidance, management and

resolution of construction disputes within both the construction industry and legal profession (page 471, 19.24).

The second reform touches on the role of construction lawyers. Instead of being reactive to the client's disputes, the author contends that construction lawyer should be proactive, and assist parties to avoiding the escalation of everyday problems into disputes (page 473, 19.30).

The third reform is to replace the old style of contracts with an entirely new suite of standard forms of construction contracts that are built on the foundations of relational contract theory, emphasizing the importance of working relationships, the motivation of communication between parties faced with problems and the encouragement of proactive identification and management of the sources of conflict throughout the course of the project (page 478, 19.39).

In conclusion and in summary, the authors have sought to ensure that readers fully appreciate the differences between the words, '*conflict*', '*dispute*' and '*claim*' as well as the causes of the first two, as the basis to launch their agenda of bringing about reform through their supply of plentiful data in support of what they sincerely believed is the best practice in construction industries globally, in regard to avoidance, management and resolution of construction disputes. On balance, this reviewer is comforted by the fact that there is hope for a better construction industry with fewer disputes if the authors' recommendations for reform and their proposed best practices for the avoidance of dispute are accepted and implemented. Nevertheless, here is a hope to see more work done by the authors on the single most troubling factor of whether a dispute will escalate or not specifically, the factor of personalities on site that could cause or avoid a dispute each time there is a conflict. It reminded this reviewer of a question posed at a conference attended in London in relation to the NEC form; should we ask whether the form is a good form of contract or should we ask whether the administrator is a good person for the job and who is it that makes the project "trouble-free".

Philip Chan
Associate Professor
National University of Singapore