

# THE STRENGTHS AND WEAKNESSES OF THE ADR PROCEDURE IN PUBLIC CONTRACTS

**Andrew Demetriou LLB (Hons.), Barrister at Law,  
FCI. Arb. Chartered Arbitrator, Accredited Mediator,  
Registered Trusts and Estates Practitioner  
Director Ioannides Demetriou LLC**

# **The Governmental Approach to ADR**

**The governmental approach to ADR and Arbitration in particular is characterised by the following traits:**

- It is ill-informed.
- It has never taken ADR seriously.
- ADR is viewed with suspicion.
- In Government Contracts there are two options:
  - Amicable Settlement
  - Litigation

# **Analysis of Clause 67.1 Settlement of Disputes**

## **The 56 Day Amicable Settlement Procedure**

*Any dispute between the Employer and the Contractor arising out of or as a result of the Contract or the execution of the works either during the course of the execution of the contract or after its completion and either before or after the abandonment or termination of the Contract, including any dispute in relation to any decision, opinion, order, determination, certificate or assessment of the Engineer then either the Employer or the Contractor have the right to give notice of the dispute to the other party, with communication [of the notice] to the Engineer, and in this event the Parties are obliged for the following 56 days to settle the dispute amicably before the commencement of the judicial proceedings. The notice shall refer to the fact that it has been given in accordance with this clause. Any dispute that is not settled amicably within 56 days from the service of the above notice shall be tried by the competent district court of the Republic of Cyprus.*

# Disadvantages of the Amicable Settlement Procedure

The process is not structured.

There are no experts on hand to guide the parties in their efforts to achieve an amicable settlement.

It is a truism that cashflow is, as Denning LJ noted in *Modern Engineering (Bristol) Ltd v. Gilbert-Ash (Northern) Ltd* (1973) 71 LGR 162, the 'very lifeblood' of the construction industry.

56 days is two months. It is too long a period, considering that the contractor is entitled to monthly payments and that payments to be made should be added to monthly certificates.

If the Contractor disputes a decision of the Engineer to deduct LDs there will be two deductions before the dispute resolution procedure is terminated.

The length of the amicable dispute process puts the contractor at a severe disadvantage and causes or increases cashflow problems.

The amicable settlement procedure diverts resources from both sides.



It provides evidence to be used in court as to the position of the Engineer - the judicial proceedings clause states “*...nothing shall preclude the possibility of the Engineer being called as a witness to file exhibits before the court for any matter that is relevant to the dispute.*”

If it is unsuccessful, it will entrench attitudes.

If it fails, two months have been lost.

# Advantages of the Amicable Settlement Procedure

- It may bring the sides closer together by informing each other of their respective positions.

- It provides evidence to be used in court as to the position of the Engineer - the judicial proceedings clause states “... *nothing shall preclude the possibility of the Engineer being called as a witness to file exhibits before the court for any matter that is relevant to the dispute.*”
- It is shorter than court proceedings.

# Question

Why not provide for Mediation?

It is structured.

It is confidential.

An expert mediator is present to assist the parties.

A shorter time limit can be achieved than 56 days.

It is not binding unless a settlement agreement is concluded.

So what has the government got to lose?

**I say enter into mediation agreements  
for all contracts tomorrow.**

**The Housing Grants, Construction and Regeneration Act 1996 (HGRA - also known as the Construction Act) is intended to ensure that payments are made promptly throughout the supply chain and that disputes are resolved swiftly.**



## Provisions of the Act include:

- The right to be paid in interim, periodic or stage payments.
- The right to be informed of the amount due, or any amounts to be withheld.
- The right to suspend performance for non-payment.
- The right to adjudication.
- Disallowing pay when paid clauses.

The Act applies to all contracts for 'construction operations' (including construction contracts and consultants' appointments).

If contracts fail to comply with the act, then the Scheme for Construction Contracts applies.

# Construction Contracts Act 2002

This Act provides those carrying out construction work with the ability to issue payment claims and, where not responded to fully or on time, elevates the amount sought in payment claims to being amounts that are due and owing.

- The aim behind the Act is to promote cashflow or, said in a different way, the philosophy is “*pay now argue later*”. It is in this context that adjudications pursuant to this Act operate. It is possible for a party to a construction contract to refer a matter to an adjudication under the Act.
- This is a fast-track dispute resolution mechanism that potentially places a duly appointed adjudicator under an obligation to make a determination within 35 working days of the adjudication claim being served by the claimant.

**What is the Reason for Such  
Legislative Provisions?**

**What has been the Result of Such  
Provisions and Procedures?**

## Points to Consider

What studies have been carried out in Cyprus?

Has anyone considered the effects of the current regime of ADR?

The government may not be losing cases in arbitration, but what are the effects on the economy?

Has the regime of dispute resolution contributed to the corruption in Cyprus public sector contracts?

# Judicial Proceedings in Cyprus

## The Second Part of Clause 67.1

- Its no secret that Cyprus has one of the slowest court processes in the EU.
- On average cases may take anything from 3 to 7 years for a first instance judgment; we are now in our office trying cases from 2007 and even one on a retrial from 1986.

- Additionally, appeals take between 3 and 5 years to be heard.
- The courts are not equipped to hear complex construction disputes.
- There is no technology in court.
- After waiting sometimes up to 5 years for a case to go to trial the judge tries to persuade the parties to go to arbitration.



- Therefore, there is a tremendous delay in the administration of justice.
- This has a price. For the contractor and for the Employer.
- Memories fade, witnesses retire, documents are lost.
- The government may benefit from a longer period to pay, but it will always be at a disadvantage against an organised and well-resourced contractor.

# **Light at the End of the Tunnel**

## **ADR and the Private Sector**

Arbitration, Adjudication, Mediation and Conciliation have all developed because society and the commercial and economic realities saw that there was a need and a place for them.

**Cyprus cannot  
and should not  
continue to be  
the exception.**

Thank  
you

ioannides demetriou LLC  
The City House, 17-19 Them. Dervi Str.  
1066 Nicosia, Cyprus.  
P.O. Box 20106,  
1601 Nicosia, Cyprus.  
Tel: +357 22022999  
Fax: +357 22022900  
[www.idlaw.com.cy](http://www.idlaw.com.cy)