

THE BENEFITS OF DRAWN OUT DISPUTES

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The incorporation of more complex dispute resolution clauses in long-term commercial contracts enables parties not only to avoid unnecessary litigation, but also offers the chance to resolve technical or trivial matters without adopting a fixed legal position, says FÁ©lix J. Montero, at PÁ©rez-Llorca

La incorporaci3n de clÁ©ulas de resoluci3n de conflictos para servicios a largo plazo, suministros y licencias permite a las partes no s3lo

ahorrarse litigios innecesarios sino también la posibilidad de resolver asuntos técnicos o triviales sin necesidad de adoptar una postura jurídica rígida, según Félix J. Montero de Pérez Llorca. Las empresas están estudiando nuevas formas de resolución alternativa de conflictos para solventar ambos aspectos, tanto el técnico como el jurídico.

Companies engaged in long-term service, supply and licensing agreements are increasingly exploring alternative and more drawn-out dispute resolution mechanisms to resolve technical and legal differences, says Félix Montero, dispute resolution partner at Pérez-Llorca in Madrid.

'Such an approach enables companies to continue to fulfil their commercial obligations while also enabling them to take the time to determine and frame what may be any issues of real significance,' he says.

The disputes that many companies are now seeing emerge from these types of arrangements largely derive from contracts drafted at the start of the decade, says Montero, and which have therefore incorporated the lessons learnt from the last major Spanish economic downturn in the early 1990s.

'Companies are justifiably no longer content for disputes over, for example, the communication or interpretation of technical specifications, to be decided by managers or engineers appointed by one side or the other. They want someone with the relevant expertise and experience to decide specific issues but they also want that person to be independent.'

Many service and supply agreements therefore now purposely enable the parties to balance the nature of the dispute resolution mechanisms and forums involved, he says. 'Often these types of clauses will enable parties to appoint an independent Dispute Review Board (DRBs) to resolve technical issues, and then if necessary to progress to mediation and ultimately arbitration if strongly held legal positions remain.'

❌ One issue that may impact on such an approach, notes Montero, may however be disclosure, and the ability of parties to gain access to information held by the other side to help support their own case.

'The non-binding nature of DRBs and of mediation means that there may, on the face of it, be a lack of powers to order disclosure but often there will be confidentiality agreements in place which can provide the requisite comfort for parties to produce information to the DRB or mediator which ultimately can not be used before State Courts or an Arbitral Tribunal.'

Once the dispute has reached the arbitration level, dispute resolution clauses may in any event refer to accepted codes of practice to deal with such circumstances, he adds, such as the International Bar Association Rules on Evidence, currently being revised . What no party will agree to are 'go-fishing expeditions' and in any event, communications between lawyers and clients will always be privileged.

Montero acknowledges that while such an approach to complex dispute resolution clauses, and mechanisms such as mediation, may be common in the Anglo-Saxon commercial world, there can be a degree of scepticism among Latin companies, particularly those unused to operating internationally.

'There can be a perception that such processes are too long or too bureaucratic, and only intended to involve expensive lawyers. But these types of agreements are purposely drafted to ensure that the contracting parties do not engage in legal processes such as litigation as soon as the first issues emerge.'

The aim instead is to encourage parties to resolve issues in an informal way and as amicably as possible, in order to ensure the continuation of commercial relations, says Montero.

'Such arrangements imply that there is a long-term benefit to the parties involved and to try to ensure that this remains the case, while applying a control and framework to resolve any recurring technical or entrenched legal issues. The ability to stagger a dispute often enables parties to work out any trivial issues along the way and to concentrate resources only on the major sticking points.'

In any event the lessons now being learnt from disputes as a result of the current economic downturn, and those presented by the mechanisms contained in existing contracts, are already informing new clauses, he adds.

'We are now looking at a third or even forth generation of dispute resolution clauses in complex long-term contract, and where there is an increased emphasis on alternative dispute resolution mechanisms. With the emphasis on making sure that the ability of any dispute to 'infect' a commercial arrangement are always minimised.'