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How the Judiciary should or could support the new ADR Procedure in Construction Contracts

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ADR in FIDIC Contracts and the Cyprus Perspective

- ❖ The State Court system has collapsed under the burden of the number of cases, the lack of resources to process them and the unyielding procedure.
- ❖ Recalcitrant Litigants seeking maximum delay can play with the inability of the Court system to efficiently process cases for years.
- ❖ ADR, especially in the form of arbitration, is not an optional extra; it is an essential tool to assist parties to resolve the problems they would otherwise face in the Courts.

- ❖ Arbitration is the only method more widely used as an alternative to the Court. Even that however, is not used routinely anywhere other than the construction contracts.
- ❖ Mediation is in its infancy and other methods of ADR, such negotiation and adjudication are only sporadically used.
- ❖ The judges, the advocates and the parties are generally unfamiliar with the intricacies of ADR making it difficult to include in general contracts and/or to effectively apply.

- ❖ No statute providing for enforcement of awards or decisions in any other form of ADR except arbitration. All other methods would have to be considered under the general provisions of contract law.
- ❖ Arbitration:
 - Arbitration Law Cap. 4
 - Antiquated and inadequate Law with significant Court intervention
 - International Commercial Arbitration Law, 101/1987
 - Not available where there is no international element
- ❖ Mediation
 - Only referred to in passing in the CPRs without any applicable framework.

- ❖ In Construction Contracts we have the DAR (FIDIC) whose decisions can become binding and the DRB (World Bank) which only makes recommendations.

- ❖ For the function of the DAR to be successful we need to have to have, inter alia, two primary elements:
 - Being able to enforce the procedure of the DAR where one of the parties wishes to avoid it

 - Giving effect to the decision of the DAR / recommendation of the DRB

- ❖ No decided cases in Cyprus for multi-tiered ADR, especially DARs.
- ❖ Follow the lead of the English Court in ***Channel Tunnel Group Ltd. v. Balfour Beatty Construction and others [1993] AC 334.***
- ❖ Under English law, the Courts have jurisdiction to stay court proceedings in favour of a procedure where, the parties have agreed to refer disputes to a panel of experts like the Dispute Resolution Board (“**Board**”) and then to arbitration.
- ❖ Under Cyprus Law, the Courts have the same wide ranging inherent jurisdiction as the corresponding Courts of the UK.

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- ❖ The decision in the Channel Tunnel case has been incorporated into **Section 9 (2) of the English Arbitration Act of 1996**
 - A party to an arbitration agreement may apply to stay litigation even though *“the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures”*

- ❖ Cyprus law (**Article 8 of CAP 4.**) enables a party to an arbitration agreement to stay litigation proceedings only in favour of the arbitration i.e. until the completion of the arbitration procedure. The wording of Article 8 refers only to arbitration and it is not drafted in a way so as to include other dispute resolution procedures, such as the Dispute Resolution Board.

- ❖ No Interim remedies in aid/pending of the dispute resolution procedure –
 - There is a gap in the legislation empowering the court to grant such remedies, which are only available for EU litigation and arbitration.

- ❖ ***EMEK INSAAT STI LTD v. The European Commission, Action 588/2016, 15/05/2017***
 - The District Court of Nicosia rejected an application for Summary Judgment based on the decision of an Adjudicator appointed under a FIDIC Contract.
 - The judge did not even provide reasons why he rejected judgments of other countries on ADR in FIDIC contracts:
 - *"I consider that the defendants/respondents have demonstrated facts of such extent and quality that they objectively create a picture of an arguable, good faith defence"*

What is required?

- ❖ The Arbitration Law needs to be brought to this century!!
- ❖ Legislation must be enacted empowering the Courts to recognise and facilitate the procedure of non arbitration ADR and enforce ADR awards such as DAR decisions.
- ❖ We need specialised judges to play the role of the Technology and Construction Court of the High Court of the UK.
- ❖ We need educated and specialised lawyers and party representatives in ADR.
- ❖ We need to work on a culture of ADR in Cyprus.

Thank you!



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