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Int'l Construction Projects Require Cultural Considerations

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One of the more difficult (and obvious) realities of the construction sector is that disputes tend to be complicated, slow-moving and expensive. This is especially true in large-scale international projects that might include complex contracting arrangements, multiple parties with differing nationalities and legal backgrounds, and multi-tiered dispute resolution mechanisms.

Effective management of the dispute resolution process in these types of megaprojects is a difficult and expensive task, and it deserves careful consideration at the earliest stages of a project. This requires getting to the root of exactly what causes complexity in construction megaprojects. There are many causal factors for this complexity. All too often, a clash of cultures is a major cause.

This article discusses the importance of anticipating key cultural differences in construction megaprojects, and analyzes certain ways in which those differences might manifest themselves at various stages of a project.

A clear understanding of cultural differences between parties makes it possible to identify a project's pressure points at an early stage, and to take steps to mitigate or even avoid disputes caused by a clash of cultures. This is crucial not only in contributing to the success of a project, but also to protect your own individual interests.

The Importance of Cultural Differences

When we use the term "culture" in this context, we are usually referring to certain shared sets of values, goals and/or conventions within a group. Culture can drive the behavior of individuals and organizations. It is often deeply rooted within an organization, and influenced by a wealth of different factors. These include company leadership, the legal system of the state in which an entity is based, the nature of the work that the entity performs, the overall financial health of the entity, and a variety of other factors.

Construction megaprojects can be perceived as complex social settings. They require a combination of skills across numerous disciplines. They also involve a massive amount of risk. No single company will have expertise across all required disciplines, nor would any company be willing to assume that level of risk on its own, even if it did have the expertise.

For that reason, collaboration across organizations, technical disciplines, languages, legal systems and even continents, is a critical factor for successful project outcomes and efficient dispute resolution. Failure to understand and appreciate cultural differences can have devastating impacts on the entities involved, and the project as a whole.

Consider the following entities as the major players in the design and construction of a gas facility in Africa:

1. The owner, a West African state-owned energy company;

2. The contractor, comprised of (1) a publicly traded French construction corporation (35%); (2) a privately held contracting company from the U.K. (35%); (3) a privately held Canadian engineering company (25%); and (4) a local West African company specializing mainly in domestic infrastructure projects (5%);

3. The project manager, a privately held U.S. engineering, construction and project management company.

This is a project involving: (1) state-owned, publicly traded, and privately owned companies; (2) parties from both civil law and common law jurisdictions; (3) contracting companies spanning four different countries in three different continents; and (4) a project management company from a different country than any of the individual contractors.

This is by no means an unusually diverse roster for this type of construction megaproject. It is in fact common and often necessary to involve entities from across the globe in these projects. In our example, it is not a stretch to anticipate cultural differences among these parties. The challenge will be identifying those differences and considering how they might manifest themselves at various stages of the project.

Below are a few cultural considerations that we have encountered, followed by some general takeaways.

The Culture of Consortia

One of the first questions that will arise for each of the four contractor companies is how to work together as a team while also protecting themselves individually. In our scenario, the contractors have decided to form a consortium. The individual companies are based in France, the U.K., Canada and West Africa.

To begin with, the purpose of including the West African entity might be driven in part by cultural considerations. The international contractors will certainly look to the contribution of local knowledge and practices, as well as local labor, logistics and support. The contractors might also believe, however, that the local entity will contribute to a sense of national pride for the project, while also combating unemployment. This might make their bid more attractive to the owner. (It will often be a requirement, in fact.)

It might also give the international contractors the opportunity to benefit from the local West African company's extensive experience with the owner, and provide a window into the culture of the state-owned entity.

At the same time, the international contractors may wish to limit the West African companies' actual stake and involvement, due to its limited experience in projects of this magnitude. The international contractors might also carefully consider the culture within the West African contractor company, including the company's regard for the owner. In the event that a dispute arises, the question of "Whose side are you on?" can be a difficult one when local entities are involved.

Obvious cultural differences will also exist among the international contractors. These might result from factors such as corporate structure, existing alliances or general modus operandi. The French company is publicly traded and therefore directly accountable to its shareholders. That level of accountability will obviously drive its commercial decisions, and will most likely mean that it must operate with a greater degree of disclosure and transparency than what the Canadian and U.K. companies are accustomed to.

The Canadian and U.K. companies might have a level of distrust among each other, which could be rooted in their experiences on previous projects and/or the two countries' history in general. The French company might have more direct experience in West Africa, and its expatriate staff may also have fewer difficulties with language barriers once they are on the ground.

There is then the issue of the project management company, which is based in the U.S. and not part of the consortium. That company is representing the owner while overseeing the day-to-day activities to ensure that the project stays on track. The project manager will need to strike a delicate balance with a state-owned entity — there is the need to run a tight ship on the ground, while also giving deference to a powerful state-run owner that is not used to being told what to do.

In short, the dynamics within a commercial alliance among contractors are complicated, and cultural differences do not only affect the individual contractors. As in our case, they also affect the owner and the project manager, and the impact often extends even further to consultants, subcontractors or other entities. Understanding those differences can help inform key decisions for all parties involved.

Those decisions might include how to structure a consortium or joint venture; whether and how to involve local contractor entities; how to select a project management company; how to better serve a state-owned entity; and/or how to assess the likelihood of infighting among consortium members when evaluating bids. These are the types of decisions that must take into account cultural differences in order to be fully informed.

Contractual Framework and Dispute Resolution

Contractual negotiations also present a myriad of potential cultural clashes. Many of these are rooted in how a party's behavior at the negotiating table is influenced by its own legal system. Staying with our example, the works will be carried out primarily in West Africa, the states of which largely have legal systems rooted in civil law. The French and West African members of the consortium will all be comfortable with this, as they are based in civil law countries. The U.K. and Canadian companies will be the outliers, as both come from common law jurisdictions (with the exception of Quebec in Canada).

These different legal systems will cause the parties to think and behave in different ways. But even so, there will be differences within them. Indeed, the law in the U.K. is not always aligned with that in Canada, and there will likely be divergences of legal principles (particularly principles and construction law).

Given the probability that the project will be governed by civil law, the U.K. and Canadian contractors

will need to understand how the choice of law drives contractual negotiations, and overall goals and strategies. For example, the other members of the consortium might be motivated by civil law doctrines rather than the strict contractual language when negotiating key provisions. Those doctrines might include, for instance, contractual rebalancing or good faith principles.

By contrast, the U.K. and Canadian companies might be more motivated by the four corners of the contract, and more inclined to strictly follow an express allocation of risk. While the U.K. and Canadian companies will not be able to negotiate a different governing law, they likely will be able to incorporate certain common law principles into the parties' agreement.

The approach to dispute resolution is also likely to vary quite significantly among the parties in our scenario. For example, while many continental European parties might be comfortable with dispute adjudication board proceedings, U.K. companies can sometimes be less content with them. This is because in the U.K. there is a statutory-based system for adjudication in construction projects. This often means that dispute adjudication boards are not always used even in some large U.K. projects, as statutory adjudication is a mandatory right, and parties cannot contract out of it.

In addition to this, there are procedural considerations if and when a dispute actually arises.

If the parties have agreed to arbitrate, how will the arbitration proceed? Is it through memorial-style pleadings, in which the witness and expert evidence should be served alongside the substantive submissions? This might be the preference of the entities operating in civil law jurisdictions. Or is it through a common law-style control order, with separate deadlines for written pleadings and designation of experts? How will the hearing be structured? Will the hearing run on a strict chess clock? Or will it be more open-ended, with all witnesses and experts presenting direct evidence and being cross examined?

On their face, these are questions of procedure, but they run much deeper than that, because they determine, in large part, how a party will be able to present its case, and how a party views the process of resolving disputes in general. Having a firm understanding of these various approaches, which draw from many different legal cultures, will help parties better understand which approach best fits their specific project. It will also help parties better understand what motivates the behavior of the opposing party if and when a dispute arises.

Takeaways

In short, most organizations are likely to have certain shared sets of values, goals and/or conventions, which we refer to as their culture. Culture is influenced by numerous different factors, including the nature of the work, the organizational structure and leadership, and the relevant legal system. Construction megaprojects require the involvement of numerous entities, each with their own unique cultures. Parties can take proactive steps to identify and consider cultural differences at the outset of a project.

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