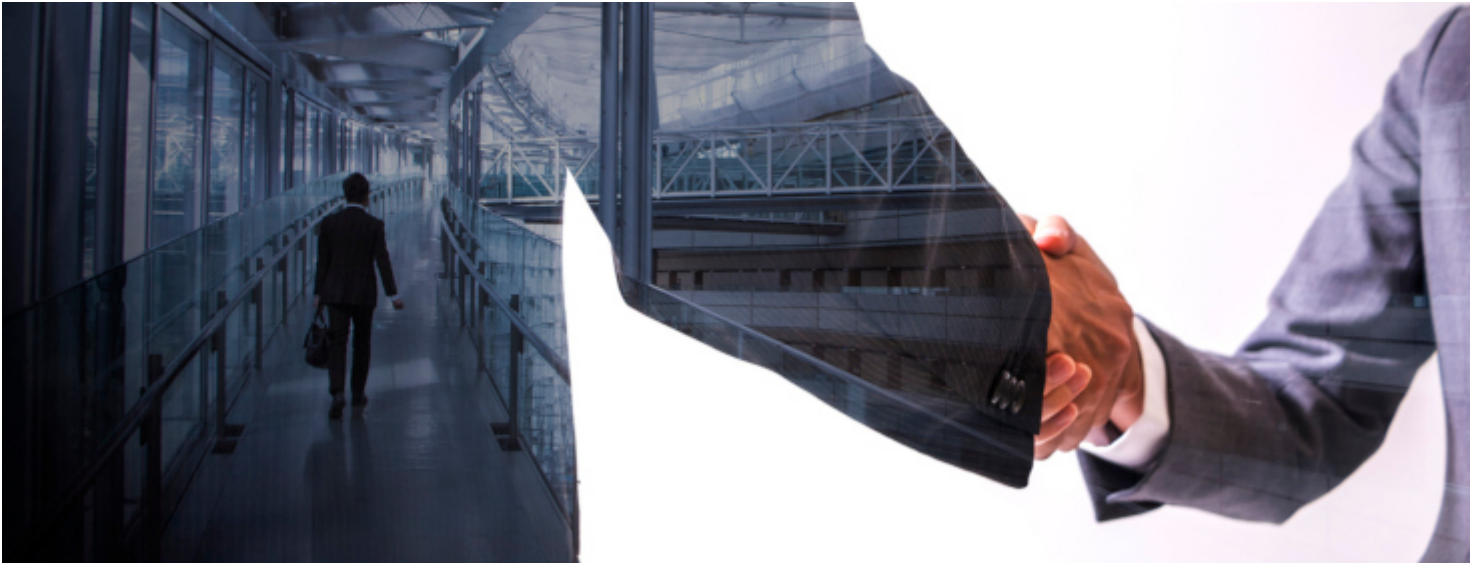


# Supply chain disputes: lessons from war and peace



**Katherine Hope Gurun - 01/08/2022 ([CDR](#))**

**Katherine Hope Gurun of JAMS draws lessons from her own experience to give advice on preventing and resolving supply chain disputes in times of pandemic and war.**

The pandemic has substantially affected how goods are manufactured and delivered. The combined impacts of climate change, the war in Ukraine and sanctions against Russia are seriously threatening the world's food and energy supplies, as well as many industries, including construction. While global construction often faces supply chain issues, the proliferation of just-in-time inventory management has resulted in significantly more shortages, breaches of contract and disputes.

These overlapping challenges have created complex situations that are well suited to agile, proactive dispute prevention and resolution mechanisms. As companies realize the complexity and longevity of these issues, they are pivoting from applying stopgap solutions to analyzing and overhauling their networks of supplier relationships to make the supply chain more resilient and sustainable. They are seeking to better understand risks and protections under their contracts or other legal agreements in the event of a global pandemic or a hot war on their doorstep.

In this context, it may be helpful to consider lessons from past experiences. I will discuss three examples from my personal experience where collaboration and ingenuity dramatically improved project performance, prevented many disputes and laid the groundwork for business-sensitive dispute resolution in remaining matters. In each case, the participation of interdisciplinary teams, detailed analysis of risks and preparation to manage or reduce those risks, along with a strong partnership between business and legal functions, were key to success.

## **EXTINGUISHING THE KUWAIT OIL FIELD FIRES (1991): PREPARATION, ADAPTATION AND INGENUITY**

The first example comes from my involvement in the restoration of the Kuwaiti oil fields after the first Gulf War. Kuwait was invaded by Iraq on 2 August 1990. On 15 January 1991, after diplomacy efforts failed, United States-led coalition forces engaged in an intensive air war against Iraq followed by a land invasion of Kuwait on 24 February 1991, which lasted only four days. Long before that, however, the **Kuwait Oil Company** (KOC) had approached the **Bechtel Corporation** (Bechtel), among others, for help in planning

for the return to its country and its restoration.

One of the first tasks was to assess the likelihood of damage to the oil fields and other related infrastructure in Kuwait. As Iraqi forces departed, they set fire to the oil wells. At the end of the hostilities, over 600 wells were ablaze at an estimated daily loss of revenue of tens of millions of US dollars. Months before that, Bechtel, in collaboration with KOC, had begun to prepare for possible restoration work. Since no one could predict when the hostilities would end or when it would be possible to begin restoration efforts, a global business, procurement and logistics team was established with KOC to plan for this work. Staging areas were established around the world to hold materials and equipment, and these items were ordered immediately to speed their eventual airlift into Dubai and then Kuwait at the appropriate time.

The volume of materials and equipment to be procured was enormous, and we quickly realized that it would be difficult to maintain the necessary pace given the existing procurement procedures and documentation requirements, as well as the global reach of the procurement requirements. We convened a small interdisciplinary team in London and, over the course of a few days, rewrote and simplified the procurement documentation, which would still protect the client and suppliers, but through a much more efficient process. The reduction in both paper and steps was significant. At the same time, consistency with regard to key checks and risk management processes was reliably enforced.

When the hostilities ended, we began lifting people and equipment into Kuwait as soon as United Nations and other sanctions were lifted in April 1991. An international procurement team was set up in a large, unairconditioned tent (as initially there was no air conditioning anywhere in Kuwait), and all additional procurement and logistic requirements were coordinated by a multidisciplinary team from this central office. Without the months of advanced planning, this rapid deployment would not have been possible. Without real-time solutions to issues in the field, the work would not have progressed as quickly and as well as it did.

All of the work in Kuwait was done largely in the ruins of war without the conventional infrastructure that normally accompanies construction work. Worker safety was key. The largest initial challenge was how to make the oil fields safe with thousands of live munitions and ordnance littering the drifting sands. It was estimated that extinguishing the oil fires would take approximately seven years. We wanted to look for innovative ways to extinguish oil well fires, so a small technical team was established. Ideas were received from around the world, numerous technologies were evaluated and, within a very short time, more than 20 teams – many employing radically differing technologies – were deployed to work in the field. These technologies were evaluated for safety as well as effectiveness.

The last fire was extinguished in November 1991—nearly 12 times faster than initially predicted.

This work was underpinned by a unique master insurance program designed by the KOC and its insurers, tightly coordinated by interdisciplinary (technical, legal, financial) and integrated teams, and led by the focused commitment and accessibility of senior management at KOC and all other participating organizations.

Dispute management lessons: The best way to improve a system is often not to tweak it, but to take it apart and rebuild it. In order to restore the oil fields as quickly as possible, known risks had to be addressed with advance planning and an integrated, team approach. New issues had to be resolved quickly in the field in order to avoid delays and later disputes.

## **CHINA (1983–2000): BUILDING BRIDGES WITH ROBUST LISTENING AND CULTURAL COMPETENCY**

Another example comes from Bechtel's work in the People's Republic of China. Bechtel began working in China in the late 1970s. By 1982, Bechtel has begun to consider the possibility of expanding the scope of its work in China into several major industries. Because China was very much in the early days of opening to the West, it was virtually impossible to determine from published literature the parameters of the Chinese

legal system or how those constraints would affect day-to-day business relationships. As a result, we established a team of legal, financial and tax experts to travel to China and meet with Chinese ministry officials to assess where there might be a sufficient legal framework (both national and international) for China and Bechtel to consider collaborating on major projects. This team met not only with Chinese officials, but also with lawyers from major law firms who were working in China. It was a new world in an ancient society.

Bechtel began to pursue major opportunities in the fall of 1983. Prior to doing any work in China, we tried to understand and analyze how each side would perceive risks and to develop a contractual approach that would be acceptable to both parties. We re-evaluated and streamlined contractual documents to adapt to China's emerging legal framework. This approach was designed to ensure balance in the risk allocation between the client and the supplier, and it clearly established the governing law, dispute resolution forum and procedures to be used. This early analysis and work proved valuable as we moved ahead with projects in China. We resolved problems during project execution rather than at the end of the project, when memories had faded or failed and positions had hardened.

As published law emerged, we contributed to that process and exchanged views with our Chinese counterparts. With months of advance preparation, the stationing of personnel (including in-house counsel) in China and a long-term commitment to working in the country, the vast majority of projects in China were executed without resorting to formal dispute resolution.

Dispute management lessons: Being open to doing something differently is essential –regardless of one's profession. China posed exceptional transborder challenges due to its legal system. The contracts negotiated and disputes resolved would have been effective in any legal system; only the process was different.

## **THE UK HIGH-SPEED CHANNEL TUNNEL RAIL LINK (2000–2007): DELIVERING ON TIME WITH TAILORED, EARLY, SPEEDY ADJUDICATION**

A third example comes from the design and construction of Phase 2 of the Channel Tunnel Rail Link Project, which brought the High-Speed Rail Link into London at the fully renovated St. Pancras Station while preserving its Grade III historic stature and allowing for the smooth arrival and departure of high-speed trains.

One dispute resolution technique that proved to be very useful in the United Kingdom, and on this particular project, was adjudication. This technique is a compulsory dispute resolution mechanism introduced in the UK's Construction Act 1996. It applies to all parties to a construction contract and encourages the early resolution of disputes on major projects. Contrary to this encouragement, it has been the habit of the construction industry to hold major disputes until the end of the project. While it is true that more facts may be known at the end of the project, it is also true that failure to resolve a dispute early may lead to increased costs or delays.

Under typical adjudication rules, the parties utilize the services of an adjudicator to hear the merits of the dispute and provide a decision within 28 days (unless the parties decide otherwise). This decision can be challenged later by either party but, in practice, it rarely is. The technique was originally designed to control cash flow on a project and keep the job moving. Adjudication can and has been used for both single-issue matters and complex construction claims. Any party may refer a claim to adjudication during any phase of a project. We used this technique successfully on this project. But it is important to note that, at the beginning of the project, well-written and well-integrated contract documents set out the project framework and the path for the resolution of disputes. This adjudication process can be adapted to projects all over the world on an ad hoc basis just by tailoring your particular dispute resolution provisions.

Dispute management lessons: There is no substitute for well-written, well-integrated contracts at all levels of the supply chain. Such contracts not only reduce the likelihood of disputes, but they are also an excellent

foundation for the early resolution of disputes through a process like adjudication.

## **TAKING LESSONS FORWARD**

In our increasingly dangerous and less predictable world, companies must evaluate and manage the risks of their businesses. They should create a risk register database for all projects and contractual agreements so that it is at hand in the event of a crisis. An early contractual and technical analysis will also help companies decide if a project should be undertaken.

In all supply chain matters, all contractual documents in the chain should contain, to the extent possible, identical terms with regard to governing law and dispute resolution; for example, the same governing law, the same steps to resolving disputes, the same arbitral body, the same location for any required hearings and the same provision for the joinder of parties. In the event of a multiparty dispute, these consistent provisions will dramatically reduce costs and promote settlement since one party will not be able to play differing provisions against another party.

In all of the examples above, the parties took well-considered risks to minimize disputes. We should remember the advice attributed to Voltaire: “Perfect [‘best’ in the original French] is the enemy of good.” For an effective supply chain with well-managed risks, be open to change and be ready to innovate, modify and diversify. Settle your disputes as early as possible. Remember that we must have a good system but not necessarily a perfect one.

*Katherine Hope Gurun, Esq. is a JAMS mediator, arbitrator, special master/referee and neutral evaluator. She is a former senior vice president and general counsel of Bechtel Corporation.*