建设管理体制研讨会

Construction Industry Administration and Regulation Conference

THE DEVELOPMENT OF A NEW LEGAL FRAMEWORK FOR THE CONSTRUCTION INDUSTRY IN THE PRC

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"The Construction Industry, Dispute Management and Education"

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Introduction.

This paper seeks to explain why, in the opinion of the author, the construction industry (at both the domestic and the international level) of the 21st century will increasingly have to embrace the concepts of integrated business practices and services. Integration in turn requires a greater degree of shared knowledge, understanding and co-operation between the various businessmen, trades and professions involved in construction projects. An integrated approach to construction requires a new and improved approach to training and education for the construction industry.

The Evolution of Industry.

Each cycle in the evolution of commerce has placed different demands on the leaders of industry. Whilst the stages of development have occurred at different times in different parts of the world nonetheless there has been a basic progression from Feudal Systems by way of the Agrarian Revolution and the Industrial Revolution through to the late 20th century Technological Revolution. Each advance has brought significant benefits to mankind and each has placed different demands on society. Equally, each system has imposed limitations on the way that society operates under the system. The progressive change from one system to the next stage has never been easy and has in the past involved considerable disruption. The key to smoothing the path into the 21st century is for society and commerce to carefully assess the requirements of commerce and to devise strategies to meet the identified needs of future industry. There is no clear dividing line between one epoch and the next. Changeover is a gradually process and the keys to identifying future needs lie in an examination of the problems that are beginning to emerge in the present.

Prior to the Industrial Revolution industry was in many ways integrated and at first sight it might appear that industry has simply gone full circle. However, this ignores the fact that the modern industry operates on a larger scale and in a far more competitive environment, with complex financial dynamics and subject to rapid technological development.

The celebrated economist Adam Smith developed the notion of the division of labour which led directly to specialism. Each industrial process could be isolated and allocated to a specialist. Industry embraced the concept. In the construction industry a diverse range of businesses and professions firmly established their respective roles and powerful institutions evolved to govern the various facets of the industry.

Whilst it is possible to identify individuals who trained and practised in a number of disciplines, by enlarge most individuals became specialists in a single field and the professional bodies jealously guarded their territory. The Developer developed, the Civil Engineer specified, the Architect designed, the constructor constructed (often sub-contracting specialist tasks to specialist

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constructors) and the lawyers sat back and waited until problems arose and litigated on behalf of their clients. The division of responsibility and the complex range of rights and duties attaching to the various players provided fertile ground for the lawyers who developed complex legal rules to govern the interrelationships between them. Contracts became lengthy all embracing documents and litigation became a divisive, protracted and expensive process with each sector of the industry seeking to protect its own interests.

The construction industry in parts of the United States achieved rapid and more economic development processes and the industry in the United Kingdom set out to discover how the US had achieved this and to emulate the process. Simultaneously the cost of and the time involved in litigation has provided the impetus for the development of new dispute settlement systems in the United Kingdom. Again the United States has provided the model for developing ADR. However, the new systems that are emerging have a distinct and separate identity to those operated in the United States. The challenge for the future is to develop standards and systems that can cross international boundaries and serve the international construction industry.

Streamlining the Construction Industry.

The catalysts for change in the United Kingdom have centred around The Latham Report in respect of the construction industry and the Housing Grants, Construction and Regeneration Act 1996 which followed in its wake, The Arbitration Act 1996, The Woolfe Report on legal services and The Deering Report which has implications for legal education. Health and safety initiatives introduced by the government have added impetus to change within the construction industry, requiring co-operation between the various branches of the industry to comply with new government regulations. As environmental issues take central stage in the consciousness of the nation it becomes increasing impractical for individual players to address the issues raised by environmental protection without effective planning and co-operation between trades and professions.

The legal system has likewise seen rapid reform instigated by the Lord Chancellor's Office with Lord Mackay of Clashfern and Lord Irvine the current Chancellor introducing widespread reforms to streamline legal services, reduce the work in the judicial system and to cut the government budget for legal services. The most significant change for the construction industry regarding dispute settlement came about with the passing of the Housing Grants, Construction and Regeneration Act 1996. The Employment Rights (Dispute Resolution) Act 1998 continues the trend towards providing alternatives mechanisms for dispute settlement and will affect the rights of all employees including those in the construction industry.

The Latham Report, The H.G.C.R. Act 1996 and Teamwork.

Specialisation and the development of professional bodies to govern the various aspects of the industry brought high professional standards and many benefits. However, it also resulted in a complex system governing the relationships between the professions. Poor communications and job demarcation detracted from the efficiency of the industry. The Latham Report introduced the notion of Team Work.

Whilst it is still early days for development teams much has been achieved in speeding up the process of identifying problems during the construction process. However, unbridled co-operation which minimises conflict may discourage healthy dispute, thus preventing problems from being addressed at an early stage. This is especially so if the team is not sufficiently self critical. Who has the authority as arbiter, to ensure quality control today ? I am tempted to reminisce on the merits of having an effective clerk of works on site (naturally since I used to be one). The clerk of works would frequently tell site workers what he wanted next and give an instant declaration of satisfaction or dissatisfaction with the work done on a daily basis. Site workers may well have resented the authority of the clerk of works but nonetheless appreciated being given clear and direct instructions and the site workers knew exactly what was required of them. The power structure within development teams in respect of quality of work and the direction and organisation of work is not yet fully developed

Where minor problems arise between the members of the team it is negotiation, not mediation or arbitration and adjudication, which is required.. However, co-operation does not mean that all problems can be identified and dealt with on a consensual basis through negotiation. A time comes when an agreed settlement cannot be reached without the help of a third party. Mediation provides a half way stage between negotiation and third party determination through adjudication, arbitration and judicial settlement. However, there is a danger that mediation, if too rapid a recourse is made to it, can get in the way of team work and negotiation. Excessive reliance on mediation may deprive the team members of the confidence to negotiate face to face without an independent barrier between the parties. In particular, agreement over variations and the precise meaning of implementation of variation clauses can still lead to a need for third party decision making and enforcement. Differing expectations of the contractual obligations can and still do arise, requiring third party determination in on going projects. The fast track dispute resolution system that the Housing Grants, Construction and Regeneration Act 1996 introduced will in time help to speed up the construction process further.

It should be pointed out that dispute is not in itself a bad thing. Disagreements arising out of problems which are identified within the process are essentially healthy and beneficial. In fact, the earlier a problem is identified the better, since there is then an opportunity to address the problem and for it to be dealt with. That way the construction process is not delayed and minor, solvable problems, do not escalate into major issues at a later date.

Whilst the construction team approach helps to identify problems it has to be understood that the team are being required to adapt to new techniques in dealing with problems which have not until now formed a major part of their professional and technical training. For the team to work effectively it is important that the members of the team receive training in the various aspects of dispute avoidance and dispute resolution. Different techniques apply to negotiation, mediation, adjudication, arbitration and judicial settlement. Managers need to understand the merits and limitations of these techniques and be able to work within their confines. The industry has in fact been quick to respond to these challenges and the Chartered Institute of Building, The Institution of Civil Engineers and the Chartered Institute of Arbitrators have played a major role in the development of adjudication training and in ADR training in general. Many of the larger consultancy firms such as James.R. Knowles have run mounted high quality Continuing Professional Development programs for the industry as have many of the larger law firms such as Edwards Geldart. The challenge for Higher Education is to address these issues and incorporate them into training for the next generation of constructor.

Isolationist approaches to the construction process will no longer be possible. Collaboration is the key to success for the 21st century. In order to collaborate effectively, we must all be prepared to be more flexible and to learn and acquire new skills, especially in effective communication and team work where people respect and value each other's contributions.

The Woolf Report on Legal Services.

The Woolf Report is the latest stage in the development of legal services and reform of the civil justice system in England and Wales. The report in particular encourages the settlement of disputes by enabling the parties to make offers to settle and promotes the use of Alternative Dispute Resolution.

As mentioned above, Alternative Dispute Resolution is in many ways an import from the United States of America. Bodies such as the Advisory, Conciliation and Arbitration Service (ACAS) have engaged in ADR for many years but made little inroad into the general sphere of dispute resolution until recently. ACAS for many years dealt almost exclusively with employment disputes mostly involving public sector industries. Trade union representatives became highly developed negotiators but practiced in a very restricted sphere. The late 1980’ies saw the development of the Centre for Dispute Resolution (CEDR) and the Alternative Dispute Resolution Group under the auspices of the Law Society responded to the challenge by developing ADR expertise within solicitors law firms.

In one respect, whilst encouraging Alternative Dispute Resolution the emphasis on a faster, cheaper more efficient justice system undermines the need for ADR. The enhanced role of the small claims court with higher cash limits for small claims, which can be litigated without the need for legal representation, takes way the need for ADR, the main advantages of which have often been that compared to the justice system ADR has been considered to be quick, informal and inexpensive.

It is far too early to tell which methods of dispute resolution will emerge as the principal forms settlement that will ultimately be used by the construction industry. Certainly, Adjudication with statutory backing under the H.G.C.R. Act 1996 has a very positive future. This is being reinforced by the courts as demonstrated by the recent case of Askin v Absa Bank on the 29th January 1999. That apart the jury is out at present on other forms of ADR.

ADR and The Arbitration Act 1996.

The United Kingdom has a long and illustrious track record of arbitration. Whilst the confidential aspect of arbitration is valued by industry the other so called benefits of arbitration, namely that it was considered to be quick and inexpensive, have long since been placed in jeopardy. Legislation in the 1950'ies and the interpretation of statutory provisions by the courts undermined the jurisdiction of arbitral courts. The judiciary often ruled in favour of jurisdiction on technical issues. Arbitrations were often suspended pending court determination of contested issues, frequently rendering the arbitration unnecessary. Invariably the arbitral process was subject to frequent delays. The cost of arbitration escalated. Frequently arbitration took longer than trials in court and often cost more. Many arbitrators, often lawyers, adopted procedures which mirrored court procedure. The only remaining advantages then, were that the proceedings continued to be confidential and issues could be settled by arbitrators who understood the industry.

This then was the climate in which new forms of ADR started to make their presence known in the U.K. The Centre for Dispute Resolution (CEDR) and The ADR Law Group have had some success in promoting mediation as an alternative to or at least as a precursor to arbitration. It is now possible to incorporate a mediation clause into a commercial contract. Mediation, whilst a voluntary process in the U.K. can lead to a legally binding agreement which can be quickly enforced by the courts without great expense, provided the agreement consists mainly of damages rather than the supply of goods or the performance of services. A fierce debate has taken place in the U.K. about the respective advantages and disadvantages of mediation and arbitration. Not unnaturally, principal figures within arbitration were not prepared to concede defeat to the newcomer. For many the answer was not to shift allegiance to mediation but rather to address the problems and shortcomings of English arbitration by reforming the regime governing arbitration.

So it has been. Arbitration has not quietly looked on as mediation entered the dispute resolution market. Arbitration has long provided an important service to the international trade and shipping industry as well as to the construction industry. The New York Convention on the enforcement of arbitral awards means that arbitration is very attractive for international disputes. However, the adverse statutory and judicial developments in England and Wales jeopardised London's central role in international arbitration, in particular because English Law had distinct disadvantages compared to arbitration under UNCITRAL and the Uniform Code. Parliament responded in 1996 by introducing a new Arbitration Act. This Act limits the scope of the courts in England and Wales to interfere with the arbitration process. It is modelled on the Uniform code though it retains in addition some distinctly British provisions. Arbitration in the United Kingdom should be quicker and less expensive in the future. As arbitration seeks to re-establish itself in the dispute resolution market the education of the next generation of arbitrators has entered centre stage. If recourse to arbitration is to become widespread in the future there will need to be many more specialist trained arbitrators for the various sectors of industry. The current interest in ADR has resulted in a greater awareness of the role of arbitrators and an increased demand for education and training.

The Deering Report on Education.

The Deering Report produced a blue print for Higher Education in England and Wales. Much of the report centres on quality assurance. However, a significant part of the report addresses the

needs of skills training and what industry requires from future graduates. Higher Education must be seen to serve industry and to work hand in hand with industry in the next century. In times gone by Universities in the United Kingdom have often been seen as "Ivory Towers" of intellectual excellence with little or no practical relevance to industry. This of course was not entirely justified since many Institutes such as The Nuffield Institute, The Treforest School of Mines (precursor to The University of Glamorgan) and the research foundations at Oxford and Cambridge had for many years provided invaluable service to industry. Nonetheless, it has become apparent that much of academia has failed to address the needs of modern industry and commerce. Reforms introduced following The Deering Report will give precedence to undergraduate and post graduate courses that provide both academic rigour and skills training. In future the Universities and Industry will be encouraged to work more closely together.

Introducing the University of Glamorgan.

The University of Glamorgan was established in 1923 as the School of Mines. The School of Mines was renamed The Polytechnic of Wales in 1967. The Polytechnic of Wales was renamed as The University of Glamorgan in 1992. The University of Glamorgan is ranked at No2 in the Principality. Within the United Kingdom as a whole the Times Higher stated that "The University of Glamorgan is a pearl waiting to be discovered and ranked the University of Glamorgan as No3 of the New Universities established in 1992.

The University has many different faculties and schools. Of immediate interest to this paper are The Law School, The School of the Built Environment and The Business School. The School of the Built Environment provides a wide range of undergraduate and post graduate courses in construction practice, law and management. The International Construction Management MSc is firmly established in the middle east as a primary educational provider to the construction industry. The Business School with over 4,800 students has received world wide recognition for its International MBA Programs. The University has also developed the University of Glamorgan Commercial Services division (U.G.C.S) which provides consultation services direct to industry. The unit is run by two leading figures from the School of the Built Environment and much of its work is concentrated on construction practice.

The Law School has recently moved into a brand new Law School with superb facilities. There are over 18,500 students registered at the University of Glamorgan with 1,059 students registered at the Law School.

Subject specialisms at the Law School include **Legal Skills**, in particular the HND paralegal training; The Legal Practice Course; The LLM CDR ADR Practice Course; The LLM in Western Legal Practice for Chinese Legal Practitioners, *pending*. and M.Phil / Phd in Legal Practice Studies by research; **European Law,** within the European Unit and in particular the LLM in European Law. Full time residential course; the LLM in European Law Distance Learning Course and M.Phil / Phd in European law by research; and finally **Commercial Law -** within the Commercial Law Unit, and in particular the LLM in Commercial Dispute Resolution, the LLM in Corporate Governance and M.Phil / Phd in Commercial law by research.

The University of Glamorgan is in the process of establishing itself as a world leader in Legal Skills training. In as much as the LLM in CDR is both a legal skill and a Commercial Law Discipline the two specialisms are not entirely separate and distinct. The Law School does not consider that any of these Specialisms takes priority over any other and regards all three specialisms as being of equal importance to our post graduate educational provision. Indeed, whilst head of the Unit for European Studies Professor Rose D'Sa was awarded the coveted Prize for Outstanding Woman in Europe in 1998 emphasising the importance of and status of European Legal Studies within the law School. The Law School established the Law Society Finals course, the precursor to the LPC in 1973 followed by the Common Professional Exam, subsequently the CPGd in 1981. The Unit for European Studies was established the LLM in European Community Law under Professor Rose D'Sa in 1995.

The LLM in Commercial Dispute Resolution was established September 1998 at the same time as the Commercial Law Unit. The LLM is validated for provision in the United Kingdom, the USA and Malaysia. The LLM program in ADR has received Congressional recognition in the USA as an exemplar of standards in ADR professional training. Professor Jill Poole was appointed Head of the Commercial Law Unit in February 1999 with a remit to develop new LLM courses in the commercial field such as insurance and banking. We currently have 3 M.Phil / Phd research students, one for each of the subject specialisms. This number is due to rise considerably to reflect collaboration in research with the CIOB and the CIArb in ADR and in particular because a number of eminent legal practitioners and arbitrators are to join the staff as visiting Professors. At this time a number of portfolio Phd projects will also commence.

The Law School works closely with the business community in Wales and research is sponsored by Leo Abse & Cohen, Solicitors, Chandler KBS, Civil Engineers as well as by the European Union which sponsored the Chair in European Law. The Law School also collaborates with The Law School and the Maritime Department at The University of Wales College Cardiff. Mr C.Spurin has been a visiting lecturer to the LLM and MSc in Maritime Law and Studies at Cardiff Law School and M.A.S.T.S. since 1991. Mr Spurin is also the MSc Law Subject Leader in Construction Law within the School of Built Environment at The University of Glamorgan which is linked with EMIC providing post graduate provision in Bahrain, Dubai and Abu Dhabi. The Law School has been participating in the EU/China Higher Education program and up to date 5 Chinese Professors have visited the Law School under the program. Seven more Professors are due to visit Glamorgan in the next academic session.

Dispute Resolution Training at The University of Glamorgan Law School.

The University of Glamorgan is pleased to announce that the LL.M Course in Commercial Dispute Resolution, a professional practice course for lawyers and non-lawyers in respect of arbitration, conciliation, mediation and adjudication commenced on a part time basis in January 1999. The first year for the January intake runs from January to September 1999. Full and part time courses will subsequently run from September to September, commencing September 1999. Directed learning provision will commence in September 1999 for overseas students at designated overseas locations. The first designated centres will be in Dallas Texas and in Kuala Lumpur, Malaysia.

The aim of the course is to provide a stimulating and challenging intellectual environment whereby legal education crosses new frontiers exposing students to innovative methods of resolving commercial disputes, grounded on an understanding of the philosophy behind the human desire to dispute. The course seeks to enable students to enhance their personal and professional development.

The course aims to prepare students for professional practice in commercial dispute resolution through a "learning and doing" approach, and in particular to represent clients in Arbitrations, Adjudications, Conciliations and Mediations and to act as Arbitrators, Adjudicators, Conciliators and Mediators. Students on the LL.M in Commercial Dispute Resolution can expect to be faced with simulations of the types of dispute in which they will be involved in the practice.

The LL.M in Dispute Resolution is a modular course and contains three stages. The Certificate stage requires students to successfully complete four modules. The Diploma stage requires successful completion of a further four modules. The LL.M Award stage involves the production of a dissertation which is the equivalent of four modules. The course may be studied full or part time. The part-time course is delivered by the same team as the full time course. Some of the lectures are shared by both groups of students.

The Certificate Stage. Students study four 15 credit modules comprising, amongst others, Conflict Management and Conflict Resolution; EC Law, Conflicts and International Codes; The Substantive Law of Arbitration and either The Common Law of Obligations (where students have no previous foundation in legal study) or Litigation Strategies.

The Diploma Stage. Students study four 15 credit modules comprising, amongst others, Practical Mediation and Arbitration; Alternative dispute Resolution in Practice; Civil evidence, Procedure and Expert Witness Skills and one of the following options, namely Arbitration and ADR in Shipping Law; Construction Law; Consumer and Trade Law or Employment Law.

The LL.M Award Stage. A 60 credit module. Students are required to submit a dissertation on an agreed topic. Students are required in conjunction with their dissertation supervisor to devise, plan, research and produce a substantial work on an area of alternative dispute resolution. Successful completion of the dissertation requires motivation, self discipline, originality and critical thought.

Persons who are interested in specific modules but who do not wish to follow the entire degree program are welcome to study for individual modules or groups of modules. As outlined above students successfully completing 4 or 8 modules will be awarded a Certificate or a Diploma respectively. However, where a person merely wants to study for less than four modules for Continuing Professional Development purposes they are welcome to do so and the Law School will be happy to help such students apply for CPD points from their relevant governing bodies.

In particular, with reference to the Civil Engineering Profession, The Common Law of Obligations Module and the Contract Procedure Module prepare students for both the University of Glamorgan LLM examinations and also for the Institution of Civil Engineers (ICE) Part 1 and Part 2 Examinations. Students following these modules can sit for both sets of examinations, or simply for ICE or for the LLM alone.

The University of Glamorgan is an examination centre for ICE Examinations. However, please note that these are external professional examinations set and marked by ICE and not by University of Glamorgan Staff. Candidates for the ICE examinations must be members of ICE and suitably qualified in order to take the ICE examinations. ICE examinations are not available to persons from other professions and disciplines.

Students may register for ICE and later elect to take the LLM examinations as well if they feel comfortable with the amount of commitment required to complete the program. There is no need to commit to the LLM at the outset. Indeed many applicants may subsequently choose to follow the MSc in Construction Management rather than the LLM.

The course is taught by a combination of lectures and small group activities with the emphasis on the latter. Students will be required to prepare thoroughly for and to participate fully in the activities, which will include the development of prescribed dispute resolution skills such as case management, advocacy, drafting, interviewing, legal research and award writing. Client autonomy, professional conduct and client autonomy are pervasive topics taught throughout the course. Students are expected to take a substantial part of the responsibility for their learning. Much of the assessment during the course is continual, practical and skills based. Great importance is placed on modern methods of teaching and the use of technical facilities, in particular video recording is used extensively in advocacy, mediation and conciliation training and skills teaching generally.

The LL.M Dispute Resolution Scheme Leader is Corbett Haselgrove-Spurin. He is a qualified arbitrator and mediator with many years experience in the construction industry and in commerce and has spent the past 10 years in higher education specialising in post graduate studies and in particular delivering courses on maritime and construction law.

Individual members of the LL.M teaching team have extensive professional, academic and judicial experience. The team includes qualified arbitrators, mediators, solicitors and barristers, who maintain professional links with practice and in some cases continue to practice on a part time basis. In addition, we are able to call upon the services of practitioners in the field to supplement the teaching team.

Applications for admission to the scheme must be made on the standard university application form. Acceptance is subject to the provision of a satisfactory reference. Applicants should possess an appropriate degree, and or, an appropriate professional qualification or suitable work experience, in particular, where a traditional academic qualification has not been undertaken. Where a recognised third level qualification has not been achieved admission will be subject to approval by the Scheme Leader and applicants will be required to attend an interview.

Future developments at the University of Glamorgan and within the Law School.

The University of Glamorgan is currently pursuing an interdisciplinary development stage. Of particular interest to the construction industry is a proposed MSc in Construction Development and Administration for China, a proposed MSc in Entrepreneurial Skills for China and a proposed MSc in International Business Development.

Within the Law School, a commercial law research unit is in the process of being established. The seven visiting Chinese Professors will join this unit for the duration of their stay at Glamorgan. It is hoped that the research unit will be able to work closely with local law and construction firms, the CIArb and the CIOB in conjunction with UGCS and the Business School to conduct research into commercial dispute resolution and other inter related issues affecting commerce. The Educational Development Unit at Glamorgan will liase with the unit to develop interactive CD Rom skills training facilities for dispute resolution. In particular the law school has drawn up a program for staging simulated dispute settlements which will be first videoed and then converted to interactive CD Rom, linking lectures and relevant web sites to the role plays.

Conclusion.

This paper has demonstrated that an integrated educational approach is essential for the construction industry as we enter the 21st century. Industry and the Universities must work closely together in the future to support each other in the development of appropriate research, academic and professional training to ensure that the next generation of practitioners can fulfil the vocational needs of industry. Globalisation of industry means that industry, commerce and education must consider the importance of codes and practices that transcend national boundaries. The University of Glamorgan is firmly placed in the vanguard of commercial dispute resolution in the United Kingdom. Furthermore, the University of Glamorgan is playing a significant education role in China, both with the LLM in Commercial Dispute Resolution, the Chinese Lawyers Western Legal Practice Skills Course and through our link with the Shanghai Bureau of Justice and Fudan and East China Universities, with the EU / China project - and with The International MBA and MSc International Business Skills run in conjunction with the Law School and the Business School and the MSc in Construction Management (which currently has 20 mainland Chinese students at Glamorgan) and the Institution of Civil Engineers ICE examinations.

It is hoped that the University of Glamorgan can continue to develop its role in construction practice, international management and dispute resolution training and that this paper will encourage you to take advantage of the educational facilities that the University of Glamorgan has to offer.

Corbett Haselgrove-Spurin. 13th March 1999.

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