THE UNIVERSITY OF GLAMORGAN

DIVISION OF THE BUILT & NATURAL ENVIRONMENT

ADR DAY

School of Technology
University of Glamorgan, Treforest, Mid Glamorgan
Friday 7th May 2004

PAPER

"DISPUTE SETTLEMENT PROCESSES IN THE CONSTRUCTION INDUSTRY"

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DISPUTE SETTLEMENT PROCESSES IN THE CONSTRUCTION INDUSTRY

INTRODUCTION

Modern construction processes are complex and highly technical. The construction process is very fluid and unpredictable. Frequently unanticipated ground site conditions create problems ; designs which looked fine on paper prove to be impracticable ; designs often have to be altered to incorporate new requirements ; labour and material fluctuate in price and supply may be variable ; the intended use of the development may change due to market conditions or because of a change of intended user ; time scales and targets can be set back by inclement weather conditions ; accidents and mistakes can have serious and far reaching consequences, whether by architects, engineers or direct / subcontract constructors. These are the types of issue parties to a construction project need to take into account and allocate risk for in their contract.

Construction contracts can be neatly divided into two parts, the first technical describing the commissioned product and the second allocating risk and financial liability for the product, variations to the works and for other foreseeable though not necessarily anticipated events that might occur during the construction process. Most contracts also provide for contract administration and a mechanism for expert determination of facts likely to be contested by the parties. Contractual mechanisms for the allocation of risk and financial liability are essential but cannot completely prevent disputes arising. Large sums of money tend to be involved. The devil lies in the detail and complexity of contracts. Applying the contract rules to given facts and circumstances leads to contention. Accordingly most contracts contain dispute resolution provisions.

There are a wide range of standard form and in-house contracts used in the construction industry. Some are very basic - most are comprehensive. They vary in user friendliness and the degree of "fairness" achieved in allocating risk and financial responsibility. Whilst it is inevitable that the parties will seek to strike the best financial deal possible, imbalances in the allocation of risk and profit ratios will inevitably lead to disputes since there may be no margin of error and lee way for give and take. Parties frequently fight their corner vigorously because they feel they cannot afford to make concessions and do not have the means to pay.

The failure to resolve disputes promptly can have serious business implications. Disputes cause delay and cash flow problems. Often a party is not prepared to risk "***putting good money after bad***" until an issue is resolved. Projects put on hold suffer from decay and pilferage, exacerbating losses which are frequently irrecoverable. Unresolved disputes and concomitant payment failures are a significant contributor to corporate failures, both of clients, financiers and developers/constructors.

The best way to deal with problems is to anticipate them and work with partners to provide solutions. Communication is essential and partnering procedures which facilitate communication can do much to prevent disputes arising and to manage conflict if and when it does arise. The Resolex contracted mediation process and Dispute Review Boards play a useful role in dispute avoidance and conflict management.

Today I will concentrate only on the dispute resolution process commonly used in the UK construction industry with a view to evaluating their respective benefits and limitations. Sadly, it is often the case that insufficient thought is given to dispute resolution provisions at the contractual stage, the parties simply selecting a standard form contract "off the shelf" instead of considering which process in the circumstances is most suitable for the project. Some forms offer a choice of dispute resolution process, which at least forces the parties to think about which to select. It is important to make informed choices.

Where a standard form contract does not include a dispute resolution clause the parties are advised to attach/incorporate a dispute resolution provision to prevent disputes arising about how to settle disputes. Even where a standard form contract contains a dispute resolution clause there is scope to amend / modify it. However where the standard form contract providers also operate an in-house dispute resolution service, governed by their own rules of conduct, these are likely to be displaced. Any new / replacement dispute resolution clause should therefore specify a proposed dispute resolution service provider and the rules / regulations / codes of practice that will apply. In particular it may be necessary to specify who will have the power to appoint the dispute resolution practitioner in the absence of agreement between the parties.

The principal processes examined today are expert determination by the contract administrator, judgment by adjudication, arbitration or litigation and negotiated settlement through mediation.

THIRD PARTY DETERMINATION

Whilst the courts (etc) must determine issues in dispute in accordance with "the law" this is no guarantor of "fair, just or reasonable" outcomes. The aim of the court is "***NOT***" to right any imbalance that might exist in the contract but rather to ensure that the duties under the contract are fulfilled and to provide compensation for consequential losses arising out of breaches of those duties. It is essential for the parties to get the contract terms right in the first place. It is not the job of the court to compensate for defects in the procurement process or to increase the price to assist a contractor who has under priced the works, even if the result is that a loss is inevitable. Negotiate appropriate terms in respect of price and other aspects of the performance of the contract. It will be too late to complain later if and when a problem arises.

Whilst the court will apply the law of the land, the principal rules and regulations governing relationships are contained in the contract. The contract is a source of personal law between the parties. There are a wide range of such standard form contracts available, developed over many years and amended in the light of experience to address issues and problems that have arisen, taking into account changes in the law. Theoretically each contract is designed to provide a manual for the efficient and effective operation of a construction project. With the exception of partnering contracts and some of the very recent standard form contract, most contracts favour one or other of the parties. They apportion risk for various aspects of the process and place control in the hands of one or other of the parties or their nominees.

A significant cause of disputes may be attributed to a lack of knowledge and understanding of the procedural requirements of construction contracts, particularly in respect of notices and applications and the payment provisions. It is important to chose your contract well, to know and understand its requirements and to ensure that relevant persons are aware of their responsibilities and rights under the contract.

EXPERT DETERMINATION

Because construction projects involve a wide range of variables and the right to payment depends upon the satisfactory completion of works or part works, which can involve answering highly technical issues, construction contracts often provide for an expert determinator / contract administrator to certify questions of fact that govern the right to payment. The role may be undertaken by an architect, surveyor or engineer, depending upon the form of contract adopted. Sometimes the administrator is directly accountable to the client but increasingly today, contracts such as the Institute of Chemical Engineers (IChemE) state that the administrator must be a wholly independent expert appointed jointly by both parties to the contract and often paid by both. By contrast under FIDIC 1999 the administrator is the employer's man, with the adjudicator providing the independent third party check on abuse.

A major distinction between the expert and the judge is that the expert determines mainly questions of fact, guided by the contract specifications, terms and conditions, not questions of law. The value of using an expert determinator is that many day to day issues that could potentially lead to disputes are dealt with automatically, quickly and inexpensively as a matter of course. However, there is considerable variation between the various contracts regarding the scope of power of determination of the expert, the effect of expert's decisions and finality of the decision and the inter-relationship between expert determinations and dispute settlement. Contracts frequently make the issuing of a decision by an expert a pre-requisite to a dispute, preventing arbitration / litigation from commencing until after an expert has considered a matter and issued a decision.

Contracts which do not involve the use of an expert determinator often state that payments will only be made in respect of work certified by the site manager who is also required to authorise day works and variations. Such arrangements often lead to dissatisfaction and to disputes, particularly when the site manager, whose job after all is to look after employer's interests, makes his presence known whenever it comes to giving out instructions but becomes mysteriously hard to find whenever a written instruction or authorisation is needed. Often work is done without authorising paperwork, because without the work other essential work is held up, leading to disputes over payment which is not officially due in the absence of written authorisation. Independent expert determination provides a better alternative, but the parties to a contract need to be clear about the terms and conditions under which they operate and choosing the form of contract which provides an effective but fair and balanced mechanism is important.

DISPUTE SETTLEMENT PROCESSES IN THE CONSTRUCTION INDUSTRY

LITIGATION

Default process : The courts are the principal mechanism for settling civil disputes. Judges are highly qualified, experienced and held in high regard but they tend to be legal experts with little empathy, knowledge or understanding of business/commercial practice and have to be advised by "Experts".

Enforcement powers : The courts have the power to enforce their decisions, so even if a party is no pleased with the outcome, apart from any scope for appeal or judicial review the decision has to be accepted. (Note that the court will also exercise enforcement powers in support of adjudication and arbitration.)

Where there is no dispute about the existence of an obligation to pay monies or about how much monies are due, recourse to a court with the power to enforce payment is the natural and obvious option for a claimant

Time – cost and commitment : The principal disadvantage of using the courts is the time it takes to get to court. Where a fast track process is available it is an attractive option for smaller claims. Most alternatives to litigation ***tend*** to be quicker than the courts, though some are quicker than others. Thus, adjudication and arbitration have a distinct advantage over litigation. Whilst the courts are needed for enforcement, because the court does not have to deal with questions of fact and law, merely issuing an enforcement order, this can normally be achieved relatively quickly.

The longer a dispute drags on the greater the expense for the parties. The failure to resolve problems quickly means that the parties have to allocate both time and money to the resolution process. The sooner a dispute is ended the sooner the involvement of lawyers can be brought to an end. The services of lawyers tends to be expensive so limiting the amount of input required by lawyers can result in significant savings for the parties. Whilst lawyers fees in support of ADR are broadly similar to those involved in litigation, the fact that most ADR processes take less time means legal costs are kept to a minimum.

Privacy : A significant advantage of ADR processes over litigation is that they are private, avoiding adverse publicity and keeping business secrets which could be useful to competitors out of the public domain.

Formality : The courts are very formal and have (despite the impact of the CPR and case management) rigid procedures.

Location : Whilst in the UK the TCC has been rolled out to the provinces, the parties have limited influence over location or the timing of trials which may not accord with business commitments.

ARBITRATION

Arbitration is the principal alternative to litigation for the settlement of construction disputes. In many ways the arbitration process resembles litigation. Arbitrators – "***judges in suits***" - act as private as opposed to a state appointed judges. The arbitrator will make determinations of both fact and law and apply these in order to produce a decision about who must bear legal responsibility and liability for losses arising out of a breach of duty, be it contractual or tortuous, as governed by the terms of any relevant governing contract and, having apportioned liability, will quantify the loss, award damages (if any) and costs.

The potential advantages of arbitration include :

1) Speed to get to the process and often quicker proceedings.
2) The cost of arbitration is often less than the cost of litigation.
3) Less formal than the courts.
4) The parties have control over the process, subject to any agreement to the contrary.
5) Choice of venue and potentially more convenient to the parties and witnesses.
6) Specialist arbitrators with industry experience and knowledge.
7) International awards are globally enforceable by virtue of the New York Convention on the Enforcement of Arbitral Awards.
8) More amenable than courts to choices of law and jurisdiction.

Speed : How long it takes to get to arbitration depends upon the system, if any, put in place by the arbitration service provider. Some arbitration clauses or rules require that the arbitration commences within a specified period of time or enables the parties to specify a time. A governing factor is the availability of a suitable arbitrator or arbitrators and the ability of the parties and the arbitrator to schedule a mutually acceptable time for the hearing. In complex disputes where both parties need a considerable amount of time to prepare for trial, the period lead in time to a court or arbitral hearing may be broadly the same. Because the parties have ultimate control over procedure arbitration can take longer than litigation.

Costs : The cost of arbitration is extremely variable. Fixed cost and fixed time, fast track arbitral processes are cost effective, particularly for small sub-contractors but they are not usually used for main contracts since the complex issues that tend to arise arguably do not lend themselves to limited proceedings.

Arbitrators are relatively expensive. There is no difference between legal representation rates for arbitration and litigation.

The parties will also have to pay the arbitrator(s)' accommodation and disbursements. The parties will have to pay for the venue, which unlike the courts will not be subsidised by the state.

The filing fees and administrative charges can be very expensive and may involve substantial deposits. Savings will only occur if the parties exercise restraint when controlling the arbitration process, keeping hearing within tight schedules.

If an arbitral award is appealed or subject to judicial review costs will escalate.

Judicial review provides a protective device against unfair and incompetent arbitrators and is thus valuable, but if the parties so wish the potential for review can be severely restricted by the parties agreeing to an award without reasons, which makes judicial review almost impossible.

Where the parties so require, an arbitration clause can exclude appeal.

Formality : Arbitral hearing are conducted in private rooms not courts, are less imposing and do not have court officials and strict codes of conduct for addressing the arbitrator. Rules of civil procedure do not apply. How formal the proceedings are depends very much on the personality of the tribunal. Arbitrators do no wear gowns and are normally addressed as Sir or by name. However, the broad functions of a tribunal and a court are the same, so parties can anticipate that the tribunal will control the proceedings with a firm hand and it is likely that witnesses and experts will be required to take an oath of some sort and be subject to cross questioning. Arbitration may be adversarial though it is more likely that the modern arbitrator will adopt an inquisitorial role and take the initiative in the discovery of facts and evidence.

The parties together (assuming they can agree) have considerable autonomy over arbitral procedure but often exercise this in advance at the contract stage. Autonomy covers issues such as the time allocated for each party to present their case, the extent to which witnesses and expert opinion is permitted and the time allocated for cross questioning. They may stipulate that only affidavit evidence is permitted, that expert opinion be limited to written reports or that a single expert be appointed to advise the tribunal.

The UNCITRAL MODEL LAW and the UNCITRAL ARBITRATION RULES have done much to ensure that modern international arbitral proceedings are cost effective, fair and efficient and modern arbitrators have considerable powers to keep the process on track, balancing the demands of the respective parties against the need for hearings which are proportionate to the size and value of the dispute at hand. Many countries have adopted the MODEL LAW or introduced reforms reflecting its aims and objectives. Thus the UK introduced a new Arbitration Act in 1996. The Act also requires the courts to play a supportive role to the arbitration process and severely restricts the powers of the court to interfere with the process.

Convenience : The location of courts is fixed. Whilst some arbitration service providers have dedicated premises it is normally possible for a tribunal to convene at any location mutually acceptable to the arbitrator and the parties. The parties negotiate the time for the hearing whereas a court will allocate a time whether it suits the parties or not. However, availability of the arbitrator may result in hard choices and some degree of inconvenience.

Specialism : Judges are allocated to a trial by the state. The parties have little or no influence over the allocation and the grounds for objection to an appointment are limited. Arbitration regulatory bodies and arbitration service providing bodies set high standards for the qualifications of their listed arbitrators, many of whom become extremely well known in due course to the business community. Depending on the appointment mechanism for the tribunal the parties may appoint the tribunal by mutual agreement or alternatively select the panel from a list provided by an arbitral institution. Often in the case of three panel tribunals each party selects an arbitrator and the two selected arbitrators select a third as chairman or umpire. Where the parties are unable to agree, a court or arbitral institution may appoint the tribunal. Some contracts provide for direct institutional appointment. The contract or institutional rules may, in the case of international disputes, require that the tribunal is composed of overseas arbitrators or that the chairman is foreign to both parties. It is normally possible to request an alternative nomination if the parties do not consent to institutional appointment. To a very large extent the parties rely heavily on the expertise, reputation and integrity of the institutional body that is involved in the appointment of the tribunal and regulation of the arbitration proceedings.

International Enforceability : The international coverage of the New York Convention on the Enforceability of Arbitral Awards is very wide but not every state is a signatory. The result is that international arbitral awards are readily enforceable worldwide, with all major states enforcing the convention.

The Convention itself provides a mechanism for challenging enforceability on the grounds of breach of due process (judicial review), illegality, lack of and excess of jurisdiction by the arbitrator and for public policy reasons. This provides a valuable safeguard against abuse. Challenges are however restricted to the extent that often the governing procedural law will require a party to raise objections to breaches of due process and jurisdiction during the hearings, so that in practical terms only a person who has refused to participate or has not been given sufficient notice or opportunity to participate can rely on these grounds to prevent an award being enforced.

It should be noted that, rather than challenge the enforceability of an award, a party may either appeal against an arbitral decision or apply for judicial review, assuming the party can establish grounds for appeal or review and or that there is a right to appeal under the contract. A contract can state that an award is final and binding preventing appeal. This guarantees finality and protects the privacy of the arbitral process. As observed above, judicial review is severely restricted if, as is common in the US the award is made without reasons. Under the Arbitration Act 1996 in the UK and likewise under the UNCITRAL MODEL LAW reasoned awards are required unless the parties specifically otherwise agree.

Choice of Law : It is very important in international contracts to determine the substantive law that will govern a contract. Apart from the unifying effect of international conventions such as the Vienna Convention on the International Sales of Goods there is little global uniformity in commercial law. The statutory rights and duties of the parties to commercial contracts vary in many ways from country to country and rules governing offer, acceptance, rectification of contractual terms, frustration, mistake, undue influence, legality and remedies for breach contract vary in significant ways. Contracts tend to be written with the laws of a particular state in mind and different versions may exist for projects in different countries. Incorporating international conventions is one way of reducing the problem.

Choice of Jurisdiction : This is closely related to but distinct from the choice of arbitral seat. The parties may chose to have disputes settled by the courts of a particular state, which is a simple choice of jurisdiction clause. However, if the dispute is to be settled by arbitration, the courts will play a secondary rather than a primary role. The procedural law of the state where the seat of the arbitration is located will govern the arbitral process. Thus an arbitration subject to English Law and Jurisdiction will be subject to the rules of arbitration procedure set out in the Arbitration Act 1996. The Act determines the powers of the court in support of the process, the default powers and duties of the arbitrator, and a number of mandatory statutory rules which cannot be overridden by the parties.

ADJUDICATION

A number of domestic standard form construction contracts[1] and international standard form construction contracts provide adjudication facilities.[2] The ICC[3] provides a pre-arbitral procedure for the settlement of all types of dispute be it construction or commercial. The process resembles adjudication.

Adjudication here is used in a specialist, technical sense, rather than the general meaning of the word which applies to what all judges and arbitrators do, which is "***to adjudicate***". What then is this thing called adjudication ? In essence it is a method of achieving a quick decision, using an inquisitorial / pro-active approach, with limited hearings, which is immediately binding upon the parties but is not a final resolution of the dispute because the parties can subsequently proceed to a full, start from scratch / "***de nouvo***" arbitral hearing, which may reach a completely different result to the adjudicator and require repayment of monies and a fresh award, turning winners into losers and vice versa. Apart from the temporary finality of the decision, adjudication closely resembles fast track arbitration, sharing many of its central features, such as peer review, privacy (unless challenged on enforcement) flexibility and informality.

The adjudication process so impressed the UK legislators that by virtue of **Part II Housing Grants Construction and Regeneration Act 1996**[4] they made it compulsory, at the option of either party to a UK construction dispute. However, overseas construction disputes are not subject to the provisions of the Act even where the law of England & Wales applies to the contract. Australia and New Zealand have introduced statutory adjudication processes. Adjudication provision, both voluntary as with FIDIC and statutory as with the HGCRA is likely to expand substantially world wide over the next decade, particularly with regard to the construction industry to which it is ideally suited.

What is it about adjudication that has impressed so much ? Where the process has been most successful, it is the low costs, speed, informality, use of industry experts, and general satisfaction with the quality of decisions that has led to it winning general approval from the industry, though it must be said that the process has its detractors. The statutory process in the UK has been thoroughly tested by the courts over the last five years. Attempts to evade the process by reluctant parties have proved by enlarge to be unsuccessful and rapid enforcement coupled with a very low percentage of challenges to adjudication decisions has effectively shown that despite the fact that the decision is not automatically final, the decisions of adjudicators have turned out to be final in over 98% of cases. The challenge process, rather than being routinely used has thus proved to be merely a safety net provision which has rarely been called into use.

Hearings are rarely used in adjudication, though they can be if the adjudicator or the parties consider that a hearing would be useful. Rather the process relies primarily on paper submissions. The statutory process runs to very tight schedules, namely 1 week from notice of dispute and appointment of the adjudicator to submission of claim and 4 weeks for the submission of defence, response to defence, hearings / site visits (if any) and the issue of the decision. The claimant can ask for a two week extension of time, resulting in a time scale of between 35 to 49 days in total. Whilst lawyers are frequently involved in client representation, there is little scope for the running up of vast legal costs. Hence, the overall cost of adjudication is quite modest. Adjudication is very affordable for the small contractor who might not otherwise be able to pursue a claim through arbitration or litigation because of the high costs involved.

Adjudicators are drawn from the ranks of established construction arbitrators reinforced by newly trained adjudicators mostly with experience as civil engineers, surveyors and architects. It is this expertise and understanding of the industry that has helped to ensure that the standard and quality of adjudication decisions has been relatively high in the UK. The process has proved to be most valuable between the prime and the sub-contractor including suppliers of goods and services to the industry, though it has been used between employer and prime. The process has even been successfully used by civil engineers and architects.

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1 The DOM /1 introduced a limited form of adjudication in 1980 (now revised for the UK).

2 For example the FIDIC 1999 Rainbow Suite adjudication and Dispute Adjudication Board processes. The FIDIC adjudication process differs substantially from the UK model both in time scales and procedures.

3 The ICC pre-arbitral procedure has not yet been widely used so little comment can be made about its effectiveness or otherwise. Note that the ICC does not provide standard form construction contracts.

4 Hereinafter referred to as the HGCRA.

The HGCRA also introduced payment rules including the issue of withholding notices which "***must***" be complied with if the employer wishes to withhold payments from the prime or if the prime wishes to withhold payment from subcontractors. However, the notice provisions are frequently ignored by the industry. The Act also banned "pay when paid" provisions. It is wise to adopt similar provisions as terms of the contract for non-HGCRA contracts.

Perhaps one of the greatest successes of adjudication is the least easily measurable, in that it deters parties from behaving unreasonably. Many disputes have come to an abrupt end upon issue of a statement of claim. The luxury of putting off the fateful day of payment is denied by this rapid process so there is no point in putting forward groundless defences to buy time.

The down side of adjudication is that some parties deliberately exploit the loopholes in the process, by for example not using written contracts. There are problems with cost provisions in contracts and the process is being used for very large and complex disputes, particularly in respect of final accounts, for which it is not best suited. Amending legislation is anticipated in the UK to fix some of the problems that have been exposed over the last few years.

MEDIATION

Mediation is an independent, third party assisted, negotiation process. The role of the mediator is to help the parties to find a "***mutually acceptable***" solution to their dispute. Unlike an arbitrator or judge, the mediator cannot impose a solution. Each party maintains control of the process. No solution is possible without the consent and cooperation of "***both***" parties. Mediation is thus deemed to be the most "***consensual***" of all the available alternatives to litigation. It is extensively used for the settlement of construction disputes in the US but its use by the UK construction industry is (whilst rising) very modest, perhaps because of the success of adjudication.

Mediation offers a valuable contribution to construction dispute resolution, because when it works, it is speedy and cost effective. Furthermore, unlike litigation, be it through the courts or arbitration, mediation tends to facilitate the maintenance of ongoing business relationships.

Mediation is not a magic "cure all". It does not render litigation and arbitration redundant. Each dispute resolution process has advantages and disadvantages. Ideally disputants should use the process most appropriate for the resolution of a given dispute. Let us now consider when mediation can be beneficially used to settle construction disputes, highlighting the conditions that need to exist in order for the parties to a dispute to avail themselves of the process, together with an examination of how and why the process works.

SOME OF THE PROCLAIMED ADVANTAGES OF MEDIATION

- Speed – days to weeks rather than months to years to commence the proceedings.
- Short hearings – one day is often sufficient – witnesses and experts are rarely called.
- Private – no press reports or adverse publicity – proceedings are privileged / not admissible in subsequent court proceedings and not recorded : all records and evidence are destroyed or returned to the parties apart from the written settlement agreement.
- Cost - relatively inexpensive – due to short hearings and absence of discovery processes and cross questioning.
- Convenient location- two rooms in a hotel or offices are all that is needed – in the country of choice of the parties and the mediator.
- Informal – no judges, robes, official recorders or court procedure.
- Lawyers are optional – though expert advice is very desirable. Self representation is permitted.
- The parties remain in control – there is no judge and no enforceable judicial award – so there is little to lose from taking part but potentially everything to gain.
- Works domestically and internationally – ideal for international trade and maritime disputes - and more sympathetic to multi-cultural issues.
- Linguistically flexible – can be conducted in the language of choice of the mediator and the parties.

- Not restricted to legal solutions and thus more flexible than going to law.
- Not restricted to the law of one country – so truly international solutions possible.
- More amenable to the preservation of business relations – less likely to result in winners and losers – enables the parties to retain "face" and where possible to continue trading after ending the dispute.
- Mediators are experts drawn from the industry and understand the issues and the business – whereas few judges have worked in commerce of in the maritime industry.
- Multi-party mediations are possible and can include interested parties such as banks, financiers and insurers and inter-related business partners – particularly useful in international chain sales involving transportation

THE NATURE OF THE MEDIATION PROCESS

Business is about cost effective contracting, management and delivery. The "***art***" of business lies in striking the right balance between profitability and the risks inherent in any given ventures. It is usual for construction contracts to identify a number of different foreseeable factors that could go wrong during the course of the venture and allocate the risks of those factors occurring to one or other of the parties. Business disputes tend to arise because one party perceives that some loss causing event has occurred, which in his opinion is contractually the responsibility of the other party, whereas the other party refuses to accept that the problem is his responsibility or, even if he does accept responsibility, is not prepared to do everything that the complainant demands to put the problem right. Alternatively disputes often arise as to how to deal with an unusual problem that is not governed by or anticipated by the terms of the contract. It is the failure by the parties, despite their negotiating experience and expertise, to find or negotiate an agreeable solution to such problems that gives rise to the disputes.

"***How can mediation, which relies on mutual consent and cooperation, solve a dispute when negotiations between the parties has already failed to do so - why might a mediator succeed where they have failed ?***"
The answer lies in the fact that frequently the parties to a dispute develop tunnel vision. The longer a dispute goes on the harder it becomes for the parties to separate themselves from their view as to who is responsible, what the contract requires them to do and most significantly of all, what will happen if a solution is nor found. As an independent outside observer the mediator is able to take a fresh, objective view of the situation and help the parties to re-evaluate the risks that they will be exposed to.

A mediator cannot make the parties agree and cannot impose a solution. The mediator's skill lies in the art of communication and to help the parties to explore solutions which are in their best commercial interests. Disputes generate a climate of animosity where parties will frequently chose to take a course of action which is commercially detrimental to their organisation simply to prevent the other party gaining an advantage. If a party can prove that the chances of success at litigation are high and that it will produce the greatest advantage to their organisation, mediation is unlikely to succeed. However, where the chances of success are evenly spread between the parties and the likely outcome is less advantageous than settlement, an experienced mediator should be able to guide the parties towards a settlement.

There is an added value to mediation, in that mediated settlements are frequently more evenly balanced than party negotiated settlements. Often the stronger party is able to force the weaker party to compromise without any genuine negotiation taking place and without a meaningful evaluation of their respective commercial rights and duties. Mediation can address this problem.

MEDIATION = WIN/WIN : LITIGATION = WIN/LOSE : What does this mean and why ?
Arbiters are asked to decide a specific question, namely which of the parties is responsible for a loss causing event. Once this is determined the arbiter assesses how much money, if any at all, is due to be paid by the person responsible to the other party. Often costs follow the event. Litigation results in a "WINNER" and a "LOSER". There is no middle ground. Contributory negligence and mitigation apart, there is no scope for the arbiter to share the costs of the problem between the parties. He cannot slice the cake. One party gets the whole cake, the other gets nothing. There is no requirement that the decision be either "fair" or "just". A judge once famously observed "This is not a court of justice. It is a court of law."

The arbiter makes a determination of fact, applies the applicable law to the facts and circumstances of the case, as proved before him in the court or tribunal and thereby produces a decision or ruling. The scope for decision making by the arbiter is limited by the law. If the law is just and fair then there is a chance that the decision will be but that is not always the case and where it is not it is unlikely to be the arbiter's fault. Why might it be that the law cannot guarantee a fair or just outcome ? Consider the following :-

Wining on a technicality : The circumstances when an arbiter can apportion responsibility under the law are severely limited and restricted. However, frequently neither party has acted in a particularly irresponsible manner and the loss causing event is simply the result of a combination of unfortunate circumstances. In the absence of a clear contractual allocation of risk for the loss neither party is likely to be prepared to shoulder responsibility and frequently comes to believe that the loss must be due to some form of failure or wrong doing by the other party, often fuelled by hindsight. In effect the allegation becomes "If he had done X the problem would have been avoided, so it is his fault." Foreseeing the need to do X at the time may not have appeared prudent, though clearly after the event it is easy to see why it would have been a good thing to do. The decision of the arbiter in such circumstances is likely to appear to be an arbitrary decision based on legal technicalities. Whilst a fair result might be to share the responsibility evenly between the parties, as discussed above, this option is not available to the arbiter.

The unhelpful business partner : Many loss causing events are the result of a combination of actions and events which both parties have to a greater or lesser extent contributed to. Often one party could have done something to assist the other party but had no legal duty to do so. The failure to assist may have been due to an oversight, self protection or because it would have involved financial loss or inconvenience, albeit perhaps relatively minor compared to the problem it would cause the other party. Whilst perhaps harsh or callous it may well have been perfectly lawful to fail to provide assistance. In the absence of wrong doing the law cannot apportion loss between the parties to take account for such harsh or careless conduct. The law will limit itself to apportioning loss on the basis of proven wrong doing alone.

Proving facts : The ability to establish in court what actually occurred is fraught with difficulties. The tribunal decides on the basis of what is presented to it what in the opinion of the court occurred. There is no guarantee that this will be what actually occurred. The tribunal draws a conclusion on the basis of the credibility of the witnesses and their ability to recall and describe the events. A witness with a poor reputation for reliability may not be believed by the tribunal even if telling the truth. Witnesses frequently have a distorted view of events which they portray to the tribunal in a very convincing and compelling manner. Time has a tendency to play tricks on memory. The party who has kept the best records or events and perhaps engaged in the most written communication has a distinct advantage in court.

Quantifying loss : Establishing the amount of loss that has been sustained as a result of the wrong doing of the other party is a question of fact for the tribunal. Evaluating the loss is more of an art than a science and the outcome is often far from predictable. The failure to recover sufficient damages in court to cover the winning party's perceived losses because of problems in proving the losses often leads to dissatisfaction with the judicial process.

Interpretation of contracts : The precise meaning of the terms of contract is a question of fact for the tribunal. Both parties may be convinced that they know what the contract meant and assert that the contract provides in their favour. However, the contract can only have one meaning and hence, even though the decision may appear arbitrary and based on a technicality, one party will inevitably lose. The loser is unlikely to derive a sense of justice or fairness out of the decision.

Causation : Many of the follow on consequences of loss making events are not legally recoverable. The law only allows a party to recover losses directly arising out of an event. Indirect losses can however frequently be far more significant for one or even both path parties and can outweigh the costs to either party of solving the problem quickly at minimal cost at the outset.

MEDIATION AND THE LAW

Courts apply the law. Much time is spent proving facts to the satisfaction of the court. Counsel is expensive. Court proceedings involve protracted legal argument. Going to law for the settlement of construction disputes is by common agreement an expensive business.

In a mediation the parties do not have to prove any facts to the mediator. Nor do the parties have to prove what the law says they are entitled to. This is because the mediator does not make a decision. A mediation settlement is based on what each party is prepared to agree. A party may pay more than he believes he is strictly required to pay under the law or settle for less than he believes he is legally entitled to. Unlike a court judgement, a mediated settlement represents what each party considers is fair, just or practicable and amounts to what they consider to be the best deal that can be achieved in the circumstances. Where the wrong doer is in severe financial difficulties an award may lead to bankruptcy. Apart from some sense of justice, the winner will reap little or no commercial benefit. A settlement agreement however could include joint financial measures or even the terms of a take over, of mutual benefit to both parties.

The fact that mediation is not a judicial process does not mean that law has no role to play in the negotiation settlement. In fact law is crucial to the effectiveness of the process. The legal alternative to mediated settlement is the principal reason for reaching a settlement and the legal requirements that would be enforced at law set the framework for shaping the actual settlement itself. The courts are essential for the enforcement of mediation settlements.

Any mediated settlement, whilst inevitably not a mirror or what a court would award, is likely to be shaped by the legal rights and obligations of the parties, subject to concessions financed out of the avoided cost of litigation, rapid cash flow benefits and uncertainty as to exactly how much might be recovered from a court or tribunal. The primary instrument of persuasion for the commercial mediator is the "***REALITY CHECK***" where the mediator forces the parties to consider likely judicial outcomes if a settlement is not forthcoming, including the costs (recoverable and non recoverable) from litigation and interim cash flow implications.

It is only by having a reasonable understanding of the relevant law as it would be applied in a court seized with jurisdiction over the dispute that the parties can assess the legal implications of the claim and defence. Whilst the degree of legal knowledge and expertise required to litigate is far higher than in mediation, a lack of legal understanding during the mediation process can result in undue optimism or excessive pessimism, leading either to a failure to make realistic concessions or alternatively to uncalled for generosity.

ENFORCEMENT OF MEDIATION SETTLEMENTS

The enforcement of mediation settlements differs radically from court and tribunal award enforcement. A mediated settlement is the equivalent of a new contract which replaces the original contract. The agreement is enforceable as a simple contract under the normal law of the land of the state where enforcement is sought. Mediated settlements tend to be in the nature of a debt and are more easily enforceable than general contract terms since there is no need for the court to determine the meaning of the terms of the contract. Most national courts will enforce mediation agreements. Often a settlement can be lodged with a court and any failure to comply will be a treated as contempt of court. Alternatively, it may be advisable to sign a deed of settlement to ensure enforcement. Frequently payment is made immediately after the settlement agreement is signed and before the parties leave, which renders enforcement unnecessary unless the payment proves to be defective. Immediate direct electronic cash transfers are one way of ensuring payment.

GETTING INTO MEDIATION

If Mediation is such a useful process, how can a party to a dispute ensure that the dispute is submitted to mediation ? The answer is that unless the contract provides for mediation it may be very difficult to do so. It is impossible to make a party actively engage in mediation, though in some countries the law may impose financial penalties on defendants who refuse to use the process and may even prevent claimants from going to court unless an attempt at brokering a mediated settlement is attempted. However, the law cannot force parties to agree. At the best it can encourage active participation but no more because by nature agreement is a purely voluntary process.

In the absence of a mediation clause it is possible for parties to agree after a dispute has arisen to submit to mediation but such agreements are rare because relationships have often deteriorated to such an extent that the parties are no longer capable of agreeing on anything at all at that late stage, ensuring that litigation is then the only way of ending the dispute.

AVOIDING MEDIATION

Can a party to a contract with a mediation provision go to court or arbitration and over-ride a mediation provision ? The answer is YES if the other party agrees to over-ride the provision or takes an active part in litigation, providing the courts or the arbitrator do not object. The UK the courts will often object and insist that the parties attempt mediation and will only go ahead with a trial if the defendant refuses to mediate or if the mediation has failed to settle the dispute. The same will apply to the whole of the EU if the current mediation proposals of the European Commission Report on ADR are adopted. However, it is essential that the mediation process be over-ridden at the request of a claimant if a defendant refuses to take part in a mediation, since otherwise the claimant would be denied justice.

In the UK, a party who fails to take an active part in mediation when it is specified in the contract or is recommended by the courts may suffer financial cost penalties in that even if they prevail in litigation the court may refuse to award costs and even order payment of the costs of the other party if the court feels it is justified in the circumstances of the case. Thus the rule that "***costs follow the event***" is overturned in such circumstances.

EVALUATION OF MEDIATION

There are rarely any real winners in conflict. No one ever recovers all their costs and expenses from litigation, which is also emotionally draining and time consuming. Furthermore, litigation is disruptive and detracts from the real business of making money. Where it is clear that a party is in the wrong and cannot win, all that litigation achieves is to postpone the time when they will have to account. An early settlement, even at full cost will save on legal expenses. The other party may well be prepared to accept a lesser sum in order to avoid the costs and risks of litigation and view the discount as beneficial particularly where it maximises cash flow at an early date. The mediator, by outlining the advantages of settlement to both parties, can often bring about a settlement in the most difficult cases and unlikely circumstances.

This is not to say that litigation is never necessary. Where the rights and wrongs of a situation are not clear the parties may only be prepared to accept the decision of a judge, particularly if the decision will help establish guidelines for future relationships. A loss resulting from a court judgment may be easier to justify to stake/shareholders or to superiors than a negotiated settlement on terms that might otherwise be open to criticism, and so a judgement is needed. Finally, where a wrongdoer is totally unwilling to take responsibility for their actions the other party may be left with no option but to go to court.

Mediation shares many of the benefits of arbitration in that it is private, quick and relatively inexpensive. However, the parties themselves maintain control over the decision making process rather than handing it over to a third party. There is an obligation to participate in the process but no obligation to reach a settlement. If no settlement is achieved the parties are free to proceed to litigation. However, having canvassed the issues thoroughly in advance during the mediation process pre-trial preparation will be at an advanced stage and many side issues will have been resolved resulting in a quicker and more efficient trial.

At a mediation, the mediator acts as a go-between, exploring issues with each of the parties in turn, facilitating them to find a way to broker a settlement. The process has much to offer where the parties realise that a settlement is necessary and are prepared to broker a settlement. Many court cases settle on the steps of the court. Mediation achieves a similar result but involves the parties directly and leads to far more satisfactory settlements than are brokered by the hands off approach of settlement through the auspices of lawyers. Mediation settlements frequently include agreements for the future conduct of business rather than a mere settlement of the dispute at hand.

Mediation has less to offer where a party adamantly refuses to recognise any liability whatsoever, to pay or perform services or put something right. Even here, participation in the process can result in the recalcitrant party realising that their stance is unrealistic, paving the way for a settlement.

Apart from being relatively inexpensive mediation is a valuable tool for repairing damage to commercial relations. Mediation is a serious process and has been successfully used to settle disputes involving very large sums of money. A great advantage of mediation is that it lends itself to multi-party dispute settlement and can therefore replace an entire series of arbitrations or court actions. Mediation agreements are readily and easily enforceable before the courts if the mediation agreement is breached.

Mediation is increasingly being used for non HGCRA contracts, particularly for domestic building work. Furthermore, it is not uncommon for a successful party at adjudication to use the decision as a lever for the mediation of on-going relationships in a project, where the adjudication provides only a partial solution to broader problems and issues.

RESOLEX appear to be making a mark for themselves with the concept of "contracted mediation" and some large projects such as the Channel Tunnel have made use of Dispute Resolution Board processes – which have much to offer the public private finance project with on-going dispute resolution provision after the building is completed and the site has to be operated with co-operation between the parties to enable the constructor to get a return on their investment.

OVERALL CONCLUSIONS FOR THE CONSTRUCTION INDUSTRY

It is virtually impossible to eliminate or prevent disputes arising during the course of commercial transactions. As and when they arise, disputes have to be dealt with and brought to an end, but dispute resolution is never cost free. On balance, arbitration and or adjudication provide the best alternative to litigation for the resolution of construction disputes in the shortest period of time, at the least expense to the parties and in the most informal and user friendly manner. Nonetheless, arbitration is not fool proof and problems can and do arise which negate the anticipated benefits of using the process.

Traditionally, the construction industry has developed a reputation for poor commercial relationships and destructive disputes. This is regrettable since there are seldom any overall winners from disputes which damage the interests of all the parties involved. Much progress has been made introducing new codes of practice into the industry and a modern ethos of integrity, mutual respect, cooperation and partnership founded upon negotiation and concepts of best value. However, when the talking stops and compromise and negotiation fails, as it inevitably will from time to time, time efficient, cost effective dispute resolution processes are required.

Innovation is the hallmark of the construction industry which has had to cope with an amazing range of technical developments to meet the needs of modern society, commerce and industry. This same talent for innovation is now being extended to dispute resolution systems within the industry. The days when litigation and arbitration provided the only means of settling disputes are fading fast. The new systems and hybrid combinations of the various systems are likely to predominate in the future.

In the UK it would appear that adjudication has become firmly established as the first port of call for the settlement of construction disputes. However, its success has forced arbitration to adapt to provide viable alternatives, solving perceived defects in the adjudication process whilst emulating its best features.

The incorporation of an adjudication clause, where the HGCRA does not apply, is a way of ensuring rapid solutions for issues that cannot be dealt with by the contract administrator or where the parties disagree with the expert administrator. This fail safe mechanism backed up by arbitration provides a viable model for the international community. Alternatively, incorporating a fast track arbitration process which benefits directly from the New York Convention on the Enforcement of Arbitral Awards 1957 is also worth considering.

Whatever the future holds, one thing is sure, change and innovation in dispute resolution provision in the construction industry is inevitable.

