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LANDLORD AND TENANT DISPUTES

Paper

"AVOIDING DISPUES AND WHAT TO DO IF THINGS GO WRONG"

By

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AVOIDING DISPUES AND WHAT TO DO IF THINGS GO WRONG

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My remit today is to contribute that part of this seminar concerning "private sector construction disputes". I propose to concentrate on "avoiding disputes" in the context of "getting the contract/agreement right" and, if a dispute does arise, how to "keep ownership of the dispute". I will then have a look at fast track arbitration, particularly the 100 day Arbitration Procedure that has been published by the Society of Construction Arbitrators and the Chartered Institute of Arbitrators' Short Form Procedure..

I am a Quantity Surveyor, and until I became fully and exclusively enmeshed in dispute resolution ten or so years ago, my main purpose in life, at least as far as the professional aspects of that life were concerned, was to be a part of a team involved in the successful procurement of construction projects.

By successful procurement of construction projects, I mean ending up on time and on budget.

My career as arbitrator and, more latterly, as adjudicator has provided me with the opportunity to confirm the view that disputes generally arise as a result of someone not getting their sums right. That often results from a pressure to see something happening on site or an unrealistic design programme.

A typical scenario is one where the design is not finished and someone has to take a stab at something that for a few more weeks design time would be properly designed and available for costing properly. All too often there is evidence that no-one stood back and took stock before into starting work on site. Drawings are released too early for the Quantity Surveyor or builder to cost. The Quantity Surveyor, if involved, does not fully allow for what the Architect has not designed. The builder's estimator does not include in his price for the things that the Architect and QS have not allowed for or, on a design and build project, allow only the minimum that they think the specification requires. The project costs too much and savings are made on the basis of incomplete information. The design is finished after the work starts on site, things turn out to cost more than anticipated, when the design is produced it reflects the designer's original thoughts and does not take into account the savings made to reach a contract sum that is acceptable to the Client.

Subsequently there are information delays when the builder identifies aspects of the construction that have not been detailed properly. There is standing time, disruption and delay claims are made. These claims are often subject to no more than token payments throughout the course of the works. The general thinking appears to be that it is better to get the building finished in order to allow the employer into occupation, than to resolve things as they go along.

This does often seem to work out quite well with the employer paying rather more than he originally anticipated and the builder reducing the amount of his claim substantially.

It seems to be an acknowledged fact that the number of disputes referred to a third party appears to increase when there is less work about and attitudes harden in an attempt to make more money out of past projects.

So my first point is, if you are involved in a construction project of any kind, get your contract arrangements right. Get the design resolved properly before the contract sum is finalised. Make sure that what the contractor prices is what the client is expecting to receive at the end of construction. Don't change things after the price has been submitted and agreed. A contingency

sum should not be there to pay for things that the Architect, Engineer or QS has not included in the tender documents but to allow for unforeseen occurrences such as bad ground or difficulties in working in an existing building.

My next point relates to the form of contract to use. The form of contract that is chosen is all about the allocation of risk. At one end of the spectrum there is the Prime Cost Contract the Management Contract where the entire risk as regards cost lies with the employer. At the other end of the spectrum, provided that the Employer's Requirements document is watertight and the contractor's tender includes for the specification that the employer expects, the whole of the risk lies with the contractor. Provided that each party really does know the level of risk that is being undertaken, and allows the other party to operate in accordance with that contract, there should be no problem. All too often however, it seems to me, from my perspective of picking up the pieces at the end, that the assumptions made by the parties are like ships that pass in the night. The principal problem being that one party, generally the contractor, has priced the job on a basis that is different from the employer's expectations.

If something goes wrong, what then?

Things generally seem to sort themselves out by negotiation between the parties. In most cases a settlement is reached where the employer pays more than he originally expected and the contractor receives less than he claims.

In this way the parties remain in control of their dispute and of the outcome. Unless there is some other agenda, no one wants the loss of control that will result from the dispute ending up in the hands of a third party such as an arbitrator or a judge.

There is however another way. A way in which the parties can have the benefit of the views of a third party without totally losing control of the dispute. There are two particular methods. The most commonly used method results from the introduction of the Housing Grants, Construction and Regeneration Act 1996 which has provided the statutory right to adjudication. A similar voluntary method is early neutral evaluation.

An early neutral evaluation provides the parties to a dispute with a non-binding assessment, by a neutral, of their respective chances of success should the dispute proceed further in the Courts or in arbitration. This procedure involves the agreement of a neutral who may be a technical man or a Commercial Judge. The neutral receives presentations comprising the nature of the dispute and the parties' respective contentions. The neutral then gives to the parties an evaluation of the issues indicating his view of the strengths and weaknesses of the claim and defence.

This procedure is set out in the Second report of the Working Party on ADR set up by the Courts Service. You will find this on the Courts Service website at
www.hmcourts-service.gov.uk/publications/misc/admiralcomm/working_party.htm
together with a considerable amount of information relating to ADR Orders made by the Courts. This is clearly a procedure where the parties to a dispute, having received the evaluation, can step back and seek to negotiate further before proceeding before a judge or arbitrator.

A brief resume of the statutory right to adjudication under the Housing Grants, Construction and Regeneration Act 1996 (HGC&R Act)

In 1996 the Government decided, having received some serious lobbying from the construction industry and sub-contractors in particular, that payment procedures in the industry could be

improved. The basic premise is that a party to a construction contract as defined in the HGC&R Act is entitled to refer any dispute arising under the contract to adjudication at any time. There is no requirement for agreement, it is a unilateral right. The parties cannot contract out of the statutory right. If the contract does not provide for adjudication on the terms required by the Act, the provisions of an accompanying secondary piece of legislation, the Scheme for Construction Contracts (England and Wales) regulations 1998, are implied into the contract and provide the set of rules under which the adjudication is conducted.

When a party wishes to refer a dispute to adjudication he issues a Notice of Adjudication. The adjudicator must be appointed and the dispute referred to the adjudicator within 7 days of the notice of adjudication. The parties can agree the adjudicator or a nomination is made on application by an Adjudicator Nominating Body. These organisations operate on a commercial basis. Each has a list of adjudicators and generally has no problem in nominating within the 7 day period. Once the dispute is referred the adjudicator is required to make his decision within 28 days. There are provisions for extension of time, up to 14 days by the Referring Party and for a longer period by agreement of the parties.

The decision of the adjudicator is enforceable in the Courts. It is thus binding on the parties. The parties are however only bound until the same dispute has been referred to an arbitrator or the Courts and has been finally determined. The phrase "temporarily binding" was coined in respect of an adjudicator's decision and this caused a substantial amount of comment. Fortunately the Courts understood precisely what it is all about and have supported the process fully and as a result it has proved to be very successful. There have been 15,000 or so adjudications in the six years since the HGC&R Act came into force and no more than 300 of these have been the subject of an action to enforce the decision.

As far as the continuation of disputes beyond the adjudication process is concerned, it would appear to be minimal. The work of the Technology and Construction Court has reduced dramatically in the area of construction disputes and construction arbitration appointments are pretty thin on the ground for construction arbitrators. .

You may be surprised when I say that adjudication is a process where the parties retain ownership of their dispute. I say that because of the temporarily binding nature of the adjudication decision. What has become evident is that adjudication is acting as a catalyst for the settlement of disputes. There are those disputes that will never settle without an Arbitrator's Award or a Court Judgment but the construction dispute business of the TCC and arbitration appointments are way down and an adjudication thus almost invariably leads to a settlement of a dispute.

The events in a typical dispute that goes to adjudication seem to be as follows: The Adjudicator's decision is enforceable in the Court unless the adjudicator has not complied with the rules of natural justice – been fair - or has acted in excess of jurisdiction. (The 300 odd cases that have been to the court are mainly in those 2 categories but as a proportion of the whole they are next to nothing.) In the eyes of the parties the adjudicator has got his decision right or about right. The parties may not be totally happy but it is an answer that they can live with. The parties accept the decision, and, knowing that the Court will in all probability enforce, the monies awarded change hands.

It may not however be the exact amount awarded that changes hands. Adjudicators' decisions are often used as the basis for negotiation. The threat of an arbitration or an action in the Courts may result in further negotiation and a settlement at a different figure from that awarded. Part of these

further negotiations may be the commencement of an arbitration or a court action and when faced with many more months of dispute resolution, settlements generally seem to result fairly shortly thereafter.

If all the above comes to naught, there is arbitration or the Courts. Arbitration has the benefit of privacy whereas a dispute that goes to court is in the public domain. The arbitrator should be a person who has the ability to understand the dispute and cost benefits should result from that but in construction matters there is probably little to choose between an arbitrator and the Judges of the Technology and Construction Court given the familiarity of the latter with construction matters. Unless expedited procedures are instigated however they both generally take too long and are too expensive.

Without expedited procedures, the stately dance of formal pleadings and disclosure followed by a hearing where a large number of witnesses are cross examined by learned Counsel which is then followed by the Arbitrator or Judge pondering for a length of time before he produces his Award or Judgment is an immensely large hammer when the nut that is to be cracked is relatively small. Of course there are cases both in court or arbitration where the issues are such that only the formal adversarial process will do but in these days of the CPR, proportionality and the requirements of ss 1, 33 and 40, of the Arbitration Act 1996, such procedures tend to be rather more truncated than before.

It is not part of my remit to talk about Court procedures.

There are two expedited arbitration procedures that I have appended to my paper.

These are:

The Short Form Procedure of the Chartered Institute of Arbitrators produced as an appendix to their 2000 Rules,

This replaces the procedural section of the main rules and is thus not stand alone. The whole document is available at www.arbitrators.org/DRS/

and

The Society of Construction Arbitrators' 100 day Arbitration Procedure available at www.arbitrators-society.org/news .

In the context of my premise that it is better for the parties to retain control of their dispute arbitration comes way down the list. It is however a fact that the majority of arbitrations settle before they get to a hearing. The parties do remain in control if they continue to negotiate during the course of the arbitration.

One great benefit of arbitration is that rules and procedures similar to those in the Court apply particularly in the areas of preparing statements of the Parties cases and disclosure.

It is often the case that in adjudication that the time pressures or the nature of the representation, the Parties often represent themselves, mean that the way in which a case is presented is not conducive to clarity. There is often a paucity of information that may not assist in achieving an acceptable result. The question of whether a procedure based upon a decision made in 28 days can ever be fair also raises its head.

One of the principal tenets of arbitration is set out in section 33 of the Arbitration Act 1996. The tribunal shall give each party a reasonable opportunity of putting his case and dealing with that of his opponent.

Section 33 also provides that procedures shall be adopted so as to provide a fair means for the resolution of the matters falling to be determined.

The parties in an arbitration must each have a reasonable opportunity of putting his case and dealing with that of his opponent. This overcomes two of the major problems of adjudication. The time factor and the knowledge factor. The parties in an arbitration can be reasonably assured that they have had the time to prepare their case, and to answer that of the other party, properly. They can also be reasonably assured that they will understand the other party's case and that their own case will be understood by the other party.

This understanding can be assisted by the importation into the arbitration process of disclosure obligations (s34(2)(d) of the Arbitration Act 1996) which means that a fuller understanding of the other party's situation may well be possible than where information is provided on a selective basis only as it is in adjudication.

I am not suggesting complete disclosure, merely the requirement to disclose all documents relative to the issues between the parties.

As far as my sub-agenda of maintaining control of the dispute is concerned, I think that the fuller the understanding of the parties regarding all the factors relating to their dispute, the more likely it is that successful negotiations will ensue. Arbitration can in appropriate cases provide the platform for this.

I do not intend to examine the two arbitration procedures that I have mentioned in any detail.

Both procedures place restrictions on the time scale. The CIArb Procedure is principally identified as applying to documents only arbitrations and concentrates on limiting the time for the statements of case and defence in respect of both the claim and the counterclaim and leaves the procedure subsequent to the reply to the defence to the counterclaim in the hands of the arbitrator. The SCA Procedure on the other hand does not start until the defence or the defence to the counterclaim has been served and the period of 100 days which includes the production of the Award runs from then (or the giving of directions by the Arbitrator if later).

I would suggest therefore that the CIArb Procedure, with its limited time scale for producing statements of case and its emphasis on documents only proceedings is more suited to the smaller dispute. The SCA Procedure however allows the proper development of the parties' cases. It is interesting to note that the main objection to the initial proposals for the 100 day procedure, which started from the issue of the notice of arbitration, was that a respondent might well have difficulty in making a counterclaim within the prescribed period, or might even be precluded from bringing a counterclaim in the same arbitration and end up with an adverse award in a time scale that had prevented him from having his counterclaim heard.

There are a few novel points in the SCA Procedure. The Arbitrator's lien on his award which could otherwise result in the 100 days being exceeded is overcome by including a trustee stakeholder provision for the arbitrator's fees. In addition any decision on the liability for costs is excluded from the 100 day period and a further period, limited to 28 days, is allowed for this. This again was perceived as a problem with a procedure limited to 100 days as the difficulties of dealing with

costs where offers had been made were seen as insuperable if they were to be dealt with within the 100 day period.

There is an adoption clause included in the SCA Procedure paragraph 2 of which is an agreement not to refer the dispute to adjudication whilst the 100 day procedure in going on. This is of course in conflict with the statutory right that any party to a dispute has under the HGC&R Act to refer that dispute to adjudication at any time. This has caused some comment but the advantages of having this provision in giving those accepting this Procedure pause for thought (even though it may be breached with impunity) are seen to outweigh remaining silent.

At the end of the day the arbitrator will make his award, if the parties do not settle first, and the parties will have then lost control of their dispute and be subject to the findings of that award. I suggest, if they have not managed to settle their dispute in course of all the earlier opportunities that they have had, that this is the best outturn in that it produces finality.

In summary. Get the contract arrangements right, if disputes arise, maintain control, use the various processes that are available as a means of maintaining control and if, in the final analysis, no settlement results, for the sake of finality get the dispute to a final award by an arbitrator, if possible using an expedited procedure.

100 DAY ARBITRATION PROCEDURE

(for use in England and Wales and other jurisdictions)

THE SOCIETY OF CONSTRUCTION ARBITRATORS
1ST JULY 2004

100 DAY ARBITRATION PROCEDURE

1 Where the parties and the appointed arbitrator agree to adopt this procedure the arbitrator shall have an overriding duty to make his Award deciding all matters submitted (excluding liability for costs) within 100 days from either;

(a) the date on which the statement of defence (or defence to counterclaim, if there is one) is delivered to him or to the other party (whichever is later); or

(b) if the statement of defence (or defence to counterclaim) has already been delivered); from the date on which the arbitrator gives his directions.

2 Reference to days are calendar days unless otherwise noted. Any period set by this procedure that would end on a Saturday, Sunday or any public holiday at the seat of the arbitration will be deemed to end on the following working day.

3 The arbitrator shall, as soon as he is appointed or on the adoption of this procedure if later, contact the parties' representatives by the most rapid and practical means (such as email or fax) to give them the opportunity to comment on the periods and dates to be ordered for the procedural steps in Rule 4.

4 Within 7 days of his appointment or of the adoption of this procedure if later, the arbitrator shall by directions establish a procedural timetable to include an overall period of no longer than 100 days to run from the service of the statement of defence (or defence to counterclaim, if there is one) or from the date that the arbitrator gives his directions (whichever is later) that shall provide for:

(1) service of any outstanding pleadings (including replies if considered necessary) and statements of witnesses and experts' reports, if not already served with the pleadings, within 7 days;

(2) service of all further documents relied on by a party, replies to statements of witnesses and experts' reports and service of any requests for disclosure of specific documents by the other party, within 14 days thereafter;

(3) subject to any ruling by the arbitrator on any issue as to disclosure of documents, service of copies of documents specifically so requested within 7 days of the request;

(4) no further documents or other evidence to be served by either party unless requested or permitted by the arbitrator;

(5) a date for an oral hearing or hearings not exceeding 10 working days, to commence not more than 28 days after conclusion of the foregoing steps;

(6) final written submissions (if ordered by the arbitrator) to be served simultaneously within 7 days from the end of the hearing;

(7) the arbitrator to make his Award within 30 days of the end of the oral hearing.

The arbitrator may, if so agreed by the parties, direct shorter periods for any of the foregoing steps (and the period in Rule 8) and the period of 100 days may be reduced accordingly.

5 For the purpose of achieving the foregoing maximum time periods, the parties agree to cooperate and to take every opportunity to save time where possible.

6 The arbitrator, for the purpose of achieving the foregoing time limits, may do any of the following at any time:

(1) order any submission or other material to be delivered in writing or electronically;

(2) take the initiative in ascertaining the facts and the law;

(3) direct the manner in which the time at the hearing is to be used;

(4) limit or specify the number of witnesses and/or experts to be heard orally;

(5) order questions to witnesses or experts to be put and answered in writing;

(6) conduct the questioning of witnesses or experts himself;

(7) require two or more witnesses and/or experts to give their evidence together.

7 The parties may agree to extend the period of 100 days. The arbitrator has no such power save that the arbitrator or any party may apply to the Court under Section 50 of the Arbitration Act 1996 (Extension of time for making award) or under other powers available at the seat of the arbitration.

8 Not later than 14 days before the Award is due, the arbitrator shall send to the parties his reasonable estimate of the total fees and expenses incurred and likely to be incurred up to the making of the Award (including VAT if applicable). Provided the parties have paid this sum to a stakeholder acceptable to the arbitrator with the monies held to the arbitrator's account (or to the arbitrator himself) the arbitrator shall have no lien over the Award.

9 Unless they agree otherwise the parties shall make simultaneous submissions on costs to the arbitrator within 14 days of the date that the Award is published and the arbitrator shall make his Award on costs within 14 days of receipt by the arbitrator of the submissions.

100 DAY ARBITRATION PROCEDURE

Standard Adoption Clause

Arbitration between **Claimant**

and **Respondent**

(1) The parties hereby agree to adopt the Society of Construction Arbitrators' 100 Day Arbitration Procedure for the following: †

* (i) any dispute which may arise out of or in connection with the Contract between the parties dated
* (ii) the dispute referred to in correspondence dated
* (iii) any cross-claim arising out of the dispute referred to in (2)
* (iv) the dispute referred to in Notice of Adjudication dated
* (v) any cross-claim arising out of the dispute referred to in (4)

(2) The parties by entering into this Agreement further agree not to refer or continue to refer to Adjudication any dispute falling within the matters to be referred to Arbitration above until the Arbitrator has delivered his Award on the matters referred to him.

(3) Where there is no other mechanism for appointment and the parties are unable to agree, the arbitrator shall be appointed on the application of either party by the President of the Society of Construction Arbitrators.

*Signed by:*_____ *Claimant* *Date*_____

_____ *Respondent* *Date*_____

† The Arbitrator must also agree to adopt the 100 Day Arbitration Procedure

*** Delete where inapplicable**

CHARTERED INSTITUTE OF ARBITRATORS ARBITRATION RULES 2000

FIRST SCHEDULE

SHORT FORM PROCEDURE

Paragraph 1 Adoption of the Short Form Procedure

1.1 The parties may agree at any time prior to or during the course of the arbitration to adopt this Short Form Procedure, and in that event the Rules set out above shall be modified as hereafter provided;

1.2 Article 8 of the above Rules shall be deleted, and the alternative Article 8 set out in Paragraph 2 of this Schedule substituted.

Paragraph 2 Alternative Article 8

2.1 The arbitration will be conducted on a documents-only basis subject to the discretion of the Arbitrator to order an oral hearing in respect of any part (or the whole) of the arbitration, but in exercising that discretion the Arbitrator shall bear in mind his duties under section 33;

2.2 Unless the Arbitrator otherwise directs the arbitration will proceed on the basis of exchange of Statements of Case as hereafter set out;

2.3 All Statements of Case shall contain the following:-

(i) a full statement of the party's arguments of fact and law;

(ii) signed and dated statements of the evidence of any witness upon whose evidence the party relies;

(iii) copies of all documents the contents of which the party relies on;

(iv) a full statement of all relief or remedies claimed;

(v) detailed calculations of any sums claimed;

2.4 Unless the Arbitrator otherwise directs the parties will exchange Statements of Case as follows:-

(a) Within 28 days of the receipt by the Claimant of the Arbitrator's acceptance of the appointment the Claimant shall send to the Arbitrator and to the other party his Statement of Case;

(b) Within 28 days of the receipt of the Claimant's Statement of Case the Respondent will send to the Arbitrator and to the other party the Respondent's Statement of Case but if no Respondent's Statement of Case is served within that time limit or such extended time limit as the arbitrator may allow then the Respondent will be debarred from serving a Statement of Case and pleadings are deemed to be closed;

(c) If the Respondent wishes to make any counterclaim then his Statement of Case shall include that counterclaim;

(d) Within 28 days of the receipt of the Respondent's Statement of Case and Counterclaim (if any) the Claimant may send to the arbitrator and to the other party a further Statement of Case by way of Reply (and Defence to Counterclaim if any) but if no Reply is served within that time limit or such extended time limit as the arbitrator may allow the pleadings are deemed to be closed and if no Defence to Counterclaim is served then the Claimant will be debarred from serving a Defence to Counterclaim;

(e) Within 14 days of the receipt of a Statement of Case by way of Defence to Counterclaim (if any) the Respondent may send to the arbitrator and to the other party a further Statement of Case by way of Reply to Defence to Counterclaim and on the expiry of that time limit or such extended time limit as the arbitrator may allow or on the service of a Reply to Defence to Counterclaim if sooner pleadings are closed;

(f) When a Respondent or Claimant has been debarred from serving a Defence or Defence to Counterclaim under Article 2.4(b) or (d) above the other party or parties will still be required to prove any allegations made in his or their respective Statements of Case.

2.5 Before or after close of exchanges of Statements of Case the Arbitrator may give detailed directions with any appropriate timetable for all further procedural steps in the arbitration, including (but not limited to) the following:-

(a) Any amendment to, expansion of, summary of, or reproduction in some other format of, any Statement of Case or any extension to or alteration of time limits for service of Statements of Case;

(b) disclosure and production of documents as between the parties;

(c) the exchange of statements of evidence of witnesses of fact;

(d) the number and types of experts and exchange of their reports;

(e) meetings between experts;

(f) arrangements for any oral hearing if, in the exercise of his discretion he concludes that any oral hearing is necessary including any time limits to be imposed on the length of oral submissions or the examination or cross examination of witnesses.

2.6 The Arbitrator may at any time order any of the following to be delivered to him in writing:-

(a) submissions to be advanced by or on behalf of any party;

(b) questions intended to be put to any witness;

(c) answers by any witness to identified questions.

Paragraph 3 Rules of Evidence

3.1 In any arbitration under the Short Form Procedure the parties are deemed to have waived all rules and requirements in respect of the law relating to admissibility of evidence unless at any stage before publication of any award (whether or not the final or last award) any party notifies the Arbitrator in writing of that party's wish to withdraw such waiver.

3.2 In any event withdrawal of such waiver shall not take effect unless the Arbitrator in his absolute discretion consents thereto.

3.3 Before consenting to withdrawal of such waiver the Arbitrator shall permit the other party or parties to make such representations, whether orally or in writing, as he considers appropriate.

3.4 In the event of such withdrawal taking effect the Arbitrator shall give such directions, either in writing or by way of holding a preliminary meeting for the further conduct of the arbitration as he considers appropriate and may take into account the fact of the withdrawal of such waiver in considering the exercise of his discretion to award costs.