

Alternative Dispute Resolution Procedures used to Resolve Construction Disputes in the UK

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Keywords: Disputes, Dispute Resolution, Negotiation, Arbitration, Expert Determination, Adjudication, Conciliation, Mediation, Dispute Review Boards.

SUMMARY

Due to the cost and time spent in Litigation and Arbitration prior to the 1996 Arbitration Act and as at the early 1990's Arbitration was incorporated into the vast majority of construction contracts (in excess of 98%) there was an industry of advisors and lawyers serving the construction industry on resolving disputes. At one time it was considered that the construction industry's costs were increased by approximately 25% because of the cost of resolving disputes emanating from construction contracts.

Therefore during the 1980s and 1990s alternative forms of dispute resolution were formulated and Arbitration was overhauled to become a more effective dispute resolution procedure enabling the Arbitrator to manage the timetable and costs of Arbitration more effectively. These were incorporated into the Arbitration Act 1996.

Furthermore, some of the professional institutions that serve the construction industry also formulated alternative dispute resolution procedures aimed at resolving disputes promptly and in relative terms, more cheaply than Arbitration or Litigation and these are also available to be incorporated into construction contracts to use as a tool to resolve disputes.

Because of the cost of resolving contractual and payment disputes in the construction industry, not least because it was threatening a national skill base and resource, the British Government involved itself in the payment procedures within the industry to ensure that all contractors received the necessary cash flow required for their survival, by instigating a means of temporary resolution, subject to review by Litigation or Arbitration should either of the parties contest the decision. Therefore, the government passed an Act of Parliament mandatorily incorporating a procedure called Adjudication into all written construction contracts in which a Decision is given on a dispute within 4 to 6 weeks. This has proved so successful that the vast majority of construction disputes are now settled using the procedure.

This paper will look at all procedures currently being used by UK employers, professional advisors and project managers and contractors to resolve their disputes. All of them normally at lower cost and reduced time than would be incurred in Arbitration or Litigation, to ensure that contractors benefit from prompt ensuing cash flow necessary for their survival and well being, and thereby the UK's construction

resource base.

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INTRODUCTION

Over the last 10 to 15 years the UK Construction Industry has grappled with new dispute resolution procedures being introduced to it and in the case of Statutory Adjudication having it imposed upon it by an Act of Parliament.

Whereas at the end of the 1980s the Construction Industry was left with only two options: negotiate and if it fails, refer the dispute to expensive and slow Arbitration under the Arbitration Act (1950) and very occasionally where Arbitration was not incorporated into the contract referring the dispute to Litigation, which was equally time consuming and costly, we now come to 2006 where if negotiation fails a dissatisfied party can refer the dispute to Statutory Adjudication, or alternatively and dependent upon the terms and conditions of the contract, refer a dispute to Conciliation, Mediation, Expert Determination or, on the larger projects, a Dispute Review Board. In some of the cases, if a party is still dissatisfied with the outcome, then the matter can still be referred to Arbitration, under the vastly improved Arbitration Act (1996) in which the Arbitrator has greater powers to manage the procedure and costs than he would have done under the former 1950 Act, or to Litigation where under the Civil Justice Reform Act (1996) the Government has set up a specific Court to deal with construction disputes (the Technology and Construction Court) and, also under this Act, has given Judges powers to manage the timetable and costs of Litigation far more effectively.

Whilst Litigation is not a subject matter of this paper, it should be noted that due to the increased performance in Courts to bringing disputes to trial and in the Judges managing the proceedings and potential costs more effectively and promptly, Litigation is now as likely to be incorporated into a modern construction contract as Arbitration is. Whereas, at the end of the 1980s it was rare to see Litigation being incorporated into a construction contract as the legal procedure to be used to resolve disputes.

Due to the variety of the different methods of alternative dispute resolution now available to the UK construction industry, this paper will consider each of the procedures in turn detailing how they operate, the procedural requirements, including that of disclosure requirements and confidentiality.

As an Appendix to this paper, I have drawn up a schedule of each of the procedures to assist the delegates on being able to understand the differences in each of them and the possible legal remedy should a party still be dissatisfied with the result of the procedure, or if the tribunal breaches its jurisdiction and/or natural justice. (This

Schedule will be handed-out to the delegates attending the Technical Session in which this paper is given.)

ALTERNATIVE DISPUTE RESOLUTION PROCEDURES BEING CONSIDERED BY THIS PAPER

The alternative dispute resolution procedures being considered by this paper are: Negotiation, Arbitration, Expert Determination, Adjudication, Mediation, Conciliation and Dispute Review Boards.

NEGOTIATION

In the late 1980s, before email became a main source of communication, it was common for parties to meet together and discuss disagreements and differences in a face to face manner.

Unfortunately, with the advent of email, it has become very easy for an aggrieved party to draft an email and, before giving time for reflection and consideration, pressing the send key. Thereby causing any opportunity for face to face discussion and negotiation to be diminished by the recipient's equal feelings of disappointment and antagonism from the wording of the email, which will remain as written evidence until the dispute is resolved.

The well publicised dispute between Multiplex and Cleveland Bridge and Engineering on the new Wembley Stadium was clearly exasperated by the emails that were exchanged between the two companies.

Whilst emailing is an excellent form of communication, it is rare for it to be a successful tool in resolving differences and disputes between two parties and because of its immediacy, more often than not exasperates the differences and disputes to make the situation worse.

Negotiation is therefore only effective by person to person communication either on the telephone or by face to face meeting, even if it is by video conferencing, and is the cheapest form of dispute resolution known to mankind.

Whilst generally negotiation is the least costly dispute resolution procedure, it is not always the quickest form of resolution, because both parties have to be in a position of wanting to settle the dispute and move on from it and it might be some time before one of the parties is in the position of wanting to settle and conclude the dispute.

Resolving a dispute by negotiation more often than not also maintains a commercial relationship between the parties, which unfortunately is not the case with many other procedures, even though this may have been one of the aims of them.

Therefore, assuming that both parties wish to arrive at a negotiated settlement of the dispute, then this is cheapest and usually the quickest form of resolving the dispute. Plus it has the advantage that it is the procedure most likely to retain commercial relationships between the parties as well as being totally confidential, as the dispute is normally only known about by the parties concerned.

By resolving a dispute by negotiation the parties involved have total control over it, can choose what documents are, or not, disclosed and only in a minority of cases require professional assistance to resolve the dispute by negotiation. Hence why it is always the cheapest way to settle a dispute.

Furthermore, if commercial relationships are maintained then the cost of losing the relationship and forming one with another company is not incurred either.

ARBITRATION

There are only two full and finally binding dispute resolution procedures in the UK. One is by Litigation through the Courts and the other is Arbitration under the Arbitration Act (1996).

Arbitration can only be invoked if it is incorporated into the subject contract or there is a voluntary agreement between the parties for the dispute to be resolved by Arbitration.

The Arbitration Act (1996) provides the legal framework of the Arbitrator's powers, including that of being able to set and manage the timetable of the Arbitration and to assess reasonable recoverable costs for the party or parties that are considered to be successful in the Arbitration.

If one party deliberately sets out to be uncooperative throughout the Arbitration, the Arbitrator has the power to use his discretion by the award of costs to recompense the other party with the additional costs it incurred by the first party's behaviour. This may even affect the recovery of costs to the apparently successful party if it has deliberately been uncooperative during the course of the Arbitration.

In addition to the Arbitration Act 1996 there are a number of different Arbitration Rules which are incorporated into construction contracts and these contractually govern the timetable of an Arbitration. This does not prevent the parties and the Arbitrator amending or altering those Rules as the Arbitration proceeds, subject to there being agreement between the parties to do so.

It is normal in an Arbitration to resolve a UK construction contract dispute for there to be only one Arbitrator. In fact, in the UK it is normal for there to be only one Arbitrator to settle a dispute, with the exception of maritime Arbitrations where the international norm of three Arbitrators is maintained.

Therefore, as it is normal for only one person to be appointed as the Arbitrator in construction disputes in the UK, he is normally appointed by agreement of the parties, or if there is failure to agree as to who the single Arbitrator is to be, then he will be appointed under the terms and conditions of the contract, or if the contract is silent as to how this is to occur, then the Arbitration Act 1996.

The vast majority of construction contracts normally state that the parties are to attempt to agree who the Arbitrator will be prior to applying to the relevant Appointing Body or Institution to appoint an Arbitrator, and this is normally undertaken by one party listing three individuals as the proposed Arbitrator for the other side to select one. Whilst enlightened parties will proactively seek to agree on who the Arbitrator is to be, unfortunately all too often the party on the receiving end of an Arbitration Notice will reject all three individuals listed as the proposed Arbitrator, and respond with a list of three individuals themselves.

Where this occurs, more often than not both parties reject the three individuals listed by the other party, possibly thereby rejecting the most appropriate and applicable six individuals, and this results in the claimant party applying to a Professional Body or Institution to then appoint an Arbitrator, who may not be as competent as some, if not all, of the six above mentioned individuals.

Arbitration does not restrict the procedure to be adopted as one of a number of procedures could be adopted by the parties and the Arbitrator to resolve the dispute. Therefore, procedures between one Arbitration and another could be completely different. Whilst Arbitration might have a tendency to follow that associated with a Litigation, it is also possible that it could be conducted as a Documents Only Arbitration, have a restricted timetable for the Arbitrator to publish his Award, for example a hundred days from the end of serving pleadings, or be one of many variants of traditional procedures that would ensure prompt completion and publication of the award by the Arbitrator.

Arbitration is a confidential dispute resolution procedure, unless an appeal is made to the Court over the Arbitrator's Award, in which case it will become public knowledge. The Arbitrator will give direction as to the extent of the disclosure of documents by both parties and if one party refuses to comply with the Arbitrator's direction in this regard, then the other party can apply to the Court for an order to enforce the Arbitrator's direction.

Whilst the parties do not have to be represented in an Arbitration, it is normal in UK construction disputes being resolved by Arbitration for either qualified lay, solicitors and/or barristers to be instructed, dependent upon size and complexity of the dispute referred to Arbitration.

An Arbitrator's Award can only be appealed in Court upon issues of law, this being where the Arbitrator has made a mistake in the relevant law applicable to resolving the

dispute, or breaches natural justice or his jurisdiction, under Sections 67, 68 or 69 of the Arbitration Act 1996.

Should the Arbitrator make an error as to the finding of fact, then this cannot be referred to the Courts as an Appeal of the Arbitrator's Award. It is only possible to refer any errors on the interpretation of held law to the Courts to appeal the Arbitrator's Award and even then the Court may well rule upon the interpretation of law and revert the matter back to the Arbitrator to reconsider his Award in the light of that interpretation and to amend it, if necessary.

Arbitration is one of the few dispute resolution procedures in which a successful party can recover its costs in having to pursue the Arbitration to resolve the dispute. However, the legal interpretation of this is "reasonable costs, reasonably spent" and therefore it is rare for a party to be awarded all of its costs if successful. The rule of thumb guideline is that a successful party should recover two thirds of its costs under this interpretation. Where the successful party has been the victim of unreasonable behaviour by the other party through the Arbitration, then it is possible for costs to be awarded on an Indemnity Basis. But even this may not result in full recovery of the successful party's costs, because all costs will have to be evidenced to have been reasonable. A substantial number of contractors carry Litigation Costs Insurance Policies to cover the costs of Arbitration as a normal course of its business.

EXPERT DETERMINATION

For Expert Determination to be the applicable contracted procedure for resolving disputes, it has to be incorporated into the contract or be voluntarily agreed to by the parties.

The Expert can determine whatever procedure he wishes to adopt and his only criteria is that he must not breach natural justice or the jurisdiction of the dispute referred to him for him to make a Determination upon.

As with Arbitration, in the UK it is usual for one person to be appointed the Expert and this will be either by the person being named within the subject contract, agreed to by the Parties, or appointed in accordance with the terms and conditions of it. More often than not the claimant party submits a list of three individuals for the other party to select one and if the responding party rejects all three, then for the Professional Institution stated in the contract to appoint the individual as the Expert to determine the settlement of the dispute.

Whilst the Expert has total discretion upon the process of the procedure, it is usual for both parties to exchange Position Papers and Documents and then after an agreed period of time to respond to the other party's Paper and Documents. This may be either by a concurrent or consecutive timetable.

The Expert then considers and investigates the subject matter and has total discretion as to how he does this, ensuring that he does not breach natural justice requirements, and following this then issues his Determination.

The procedure is again confidential, unless the Expert's Determination is appealed to Court, when again it will become public knowledge. However, it is very rare for an Expert Determination to be referred to a Court because the only time a Court will scrutinise an Expert's Determination is if there is a serious possibility that the Expert has breached natural justice requirements or his jurisdiction in arriving at his Determination. For example, an Expert, following his Determination being published was requested to reconsider it by one party, following further evidence being provided to the Expert for him to consider. The Court held that an Expert did not have jurisdiction to deal with the same dispute a second time as it was a breach of natural justice. (*Odebrecht Oil and Gas v North Sea Production Company*, Technology and Construction Court, 10 May 1999)

The parties only release documents they wish the Expert to see and the Expert has no power to enforce disclosure of any other document.

As Expert Determination is virtually un-appealable in British Courts, it is important for the parties to ensure that its best case is prepared and submitted to the Expert. Therefore, whilst a party does not have to be represented in an Expert Determination, it is recommended that it is.

It is usual for each party to bear its own costs in an Expert Determination and in many contracts it is a contractual requirement that both parties pay 50% of the Expert's costs, although some do require him to apportion his costs between the parties.

ADJUDICATION

Whilst Adjudication was incorporated into a number of construction contracts prior to the enactment of the Housing Grants, Construction and Regeneration Act 1996, it was rarely used because of enforceability problems of Adjudicator's Decisions at that time.

However, by the early 1990s specialist works contractors and sub-contractors were incurring severe cash flow problems due to upstream parties failing to pay reasonably for work duly completed, or not being able to do so, which was risking the construction industry's skills and resources in the UK as a whole.

Therefore, the Government chose to act by introducing an effective and prompt method of resolving disputes, if only as a temporarily enforceable solution until the dispute was agreed between the parties or dealt with in Arbitration or Litigation and under the above Act incorporated Statutory Adjudication into all written construction contracts.

The Housing Grants, Construction and Regeneration Act 1996 made it a mandatory requirement of all written construction contracts for a party to the contract to be able to refer a dispute to an Adjudicator to resolve in a temporary yet fully binding way, so that cash flow was not restricted within the industry due to disputes, whether legitimate or fabricated. The Act required the incorporation of clauses to settle disputes by Adjudication to be incorporated into construction contracts and should a construction contract fail to incorporate such clauses, then the Government enacted by Regulation a fall back Adjudication provision in the Scheme of Construction Contracts Regulations (1998) which mandatorily incorporated this provision into contracts. These fall back provisions also applied if Adjudication provisions were incorporated into a construction contract which were not compliant with the requirements of the Act.

The Adjudicator may be named in the contract, or be appointed in accordance with it and if neither is stated within the contract, then the referring party of the dispute can apply to one of a number of Adjudicator Nominating Bodies to appoint the Adjudicator.

Whilst an Adjudicator cannot be appointed prior to an Adjudication Notice being served, it is a requirement of the Act and most construction contracts that the referral of a dispute to the appointed Adjudicator occurs within a short period after the service of an Adjudication Notice. Usually seven days. This means that the Adjudicator may receive the Adjudication Referral and supporting documentation within a few days of being appointed to be the Adjudicator.

Whilst different Adjudication procedures prescribe different time periods for the responding party to serve its Response and supporting documentation, this normally has to be undertaken within seven to fourteen days following service of the Referral.

Adjudication is therefore only available for disputes where both parties' contentions have been well rehearsed between them beforehand and it is not available for an Adjudicator to decide upon a new claim. The Act is clear in that only disputes can be referred to Adjudication, not claims.

Whilst natural justice allows for the referring party to respond to the Respondent's Response which normally has also to be served within seven days of the Response being served, the Adjudicator must come to a Decision within twenty eight days of receiving the Referral, unless the referring party agrees to extend the Adjudicator's Decision Period for up to a further fourteen days, or both parties agree a longer period for the Adjudicator to reach a Decision.

Because of the short time in which an Adjudicator has in which to issue his Decision, it is expected that both parties are familiar with the evidence that will be submitted to him and there would normally be a challenge if completely new documents or reports were issued for the first time during the Adjudication period.

Adjudication has become a very popular way of resolving disputes because of the short time scale in which an Adjudicator has in which to issue his Decision and its enforceability which more often than not resolves the dispute.

Furthermore, whilst the Adjudicator's Decision is only temporary, as it is subject to the subsequent agreement of the parties or referral to Arbitration or Litigation, the Adjudicator's Decision must be honoured and payment made against it, usually within seven days of the Decision being issued, and the Technology and Construction Courts have been empowered to deal with Adjudication enforcement cases promptly. Where an Adjudication Decision is referred to the Courts for summary enforcement, this is usually obtained within four to six weeks of proceedings being commenced and the author was involved in one case where the whole enforcement procedure was conducted within two weeks.

The Courts will even enforce an Adjudicator's decision where the Adjudicator may have made an error, as long as he has remained within the jurisdiction of the dispute that is referred to him.

Whilst Adjudication is only designed as a temporary remedy for aggrieved claimants, in excess of 80% of Adjudications the Adjudicator's Decision forms the conclusion and/or basis of settlement of the Dispute. This may be by the paying party honouring the Adjudicator's Decision, or that it is used as a negotiating tool by the parties upon which to negotiate a final settlement of the dispute.

The advent of Adjudication as a dispute resolution tool has therefore brought speedy conclusion to construction disputes in the UK, enabling an improved cash flow to the works contractors and sub-contractors, and at the same time reducing the sums paid to dispute resolution professionals. Thereby keeping this saving of cost within the industry to improve its overall performance.

Adjudication is confidential, unless an Adjudicator's Decision is referred to the Courts for enforcement, or it is challenged because of the Adjudicator allegedly breaching natural justice requirements and/or his jurisdiction whilst fulfilling his function as the Adjudicator. In which case, it becomes known to the public at large.

The parties only release documents that they wish the Adjudicator to see and the Adjudicator does not have power to enforce disclosure of documents.

Whilst Adjudication is a positive way of concluding a dispute, the very tight timetable in which the procedure is required to be adhered to normally means that a party would be recommended to be represented to ensure that its best case is submitted to the Adjudicator. This representation may be either by a qualified lay representative or a specialist solicitor familiar with the short time scales required for actions to be taken.

As stated above Courts will only interfere and overrule an Adjudicator's Decision if the Adjudicator has breached natural justice requirements and/or his jurisdiction concerning the dispute referred to him.

Usually each party bears its own costs and the Adjudicator apportions his costs between the parties as he sees fit. Occasionally, the Adjudicator is given jurisdiction to deal with both parties costs as a part of his Decision.

Whilst Adjudication was instigated by the Government to provide a means for disputes in construction contracts to be resolved promptly and to ensure adequate cash flow to the contractors undertaking construction work, it has proved such a beneficial way of concluding disputes that industries exempted from the Act have decided voluntarily to incorporate Adjudication Clauses within their contracts.

Whilst consultation and debate was being held regarding the Act and Adjudication, many chemical and process engineering companies did not wish Adjudication to be a requirement of their contracts and successfully lobbied Parliament to exclude these contracts from the provisions of the Act. However, as Adjudication has proved to become a relatively cheap and prompt way of concluding disputes, these industries wished also to have the benefit of disputes being resolved by Adjudication and many of those industries contracts, whilst exempted by the Act, now incorporate provisions for disputes to be settled by Adjudication between the parties. This alone is proof of the effectiveness of Adjudication as a dispute resolution tool that is available to parties of construction contracts.

MEDIATION

One of the provisions of the Civil Justice Reform Act 1996 was for English Courts to direct that the parties attempt to settle their disputes by Mediation and only if there was failure to reach a settlement through Mediation, that the parties then refer the dispute to the Court to be tried.

The Technology and Construction Court is proactive in directing parties to resolve their disputes by Mediation prior to the Courts becoming involved in listing for trial and with the advent of the possibility, if not probability, that the Judge will direct that a Mediation be held, parties to construction contracts have become more progressive in incorporating Mediation clauses into construction contracts as a means for resolving disputes.

Court directed mediation did not always have the successful results that were expected, because one party usually wished the dispute to be resolved in the Court, not in a Mediation, and Mediations are only successful where both parties embark upon a Mediation with the intent of settling the dispute.

The author's experience of Mediation has been that where the Mediation has been directed by a Court, or has been incorporated as a contractual dispute resolution

procedure, then more often than not it has failed to conclude a settlement. However, where the parties have agreed to resolve their dispute by mediation without any duress of the Court or the contract stipulating that Mediation must be used, then it has proved to be a very successful and relatively cheap procedure in which to resolve a dispute.

The one advantage that Mediation has over all other dispute resolution procedures is that there is opportunity within the Mediation for the parties to seek a commercial settlement to the dispute and that commercial settlement may not have to be arrived at by the strict interpretation of the terms and conditions, along with held law, of the contract. Because of this Mediation is one formal procedure that assists in maintaining commercial relationships where there are disputes that have to be settled between parties who wish to continue to work together with an ongoing contractual relationship.

The appointment of the Mediator may be by agreement of the parties or by one of a number of Mediation Associations and as appears to be custom in the UK, agreement is normally attained by the claiming party submitting three names to the responding party for it to select one to be of the Mediator.

The procedure is decided upon by the Mediator, but it is usual for Position Papers and supporting documents to be exchanged by the parties and then a short time afterwards for the parties to respond to the other parties Position Paper and documents.

After the Mediator has had opportunity to read these, he will then arrange for a meeting to be conducted whereby both parties usually meet to outline their contentions and then withdraw to their own rooms. The Mediator then meets with each party in turn to discuss their case, put to each party his considerations as to the strengths and weaknesses of their cases, with the aim of reducing both parties' expectations. The Mediator will continue to visit both parties in this fashion until he is confident of being in a position where both parties expectations are relatively similar, or not far apart, and then invite them to meet together to negotiate the outstanding differences with the aim of making a settlement.

This is the one procedure in which the tribunal does not make the decision on the settlement of the dispute. All the Mediator does is facilitate a settlement between the parties by reducing both parties expectations of the settlement. Once the Mediator believes that the parties are near enough in their expectations to agree a settlement he then chairs the negotiations, but leaves it for the parties to conclude the settlement of the dispute. Once agreement has been reached, the Mediator then drafts the agreement that the parties have reached and obtains their signatures to the agreement, before the parties leave the room.

As it is for the parties to reach an agreement, there is always the possibility that the parties will fail to agree and thereby the Mediation fails. In which case the dispute is then referred to a procedure in which a final and binding decision can be reached. Usually Arbitration or Litigation, but it is not unknown for an aggrieved party from a failed Mediation to refer the dispute to Adjudication.

Mediation is normally confidential, however, if it is a Court directed mediation which fails, then this will become public knowledge upon the handing down of the Judge's judgement.

The parties only disclose documents that they wish the Mediator to see and the Mediator has no power to enforce any disclosure, except in Court directed mediations where full disclosure is required and may well be enforced by the Court.

As with many other procedures, parties do not have to have professional representation in Mediation, but it is recommended to ensure that their best cases are submitted to the Mediator and that in the discussions with the Mediator, their strongest contentions are emphasised. The representation can be by either qualified lay professionals or a solicitor.

A Mediation either succeeds in settling a dispute, or it fails, in which case the dispute is referred to another procedure. Because of this there is nothing that can be referred to an appellant tribunal.

Each party pays 50% of the Mediator's costs, unless the parties agree otherwise as part of their settlement, and each party bears its own costs. However, under Court directed Mediation, unless the parties agree the costs, the Court will decide the costs to be awarded to the successful party as Costs of the Action.

Where parties carry Litigation Costs Insurance protection as a part of its business insurances, then where a Court directs Mediation as a part of the Litigation process, then the insurer will meet the parties' costs of the mediation.

CONCILIATION

Due to the advent of Statutory Adjudication with its enforceability, Adjudication has supplanted Conciliation and therefore Conciliation is now rarely used.

Conciliation is very similar to Mediation except that the Conciliator is either named in the contract, agreed to by the parties, again usually by three names being given to the responding party for it to select one, or if agreement is not made, appointed by the stated Professional Institution.

The procedure is very similar to that of Mediation stated above, except that if the parties fail to agree a settlement then the Conciliator will issue a Recommendation on what he considers is the fair and reasonable settlement of the dispute referred to him.

The parties then have a period of time in which to accept the Conciliator's Recommendation, or to refer the dispute within a stated period of time to Arbitration or Litigation for it to be resolved. In most construction contracts the period of time within

which an aggrieved party must refer a dispute to either Arbitration or Litigation is normally 28 days of receiving the Recommendation.

Furthermore, it is normal for the Conciliator to have to reach his Recommendation within a contracted and stipulated period from when he receives the referral documentation from the claimant. This is usually also 28 days.

The procedure is totally confidential as a Conciliator's Recommendation cannot be disclosed to either an Arbitrator or a Judge if it is not accepted by both parties.

As with Mediation the parties only disclose documents that they wish the Conciliator to see and the Conciliator has no power to enforce disclosure of anything more.

The parties do not have to have representation, but it is recommended to ensure that the party's best case is submitted to the Conciliator for him to arrive at his Recommendation if the parties fail to agree a settlement.

Each party pays 50% of the Conciliator's costs, unless they agree otherwise as part of the settlement and each party bears its own costs in the Conciliation.

In all other respects the Conciliator uses the same procedures as a Mediator would to reduce the expectations of both parties and narrow their differences so that the parties are able to meet together to negotiate a settlement. The main difference being that a Conciliator will issue his Recommendation of a fair and reasonable settlement of the dispute should the parties fail to come to a settlement in the Conciliation.

It is because of the lack of enforceability of getting a settlement or having the Adjudicator's Recommendation honoured, that has caused Adjudication to supplant this dispute resolution procedure.

DISPUTE REVIEW BOARD

Dispute Review Boards are becoming more and more popular for the larger projects and in some cases are a requirement. For example, on some World Bank, UN Development Agency and /or EEC Development Funded Projects.

The Client Organisation normally appoints three to five persons to constitute the Board at the time of negotiating the contract and this Board will become a permanent part of the project and attend project meetings, receive minutes of meetings and such other communications considered relevant to their requirements.

Dispute Review Boards operate differently and some may have a standing provision to discuss any contentious items between the parties to assist in their not becoming a dispute, or to have a proactive involvement with them from when the Board is made aware that an issue is contentious. Or it waits until a party to the contract refers a dispute to it to resolve.

The Board decides upon the most appropriate person or persons to consider and decide upon the resolution of the dispute and the procedure to be adopted to achieve its resolution, if no procedure or rules are incorporated into the contract concerning the operation of the Dispute Review Board.

The Client Organisation usually pays the costs of the members of the Board as an item of funding for the construction of the project. Despite this all the Board members are independent and arrive at decisions in accordance with their interpretation of the events and terms and conditions of the contract, not necessarily being that wished by the Client Organisation. Whilst the Dispute Review Board has discretion to choose the procedure to be adopted to resolve disputes referred to it, unless incorporated into the contract, it would normally operate in a similar manner to that of a Mediator, to reduce the expectations of both parties so that they agree a settlement and maintain their relationship for the good of the project as a whole.

The Dispute Review Board has access to all documents exchanged between the parties and it can request disclosure of internal documents from a party, but it has no power to enforce disclosure of these documents and because the whole of the procedure is contained within the terms and conditions of the contract, all disputes are normally resolved in a confidential manner.

Where the Dispute Review Board is unable to resolve the dispute, then the dispute would be referred to Arbitration or Litigation under the terms and conditions of the contract.

A party does not normally require representation at a meeting with the Dispute Review Board to resolve disputes, although it may choose to involve specialist qualified lay assistants or a solicitor in drafting documents to be submitted to the Board to ensure that its best case is advanced. As the Client Organisation normally bears the costs of the Dispute Review Board, the only cost that the parties have to meet are their own.

Due to the success of Dispute Review Boards resolving disputes in a confidential, prompt and cost effective manner on major projects, the London Olympic Delivery Authority is incorporating Dispute Review Boards into all of its major Olympic Construction Contracts to ensure that any contractual disputes between the parties are not allowed to fester and cause a hindrance to the construction of the projects.

BIOGRAPHICAL NOTES

Professional Qualifications: FCI Arb; FinstCES; FCI OB; MRICS

Current Position: Proprietor, Klein Consult Ltd

Practical experience: In excess of 20 years experience as a senior contractor's quantity surveyor responsible for compiling, negotiating

and defending contractual claims on Building, Civil Engineering and M & E projects.

Representing parties in a substantial number of Arbitrations, Adjudications, Conciliations and Mediations and appointed as an Expert Witness in disputes in Arbitration and Litigation, including appointment as Single Joint Expert, in respect of construction contract and negligence disputes.

Appointed as Adjudicator on construction contract disputes varying between £8,000 and £1 million and as the Expert to arrive at an Expert Determination on other disputes.

International experience: Represented Italian and German contractors in contractual negotiations and dispute resolution concerning contracts undertaken in the UK.

Professional Institutional Appointments: Chairman of the Institution of Civil Engineering Surveyors' Dispute Avoidance and Resolution Panel. Member of the Construction Industry Council's Adjudication Board.

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