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Dispute Resolution in the Construction Industry

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The intention at the outset of any construction contract is for the project to run as smoothly as possible with parties hopeful that the works will be completed on time and to budget.

However, things do not always go according to plan. Additional works, for example, may be requested by the employer or additional works may become necessary because something unforeseen is discovered on site.

These scenarios are likely to result in works taking longer than anticipated which, in turn, will generally result in an increased cost to the project. This will often lead to a claim by one of the parties – if it cannot be resolved through discussions.

Common types of claims arising in construction projects include:

- the employer claiming against the contractor for delay or defective works (i.e. poor workmanship);
- the employer claiming against a professional consultant for shortcomings in the design or a failure to properly supervise the works;
- a contractor claiming against the employer for delay or a change to the scope of works;
- a professional consultant claiming against the employer for non-payment of fees.

Ways of resolving disputes

With a dispute on the horizon, what options are available to parties to resolve their differences?

Traditionally, the resolution of disputes took place through the courts. This is a formal process which generally involves lengthy pleadings, full disclosure of documents, witness statements and expert reports followed by the hearing itself.

However, the 1990s witnessed an enormous growth in alternative dispute resolution ("ADR") such as mediation and conciliation, adjudication and arbitration.

There were a number of reasons that ADR techniques were (and still are) found to be attractive:

1. speed - court lists had become extremely long often taking in excess of two years to get a matter before a Judge.
2. lower costs – litigation is not only time consuming but costly.
3. confidentiality – litigation is in the public domain meaning that there is the risk of bad publicity. ADR, on the other hand, is a private process and therefore confidential.
4. flexibility – this predominantly apples to mediation. Whereas litigation, arbitration and adjudication are based on rights and obligations, a mediated settlement focuses on

the parties' interests and needs with the mediator encouraging the parties to search for a commercial solution which meets with both parties' needs.

So, what are mediation, adjudication and arbitration and how does each differ from litigation?

Mediation

Mediation is a step beyond the attempt to resolve a dispute by general commercial discussions/negotiations.

With mediation, parties use the assistance of an independent third party to help identify the issues in dispute and to explore the options for resolution in an attempt to reach agreement. An important factor is that the mediator does not decide the outcome; rather, settlement lies ultimately with the parties.

One of the major benefits is that the average mediation lasts one to two days. Having said that, parties may not be in a position to forge a settlement early in the dispute process because of limited background information meaning there is often a lack of knowledge about the merits of a claim in the early stages. Therefore, it may take many months before parties are in a position to mediate effectively.

Adjudication

Adjudication is a statutory right introduced into UK construction contracts by the Housing Grants, Construction and Regeneration Act 1996. It provides a temporarily binding decision which must be complied with until overturned or varied by a court or arbitration.

The intention of adjudication is to resolve disputes quickly (an adjudicator is required to reach a decision within 28 days of its referral) during the course of a contract so that money keeps flowing and work can continue without (or with only minimal) delay.

Prior to adjudication, a party who had not been paid had to go through a long-running arbitration or court litigation to make its claim. This meant funding expensive legal costs to recover that money. Many sub-contractors and small construction companies, unable to afford this expensive and lengthy process, were, as a result, unable to enforce payment or contractual entitlements.

Adjudication is not only appropriate for recovering unpaid fees, but also for resolving delay and disruption claims, extension of time claims and final account disputes.

Arbitration

Arbitration is a process whereby formal disputes are determined by a private tribunal of the parties' choosing. If a contract comprises an arbitration clause, then a dispute arising under that contract must be referred to arbitration – as opposed to litigation through the courts.

The outcome of arbitration (the award) is final and binding on the parties.

The arbitrator focuses on the issues (fact or law) presented by the parties and the process is similar to litigation – although less formal – with pleadings, disclosure of documents, witness statements, expert reports and a hearing. The perceived advantages of arbitration over litigation are:

(i) the flexibility to appoint an appropriate arbitrator for the dispute at hand e.g.

arbitrator(s) with the relevant technical knowledge as opposed to a Judge who is appointed by the Court and may not be technical;

(ii) it is generally a faster process than litigation;

(iii) it can be cheaper;

(iv) the award is private and therefore confidential;

(v) arbitration awards are generally easier to enforce than court judgments in other nations because of conventions on the recognition and enforcement of foreign arbitral awards.

What do the major construction contracts provide for?

NEC3 2013 provides a two tier approach with the first step being adjudication and, if the dispute is not resolved at that stage, a second step of arbitration or litigation (depending on what the parties agree). JCT Design & Build 2011 states that mediation should first be given serious consideration followed by adjudication and arbitration or litigation (litigation applies unless the parties "opt in" to arbitration) – although adjudication is not necessarily a prerequisite to arbitration/litigation as with the NEC3. NFDC 2012 provides for both adjudication and arbitration in its standard form – again, adjudication is not a prerequisite to arbitration.

Finally, although contracts set out the formal approach to be taken to dispute resolution, direct negotiations and/or mediation always remain an option. There is nothing to stop parties meeting at any stage to try and resolve a dispute by way of commercial discussions or mediation. This can be done prior to formal proceedings or in parallel. If initial discussions or the first mediation fail, there can always be further attempts when parties will know more about the strengths and weaknesses of their opponent's case.

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