OPEN AND CLOSED ADJUDICATION

The inspiration for this short paper was a presentation by Tony Bingham under the auspices of the SCL at Cardiff in May 2006 at the offices of Hugh James. With his usual enthusiasm for new found causes, Mr Bingham urged his audience (as erstwhile litigators) to case manage their disputes by closely prescribing in advance the remit of an arbitration or adjudication, to prevent the process from growing like ***Topsy*** into massive, uncontrollable proportions with consequent cost and time implications which could potentially deprive the parties of any realistic sense of proportionate justice. Beguiling as the concept might at first blush appear, are their any hidden dangers to such an approach and in what circumstances, if any might such an approach work?

There are two distinct aspects to this concept. The one involves the extent to which an applicant is able to prescribe the scope of a dispute, which is inextricably linked to the question of "*What is a dispute*," the other, the role of the adjudicator/arbitrator/judge in case managing the proceedings.

The Submission Process

The drafting of the notice of intent to adjudicate and the referral rapidly developed into an art form almost immediately after the Housing Grants Construction and Regeneration Act 1996 came into force in 1998. It quickly became apparent that the referring party would pay a heavy price for getting the content of these documents wrong. Far from being an informal process to be operated by amateurs from within the industry, as initially envisaged by early proponents, it turned into a business for professionals. The lawyers and the courts made sure of this, quite correctly it might added in hindsight, since a great deal often rides on the outcome of adjudication.

Between them the notice of intention and the referral prescribe the scope of the dispute submitted to adjudication. To a greater or lesser extent, the same may be said of the referral document in arbitration and the statement of claim in litigation. Unlike the latter two, however, where there is both time and the facility to further develop and broaden out the scope of the dispute, adjudication presented a serious challenge in that there was a danger that because of the tight timescales within which the procedure operates, there was a serious potential of ambush. There are two distinct aspects to ambush, namely novelty and constriction. Both have been addressed by the courts.

The novelty aspect relates to whether or not it is possible to land a claim on an unsuspecting party about something they had no idea about, forcing them to attempt to respond in a very short period of time, whereas the claimant has had all the time in the world to dot the I's and cross all the T's in the referral documentation. In 1998 this was a highly contested issue, with many proclaiming that the adjudication process was inherently unfair. The reality has proved to be somewhat different. Whilst the key to the scope of the dispute before an adjudicator lies in the notice of intention, which prescribes the content of the referral document, forcing it to remain within the limits of the issues mentioned in the notice, albeit with far more detail, what can be validly submitted to adjudication has been drawn back to crystallisation. The court have insisted that a matter cannot be referred to adjudication unless it had matured into a dispute, that is to say that the claimant had put the matter to the other party, leaving sufficient time for response and no satisfactory response had been received. Hence, wherever a matter is validly referred to adjudication the respondent will have had sufficient advance warning and should have been fully aware that a referral was imminent. Furthermore, the scope of the dispute is limited to the issues that had been previously canvassed and no novel issues can be slipped in on the back of the crystallised matters.

The constriction aspect relates to what matters the respondent can raise in his defence. In line with the above, the courts will not allow a respondent to introduce novel disputes into the process by way of counter-claim. The test for novelty lies in whether or not the grounds of defence are based on matters which are integral to the dispute at hand. The potential for ambush lies in the extent, if at all, that it is possible for the claimant to couch his reference in limited terms which exclude any scope for the respondent to assert contrary rights.

By treating anything which is integral to the dispute within the scope of the reference limits the ability of the claimant to secure an unfair advantage. However, the claimant who submits a sloppily drafted reference can broaden out the scope of the dispute unnecessarily and do himself a major disservice, enabling the respondent

to pursue counterclaims that would not otherwise be necessary. The tightly drafted reference is not necessarily an unfair one. After all there is nothing preventing a respondent from initiating adjudication in respect of matters outside the scope of the current adjudication.

Thus, to a limited extent, what Mr Bingham proposes is practicable, but the scope to do so is limited. Let us consider some of the things not to do and some of the things that it would be wise to do.

1) Make sure you ask for what you want. The response to the question of breach will be ***YES*** or ***NO.*** If you want payment ask for it. If a specific sum is asked for the adjudicator must reach exactly the same valuation in order to accede. Therefore, pitch the referral in the alternative, to include *"such other sum as the adjudicator deems due*." Do submit a concise documentation and where evidence is submitted, cross reference it clearly.
2) To require a decision as to how much is due under a contract will provide the scope for the respondent to set off sums against the works. Thus it is best, wherever possible, to require a decision as to how much is due under a progress claim, directly linked to an application for payment and terms if any of withholding notices, all tied up to the contractual payment mechanism.
3) Progress disputes are limited in scope. Final disputes and valuations are open ended. The adjudication process was intended to be incremental with the parties if needs be pursuing a series of adjudications during the course of a project rather than one massive dispute at the end.
4) Whilst a bit previous, make sure the initial contract is ***"shipshape and Bristol fashion".*** Adjudication is not the best place to attempt to remedy defects in the contract.
5) Do keep your paperwork in order. Poor administration on both sides is a major cause of extended disputation.
6) Don't introduce novel matters into an adjudication, have another go later. Do not let the other side introduce novel matters either.

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