THE SETTLEMENT OF MANUFACTURING PLANT CONSTRUCTION DISPUTES

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SPEAKER'S PROFILE

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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 constructers. This list, whilst far from comprehensive, provides a fair indication of the types of issue that the parties to a construction project need to take into account and provide for in the terms and conditions of a 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 the expert determination of facts likely to be otherwise contested by the parties. Despite the fact that contracts establish contractual mechanisms for the allocation of risk and financial liability, it is hardly surprising, given the large amount of money frequently involved and the complexity of the mechanisms themselves, that disagreements arise as to the application of the rules to given facts and circumstances and thus as to who should actually shoulder the financial responsibility when things go wrong during the construction process. Accordingly most contracts also provide dispute resolution processes and procedures.

Whilst disputes are therefore perfectly normal, the failure to resolve disputes promptly can have serious implications for the prosecution of business. Disputes frequently result in delays in the construction process, particularly where suppliers and sub-contractors temporarily deprived of funds suffer cash flow problems preventing further work or simply because a party is not prepared to risk "***putting good money after bad***" until the 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.

This paper examines the dispute resolution processes that are available to the industry, highlighting their respective advantages, disadvantages and limitations. The processes discussed are adjudication, arbitration, dispute arbitral and review boards, (DAB and DRB), expert determination and litigation, which will be examined both from domestic and from international perspectives. The previous paper discussed the role that mediation plays in dispute resolution in the trade and maritime industry. Whilst there are significant differences between the construction industry and international trade, the role played by mediation in both industries is broadly similar. Accordingly, references to mediation here will be limited to highlighting construction specific factors.

There are a wide range of standard form contracts available to the construction industry, both domestically and internationally. There are champions for all of the various forms who will assert that a particular form provides the clearest, the best, the most comprehensive, the most practicable or fairest mechanism for administering construction projects and allocating risk and financial responsibility. In addition, there are a variety of alternate forms from most providers to cater for different types of project, including domestic and international projects, or alternatively to allocate aspects of responsibility or control to one or other of the main parties. It is not intended to evaluate here the balance of fairness achieved by the various forms of contract, but reference will be made to the different forms of dispute resolution and fact determination mechanisms used by some of the principal forms.

The overall aim of this paper is to provide the parties to prospective construction contracts with an overview of the mechanisms available for the settlement of disputes that might subsequently arise during the proposed construction process. The objective is to encourage the parties to give more thought to dispute resolution provisions at the contractual stage.

Parties are encouraged to seek further advice on which process would in the circumstances be most suitable for incorporation in the contract. The forms often offer a choice of dispute resolution process. The paper should help parties to make more 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 often scope to amend / modify the clause. The parties should be aware however that 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 to the chosen process where the dispute resolution service provider does not automatically provide such regulation. In particular it may be necessary to specify who will have the power to appoint the dispute resolution practitioner be it mediator, adjudicator or arbitrator in the absence of agreement between the parties.

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CONSTRUCTION CONTRACTS

Whilst the parties to a construction dispute have the right to expect that recourse to a dispute resolution process, be it the courts or some private alternative, will result in a settlement of the dispute in accordance with "the law" it would be wrong to imagine that the settlement will produce what both parties consider to be a fair and just outcome. In particular the aim of dispute resolution 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 any breaches of those duties. It is important therefore to get the contract right in the first place. Thus it is not the job of the court to compensate for defects in the procurement process and to increase the price to assist a contractor who has under priced the works and subsequently discovers the profit ratio is not sufficient to justify the works or even that a loss is inevitable.

In the US construction contracts are frequently drafted on a one off, case to case basis. The contracts are drafted by each parties legal team who compete to negotiate the most favourable terms for their clients, drawing on commonly used provisions within the industry. In the UK and internationally on the other hand, standard form contracts are the norm. Nonetheless, many goods and service providers and specialist sub-contractors contract on their own standard forms, drafted clearly for their benefit. Many prime / main contractors also have standard form sub-contracts which are used as the basis for putting work out to tender. Often these people have variations on their contracts which they will use if pressured during negotiations, which provide a better balance of rights and duties between the parties. Rather than simply accept what is offered it pays to ask and negotiate best terms, not just about price but also about other aspects of the performance of the contract. It will be too late to complain later if and when a problem arises.

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. It is commonly asserted that these contract manuals are for the mutual benefit of all concerned, but in reality each of these contracts is likely to favour one or other of the parties in one manner or another since 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.

The standard form construction contracts are drafted / designed with different types of project in mind. Thus the Joint Council of Tribunals (JCT) family of contracts provide a range of contracts for different types of general and specialist projects, whereas the IChemE contracts and the J.C. Institute of Electrical and Mechanical Engineers and Associate Consulting Engineers (Model Form 1 and Model Form 2) contracts are designed for plant supply and installation rather than for the construction of general works. The Institution of Civil Engineer's (ICE) and the Federation Internationale Des Ingenieurs-Conseils (FIDIC) construction contracts are designed specifically with international contracts in mind and it is for this reason that they are used by the World Bank as the basis of its international construction contract work. By contrast, local organisations and industry institutes have produced local versions of common contract forms, tailored to meet local legislation requirements which are used by virtually the entire local industry. The Malaysian Standard Form of Building Contract (PAM 1998 Form) is an updated and revised form of an early version of the JCT contract.

Apart from the industry divisions between the Developer and Prime / Main Contractor relationship and the Prime / Main Contract and Sub-Contractor relationship the other significant distinction in forms of contract lies in those that place control and responsibility for design with the developer and his appointed professional advisers including engineer and architect and those that vest responsibility with the main contractor. The Institution of Civil Engineers contracts are primarily designed for the former whereas the JCT Design and Build contract is designed for the latter. Further sub-divisions cover contracts with and without quantities and there are versions of many of the main contracts designed specifically for private and government projects, as with the JCT Public and Private Building Contracts.

There are in fact several hundred different standard form construction contract, each providing a different apportionments of both risk and responsibility between the parties. Some contracts specify the remedies available to the parties[1] excluding remedies for other events. Specialist advice is recommended in selecting the most appropriate contract for a development, though it is not unusual for companies to rely on a particular form which they are familiar with and to attempt to impose that form of contract on the other party. It is important for both parties to be fully aware of their rights and duties under the contract. I never ceased to be amazed by the number of clients who approach me for dispute resolution advice who have a very poor understanding of the terms and conditions of their contract. I have even had sub-contractors who have submitted tenders, and whilst they know the financial terms and the works specifications they have never received or alternatively have never read the legal parts of the contract. Unsurprisingly such people often run into problems over payment because no withholding notices have been issued or alternatively they have no written record of instructions, variations or day works as required by the contract.

Most of these standard form contracts will either provide for a specific mode of dispute resolution or provide a range of options for selection. Only time will tell which is the most appropriate mechanism. A flexible dispute resolution process that minimises aggravation and can potentially assist in producing an enforceable settlement, quickly at minimum cost without disruption is the ideal. Which if any of the processes gets closest to this ideal ?

[1] eg IE&ME Model Form 1 & Model Form 2. Similarly force majeure clauses exclude liability for certain events.

LITIGATION

The courts provide the principal mechanism for settling commercial disputes. Judges are normally highly qualified, experienced and held in high regard by society. Even though a losing party may not be pleased with the outcome, the decision of a court is likely to be accepted and respected by both parties. Only courts have enforcement powers, though often the court will exercise those powers in support of alternative dispute resolution processes. For this reason, 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. Domestic courts are the most appropriate way of ensuring the payment of debts where both parties are residents and have assets within the jurisdiction of the court. Any alternative to the courts will achieve little if the defendant will resist payment until forced to do so, since enforcement of the decisions of an alternative decision provider will require the assistance of the court in any case.

The principal disadvantage of using the courts lies in the fact that it may take a long time to get a court hearing. The courts have to deal with a wide range of judicial business ranging from civil law, public law, family law and criminal law and so the resources of the state are often insufficient to ensure the rapid settlement of commercial disputes. Most alternatives to litigation tend to be far quicker and since businessmen need to resolve problems quickly in order to concentrate on commerce, they have a distinct advantage over the courts. 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 than court hearings means that legal expenses are kept to a minimum.

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

The effectiveness of domestic courts in securing jurisdiction over international disputes and subsequently enforcing judgements against parties outside the jurisdiction is severely limited. Many contracts for manufacturing plant will involve overseas suppliers and installers and thus it may be advisable for the contract to provide more effective mechanisms for the settlement of disputes arising out of such contracts than are available in the domestic courts.

ARBITRATION

Arbitration is the principal alternative to litigation for the settlement of both domestic and international construction disputes. In many ways the arbitration process resembles litigation. The arbitrator acts as a private as opposed to a state appointed judge. 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 award 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. The parties often have control over the process, which is not prescribed by rules of court.
4) Choice of venue and potentially more convenient to the parties and witnesses.
5) Specialist arbitrators with industry experience and knowledge.
6) International awards are globally enforceable by virtue of the New York Convention on the Enforcement of Arbitral Awards.
7) More amenable than courts to choices of law and jurisdiction.

Speed : It takes as long to get to court as it takes. Court listing is governed by the judicial system and depends entirely upon how busy the domestic court is. It may take as little as a few weeks as for instance in Brunei or several years in countries where the courts are completely overloaded and overwhelmed by the volume of business relative to the number of judges and courts available for the settlement of civil disputes. 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. However another 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 involving a great deal of information and where both parties need a considerable amount of time to prepare for trial, the period leading up to a court or arbitral hearing may be broadly the same. As demonstrated below, the fact that the parties have control over the process can result in arbitration taking longer than litigation, particularly if an appeal to the courts is involved.

Costs : How much arbitration costs is extremely variable. Fixed cost and fixed time, fast track arbitral processes are very cost effective, particularly for small sub-contractors but they are not usually used for main contracts because the complex issues that tend to arise do not lend themselves to limited proceedings. Arbitrators are relatively expensive and legal representation is normally charged at the same rate as litigation. The parties will also have to pay the arbitrators accommodation and travel expenses, particularly where overseas arbitration is involved. Where a three person tribunal is engaged the costs of the tribunal may be considerable. 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 of some arbitration service providers are very expensive and may even involve substantial deposits. Savings will only therefore 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 then costs can 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. In conclusion, there is no guarantee that arbitration is cheaper than litigation, though it usually is more cost effective. Much depends on what the parties want.

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. Common law courts in the commonwealth countries, the UK and the USA are rather more adversarial in approach whereas the courts of civil law jurisdictions such as mainland Europe tend to be inquisitorial.

The parties have considerable autonomy over arbitral procedure which may be prescribed by the chosen rules governing the process or by agreement between the parties as the process progresses. Thus if the parties so require the proceedings may be as long as and as formal as a court or alternatively very informal and tightly constrained in terms of 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. A useful way of keeping time to a minimum is to require affidavit evidence to be submitted to the tribunal and for expert opinion to be limited to written reports. The tribunal may even appoint a single expert to advise the tribunal, eliminating lengthy trials involving a battle between a series of experts, each delivering extensive reports which are then cross examined in detail.

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. In conclusion, it is normally the case that arbitration is quicker and less formal than litigation but again the process is very much in the hands of the parties.

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. Note that 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.

Conclusion : 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, compared to litigation, arbitration provides the best chance of resolving international commercial / 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.

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 to certify questions of fact that govern the right to payment. Thus under the Institution of Civil Engineer's (ICE) and the Federation Internationale Des Ingenieurs-Conseils (FIDIC) construction contracts the resident engineer, who is an employee of the employer, administers significant aspects of the project, certifying work and extensions of time etc. In others the certification role is carried out by Chartered Surveyors, Quantity Surveyors or architects as under the Joint Council of Tribunals (JCT) range of contracts. 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.

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. 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.

ADJUDICATION

A number of domestic standard form construction contracts[2] and international standard form construction contracts provide for what is known as adjudication.[3] The ICC[4] provides a pre-arbitral procedure for the settlement of all types of dispute be it construction or commercial. The process resembles adjudication. NADR provides adjudication / arbitration services for both construction and commercial contracts.

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 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 which turns winners into losers and vice versa.

The adjudication process so impressed the UK legislators that by virtue of **Part II Housing Grants Construction and Regeneration Act 1996**[5] 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 also introduced statutory adjudication processes. A number of US states are currently considering adopting the process. Adjudication is likely to grow 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 does have its detractors. The statutory process in the UK has been thoroughly tested by the courts over the last three years since its introduction. 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 effective 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 very 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

The ICC pre-arbitral procedure has not yet been widely used so little comment can be made about its effectiveness or otherwise. The FIDIC adjudication process differs substantially from the UK model in that the initial time scale up to adjudication is 6 months and there are a number of differences in the procedure applied. The NADR adjudication rules and regulations incorporate the central features of the UK process as contractual terms for the conduct of the process. Ideally the adjudication / arbitration clause should feature in both the main contract between employer and prime and in subcontracts between prime and sub-contractors. 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. The Act banned "pay when paid" provisions. It is wise to adopt similar provisions as terms of the contract.

Perhaps one of the greatest successes of adjudication is the least easily measurable, in that it deters parties from behaving unreasonably. Evidence is perforce anecdotal, but I am personally aware of a number of disputes that were promptly settled upon issue of a statement of claim, without proceeding to adjudication and have witnessed the prompt dismissal of groundless defences by adjudicators that might otherwise have taken up to two years to get to court.

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

3 eg the FIDIC adjudication process.

4 Note that the ICC does not provide standard form construction contracts.

5 Hereinafter referred to as the HGCRA.

DISPUTE REVIEW PROCESSES (DRP)

Dispute Review Boards (DRB) are widely used in the US for large public and private construction contracts and Dispute Arbitration Boards (DAB) are mandated by the World Bank in the construction contracts it finances throughout the world. The principal body responsible for the promotion and development of the DRB / DAB concept is the Dispute Resolution Board Foundation. The Dispute Review Board Manual,[6] produced in 1996 provides the only definitive guide to the operation of DRB's to date. The authors and many of the contributors, early DRB pioneers and practitioners, formed the Dispute Review Board Foundation in 1996. It changed its name to the Dispute Resolution Board Foundation last year and now has almost 500 members spread over 30 countries world wide.

There is substantial and compelling evidence that construction projects involving DRB / DAB process have virtually no formal disputes and that advisory opinions / arbitral awards are hardly ever required. The processes appear to offer the prospect of dispute free construction projects. What are DRBs and DABs, how and why do they work and what is the difference between a DRB and a DAB ?

Dispute Review Processes evolved in the US out of an experiment by the parties to a series of major tunnelling contracts to try and ensure that the second stage of the project avoided the protracted disputes that had plagued the first stage. The first documented DRB was used on The Sokane Dam in Washington in the mid-1960's. Over the last 20 years the process has been refined and its proven track record in dispute avoidance has resulted in the process being mandatory in many states for public projects. DRPs combine the concepts of negotiation, conciliation, expert determination, mediation and arbitration into one seamless operation. DRPs have been successfully employed in the UK e.g. on the Channel Tunnel Project and for the Channel / London Fast Rail Link and in Hong Kong for the major new airport development. DRPs have resulted in major improvements in efficiency and have savaged the legal costs involved in disputes on major projects. There are many variants on the dispute review process and processes can be tailored to the specific needs of parties engaged in joint ventures. In the UK a number of Joint Public Private Finance Projects where the finance for the construction of a facility is provided by the private sector and subsequently recouped out of operational profits from the facility by contractor/financier have successfully used the DRB process. Once construction is completed the composition of the DRB is altered and it continues to assist in the settlement of disputes that arise during the court of operating the facility.

The central distinction between a DRB and a DAB is that a DRB produces a recommendation which if not followed is admissible in evidence to any subsequent court or tribunal that considers the dispute, whereas a DAB issues an enforceable arbitral award. DRB's are commonly used in the US because in the few cases where a dispute has gone to court, the courts have tended to adopt and follow the recommendations of the DRB, rendering such recommendations highly coercive. FIDIC and the World Bank have adopted the DAB model principally because of a lack of confidence in domestic courts around the world adopting mere recommendations, whereas the New York Convention on the Enforceability of Arbitral Awards provides a well proven and reliable enforcement mechanism. A consequence of this distinction is that the DAB tends to be far more legalistic and formal than the DRB process, since the outcome has a direct impact upon the respective legal rights and duties of the parties and thus natural justice and due process requires a more rigorous approach. It is possible to vary the DAB process so that the Board produces an adjudication decision as opposed to an arbitral award, which provides a mid-point between the traditional DRB and DRB.

WHAT DISPUTE REVIEW BOARDS SEEK TO ACHIEVE : The purposes of the DRB process are:-

1 To identify problems in advance and provide an informal mechanism for solving issues before they develop into disputes.
2 To provide a mechanism for the settlement of on-going construction disputes, involving the assistance of an independent panel of industry experts.
3 To minimise the cost to the industry traditionally arising out of the litigation of disputes
4 To provide a speedy mechanism that prevents damage to the interests of both parties.
5 To preserve the working relationship between the parties.
6 To keep disputes out of the public arena as much as possible.
7 To provide industry informed solutions to disputes.

WHAT IS A DRB AND WHAT DOES IT DO ?

The Board consists of **t**hree industry experienced, respected, impartial reviewers, appointed by the parties in accordance with the construction contract terms after the contract is formalised. The board is organized before construction begins. The board is provided with contract documents and has the opportunity to become familiar with the project and the parties. The board meets with the owner and contractor representatives during regular site visits, receives progress updates and encourages the resolution of any disputes identified during those visits, at job level through informal negotiations between the parties with the guidance and assistance of the board if necessary. Where settlement is not possible the board holds hearings and makes recommendations for the resolution of the dispute.

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6 Matyas, R.M., A.A. Mathews, R.J. Smith and P.E.Sperry. ***Construction Dispute Review Board Manual***, McGraw-Hill, 1996. 2nd ed due October 2003.

HOW A DRB IS ORGANISED

The owner initially evaluates the applicability of a DRB to a project. If it is decided to use the process the bidding documents will specify the appointment of a three person DRB under a three way contract to be concluded between the parties and the board as and when appointed. After the contract is awarded each party nominates one member to the board. The parties approve each other's nominee and the first two members are provided with contract documents. The First two members then select a third member and both parties approve that third member. The third member then receives the contract documents and a three-party agreement is signed. This is followed by organizational meetings to establish how the board will operate.

THE REPONSIBILITIES OF A DRB

A DRB should conduct periodic site-visits, keep abreast of activities and developments, encourage the resolution of disputes by the parties (though apparently the informal meetings where this is achieved are not the equivalent of mediations – perhaps because the parties themselves draft and agree any settlement without any formal involvement by the board) and if and when a dispute is referred to the board, conduct hearings, complete deliberations and prepare a timely recommendation. One to two weeks is the target timescale for recommendations.

THE NINE ESSENTIAL ELEMENTS OF A SUCCESSFUL DRB as per The DRBF[7]

1. All three members of the DRB are neutral and subject to the approval of both parties
2. All members sign a Three-Party Agreement obligating them to serve both parties equally and fairly
3. The fees and expenses of the DRB members are shared equally by the parties
4. The DRB is organized when work begins, before there are any disputes
5. The DRB keeps abreast of job developments by means of relevant documentation and regular site visits
6. Either party can refer a dispute to the DRB
7. Once a dispute is referred, an informal but comprehensive hearing is convened promptly
8. The written recommendations of the DRB are not binding on either party but are admissible as evidence, to the extent permitted by law, in case of later arbitration or litigation.
9. The members are absolved from any personal or professional liability arising from their DRB activities.

COMMON MECHANICS OF DRB PROCESSES

- The dispute resolution process is provided for in the contract.
- A five way contract is established between each member and the parties and between members.
- The board is appointed before work commences.
- Board members are supplied with all necessary documentation in advance.
- The board meets on a regular basis, is updated by the parties on progress during site visits and provides both informal and formal facilities for the settlement of disputes as they arise.
- The board ceases to exist when the project is completed.
- Lawyers play a less significant role than in arbitration and litigation. The objective is for the parties to set out their views in a non-legal manner whenever possible.
- The board is party appointed, one from either side and the chairman by the parties' appointees. The objective is to achieve a balanced membership with wide but differing expertise.
- Majority outcomes are permitted.
- The parties share the costs equally.
- Members are paid on an equal, pro-rata basis.
- Either party can refer a dispute to the board.
- All members are neutral and serve both parties equally and fairly.
- The board only meets "in toto" particularly on site visits and never meets with parties without inviting both parties to attend, and never meets with a single party without the permission of the other party.
- All communications are shared with all other parties and members. Wherever possible telephone conferencing is used to avoid any perception of bias and allegations of breach of due process.
- Members may not receive payments in cash or kind from one party.
- Members are absolved from any personal or professional liability arising out of DRB activities.

WHY DO DRB's WORK ?

Frequently disputes arise because an operative refuses to acknowledge that there is a problem. If senior management had had any inkling of the problem they would invariably have nipped the problem in the bud and settled the problem. The operative, perhaps fearing that his job is on the line, pushes the issue to one side. Since the operative is the point of contact there may be no way of getting past the operative to higher management in the early stages of the dispute. The problem festers and turns into a major problem requiring arbitration or litigation to settle. Major disruption to commercial activities ensues. The DRB process provides a way of getting such problems out into the open and dealing with them at an early stage. By creating opportunities for cooperation the process reduces the likelihood of disputes.

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[7] Matyas, R.M., A.A. Mathews, R.J. Smith and P.E.Sperry. ***Construction Dispute Review Board Manual***, McGraw-Hill, 1996. 2nd ed due October 2003. p17 para 1.3.

VARIATIONS ON THE DRB THEME

Whilst the DRBF does not approve of deviations from to their preferred format, with the exception of the DAB which it approves of for international contracts under the auspices of the World Bank and FIDIC, it should be noted that other organisations have used a variety of slightly different formats.

The appointment of a DRB involves considerable financial commitment which may be impracticable for smaller projects. Whilst appointing a DRB is a form of dispute insurance policy, a three person board may be perceived of as an expensive luxury that eats into profits, to guard against a danger that might not materialise. For this reason one man boards have been used on some smaller projects with the parties jointly selecting the member from a list or giving an external body powers of appointment. This produces some of the benefits of the DRB at a more affordable price. The disadvantage is that whilst a three person board can be made of up a variety of industry experts, for example a civil engineer, an architect or surveyor and a construction lawyer, this depth and range of expertise is not achievable with a one person board. Furthermore the recommendation of a three man panel is likely to have far greater authority than that of a single expert and thus is more coercive and effective. It may in such circumstances be necessary to institute a one man DAB instead, vested with the power to produce an enforceable award.

An alternative to the admissible recommendation is the private recommendation. These have been tried in an attempt to make it easier for the parties to commit to a non-binding settlement during informal meetings. Whilst the concept appears to encourage negotiations, it would seen that the lack of coercive power has resulted in a poor success record for this model with many more disputes ultimately having to be resolved by arbitration or litigation.

REFLECTIONS ON THE DRB PROCESS

A DRB cannot provide any assistance to the parties if it does not meet. However, in order to save money there has been a reluctance to convene regular DRB meetings, particularly where the panel members are remunerated on an attendance basis for attendance time and expenses. Frequently therefore, the parties have only convened a DRB after a dispute has arisen. The problem with this approach is that the dispute prevention role of the DRB is lost. By the time the DRB meets attitudes have already hardened and the DRB hearing turns rapidly into a hard fought trial, making agreement difficult and the recommendations of the board less acceptable to parties committed to their own hard held views. To combat this, if the contract provides for the payment of a minimum fixed retainer for the panel members, the only saving that can be made by not convening a meeting arises from expenses. This greatly encourages regular meetings and has proved to be a successful mechanism for maximising the benefits of the DRB process.

One draw back of the DRB process is that it is most effective in terms of the Employer/Prime relationship but has little to offer the Main / Sub-Contractor relationship. Even where sub-contractors are invited to meetings where their interests are involved, the short period of time that many sub-contractors are present on site and are involved in the project means that they are unlikely to develop any sense of ownership in the overall project and little rapport with the members of the DRB. In fact most DRB contracts do not provide for sub-contractor involvement and the board has no jurisdiction over disputes between the Main / Sub-Contractor. This can be a serious problem because subcontractors often fulfil a central role in projects and subcontractor disputes can cause serious delay and disruption.

GENERAL CONCLUSIONS

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 near future. One potential way forward is to adopt a two process dispute resolution approach to large contracts, with the Developer / Prime relationship being assisted by a DRB / Arbitration dispute resolution process and the Prime / Sub-Contractor relationship being regulated by an adjudication / arbitration dispute resolution process.

It is likely that most Manufacturing Plant Construction Contracts will not be large enough to justify the appointment of a three person DRB or DAB for international contracts. Whilst a one man DAB might be appropriate, perhaps the model provided by IchemE provides a useful compromise where an independent engineer deals with day to day issues that might otherwise lead to disputes. The incorporation of an adjudication clause to provide rapid relief and enable the parties to get on with the project and plan for the future for issues that cannot be dealt with by the expert or where the parties disagree with the expert, backed up by arbitration as a fail safe mechanism provides a viable model for the future. Alternatively much can be achieved by incorporating a fast track arbitration process for smaller, less complicated disputes. Whatever the future holds, one thing is sure, change and innovation is inevitable.

