

construction law update - april 2006

What happens when it all goes wrong?

This is a short overview of dispute resolution within the construction industry. It is intended as an introduction with more detailed articles, on specific issues, being published over the following months.

When entering into a contract in the construction industry, just like any other industry sector, you would be ill advised to sign on the dotted line without having a lawyer review the contract on your behalf. Many people take the view that this is an expense they can do without. However, this is frequently a false economy, as many a dispute arises from a failure to take legal advice in advance. Even when contracting on the basis of a standard form, such as JCT or ICE, lawyers' advice should be sought. This is because the individual facts of every case vary and whilst it may be suited to one party in a certain scenario, it may not be suited to another. Furthermore, it is uncommon for a standard form contract to be found in a wholly standard form. The amendments will generally run to many pages. When contemplating contracting on the basis of a bespoke contract, particularly if it is the other party's terms and conditions, we cannot emphasise strongly enough the need for legal scrutiny.

If the parties do find themselves in dispute, the parties should maintain a commercial stance and continue to talk with a view to settling their differences. Too often we see situations deteriorating, positions becoming entrenched and parties rushing headlong into an acrimonious dispute. Where one or more parties is not conducting themselves in a commercial manner, other forms of dispute resolution exist. In the construction sector, the most common forms of dispute resolution are as follows:

- = adjudication
- = ADR and mediation
- = arbitration
- = litigation

Adjudication - Adjudication under the Housing Grants, Construction

and Regeneration Act 1996 has become the predominant means of resolving disputes in the construction industry. Section 108 of this Act provides parties to construction contracts with a right to refer disputes under the contract to adjudication. It sets out certain minimum procedural requirements which enable a party to a dispute to refer the matter to an independent party who is then required to make a decision within 28 days of the matter being referred.

If a construction contract does not comply with these requirements, a statutory default scheme called the Scheme for Construction Contracts ("the Scheme") will apply.

Adjudication does not necessarily achieve final settlement of a dispute because either of the parties has the right to have the same dispute heard afresh in court (or where the contract specifies arbitration, in arbitration proceedings). Nevertheless, recent experience shows that the majority of adjudication decisions are accepted by the parties as the final result. The legislation provides that adjudication can be used at any time. For example, provided the parties have a written contract (the definition of "written" is wide), it can be used to decide contractual disputes with designers before construction begins; it can be used to resolve contractual disputes with and between designers, contractors and sub-contractors both during construction as well as after completion.

Once a dispute has arisen between the parties, either party may seek adjudication. The adjudicator is selected within a week and must decide the dispute within a further four weeks (subject to any agreed extension). Once the adjudicator has made a decision, the other party must comply with it. If he does not, a court hearing to compel compliance can usually be obtained within a matter of days.

Adjudication is thus very quick in comparison with other methods of dispute resolution such as arbitration or litigation and it can also be used during the currency of a contract. Adjudication can be a simple procedure, so in many cases there is no need to involve lawyers or

other advisers. It is usually more cost effective than arbitration or litigation.

Alternative Dispute Resolution ("ADR") - ADR covers a whole range of consensual dispute resolution techniques from mediation through to mini trials. Mediation is effectively a structured means of facilitating negotiation aimed at achieving a negotiated settlement which is acceptable to both parties. The parties are assisted in their negotiations by a third party, a neutral mediator, who will discuss the issues with the parties in open or private sessions, assist the parties to understand the strengths and weaknesses in their positions and identify avenues for settlement which often involve issues and options outside the immediate matters in dispute. Mediation is actively encouraged by the courts and is ideally suited to parties who have a commercial view and an interest in reaching a negotiated settlement, but just need a little further assistance and encouragement to do so.

Early Neutral Evaluation ("ENE") involves the use of a third party neutral expert to give a non-binding opinion on technical or legal issues which are likely to assist the parties in settling their dispute. This has been expanded upon to develop a system of expert determination with the parties agreeing to be bound by the outcome. This has gained some popularity as the dispute is decided by an industry expert and the costs are significantly less than arbitration or litigation.

Arbitration - Most standard forms of construction contracts contain an arbitration clause for the resolution of disputes arising under the contract, but as a result of the Housing Grants, Construction and Regeneration Act 1996, the initial form of dispute resolution now tends to be adjudication.

However, arbitration still remains a common forum for resolving construction disputes. If there is an arbitration clause in the contract, the court will automatically stay court proceedings to allow the parties to complete the arbitration process. Following the recent reforms of the Technology and Construction Court ("TCC") it remains to be seen whether arbitration will maintain its popularity as a dispute resolution forum. The TCC has now tailored itself to better meet the needs of the construction industry. The judges have impressive construction expertise and it has become apparent that resolving a dispute through litigation in the TCC can be both quicker and less costly than resorting to arbitration. There are further complications where the dispute has an international flavour. Where the parties in dispute reside in different jurisdictions, there is often a reluctance on behalf of each party to submit to the home courts of

the other. Furthermore, the greatly increased scope for enforcement of arbitration awards around the world provided by the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards means arbitration is more attractive. Enforcing an English High Court judgment within a foreign jurisdiction can be fraught with difficulties.

Litigation - Known previously, until 9 October 1998, as the Official Referees Court, the TCC is one of the specialist courts of the Queen's Bench Division. Recent years have seen a reduction in the number of cases being heard by the TCC. This was partly due to concerns in respect of the time taken and the costs involved. However, to a greater extent, it was the advent of the Housing Grants, Construction and Regeneration Act 1996 ("the Construction Act") and the adjudication procedure it contained, which had a dramatic impact on litigation in the TCC.

The TCC is a national court whose principal venue is located in St Dunstan's House in London. As well as London, full time judges also sit in Birmingham, Manchester and Leeds. In addition, circuit judges of varying levels of seniority sit part time in the TCC in other court centres around the country and some smaller TCC disputes are dealt with in the County Courts.

Recent reforms of the TCC have resulted in the appointment of more judges of greater seniority and the streamlining of the rules and procedures within the court. This resulted in publication of a revised edition of the TCC Guide in October of last year.

A principal task for the TCC is to deal promptly and expeditiously with the litigation, in a manner which is consistent with the policy of the Construction Act. It does appear that earlier criticisms of the time taken to hear matters in the TCC are now unjustified. In the recent case of Carillion Construction Limited v. Devonport Royal Dockyard [2005] EWHC 778 [TCC] proceedings were commenced by both parties separately on 4 April 2005, there was a two day trial on 20 and 21 April and judgment was given on 26 April. This may not be entirely typical but is an example of the expeditious manner in which cases are being decided within the TCC. The quality of the judges within the TCC is now without question and the TCC is able to offer speedy trial dates. The speed and costs of litigation in the TCC compare favourably with other forms of construction dispute resolution and litigation is now probably a more attractive proposition than arbitration. In the next edition, we will take a more detailed look at the adjudication process.

For further advice on construction law related matters please contact [Neil Kelley](mailto:nkelley@ts-p.co.uk) (contentious) on 01892 701310 or [email nkelley@ts-p.co.uk](mailto:nkelley@ts-p.co.uk) or [Chris Whittington](mailto:cwhittington@ts-p.co.uk) (non-contentious) on 01892 701222 or [email cwhittington@ts-p.co.uk](mailto:cwhittington@ts-p.co.uk).

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