



briefing

construction - autumn 2006

Choice of resolution procedure is the key

A sometimes baffling array of dispute resolution options is now available, Rachel Gwilliam of Morgan Cole reviews the main options, including one or two you may not have considered before.

Key points

1. There are many different dispute resolution procedures available
2. You should carefully evaluate which procedure is best suited to the circumstances of your dispute
3. Different forms of dispute resolution have different advantages in terms of cost, speed, finality and confidentiality
4. The right procedure can help preserve commercial relationships
5. Cost consequences can flow from failure to explore alternatives to litigation

The parties to any construction contract will often have a bewildering array of dispute resolution procedures to choose from when an argument rears its ugly head. However, the parties to the dispute are often all too quick to resort to the Courts to settle the conflict. The parties should explore the alternatives before weighing in with their claim form and, in doing so, may reap the kind of benefits which often get ignored in a typical tug-of-love for cash.

What then, are some of the main alternatives to litigation or arbitration?

Mediation

Mediation is the most commonly known and used form of alternative dispute resolution. It essentially constitutes negotiation aided by a neutral third party who helps the parties to try and achieve a settlement. Mediation is not binding and is a flexible and informal process, which may be stopped by any party at any time. The procedure is confidential and without prejudice. In contrast to litigation and arbitration, mediation aims to facilitate settlement by encouraging the parties to communicate.

Adjudication

Adjudication is a dispute resolution process unique to construction disputes. Adjudication proceedings are most commonly used in relation to payment disputes under construction contracts. Under the Housing Grants, Construction and Regeneration Act 1996 however, any dispute relating to a construction contract entered into after 1 May 1998 may be referred to Adjudication at any time. The adjudicator must reach a decision within 28 days from the date of referral of the dispute to him. The decision of the adjudicator is binding upon the parties unless and until the dispute between the parties is finally determined by litigation, arbitration or by agreement.

Expert determination

Parties often elect to resolve disputes by way of expert determination where the subject matter is complex or technical in nature. An independent, expert third party is appointed by the parties to resolve the dispute. He will have particular expertise in the field or discipline at issue. The expert's decision will be final and binding on the parties and cannot be appealed. The process is conducted in private and can be concluded relatively quickly when compared with other forms of dispute resolution.



Executive tribunal

Most commonly used in commercial and corporate disputes, an executive tribunal or panel comprises of senior managers or representatives for each party and a neutral mediator who listen to a presentation of each party's case. The panel will debate the issues and have an opportunity to probe each party's case with a view to assisting the parties to find acceptable solutions. The process is not binding, is without prejudice and is conducted in private.

Early neutral evaluation

A neutral, professional third party will be engaged by the parties to review their respective cases and to provide an evaluation of the merits of their respective positions and an opinion as to the likely outcome at trial. The third party's assessment will not be binding, but may be used as a basis for settlement or further negotiation/mediation and can help the parties to focus on the key issues.

Factors that can affect the choice of dispute resolution procedure

A variety of sometimes competing and sometimes complementary considerations will govern each party's choice of combative arena. The parties must decide which of these factors are of critical importance. The parties' freedom of choice may also be curtailed by the terms of the contract and by their opponents' willingness to co-operate.

The dispute resolution procedures prescribed by the contract

The contract between the parties will usually specify that a particular form of dispute resolution procedure must be used. For example, a JCT 1998 With Contractors Design building contract will specify that either arbitration or litigation shall be used to resolve disputes. This may preclude one party to a contract from requiring the other to adopt a different means of dispute resolution, although it is of course open to the parties to agree to embrace an alternative procedure, such as mediation.

You should always consider at the outset of a project how you would like to deal with disputes, should they arise and make appropriate provision in the contract by inserting a suitable clause. You may wish to have the opportunity to employ a variety of methods of dispute

resolution, depending upon the nature or severity of the dispute. For example, you could specify that the parties should refer all disputes to arbitration, but also include a requirement for the parties to attempt mediation in good faith before any such referral can be made. Alternatively, some contracts incorporate dispute ladders, providing for a dispute to be referred up from site through line managers and supervisors to Managing Director level to try and resolve the issue before either party can contemplate litigation.

A party's right to refer a dispute to adjudication at any time in accordance with Section 108 of the Housing Grants Construction and Regeneration Act 1996 will not be hampered by clauses of this nature. For example, contractual clauses requiring disputes to be mediated prior to a referral to adjudication have been held to be unenforceable. (*R G Carter Limited v Edmund Nuttall Limited* (21 June 2000)).

Keeping up appearances

Appearances can count for a lot in a dispute. Parties often fear that eagerness to explore alternatives to hard core litigation and arbitration could be perceived as a sign of weakness or a lack of confidence in your case. And who wants a reputation in the marketplace as a soft touch who'll cave in and pay any old claim when the heat is on?

Whilst it may be important for the protagonists to show that they mean business, management time and money can often be better spent in looking for a way to pro-actively resolve the problem.

Speed

It is an inescapable fact that some methods of dispute resolution are more expeditious than others. For example, an adjudicator must reach his decision within 28 days of the referral of a dispute. In comparison, litigation proceeds at a snails pace. The parties must consider, however, whether they are willing to risk sacrificing the obvious advantages of a fully reasoned, final and binding decision in the interests of obtaining a quick fix. It is always possible that the decision-maker will get it wrong if a short-form dispute resolution procedure is adopted. There is also no guarantee that your opponent will take the ruling on the dispute lying down, in which case the advantages of using a fast-track procedure may be lost.



Cost

Litigation and arbitration can be expensive. It is clearly in the parties' interests to try to minimize the costs of a dispute. Alternative forms of dispute resolution can prove to be both less expensive and more productive than becoming bogged down in formal legal debate.

It is also important to bear in mind that, even if the parties are set on litigating their dispute, they are obliged to consider alternative forms of dispute resolution to try to bring the case to an early close. Part 44.5(3) of the Civil Procedure Rules states that the Court must have regard to the conduct of the parties in determining liability for costs. In particular, the Court will review what efforts (if any) have been made both before and during the course of the litigation to try and resolve the dispute. The Courts have indicated (*Dunnett v Railtrack* [2002] 2 All ER 850, *Royal Bank of Canada v Secretary of State for Defence* [2003] EWHC 1841) that they will penalize parties (including Government bodies) in costs if they unreasonably refuse an offer of mediation. Parties will not be penalized if they reasonably decline a mediation proposal where mediation could properly be regarded as having no real prospect of success (*Hurst v Leeming* [2003] 2 Costs L.R.).

Preserving a business relationship

Nothing sours a commercial relationship faster than a protracted and ugly dispute. In this bold new age of partnering, parties should be looking to abandon the blame and claim culture which has dogged the construction industry and to resolve their differences by way of mutually acceptable solutions. If you are able to work together in a positive way at an early stage to solve arguments that arise during a project, your relationship will be preserved and the likelihood of winning repeat work should inevitably increase.

Privacy/confidentiality/adverse publicity

As with many other commercial sectors, a good reputation in the construction industry is worth its weight in gold. Potentially interested parties who see you embroiled in a lengthy and costly dispute are unlikely to be impressed. They will be even less enamoured if your practices, products, workmanship or professionalism are found to be at fault. Many of the alternative forms of dispute resolution are conducted in private or are confidential. If you want to avoid washing

your dirty linen in public, the advantages of avoiding the Courts are obvious.

Innovative solutions

The remedies available from the courts can be limited in nature. What if the question you want decided is something other than who owes whom for what and how much? Using a different method of dispute resolution unhindered by strict Court rules can give parties the scope to find innovative solutions to the problem, which might otherwise be unavailable.

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