



## *Dispute avoidance and resolution*

### Challenges, strategies and solutions to weather the economic storm

#### Introduction

1. A word about that storm we are weathering, the cheery news from the Chief Economist's Weekly Brief of RBS for 18 May 2009 had these highlights:

Read all about it...

- Noises from the OECD last week that we are past the worst of the downturn will have been met with sighs of relief from the euro area where Q1 output plummeted at never before seen rates. This doesn't mean a recovery is in sight, just that the pace of decline is slowing. For the time being, "less rapid contraction" is the new "green shoots".
- The Bank of England remained reluctant to buy into any building wave of optimism.
- We saw a glimpse of the two sides of the UK housing market last week - the number of buy-to-let borrowers more than three months in arrears has trebled in the last year. House prices are unlikely to stabilise until demand and supply find an equilibrium.
- The latest news from the UK labour market was unexpected - the highest quarterly increase in the number of people looking for jobs since 1981.
- After proving surprisingly resilient at the beginning of the year, US retail sales fell for a second month in April.
- It is an anomaly of the current recession that core consumer price inflation refuses to come down.
- The global recession has turned the world on its head in the euro area.

These are remarkably difficult times and the worst for 60 years and engaging in long running disputes is bad for corporate well-being even in the boom times. So this paper looks at the options and some practical ways to get through disputes without imperilling your business - as the adage goes, a stitch in time saves nine.

2. It goes without saying that the best way to avoid and resolve disputes is to circumvent them happening in the first place; if this is not possible you need to manage the dispute in the best, fastest and most economical way possible.
  3. Therefore, this paper will look at how to tell if your project is heading for a dispute, how to avoid that dispute coming to a head and, if the worst happens, how to effectively manage the dispute and the best processes. This will include a look at the techniques and thought processes I encourage clients to go through as they try and avoid disputes, and some of the contractual approaches to dispute avoidance, for example under the NEC where many enlightened ideas have come from. I shall then look
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at some of the alternatives to the better known forms of dispute resolution litigation, arbitration, and statutory adjudication, including project mediation and adjudication boards, which is favoured by many international contracts and is the process adopted by the Olympic Development Authority in London.

4. I will then move on to look at one of the more practical issues that may arise, how to get out of a bad deal.
5. But first some background to why dispute avoidance and resolution is such an important issue for the construction industry:
  - (i) Construction as we all know is full of personalities who often take a hard-nosed view to negotiation/business.
  - (ii) Construction is inherently risky. Unexpected ground conditions, unique designs, procurement hold-ups, and the sheer logistics of organising a large number of contractors, subcontractors, suppliers, etc. to produce construction means that much of the process is still uncertain and therefore risky by definition. This, combined with the fact that most contractors' margins are minimal. Margins of 1-2% are not rare in good market conditions and buying turnover is standard practice in recessions like now makes the risk of dispute high. No matter what the wording of the construction contract is, many contractors have little option but to try a claim to recoup their losses, hence the claims industry.
  - (iii) On the other side of the fence, employers want minimal risk yet at the lowest cost price to maximise the return on their investment and often want a project finished in a period which does not reflect a proper understanding of the construction process.
  - (iv) Construction is a very traditional business in which a large number of different professions and trades have to work together to achieve the employer's aim of completing the project. Unfortunately, sometimes the team can be poor at communicating and often lacking in understanding the needs of others. People chemistry is a very key ingredient in the recipe.
6. Taking all of this on board, some might think it is a miracle that the majority of projects are completed without any form of dispute.
7. Warning signs, early symptoms, action and dispute avoidance
  - (i) What are the warning signs to look out for? What are the early symptoms of problems in a project?
  - (ii) What action can you and should you take when a problem becomes apparent?
  - (iii) What can you do to avoid a potential scarp turning into a bloodbath?
    - (a) How can disputes be resolved by informal methods, such as negotiation and mediation?
    - (b) What methods are included in contracts?

#### What are the warning signs/early symptoms to look out for?

8. The signs to look out for differ depending on whether you are the employer or the contractor but there are some things that are always a clear indication that trouble is brewing in a project. I call these sirens.
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9. One thing always to be wary of is the breaking down of communication. Construction projects rely on effective communication between the contractor and the employer's team to succeed, if people work as a team most problems can be overcome (I look at this in more detail below when considering the NEC standard form contract). If you are an employer and you notice that the information being supplied to you by the contractor has become less profuse or indeed has stopped altogether, that is the time to start talking to your contractor and your team to find out if there is a problem and address it. Often a hiatus comes before a storm.
  10. Another regular warning bell is an increase in the number of letters and notices coming from either party; while it might sound strange coming from a lawyer, you know you have a problem when one or both parties begin to become contractual and start quoting clauses. Yes a notice of delay at the right time is exactly what a contractor should be providing or a payment certificate /notice of non-completion from the CA, but when it is for every minutiae and begins to arise on a regular basis then this is probably a good flag to problems looming.
  11. Late payment is a classic warning sign of a problem brewing. It might be cash flow or it might be a sign of unhappiness on the part of the employer with the work being done by the contractor but at the end of the day money makes the project happen. Never underestimate cash as being anything other than the lifeblood of the industry.
  12. By way of a final example for current purposes, another warning sign is the arrival of groups of men in suits on site. This is another classic sign that there is a problem which needs addressing as a claims team may have been put on the job.

#### What action to take

13. The first piece of advice, and this is more common sense than legal advice, is that jaw-jaw is always better than to war-war between the contractor/employer and the professional team. It never goes amiss to enquire if there is a problem. Open up the canvas and discuss the problem with all interested parties - to avoid big bills later keep the lines of communication open. Sometimes two channels are better than one. Try to wrestle a dispute to the ground before it develops too many limbs. If a dispute is unavoidable then, as I set out below, there are a number of different procedures open to the parties to a Construction Contract to help resolve the dispute, but try talking first, it is cheap.
  14. Before becoming heavily involved in any dispute sit down and think about what you want to achieve, where you want to get to, and what your priorities are as it is often far too easy in the heat of battle to lose sight of what you want to achieve. Be realistic about your objectives when entering into any dispute. Know where you would like to end up, but have a plan B and possibly C too.
  15. Be creative, run through the possible ways to resolve the dispute, read your contract, and ascertain what routes for dispute resolution are included in the contract and consider both the risks and the benefits of the dispute resolution methods available. Consider the non-contractual methods of resolving the dispute and finally, and often most importantly, consider your strategy. This is an issue I discuss in detail below.
  16. Another action to take when a dispute is threatening (if this is not already the case) is to get your papers in order. One of the biggest problems with bringing or defending a claim is a lack of or disorganised papers and assuming the contract is one thing, when plainly it is not.
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Another example of good records to keep are details of how contractor costs are built up, i.e. his tender analysis notes (in particular the monies which the tender included for preliminaries, variations and the like), which can stop the great ingenuity and creativity that go into making claims which can stretch into rewriting history later on. This helps identify what the contractor captured in his work scope and priced. This information should be obtained prior to the signing of the contract by the project manager/PQS obtaining a breakdown of the prices used by the contractor including his labour and material rates, together with the actual profit percentages used and overheads (as separate figures). Overheads should be broken down further to show whether a formula has been used, or if there is any build-up.

17. Contractors may balk at the idea of supplying these figures, but if they are to pursue a claim in arbitration or court or even adjudication, they will have to produce their build-ups at some stage. If a contractor truly appreciates that a more open approach is being adopted, he should be more amenable to suggestion that this information is provided.
18. At the first hint or even notice of a claim, it should be investigated by the professional teams. If parties simply reserve their positions and do not deal with the claim, they will lose opportunities to try to manage the dispute whilst it remains on site.
19. I now look in greater detail at some of the options.

**What aids management better is a form of early warning system.**

20. The NEC states that the contractor can serve Notice of the Compensation Events but also call a meeting to discuss what is to happen. Clause 13.1 states, "Each instruction, certificate, submission, proposal, record, acceptance, notification, reply and other communication which this contract requires is communicated in a form which can be read, copied and recorded."
21. Once an early warning is given the project manager enters the matter in the risk register and there is an instruction to attend a risk reduction meeting. Those attending co-operate in making and considering proposals to avoid or reduce the risk, seek solutions and decide actions. The focus of the meeting is to solve the problem in the interests of the project. It is about prevention rather than cure and focuses participants' efforts to be proactive rather than reactive. It encourages collaboration, innovation and ability to adjust to circumstances during the contract.
22. By getting to grips with the potential delay as soon as possible, it allows the parties to discuss freely between themselves what is the best way to cope with what has happened. For example, days are often lost doing nothing, waiting for the preceding trades to finish or works to become available. With the professional team, the employer, contractor and subcontractors discussing what is to be done in the event of a delay, often labour can be redeployed on another part of the site, work re-sequenced etc., which can reduce the delay and the cost claimed.

**Negotiation strategies - positional negotiation**

23. In its most basic form direct negotiation provides a simple, party-based, problem-solving technique. A further dimension is added when either party introduces advisers. Nonetheless, the essential feature of this process is that control of the outcome remains with the parties.
  24. When a dispute is potentially cooking it is important to consider your
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negotiating strategy to avoid the dispute being served up as the main course. There are differing approaches to negotiation. First is the “competitive”, “distributional”, or “positional” approach. Positional negotiators will make an initial offer that is considerably less than they are ultimately willing to pay. They will raise their offers gradually and seek whatever tactical advantages are available. These tactics can be looked at under three headings.

25. Firstly, proprietary tactics. These involve a range of simple positional moves. For example, insisting that meetings be held in your own office or some other setting where you feel more comfortable than your adversary. Attempting to ascertain the number of people the other side will bring to the meeting in order to ensure that you balance or slightly outnumber the other side. In the event that the other side requests a negotiation meeting, then demanding some sort of pre-condition may, if the other side accepts, improve the chances of a favourable outcome. These simple tactics provide an opportunity to weigh up the negotiating clout of the adversary as well as an opportunity to put the other party at a psychological disadvantage. Declaring certain people *persona non grata*, taking the lead on setting the agenda, are other things to consider.
26. Secondly, initial tactics. These tactics are used in order to attempt to extract the first offer from the other side. Things like changing your team line-up at the last moment without telling the opposition to rev up the engagement, or, for example, the use of silence in the hope that the other side will tender an offer in order to keep negotiations under way. A first high demand provides the negotiator with the ability to manoeuvre and reduce subsequent demands. Furthermore, unreasonable and outrageous demands appear to become more justifiable after extended discussions if you have made a good nest in which to lay your egg. Another initial tactic involves putting your major demand first on the agenda. Some competitive negotiators believe that there is a “honeymoon” period at the outset of all negotiations during which negotiators make compromises more freely. I always recall when I was an articled clerk, husbands always tended to yield more when “discovered” by their wives; the trick was to make audacious demands early and close them quickly as the next chance would be the old man in a wig!
27. Finally, a range of general tactics. This may simply include raising some of your demands during the course of negotiation in the hope that this will put pressure on the other side to complete the negotiations quickly before the position stiffens yet further. Another approach involves the use of two negotiators who play differing or even opposing roles. One takes a very hard line offering almost no compromise whilst the other appears to desire compromise. Opposing parties who are unaware of such tactics frequently grasp at marginal concessions because they perceive them as substantial in relation to the position of the hardliner.

#### Move the claim up!

28. I often advise clients early on to move the dispute up the management chain as soon as possible. Don’t talk to the ticket clerk; always go to the fat controller. The employer’s clerk of works and contractor’s site or project manager will have a personal interest in the project. They will find it very difficult to back down on compromise.

#### Deal with the person who has authority

29. Many negotiations fail because the parties at the meetings do not have the authority to commit or to deal. In addition, it is a bad tactic to
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disclose your bottom line to (say) a project manager and then to find that when the project manager refers it to his director, they cannot commit, and your cover is then blown.

30. Always try to negotiate with the person who will write the cheque/mandate the TT.
31. An approach to senior management from a subcontractor or contractor to a director or to senior management of the employer is more likely to defuse the situation. I advise clients to make contact with or write to (say) a director of the contractor, where the project is only one of several problems on his desk. A *de facto* main board director is more likely to take a commercial view.

#### Adopt this approach in the contract

32. If senior managers/directors are to be involved, it is best to enshrine this approach in the contract. By setting out a dispute escalation procedure in the contract for resolving disputes sometimes having two rungs is a good plan, first and second tiers so the big guns are kept in reserve for dealing with failed tier one engagements. One often sees the naming of senior managers in such clauses; this can save time in trying to decide who is the best person to approach and can even encourage the parties to involve their superiors at an early stage. I have seen this put to good effect, for example, on the Westfield White City project in recent months. It importantly buys time which tactically is invaluable before more formal engagement.
33. However:
  - (i) if the contract sets out the dispute escalation procedure involving senior managers/directors, the senior managers/directors should ideally be those who are not involved in the project;
  - (ii) it will nearly always be open for a party to ignore the procedure and adjudicate immediately.

#### *Without Prejudice*

34. The law tries to encourage the parties to settle disputes without recourse to the court. As a result, if the parties make a genuine attempt to settle a dispute, by making offers, counter-offers, etc., the law will try to protect these communications and prevent them from being put before a judge. The reason for this is to allow the parties to discuss their differences freely without fear of what they say being repeated in court.
  35. However, just because a letter is headed "*Without Prejudice*" does not mean it cannot be produced before a judge. The letter or conversation it refers to must be part of the genuine attempt to try to settle the dispute. Writing an aggressive letter without any hint of settlement and heading it "*Without Prejudice*" will not prevent a judge from seeing it.
  36. My advice is that:
    - (i) If you are going to make an attempt to settle a dispute either during a telephone conversation, or at a meeting, get clear with the other party that your conversation is "*Without Prejudice*" before you make the offer. I often ask other solicitors "*Can we talk on a without prejudice basis?*" - no one has ever refused.
    - (ii) If you are going to make an offer in writing, avoid any arguments as to whether it is an attempt to settle the dispute by heading your
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letter “*Without Prejudice*”.

- (iii) Do not just slavishly add the magic words, as they are otiose and useless unless intended to be part of a genuine settlement attempt.

### Mediation

- 37. Over recent years, the informal non-binding process of mediation has become increasingly popular in the construction industry and generally, although in certain civil law countries it remains out of favour. The origins of mediation and conciliation can be traced to China some 3,000 years ago. More specifically, China has used these techniques as a primary dispute resolution process whilst other parts of the world have resorted to some form of adjudicative process.
- 38. More recently, and during the last 15 years, there has been a growing international awareness of the benefits of mediation as a dispute resolution technique. I distinctly recall 1991 being a watershed point when London started to embrace it. In the US, research by Stipanowich has documented the rise of mediation, which was first taken seriously by the US construction industry. Apparently the Army Corps of Engineers pioneered the process in order to reduce the high costs of litigation.
- 39. The Court Service has embraced the idea of mediation to such an extent that now it is almost impossible to avoid going through a mediation. If you do refuse to mediate, the courts will likely penalise you in costs for your refusal and you will be made to feel you have something to hide, which becomes a sign of weakness whereas at one time it was considered a sign of weakness to offer mediation! Indeed, there are Ungley Orders!
- 40. Mediation is an incredibly powerful and cost-effective tool for settlement of disputes and avoiding the dispute becoming formal but often will not work until the parties' positions are fully set out. One of the problems with court-based mediation is that it takes place as soon as the initial pleadings have been produced which, if there has not been a decent pre-action protocol exchange and/or a measure of robust disclosure beforehand, will make coming to a formal resolution very difficult.
- 41. Mediation also allows for creativity and lateral solutions to a dispute. Indeed, recently, one of my mediations was settled by one party wearing a hair shirt and making payments to charity rather than to the claiming party to resolve the dispute!
- 42. Mediation comes in many different forms, from the very time-limited court referred mediation to the massive multi-party mediation lasting late into the small hours or even days. Mediation also takes a number of different forms, from informal facilitative mediations where someone assists the parties but is not a trained mediator, to evaluative mediations where a recommendation is issued and then project mediation, which I will say more about below.
- 43. I now look at mediation in greater detail.

### Contractual dispute avoidance

- 44. Most standard forms of contract include procedures for resolving disputes formally and many now include procedures to try and avoid disputes, for example, the JCT form now includes a provision for mediation in Clause 9. Today I want to look at the NEC form which is really at the vanguard of avoiding disputes contractually as managing them out is the name of
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the game.

#### NEC - early warning

45. The ability to manage out disputes is one of the principal reasons for the Olympic Delivery Authority's choice of the New Engineering Contract (NEC) as its preferred form for its 2012 procurement programme and came as no surprise to industry watchers. The NEC claims to be the antidote to traditional construction contracts. Written by non-lawyers, it eschews familiar language (like "shall") and terminology (variations, extensions of time) in favour of its own argot. The layout and numbering style are very different.
  46. More importantly, it is designed not as a set of rules, but as a project management tool and a guide to good practice. The first clause requires the parties to "act in a spirit of mutual trust and co-operation" – a concept alien to English lawyers. The parties must notify each other of problems promptly and co-operate to solve them, regardless of who caused them. Risks must be identified and managed, not ignored in the hope that they will not happen. There is a heavy emphasis on programming and cost forecasting. The target cost version provides for savings and overruns to be shared, thus incentivising cost reductions.
  47. The message is clear: traditional contracts (it is said) ferment conflict; the project suffers and only lawyers benefit. The NEC offers, they say, a better way. Well the jury is still out until we have seen its exposure on a wider battle field. The experience of committed users seems to bear this out – very few disputes have been reported under it so far. This however also has a lot to do with the project sponsors so far.
  48. The NEC early warning procedures (core clause 1.6 provides for Early Warning Notices) are, however, a clever idea and are to be found at core clause 16 which provides that:
    - (i) the Contractor is to give the Project Manager a warning of relevant matters;
    - (ii) a relevant matter is anything which could increase the total cost or delay the completion date or impair the performance of the finished work;
    - (iii) the Contractor and Project Manager are then required to attend an early warning meeting if one or the other party request it. Others might be invited to that meeting;
    - (iv) the purpose of the early warning meeting is for those in attendance to co-operate and discuss how the problem can be avoided or reduced. Decisions focus on what action is to be taken next, and to identify who is to take that action.
  49. It could be said that this is a partnering-based approach to the resolution of issues before they form entrenched disputes. Co-operation between the parties at an early stage of any issue identified by the contractor or project manager provides an opportunity for the parties to discuss and resolve the matter in the most efficient manner. It therefore reinforces contractually much of what has been discussed above.
  50. This is a departure from the usual approach of the contractor serving formal notices. A contractor may receive compensation for addressing issues raised by way of the early warning system. On the other hand, if a contractor fails to give an early warning of an event which subsequently
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arises, and that he was aware of, then any financial compensation awarded to the contractor is assessed as if he had given an early warning. If, therefore, a timely early warning would have provided an opportunity for the employer to identify a more efficient manner of resolving the issue, then the contractor will only be paid for that economic method of dealing with the event.

### Risk Register

51. A risk register appeared for the first time in the most recent edition of NEC in July 2005. The risk register will at the outset contain risks identified by the employer and contractor, but the risk register is designed to develop as the project proceeds. It works hand in hand with the early warning process and in conjunction with the proactive project management approach of the contract.
52. There are three main objectives of the risk register:
  - (i) to identify the risks associated with the project;
  - (ii) to set out how those risks might be managed; and
  - (iii) to identify the time and cost associated with managing those risks.
53. It may be possible precisely and specifically to identify risks that can be added to the register like power supply, bearing pressure, wind load, specific adjoining owner issues, or in other instances the risk register may simply contain reference to more generic risks.

Likelihood	Consequences				
	Insignificant <i>(Minor problem easily handled by normal day to day processes)</i>	Minor <i>(Some disruption possible, e.g. damage equal to \$500k)</i>	Moderate <i>(Significant time/resources required, e.g. damage equal to \$1million)</i>	Major <i>(Operations severely damaged, e.g. damage equal to \$10 million)</i>	Catastrophic <i>(Business survival is at risk damage equal to \$25 Million)</i>
<b>Almost certain</b> <i>(e.g. &gt;90% chance)</i>	High	High	Extreme	Extreme	Extreme
<b>Likely</b> <i>(e.g. between 50% and 90% chance)</i>	Moderate	High	High	Extreme	Extreme
<b>Moderate</b> <i>(e.g. between 10% and 50% chance)</i>	Low	Moderate	High	Extreme	Extreme
<b>Unlikely</b> <i>(e.g. between 3% and 10% chance)</i>	Low	Low	Moderate	High	Extreme
<b>Rare</b> <i>(e.g. &lt;3% chance)</i>	Low	Low	Moderate	High	High

54. This sort of matrix can be very helpful.
55. The process of identification allows the parties to consider how those risks might be managed before turning their attention to the time and cost implications. If Option A or B applies, then the employer will only bear the costs in terms of time and money if a risk is covered by a compensation event. Otherwise, the contractor bears all other risks. The approach is similar for Options C and D (target cost contracts) in that the employer will bear the risk if the event is one listed in clause 80.1. If not, the employer will in any event initially bear the risk, but the risk will then be shared through the risk share mechanism set out in clause 53.
56. There is, however, the further impact of clause 11.2(25) dealing with disallowed cost. If an element of cost is a disallowed cost, then the risk

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will be the contractor's in any event. Finally, the employer bears almost all of the risk under Options E and F (cost reimbursable contracts). This is unless the risk is covered by the definition in clause 11.2(25) or 11.2(26), again relating to disallowed costs.

57. Nonetheless, the important aspect of the risk register is not just the early identification, but also the ability to then appraise and reappraise as well as proactively manage risks before they occur. The overall effect of a well run risk register is a greater assessment of the overall financial outcome of the project and a greater ability to manage the time for completion of the project.
58. The importance to the contractor of these early warning systems can be found in the potential penalties if the contractor fails to give a timely notice of the occurrence of a compensation event. Interestingly, the risk register that appears in NEC contracts is now finding its way into non-NEC contracts by bespoke amendment reflecting its use in other areas of commerce and often linked into dispute board procedures.

#### Compensation events

59. Core clause 60 deals with compensation events. If a compensation event occurs, which is one entitling the contractor to more time and/or money, then these will be dealt with on an individual basis. If the compensation event arises from a request of the project manager or supervisor then the contractor is asked to provide a quotation, which should also include any revisions to the programme. The project manager can request the contractor to revise the price or programme, but only after he has explained his reasons for the request.

60. NEC3 has adopted a stricter regime than most current contracts for contractors in respect of compensation events. Core clause 61.3 is set out in terms:

The Contractor notifies the Project Manager of an event which has happened or which he expects to happen as a compensation event if the Contractor believes that the event is a compensation event and the Project Manager has not notified the event to the Contractor.

If the Contractor does not notify a compensation event within eight weeks of becoming aware of the event, he is not entitled to a change in the Prices, the Completion Date, or a Key Date unless the Project Manager should have notified the event to the Contractor but did not.

61. Clause 61.3 is effectively a bar to any claim should the contractor fail to notify the project manager within eight weeks of becoming aware of the event in question. The old NEC 2 formulation of a two-week period for notification has been replaced with an eight-week period, but with potentially highly onerous consequences for a contractor. This clause must also be read in conjunction with clause 60.1(18) which states that a compensation event includes:

A breach of contract by the Employer, which is not one of the other compensation events in this contract. This helps avoid time at large arguments.

#### Dispute avoidance

62. So what is dispute avoidance? In many respects it is whatever you want it to be. Everyone practises it to some degree, even if it is given a
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different label. Grant Thornton in a report produced in November 2006 listed the following diverse dispute avoidance methods:

- Early negotiation;
- Pre-contract reviews;
- Risk audits;
- Training;
- Compliance audits;
- Periodic reviews;
- Early warning systems;
- Policies and procedures.

63. Of these, the first two are listed as being both the most widely used and most effective. The first is an example of what is commonly known as a non-escalation mechanism, the second is an example of a more management-based technique. However, they are, in a construction context at least, closely linked.

64. I have already addressed the subject of negotiation techniques above, the idea of “early negotiation” is that you nip the problem in the bud at the foetal stage. However to be able to do that, you need to have sufficient information in place so that you become aware of that potential problem at the initial stages - in other words you really need a draft putative contract to review. Ideally you should be looking for your prospective contract to include details of the following:

- Scope and price;
- Responsibility for design;
- Payment - is the contract compliant with the Housing Grants, Construction and Regeneration Act 1996 (“HGCRA”)?
- Time - when does the project commence? When should it be complete by? Can you adjust the completion date? Is the project divided into phases? Is there sectional completion?
- What are the procedures for valuation, variations, final account, defects etc.?
- Insurance;
- Security (assignment, warranties, bond);
- Termination;
- Dispute resolution.

65. Therefore, the idea is to cross check a matrix of issues before you sign on the dotted line. However, if you have a letter of intent, many of the above issues will not be dealt with and you might not be able to adjudicate. For example, His Honour Judge Wilcox considered that the letter of intent in the case of *Bennett (Electrical) Services Limited v Inviron Limited* failed to comply with the requirements of section 107 of the HGCRA.

66. That letter read as follows:

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We hereby confirm that, subject to approval of your appointment by YJL it is our intention to enter into a secondary sub contract with yourselves, for the installation and testing of the Electrical Services and Labour Only Installation Package related to works at the above site.

The basis of the Secondary Sub Contract (in no particular order of precedence) is set out below:

- (i) Inviron Ltd contract
- (ii) Inviron Form of Secondary sub contract
- (iii) Form of Sub contract between YJL and Inviron Ltd
- (iv) Inviron Form of Enquiry 8th March 2004
- (v) Meeting on 23rd of March 2004

The Secondary Sub Contract sum will be £169,157, which is fixed price for the duration of the contract.

Sub Contract works to commence on site on the 13th of April 2004.

You are to provide the quantified schedule of rates, (not re-measurable) reconciling to the submitted Tender summary within seven days of the date of this letter.

On the basis of this letter of intent we instruct you to proceed with all works required to progress the proposed Secondary Sub Contract and to meet the programme requirements noted above.

Our obligations arising from this letter of intent are conditional upon your compliance with the foregoing requirements and the matters set out hereafter.

If and when the Secondary Sub Contract is concluded, (which will not occur until we notify you of approval of your appointment) the terms and conditions of such contract shall govern retrospectively. The work carried out by you, pursuant to this instruction, and any monies paid to you, in respect of the work performed pursuant to this instruction shall be treated as a payment on account of the contract sum under the Secondary Sub Contract once concluded.

In the event that a Secondary Sub Contract is not concluded we shall reimburse only your reasonable and substantiated direct costs of complying with this instruction until it is revoked. We will not reimburse any other expenditure cost or loss whatsoever. This limitation includes without derogating from the generality of the foregoing any claim for breach of contract, loss of profit, loss of contract, loss of expectation or otherwise.

We reserve the right by written notice to revoke this instruction without cause at any time before an unconditional contract is concluded. In such event, you shall vacate the site promptly and with as little disruption as possible, removing all plant and waste materials and leaving the site clean and tidy. It is a condition of this instruction that upon such written notice you shall in addition; deliver to us all designs, plans, programs and other documents prepared by you or on your behalf in relation to the proposed Secondary Sub Contract works, which we may use for the purpose of executing the work.

If you withdraw from performance of the work instructed prior to conclusion of the Secondary Sub Contract, you shall not be entitled to any payment for work done. In such event you will be liable for all loss and expense incurred by us resulting from your withdrawal.

67. The letter of intent did not refer to a number of issues discussed at the meeting of 23 March 2002, including working hours, mechanisms of
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payment, variations, insurance and health and safety. Unfortunately neither did the minutes of the meeting. Judge Wilcox characterised these matters as being “key”. As they were not the subject of a recorded agreement, the HGCR could not apply.

68. Of course there is not always time to carry out a detailed pre-contract review. And perhaps the Judge recognised this when he commented on the difference of opinion in the Court of Appeal case of *RJT Consulting Engineers Ltd v DM Engineering Ltd*. Judge Wilcox noted that:

The reasoning of Auld LJ is attractive because at the subcontractor level and where cash flow difficulties are likely to be encountered in the smaller projects, the paperwork is rarely comprehensive. The extent of the requirement for recording contractual terms for an agreement to qualify under section 107 laid down by majority could have the effect of excluding from the scheme a significant number of those whom the Act was perhaps intended to assist.

69. However, Judge Wilcox also noted that he was bound by that majority opinion. Everyone else is too, unless the long-delayed changes and the Local Democracy, Economic Development and Construction Bill ever becomes law with this debacle of a government. As for risk audits, training, compliance audits, etc., they are all developments on a theme of using systems to drive out trips and falls, they will only tend to work with people who think and do not tick boxes.
70. A modern example of the non-escalation method in the NEC suite of contracts is the system of early warning procedures touched upon above. It should, of course, go without saying that if you are required contractually to provide early warning of problems you must set up your own procedures so that you can catch any trouble at an early stage. In fact, these are the type of procedures that should be in place in any event. Looking back at the Grant Thornton list of dispute avoidance methods, adequate training (do those you have tasked with looking ahead for potential problems know what they have to do?) and periodic reviews (how is the project really progressing?) stand out as two means to provide your own early warning bell-ringing system.

#### Bang for your buck - cost-effective management of disputes

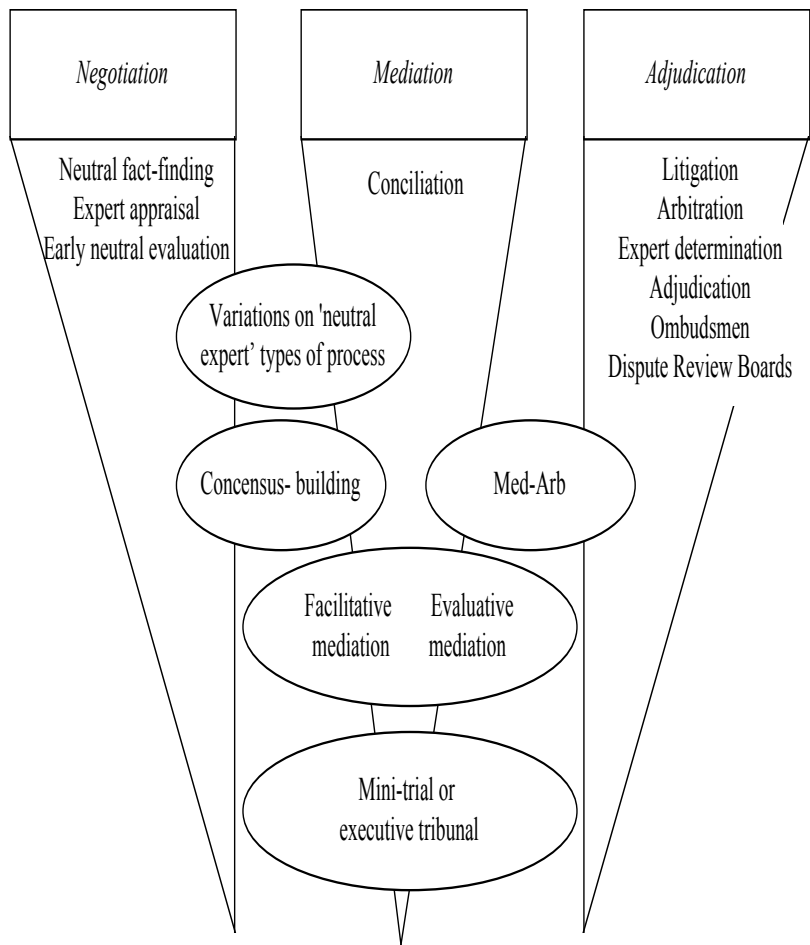
71. Before I look at different ways to resolve a dispute I shall quickly turn to the issue of getting the most bang for your buck when a lawyer and/or consultant is to act for you in resolving a dispute. Here are just a few of my hot tips for getting the most bang for your buck (simple yes, obvious too, but time and again clients fail to get it right):
- (i) Ensure that all of your papers are in order so that you do not have to pay someone to organise them for you. Be systematic.
  - (ii) Make sure you keep electronic and paper copies of all of your records, save emails, do not delete, as that is no use to anyone.
  - (iii) Know where you can find an executed copy of the full contract and provide it to your advisors from the outset. Ditto supplementary agreements.
  - (iv) Plan what you want to achieve and how you aim to achieve it.
  - (v) Know the figure that you will settle for and work towards achieving a result which at least meets your target. If things start going your way and that figure looks easily achievable do not lose sight of the commercial reality of the situation fighting on for another few
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months for a few thousand pounds more may actually mean you go backwards!

- (vi) Never lose sight of your goal - an immense amount of costs burn can be incurred unnecessarily if you lose sight of your goal. Preliminary issues are best won and the moment seized to deal; never wait for better things at trial unless you have to.

72. Now we all familiar, at least in outline, with what we might call normative forms of dispute resolution , adjudication, arbitration and litigation illustrated below.

### The Dispute Resolution Landscape



Source: Mackie, K., Miles, D. and Marsh, W. (1995) Commercial Dispute Resolution: An ADR Practice Guide, Butterworths, London, p. 50. The chart was derived from a chart by Professor Green of Boston University (1993).

73. The more quant-garde forms of dispute resolution being applied today, both nationally and internationally, are those I now turn to.

### Expert determination

74. I am sure most of you in this audience know of expert determination as a process by which the parties to a dispute instruct a third party to decide a particular issue. The third party is selected because of his or her particular expertise in relation to the issues between the parties. According to John Kendal:

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There is nothing very new about expert determination. It has been a feature of English commercial and legal practice for at least 250 years. What is new about it is that it is being called in to help with the current crisis in commercial dispute resolution. Expert determination is a simple procedure by which valuation and technical issues are referred to a suitably qualified professional to determine “acting as an expert and not as an Arbitrator” ... Unlike alternative dispute resolution (ADR), expert determination guarantees a result which is final and binding.

75. Expert determination is essentially a creature of contract (QC clauses in policies of insurance, rent review clauses, etc.) but in many cases it is still agreed ad hoc post dispute. The parties to a contract agree that some third party will decide a technical or valuation issue between the parties. Expert determination has traditionally been used in rent reviews. According to Kendal, approximately half of all commercial leases contain a provision for rent review by a surveyor acting as an expert whilst the other half state that the surveyor is to act as an arbitrator. Nonetheless, expert determination is not restricted to mere land valuations.
76. The technique lends itself to valuation and complex technical issues. In this respect, expert determination may be found in a wide variety of circumstances: valuing shares in private companies, certifying profits or losses of a company during sale and purchase, valuing pension rights on transfer, determining market values in long-term agreements. Further, the use of expert determination may be used as part of a multi-stage dispute resolution procedure. In this instance, some technical matter may be referred to an expert, leaving the other issues in dispute to arbitration or litigation.

#### The sine qua non of ED

77. A typical expert determination clause should ensure that specific items are clearly dealt with.
- (i) the issue or issues to be determined should be clearly and precisely expressed. Lack of clarity in relation to the issue to be determined may provide an opportunity to argue subsequently about the jurisdiction of the expert.
  - (ii) it is important to state that the expert is to act as an expert and not as an arbitrator. Much of the case law in the area of expert determination focuses on this point. If the third party is acting as an expert, then his or her opinion as to the value or opinion of the correct decision in relation to the issue in dispute is not capable of being challenged. On the other hand, if the third party is acting as an arbitrator, then the formalities of an adjudicative procedure must be adhered to.
  - (iii) a further essential feature of expert determination is that the decision should be final and binding. On the other hand, adjudication and decisions of dispute review boards are often expressed as final unless challenged by a subsequent arbitration.
78. Finality is a common feature of expert determination. It is, as they say, usually over when the fat lady stops singing.
79. The contractual machinery should ideally provide some mechanism for appointment of an appropriate expert. If it does not it can be difficult to get this off the ground. Often the contract will provide for appointment by agreement between the parties or in default by some appointing
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authority stated in the contract. A default procedure will ensure that an expert is appointed regardless of the strategies associated with the other party. In addition, it is beneficial to include express provisions in relation to the expert's qualifications and state how the expert is to be paid. This is usually split equally between the parties with a further provision allowing the expert to decide otherwise.

#### Answering the right question

80. The leading case in this area is *Jones v Sherwood Computer Services Plc*. This case involved a sale and purchase agreement where part of the consideration was to be deferred. The valuation of this deferred consideration depended upon the acquired company's sales figures exceeding a certain level. If the vendor and purchaser's accountants were unable to agree this figure then a third accountant was to determine the figure as expert. The vendor's and purchaser's accountants could not agree on the categories of transactions which should be included as sales.
  81. Coopers & Lybrand were appointed as the expert firm who determined that the sales amounted to £2,527,135. The vendor was not satisfied and wished to challenge the reasoning behind the determination. The Court of Appeal stated that the expert had been asked to determine the level of sales and that is exactly what they had done. On the other hand, if the expert departed from his instructions - for example, by valuing shares in the wrong company - then that would be sufficient to upset an expert's decision. *Jones v Sherwood* suggests then that an expert would need to make some manifest mistake in relation to its jurisdiction before the court would intervene.
  82. *Nikko Hotels (UK) Limited v NEPC Plc* considers the expert's jurisdiction in relation to points of law. If the expert had answered the wrong question, then his decision would be a nullity. On the other hand, if the expert had answered the right question but in the wrong way, the decision would still be binding.
  83. More recently, the House of Lords considered expert determination in the case of *Mercury Communications Limited v Director General of Telecommunications and Another*. In that case, two companies, BT and Mercury, were granted licences to run telecommunication systems under section 7 of the Telecommunications Act 1984. Clause 29 of the Agreement provided for a review of the Terms of the Agreement after five years. If either party was unable to agree to any fundamental changes of the Terms then a reference was to be made to the Director General of Telecommunications for the determination of any particular issue. An issue in relation to pricing was referred to the Director General. Mercury challenged the Director General's decision on the basis that he had misinterpreted the costs to be taken into account when setting the price.
  84. Initially, the Director General applied to strike the action out on the basis that the action was an abuse of process. The Director General argued that as the Agreement was formed under the Telecommunications Act 1984 any determinations of the Director General were in the domain of public law and should therefore be subject to judicial review and not a private action.
  85. The House of Lords held that as the dispute related to a contractual matter (albeit by way of a statutory power) then an action in private law was appropriate. In relation to the exercise of that decision-making function the House of Lords decided that they ultimately had jurisdiction
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to interpret the construction of the clause. They went on to say that provided the expert does not depart from his/her instructions then the decision cannot be challenged unless there is some allegation of fraud.

86. So one can see EDs are robust creatures and relatively low cost compared with other more formal dispute processes.

#### What about project mediation?

87. Project mediation is one of the “new” methods of managing the risk of disputes during the delivery stage of a project. In short, the project participants contract from the outset to use mediation as the primary means of dispute resolution. Project mediation is aimed at the real-time resolution of disputes or differences arising in the context of an ongoing long-term relationship. The resolution of disputes or differences is assisted by experienced mediators who are appointed at the outset of a project. They will be familiar with the industry concerned and the contractual framework in place. Project mediation is a collaborative problem solving process, which encourages creativity and should enhance working relationships. In this way project mediation attempts to fuse team building, dispute avoidance and dispute resolution in one procedure.
88. The aim of project mediation is to assist in the successful delivery of a project by identifying and addressing problems before they turn into disputes about payment and delay. The project mediation panel is appointed at the outset of the project; it is impartial and normally consists of one lawyer and one commercial expert, who are both trained mediators. The panel assists in organising, and attends, an initial meeting at the start of the project and may conduct one or more workshops at the outset or during the course of the project as necessary, to explain what project mediation is about and how it works. They may also visit the project periodically in order to have a working knowledge of the project and, more importantly, the individuals working on it.
89. That knowledge allows the panel to resolve differences before they escalate, because the panel provides an immediate forum for the confidential discussion and potential mediation of differences or disputes. Therefore the panel members will not be coming to the project cold each time there is a dispute, but rather will build up their knowledge of the project as it progresses. In addition, the parties have the right to contact the mediators informally and consult with them privately at any time.
90. The Model Project Mediation Protocol sets out the ground rules, including the powers of the project mediators. It includes, as you would expect, a confidentiality agreement to ensure that all information emanating from the mediation process is not to be used for any other purpose, unless the parties agree otherwise.
91. In project mediation, the parties to the construction contract recognise that there is a risk that they might have disputes during the course of the work but also recognise that a standing mediation panel could help to avoid those disputes. This is because the parties to the construction contract will get to know the individual mediators, and those mediators will not only have an understanding of the project, but will also know the individuals concerned. There is, therefore, the potential for the project mediation panel to become involved not just in disputes, but also in the avoidance of disputes before the parties become entrenched and turn to adjudication, arbitration, or litigation. By anticipating potential differences, managing unexpected risks, and seeking to prevent disputes,
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the mediators help to control project delivery.

92. There are of course some similarities with the structured ADR procedures such as dispute review or adjudication boards. However, typically these are only economically viable because they are used on substantial projects; this is because of the costs associated with establishing and running a three-person board. However, project mediation is viable for projects with a much lower contract sum, and has the potential for very widespread use; it is intended to be cheaper, less formulaic, more flexible, and more informal than a dispute board.
  93. In terms of cost, it is much cheaper than a dispute board. If a dispute arises, a dispute board requires detailed statements of case, evidence, experts' reports, and a hearing. If a dispute arises on a project with project mediation (and remember that the idea behind project mediation is that it is there to prevent disputes arising), the parties exchange position statements and supporting documents. There would then usually be a one-day mediation with a high chance of resolving the dispute. The mediators already have valuable knowledge of the project and of the individuals working on the project.
  94. The Model Project Mediation Protocol sets up a mediation framework which is then put in place for the entire lifecycle of a project. A key difference with mediation in its traditional sense is that currently ADR is often only explored once a dispute has arisen, positions been taken and relationships soured. Here, the parties agree at inception to manage and resolve any differences that may arise with the assistance of the Project Mediation Panel that follows the project through. This knowledge allows the panel to resolve contractual differences before they escalate, and provides an immediate medium for the confidential, mediated resolution of disputes. With project mediation, a dispute can be nipped in the bud and where a dispute is resolved during the course of a project, the Panel will of course still be in place afterwards to help facilitate implementation of the agreement, as well as to help avoid, manage or resolve other disputes.
  95. Project mediation provides a better response to project finance and risk management. Banks and funders are increasingly having to look at operational risk and having effective measures available to deal with conflicts. Project mediation is one such option.
  96. Some of the advantages of project mediation are as follows:
    - (i) By its nature mediation is voluntary but quasi contractual.
    - (ii) The process encourages communication and information flow and enhances collaborative working between the parties.
    - (iii) It focuses on dispute prevention.
    - (iv) It shows that parties are taking collaborative working seriously.
    - (v) It is flexible, cost-effective and can be budgeted for in advance.
    - (vi) It is without prejudice to the parties' contractual rights and remedies.
    - (vii) The process focuses on the parties' needs rather than contractual rights.
    - (viii) Imaginative solutions are generated and become available to the parties.
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- (ix) It is relatively inexpensive, quick and effective.
97. Project mediation enables conflict management and dispute resolution to be integrated into the contract as part of a collaborative contracting approach. As project mediation is integrated into the contract, it will be included as part of the contract procurement documentation.
98. Project mediation does, of course, build on what has gone on before, but is tailored to the needs of the industry. It is more about dispute avoidance and only then resolution. The mediators are there to assist with problem solving during the project. Therefore, the parties can focus on the project not the fight. Although they cannot make decisions, so the power to deal with issues remains with the parties, the project mediators can inject some reality that might otherwise be overlooked. It's like partnering with teeth.
99. The benefit of project mediation lies with encouragement of collaborative working and the use of an effective early warning system. The aim of such a process is to encourage parties to look ahead together and eliminate financial and programme risks. It focuses on the people and getting the job done. The project mediators can test whether the participants are really collaborating or just going through the motions. Thus it has clear links with partnering

#### Partnering - briefly!

100. Of course, as with dispute avoidance techniques, there are many forms of partnering and in this credit crunch all forms of it are being severely strained when once collaborative working, repeat business, secure supply chain and dispute avoidance convinced many private and public sector procurers to insist on partnering as the way forward, some contractors have embraced this, but not covered their backs. While entering into a partnering agreement might seem one of the best ways to minimise the risk of a dispute arising, all that love and honey evaporate when the purse strings snap shut. There is no accepted definition, but the US Construction Industry Institutes Partnering Taskforce says this:

a long-term commitment between two or more organisations for the purpose of achieving specific business objectives by maximising the effectiveness of each participant's resources. This requires changing traditional relationships to a shared culture without regard to organisational boundary. The relationship is based upon trust, dedication to common goals, and an understanding of each other's individual expectations and values.

101. Under such arrangements, it seems plain that disputes should never arise.
102. That would be a very dangerous assumption. Just because many partnering agreements are collaborative in nature does not mean they will not go wrong and when a project goes wrong, someone has to take the blame. So if your colleagues give the partnering charter more room than the contract it is time to worry.

#### TCC Court Settlement Service

103. Another possibility is CSS. Early in 2005, to some controversy I might add, HHJ Toulmin CMG QC began to consider whether judges in the TCC should provide an ADR service and a proposal entitled *Court Settlement Process* was published at the end of the same year. In June 2006, a pilot scheme was introduced into London's TCC. The Court Settlement Process was described as "a confidential, voluntary and non-binding dispute resolution process", during which the parties to the dispute seek to reach an amicable settlement. The case management judge from the TCC would
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then conduct the process. The pilot scheme had been planned to conclude in July 2007, but was later extended to the end of that year due to the small number of cases initially.

104. The initiative behind the scheme was to make use of the expertise the judges of the TCC have as a result of the specialist nature of the cases brought before it. This expertise might, it was argued, assist the parties in reaching a settlement.
  105. Under the Court Settlement Process the case management TCC Judge could decide (either of his own volition or at the request of the parties) to offer a Court Settlement Conference. If the parties agreed to this, the date and length of time needed for the conference (not usually longer than a day) would then be fixed and embodied in a Court Settlement Order. The Court Settlement Conference consists of what seems to be a basic mediation service with the parties free to communicate with the TCC Judge in private (unless otherwise agreed by the parties).
  106. If the Court Settlement Conference was successful then a Settlement Agreement signed by the parties will be entered into in the usual way. Any agreements reached which are not recorded in a settlement agreement will not be binding on the parties. If a settlement could not be reached, then the Judge may send the parties an assessment setting out his views on the dispute including, without limitation, his views on the prospects of success on individual issues, the likely outcome of the case and what an appropriate settlement would be. This would of course be confidential between the parties.
  107. If the Court Settlement Conference was unsuccessful the case would then be taken by another case management judge and the settlement judge would not take part in any part of the subsequent proceedings. The Court Settlement Process is private and confidential and any documents produced for that process are privileged. The process is therefore in some ways less like mediation and closer to ICE conciliation and/or Dispute Review Boards (albeit with one and not three members).
  108. Before the pilot scheme was implemented, it was subject to a consultation process and concerns were raised about the scheme. For example, the Chartered Institute of Arbitrators was concerned that mediation was not a judicial function and could be seen as a breach of natural justice. They were also concerned that the process could compromise the court's impartiality and neutrality, threatening public confidence in their processes. They also argued that the qualities needed from a Judge (the ability to consider, weigh and determine the issues) are very different to those making a good mediator (the ability to facilitate negotiations).
  109. Opinion was otherwise relatively mixed as to the benefits of the scheme. The Technology and Construction Solicitors Association (TeCSA) was against the proposal whilst the Technology and Construction Bar Association (TeCBAR) was neutral. Others were broadly supportive. Philip Norman of Pinsent Masons suggested that the proposal was not so much mediation but rather an opportunity for the TCC judges to "bang the parties' heads together". He went on to conclude that:

the process will be useful where litigation progresses to trial solely because of the characters involved (clients and lawyers alike), whose participation has avoided early settlement. A judge's views will bring into sharp focus the merits, and more importantly the litigation risk in each party's case.
  110. The uptake for the TCC Court Settlement Process appears very limited;
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only five respondents stated that they had used it, though these five experiences resulted in settlement. The general lack of enthusiasm suggests that the TCC may not encourage much additional “business” in the long term by offering the service.

#### Interim/final settlements

111. Now whether through informal dispute avoidance or formal dispute resolution you have reached a settlement acceptable to all, how do you put the settlement into effect and tie it down?
112. We all know one problem is that disputes arise both during the construction phase and at the end as part of the final account. Two different approaches may need to be taken to settlements that are reached as part of an interim measure and as part of a final settlement of all issues. I set out below what is essentially a way of distinguishing between an interim and a final settlement and what you need to include in your settlements to make them either interim or final.
113. If a dispute arises during the course of the works then careful thought needs to be given to whether a settlement reached should be either interim or final. Often the views of the contractor and the employer will be very different. Let us look at an example. An extension of time claim and related loss and/or expense arises part way through the works and the parties agree the extent of the delay and the amount of the contractor’s loss and expenses. Should this then be an interim or a final settlement or in other words can the claim be revisited later? Now you can tell where the difference will lie between the contractor who will of course potentially want to revisit the claim and the employer who would like certainty for this element of the final account. Provided the parties can get over this issue it is important to distinguish between whether the settlement you have reached is an interim or final settlement of that head of claim.
114. In order to ensure that the settlement is final, words will need to be inserted in the document containing the settlement to confirm that the parties have agreed that the settlement is in full and final settlement of all and any claim in respect of the claim made and identifying the claim as fully as possible to avoid any confusion.

#### Final settlement

*This Agreement is in full and final settlement and satisfaction of all claims howsoever arising in respect of the Works arising under, out of or in connection with the Contract dated the 15th day of April 2007 excluding latent defects.*

115. The position with an interim settlement is far easier as you will simply need to identify that it is in settlement of the claim, identifying the claim being pursued, that it is subject to review, and that it is only up to the date of the settlement and no further.

#### Interim settlement

*This Agreement is in full and final settlement of C’s claim in respect of an extension of time under clause 26 of the Contract to the date of this Agreement.*

116. One thing to note is that when it comes to the final account the settlement should always be in full and final settlement but if you are the employer make sure it clearly excludes any latent defect claims and DLP
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procedures that may arise after the event or defects if you conclude the final account early.

117. Indeed, sometimes a settlement is intended to be a compromise of only certain defects, and is not intended to compromise the employer's rights in respect of other defects which have yet to appear. If that is the intention, particular care needs to be exercised because there is authority in *Conquer v Boot* to the effect that in a claim for defects in an ordinary lump-sum contract there is only one course of action in contract in respect of all the defects. Accordingly, the terms of settlement should specify with particularity which defects are within the scope of the settlement, and care should be taken before consenting to any court order embodying the terms of settlement lest future claims should become *res judicata*.

#### Dispute boards/FIDIC

118. Dispute boards have become more popular and more widely used in recent years as a dispute settlement mechanism in international construction projects. A dispute board is an ADR mechanism in which a neutral third party normally consisting of three persons renders a determination in the form of a recommendation (which can become binding) or a (binding) decision on a (normally technical or legal) question in dispute within a relatively short time in an expedited proceeding. Project dispute boards are a jolly fine idea.
119. I shall therefore spend more time than I can devote on my feet to this important area which, but for resistance in some civil law countries, is gaining following on super projects in the infrastructure arena around the world in hydroelectric facilities, roads, bridges, airports, and tunnels, that sort of thing. The now international Dispute Resolution Board Foundation is testament to its growth.
120. One of the best known examples of the dispute board can be found in the FIDIC suite of contracts.
121. The use of the terminology "dispute board" or Dispute Adjudication Board ("DAB"), whether or not it includes "adjudication", is relatively recent in origin on the landscape. It describes a dispute resolution procedure which is normally established at the commencement of a project and remains in place throughout the project's duration. The intention behind this is so that the members of the DAB can become acquainted with the contract and project and, if appropriate, provide informal assistance, recommendations about how disputes should be resolved and, ultimately, binding (if only on a temporary basis) decisions.
122. The important distinction then between Dispute Review Boards (DRBs) and DABs is that the function of a DRB is to make a recommendation which the parties voluntarily accept (or reject), while the function of a DAB is to issue written decisions that bind the parties and must be implemented immediately during the course of the project. The DRB process is said to assist in developing amicable settlement procedures between the parties, such that the parties can accept or reject the DRB's recommendation. Genton, adopting the terminology of the International Chamber of Commerce ("ICC"), describes the DAB approach "as a kind of pre-arbitration requiring the immediate implementation of a decision". He goes on to state that: *"the DRB is a consensual, amicable procedure with non-binding recommendations and the DAB is a kind of pre-arbitration step with binding decisions"*.
123. It is only recently that FIDIC introduced the DAB concept. Before that the
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engineer, for example under clause 67 of the Old Red Book FIDIC 4th edition, was given the responsibility of resolving disputes, prior to formal arbitration. The ICC has also given it serious house room as a precursor to processes that might lead to a full blown arbitration. The ICC issued on 1 September 2004 its Dispute Board Rules, together with Standard ICC Dispute Board Clauses and a Model Dispute Board Member Agreement.

124. However I will focus on FIDIC which first introduced a DAB in 1995 in its Orange Book nine years before the ICC. The DAB was then introduced as an option in the Red Book in 1996. This led to the dispute resolution system under the FIDIC form here which retains the engineer in accordance with the provisions of sub-clause 3.5 but also made the DAB mandatory.
125. The DAB procedures under the FIDIC form consist of the following:
- (i) Clause 20 - the Dispute Adjudication Board;
  - (ii) Appendix - General Conditions of Dispute Adjudication Agreement;
  - (iii) Annex 1 - Procedural Rules; and
  - (iv) The Dispute Adjudication Agreement.
126. Of all the provisions to be found in the FIDIC form, those of clause 20 have attracted by far the most comment. That in itself is unsurprising, in that if disputes do arise, they can quite quickly become very costly. Of course, the better an understanding both parties have of how the entire contract works, then the less likelihood there is for disputes to arise. However when disputes do arise, it is of crucial importance that both parties follow the provisions of clause 20 with some care. A failure to do so could quite possibly prevent an aggrieved party from bringing a claim. This is the same under any contract.
127. Clause 20.1 requires that:
- (i) The Contractor must give notice to the Engineer of time or money claims, as soon as practicable and not later than 28 days after the date on which the Contractor became aware, or should have become aware, of the relevant event or circumstance.
  - (ii) Any claim to time or money will be lost if there is no notice within the specified time limit.
  - (iii) Supporting particulars should be served by the Contractor and the Contractor should also maintain such contemporary records as may be needed to substantiate claims.
  - (iv) The Contractor should submit a fully particularised claim after 42 days.
  - (v) The Engineer is to respond, in principle at least, within 42 days.
  - (vi) The claim shall be an interim claim. Further interim updated claims are to be submitted monthly. A final claim is to be submitted, unless agreed otherwise, within 28 days of the end of the claim event.
  - (vii) Payment Certificates should reflect any sums acknowledged in respect of substantiated claims.
128. Thus, sub-clause 20.1 requires that the Contractor, if it considers it has a claim for an extension of time and/or any additional payment, must give notice to the Engineer “as soon as practicable, and not later than 28 days
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after the event or circumstance giving rise to the claim”. This makes it clear that the Contractor must submit its claims during the course of the project. The initial notice at first instance does not need to indicate (for the very good reason that usually it cannot) the total extension or payment sought. The scheme of the FIDIC form is thus that where possible, disputes should be resolved during the course of the works.

129. Therefore reflecting a modern trend and as with the NEC suite of contracts, compliance with the notice provisions is intended to be a condition precedent to recovery of time and/or money and, without notices, the Employer has no liability to the Contractor. Certainly parties should treat the sub-clause in this way and the prudent Contractor should take care to comply with the timescales set out in this sub-clause and submit the required notice during the course of the works and within the proscribed period of 28 days.
130. The Contractor also needs to remember that where the effects of a particular event are on-going then, rather unusually, the Contractor is specifically required to continue submitting notices at monthly intervals - a sort of periodic review. Thereafter, the Contractor has a further period in which to submit a fully particularised claim. There is no condition precedent attached to this part of sub-clause 20.1. Although the Engineer can request additional particulars, the Contractor should not rely on any such request to flag up potential areas of weakness in its claim. The Contractor’s claim will stand and fall by the quality of the evidence and the time within which it is produced.
131. The Contractor is required to keep contemporary records to substantiate its claim. In the case of *Attorney General for the Falkland Islands v Gordon Forbes Construction (Falklands) Limited*, Acting Judge Sanders ruled that you could not attempt to get around this requirement by producing simple witness statements after the event. Such statements would not be the equal of either statements taken at the relevant time. He defined “contemporary records” thus: “original or primary documents, or copies thereof, produced or prepared at or about the time giving rise to a claim, whether by or for the contractor or the employer.”
132. The sub-clause ends by noting that the success of the Contractor’s claim “shall take account of the extent (if any) to which the failure” to provide for example contemporary evidence, “has prevented or prejudiced proper investigation of the claim”. Thus, in the case of *London Borough of Merton v Stanley Hugh Leach Limited*, whilst the giving of a notice was not a condition precedent to the architect considering whether an extension of time should be granted under the relevant contractual clause, the failure to give such a notice was a breach of contract. Thus if such a breach had caused a delay which would otherwise have been avoidable, then the defaulting party would not be entitled to recover for that avoidable delay. This is what the final paragraph of sub-clause 20.1 envisages would happen under the FIDIC form here.
133. The appointment of the Dispute Adjudication Board is governed by clause 20.2 which stipulates that:
- (i) Sub-clause 20.2 establishes the Dispute Adjudication Board or DAB.
  - (ii) The DAB shall consist of one or three people who must be suitably qualified.
  - (iii) The composition of the DAB shall be by nomination and then joint selection.
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- (iv) DAB members are to be remunerated jointly by the parties with each paying half of any fees.
  - (v) DAB members can only be replaced by mutual agreement.
134. The DAB will either be named in the contract or must be constituted by a date set out in the Appendix to Tender. The DAB procedure is to be considered as the primary method for dispute resolution under the contract and is a development of real significance in the area of dispute resolution procedures, as noted above, replacing the process of decision-making by the engineer. Referral to the DAB must occur prior to any reference to arbitration. The intention is that a referral to the DAB will occur at a practical “job” level with the members of the DAB being able to see the disputes referred to it on a practical level rather than on the more abstract level encountered in, say, arbitration. It is also hoped that parties will refer matters to the DAB at an earlier stage so that any dispute can be nipped in the bud before it develops into something more time-consuming and costly.
135. As the DAB is appointed by a date specified in the Appendix to Tender, it is therefore highly likely that the DAB will be appointed before work has begun. This also results in consistency throughout a project, as all disputes should be referred to the same DAB. The early appointment of the DAB will bring the benefit that the DAB will, over time, become familiar with and better understand any complexities of the project. For example, under the first Procedural Rule, the DAB is required to visit the site at intervals of not less than 140 days. The rules and responsibilities of the DAB members are set out in the General Conditions of the Dispute Adjudication Agreement and the Procedural Rules.
136. The parties do not have to agree to the full-time appointment of a DAB. This can be costly, particularly in the early part of a project when there is little construction activity going on. The Particular Conditions suggest that if it is intended that the parties want to defer the appointment of the DAB until a dispute actually arises then they should use the wording to be found in sub-clause 20.2 of the FIDIC Form for Plant and Design-Build. This would be achieved primarily by adding the following sentence to the first paragraph of this sub-clause:
137. The Parties shall jointly appoint a DAB by the date of 28 days after a Party gives notice to the other Party of its intention to refer a dispute to a DAB in accordance with sub-clause 20.4.
138. One potential difficulty with this adhoc procedure will be the ability to achieve the swift composition of the DAB.
139. Depending on the agreement between the parties, the DAB consists of either one (then referred to as an adjudicator) or three members. An odd-numbered DAB means that it is unlikely that a position of stalemate will be reached from which there is no impasse. Where the DAB consists of three members, each party chooses one of the members with the approval of the other party. The third member of the DAB is then chosen by agreement of the parties, after consultation with the two party-appointed members. This will, presumably, allay any fear by either party that the DAB will favour one party’s interests over the others.
140. The FIDIC Guide makes the point that it would be contrary to (the spirit of) the adjudication provisions for a member of the DAB to act as an advocate for one party. Paragraph 9(6) of the procedural rules stresses that the members of the DAB should endeavour to reach a unanimous decision. The FIDIC Guide says that each party should aim to appoint “a
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truly independent expert with the ability and freedom to act impartially, develop a spirit of team work within the DAB, and make fair unanimous decisions". In reality these may only be some of the qualities a party looks for.

141. The terms for the remuneration of the DAB members and experts whom the DAB use to help it must be decided before the appointment and are to be paid in equal proportions by each party. This seems to be in keeping with the general ethos of the DAB that the DAB is decided on and ready to be used prior to any dispute arising. It also reinforces the idea that the DAB is to be considered as a pragmatic rather than litigious dispute resolution procedure in which the cost of the DAB is to be carried by both parties rather than by the unsuccessful party. It is common for members of the DAB to be paid on a monthly retainer.
  142. The decision of the DAB may be regarded as being of interim binding effect since it must be complied with until the further steps in clause 20 have been taken. Under Procedural Rule 8(a), the DAB can also decide upon provisional relief such as interim or conservatory measures. In some other international forms of contract, the equivalent of the DAB only has a power to make a non-binding recommendation. The decision of a DAB, in contrast, has greater impact and provides greater commercial certainty and thus has much to recommend it.
  143. Most importantly, the DAB represents a significant improvement on the traditional method of dispute resolution namely the Engineer's Decision. As a result of the increasing perception on the part of the contractor of the partiality of the engineer, the Engineer's Decision had almost become a mere formality on the route of the dispute resolution procedure, offering little possibility of a permanent solution to disputes. The DAB offers the real possibility of early dispute resolution and, in doing so, would seem to justify the additional costs to the project which DABs will represent.
  144. Clause 20.4 deals with obtaining a Dispute Adjudication Board's Decision. The procedure is as follows:
    - (i) If any dispute arises between the parties then either party may refer that dispute to the DAB.
    - (ii) The reference must be in writing and copies must be provided to the other party and the engineer.
    - (iii) The DAB shall be entitled to whatever access it requires, including access to information and the site.
    - (iv) The DAB will not act as an arbitral panel.
    - (v) Unless otherwise agreed, the DAB shall reach its reasoned decision within 84 days.
    - (vi) That decision shall be binding unless it is overturned by agreement or by the decision of an arbitral panel.
    - (vii) If a party disagrees with the decision of the DAB it should serve a Notice of Dissatisfaction in accordance with sub-clauses 20.7 and 20.8.
    - (viii) If no such notice is served, then the decision of the DAB shall become final and binding.
  145. No definition is provided as to what will constitute a "dispute" within the
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meaning of clause sub-clause 20.4. That there is a dispute is, it is submitted, essential in the event that there is a later challenge to the jurisdiction of the DAB if its decision is to be enforced. Where the contract is entered into under English law, recent decisions of the English courts on the meaning of “dispute” found in the case law relating to the meaning of that term in the context of arbitration and adjudication should prove useful.

146. A reference to a DAB of three members is deemed to have been received on the date that the chairman receives it. Since the chairman of a three member DAB is chosen with the consent of both of the parties, this provision will help to reduce the fear that one party is obtaining an advantage over the other. The parties should direct their correspondence to the chairman, but with copies to the other members, as well as providing a copy to the other party and engineer.
  147. The parties are to cooperate with the DAB in its decision-making process. This is another manifestation of how the DAB is designed to be integral in and to the smooth running of the project.
  148. A deadline is set for the DAB to produce its decision. That decision must be reasoned. The 84 days specified is longer than often provided for by adjudication clauses in English construction contracts. The decision of the DAB then becomes binding on the parties until settlement or arbitration. Throughout the DAB process, unless the contract has been ended, the parties must continue with the operation of the contract. Again the emphasis is on the smooth running of the contract as a whole.
  149. Once the decision of the DAB has been produced, the parties have 28 days to register their dissatisfaction. A notice of dissatisfaction with the decision of the DAB is a condition precedent to commencing arbitration proceedings. A referral to arbitration will therefore not be valid where the DAB procedure has not been attempted first. Similarly, court proceedings (in England) will not be possible since the presence of an arbitration clause will entitle the defendant to a stay of proceedings under section 9 of the Arbitration Act 1996. It is not known at this stage to what extent parties will be encouraged to refer to the DAB in situations where it is well known that the DAB will not produce the desired result simply as a way to arbitration. It can well be imagined that bogus referrals to the DAB will be made so that the party can proceed directly to arbitration once the time limits have expired.
  150. It is important for parties to be aware of the 28-day limit for registering a notice of dissatisfaction in the prescribed form as failure to do so will cause the DAB's decision to become final and binding.
  151. In the event that a Notice of Dissatisfaction is served both parties must try and resolve that dispute amicably. An arbitration may not be commenced until 56 days after the Notice of Dissatisfaction has been served.
  152. An attempt to obtain an amicable settlement for a prescribed time of 56 days is also a condition precedent to a referral to arbitration. This is a further instance of where the FIDIC contract places emphasis on the smooth running of the project in which disputes are resolved on a local level. It is anticipated that where a party has not waited and then complied with the 56-day “cooling off” period any reference to arbitration would be invalid. That said, it is conceded by the final sentence that a party does not need to make an attempt to achieve an amicable settlement.
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153. If a dispute remains following the decision of the DAB and any attempt at amicable settlement, then that dispute is to be settled by international arbitration under the rules of the International Chamber of Commerce. Any arbitral decision is to be final and binding. The arbitral tribunal will have full powers to open up and revise any decision of both the engineer and the DAB.

#### What are the advantages of the Dispute Boards?

154. The major disadvantage of the DAB is the cost. Obviously for small projects it could be prohibitive, but for the larger projects there is potentially a significant saving to be made. Dr Helmut Kontges has suggested that the cost of a typical DAB might be up to 2% of a project cost, which compares favourably with the costs of an arbitration which Dr Kontges puts at in excess of 5%, a figure many would consider errs on the side of caution.
155. If the DAB is introduced into a project at an early stage its presence alone should increase the chances of problems on site being resolved at an early stage. A properly constituted DAB may also reflect the fact that most construction disputes are a mixture of law and technical expertise. This will increase the chances of a decision being honoured rather than referred to adjudication. In addition, a DAB decision from a panel of independent experts might be viewed more favourably by a Board of Directors than a settlement achieved through negotiation, perhaps at a mediation.
156. That said, one of the new alternatives to the DAB specifically focuses on mediation, project mediation, which was launched on 7 December 2006. The Model Project Mediation Protocol and Agreement was prepared jointly by Fenwick Elliott and the Centre for Effective Dispute Resolution (better known as CEDR).

#### Getting out of bad “deals”

157. One fundamental skill for any employer or contractor is to know ASAP when a deal is a bad one and to allow for using all means to get out of that deal. It goes without saying that you can withdraw an offer at any time before acceptance and even the offer was expressed as open for say three months, on a practical level sometimes you need to retract it. At whatever stage the key is to identify that it is a bad deal and get out before it is too late.
158. This leads on to the question when is it too late?
159. While some might argue that it is never too late and, indeed, traditionally contractors have been known to enter into bad deals but with a view to making a good deal on the swings and roundabouts of bringing as many claims as they can, for those less minded to this way of thinking there is a time when it is too late. That time is generally when the Letter of Intent has been issued, the contract signed or, and this is often the worst case scenario, when you have started work on site with an oral instruction.
160. Until you have been given and accepted a letter of intent/signed the contract or worst case scenario started work on site there is no contractual relationship between the parties and therefore it is open for either party to say that they will not proceed. A party has no contractual duty to the other (although there may be a claim for breach of an oral agreement) and the parties can go their separate ways.
161. What do you do if you have accepted a letter of intent, signed the
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contract or started work on site?

162. Once you have done any of the above you will find it far more difficult to get out of a bad deal but it is not impossible. You will almost inevitably need legal assistance to get out of a bad deal once you have done one of the above but the key is to look carefully at the terms of your agreement (if there is one in writing).
163. If you are acting under a letter of intent look to see whether it implies any terms into the letter, for example a JCT standard form. Is there a specified amount of work or value of work to be carried out, is the letter of intent subject to agreeing terms? If any of these apply then there is still room to manoeuvre. If there is a specified amount of work to be carried out, carry out the work and while doing so change your position so that the employer really will not want to employ you under a contract so that you can offer to walk away once the works are done or before if the Employer would rather, thus limiting your exposure. Equally, if there is a cap on the value of the work covered by the letter of intent you can take a similar approach to encourage the employer to seek to employ others. If you are the employer you can always make negotiations difficult by requiring amendments to the contract which will either make your position far better or force the contractor to pull out of the deal. All not necessarily within the spirit of Latham but this does reflect the commercial world we live in.
164. If the contract is signed then you are in for a far more difficult time getting out of a bad deal and more likely than not you will need to look to improve your position whether by trying to reprogramme your works or by putting extra staff on to the project to mitigate your losses. Otherwise look at the termination provisions in your contract and review whether there are any grounds for getting out, for example late payment of interim payments.
165. In the final case where you have started work on a project and there is no contract in place both parties really are in some difficulty getting out of a bad deal as quite possibly you have no terms to look at. In this case it is something akin to the letter of intent position I examined above and you will need to push for a contract to be agreed at a far better deal than you presently have with a view to either improving your position or encouraging a mutual parting of the ways.

#### Closing remarks

166. There is more than one way to skin the cat when it comes to dispute avoidance. Make your opportunities by planning, recording, watching your back, making use of honeymoon periods, checking that there is a contract early on and that that contract clearly defines the dispute resolution procedures and any other issue which is important to you.
167. Once you have your agreement in place, monitor that contract so that you get an early warning of potential disputes. There does not have to be a specific early warning clause. This advice applies to employer, contractor, and subcontractor alike.
168. Importantly, recognise some contracts like NEC require extensive management and notification procedures, you need to resource those functions not pay lip service to them. Indeed, if the parties to those contracts are not prepared to engage in a proactive manner of working there may be seriously unhealthy financial consequences. For example, the increasing prevalence of time bar clauses like clause 61.3 means that for the contractor or subcontractor failing to notice a problem in good
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time may prevent the recovery of significant costs.

169. In addition to this, any dispute resolution machinery outside court and in particular in adjudication could have a serious impact on resources and prompt a large payout which will be most probably enforced even if “wrong”, pending the dispute being resolved through litigation or arbitration. The material and paperwork involved may be voluminous and encompass a complicated factual matrix, which is an expensive way to flip a coin.
170. Therefore, as a safeguard, if you maintain a watch on the project and preserve relevant records, you will be keeping an eye out for impending difficulties. The issues become more blurred and acrimonious if left unsolved and invoices/notes lost or thrown away. With the appropriate housekeeping, problems may be noticed and solved at the outset.
171. In the interests of saving time and costs, effective contract administration must be paramount. If this level of organisation can be achieved and the potential dispute is discovered at an early stage, the likelihood is that it will be resolved more promptly, without there being any need to contemplate adjudication. Above all keep talking. If that does not work, come and see me!

Simon Tolson  
19 May 2009

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