Fenwick Elliott

MANAGING DISPUTES
IS ADJUDICATION THE BEST OR ONLY WAY?

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13TH ADJUDICATION UPDATE SEMINAR

Introduction

1 It goes without saying that the best way to manage disputes is to avoid them in the first place. It also goes without saying that there are probably as many forms of "dispute avoidance", to use the current technical jargon, as there are means to skin the proverbial cat. Therefore the first part of this paper will look at some of the differing approaches. This will include a look at how the NEC form of contract has adopted a form of early warning procedure designed to help minimise actual disputes. The second will then look at some of the alternatives to statutory adjudication, including Project Mediation and the Adjudication Board, which is favoured by many international contracts and is in the process of being adopted by the Olympic Development Authority[1] in London.

Dispute avoidance

2 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 different label. Grant Thornton, in a report produced in November 2006[2], listed the following different dispute avoidance methods:

2.1 Early negotiation.

2.2 Pre-contract reviews.

2.3 Risk audits.

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[1] This is not an official paper on behalf of or in association with the Olympic Development Authority
[2] *The Future of Dispute Resolution III* – paper to be found in the publications section of their website www.granthornton.co.uk

2.4 Training.

2.5 Compliance audits.

2.6 Periodic reviews.

2.7 Early warning systems.

2.8 Policies and procedures.

3 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.

4 The idea behind early negotiation is that you nip the problem in the bud at an embryonic 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 (pre) contract to review. Ideally you should be looking for your contract to include details of the following:

4.1 Scope and price.

4.2 Responsibility for design.

4.3 Payment – is the contract compliant with the Housing Grants, Construction and Regeneration Act 1996 ("HGCRA")?

4.4 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?

4.5 What are the procedures for valuation, variations, final account, defects, etc?

4.6 Insurance.

4.7 Security (assignment, warranties, bond).

4.8 Termination.

4.9 Dispute resolution.

5 If you have a letter of intent, many of the above issues will not be dealt with and, for example, you might not be able to adjudicate. His Honour Judge Wilcox considered that the letter of intent in the case of *Bennett (Electrical) Services Limited v Inviron Limited*[3] failed to comply with the requirements of section 107 of the HGCRA.[4]

6 That letter read as follows:

[3] [2007] EWHC 49 (TCC)
[4] He had already decided that no contract had come into being

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, which is a 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.

7 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 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 HGCRA could not apply.

8 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* [(5)] 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.

9 However, Judge Wilcox also noted that he was bound by that majority opinion. Everyone else is too, unless the long-delayed government review of the adjudication provisions changes the position.

10 A modern example of the non-escalation method can be found in the NEC suite of contracts, which provide for a system of early warning procedures. 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 system.

NEC - early warning

11 The NEC early warning procedures can be found at core clause 16 which provides that:

11.1 The Contractor is to give the Project Manager a warning of relevant matters;

11.2 A relevant matter is anything which could increase the total cost or delay the completion date or impair the performance of the finished work;

11.3 The Contractor and Project Manager are then required to attend an early warning meeting if one or the other party requests it. Others might be invited to that meeting;

[(5)] [2002] WLR 2344

11.4 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.

12 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.

13 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 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

14 A risk register has appeared for the first time in this most recent edition of NEC.[6] The risk register will initially contain risks identified by the employer and contractor, but the risk register will 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.

15 There are three main objectives of the risk register:

15.1 To identify the risks associated with the project;

15.2 To set out how those risks might be managed; and

15.3 To identify the time and cost associated with managing those risks.

16 It may be possible to precisely and specifically identify risks that can be added to the register, or in other instances the risk register may simply contain some generic risks. 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[7] 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.

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[6] Core clause 16.3

[7] Under NEC3 there are six main options. Option A is a priced contract with activity schedule, whilst Option B (priced contract with bill of quantities) provides that the contractor will be paid at tender prices. Basically, a lump sum contract approach.

17 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 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.

18 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.

19 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.

Compensation events

20 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.

21 NEC3 has adopted a more strict regime 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.
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> 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.

22 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 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.

23 Clause 61.3, therefore, effectively operates as a bar to the contractor in respect of any time and financial consequences of any breach of contract if the contractor fails to notify.

London 2012[8]

24 The NEC suite of contracts have been recommended for use by the Olympic Delivery Authority ("ODA") in the construction of the facilities necessary for the London 2012 Olympics. It is recognised that the ease of resolving any disputes that arise will be a key factor in determining whether the contracts are executed on time and on budget. The ODA therefore must ensure there is an adequate dispute resolution procedure in place to deal promptly and fairly with any issues that arise. If the early warning system fails to resolve the disputes in question then the contract provides for the use of dispute boards. The ODA is currently setting these up.

Dispute boards/FIDIC

25 One of the best known examples of the Dispute Board can be found in the FIDIC suite of contracts.

26 The use of the term "dispute board" or Dispute Adjudication Board ("DAB"), whether or not it includes "adjudication", is relatively recent. 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.

27 The term DAB should not be confused with Dispute Review Boards, which originated in the mid-1970s in the USA. The difference is that the function of the Dispute Review Board is to make a recommendation which the parties are able to accept or reject. The DAB can issue written decisions of a (temporarily) binding nature, which must be implemented immediately during the course of the project.

28 It is only recently that FIDIC introduced the DAB concept. Before that the 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. FIDIC first introduced a DAB in its Orange Book in 1995. 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[9] in accordance with the provisions of sub-clause 3.5 but also made the DAB mandatory.

29 The DAB procedures under the FIDIC form consist of the following:

29.1 Clause 20 - the Dispute Adjudication Board;

29.2 Appendix - General Conditions of Dispute Adjudication Agreement;

[8] This is not an official paper on behalf of or in association with the Olympic Development Authority
[9] Although, as discussed below, the Particular Conditions include an option for the to retain his traditional role.

29.3 Annex 1 - Procedural Rules; and

29.4 The Dispute Adjudication Agreement.

30 Of all the provision, to be found in the FIDIC form, the provisions 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.

31 Clause 20.1 requires that:

31.1 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.

31.2 Any claim to time or money will be lost if there is no notice within the specified time limit.

31.3 Supporting particulars should be served by the Contractor and the Contractor should also maintain such contemporary records as may be needed to substantiate claims.

31.4 The Contractor should submit a fully particularised claim after 42 days.

31.5 The Engineer is to respond, in principle at least, within 42 days.

31.6 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.

31.7 Payment Certificates should reflect any sums acknowledged in respect of substantiated claims.

32 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 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.

33 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.

34 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.

35 The Contractor is required to keep contemporary records to substantiate its claim.[10] In the case of *Attorney General for the Falkland Islands v Gordon Forbes Construction (Falklands) Limited*,[11] 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 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.

36 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*,[12] 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.

37 The appointment of the Dispute Adjudication Board is governed by clause 20.2 which stipulates that:

37.1 Sub-clause 20.2 establishes the Dispute Adjudication Board or DAB.

37.2 The DAB shall consist of one or three people who must be suitably qualified.

37.3 The composition of the DAB shall be by nomination and then joint selection.

37.4 DAB members are to be remunerated jointly by the parties, with each paying half of any fees.

37.5 DAB members can only be replaced by mutual agreement.

38 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

[10] See also discussion above regarding sub-clauses 6.10 and 8.4
[11] (2003) 6 BLR 280
[12] (1985) 32 BLR 51

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.

39 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.

40 The parties do not have to agree to the full-time appointment of a DAB. These 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:

> 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.

41 One potential difficulty with this adhoc procedure will be the ability to achieve the swift composition of the DAB.

42 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. 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 other's.

43 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 truly independent expert with the ability and freedom to act impartially, develop a spirit of teamwork within the DAB, and make fair unanimous decisions". In reality these may only be some of the qualities a party looks for.

44 The terms for the remuneration of the DAB members and experts who the DAB use to help it must be decided before the appointment. Payment is to be made 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 that 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.

45 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 the 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.

46 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.

47 Clause 20.4 deals with obtaining a Dispute Adjudication Board's Decision. The procedure is as follows:

47.1 If any dispute arises between the parties then either party may refer that dispute to the DAB.

47.2 The reference must be in writing and copies must be provided to the other party and the engineer.

47.3 The DAB shall be entitled to whatever access it requires, including access to information and the site.

47.4 The DAB will not act as an arbitral panel.

47.5 Unless otherwise agreed, the DAB shall reach its reasoned decision within 84 days.

47.6 That decision shall be binding unless it is overturned by agreement or by the decision of an arbitral panel.

47.7 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.

47.8 If no such notice is served, then the decision of the DAB shall become final and binding.

48 No definition is provided as to what will constitute a "dispute" within the meaning of 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.[13]

49 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.

50 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.

51 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.

52 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 a situation 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.

53 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.

54 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.

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[13] For example see the seven principles outlined by Mr Justice Jackson in *AMEC Civil Engineering Ltd v The Secretary of State for Transport* [2005] CILL 2189, endorsed and slightly expanded by the Court of Appeal in the same case [2005] CILL 2228 and the case of *Collins (Contractors) Ltd v Baltic Quay Management (1994) Ltd* [2005] CILL 2213.

55 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 that 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.

56 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?

57 The major disadvantage of the DAB is the cost. Obviously for small projects it is prohibitive, but for the larger projects there is potentially a significant saving to be made. Dr Helmut Kontges[(14)] has suggested that the cost of a typical DAB might be up to 2% of a project cost, which compares favourably to 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.

58 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.

59 That said, one of the new alternatives to the DAB specifically focuses on mediation. Project Mediation 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").

What is project mediation?

60 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 attempts to fuse team building, dispute avoidance and dispute resolution into one procedure.

61 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. A 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

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[(14)] *International Dispute Adjudication – Contractor's Experiences* – ICLR July 2006

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.

62 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.

63 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.

64 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, the mediators help to control project delivery.

65 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.

66 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.

67 The Model Project Mediation Protocol sets up a mediation framework which is then put in place for the entire life cycle 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.

68 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.

69 Some of the advantages of project mediation are that:

69.1 By its nature mediation is voluntary but quasi contractual;

69.2 The process encourages communication and information flow and enhances collaborative working between the parties;

69.3 It focuses on dispute prevention;

69.4 It shows that parties are taking collaborative working seriously;

69.5 It is flexible, cost-effective and can be budgeted for in advance;

69.6 It is without prejudice to the parties' contractual rights and remedies;

69.7 The process focuses on the parties' needs rather than contractual rights;

69.8 Imaginative solutions are generated and become available to the parties; and

69.9 It is relatively inexpensive, quick and effective.

70 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.

71 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.

72 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

73 Of course, as with dispute avoidance techniques, there are many forms of partnering. Indeed, in the forum of managing disputes, entering into a partnering agreement might seem one of the best ways to minimise the risk of a dispute arising. Today's seminar is not about defining partnering which has been described by the US Construction Industry Institutes Partnering Taskforce as:

> … 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.[15]

74 Under such arrangements it seems plain that disputes should never arise.

75 That would be a very dangerous assumption. Just because many partnering agreements are collaborative in nature it will not stop them going wrong and when a project goes wrong, someone will take the blame.

Conclusion

76 Thus even with partnering you should make use of the honeymoon period at the outset of almost every project to check that there is a contract and that that contract clearly defines the dispute resolution procedures and any other issue that is important to you.

77 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.

78 Importantly, some standard form contracts such as the NEC[16] suite necessitate extensive management and notification procedures. The parties must embrace these if the contract is to work effectively and to their benefit. Indeed, if the parties to those contracts are not prepared to engage in a proactive manner of working there may be serious financial consequences. For example, the increasing prevalence of time bar clauses means that for the contractor or sub-contractor failing to notice a problem in good time may prevent the recovery of significant costs.

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[15] CII, (1991) page 2.
[16] For further information about the NEC suite of contracts please refer to the articles by Nicholas Gould to be fond on our website at www.fenwickelliott.co.uk.

79 In addition to this, any dispute resolution machinery and in particular adjudication could have a serious impact on resources and prompt a large payout which will be enforced pending the dispute being resolved through litigation or arbitration. Arguably the material and paperwork involved may be voluminous and encompass a complicated factual matrix.[17]

80 Therefore, as a safeguard, if you keep an eye on the project and maintain 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 are lost or thrown away. With the appropriate housekeeping, problems may be noticed and solved at the outset.

81 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.

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[17] Toby Randle, "An expensive way to flip a coin" *Building Magazine*, Issue 05, 2005