Construction disputes

A toolbox of how to avoid them and how to manage them in the early stages

Conflicts arise many times during the lifecycle of a construction project. The vast majority of those are resolved amicably between the parties. One party will either convince the other party that its interpretation is correct (or that the risks of it being right outweigh the benefit of continuing to dispute it), or the parties will settle on an agreed interpretation. But in some cases, the conflicts cannot be resolved merely by discussion or negotiation. Sometimes a party will feel so strongly about its position, or feel that there is something to be gained from not reaching a consensus, that both parties will need to refer their conflict to a structured form of dispute resolution, where normally an independent third party will either assist the parties in trying to reach a consensus or, having appraised both parties’ positions, make a decision for them.

There are a large number of dispute resolution forums ranging from quick non-binding voluntary and consensual processes, like mediation, to more formal processes like litigation or arbitration. In the latter, the parties are bound to a long chain of procedural steps, culminating in a hearing and a decision that binds the parties. The time and costs involved with litigation and arbitration mean it will rarely be the case that a dispute is suited for those processes as a first step or at all. More often than not they are seen as a last resort, once other alternative means of resolving disputes have been exhausted. It is also common for parties to recognise that litigation or arbitration is a last resort and include escalation clauses in their contract requiring (or at least recommending) that the parties undertake various steps such as exchange of information and meetings between directors to see if they can settle before either one commences litigation or arbitration proceedings.

Although adjudication is by far the most common method of alternative dispute resolution in the construction industry, it may not be the most suitable method. A party wishing to formalise a dispute must choose whether adjudication or another form of dispute resolution is the most suitable.

This paper will examine some of the tools which can be utilised to:

• minimise the risk of disputes arising on construction projects;
• formulate and respond to claims; and
• resolve disputes.
Minimising the risk of disputes arising

The contract

Drafting and negotiating the contract

Managing disputes starts with the contract. Disputes often relate to disagreements over the agreed contractual terms, the interpretation of agreed terms, purported ambiguities or inconsistencies in the agreed terms, and may even challenge the existence of a contract. Clear and careful drafting is thus crucial to ensure the contract captures the commercial terms agreed between the parties and that it represents a clear and unambiguous reflection of the parties’ rights and obligations.

Usually, the contract comprises more than the terms and conditions. It also comprises the employer’s requirements, the contractor’s proposals, drawings and sometimes the programme of works. Clear and careful drafting is required in all of these documents, as well as consistency amongst the different parts. Too often parties spend little time ensuring the schedules of the contract are correct, with the effect that disputes arise later, because the schedules are not clear or conflict with the operative provisions. Drafting the schedules is an exercise that requires both legal and commercial input. These teams should work closely together to ensure that both the legal terms and contract documents are consistent and reflect the commercial intentions of the parties. Taking the time to do so will minimise the risk, uncertainty and expense of asking a court (or other forum) to determine the contractual meaning.

Of course, a contract is rarely drafted by one party. The period leading up to the execution of the contract involves a period of often intense negotiation between two or more parties, each vying for the best position they can obtain. The best position is often measured by reference to the risk allocation between the parties. An employer will naturally seek to pass risk on to the contractor. Conversely, a contractor will look to limit its exposure to risk. The following issues are usually at the heart of defining the risk profile for a contract:

- **Events entitling additional time and money** – claims for additional time and/or loss and expense are among the most common disputes arising in construction projects. Each of the main construction standard form contracts, including NEC, JCT and FIDIC, contain triggers which will entitle a contractor to additional time and/or money. Many consider that these clauses are neither prescriptive enough, nor do they identify a sufficient number of events; they are thus amended or complemented. This needs to be done with care. Once the revised terms have been agreed, they need to be imprinted on the minds of the project administrators, to ensure that they are very clear on the scope of the compensable events.
  - **Disallowed costs** – disallowed costs is a term used in the cost reimbursable forms of the NEC suite of contracts. It is defined by reference to a list of categories of cost which the contract precludes the contractor from claiming. It is self-evident that such a clause will alter the risk profile in a project and so perhaps for this reason it is frequently amended. As with time and money events, amendments need to be drafted carefully and concisely. The fairness of the amendment should also be considered to limit the scope of future disputes.
  - **Liquidated damages** – parties to a construction and engineering contract often pre-determine the level of damages that the employer will be entitled to in the event of certain specified breaches. Most commonly, liquidated damages are connected to a failure to complete the works on time. Liquidated damages provisions can serve to avoid litigation about the quantum of damages because the amount is predetermined. However, a liquidated damages clause may come under scrutiny if it is alleged that it amounts to a penalty. If that allegation is proven, the clause will be unenforceable. It is therefore imperative that the rate set for the liquidated damages is a genuine pre-estimate of loss and it is prudent to maintain records of the workings out, from the time of negotiating the contract, showing how such figure was calculated.
  - **Limitation of liability** - a limitation of liability clause is one of the best ways to contain a party’s overall liability on the project. The limitation may be to the contract price, to a percentage of the overall works or to a fixed amount. It can limit the types of claims that can be recoverable under a contract, for example by excluding consequential losses. Net contribution clauses are also limitations of liability, limiting the liability of a party for loss or damage to the amount which would be apportioned to that party, for the relevant breach, by a court on a fair and reasonable or just and equitable basis.
Understanding the Contract

Once the contract is finalised it is important to understand what has been agreed and comply with the terms. The contract is a live document; it is a tool to be utilised during the term of the project.

The team who will be administering the contract should be identified at an early stage. It is important that the team has the resources required to properly administer the contract in question. Some contracts, for example the NEC suite, are seen as being particularly burdensome to administer due to the volume of instructions, notices and other documents required to be issued by the contract administrator. Inadequate resourcing may lead to contractual mechanisms, such as payment or change control procedures and record keeping, to break down, and the contract will cease to function as intended. The increase in cost to ensure the contract is adequately resourced should be weighed against the reduction in risk, both in terms of disputes arising and the benefit of having a properly implemented contract, with properly kept records, should a dispute arise.

It is vital that contract managers are trained on how the agreed contract operates at the outset of the project. Not only will this act as a useful refresher for the team, but it will also highlight differences between the form of contract agreed for the project and the standard form contract. Such training can be provided by the legal and commercial teams, who negotiated and prepared the contract. Due emphasis should be placed on the following important issues:

- **The agreed timetable** – It is important to know the project’s phases and deadlines and each party’s obligations and rights in relation to these.

- **Matters still to be agreed** – Ensure any outstanding post signature matters are resolved as soon as possible and recorded properly, either in accordance with a bespoke procedure or by utilising the variation provisions in the contract. Such matters include obtaining performance security, agreeing provisional sums or developing outline designs.
• **Variation and extension of time provisions** – Following the right procedure may avoid retrospective allegations about informal requests for extra work or extra time and payment for this. Progress of a project should be monitored from the outset and any causes of delay should be identified and dealt with at the earliest opportunity.

• **Payment timings** – Being aware of and complying with the contractual procedures, including the requirements to issue pay and pay less notices. Failure to do so has consequences under the Housing Grants, Construction and Regeneration Act 1996, as amended by Part 8 of the Local Democracy, Economic Development and Construction Act 2009. This is a particularly contentious issue at present, following the case of ISG Construction Ltd v Seevic College. In this case, the contractor issued an interim application for payment (albeit after practical completion), the employer did not issue a pay less notice nor did it pay and so the contractor commenced what is often termed a ‘smash and grab’ adjudication. The contractor obtained an award in its favour for £1 million based on the employer’s failure to issue a pay less notice. Before the conclusion of the first adjudication, the employer commenced a second adjudication and asked the adjudicator to value the contractor’s works in respect of the same amount applied for in the first application. The second adjudicator valued the works at £315,000 and awarded a repayment of around £700,000 to the employer. In the event, the employer had not paid the £1 million it was required to pay pursuant to the first adjudication decision and so there was nothing to repay. As a result, the contractor commenced what is often termed a ‘smash and grab’ adjudication. The contractor obtained an award in its favour for £1 million based on the employer’s failure to issue a pay less notice. Before the conclusion of the first adjudication, the employer commenced a second adjudication and asked the adjudicator to value the contractor’s works in respect of the same amount applied for in the first application. The second adjudicator valued the works at £315,000 and awarded a repayment of around £700,000 to the employer. In the event, the employer had not paid the £1 million it was required to pay pursuant to the first adjudication decision and so there was nothing to repay. As a result, the contractor commenced proceedings to enforce the adjudicator’s first decision. The court enforced the first adjudicator’s decision and declined to enforce the second decision for a number of reasons:

- The contract (in this case a JCT 2011 Design and Build) provides no mechanism for repayment of sums from the contractor to the employer. The only mechanisms for payment under the contract were through interim applications or the Final Statement.
- The employer is not entitled to demand a valuation of the contractor’s work on any other date than the valuation dates for interim applications.
- If the employer fails to serve a pay less notice in time it must be taken to be agreeing the value stated in the application, right or wrong.
- If an employer that failed to serve a payment or pay less notice against an interim application could then refer to adjudication the value of that interim application (which may require a payment to the contractor or a repayment by the contractor), that would ‘completely undermine’ the statutory payment regime.
- The second adjudicator was asked to decide the same dispute as the first, which meant he lacked jurisdiction.

In essence, the subsequent valuation adjudication was prohibited. This case is taken as authority that interim applications which have not been the subject of a valid pay less notice could not in themselves be challenged, at least until the final account process.

• **All notice requirements** – Understand what notices are required under the contract and the timescales for issuing these notices. Notice provisions are frequently used in construction contracts and ensure that parties are clear as to what issues need to be communicated, the procedure to be used and the timescales. These clauses aid communication between the parties and, if adhered to, ensure issues are raised and dealt with as and when these arise. They can also prevent claims (such as a contractor’s claim for additional time and/or money) to become time barred if they do not issue a notice in the specified time period.

• **Contractual dispute mechanisms** – Follow any dispute escalation procedures carefully. Contracts will often contain escalation procedures which are designed to resolve disputes quickly and cheaply, whilst maintaining relationships between the parties.

Understanding each of the parties’ rights and obligations under the contract and how the contract should be implemented will ensure issues are identified and dealt with promptly, hopefully before disputes arise.

**Record keeping**

The importance of record keeping cannot be underemphasised. Keeping complete and proper records is singularly the most important tool in terms of avoiding, managing and resolving disputes.

Record keeping is key to both mitigating the risk of disputes occurring and to dealing with disputes if they do occur. If a dispute arises, records will be essential in order to demonstrate exactly what was said or not said, done or not done. In order to establish a claim in front of a decision maker such as an adjudicator, judge or arbitrator, a party must be able to substantiate with evidence the claims or the defence it is advancing. The ability to produce accurate, contemporaneous and measured records throughout a project will be decisive. It is not uncommon for the strength of a party’s claim and ultimately the strength of a party’s negotiating position to boil down to the quality of the records available.

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1 [2014] EWHC 4195 (TCC), per Edwards-Stuart J at [22-33; 42-53].
Organised, meticulous record keeping should be one of the highest priorities on any project. Some tips for record management include:

- **Creating a document structure** – Write down all material events, facts and conversations and send them to all other parties. Create a pro-forma, for example of notices, forms for instructions and minutes to encourage good practice.

- **Records come in many forms** – Records can take many forms including handwritten notes in site diaries, email communications, contract notices, meeting minutes (preferably agreed), formal letters and photographs. If the contract is being administered with reliance on email correspondence or other electronic communications, it is important to understand what devices are being used by individuals to send and receive information and ensure a method is put in place to store these effectively. Electronic devices of key individuals on a project should be regularly backed up. These records should then be logically organised and centrally accessible.

- **Communications** – All documents will have to be disclosed to the other party in the event the parties fall into dispute and resolve the dispute via litigation or arbitration. The only exception is where the document created is subject to legal privilege, but this will not be available in the ordinary course of business on a project. Therefore, parties should exercise caution when creating documents, not only when the document is sent to the other party, but also where the document is circulated internally, or not circulated at all. The rule of thumb is, if the author would not like the document read out in court, then the contents should not be put into permanent form.

- **Joint documents** – Where a document records the agreement of both parties, such as a meeting minute, try to ensure the other party expressly agrees it. Correct any inaccuracies in writing immediately if the other party’s documents fail to record the agreement or discussions in the right way.

- **Retention of documents** – When a dispute arises it is also key to ensure that individuals within the company are instructed to retain all documents in relation to that dispute. Locating and reviewing correspondence to provide evidence can be both time-consuming and challenging, so it is crucial to ensure that documents are organised logically from the outset. Every business should implement a clear document retention policy which not only sets out how documents should be stored but also how long they should be retained for (bearing in mind limitation periods and data protection issues).
Developing claims and formalising the dispute

Do I have a claim?

When a potential dispute arises the first thing is to consider whether the claim has any weight; what are the prospects of success? Determining whether there is a legal and factual basis for a claim and, if so, whether it is sufficiently strong, should be the very first step in the process of deciding whether or not to formalise a dispute. If the case has no real prospect of success, the sensible approach must surely be either to accept the opponent’s view or reach as good a compromise as possible. The emphasis is on whether the claim, or elements of it, is sufficiently strong that it merits pursuing. It is surprising how often this essential first step is missed and parties end up in dispute without any proper consideration as to whether the fight is one they should take.

At a very basic level, the preliminary analysis can be split into three parts: law, facts and application. The first part entails establishing the scope of the contractual or other relevant relationship between the parties and identifying the rights and obligations of the parties that are relevant to the matters in dispute. For instance, which terms and conditions of the contract support or are adverse to the claim.

The second part entails ascertaining the facts. Typically this involves mapping out what has happened in respect of the events or matters in dispute and gathering documents (such as letters, emails, reports) or other information (such as witness statements) that tell the story.

The final part entails applying the law to the facts. In other words, working out whether what has happened has led the would-be defendant to stray outside its obligations such that the would-be claimant has suffered some form of loss which, pursuant to the terms of the contract or otherwise, it is permitted to recoup from the defendant.

At the end of the exercise, if it has been carried out properly, it should be possible to take a considered view on whether the claim is strong or weak. Following this preliminary analysis, and having taken into account the other factors to consider (e.g. whether pressing the dispute will damage an otherwise beneficial relationship on other projects for no commensurate gain), if it is decided that the dispute should be formalised, most of the time from then until the conclusion of whatever dispute process is chosen will be spent fleshing out the initial analysis into detailed submissions, which are supported by evidence collated and drafted for the purpose.

Even at the initial analysis stage, it will be necessary to involve individuals from within the business; very few disputes turn purely on questions of law, and almost all disputes are factual ones, where what people within the business said and did at the relevant times will be of high, and often crucial importance. It may also be necessary or desirable to engage external assistance from solicitors and consultants, who will have the legal expertise and experience to carry out the analysis on behalf of the company and (just as importantly) to identify the key evidence that needs to be gathered.

Is it worth it?

The second stage in deciding whether or not to formalise a dispute is to assess whether the dispute is “worth it.” This entails assessing whether the redress sought, pecuniary or declaratory, is sufficiently large or important to formalise a dispute. It also requires weighing wider commercial considerations, such as the impact on the company, in terms of the time and expense of engaging others in the process, the diversion of resources away from normal, profitable business to dealing with the dispute, as well as the effect on any ongoing relationship with the other party. What follows is a checklist of issues that a party may wish to consider.

Amount in dispute

If the dispute relates to money, consider whether the value of the dispute is sufficiently high such that the award of money will provide a material financial benefit that outweighs the cost involved in achieving that success. What is ‘sufficiently high’ will depend on the context. £10,000 may be a significant sum to a small sub-contractor, but immaterial to an international contractor. Sometimes a party will feel so aggrieved by the other party’s position on a disputed issue, that it will formalise the dispute at whatever cost. This rarely makes commercial sense.

Generally, there is a fairly close link between the amount in dispute and the cost of recovery when deciding whether to pursue a claim. Unless the claim is sufficiently large to bear the costs involved to press it to a conclusion, formalising the dispute will rarely be worth it. The size of the claim versus the costs to be incurred may also inform the choice of procedure and what resources are deployed. For example, adjudicating over a £10,000 debt using lawyers and experts will rarely be worth it given that adjudication is usually a “no costs” environment. It might however be worth informally mediating.
Likely recovery

Almost always, there is a significant difference between the value of the claim advanced to the other party and the claimant’s internal assessment of the claim’s true value. Presumably, the rationale behind this is that a party will want to recover as high a sum as possible and so where there is even a small chance of recovery on a particular aspect of the claim, the party may choose to ‘throw it in’ regardless. Furthermore, the value of the amount claimed at the outset will serve as the claimant’s stake in the ground, representing the amount it wishes to recover. Sometimes known as ‘goal-posting’, some take the view that the higher the starting figure the higher the amount ultimately recovered.

Before the start of any adjudication, the party and/or its advisers should carry out a detailed analysis of each element of its case, evaluating in money terms what the likely recovery of each of those elements might be. One way to do this is to assess each element within a range; selecting a value that represents a worst case outcome, likely outcome or best case outcome, or to put it another way low, medium or high. For example a party might consider that its claim for disallowed costs articulated to the contractor at £300,000 will in fact yield a recovery of £100,000 at its lowest, most likely £200,000 and at the most £300,000. Once the analysis of each element of the claim is done, this can be fed into the overall assessment of whether or not to formalise the dispute.

Professional fees

Where a company or individual wishes to employ advisers to assist it, such as solicitors, counsel and experts, it is important to obtain an estimate of costs from each adviser as to what their fees might be. The estimates can be fed into the financial assessment of the viability of formalising the dispute. The estimates should contain a written explanation of what they include and do not include. For example, the estimates may be given on the basis that the dispute procedure will only last for a particular number of days, or that the scope of the dispute is limited. It is important for a client to carefully review any caveats to the estimates before accepting them. It is also important to understand that the case will inevitably get more complex once the claim is put to the other side, and it is not usually possible to get a fixed price to deal with all those contingencies in advance.

Very often early involvement of lawyers and experts is essential, particularly if a claim is large and/or complex. If that is required, then as described above, there will be an initial phase in which the various ways in which the claim might be advanced will be explored, and the evidence available to test each of them gathered and evaluated. It is therefore possible to incur considerable expenses before the value of the claim can be assessed. If that is necessary, it will be important to get updated budgets for professional fees incurred and to be incurred as the case develops.

Resources

The amount of internal resource required by a party to prepare and participate in a claim can be considerable. The dispute will involve a number of people from the project team, witness statements may be required, documents need to be located and organised, and so on. If the project is on-going (or if personnel are now profitably deployed on other projects), the company should consider whether it is feasible or desirable to divert these individuals away from the project without materially impacting on performance. This may be particularly important in adjudication, where someone may need to be involved in providing evidence or other substantial input at very short notice with no real prospect of an extension of time being available. Where possible, the time and tasks undertaken by members of staff who are directed away from the business should be accurately recorded because in certain circumstances the cost of this time may be recoverable. Again, this factor (and the likely recoverability of any costs associated with it) should then be fed into the overall assessment of whether or not to formalise the dispute.

Relationships

Although it is not always the case, more often than not the act of formalising a dispute will not be welcomed by the other party. Accordingly, it may lead to a deterioration of relationships between the parties, both at a management level and between those working on the project. The result may be that communication between the parties becomes more turgid and abrasive resulting in the parties quickly moving away from working in collaboration to searching out opportunities for further claims.

That said, addressing a disputed issue during the course of the project can have the effect of “lancing the boil” in relation to that dispute, following which the parties continue and arrange their affairs accepting that decision. Non-anecdotal evidence is hard to come by, but it certainly seems that, as a general rule, (a) parties tend to accept adjudicator’s decisions as final, even though in theory they have a right to open them up subsequently, and (b) a series of adjudications during the course of the project, even if fought bitterly at the time, nevertheless seems to produce an outcome more acceptable and cheaper than saving up a basket of disputes for the final account.
An example of poor investigations

There have been a number of recent cases where parties have not fully investigated their position before commencing proceedings, but perhaps there is no better example than the case of (1) Brit Inns Limited (in liquidation) (2) Vincent Barber (3) Linda Lawless v (1) BDW Trading Limited (2) J Reddington Limited.\(^2\)

- Brit Inns was a relatively simple subrogated insurance claim where liability was not in dispute. The Claimants operated a restaurant called The Oak in Teddington, which was flooded as a result of admittedly defective work carried out by BDW Trading and its sub-contractor, J Reddington. The disputes eventually decided at trial related to causation and quantification of the losses the Claimants had suffered as a result of the flooding. There was also a substantial uninsured claim arising out of the same facts, which the court heard at the same time as the insured claim.

- In the insured claim, the Claimants claimed the sum of approximately £660,000 and recovered only £157,467.89 plus interest at trial – around 25 per cent of what was claimed. The Claimants' costs in those proceedings were £528,547.02. In the uninsured claim, the Claimants claimed the sum of approximately £522,000 but recovered only £16,403.24. This equated to a percentage recovery of just 3 per cent. The Claimants' costs in that claim were £157,311.16. As the court itself commented, neither party could call itself successful in such a case.

- The court decided that the Claimants should only receive 60 per cent of their costs up until the date the Defendants’ offer expired. This was to exclude the costs of their experts and the service of late evidence. The court decided that, from the date the Defendants’ offer expired, the Claimants should pay the Defendants’ costs. In the uninsured action (where the Claimants only recovered 3 per cent of the sums claimed), the Claimants were ordered to pay 90 per cent of the Defendants’ costs. As a result, the Claimants were left significantly out of pocket.

The facts of this dispute are a cautionary tale for those involved in the construction industry. The outcome could have been avoided with sensible planning and assessment. In particular, the court heavily criticised the evidence submitted by the Claimants. There were irreconcilable invoices and a complete absence of contemporaneous records as to the scope and extent of reinstatement and fit-out works originally carried out by the Claimants. Where the Claimants sought to make good these deficiencies with witness evidence, this was rejected by the court as not being credible. These issues were compounded by the Claimants engaging an expert who carried out a valuation which the court found to be “fundamentally flawed” as the expert did not independently check the costs allegedly incurred. This was in contrast to the Defendants’ expert, who did carry out such a valuation.

The Claimants could have avoided these issues by properly investing in the dispute before the issue of proceedings. In any dispute, the available evidence should be properly tested at the earliest opportunity. In this case, a proven expert quantity surveyor should have been engaged to report on whether the Claimants’ claims could be corroborated or substantiated and to identify what further evidence was required. Importantly, the weakness of the claim should have been evident from the outset. The Claimants’ advisers could then have assessed the merits of the claim before advising the Claimants on whether to issue proceedings and, if so, for what sum. This exercise would have included assessing the credibility of the Claimants’ witnesses of fact.

\(^2\) [2012] EWHC 2143 (TCC)
External Assistance

**Who to Involve?**

Assembling the right team to assist with the dispute process is paramount. Whilst the underlying facts of a dispute will (or should) play the biggest part in determining the outcome of a dispute, having the right professionals available is likely to radically improve the party’s chances of success. Whether and to what extent it is necessary to involve external solicitors, barristers and expert witnesses in addition to internal management, legal counsel and members of the project team familiar with the issues will always depend on the nature, scale and value of the dispute.

- **In-house lawyers** – Many medium or large companies will have an in-house legal team who have expertise in construction law matters and experience with disputes. Where this is the case, a member or number of members of that team may either manage the dispute on behalf of the company and in so doing appoint external advisers to assist or run the dispute themselves. As a minimum, it is sensible to involve in-house lawyers at least in a dispute management capacity because they are likely to be familiar with the details of the project out of which the dispute arose, they will understand the business and its objectives much better than external teams, they are likely to have a relationship with members of the commercial and management team involved in the project and other than the time they divert from their usual duties, they will not cost the company any additional expense.

- **External lawyers** – External lawyers, whether solicitors or barristers, are sometimes instructed to assist with or conduct the dispute process. Experienced law firms or chambers will have a wealth of experience not only relating to various dispute forums, but also about the legal issues and the subject matter in dispute. Generally, external lawyers are instructed where there is no in-house legal function, it is insufficiently resourced, or does not have experience with construction and/or disputes. External lawyers are more likely to be instructed where the scale and/or value of the dispute is large.

- **Claims consultants** – Claims consultants have come to prominence in the last three decades, partly due to the rise in popularity of alternative forms of dispute resolution, such as adjudication. As a very general rule, claims consultant companies are a mix of practising or non-practising lawyers and industry professionals (quantity surveyors, architects, planners). More often than not, they will have had hands on experience in the construction industry before turning to claims consultancy. Their charge out rates can be (but are not necessarily) lower than those of law firms. For these reasons, in addition to their experience with adjudication, companies will employ them to assist with claims that arise during the course of a project and to prepare for and conduct the adjudication.

One possible draw-back of employing claims consultants relates to the question of privilege. Legal advice from claims consultants does not attract legal advice privilege. Thus, any sensitive information committed to permanent form (usually a written document) such as an assessment of the weakness of its client’s case, or reference to ‘smoking gun’ evidence, may well fall to be disclosed to the other party in the event that the dispute proceeds to litigation or arbitration.

- **Experts** – There may be technical matters in dispute that necessitate external expertise. For example, an expert may be required to understand the metal fatigue properties of a particular steel member in a dispute concerning whether the structure is fit for its purpose. In that case, it can be useful to instruct an expert witness who has the expertise to know whether the steel is adequate and can prepare an independent report to be submitted as part of the dispute process which explains the relevant technical issues as well as his opinion and the reasons for it. Experts are particularly important where the success of a case relies heavily on the interpretation of technical information. Not only will this assist a determining party in their understanding, but greater evidential weight is likely to be attributed to the expert’s report than to a technical submission made by the party itself.

The number of experts required will depend. For instance, if there is a dispute over the entitlement to a period of an extension of time, it may be that only a programming or delay expert is required. However, if there is a dispute as to an extension of time, disruption and prolongation costs, it may be necessary to employ a delay expert to assess the extension of time claim and a quantum expert to value the costs flowing from that extension.

- **Project team** – Those responsible for delivering the project will be the best source of information to understand the factual background to the issues in dispute. The relevant individuals should be identified as early as possible in order to ascertain their availability to assist over the period it is anticipated the dispute will run for. It is helpful to map out who is best placed to speak about or assist with which issues and then interview those individuals to obtain as much information as possible. Depending on the scale of the dispute, it may be prudent to prepare witness statements for those individuals to preserve the knowledge retained by those individuals in written form before the individuals move off the project or before memories fade.
Tools to resolve disputes

Formal dispute resolution options are expensive and time consuming. Furthermore, formal dispute resolution options such as litigation and arbitration are adversarial and are likely to result in a breakdown in communication as parties become entrenched in their positions. Preserving a future working relationship may be an important consideration for a business. Therefore, negotiation and settlement should be considered at the outset and throughout the resolution of a dispute. Making small concessions at an early stage can save both time and money in the long run.

Disputes with a party where there is a concern about its solvency should be approached with caution. The financial pressure of being involved in legal proceedings may contribute to the financial ill health of the other party and may even mean little or no damages are paid if that party becomes insolvent. Trying to reach a commercial settlement through negotiation is more often than not the sensible first step.

Negotiation and settlement

Significant cost and time savings can be made if a business resolves a dispute through negotiation. Negotiation can be less adversarial than formal dispute resolution options and assist with preserving future working relationships.

It is important to approach settling a dispute with a considered strategy before negotiation commences. First, before settlement discussions are commenced, ensure they take place on a “without prejudice” basis. This will enable a frank discussion of the issues without concern that these discussions may be referred to in formal proceedings should settlement not be achieved. All discussions regarding the terms of the settlement should be “subject to contract”, to ensure it is clear that parties are not agreeing to be bound until the agreement has been formalised and signed. Nevertheless, in some circumstances parties may still be bound, so care should be taken during the negotiation stage.

Consider which claims it is desirable to settle. The paying party will want to make the settlement agreement as wide as possible to close off all potential claims the other side may have against it whilst keeping the option open to pursue any cross-claims it may have. The receiving party may want to narrow the settlement agreement to keep the possibility of future claims open. Whichever claims are intended to be settled, clear wording should be used to ensure that the intentions of the parties are reflected in the settlement agreement.

All practical issues should also be dealt with in the settlement agreement. If there are completed works that need to be valued, consideration should be given to how these should be valued and by whom. A clear timescale for the valuation and payment to take place should be included. Provision in the agreement should also be made for the return of documents, drawings, equipment or materials if this is applicable. If the parties have to maintain an ongoing relationship to complete works after the settlement, then consider how the settlement agreement will affect the original building contract and the relationship going forwards.

Detailed payment provisions should be included, setting out when payment will be made and what method will be used. If the paying party fails to pay by the date agreed, the agreement should set out whether interest will be payable and at what rate. If payment is not made at all, the agreement needs to be clear as to whether the claims settled can be revived or whether the unpaid party only has the option to claim for the unpaid sums under the settlement agreement.

It may also be desirable to consider making the settlement agreement confidential so other interested parties do not find out about the existence or content of the settlement agreement. Where defects are evident in a number of properties, without strict confidentiality provisions, the details of a settlement with one claimant may be disclosed to other would-be claimants. Copycat claims are a high risk, especially in construction management.

Be clear as to what claims the settlement agreement applies to. It may not be desirable for it to apply to future claims that may occur.

The key is to get the settlement agreement in writing as soon as possible after it has been agreed. A delay brings with it a risk that the other party changes its mind, either entirely or in relation to particular points.
Forms of Rapid Dispute Resolution

Explaining the various forms of alternative dispute resolution available would warrant a whole separate paper, even a book! For the purposes of this paper therefore, the descriptions are high level and limited to those forms where the procedure is relatively short.

- **Adjudication** – Adjudication is the most common form of alternative dispute resolution for construction disputes. Adjudication was introduced as a statutory right for parties to a construction contract to refer their disputes to adjudication by the Housing Grants, Construction and Regeneration Act 1996. Parties to a construction contract can adjudicate at any time. It is seen as a speedy and cost effective means of resolving disputes on an interim basis. The adjudicator’s decision is binding on all parties until the dispute is finally determined by legal proceedings, arbitration or agreement. The fast nature of adjudication has given it the reputation of being rough and ready.

- **Mediation** – Mediation is a structured settlement negotiation facilitated by a neutral third party, the mediator, who has no decision-making power. The style of mediators can vary from pure facilitators who assist the parties in their negotiations to evaluators who express views on merits and outcomes to encourage settlement. The third party mediator will typically spend at least a part of the mediation process engaged in shuttle diplomacy between parties located in separate rooms. This enables parties to appraise their cases with the assistance of the neutral third party in confidence with progress being made where direct negotiation has reached deadlock. The focus of the process is on issues other than just the legal merits of the parties such as business relationships, external commercial pressures, reputational issues. The process is conciliatory and the outcome consensual. This is in contrast to the contentious approach in both litigation and arbitration and the imposition of a solution by a court or arbitral tribunal.

Many domestic courts offer a form of mediation. In England and Wales for example, the Technology and Construction Court offers a form of mediation during litigation, which it calls the Court Settlement Process. Following a request from the parties, the assigned judge or another TCC judge will hold a Court Settlement Conference at which the judge will act as a mediator. The case is stayed whilst the Court Settlement Process takes place. If no settlement is achieved then the case proceeds as before.

- **Fast Track Arbitration** – Fast-track arbitration is very similar in structure and outcome as traditional arbitration. The key difference is that each step of the process is more limited in time and scope with the result that an award will be issued within a much shorter time period (a typical time period would be the SCA 100 day procedure).

- **Expert determination** – Expert determination is a process by which an independent third party is appointed by the parties either pursuant to the contract or pursuant to a separate agreement entered into between them, to decide a dispute, which can be helpful in resolving the dispute quickly and economically. The parties are able to select the expert who, as the name suggests, is likely to be an expert in the subject matter of the dispute. Expert determination is only available if the contract between the parties provides for it, or it is agreed ad hoc. The exact remit of the expert’s authority and the procedure will be set out in the contract and in the expert’s terms of agreement. Often, the expert’s decision is final and binding with limited, if any, right of appeal.

- **Early Neutral Evaluation (“ENE”)** is a non-binding dispute resolution process whereby a neutral party is retained to provide a non-binding evaluation on the merits of a dispute. The option of seeking a non-binding decision from a recognised individual with specific expertise can be a powerful catalyst for settlement. The parties usually undertake it jointly, although one party can use it where it wishes to privately and independently evaluate the merits of its case with a third party. Typically, the third party evaluator will not engage the parties in discussion or debate (as he or she might in mediation), rather the evaluation will be a paper based exercise and the decision of the evaluator will be communicated usually in writing, although sometimes in conference. It is rare to see ENE principles enshrined in contracts, albeit not impossible to draft.

ENE can also form part of court proceedings. The Technology and Construction Court allows parties to seek a stay in the proceedings to facilitate an ENE, either at the first case management conference or at any time prior to the commencement of the trial. The evaluation is usually undertaken by another judge (although sometimes by the assigned judge, and in which case he or she will take no further part in the proceedings). Usually, the evaluator will give reasons in writing and the decision will not bind the parties.
• **Part 8 Applications** – Commencing a claim in accordance with the rules set out in Part 8 of the Civil Procedure Rules is one way in which a claim brought in the court can be dealt with relatively swiftly. With a comparable timescale it can be seen as a real alternative to adjudication. In fact it can even be preferable to adjudication, because the decision is binding, the court’s fees are typically lower than those charged by an adjudicator and the court has jurisdiction to allocate the parties’ costs. However, the major limitation is that Part 8 cannot be used where there is a substantial dispute of fact.

• **Part 36 Offers** – Part 36 offers constitute one of the most important tactical steps that parties can take during the course of legal proceedings. They provide a means of putting pressure on the other side to settle a case and of protecting, to some extent, the client’s position on costs. If the other side does not accept a Part 36 offer during the period for which it is expressed to be open, they are taking a significant risk regarding costs and interest. Part 36 offers can be made before an action is commenced in court. Doing so can apply pressure on the other side and make them seriously consider both the strength of his claim and the merits of continuing rather than settling.

• **Bonds and Parent Company Guarantees** – Although not a dispute resolution process, bonds and parent company guarantees should be considered when identifying a party against whom a claim can be brought and as a mechanism for recovering money relatively quickly.

**Conclusion**

When a dispute arises it is important to consider and utilise the tools available to ensure a successful outcome. The toolbox comprises the contract, the records maintained during the course of the project, the individuals making up the project team, proper and considered claims analysis, the appropriate use of external advisors and the multitude of dispute resolution methods.

How to approach the resolution of issues and disputes will be dependent on many factors including the strength of the claim, the resources available to pursue the claim, the quality of the evidence available, public relations issues and whether there will be an ongoing business relationship with the other party.

The strategy for resolving the dispute will need to be developed, most likely with the help of external advisors and will need to be regularly reviewed during the life of the dispute.

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