Finding solutions
Alternative dispute resolution in construction and engineering

What is alternative dispute resolution?
Where two or more parties are in dispute, their aim is almost always to resolve that dispute on favourable terms at a cost that is proportionate not prohibitive.
The traditional methods of resolving disputes is via court or arbitral proceedings and although these processes will offer a thorough examination and a final determination (subject to any rights of appeal) of the dispute, they are invariably costly.

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. Indeed, there are often rules governing the conduct of litigation that require the parties at the very least to consider alternative forums for resolving disputes before or sometimes during a court claim. 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.

Therefore, in the overwhelming majority of cases, we advise our clients to consider alternative forms of dispute resolution (ADR) before taking the decision to commence proceedings. Particularly over the last two decades, ADR has grown enormously in popularity and has shown itself to be an incredibly effective way of resolving disputes. There are a number of forms of ADR, each with their own strengths and weaknesses. However, without exception, they are each a quicker and cheaper way of resolving disputes than formal proceedings.
How are we effective?

We have a wealth of experience in assisting clients to resolve their disputes via a form of ADR at any stage in a project. Some of the issues we consider or steps we take that make us effective include:

– being able to identify the strengths and weaknesses of a dispute at the outset and how this might affect the choice of ADR

– focusing our initial discussions with you to draw out the end goal, whether there are any particular concerns around cost and time in which to resolve the dispute, and how these factors inform our choice of the most appropriate method of ADR

– demonstrating the advantages and disadvantages of ADR methods according to our previous experiences

– preparing client submissions for the ADR when required and engaging with the project team and consultants

– consistently evaluating our approach throughout the ADR process, including procedural and legal issues to ensure that the position taken is the one most likely to secure a favourable result.

Different forms of ADR and our recent experience

There are several forms of ADR and choosing the most appropriate method is not always straightforward. We help our clients choose the ADR forum that best suits the dispute and their needs. What follows is a short summary of some of the common forms of ADR (excluding adjudication, which is explained here) together with a sample of our experience.

Inter-party negotiation

If clients can resolve matters between them without recourse to a dispute resolution procedure, it often provides the most satisfactory outcome at a low cost, with minimal damage to the parties’ relationship.

Where the client adopts this path, we are often asked provide advice on: the strengths and weaknesses of the client’s case (contractual or otherwise); on the strategy that the client should adopt in any meetings with the other party; a crib sheet of points for the client to refer to; and advise on a range of settlement overall and in respect of individual components of the dispute. Depending on the circumstances, we may well attend the negotiation with the client or be close at hand to offer advice and guidance as the negotiation proceeds.

Case study

We acted for international developer on a dispute arising out of the construction of a 98 unit luxury development in super-prime London, where the completed units were marketed in excess of £5,000 per square foot. The dispute centred around the consequences of ground conditions that had not been foreseen, the design of issues surrounding rights of light and defects in the water system. The potential cost consequences of these issues amounted to over £55 million. The client had a good relationship with the contractor and it was reluctant to engage in formal dispute resolution.

Working with the project manager’s team and a delay expert, we assisted the client by advising it on the merits of the various aspects of the dispute, ghost writing correspondence and discussing the options for and consequences of the various options available to it. In advance of a principals only meeting, we prepared a short brief for the client, distilling the key points on each aspect of the dispute into bullet points. During the meeting, we also fielded calls from the client where the client sought our opinion on particular points. The meeting concluded in a satisfactory settlement in principle. Almost as important as reaching agreement was to ensure that a settlement agreement was entered into quickly and that it accurately recorded the parties intentions.

On behalf of the client, we successfully negotiated the terms of an agreement with the other party and it was signed by both parties the day after the negotiation.
Early Neutral Evaluation

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. ENE can 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.

We advised a client in relation to the construction of a major new headquarters. Many years after practical completion, the parties were still haggling over hundreds of defects, many of which were major and/or potentially hazardous.

The defects related to all aspects of the building – foundations, roofing, flooring, glazing, curtain-walling, mechanical & electrical systems – which meant that a vast array of experts was needed to advise on appropriate remedial works and quantum.

There were significant differences between the parties as to both liability and quantum; and relations were at breaking point. We had held one mediation which was partially successful but many items remained in issue. Trial would have been prohibitively expensive given the need to prove our client’s case on every one of hundreds of defects.

We decided to use ENE because:

1. we wanted to unblock the position after many years of wrangling over buildings that were then seven years old
2. we could see the benefit of a view on the merits from the Evaluator on some key points without being bound
3. we also wanted a gut feel from the Evaluator about quantum levels, particularly in the light of various settlement offers that had been made by both sides
4. we hoped it would serve as a wake-up call to all sides (including our client) to show how much work and cost would be involved in going to full trial.

We used a judge as the evaluator and put only the key issues in front of him. He was fantastic at assimilating a vast amount of data in a short period of time.

Of course, he could not descend to detail; and on some points we think that he got it wrong – but in some ways this did not matter. He was able to give a strong enough steer on both liability and quantum that we were able to settle the whole dispute at a subsequent mediation.
Mediation is a structured settlement negotiation facilitated by a neutral third party, the mediator, who has no decision-making power. 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. We are regularly involved in mediations and have advised:

– A London public rail authority on a £500 million dispute arising out of the construction of a London railway line. An unusual feature of this mediation was its structure. Given the size of the dispute, the parties agreed a mediation timetable over six months, whereby the dispute was split into three tranches and within each tranche both parties would exchange submissions and then meet for one day during which both parties would carry out presentations on aspects of the dispute. At the end of the three tranches, the parties met for two days to negotiate the claims between them.

– An international meat processing company in respect of dispute arising out of defects in its UK factory floor. The contractor who had installed the floor, as part of a larger extension works scheme, refused to accept responsibility for the defects and the losses our client had incurred as a result. Our client sought to recover £7.5 million the original contract sum. After a one day facilitative mediation the parties were able to agree a settlement whereby the contractor paid our client £3.4 million.

– A large property developer in respect of a prestige project in London’s West End in relation to a dispute regarding the contractor’s entitlement to extensions of time. The parties agreed to a one day facilitative mediation, with an element of evaluation in the form of the mediator giving his opinion as to the parties’ strengths and weaknesses in their respective claims. The views of the mediator allowed the parties to re-evaluate their positions and reach an agreement. Settling the extension of time dispute also allowed the parties to negotiate a settlement on the related quantum dispute.

Conciliation

Conciliation is a similar process to mediation, but the conciliator takes a more active role in the settlement of the dispute than does the mediator. A conciliator necessarily has to have a detailed understanding of the facts and law of the matters in dispute. The conciliator will express an opinion on the relative merits of the parties’ respective cases. Conciliation can be expected to be a little shorter than mediation simply because the conciliator is able to focus the parties’ attention on the issues and drive the process in a way that is unavailable to a mediator.

Case study

We acted for an employer client on a claim brought by its main contractor in connection with a marine engineering project, which had been subject to delay and additional cost. The employer client and main contractor were parties to a number of contracts for marine enquiry projects. A dispute on an earlier project had been referred to arbitration and both parties were keen to avoid the time and cost consequences of a second arbitration. We recommended conciliation because the issues in dispute were complex, and so the parties wanted guidance from an independent expert to assist them in understanding the issues in dispute as well as the strengths and weaknesses of their case. The conciliator was a highly regarded industry expert respected by both parties. His reputation in the industry and his knowledge of the subject matter in dispute helped the parties to come to a resolution quickly.

“Mediation is like a game of chess and in our case Eversheds were like the Grandmaster!”

Solicitor, London based development company
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. 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. Used in the right situation, expert determination can get to the heart of a technical dispute very quickly, with limited procedural hurdles to comply with and resulting in a reliable binding decision which will often help the parties to continue with their contract with greater certainty than before.

Case study

Following the service of a statutory demand on our client, an international water utilities provider, we were engaged to resolve a final payment dispute under a planning services agreement it had entered into with a specialist wind farm planning consultancy.

The parties had agreed to determine disputes under the agreement by way of expert determination, which was to be final and binding save for fraud or manifest error. The dispute centred around the interpretation of two points of principle, namely:

1. the valuation mechanism used to value the final payment
2. the ability of our client to elect to make payment of the final amount over five years as opposed to a single lump sum.

It became apparent during negotiations that both parties were nervous about the binding nature of a nominated expert. As a result of this we managed to obtain the dismissal of the statutory demand and a concession on the consultant’s behalf that our interpretation of the instalment payment provision was correct. As part of the concession we advised our client to make an on account payment towards the total final payment being claimed. Following the payment, it was agreed a period of time for negotiations would occur followed by a two-stage expert determination process with the experts being agreed upon mutually if the negotiations failed.

The two stage process was split into a first expert determination by a QC on the interpretation of the valuation mechanism under the contract, and a second by a wind farm valuation expert as to the quantum of the final payment based on the QC’s interpretation.

In line with the advice we provided our client from the outset, an amount was found to be payable to the consultant. The important point was to use the binding nature of the expert determination to secure the five year payment instalment election.
Dispute boards

A dispute board is a project-specific contractual dispute resolution process most commonly used on large scale international projects. There are three types: Dispute Adjudication Board (DAB), Dispute Conciliation Board (DCB) and Dispute Review Board (DRB). DABs are used by FIDIC standard form contracts, the World Bank, Multilateral development banks and the Institution of Civil Engineers.

Case study

We acted for a subcontractor responsible for the design, manufacture, supply, installation, quality assurance, testing, erection and commissioning of boilers and auxiliary plant to a new power station being constructed in Africa. The subcontract conditions were an amended FIDIC Yellow Book. The issue in dispute is the design and manufacture of certain high pressure boiler parts and in particular, the information supplied at tender; compliance with the contractual weld qualification procedure; and the consequences of the failure of around 800 fabrication welds. The dispute was referred to a three member board, two members whose practice was in the African country in which the power station was being constructed and one member whose practice was in the UK. The professional disciplines of the members was a mix of engineering and legal resolved via two separate Dispute Adjudication Board proceedings and two separate sets of proceedings in the South African Court.

Client training

We have given a broad spectrum of training to our clients on the full range of ADR options. Recent training includes:

- an overview of ADR forums: key features, advantages, disadvantage and war stories
- drafting alternative dispute resolution agreements
- how to successfully negotiate
- expert determination: an analysis of the process and key case law
- dispute boards: what are they and when should I use one?
- dispute boards: similarities and differences in FIDIC, AAA, ICC and ICE.

We can tailor training to the client’s needs where required.

Key contacts

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