Winning your construction and engineering dispute
Litigation and arbitration in the UK

What is litigation and arbitration?

Litigation is a term used to describe the resolution of dispute through a court system. In England & Wales, the majority of construction and engineering disputes are dealt with in a division of the court called the Technology and Construction Court (TCC). The English court system is one of the oldest in the world and has a global reputation for being reliable and capable of dealing with the most complex disputes. Although historically the courts have been accused of being slow and expensive, two reforms within the past two decades, the Woolf and Jackson reforms, have improved this to some degree.

Arbitration is a formal dispute resolution procedure whereby a tribunal makes an award which binds the parties. The Arbitration Act 1996 provides the statutory framework within which arbitrations are conducted where the seat of the arbitration is England, Wales or Northern Ireland. An arbitration requires the agreement of the parties to submit the dispute for a final decision by the Arbitrator. Arbitration clauses are therefore commonly found in standard form construction contracts but parties can agree to submit their dispute to arbitration at any time. An advantage of arbitration is that it is private to the parties, unlike court proceedings.

Allied to the expansion of our caseload in the international arbitration sphere we have seen a decrease in the use of domestic arbitration and litigation to resolve disputes over the last two decades. The causes of this relative decline are complex, and arise out of changing economic climates and the ways in which infrastructure projects are procured in the UK. We have seen a commensurate increase in adjudication, mediation and early neutral evaluation. This does not mean there is no place for domestic arbitration or litigation in the UK, particularly in cases where confidentiality may be particularly important and/or where alternative forms of dispute resolution fail and the amount in dispute is large.
How are we effective?

Where a dispute is referred to court proceedings or arbitration, it is usually as a last resort, once all other avenues of negotiation or alternative forms of dispute resolution have failed. At this point, the main objective of our clients is to win. There are a number of ways in which the Eversheds team ensures that objective is achieved.

– In the United Kingdom alone, we have over 15 partners and 55 associates who are fully dedicated to construction and engineering matters. These numbers give us an unparalleled level of expertise which we bring to each dispute in all areas of construction law.

– Disputes referred to litigation or arbitration tend to be large and require significant resource. The size of our team affords flexibility in how we structure and resource matters.

– At the outset, we will conduct a detailed case assessment. This will include a legal assessment of the case in order to determine whether the case is sufficiently strong to advance and formalise a dispute, and whether there is likely to be an overall benefit (financial or otherwise) to spending time and money engaging in a dispute process.

– The procedure of litigation and arbitration can be complex. Our extensive experience in both forums means that we have a profound understanding of each process, and we pro-actively manage time and resources spent so we can focus on the more substantive matters in the dispute.

– A major ingredient of success in litigation and arbitration is ensuring that the dispute process is managed and organised meticulously. Being on top of the procedural aspects of the case, organised, efficient disclosure processes, and closely monitored internal timetables are just three important areas that, if managed poorly, can be hugely detrimental to the client’s prospects of success. We have both the experience and a series of processes in place to ensure cases are managed effectively time after time.

Litigation experience

What follows is a small selection of our recent litigation experience, which we hope demonstrates the breadth and depth of our expertise.

– Advising a global services company in relation to a €28 million dispute arising out of a roads scheme for the construction of a major trunk road in the Republic of Ireland. The claim involved disputes in relation to the design of drainage and piling and significant claims arising out of delay brought by an international consortium of contractors. Primary disputes were subject to Irish law and proceedings were commenced in the Irish Court both in relation to the main claim and downstream claims.

– Advising a London public rail authority on a £600 million dispute under a concession agreement involving issues arising from the payment mechanism, alleged additional works and costs arising from obligations to improve the underground estate and access issues. Proceedings were issues in this matter in the High Court and the process of e-disclosure in particular in a claim of this size was significant. The matter was finally settled via mediation and resulted in a further six month period of contract re-negotiation.

– Acting for a multinational materials company on the defence of a claim relating to landfill engineering against a PLC Housebuilder. Following a successful outcome of a trial on liability in the TCC, we successfully defended an appeal and cross appeal to the Court of Appeal. The case concluded with a return to the TCC to hear the case on quantum, which entailed a 15 day trial that again ended in success. The trial involved extensive expert evidence both in relation to engineering and quantum and the legal interpretation of a series of commercial agreements regulating liability for reinstatement of worked land.

– Acting for a US engineering company in litigation against the major players in the soft drinks and engineering industries. This was a multi-million pound dispute in the Technology and Construction Court, involving complicated strategic advice and a huge volume of project documentation.

– Acting for the parent company of a German civil engineering business in High Court litigation regarding the cost to complete the civils work on a UK power station. In parallel, we brought warranty claims concerning the sale of the business, against a backdrop of insolvency risk.

– Advising a contractor client specialising in infrastructure works in a multi-million pound claim and counterclaim through to trial in the Technology and Construction Court concerning an landmark London structure. The dispute arose under a bespoke contract for design and construction works, and concerned variations, delay, disruption, acceleration and defects. We advised our client across the full course of proceedings, working closely with the commercial team and international stakeholders, from pre-action stage through to the settlement that was ultimately concluded between the parties.
Case study – Wastewater treatment project

Our client, a major utility company who let a contract valued at £85m for the upgrade of an existing wastewater treatment plant using a biological aerated flooded filter (BAFF). The designer of the BAFF was a UK subsidiary of a French design house. The contractor was a joint venture of a specialist UK water contractor and one of the UK's largest construction contractors. Shortly after commissioning the upgraded plant, it became clear that the BAFF did not meet the required performance criteria. Extensive (and expensive) remediation works were required. We advised our client on recovering the amount (over £100m) spent on the remediation works. The case presented a number of issues, including isolating key members of the project team and allocating the thousands of sub-claims between them in the most appropriate way. Recovering of contemporaneous documentation which were held in multiple formats and were voluminous. Our client issued proceedings against the designer and contractor in the Technology and Construction Court. The issues we advised upon in that claim included claims in contract/negligence and misrepresentation, jurisdictional issues, design issues and performance warranties and defective works.

“They understand that they become part of our team and our organisation. They do not come across as external lawyers who quote the law and leave us to do what we want with that information ... Their relationship management and interaction with our non-legal staff is second to none ... They understand us as a client, and they not only talk a good story, but they actually do it.”

GC at one of the UK ‘big four’ energy companies

"Initially we were worried that because the litigation was so large, there might be issues in managing the dispute properly. However, it was clear from pretty early on that Eversheds were able to take the size of the dispute in their stride. Their organisation and strategizing was incredibly effective.”

EMEA GC, International Engineering Company
Domestic arbitration experience
Performing effectively in domestic arbitration requires an inside-out knowledge of the Arbitration Act 1996 and the institutional or bespoke rules specific to the arbitration. The better the process is understood, the more time can be spent on the substantive dispute. What follows are a few recent examples demonstrating our experience.

– Acting for an international energy company in respect of a €35 million claim for remedial costs of works to rectify defects in design and construction of two offshore wind farms. The arbitration was subject to the LCIA Rules and concluded in a four week hearing. This was a complex case with a bespoke construction contract and leading edge technological issues coupled with established north sea oil rig technologies in offshore wind power generation.

– Advising a public body on a dispute brought by the main contractor in connection with the construction of sea defences. The contract was ICE 6th Edition. The dispute resolution procedure was domestic arbitration subject to the ICE Arbitration Rules. The issues unique to the dispute were wave climate, the assumptions at the time of tender and as experienced, and methods of construction in the near shore environment.

– Acting for a main contractor and subcontractor on a dispute with the employer concerning the remediation of a Victorian industrial site to a standard suitable for the construction of an urban link road and light industrial units. The contract was ICE 5th Edition. The dispute included issues of classification of materials; transporting and disposing of contaminated materials; and treating disused mineshafts.

– Acting for a sub-contractor who brought arbitration proceedings against the main contractor for additional sums due under a contract associated with the construction of an office block. There was a very substantial delay in the publication of the Award. When published, it was in favour of the sub-contractor. The main contractor brought court proceedings under sections 24, 57, 68 and 69 of the Arbitration Act to have the Award set aside.

Client training
We regularly hold seminars aimed at training or educating our clients on litigation and arbitration matters. Some examples of training recently given includes:

– An introduction to litigation and domestic arbitration
– Annual Civil Procedure Rules changes and case update
– Disclosure: understanding the rules and managing the procedure
– Top tips in drafting statements of case
– Strategy and tactics in final determination
– Drafting an arbitration clause
– Which rules? A guide to the similarities and differences between institutional arbitration rules
– Settlement: Part 36 and beyond
– Rules for factual and expert witnesses in litigation and arbitration.
We can tailor the training to suit the client’s needs, as appropriate.

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