

CRITICAL REVIEW OF ADJUDICATION AND MEDIATION METHODS OF DISPUTE RESOLUTION IN TERMS OF TIME, COSTS, EFFECTIVENESS AND THE OVERALL INTERESTS OF THE PARTIES

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ABSTRACT: *This paper identifies the positive and negative aspects of adjudication and mediation as alternative methods of construction dispute resolution to arbitration and litigation. Upon examination of relevant literature, judicial findings, and anecdotal evidence, it is evident that adjudication and mediation have proven to be less adversarial and more efficient and cost effective approaches to resolving disputes in the Industry. With the recent improvements in the adjudication process, these have resulted in reducing the incidence of court hearings, and maintaining a working relationship between contracting parties for present and future project purposes. This research information will allow parties in dispute situations to understand such aspects, and make an informed decision as to which dispute resolution process may best suit their interests, and the interests of those concerned.*

KEYWORDS: Adjudication, Dispute, Contract, Construction Act, Cash Flow, Arbitration, Litigation, Scheme, Adjudicator, Notice, Jurisdiction, Natural Justice, Mediation, Claim, Summary Judgement, Time, Cost, Mediator, Without Prejudice

ADJUDICATION

Introduction

Adjudication was introduced into the Building and Construction Industry to facilitate the cash flow of parties, which Lord Denning observed in 1970 “*is the very lifeblood of the enterprise.*” (Battrick, Duggan and Driver Consult Ltd, 2012, p.1) Since its introduction, adjudication has proved to be a popular choice amongst contractors for having a dispute resolved. This is because contentious issues can be resolved both expeditiously and at low cost. Indeed, some standard forms of contract, such as NEC3 2005, require that in the first instance a dispute in connection with the contract shall be referred to and decided by an adjudicator.

In its early years, problems were encountered with the adjudication process, such as challenges by responding parties on the grounds of natural justice. However, over the years, the Construction Act has been revised with the aim of addressing these problems.

Anecdotal evidence clearly indicates that adjudication has been working well in the Industry, to the extent that it is largely responsible for a reduction in arbitration and litigation. Commentators in the legal arena envisage that the increasing trend of disputes going to adjudication will continue due to the attractive features of the process to the parties in dispute.

Effectiveness and Overall Interests of the Parties Involved

The Local Democracy, Economic Development and Construction Act 2009 (Construction Act 2009) provides a statutory right for the parties to a construction contract to refer a dispute to

adjudication. This is a mode of dispute resolution that unlike arbitration and litigation is not protracted and expensive in nature, which is particularly advantageous if the amount in dispute is disproportionate with the cost of the process.

Importantly, adjudication is designed at assisting the cash flow of the parties during the course of the project, by having the dispute resolved quickly and cheaply. This was the main thrust behind the introduction of statutory adjudication to the Building and Construction Industry.

A further positive point of the process is that it *“may in some cases amount to a dress rehearsal for subsequent litigation or arbitration if the matter is not resolved by or as a consequence of the adjudication. That enables the parties to identify what is really in issue and to test the strengths and weaknesses of their case.”* (Kirkham, 2004, p.1)

An essential requirement for adjudication is that a ‘construction contract’ exists between the parties under the definition of Sections 104 and 105 of the Construction Act 2009, which is an agreement to carry out ‘construction operations’. Oral contracts or part oral contracts are now covered by the Construction Act 2009 and thus can be referred to adjudication. Many standard forms of contract in the UK express a contractual right to refer a dispute to adjudication, including the JCT 2011 and NEC3 contracts. This is discussed in more detail below.

The Scheme for Construction Contracts (Scheme) dealing with adjudication in the Construction Act 2009 ensures that the adjudication terms are fair and override any contractual provisions that do not comply with the Scheme, so that a party is not deterred from triggering the adjudication process.

According to Russell (2001, p.26), there are five basic points that need to be considered before deciding whether or not to adjudicate:

- (i) Was the contract entered into after 1 May 1998?
- (ii) Is there indeed a contract?
- (iii) Is there a contract for the carrying out of ‘construction operations’ within the meaning of Section 105 of the Construction Act and not excluded by Sections 105(2) or 106?
- (iv) Is there a contract in writing within the meaning of Section 107 of the Construction Act?
- (v) Is there a dispute within the meaning of Section 108 of the Construction Act?

The adjudicator’s decision is binding on the parties, until such time as it is finally determined by legal proceedings, such as by arbitration or litigation.

Quite often, the parties do not agree on the adjudicator. To circumvent this, the contract may provide for a body, such as the RICS, CIArb, RIBA and ICE to nominate the adjudicator. In December 2005, research into adjudication found that, *“Figures given anecdotally are that there have been about 15,000 adjudications thus far, the vast bulk being dealt with by members of the RICS.”* (Gaitskell QC, 2005, p.11)

The Notice of Adjudication (Notice) is the most important document in the adjudication process as it defines those matters which the adjudicator has the power to decide, and thus provides the basis for the adjudicator’s jurisdiction. The adjudicator is not empowered to decide any matter that is not set out in the Notice.

Therefore, it is paramount for the party completing the Notice to ensure that the dispute has been crystallised between the parties at the date of the Notice, in order for the adjudicator to have jurisdiction to hear the matter. The parties may submit evidence that has been exchanged before the adjudication commenced, provided that such evidence does not change the nature of the dispute.

The rules of natural justice apply to the adjudication process and if they are breached the decision will be unenforceable. This protects the interests of the parties participating in the process. That is, the affected party has the right to:

- Prior notice and an effective opportunity to make representations; and
- An unbiased tribunal – the rules oblige tribunals to exercise procedural fairness in reaching their decisions.

In the case of *Carillion Construction Ltd v Devonport Royal Dockyard Limited* [2005], the Court of Appeal found that:

- (i) Error in the adjudicator's analysis does not provide grounds for refusing to enforce the adjudicator's decision; and
- (ii) The procedure adopted and the decision reached by an adjudicator must be unfair before a breach of the rules of natural justice will be serious enough to warrant interference by the courts.

The case of *Bloor Construction (UK) Ltd v Bowmer & Kirkland (London) Ltd* [2000] found that the adjudicator shall have the right to correct a slip error (such as in the calculation of monetary amounts) within a reasonable time after the decision has been published so that the correction does not prejudice the affected parties.

Indeed, the Construction Act 2009 under Section 108(3A) provides that all construction contracts include a provision that permits slips to be corrected. In the interests of the parties, if no such provision is included in a contract, the default clause in the Scheme applies, which permits the adjudicator to correct a slip within a prescribed period. A party identifying a slip may also bring it to the attention of the adjudicator, who would be required to promptly correct the slip and issue his/her revised decision to the parties.

Adjudication has often been criticised by responding parties in situations where referring parties have ostensibly exploited the process by 'ambushing' the responding party with an adjudication claim. This places considerable burden upon the responding party having to review and respond to volumes of material within the timeframes stipulated by the Scheme.

Brandt describes this scenario as a "*rigid and draconian time table imposed by adjudication*", which is capable of "*cutting across the mediation process...throwing the resolution process into chaos...The availability of adjudication and its use (and sometimes abuse) is often difficult to rationalise with the philosophy underpinning mediation: preserving relationships.*" (2002, p.4)

This advances another criticism of adjudication, where the inherent right of a party to refer a dispute to adjudication creates uncertainty when another dispute resolution process, such as mediation, is underway.

Further, in terms of the relationship between the parties in dispute, there is a contrast between the nature of mediation and adjudication where:

- In mediation the disputant acknowledges the feelings of the other party, even though it may not sympathise with them; and
- Adjudication threatens to damage relationships, particularly when the responding party feels that it has effectively been ‘ambushed’ by the referring party.

Such ‘tactical ambushing’ practices were particularly prevalent in early adjudication proceedings. The leading case on this is *London and Amsterdam Properties Ltd v Waterman Partnership Ltd* [2004] BLR.

In these situations, the onus is on the adjudicator to uphold his/her duty to ensure that the adjudication is conducted in a balanced manner by affording the responding party sufficient time to prepare its response, in accordance with the rules of natural justice. Further, it is in the interests of the adjudicator to do this, in order to ascertain the facts and the law pertaining to the dispute. Failure by the adjudicator to properly discharge his/her obligations may result in the responding party mounting a successful challenge to the adjudicator’s decision on the grounds of natural justice.

John Marrin QC in his paper “Adjudication” (2000) lists the “possible core obligations” of an adjudicator as (p.6):

- The duty not to exceed his jurisdiction.
- The duty to act impartially.
- The duty to act in good faith.
- The duty to observe the principles of natural justice.
- The duty to avoid manifest unreasonableness.
- The duty to decide in accordance with the applicable law.

Marrin QC then lists the “currently permissible grounds for challenge” as (p.12):

- Exceeding the jurisdiction.
- Failure to act impartially.
- Failure to act in good faith.
- Failure to observe the principles of natural justice.
- Manifest unreasonableness in the exercise of discretion.
- Error of law going to jurisdiction.

In this respect, an onus is also placed on the referring party to avoid a challenge being made by the responding party. The referring party may do this by:

- (i) Avoiding to refer the matter to adjudication immediately before the Christmas/New Year vacation period;
- (ii) Limiting the volume of material in connection with the claim to only the material essential to proving its case; and
- (iii) Allowing the responding party an extension of time, if it has been requested by the responding party.

Notwithstanding the aforementioned criticisms that have been made of the adjudication process, *“anecdotal evidence indicates that the vast majority of adjudication decisions are not taken on to arbitration or litigation, and are effectively accepted by the losing parties...It is believed that well over 80% of adjudication decisions are simply accepted, with the losing party content that it has had a fair chance to put its case to an independent tribunal. Crucial components in the final acceptance of a decision are that, firstly the parties have confidence in the adjudicator appointed and secondly, the parties have an adequate opportunity to present their case.”* (Gaitskell QC, 2005, p.11)

If a party does not comply with an adjudicator's decision, the other party can enforce that decision by applying for a 'summary judgement' from the Technology and Construction Court ('TCC'), which *“can still provide swift justice themselves. In John Young -v- The Rugby Group, the Claimant, in a case where the contract was dated before 1 May 1998, issued a claim form on 5 September 2000. The case related to alleged non-payment, a typical adjudication scenario. The application for summary judgment pursuant to CPR 24 was heard on 15 December 2000 and judgment for the Claimant was given some four days later.”* (Russell, 2001, p.27)

Time

Her honour Judge Frances Kirkham in her paper “The Future of Adjudication” (2004) describes the time involved in adjudication as *“a comparatively quick process”* and *“It is clear from anecdotal evidence that the limited time and necessarily limited cost elements of adjudication are significant for the parties.”* (p.1)

The process and timeframes associated with adjudication are as follows:

1. Either party may give notice (Notice of Adjudication) at any time referring a dispute to adjudication.
2. A timetable is normally provided in the contract for appointing an adjudicator. By way of example, this period may be 7 days.
3. Referral of the dispute to the adjudicator within 7 days of the notice.
4. The Scheme is silent on the period in which the responding party is required to serve its response to the referral. However, some standard forms of contract expressly state a time period. The response time is often contentious, especially if the responding party argues that it cannot respond to the referral within the allotted timeframe.
5. The Scheme is silent on any reply to the response. In the interests of natural justice, the adjudicator normally allows the referring party to reply to the response. However, the referring party is generally instructed to limit its reply to aspects of the response it has not seen before.
6. The adjudicator shall reach a decision within 28 days of the adjudicator's receipt of the referral notice or a longer period as agreed by the parties after the dispute has been referred.
7. The adjudicator may extend the period of 28 days by up to 14 days with the consent of the referring party. A longer extension of time requires consent from both parties.

From the above, the potentially uncertain timeframes in the process relate to the time for the responding party to serve its response to the referral and the time for the referring party to reply to the responding party's response.

Notwithstanding this, the adjudication process is quick in comparison with arbitration and litigation. The process may potentially be completed in (7 days + 28 days + 14 days =) 49 days.

Cost

Her honour Judge Frances Kirkham in her paper "The Future of Adjudication" describes the cost of adjudication as *"the cost can be lower than the cost of litigation or arbitration...there is generally no exposure to the other side's costs."* (2004, p.1)

The two elements of costs include the:

- (i) Fees of the adjudicator (together with the cost of any assistance the adjudicator obtains); and
- (ii) Costs that the parties spend on legal, expert or commercial advice as part of the process.

Under the Scheme, the adjudicator decides who should pay his/her costs. This forms part of the adjudicator's decision. The adjudicator may simply apportion his/her fees equally between the parties. However, the parties must bear in mind that, as they are jointly and severally responsible for the adjudicator's fees, if one of the parties defaults on payment of the adjudicator's fees, the other party or parties will have to bear the costs for those fees.

The Scheme is silent on which party pays legal costs. Generally, each party bears their own legal costs in adjudication, unless the parties agree for the adjudicator to have jurisdiction to allocate legal costs in his/her decision.

Thus, it is evident that similar to time, adjudication is a cheap process in comparison with arbitration or litigation, which is an attractive feature of the process to the parties in dispute.

Section 108A of the Construction Act 2009 renders a 'Tolent clause' (that is, the referring party pays all legal costs regardless if it is successful in the adjudication) ineffective unless the agreement as to costs is made after the adjudication has commenced, or the contractual provision deals only with the allocation of the Adjudicator's fees and expenses. This is akin to preserving the statutory right of contractors to refer a dispute to adjudication.

Conclusion

Adjudication has become a common contractual method of dispute resolution both during a project and after the completion of a project. The attractive features of adjudication for claimants are the quick and relatively inexpensive resolution of issues in dispute – generally, the cost is lower than the cost of arbitration or litigation – and an opportunity to test the strengths and weaknesses of their case.

Unlike mediation, adjudication is at greater risk of jeopardising the relationship between contracting parties, particularly where the responding party feels that it has been 'ambushed' by the referring party. However, in recent years the Construction Act has been amended for

the purposes of addressing such concerns. This has included the adjudicator allowing the period of 28 days to be extended by up to 14 days with the consent of the referring party, and permitting error slips to be corrected.

Research indicates that in broad terms the industry is satisfied with adjudication and in the majority of cases parties will accept an adjudicator's decision rather than proceed to having the dispute resolved via arbitration or litigation.

MEDIATION

Introduction

Mediation is beginning to be recognised as a sensible and cost-effective process for settling disputes (Rowe, 2004, p.ix).

Mediation is quick, cheap, easy to understand and participate in and, most importantly, within the control of the parties to a dispute, not that of their legal advisers or the courts. It is also flexible and open to creative problem solving as distinct from conventional forms of dispute resolution.

The mediator normally holds private sessions with the parties to persuade them to focus on their underlying interests and priorities. The discussions are aimed at gradually bringing the parties closer to agreement by reconciling their differences in a settlement they have devised, and with which they are satisfied.

Effectiveness and Overall Interests of the Parties Involved

To begin with, the process is made effective by the parties themselves appointing the mediator, who will assist them in reaching an acceptable solution. Further, the parties give the mediator his/her powers, which include exploring realistic possibilities of bringing the parties together, and re-designing the agenda if necessary as the mediation proceeds.

The parties themselves have considerable powers which, amongst other things, include deciding what to empower the mediator to say to another party, and withdrawing from the mediation altogether.

Mediation has been used widely and successfully with different models of practice in family matters – such as divorce, neighbourhood and community disputes, and employment disputes. Although the principles of mediation are the same, some of the practices and procedures implemented in these areas are different.

However, mediation does not suit all types of disputes. There are times when arbitration or litigation will work best, and times when disputes are best resolved using mediation.

If a legally binding decision in a court of law is required, and one party believes that the decision will favour it, it may be more effective and in the best interests of that party in terms of time, cost and convenience to litigate.

In some cases, the parties are ordered by the courts to mediate as part of the dispute resolution process. Indeed, the Civil Procedure Rules ('CPR') in England and Wales begin with an

“Overriding Objective” (Rule 1.1) “*enabling the court to deal with cases justly*” by, amongst other considerations, “*encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure.*”

Therefore, the courts may view mediation as an effective means to resolve some if not all of the issues in a dispute, or as a stepping stone to final determination of the dispute by other means.

An essential characteristic of any mediation is that it is conducted in a ‘without prejudice’ manner. This means that nothing revealed to another party can be used in subsequent or existing legal proceedings. Further, the release of information is within the control of the parties, in that, during a mediation the parties choose what information to disclose. The mediator is not permitted to divulge any information emanating from his/her private discussions with each party.

Some good reasons to mediate are (Rowe, 2004, p.6):

1. Historically, and by its nature, litigation has proven to be adversarial, whereas mediation allows the parties to resolve their dispute so as to retain a positive commercial relationship.
2. Lawyers advise that the balance of responsibilities in the case is unclear, and therefore that a legalistic judgement may not be appropriate.
3. The dispute is delaying the completion of an important project and is costing the parties significant money.
4. The sum in dispute does not justify substantial legal costs, some of which will have to be met even by the winner.
5. The parties wish to resolve the dispute without loss of face or without publicity.
6. The parties wish to settle as quickly as possible.
7. The parties wish to retain some control over the negotiation of their dispute.
8. The parties both want a settlement but cannot see how to achieve one without help.
9. Where non-damage settlements which are not available from the courts, are possible.
10. The courts may impose cost penalties if the parties cannot show that they have considered mediation.

In the case of *Susan Dunnett v Railtrack Plc* [2002] ADR.L.R. 02/22, Lord Justice Brooke states in his judgement:

“Skilled mediators are now able to achieve results satisfactory to both parties in many cases which are quite beyond the power of lawyers and courts to achieve. This court has knowledge of cases where intense feelings have arisen, for instance in relation to clinical negligence claims. But when the parties are brought together on neutral soil with a skilled mediator to help them resolve their differences, it may very well be that the mediator is able to achieve a result by which the parties shake hands at the end and feel that they have gone away having settled the dispute on terms with which they are happy to live. A mediator may be able to provide solutions which are beyond the powers of the court to provide. Occasions are known to the court in claims against the police, which can give rise to as much passion as a claim of this kind where a claimant’s precious horses are killed on a railway line, by which an apology from a very senior police officer is all that the claimant is really seeking and the money side of the matter falls away.” (para. 14)

As no legal procedures are involved in mediation, a judgement is not made, and an acceptable solution is decided upon by the parties. The settlement is not constrained by what the law would deem to be correct, or by evidence, witness statements and legal precedent. Therefore, mediation can produce results and solutions that cannot be produced by arbitration or litigation, where a judge or adjudicator will find in favour of one side only based on a legal solution, which may not be the best solution to a party's needs.

“Thus, judges and adjudicators are unlikely to arrive at a win-win solution which allows both parties to go forward on a new constructive basis, once again to be able to live together or do business together.” (Rowe, 2004, p.8)

The Centre for Effective Dispute Resolution (‘CEDR’) in the UK states in its Mediation Guidance:

“Mediation has a number of advantages over litigation and arbitration processes:

- *Successful - over 70 per cent of cases referred to CEDR Solve settle.*
- *Quick - most mediations are arranged within a few weeks (and can be arranged even more quickly) and the formal mediation session usually lasts for one or two days only.*
- *Cost effective - compared with litigation and arbitration processes, mediation is a less expensive route to resolving disputes.*
- *Gives parties control over the process and the outcome.*
- *Mediation can run alongside litigation or arbitration or you may prefer to put the litigation or arbitration process 'on hold' while you mediate.*
- *Mediation can maintain business relationships far more effectively than adversarial processes.*
- *A wide variety of settlement options can be achieved in mediation over and above monetary settlements.*
- *Informal and flexible - the process to suit clients' needs.”*

How successful a mediation is, depends upon the attitude of the parties. The parties need to approach a mediation in a positive frame of mind. The process itself assists in this respect, as the major advantage of mediation is that it is a positive process by virtue of each party being in confidential collaboration with the mediator, putting forward proposals designed at appealing to the other party in a non-confrontational demeanour.

The benefits offered by a bilaterally selected independent third party or neutral are that the mediator comes fresh to the problems at hand, offers help with problem solving, and is able to look at the problems objectively and dispassionately.

Thus far, I have been discussing ‘facilitative’ mediation. Another form of mediation is ‘evaluative’ mediation, which is more commonly called ‘conciliation’ in the UK.

Dr Robert Gaitskell QC in his paper “Trends in Construction Dispute Resolution” (2005) states:

“In my experience evaluative mediations rarely succeed in securing a compromise by mediation. This is for very good reason that where both parties are aware that, if no mediation deal is achieved, the mediator will turn himself into an evaluative tribunal and state publicly that one party’s case is stronger than the other, then neither party will be frank with the mediator during the course of the private caucuses in the mediation. This will virtually guarantee that no mediated deal is achieved.

By contrast, if both parties are aware that the mediator will never be anything other than a facilitator, during the course of the process they are encouraged to reveal to the mediator the concerns which they have about the weaknesses within their case. This enables the mediator to guide both parties towards a mutually satisfactory compromise.” (p.7)

Consistent with the comments expounded above on the strengths and advantages of mediation, Dr Robert Gaitskell QC adds that in his experience mediations work because:

- “(i) At a mediation everyone who matters (including, particularly, the decision makers for all parties) will be present.*
- (ii) By ‘reality testing’ a mediator will encourage each party to face up to the difficulties in its own case. Since the mediator is an independent third party, the parties involved in the dispute are much more willing to listen carefully to his concerns about the weaknesses in their position than if the same points are made by the opposition.*
- (iii) The process is entirely confidential, and is without prejudice so that nothing said or admitted in the mediation is admissible in evidence in any court, arbitration or other proceedings.” (p.7-8)*

In terms of the effectiveness of mediation in resolving or partially resolving construction disputes, *“its effectiveness has on occasions been critically questioned”* and *“not always conducive to the particular rigours of construction projects. Mediation demands compromise, which in the life span of a long term project may not necessarily be in the project’s best interests.”* (Brandt, 2002, p.4).

Brandt says that the process often demands candour by both parties, which is not without its drawbacks, including *“information which has a habit of coming back to haunt the client, often with damaging effect, in subsequent proceedings should the mediation fail.”* (p.4) However, this reason is at odds with the above referenced views of other sources and the fact that mediation is not only a private and confidential process, but it also operates on a ‘without prejudice’ basis.

Brandt adds (p.4-5):

- Claims advanced in mediation can become ‘fishing expeditions’ or opportunities for parties to redefine their claim;
- A notice to adjudicate may interfere and create uncertainty with the mediation process, particularly if a party is not fully engaged in the mediation process; and

- Mediation demands that all relevant parties engage in the process, which does not always happen, particularly when more than one party are involved in the dispute, which is commonly the case in construction projects.

A research project into the use of mediation in construction disputes was conducted by the Centre of Construction Law and Dispute Resolution, King's College London and the Technology and Construction Court ('TCC'). The final results published in 2009 found that:

- The majority of respondents who had used mediation said it resulted in a settlement;
- Even where the mediation did not result in a settlement it was not always viewed negatively;
- Mediation was undertaken on the parties' own initiative in the vast majority of cases;
- The results suggest that the incentives to consider mediation provided for by the CPR (namely, cost sanctions) are effective;
- Those advising the parties to construction disputes now routinely consider mediation to try and bring about a resolution of the dispute; and
- The cost savings attributed to successful mediations were also significant, providing a real incentive for parties to consider mediation.

These findings indicate that mediation has a good degree of success in resolving construction disputes and is a popular medium of alternative dispute resolution ('ADR') in the Building and Construction Industry.

Time

In mediation, *"Solutions are achieved quickly and without loss of face. The parties to a successful mediation will have agreed to something they can live with."* (Rowe, 2004, p.1)

Mediation is a quick, cheap and amicable way of reaching a settlement. This is because:

1. *"Mediators do not have to establish the parties' responsibilities on a balance of responsibility level as in a civil court."*
2. *"There is no requirement for the preparation and exchange of pleadings and other documents."*
3. *"There are no examinations and cross examinations on oath."* (Rowe, 2004, p.10)

It is usually possible to find and appoint a mediator and to hold a mediation within the space of a few weeks. Complex disputes involving multiple parties have been known to extend over several weeks. However, once the mediation commences, *"a natural desire to succeed and to arrive at a solution takes over and the process acquires its own dynamics which encourage the parties towards swift settlement."* (Rowe, 2004, p.10)

Cost

If the parties mediate, but nonetheless fail to agree, they have lost nothing, except a small amount of time and cost. This is because:

- Mediations are conducted on a ‘without prejudice’ basis;
- Proposals or offers made during a mediation are not legally binding until formally agreed by the parties;
- No party may make use of any information disclosed by another party during the mediation; and
- Most, if not all, of the preparation for mediation forms part of the preparation for other, conventional methods of dispute resolution and thus, would have to be done in any event.

In the case mentioned above of *Susan Dunnett v Railtrack Plc* [2002] ADR.L.R. 02/22, Lord Justice Brooke states in his judgement:

“It appears to me that this was a case in which, at any rate before the trial, a real effort should have been made by way of alternative dispute resolution to see if the matter could be satisfactorily resolved by an experienced mediator, without the parties having to incur the no doubt heavy legal costs of contesting the matter at trial.” (para. 10)

In terms of the costs of mediation, normally each party bears its own costs and shall bear the costs of the mediation equally with the other party or parties.

Conclusion

Mediation has been proven to be an effective and successful means of dispute resolution on construction projects. The incentives offered by mediation include the parties have control over information and the process, solutions are achieved quickly and without loss of face, and it is a cheap way of reaching a settlement without the adversarial battles normally fought out in arbitration and litigation cases.

Notwithstanding this, the challenges that face the effectiveness of mediation in resolving construction disputes are that the process may be treated as an opportunity to identify the weaknesses in the other party’s case, for the purposes of increasing the claims against the other party, and the process needs to adequately engage all parties in the dispute.

STANDARD FORMS OF CONTRACT

Introduction

In this section, dispute resolution clauses have been examined in the following Standard Forms of Contract:

- Australian Standard General Conditions of Contract, AS 4000-1997;
- The Joint Contracts Tribunal Standard Building Contract With Quantities, JCT SBC/Q 2011; and
- NEC3 Engineering and Construction Contract June 2005.

AS 4000-1997

The AS 4000-1997 General Conditions of Contract ('GCC') was introduced as an upgrade to the AS 2124-1992 traditional construction contract, and is currently used by several Government departments in Australia.

The key provisions of Clause 42 "Dispute resolution" are:

Clause	Title	Provision
42.1	Notice of dispute	If a difference or dispute between the parties arises in connection with the subject matter of the <i>Contract</i> , then either party shall, by hand or by certified mail, give the other and the <i>Superintendent</i> a written notice of <i>dispute</i> adequately identifying and providing details of the <i>dispute</i> .
42.2	Conference	Within 14 days after receiving a notice of <i>dispute</i> , the parties shall confer at least once to resolve the <i>dispute</i> or to agree on methods of doing so. At every such conference each party shall be represented by a person having authority to agree to such resolution or methods. If the <i>dispute</i> has not been resolved within 28 days of service of the notice of <i>dispute</i> , the <i>dispute</i> shall be referred to arbitration.
42.3	Arbitration	If within 14 days the parties have not agreed upon an arbitrator, the arbitrator shall be nominated by the person in <i>Item 32(a)</i> . The arbitration shall be conducted in accordance with the rules in <i>Item 32(b)</i> .
42.4	Summary relief	Nothing shall prejudice the right of a party to institute proceedings to enforce payment due under the <i>Contract</i> or to seek injunctive or urgent declaratory relief.

JCT SBC/Q 2011

Some key provisions of Section 9 "Settlement of Disputes" are:

Clause	Title	Provision
9-1	Mediation	If a dispute or difference arises under this Contract which cannot be resolved by direct negotiations, each Party shall give serious consideration to any request by the other to refer the matter to mediation.
9-2	Adjudication	If a dispute or difference arises under this Contract which either Party wishes to refer to adjudication, the Scheme shall apply.

Clause	Title	Provision
		For the purposes of the Scheme the Adjudicator shall be the person (if any) and the nominating body shall be that stated in the Contract Particulars.
9-3	Arbitration	Any arbitration pursuant to Article 8 shall be conducted in accordance with the JCT 2011 edition of the Construction Industry Model Arbitration Rules (CIMAR).

NEC3 2005

Some key provisions of Options W1 and W2 “Dispute resolution” are:

Clause	Title	Provision
Option W1.1	Dispute Resolution (Dispute resolution procedure used unless the UK Housing Grants, Construction and Regeneration Act 1996 applies)	A dispute arising under or in connection with this contract is referred to and decided by the <i>Adjudicator</i> .
W1.2	The Adjudicator	<p>(1) The Parties appoint the <i>Adjudicator</i> under the NEC Adjudicator's Contract current at the <i>starting date</i>.</p> <p>(2) The <i>Adjudicator</i> acts impartially and decides the dispute as an independent adjudicator and not as an arbitrator.</p> <p>(3) If the <i>Adjudicator</i> is not identified in the Contract Data or if the <i>Adjudicator</i> resigns or is unable to act, the Parties choose a new adjudicator jointly. If the Parties have not chosen an adjudicator, either Party may ask the <i>Adjudicator nominating body</i> to choose one. The <i>Adjudicator nominating body</i> chooses an adjudicator within four days of the request. The chosen adjudicator becomes the <i>Adjudicator</i>.</p>
W1.4	Review by the tribunal	(1) A Party does not refer any dispute under or in connection with this contract to the <i>tribunal</i> unless it has first been referred to the <i>Adjudicator</i> in accordance with this contract.

Clause	Title	Provision
		<p>(2) If, after the <i>Adjudicator</i> notifies his decision a Party is dissatisfied, he may notify the other Party that he intends to refer it to the <i>tribunal</i>. A Party may not refer a dispute to the <i>tribunal</i> unless this notification is given within four weeks of notification of the <i>Adjudicator's</i> decision.</p> <p>(4) The <i>tribunal</i> settles the dispute referred to it. The <i>tribunal</i> has the powers to reconsider any decision of the <i>Adjudicator</i> and review and revise any action or inaction of the <i>Project Manager</i> or the <i>Supervisor</i> related to the dispute. A Party is not limited in the <i>tribunal</i> proceedings to the information, evidence or arguments put to the <i>Adjudicator</i>.</p> <p>(5) If the <i>tribunal</i> is arbitration, the <i>arbitration procedure</i>, the place where the arbitration is to be held and the method of choosing the arbitrator are those stated in the Contract Data.</p> <p>(6) A Party does not call the <i>Adjudicator</i> as a witness in <i>tribunal</i> proceedings.</p>
Option W2.1	Dispute Resolution (Dispute resolution procedure used in the UK when the Housing Grants, Construction and Regeneration Act 1996 applies)	<p>(1) A dispute arising under or in connection with this contract is referred to and decided by the <i>Adjudicator</i>. A Party may refer a dispute to the <i>Adjudicator</i> at any time.</p>
W2.2	The Adjudicator	<p>(1) The Parties appoint the <i>Adjudicator</i> under the NEC Adjudicator's Contract current at the <i>starting date</i>.</p> <p>(2) The <i>Adjudicator</i> acts impartially and decides the dispute as an independent adjudicator and not as an arbitrator.</p> <p>(3) If the <i>Adjudicator</i> is not identified in the Contract Data or if the <i>Adjudicator</i> resigns or becomes unable to act</p> <ul style="list-style-type: none"> • the Parties may choose an adjudicator jointly or • a Party may ask the <i>Adjudicator nominating body</i> to choose an adjudicator.

Clause	Title	Provision
		The <i>Adjudicator nominating body</i> chooses an adjudicator within four days of the request. The chosen adjudicator becomes the <i>Adjudicator</i> .
W2.4	Review by the tribunal	<p>(1) A Party does not refer any dispute under or in connection with this contract to the <i>tribunal</i> unless it has first been referred to the <i>Adjudicator</i> in accordance with this contract.</p> <p>(2) If, after the <i>Adjudicator</i> notifies his decision a Party is dissatisfied, that Party may notify the other Party of the matter which he disputes and state that he intends to refer it to the <i>tribunal</i>. The dispute may not be referred to the <i>tribunal</i> unless this notification is given within four weeks of the notification of the <i>Adjudicator's</i> decision.</p> <p>(3) The <i>tribunal</i> settles the dispute referred to it. The <i>tribunal</i> has the powers to reconsider any decision of the <i>Adjudicator</i> and to review and revise any action or inaction of the <i>Project Manager</i> or the <i>Supervisor</i> related to the dispute. A Party is not limited in <i>tribunal</i> proceedings to the information or evidence put to the <i>Adjudicator</i>.</p> <p>(4) If the <i>tribunal</i> is arbitration, the <i>arbitration procedure</i>, the place where the arbitration is to be held and the method of choosing the arbitrator are those stated in the Contract Data.</p> <p>(5) A Party does not call the <i>Adjudicator</i> as a witness in tribunal proceedings.</p>

Conclusion

AS 4000-1997 was introduced prior to the Security of Payments Act 1999, allowing for the adjudication of disputes over progress payments in New South Wales (NSW), Australia. The dispute resolution process expressed in the GCC starts with at least one conference between the parties, escalating to arbitration. It is interesting to note that even before adjudication was officially introduced into the NSW Building and Construction Industry, there exists a quasi-cash flow remedy which gives a party the right to commence proceedings to enforce payment due under the Contract or to seek injunctive or urgent declaratory relief.

JCT SBC/Q 2011 requires that the parties give serious consideration to mediation and gives the parties the right to take the dispute to arbitration, in which case the Scheme shall apply. This may create the situation described by Brandt (2002, p.4), where adjudication may cut across the mediation process. Similar to AS 4000-1997, ostensibly, arbitration is presented as a last resort.

NEC3 2005 stipulates that a dispute arising under or in connection with this contract is referred to and decided by an adjudicator. If a party is dissatisfied with the adjudicator's decision, that party may refer the dispute to a 'tribunal' which, similar to AS 4000-1997 and JCT SBC/Q 2011, may be arbitration.

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