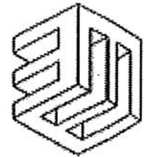
PROFESSIONAL ISSUES



SESSION TOPICS

- **Alternative Dispute Resolution**

SESSION OBJECTIVES

- To outline the alternatives available to construction professionals to resolve disputes.

INTENDED AUDIENCE

The programme is a basic introduction to ADR and should be of interest to all levels of construction professional.

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B23745125
BIB. REC. NO. ~~B2358581~~
DATE REC'D 18 APR 2002
CLASS NO. KN398.6
AUTHOR NO. A4

SUMMARY

PROGRAMME

In the studio discussion, our contributor explains the benefits of dispute avoidance and mediation over the more traditional approaches to dispute resolution.

PROGRAMME NOTES

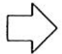
The programme notes provide an overview of the alternatives available for the resolution of disputes.

ABOUT THE CONTRIBUTOR

Peter Campbell is a past president of the Institution of Structural Engineers (1988-1989) and has also served as Chairman of the Association of Consulting Engineers (1991-1992). He is currently Vice President for the Register for Engineers for Disaster Relief (RedR)

Peter spent many years as an expert witness in disputes resolved by arbitration and litigation. He felt that this was not the most cost effective way to settle disputes and, in 1990, helped to establish the Construction Disputes Resolution Group – a register of about 50 construction professionals – who promote the low-cost amicable settlement of disputes using mediation techniques. He is currently Chairman of the Group.

In 1997 *Construction Disputes - Avoidance and Resolution* was published, edited by Peter. This book covered the different processes of dispute resolution, from private negotiation to litigation.



DISCUSSION POINTS

On Alternative Dispute Resolution

- What are the avenues open for dispute resolution?
- What types of contract encourage mediation?
- Does ADR apply only to the contractor/client relationship?
- Could ADR be applied to projects you are currently involved with?
- What is adjudication and how does it work?

PROFESSIONAL ISSUES

1 Alternative Dispute Resolution: introduction

Every construction undertaking is, by its nature, very complex. Each requires a wide variety of knowledge and skills and input from a diverse group of designers, suppliers and contractors, often in difficult environmental conditions. So it is not surprising that difficulties arise and disputes develop.

Lord Donaldson, a former Master of the Rolls, expressed the following view:

> It may be that as a judge I have a distorted view of some aspects of life, but I cannot imagine a construction contract, particularly one of any size, which does not give rise to some dispute. This is not to the discredit of either party to the contract. It is simply the nature of the beast. What is to their discredit is if they fail to resolve those disputes as quickly, economically and sensibly as possible.

Sir Michael Latham in his report on the construction industry, *Constructing the Team*, said:

> It is widely acknowledged that the industry has deeply ingrained adversarial attitudes. Many believe that they intensified in recent years. There is also general agreement that the route of seeking advice and action from lawyers is embarked upon too readily. While a relatively small number of these legal disputes actually reach formal court hearings, the culture of conflict seems to be embedded and the tendency towards litigiousness is growing. These disputes and conflicts have taken their toll on moral and team spirit.

1.1 Ethical considerations

The best way to resolve disputes is to avoid them in the first place. Good behaviour helps.

Construction disputes are invariably concerned with demands for the payment of additional money over and above that which was envisaged at the outset. In those circumstances, individuals, usually representing a corporate body, often behave badly to the point of being unscrupulous. That said, it is probably naive to believe that if everyone involved behaved with selfless honesty, disputes would never arise. The resolution of disputes is therefore as much concerned with human characteristics and professional ethics as it is with technical and legal problems.

It is inevitable that numerous problems will arise on any construction contract. It is the manner and speed with which they are disposed of that reflects on the individuals involved.

1.2 Dispute avoidance

Many problems are solved at source by the people involved before they turn into disputes. Experience shows that a problem becomes a dispute for the following reasons:

1 A technical problem which is difficult to resolve, either because of conflicting expert opinions, or because someone wants to cover up a previous mistake;

2 The rigid application of one individual's interpretation of a contract;

3 Personality clashes which gain precedence over reasonable discussion; and

4 A situation, either natural or man-made, which requires a correct legal interpretation and decision.

All those involved in a construction project are usually subject to formal contractual arrangements and all standard contracts have a clause that specifies the manner in which disputes under the contract will be resolved. The clear presumption is, therefore, that disputes will inevitably arise.

These contractual arrangements are central to the avoidance of disputes, or at least the prospect of reducing the incidence of disputes. Sir Michael Latham underlined what the arrangements ideally should be on each contract to see the project through to a successful completion.

There are a variety of ways of achieving this, using project management, design and build, or partnering. Each of these procedures depend on all the people party to the contract being prepared to work closely together with one objective, namely to produce a project of appropriate quality on time and for the price that was originally agreed. With dedicated teamwork, this is perfectly possible. Teamwork in this context means that when problems arise, as inevitably they will, the team takes whatever steps necessary to resolve the problems by negotiation and agreement. If that fails, there are several alternatives to dispute resolution processes that are available.

1.3 *Disputes advisors and dispute review boards*

The best way of avoiding disputes arising is to nominate in the contract an independent impartial expert (or a small group of experts), who can be called upon at short notice. When problems arise, advice can be obtained quickly and the dispute defused at the outset. It may be that the parties have to share the cost of this facility; however, the cost involved will be a tiny fraction of the cost of solving future disputes by more formal procedures.

1.4 *Mediation and conciliation*

An independent impartial expert who is called upon when the dispute has arisen acts as a facilitator to assist the disputing parties through discussions. These discussions should take place with both parties together and separately, to reach a resolution acceptable to both.

The process is confidential, without prejudice and non-binding, unless the parties agree that it should be binding. It is valuable because problems are not only invariably resolved, but bridges are built and working relationships are re-established. It should be noted that if the mediation/conciliation is not successful, the expert will have no further involvement in any ongoing procedures.

1.5 *Mediation/arbitration (Med-Arb)*

This process is fairly common in the US, but is comparatively new in the UK, although there are advocates for its use here. At first glance, the process appears contradictory, in that it attempts to combine an informal non-binding procedure with one that is not only imposed, but is binding on the parties and has the force of law to sustain it. The expert first acts as an impartial facilitator attempting to guide the disputants to their own resolution. When this fails, the mediator, with full knowledge of the dispute, then acts as an arbitrator. The dispute is then settled by the imposition of the arbitrator's solution which, to all intents and purposes, is final and not capable of challenge.

1.6 *Adjudication*

The Housing Grants, Construction and Regeneration Act 1996 came into force in May 1998. The Act requires disputes to be settled by the intervention of an independent adjudicator who is required to announce the award no later than 28 days from the date of referral. This procedure has been dubbed the 'quick fix', and is designed to ensure that the money changes hands rapidly and the work is not delayed. The decision is immediately binding on the parties until it is finally settled by arbitration or court proceedings.

1.7 *Arbitration*

Arbitration is a formal procedure conducted in a manner that is similar to litigation; that is, strictly controlled by the rules set out in the Arbitration Act 1996. The arbitrator's award is binding in law and cannot be challenged, unless made in bad faith or is in some way contrary to the law. It generally takes a long time and is inevitably expensive.

1.8 *Litigation*

Litigation is a lengthy and costly procedure involving lawyers and experts who represent all litigants. It usually leads to a trial in the High Court before a judge

who ultimately gives a judgment based on arguments. However, rarely does the matter reach court. It is common for the parties to reach their own resolution at the last minute.

1.9 *Summary*

The cost involved in both arbitration and litigation is the reason to promote the less formal, quicker, and vastly less expensive methods. In the main, mediation techniques result in quick, low cost resolution. However, for this to occur, it is necessary for the parties involved to decide firmly that they wish to settle disputes in this manner. All too frequently one of the parties refuses to go down this route and the process never gets started. In these instances it is usually apparent that one of the parties has entrenched views about the dispute and is often only familiar with arbitration or litigation as the means of reaching a settlement.

In many cases, prevention is better than cure when it comes to disputes, and is certainly less expensive. For this to happen, thought must be given to preparing the contract. It should allow provision for mediation by naming an independent individual or group who can either facilitate the resolution of disputes or come to a non-binding 'judgment' on the issue.

1.10 *References and further reading*

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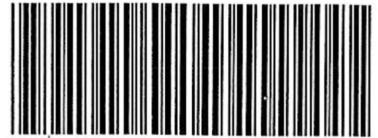

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