International In-house Counsel Journal
Vol. 2, No. 8, Summer 2009, 1–1

Alternative Dispute Resolution – The Preferred Option In The UK Construction Industry

ANTHONY PHILPOTT MCIArb
Legal Counsel, Bovis Lend Lease Ltd, UK (from 1998 to 2009)

Alternative Dispute Resolution in its various forms is the preferred option for resolving disputes in the UK Construction Industry and Adjudication in particular brings a swift outcome to the parties. My experience of construction disputes is that often there is fault to be found on both sides, a recognition of which, coupled with the scale of costs that are to be incurred, can foster a spirit of compromise towards an amicable settlement. Legislation enables the parties to Adjudicate "at any time", and this entitlement is written into the building contract so that if this right is fettered in any way the dispute resolution procedure will become unenforceable.

Nowadays in the Construction Industry there is a greater recognition of the scale of unnecessary legal costs and time involved in the litigation process. The consequence of this is that there is a drive towards the avoidance of protracted disputes that often alienate the parties from each other, increase legal costs and reduce the prospect of an amicable solution.

The parties retain their right to bring the matter to court if they are entitled to do so under the contract and legislation, and in enforcement of the Adjudicator's award. Adjudication and Arbitration in ADR have been joined by Mediation as the promoter of conciliation in construction disputes and it is fast becoming a pre-requisite to a trial of an action, that is not subject to Adjudication or to an Arbitration clause, generally in the civil courts and the construction court in particular. In addition it is often a preferred means of resolution in any event.

The "do or die" approach through purely adversarial litigation towards court trial has been consigned to the pantheon of the past as the parties to construction disputes must now show good grounds for bringing a dispute before the court, either by the absence of a contractual resolution procedure containing Adjudication as the Dispute Resolution Procedure mechanism, the absence of an Arbitration clause or by satisfaction and compliance with the requirement to Mediate. I reflect upon in this in the light of my experience in my previous life as a court advocate and more recently in dealing with Arbitration, Adjudication, Mediation and High Court litigation in construction disputes in England. It is now more than a decade since the Housing Grants, Construction and Registration Act 1996 introduced Adjudication to the UK Construction Industry. It is here to stay, to the general satisfaction and acceptance of the industry.

Meaning of "a dispute" in Adjudication

As a Solicitor and a former Barrister that has spent many years following the routine of waiting rooms separately occupied by opponents in court hearings of both civil and criminal cases to me this very routine marks it out for what it is, a battle to be played out

before the Tribunal that can only be won and lost by one of two adversaries. There is no middle path towards compromise once the case starts unless there is a guilty plea, a successful submission of no case to answer in the criminal case or a change of heart by the parties towards the seeking of a settlement in a civil case. The fact that the parties gather and assemble for the hearing in opposite waiting rooms symbolises the patently obvious that both parties are in dispute and are determined to emerge victorious after all is said and done in the court.

The same can be said of Adjudications except that the governing legislation stipulates when a "dispute" will arise and there is no restriction upon who may represent the parties and on who may adjudicate upon the matter. Section 108 of the Housing Grants Construction and Regeneration Act 1996 (1) allows a party to a construction contract to refer a dispute arising under the contract for Adjudication, a particular form of Alternative Dispute Resolution procedure designed to bring the acceleration of cost effective justice and to resolve disputes in the construction industry. For this purpose "dispute" includes any "difference" between the parties to the contract. Under the same section of the Act the construction contract enables a party to give notice "at any time" of it's intention to refer a dispute to Adjudication. If the contract in any way fetters this right, by for example requiring the parties to first mediate or negotiate a settlement, this will act as an unlawful fetter to this right and will be ignored (2).

The Act requires a decision within twenty eight days of referral of the dispute, although the Adjudicator can extend this period by a further twenty eight days or longer period agreed between the parties. The parties to the contract retain their right to have the dispute heard in court proceedings because the construction contract must provide that although the decision of the Adjudicator is binding this is only until the dispute is finally determined by legal proceedings or by Arbitration, if the contract provides for Arbitration or the parties otherwise agree to Arbitration, or by agreement. The most significant aspect of the Act is that there is not a mandatory requirement for the parties to refer their disputes to Adjudication. This means that the parties are therefore free to use ADR by agreement.

Recent trends in English construction case law have focused upon when a "dispute" under the Act becomes crystallised to enable a party to commence Adjudication. This includes the recent case of Bovis Lend Lease -v- The Trustees of the London Clinic (3) in which the Applicant construction company applied for summary judgement for enforcement of an adjudicator's decision, the established method of enforcement of an Adjudicator's legitimate decision. The specialist Technology and Construction Court in England decided that a dispute did not arise unless and until it emerged that the claim was not admitted and this will not include circumstances where the claim is so ill defined and nebulous that the respondent cannot sensibly respond to it. In deciding in favour or against the existence of a dispute a determining factor will be whether a claim for payment was refused or not accepted. If this is evident there will usually be a "dispute" between the parties under the Act. In particular the fact that a claim for payment by the Contractor is refused or not accepted, on the basis that insufficient information had been provided, for the claim to be upheld as good there would have to be some contractual requirement for such information to be provided.

---

1. Section 108 (1)
2. Section 108 (2): "The contract shall ..enable a party to give notice at any time of his intention to refer a dispute to adjudication…"
3. [2009] EWHC 64 (TCC)

The court followed the leading case of Amec Civil Engineering Ltd –v- The Secretary of State for Transport (4) in deciding that a "dispute" does not arise unless and until the claim is not admitted. This is because contractual relationships in the construction industry are by their very nature adversarial and that differences between the parties are endemic. The task of the court is to determine the moment when crystallisation of the dispute has arisen. If they decide that it has not crystallised then enforcement of the Adjudicator's decision will be refused.

Adjudication "at any time"

In England court proceedings have a reputation for being notoriously slow and protracted and indeed rules of civil court procedure have been introduced in recent years to accelerate to the wheels of justice towards an early court hearing. There is however no comparison of the speed of the court process with that of Adjudication in the construction industry because the Respondent has no more than fourteen days to respond to a notice to adjudicate.

The party on the receiving end of an Adjudication will often complain at the short period of notice that is required to respond and to defend it. In the recent case of The Dorchester Hotel Limited –v- Vivid Interiors Limited (5) the Technology and Construction Court ("the TCC") the Dorchester applied for declarations to request a more realistic time table to comply with a Referral Notice to Adjudication where huge amounts of material had been served, some of which was entirely new and showed figures that had changed from what had previously been submitted. They complained that they had been "ambushed" and this led to a risk of a breach of natural justice in the Adjudication.

The TCC decided that although the rules of Natural Justice apply to Adjudications and the courts have the power to intervene in Adjudications to prevent a breach of it's principles they will do so rarely and sparingly. This is because the court recognised that Adjudication is a "rough and ready" process and they will treat with scepticism arguments of breaches of natural justice especially where the breach might occur but has not occurred as in this case.The court said it is for the Adjudicator to decide on whether or not he has enough time to conduct an Adjudication fairly. This robust approach was followed in the Bovis Lend Lease case in which Akenhead J rejected the argument of the defendant building employer who tried to resist enforcement in the court by summary judgment because it said that it had been presented with too much material to be considered properly in the time available. In addition the court criticised them for not raising this point in the Adjudication itself. The lesson from this is that if a party wishes to resist enforcement of summary judgment in the court of an Adjudicator's decision on the grounds of a breach of natural justice they should at least raise it during the Adjudication.

The principle that emerges from these cases is that the courts will not interfere with the right to Adjudicate "at any time" and arguments based on natural justice are not likely to be successful where a respondent claims to have been "ambushed" or swamped with material to deal with within the extremely tight time frame. In both cases the court decided that although there had been an "ambush" this did not necessarily result in a

---

4. [2004] EWHC 2339 (TCC)
5. [2009] EWHC 70 (TCC) 13 July 2007

breach of natural justice. This shows that the whole purpose of Adjudication is to ensure that an early resolution will be achieved and the parties will not be able to delay by making applications for extension of time or postponement of the hearing.

The power of the courts' to intervene in Adjudication and Arbitration

(i) "Rough and ready justice" in Adjudication

The courts have steadfastly refused to intervene in Adjudications because to do is seen as a betrayal of the purpose of the legislation to bring a swift decision delivered invariably by the parties' peers, a Quantity Surveyor with experience and accreditation by the nominating professional body of which they are members.

The "rough and ready" nature of the justice administered in Adjudications is to be found in recent decisions of the court including those in enforcement of the Adjudicator's decision. Can a responding party raise for the first time an entirely new defence? If so, can the scope of the dispute be extended by such defence or otherwise be extended beyond the basis identified in the notice of Adjudication? In William Verry (Glazing Systems) –v- Furlong Homes (6) the building employer commenced an Adjudication against the contractor on the whole final account including a contention that the extension of time granted was correct. William Verry included with it's response an updated extension of time claim. The responding party objected but the Adjudicator decided to allow the new claim by way of defence. Furlong did not like the decision and argued at enforcement that the Adjudicator had no jurisdiction to reach his decision on the basis of the new claim.

His Honour Judge Coulson found that since William Verry was the responding party there was nothing to stop it from submitting a new claim by way of defence. He said "In my judgement Verry were entitled to take whatever points they liked to defend themselves against the assertion that their extension entitlement was limited in the way advanced by Furlong and the Adjudicator was obliged to consider all the points which they raised". Importantly he found that Furlong had had sufficient time to deal with those new submissions and therefore the Adjudicator's decision was binding upon the parties.

The case of Quartzelec Limited –v- Honeywell Control Systems Limited (7) followed the established principle that a responding party can offer any relevant or arguable defence in an adjudication and that an adjudicator is obliged to consider such defence. This was explained by Akenhead J in the case of Cantillion Limited –v- Urvasco Limited (8) in which he held that the Adjudicator is bound to consider "any arguable defence in adjudication whether propounded before the adjudicator or not..." The Quartzelec case developed the courts' approach to the obligations of Adjudicators to consider defences not raised before Adjudication proceedings had commenced. Honeywell in it's defence argued for the first time that there had been significant omissions on the project which Quartzelec had failed to consider previously when valuing the works and which substantially reduced the amount claimed. Quartzelec countered this by arguing that

---

6. [2005] EWHC 138 (TCC) (13 January 2005)
7. [2008] BLR 250
8. [2008] EWHC 282

Honeywell was attempting to widen the jurisdiction of the Adjudication beyond that set out in the Notice of Adjudication and that the Adjudicator did not have jurisdiction to consider such a defence. The Adjudicator was not persuaded by this argument and decided that he was constrained by the wording of the Notice of Adjudication and he could only consider the matters which were said to be in dispute. Quartzelec sought summary judgement to enforce the Adjudicator's decision but Honeywell resisted enforcement on the basis that the Adjudicator failed to consider their omissions defence and this was a serious jurisdictional error and a serious breach of natural justice.

His Honour Judge Stephen Davies relied upon the rationale of Akenhead J in the case of Cantillion –v- Urvasco to overrule the Adjudicator's decision and said:

"Where the dispute referred to adjudication by a claimant is one which involves a claim to be paid money, it is difficult to see why a respondent should not be entitled to raise any defence open to him to defend himself against that claim, regardless of whether or not it was raised as a discrete grounds of defence in the run-up to the adjudication.The adjudicator has jurisdiction to, and should, consider any such defence". According to the judge a failure of the Adjudicator to consider such a defence was contrary to the rules of natural justice.

(ii) Arbitration

The legislation governing Adjudication is unlike the legislation governing Arbitration because in the latter the courts are given statutory power to intervene to remove an Arbitrator in very specific and limited circumstances. Section 1 of the Arbitration Act 1950 provides that the authority of an Arbitrator appointed by virtue of an Arbitration agreement shall be irrevocable except with leave of the High Court or a judge thereof. The intention behind this section is to remove the power of a party at common law to frustrate the reference to Arbitration. The Arbitrator will retain his authority until a notice of revocation has been issued. On the other hand an order for removal takes effect immediately (9). The section enables the court to give a party leave to revoke an appointment and where the court makes an order a party may issue a notice of revocation. Until he has done so the authority of the Arbitrator is retained but an order revoking his authority takes immediate effect.(10)

Revocation of the Arbitrator's authority can take place in the following circumstances:

- Serious and irreparable, misconduct
- Actual or potential bias
- Deficiencies in capability or performance
- Justice demands the temporary or permanent halting of the Arbitration (11)

---

9. Mustill & Boyd - Commercial Arbitration Second Edition 526 - 527
10.Mustill & Boyd - Commercial Arbitration Second Edition 528
11. Mustill & Boyd - Commercial Arbitration Second Edition 551

The power to remove an Arbitrator for misconduct includes where he may not have acted unfairly but he has allowed himself to be the subject of suspicion of unfairness or bias. The Arbitrator must not only show the absence of actual bias he must also appear to be in a position of acting judicially and without any bias. The remedy of removal will not be ordered lightly and even in the face of serious errors the Arbitrator may be allowed to continue to a conclusion. The remedy is likely to be confined to cases where the Arbitrator cannot be allowed to continue because of actual or potential bias or his conduct has destroyed the confidence of the parties in his ability to conduct the dispute judicially or competently. The absence of minimum requirements of Natural Justice to hear both sides and the failure to abstain from receiving evidence or arguments in the absence of one of the parties will allow the court to intervene.

In the case of Mooney –v- Henry Boot Construction Limited and Balfour Beatty Construction Limited –v- Kelston Sparkes Contractors Limited (12) the court decided the Arbitrator ought to have revealed to the parties the basis on which he was conducting his calculations and his failure to do so amounted to misconduct. The court had ordered the Arbitrator to provide further reasons by way of answers to questions including explanation of figures and documents used. His Honour Humphrey Lloyd concluded that instead of answering these questions the Arbitrator set out at length how he had assessed the evidence.This was irrelevant to the questions the court had ordered to be answered. The Judge set aside the award for this reason and added he had failed to give Henry Boot a proper opportunity of dealing with the method he had adopted and the court did not believe he had the ability to determine the dispute.The court therefore agreed to the request for an order removing the Arbitrator.

On the other hand in Suen Wah Ling –v- China Harbour Engineering (13) the Court of Appeal of Hong Kong an application to set aside an Arbitrator's award on the grounds of bias was refused in circumstances where the Arbitrator had previously advised the Appellant in conference on the subject matter of the dispute several years before the action had been commenced. The Arbitrator was ignorant of the fact that he had previously advised the Appellant in conference and for this reason a fair minded and informed observer could not conclude that there was any danger of the Arbitrator being biased. The court decided that the Arbitrator was entitled to assume that the parties concluded that he was an appropriate person to act as Arbitrator and there was no reason for him to check his previous files.

A party may also apply for removal under Section 24 of the Arbitration Act 1996 where there are justifiable doubts as to his impartiality or where he has failed to properly conduct the Arbitration or there has been or will be substantial injustice caused to the Applicant.

In Brian Andrews (t/a BA Contractors) –v- John H Bradshaw H Randell & Son Ltd (14) there was an objection that the Arbitrator had failed to obtain legal advice on preliminary issues. The Arbitrator had written a letter showing his irritation and Andrews made an application to the court under Section 24 (1) of the Arbitration Act 1996 to have the

---

12. 53 Con LR 120
13. [2007] BLR
14. [2000] BLR 6

Arbitrator removed. The court decided that the letter of the Arbitrator was no more than a display of irritation of the Arbitrator. The letter and the refusal to retract it did not indicate a real danger of bias and the Arbitrator had not inappropriately formulated the preliminary issues and had not failed to identify them in advance of the full hearing.

This is to be contrasted with Norbrook Laboratories Limited –v- (1) A Tank (2) Moulson Chemplant Limited (15) where the Arbitrator was removed as a result of direct contact with witnesses under Section 24. The Arbitrator was or may have been exposed to information which consciously or unconsciously could have unfluenced him in his decisions. The determination of the Arbitrator to put matters out of his mind was no answer because a fair minded and informed observer with knowledge of the facts of the Arbitrator's contact with witnesses would conclude that there was a real possibility of bias of the Tribunal.

A binding decision in Adjudication

The successful party in an Adjudication will know that once the decision is made and communicated to them they will be entitled to seek enforcement of it by summary judgement in the High Court if the unsuccessful party refuses to pay the award. In this way the courts intervene but merely to "rubber stamp" the Adjudicator's decision. While the parties can challenge the decision of the Adjudicator by issuing court proceedings or Arbitration, because it is a "binding" interim award only, most parties decline to do so and instead treat it as final.

Under Section 108 (3) of the Housing Grants Construction and Regeneration Act 1996 the decision of an Adjudicator in respect of the dispute referred is binding until the dispute is finally determined by legal proceedings, Arbitration or by agreement. This means that once an Adjudicator has reached a decision in relation to a dispute it cannot be referred to Adjudication for a second time.

In the recent Technology and Construction Court case of Birmingham City Council ("BBC") -v- Paddison Construction Limited (16) the court considered an application to prevent a second Adjudication on the basis that it was to consider the same, or substantially the same, dispute as had previously been referred and decided in an earlier Adjudication. The Adjudicator awarded a full extension of time for completion of the project but in respect of a claim for loss and expense arising from delays he said he was not prepared to grant payment of any further monies. He said that Paddison would be able to pursue it's loss and expense claim via a further Adjudication.

Paddison's case was that the Adjudicator had made "no decision" in relation to the loss and expense claim and it was therefore able to pursue this via a second Adjudication. In the alternative it argued if the court found that decision had been made on the issue of loss and expense the dispute now being adjudicated upon was "not the same or substantially the same" as had been previously referred._

---

15. [2006] BLR 412
16. [2008] EWHC 2254 (TCC)

The court decided that there was no real difference in the matters being considered because they were for loss and expense consequent upon delayed completion and were rooted in precisely the same contractual conditions. Both Adjudications were made on precisely the same grounds and the material being relied upon was essentially the same. The moral to be drawn from this case is that a party referring a matter to Adjudication must make sure that they properly prepare their claims before considering Adjudication and if they fail to do so they will not be able to refer to Adjudication for a second time a dispute on the same grounds and which is supported by material that is essentially the same.

Oral agreements and agreements in writing – "written on the backs of cigarette packets" or by a gentlemen's handshake

My experience in the English construction industry is that it becomes paramount to conclude a signed and executed contract because the failure to do will mean there is uncertainty as to the agreed terms and this could lead the courts to find that no agreed contract has been concluded at all. This problem persists whether the parties are major multinational contractors or small builders carrying out building work for residential customers. The slang phrase that the contract has been written "on the back of a fag packet" describes in succinct fashion the formerly endemic practice of failing to execute a signed contract. The insistence in the 1996 Act that there must be a "contract in writing" before the parties can adjudicate seeks to address and eradicate the evil derived from this practice of not having a written contract.

However, the Housing Grants Construction and Regeneration Act 1996 is to be amended by the Economic Development and Construction Bill ("the Bill") to abolish the current rule that in order to commence a statutory adjudication the parties must have entered into an "agreement in writing". From when the new legislation comes into force in approximately eighteen months time all oral contracts relating to construction operations will now be "Construction Contacts" enabling the parties to adjudicate. This throws into confusion as to what is required when concluding that a contractual agreement has been reached.

On the other hand the repeal of Section 107 and the rule that construction contracts must be in writing as a pre-requisite to statutory adjudication will avoid the Courts' restrictive interpretation of that section that all non-trivial terms of construction contracts must be in writing.

Currently an essential pre-condition to the right of either party to a construction contract to refer a dispute to statutory Adjudication is that there must be a construction contract as defined by the 1996 Act in which Section 107(1) states that the provisions of the Act only apply where the construction contract is in writing. Under the 1996 Act there is an agreement in writing:

- if in writing whether or not it is signed by the parties;
- if the agreement is made by exchange of communications in writing;
- if the agreement is evidenced in writing;
- if the parties agree otherwise than in writing by reference to terms which are in writing;

In the case of RJT Consulting Engineers –v- DM Engineering (17) decided in 2002 that all of the terms of the contract had to be evidenced in writing. It was not sufficient for there to be documents such as invoices that were consistent with the existence of a contract. There had to be written evidence of the terms themselves. The repeal of Section 107 appears to be justified on the basis that the Courts' restrictive interpretation of the section to the effect that all the non-trivial terms of the construction contracts must be in writing and the problem of the practical difficulty of agreeing a full written contract has acted as a barrier to the referral of disputes and has led to challenges to Adjudicators' jurisdiction.

The Adjudicator will now be faced with the thankless task of trying to sort out what the contract terms were that were agreed, before he turns his mind to the particular dispute between the parties. This will pose challenges to the Adjudicator in the assessment of witness evidence because it is likely that hearings will become more common. Unlike Arbitrators, who have such powers, Adjudicators cannot administer oaths. In addition the 1996 Act and the Bill do not deal with formal rules of admissibility of evidence. This means that hearings dealing with disagreements about material terms alleged to have been agreed orally will allow disgruntled parties to argue breaches of natural justice, for example it's witnesses have not been heard.

It is a worthwhile exercise to consider the way the courts have treated "gentlemen's agreements" that are purported to be made orally in order to anticipate the way in which the law will develop when the courts decide whether or not an oral agreement has been reached to entitle the parties to adjudicate. The House of Lords recently denied a developer the uplift promises under a verbal agreement. In the case of Yeoman's Row Management Limited –v- Cobbe (18) it was decided that parties to an agreement should be wary about entering into commitments on the basis of a handshake. If the terms are not properly documented the courts may not find there has been an agreement.

C entered into an "in principle" agreement with Y whereby he would at his own expense obtain planning permission for residential redevelopment of Y's land. Y would then sell him the land for £12M. C would develop the land and sell the houses on it. Y would receive fifty per cent of the amount by which the proceeds of sale for newly developed

houses exceeded £24M. Despite the absence of a formal contract C applied for planning permission at great expense which was approved. Y tried to withdraw from the deal and proposed new terms, namely a reduction in the price of the land but that Y would receive forty per cent of the sale proceeds. C refused to agree and argued that Y was bound by the original deal.

The House of Lords decided that C was only entitled reimbursements of his costs in obtaining the planning permission on a quantum meruit (a reasonable amount earned) and unjust enrichment basis, amounting to approximately £150,000. The House of Lords decided that a proprietory estoppel had not arisen to entitle C to half the increase in value in the land as a result of the planning permission. Proprietory estoppel can only arise if

---

17. [2002] BLR 217
18. [2008] UKHL 55 30 July 2008

there is an expectation that an interest in the property was to be acquired. Here C's expectation was not that he would acquire the land but rather that there would be a successful negotiation of the outstanding terms of contract of sale of the property to him.

The court said that to the extent that C had an expectation of an interest in land it was contingent not only on the grant of planning permission but also on the course of further contractual negotiations and conclusion of a formal written contract. The Construction Bill flies in the face of this decision that the courts are reluctant to find the existence of contract where it is only concluded orally. It can be viewed as bringing informality to the ADR process by allowing the parties to adjudicate in the absence of a written contract but it may prove to cause more problems than it solves in this respect.

The courts powers to stay court proceedings in Arbitration, Mediation and Adjudication

(i) Arbitration

Under the old law where an Arbitration clause was contained in the agreement if there was an arguable defence to the claim the courts would refuse to stay the court proceedings to Arbitration. In the case of Croudace –v- London Borough of Lambeth (19) the Court of Appeal decided it was not a proper case for the granting of a stay of proceedings under Section 4 of the Arbitration Act 1950 because of the fact that there no defence on liability. The court decided that a matter should not be referred to Arbitration if it is clear that it is possible for the court to give summary judgement for a sum that is indisputably due. In this case Lambeth's conduct in failing to take steps necessary for Croudace's claim to be ascertained on the merits was condemned. The court said it was entitled to infer that the object of this conduct was to postpone the "evil day" when Lambeth would have to pay Croudace the sum which the Architect acknowledged was due. It was a reasonable inference that the sole motive of the application to stay proceedings was to create further delay.

Section 9 (4) of the Arbitration Act 1996 provides that on an application under this section the court shall grant a stay unless satisfied that the Arbitration is null and void, inoperative or incapable of being performed. In the case of Collins (Contractors) Limited –v- Baltic Quay Management (1994) (20) Limited the principle in the Halki Shipping case was followed. In the Halki Shipping case the Court of Appeal held by a majority that

a stay to Arbitration would be granted by the court whenever there was a dispute, regardless of whether the Defendant had an arguable defence to the claimant's claim. This was different from the position under the old law where a stay would be refused if the defendant had no arguable defence to a claim for summary judgment. The Contractor's argued because there had been a failure of the Defendant to issue a notice of intention to withheld monies to under the Housing Grants Construction and Regeneration Act 1996 they had no defence or arguable defence to the claim. The Court decided that this was precisely the argument which had been considered and rejected in the Halki case. Therefore the court granted the application for a stay in the absence of the notice to withhold.

---

19. Construction Law Reports Vol 6 21 March 1986
20. [2005] BLR 63

In the case of McConnell Dowell Construction (Aust) Property Limited –v- National Grid Gas PLC (21) Mr Justice Jackson in the Technology and Construction Court decided that where a jurisdiction clause in a contract gave jurisdiction to the English courts then they should regulate the Dispute Resolution Procedure and as a result there was an effective Arbitration clause. The court decided that Section 9 of the Arbitration Act 1996 gives no discretion to the court. Therefore the action had to be stayed.

The courts take a liberal approach when it comes to interpretation of Section 9 and an example of this is the case of Al-Naimi –v- Islamic Press Agency Inc (22) where it was decided by the Court of Appeal that where a court was not satisfied that the subject matter of an action was covered by an arbitration agreement and should be stayed under section 9 of the Arbitration 1996 it could still stay the proceedings under its' inherent jurisdiction if good sense and litigation management made it desirable for the matter to be referred to Arbitration. If for example the court thought that it would take a trial with oral evidence to decide whether matters the subject of the action were actually within the scope of the arbitration clause but that it is likely that on detailed enquiry they would be found to be so it would often be sensible for the court not to try to resolve that question itself but to instead leave it to the Arbitrator to decide.

(ii) Mediation

The courts inherent jurisdiction in favour of a stay to Mediation is likely to be exercised where the parties have agreed this as the method of ADR. In Cable & Wireless Plc –v- IBM UK Limited (23) a clause in an agreement for the provision of information technology by IBM to Cable & Wireless provided that any dispute or claim should be resolved by negotiation and if that were not successful then an attempt in good faith should be made to resolve the dispute through ADR as recommended by the Centre of Dispute Resolution ("CEDR"). A dispute arose over "benchmarking" of prices. Cable & Wireless issued proceedings and IBM brought an application to stay the claim. The court decided that the parties had not made enough effort to resolve the dispute through ADR and that the clause imposed an obligation to participate in ADR through CEDR. The availability of the remedy by stay or adjournment was in the discretion of the court and would be exercised upon equitable principles. In this case there were strong Case Management considerations for allowing the reference to ADR to proceed.

When will a party be able to decline to mediate without sanction or criticism of the court? In the case of P4 Limited –v- Unite Integrated Solutions plc (24) the Technology and Construction Court decided that Mediation was not only desirable but stood a reasonable prospect of success. The court criticised Unite's refusal to Mediate on the grounds that the costs of the Mediation were disproportionately high. The court found this surprising because the costs of the trial vastly outweighed the projected costs of the Mediation. The court penalised Unite in costs in that they lost their costs incurred from the beginning of the court action. The test to be applied as to whether it is reasonable to decline Mediation is that there is no justification for refusing Mediation if a party unreasonably believes that his case is watertight. However the fact that he has a watertight case may well be a sufficient justification for a refusal to mediate. The court will decide which side of the line the decision not to mediate falls and the wrong decision can result in heavy costs penalties being made.

---

21. [2006] EWHC 2551 (TCC) (3 October 2006)
22. Times Law Reports 16 March 2000
23. [2003] BLR 89

However, if the contract contains an ineffective Mediation clause a recent case shows that the court will decline an order to stay the proceedings to Mediation. In Balfour Beatty Construction Northern Limited –v- Modus Corovest (Blackpool) Limited (25). Balfour Beatty applied for summary judgment to enforce an Adjudicator's decision. The contract contained a provision giving the parties the option to mediate if they so wished. Mr Justice Coulson said that where the parties have agreed a particular method of ADR they wish to adopt then the court has an inherent jurisdiction to stay proceedings brought in breach of that agreement. He referred to the Cable & Wireless case where the court found sufficient certainty that Mediation should be followed. In this case a stay was refused because the Mediation clause was nothing more than "an agreement to agree" and therefore lacked certainty. Therefore, there had been no breach of the Mediation clause and a stay was refused. This case shows that the courts will order a stay (a) where the mediation provisions are certain (unlike in the Balfour Beatty case) and capable of enforcement (b) where the Claimant has no entitlement to summary judgement and (c) where mediation is considered by the Court as the best method of resolving the dispute.

(iii) Adjudication

The courts have also been active in deciding when it will adjourn court proceedings to Adjudication when there is an agreement to adjudicate in the agreement. In DGT Steel and Cladding –v- Cubitt Building and Interiors Limited (26) the court decided that if the parties have agreed upon a particular method of dispute resolution the court has an inherent jurisdiction to stay proceedings brought in breach of that agreement. While the jurisdiction to stay is discretionary there is a presumption in favour of the parties' agreement to adjudicate. The court found that the wording of the agreed adjudication clause was mandatory and since the dispute in the court proceedings was not one that had been referred to adjudication, the court proceedings constituted a breach of the adjudication agreement. The clause in the agreement made it mandatory by the use of the word "shall".

The argument was made that the clause merely gave rise to an option to adjudicate rather than an arbitrary process because this was only what was provided in Section 108 of the Housing Grants Construction and Regeneration Act 1996, that it is merely gave a right to adjudicate. The court disagreed and said that under Section 108 the parties had the right

to refer any dispute to Adjudication. Therefore, as a matter of simple Case Management the court would be likely to temporarily stay the court proceedings until after the adjudication has been decided. For this reason the court decided that even in the absence of the mandatory Adjudication clause Cubitt would still be entitled to assert their right of referral of the dispute to Adjudication.

Another circumstance in which the court may grant a stay of court proceedings is where there is an application for enforcement of an Adjudicator's decision for a sum of money to be paid. The court may be reluctant to grant summary judgement if a claimant is unlikely to be able to repay the amount in the event that it is subsequently decided that it has been overpaid. The court might instead grant a stay of execution of the judgment until the claimant gives security to cover the potential repayment of the sum. A stay is

---

24. [2006] EWHC 2924 (TCC) (17 November 2006)
25. [2008] EWHC 3029 (TCC) (O4 December 2004)
26. [2007] EWHC 1584 (TCC) (04 July 2007)

more likely where the claimant is in administrative receivership or good evidence of insolvency exists. However, in Mead General Building Limited –v- Dartmoor Properties (27) the court refused a stay where the claimant was the subject of a CVA because the mere fact of this did not of itself mean that the Claimant would be unable to repay any sum paid to the claimant. The evidence before the court showed that there was a good chance that the claimant would continue to trade successfully and be able to repay any part of any sum found to be overpaid.

A fair trial or a "rough and ready" resolution?

Article 6 of the European Convention on Human Rights makes it obligatory for member states to ensure that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. The Human Rights Act 1998 came into force in England on 2 October 2000 and it gave effect to various articles of the convention in English law including Article 6. This means that Arbitration and Adjudication should in principle conform to the precepts of a fair hearing as defined in Article 6.

However, Alternative Dispute Resolution in the UK Construction Industry was introduced and has gathered pace as the principle means of determining disputes because of dissatisfaction with the overwhelming costs incurred by both sides in protracted court litigation. In particular Adjudication has been devised as an adversarial alternative to court proceedings and it appears that the fairness of the process is relegated in importance to that of achieving a swift outcome reached after reasoned argument when both parties have had an opportunity of arguing their case with some degree of natural justice being present. In their article "The Human Rights Act 1998: the Implications for Dispute Resolution in the Construction Industry" (28) Lewis N Cohen and Jonathan Miller observe that Adjudication and Arbitration are probably not compliant with the Human Rights Act .They cite that in Adjudication the time limits are too tight and "ambush type adjudications" intrinsically means that there is a risk of unfairness to the responding party.

Nevertheless, as we have seen the specialist construction court and the Court of Appeal in England have consistently decided to cast aside these concerns of unfairness and to instead uphold the overriding objective of supporting an alternative form of dispute resolution that best suits the needs of industry, is one that has the consent of the industry and is one administered by it's members, invariably Quantity Surveyors and by definition non-lawyers.

On balance a "rough and ready" resolution to a construction dispute is preferred by the industry to that of strict adherence to a fair judicial process. It will be interesting to see whether this trend will continue when witnesses are called in adjudications to give evidence on the existence of an oral contract and whether the Human Rights Act will be used to argue that a fair trial has not occurred because a fair hearing of the evidence has not taken place.

---

27. CMS Cameron McKenna; "Law- Now" 17 February 2009
28.(2000) 16 Const.LJ. No. 5 295 - 308

Anthony Philpott MCIArb has been in the law for over 30 years. He is included in the Legal 500 as one of 200 hundred in house lawyers in the UK. Anthony Philpott is a solicitor, former barrister and a Member of the Chartered Institute of Arbitrators. He holds the MSc in Construction Law and Arbitration from King's College University London and has a BA Hons Law Degree.