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Resolving disputes: how to practically manage them on a project

Introduction

This guidance paper has been produced as a result of a break out session facilitated by Neil Earnshaw of NE Consult and Rob Horne of Osborne Clarke at the Built Intelligence NEC People Conference on 19th June 2018. The session looked at the advantages and disadvantages of using adjudication and dispute resolution boards and looked at alternative methods for resolving disputes before they get that far. It also sought to identify practical advice on how to manage projects in order to reduce the chances of formal dispute resolution being required.

Participants in the break out session represented all sides of the industry with representation from directors and senior managers of clients, consultants, contractors and lawyers.

Background

Adjudication as the normal method of dispute resolution in the construction industry was advocated in the seminal Latham Report[1] as a way of obtaining a speedy, provisional settlement of disputes and improving cash flow between parties. Statutory adjudication was introduced through the Housing Grants, Construction and Regeneration Act 1996 ("the 1996 Act") which came into force in 1998. Over the last 20 years adjudication has superseded arbitration as the traditional dispute resolution process within industry with on average approximately 1500[2] referrals being made each year.

In the first major case on adjudication under the 1996 Act (Macob Civil Engineering v Morrison Construction Ltd [1999] BLR 93), the history and purpose of adjudication was summarised succinctly by Dyson, J:

"The intention of Parliament in the Act was plain. It was to introduce a speedy mechanism for settling disputes and construction contracts on a provisional basis, and requiring the decision of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement ... The timetable for adjudication is very tight... many would say unreasonably tight and likely to result in injustice. Parliament must have been taken to have been aware if this ..."

Dispute boards were originally developed in the USA during the mid-1970s for major projects and were adopted by FIDIC in its 1999 suite of contracts as dispute adjudication boards that have the authority to make binding decisions. In 2017 NEC launched the NEC4 suite of contracts that includes a new secondary option W3 for using a dispute avoidance board throughout a project that has the authority to make recommendations for resolving potential disputes. In the UK, the guidance from the NEC is that option W3 cannot be used if the 1996 Act applies due to the statutory right to adjudicate at any time.

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[1] Sir Michael Latham (1994), Constructing the Team, Final Report of the Joint Government / Industry Review of Procurement and Contractual Arrangements in the United Kingdom Construction Industry [Latham Report]

[2] Based on figures from the Adjudication Reporting Centre

Pros and Cons of Adjudication

The group discussed the pros and cons of adjudication, with the main points being:

Pros	Cons
• Independent process • Temporarily binding • Quick (both to start & decision) • Influences future behaviours • Cheaper than litigation / arbitration • Mutual appointment in Contract Data • More accessible for SMEs • Private – avoids publicity • Gets a decision • Ease of use – not court • Uncertainty of outcome might encourage parties to resolve through discussion • Threat of adjudication can lead to escalation & resolution • Easily understood	• More overturned • Labour / time intensive • Increasing costs • Potential dissatisfaction between parties • Decision not binding • Pot luck / uncertain outcomes • Costly to challenge • Susceptible to ambush • Can negatively affect relationships • Only looks at specific issue • Cost to value (own fees) • Too time constrained • Heavy on procedure – few get into the issues

The group concurred that generally adjudication has achieved its objectives, however there were significant concerns about the costs of the procedure (which appeared to many to be on the increase), the quality of the decision, and the impact that it has on relationships.

Adjudication is also being used cynically by claimants attempting to gain advantages over respondents by preparing detailed cases prior to referring a dispute in the hope that they can catch respondents ill prepared for responding within the short timescales; the so-called ambush.

Pros and Cons of Dispute Avoidance Boards

The group discussed the pros and cons of dispute avoidance boards, with the main points being:

Pros	Cons
• Independent • Access of knowledge • Early access to issues • Quicker • Proactive - can resolve issues before they become disputes • Efficient – 10 pages • Easier to challenge (than adjudication) • Relatively easy to prepare for • More of a planned process and less susceptible to ambush • Preserves relationship • Could be cheaper if rolled out over programme • More learning in the group • Know who will be involved	• Cost of setting up and maintaining • Yet another dispute process • Potentially protracted procedure • Not final – only an interim solution • Nomination vs choice of individual (bias?) • Initial cost / time • Could be just another step • Potentially used as a delay tactic • Contracting out problems • Discourages negotiation • Little penetration • Non-binding recommendation • Slow procedure

Continued

Pros	Cons
• Resolve things as you go • Not binding • Escalates to management • Positively engaged from outset of project • Less likely to negatively affect relationships	

Whilst experiences in the group of using dispute avoidance boards under NEC4 option W3 were limited, many had used similar procedures that have been added to NEC contracts as Z clauses.

There was overwhelming support for the use of dispute boards however there were concerns that the high cost of setting up and maintaining the board makes them only appropriate to be used on large projects or programmes (e.g. over £100m). Also, it remains to be seen how popular option W3 will be internationally.

Whilst the use of dispute boards isn't prohibited in the UK, option W3 removes the right for parties to adjudicate at any time which is a statutory requirement under the 1996 Act. Option W3 could be amended using Z clauses to make it compatible with UK law (in much the same way as the escalation process through meetings does not prohibit the use of adjudication), however the group warned about introducing too many tiers in the dispute avoidance / resolution process as they could protract the length of time to reach a final decision and increase costs.

Alternative Methods of Dispute Resolution

The group then considered alternative methods of dispute resolution. Whilst alternative formal procedures were proposed such as conciliation, expert determination, and mediation, the group discussed more informal methods and practical steps that can be taken to avoid disputes occurring in the first place.

Much emphasis was put on people, and how spending time at the outset of a project to develop collaborative working relationships is one of the main ways of avoiding disputes.

Suggestions from the group were:

Pre Contract

- Pre-procurement engagement – clients need to know how the market will react
- Ensure the risk allocation in the contract is reasonable and understood by both parties
- Eliminate onerous Z clauses
- Use early contractor involvement
- Ensure the project team reads and understands the contract
- Appoint team members based on attitude and behaviour
- Allow sufficient time for mobilisation to help build relationships and trust
- Consider using expert determination
- Consider pendulum / baseball arbitration on quantum
- Leadership from senior management to set vision and align teams
- Ensure pre contract behaviours reflect expected post contract behaviours

Continued

Post Contract

- Collocation of project teams
- Use of online collaboration tools for contract management
- Joint start-up / mobilisation workshops covering expectations, behaviours, governance, systems, and contract training
- On-going risk reduction meetings
- Don't bury problems, encourage early identification and resolution
- Be prepared to remove people from the team who are disruptive or not displaying the right behaviours
- Have points of difference as an agenda item at progress meetings
- Escalate differences to senior managers for resolution
- Joint appointment of expert(s) for expert determination will increase likelihood of parties accepting decision
- Use a differences / disputes post-it board to help identify problem areas
- Educate the supply chain when there are issues
- Discuss compensation event notifications and quotations prior to submission
- Work to develop a no surprises culture, discuss before acting, especially in relation to potentially more contentious actions e.g. deduction of delay damages, non-acceptance of submissions etc
- Use a contract assurance team with representation from client
- Use deeds of variation / amendment to capture agreements if contract drafting is found inadequate
- Be prepared to compromise your position
- Have access to independent expert advice on potential disputes, available to both parties, 50/50 split on costs
- On frameworks with multiple contractors, if most of the contractors have the same opinion on an issue which is going to dispute, conduct a single adjudication with all contractors

Over recent years the escalation of potential disputes to senior representatives from each party has been incorporated into NEC contracts by Z clauses. The group were supportive of NEC4 including this in the standard contract under Options W1 and W2.

Collaborative Adjudication

If and when adjudication becomes unavoidable, the group identified several steps that could assist in preventing the adjudication damaging relationships:

- Do not view adjudication as failure
- Make a joint decision to adjudicate when it is apparent that other methods aren't working
- Jointly agree on appointment of adjudicator
- Make a genuine effort to resolve with the facts
- Ensure both parties have access to all information
- Pre-adjudication meeting to understand / agree what the dispute is
- Understand the other side of the argument

Notes from the Moderators

The group had a very positive and engaged discussion about disputes, but it was obvious that there remained a relatively low level of understanding of exactly what **could** be done in a dispute context.

The continued rise in the use of specialist advisers (not limited to lawyers) who do not properly understand either the NEC approach or dispute resolution in a holistic sense often leads to unnecessary and destructive adjudication and other processes simply because there is a right to it. Often those advising are unable or unwilling to step away from what you can do what you should do. This is despite the very clear feedback from those operating projects at site level who want to improve relationships on the whole and work within the context of mutual trust and cooperation which is a cornerstone of the NEC approach.

At least as much, and possibly more, than any other aspect of the NEC, industry needs to place more emphasis on educating people in non-destructive dispute resolution techniques.

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September 2018