Construction Dispute Resolution Handbook

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Construction Dispute Resolution Handbook

Engineers' Dispute Resolution Handbook Second edition

By a specialist team of authors in Keating Chambers

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Foreword to the second edition

The success of the First Edition of this work, *Engineers' Dispute Resolution Handbook*, is not a surprise. The book covers the complete spectrum of dispute resolution expertise required by engineers and other professionals involved in substantial construction projects, which is otherwise available only in separate and unconnected texts. As pointed out in the Foreword to the First Edition, the challenge is not simply the effective use of one dispute resolution procedure, but making effective use of the whole range of procedures available.

The basic procedures available now number at least six, all of which are well covered in this work. But it will be found that parties are quite capable of 'inventing' other procedures with new names which, however, invariably turn out to be one of the existing systems, or perhaps a combination of these, repackaged for the particular needs of the case. An example of this is a 'conciliation' procedure introduced into a number of high value contracts in Taiwan which required disputes to be conciliated by a panel; but if the parties did not reach settlement, the panel was to issue a decision which was contractually binding until a final decision by a court or arbitrator, following the UK adjudication model. The moral is that that the principles remain the same, whatever the label.

In deciding how particular disputes should be resolved, the choices facing the parties are: (1) an initial choice between state court or private dispute resolution; and if the latter, (2) a choice between procedures supported by court powers such as arbitration or adjudication and *ad hoc* procedures such as mediation, expert determination and early neutral evaluation (ENE); and then (3) a choice as to the extent to which a decision or result is to be binding. It is perhaps this last element that can surprise the non-lawyer, as it is the judgment of the High Court that is most likely to be reversed on appeal; and, conversely, the relatively informal decision in an expert determination is least likely to be open to challenge in any forum. And although adjudication is, in theory, binding only until the dispute is 'finally determined' in another tribunal, the reality is that adjudication is about cash flow and, depending on your source of statistics, something well in excess of 90% of adjudication decisions are not challenged further. At the other end of the scale, mediation and ENE create no binding result unless the parties enter into a binding contractual settlement as a result. Even here the courts are beginning to entertain limited challenges, but the processes themselves remain relatively risk free.

One might ask why all these procedures are needed and why could we not return to the old days when the engineer was king (see Foreword to the First Edition). One answer is that the world inevitably moves forward and lawyers and contract draftsmen will be dragged along with the rest of humanity.

Another answer is that contracts, and therefore the disputes that they generate, are vastly more complex today than at any time in the past, and call for a corresponding spread of remedies such as those described in this work. Another significant new facet of modern dispute resolution techniques is that they are infinitely more available than at any time in the past. A mere 20 years ago the only remedy available to a contractor under an Institution of Civil Engineers (ICE) Form of Contract who was dissatisfied with the engineer's certification was to refer the matter back to the (same) engineer who was then given three months to reconsider and, if he thought fit, to affirm his original decision. Compare this to the current availability of adjudication 'at any time' or, if preferred, arbitration or any other agreed method of resolution, also at any time. However, it may be that this abundance of availability now carries with it the danger that parties may be precipitated into a formal dispute resolution process earlier than is necessary, and before steps have been taken that might reduce or even avoid the dispute. Hence the importance of dispute avoidance (a phrase that would not have been understood in the past) and the systematic consideration of the steps to be taken when a potential dispute looms. Both these subjects are well covered in this book.

While the basic principles remain unaltered, this edition has updated the law and practice in a number of respects, which are reviewed in Chapter 1. The book has rightly attracted a wide following, and will become one of the standard pieces of equipment needed by those whose business it is to see engineering disputes properly resolved.

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Foreword to the first edition

There was a time when the engineer was king. In those days disputes were, in the first place, settled by the engineer acting as quasi-arbitrator, usually following his own decision as certifier. Sometimes he changed his mind, and only rarely did a dispute get beyond the contractual mechanism and out into the world of arbitration. And even then the invariably sole arbitrator would be another engineer, who could be expected to look at the issues in the same way as the original engineer. Partly for these reasons it was rare for a formal dispute even to arise. Most matters would be dealt with by informal discussion, with the engineer certifying what he thought was appropriate. Engineers in those days were said to command great respect.

But all was not necessarily well in the world of engineering contracts, even in the heady days of nineteenth century industrialisation. Isambard Kingdom Brunel is still revered as one of the greatest engineering geniuses. But his treatment of contractors shows him in another light. Brunel's appalling treatment of William Ranger, one of the contractors for the Great Western Railway, is fully documented in the report in House of Lords Cases (1854), volume V, page 72. Ranger had taken on a series of contracts, including that for the Avon Bridge, which was to be constructed in stone from the tunnels and cuttings eastward of the bridge. Ranger complained that he was deceived by reports as to the nature of the rock, which proved to be much harder than stated. When the project inevitably slowed down, Brunel took the work out of Ranger's hands and charged him with the additional cost of completion as well as delay penalties, eventually driving him to ruin. Ranger's final plea to the House of Lords that Brunel was a substantial shareholder in the company, and for that reason his decision could not be binding, was dismissed with a mixture of disbelief and regret that such a point should be taken. From that stage on, for more than a century the engineer remained king.

Ironically, it was not the great power wielded by the engineer which eventually led to his demise, but something quite different. By the 1970s there was general dissatisfaction in the construction industry that both engineers and architects, as the principal certifiers of cash flow to contractors, were no longer the independent spirits they once had been. They tended always to err in the employer's favour, rejecting claims which had then to be pursued in arbitration. Sometimes the engineer reacted cautiously, through fear of being sued himself for over-certification; and sometimes he was under pressure to avoid exceeding budgetary limits of which the contractor was unaware. Yet under the Institution of Civil Engineers (ICE) standard form conditions of contract, and many others, arbitration against the engineer's decision could not generally be pursued until after completion of the works, leaving the engineer in sole charge of the contractor's cash flow.

In the case of the ICE Conditions of Contract, the first sign of change began with the seemingly innocuous introduction of 'conciliation' as an alternative to the engineer's decision. One thing rapidly led to another, the next step being a reduction in the three months allowed for the engineer's decision, to a more familiar one month. This was followed by the groundbreaking introduction of arbitration available at any time, without the necessity of waiting for completion. This was the situation at the time the Housing Grants, Construction and Regeneration Act came onto the scene in 1996.

No one quite predicted what would be the effect of the statutory adjudication on the construction industry. The ICE initially attempted to preserve the traditional but reduced role of the engineer by relabelling the initial 'dispute' as a 'matter of dissatisfaction' so that the contractor remained bound to submit the matter to the engineer before a dispute could arise for the purposes of adjudication. This device was considered by some to be legally ineffective, and by others to be contrary to the spirit of the new Act. At all events, it was soon abandoned, leaving hardly a trace of the former regime. The latest 2005 amendments to the main ICE Conditions of Contract, mirrored in all the other ICE forms, thus presents the parties (it must never be forgotten that the employer may initiate disputes) with a seemingly bewildering choice between negotiation, mediation, adjudication, arbitration or even litigation. All these options must now be packed into any form of construction contract, and they present their own challenge to the parties. Rather than searching for a remedy within the inadequate procedures provided up to the 1970s, parties wishing to pursue a genuine dispute now have an *embarrass de richesses* in terms of available channels of resolution. The danger thereby created is that the would-be claimant may fail to identify the quickest and cheapest means by which the dispute may be resolved. The prospect of multiple concurrent resolution procedures carries with it the alarming possibility, if not probability, of multiple costs, all of which have to be paid by someone. None of the dispute reformers have yet devised a way of reducing the cost of legal services or the disruption that a formal dispute procedure can cause to normal economic activity.

So there is the challenge that dispute resolution now presents to engineers, contractors, lawyers and all those involved in engineering and construction disputes: how most effectively to make use of the huge variety of available techniques and procedures, and particularly whether to use the procedures singly or in combination. That is why this handbook is now invaluable as a source of essential expertise in making these unavoidable choices. Whatever choice is made, the initiating party inevitably commits to a particular course; and even if that course can be switched before reaching its conclusion, costs will have been

incurred which must be paid. Parties must now decide, at the outset of a dispute, their particular strategic route to achieving satisfactory resolution. This presents choices and challenges not dissimilar to those of programming and managing the construction work itself, and involves no less serious outlay of expenditure.

For the task of overcoming these novel hurdles, I am delighted to commend this handbook to anyone embarking on dispute resolution, whether as a theoretical study, in preparation for disputes to come, or in support of actual disputes that need immediate decisions and commitment to a particular course of action. The work is written by a team of specialists who can offer practical help and guidance in all the intricate stages described, and particularly in making the strategic decisions that will ultimately determine whether the dispute is resolved satisfactorily or not. Dispute resolution is no longer to be embarked upon without the guidance offered in this handbook.

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Chapter 1
Introduction

Robert Gaitskell

1.1. The second edition

Gratifyingly, the first edition of this book was a runaway success, being bought not only by the engineers for whom it was principally written but also by the host of other professionals who participate in big construction projects. Hence, whereas the first edition was entitled the *Engineer's Dispute Resolution Handbook*, this second edition is aimed at the wider readership and is named *Construction Dispute Resolution Handbook*.

Much has changed in the construction world since the first edition appeared in 2006. This is true not only in the field of adjudication but across the board. There is a new (October 2010) Technology and Construction Court (TCC) Guide and the TCC building itself is relocating. Mediation and dispute boards are much more widely used, with refined techniques. Early neutral evaluation has recently helped to settle one of the UK's most intractable construction disputes. Arbitrations nowadays often value 'hot tubbing' of experts, and there is recent court guidance on expert determinations. All this and more is reflected in this new edition.

What has not changed is our determination to make this a thoroughly 'hands-on' book. We want you to be comfortable with, and confident in, the contents.

Construction professionals often have to deal with disputes, whether with a contractor over certified sums, with an employer about unpaid fees, or with a supplier over sub-standard materials. Whether you are in London or in Lahore, this book is for you.

The purpose of this book is to serve as a guide when a dispute does arise. It is intended to be an intensely practical and useful book. It avoids legal jargon and sets out, in straightforward language, how you can avoid disputes, if at all possible, and how to cope with those that cannot be avoided. However, please remember that this book is not giving legal advice. It is merely making suggestions as to how to approach dispute problems. If you do have a specific dispute, then you should consider seeking legal advice. See Chapter 3 for how to do this. As the authors are not intending to give legal advice, they specifically exclude any liability whatsoever, including for negligence.

This book covers all the forms of dispute resolution that an engineer is likely to encounter

- litigation (Chapter 4)
- arbitration (Chapter 5)
- adjudication (Chapter 6)
- mediation (Chapter 7)
- expert determination (Chapter 8)
- early neutral evaluation (Chapter 9)
- international dispute resolution (Chapter 10).

For each type of dispute procedure you will be led, step-by-step, through the process, in a practical way. If you want to do your own research, you will be guided to accessible libraries and websites. If you want to instruct professionals to assist you, you are given contact details with suggestions on how to go about it. If you need to choose between different dispute processes, you are given useful comparisons of the pros and cons of each procedure.

As the UK construction industry and its professionals are heavily engaged abroad, there is a separate chapter (Chapter 10) dealing specifically with international dispute resolution procedures, pointing out how these differ from dispute processes used in the UK. That chapter gives particular guidance on the growing use of dispute boards.

Not long ago a construction professional faced with a dispute would simply have had to choose between litigation or arbitration. However, in recent years a range of new procedures has become available, many of which offer much cheaper and quicker alternatives. Although processes such as mediation, adjudication and early neutral evaluation are, in theory, simply steps that can be tried en route to a full-blown arbitration or court case, in reality these new procedures generally dispose of the dispute altogether. Mediation, for example, has a success rate generally greater than 70%. Similarly, the vast majority of disputes dealt with by adjudication never proceed to arbitration or litigation; the parties simply accept the adjudicator's decision. The same applies to early neutral evaluation. Thus, one of the most important decisions you may have to make in the course of a project is precisely what strategy to adopt with regard to dispute resolution. Should the choice be to opt for mediation, with adjudication as a fallback, and arbitration if all else fails; or would it be better to choose early neutral evaluation and then a possible court case? Alternatively, an expert determination might satisfactorily dispose of a particular technical or financial issue. This book gives sensible, straightforward guidance to anyone facing such questions.

This book has been written by a team of specialists from Keating Chambers, one of the leading sets of construction and engineering barristers' chambers in the UK. Many of the authors are themselves Chartered Engineers and one is a building surveyor. Their expertise includes civil, electrical, mechanical and chemical engineering. This is not a tome for lawyers; it is a down-to-earth handbook for construction professionals, written by specialists who are both engineers and barristers. It is, we believe, unique, and we hope that you will find it useful. If, having used it, you have any comments, whether praise or criticism, please let us know at the email address given at the end of Chapter 12. We also have a website at www.keatingchambers.com.

1.2. Overview of the forms of dispute resolution

Some procedures are finally determinative. Once those procedures have run their course there is a final and binding decision, subject to appeal only where this is permitted. Those procedures are, principally, court litigation, arbitration and expert determination. However, there is a growing range of preliminary procedures that very effectively screen out the vast majority of disputes to which they are applied. These are adjudication, mediation, dispute boards and early neutral evaluation (ENE). This book deals with all of the above procedures, so that the engineer is able to make an informed choice at each stage of the problem.

To enhance the usefulness of each chapter, where appropriate there is a model notice of arbitration, or a mediation position paper, and so on. This means that when a construction professional needs to deal with a dispute this book ought to provide the material necessary for decisive action.

Other than for court litigation, which is, of course, governed by the procedures of the national courts, most other forms of dispute resolution can be easily applied to international projects. Accordingly, this book (Chapter 10) outlines dispute resolution in an international context. Thus, whether working in the UK or running a site in the Middle East, Far East or anywhere else, engineers faced with a dispute problem will find that help is at hand in this book.

1.3. The seven forms of dispute resolution

The seven forms of dispute resolution mentioned above are each now described briefly, and are illustrated graphically at the end of this chapter.

1.3.1 Final determination procedures

1.3.1.1 Court litigation

For the purposes of construction disputes, 'court litigation' means trials in the TCC. The principal TCC is in London, but specialist TCC judges also sit in the main English provincial centres and in Wales.

If proceedings are commenced in the TCC, the relevant procedures in the Civil Procedure Rules (CPR) must be observed, including the fulfilment of the protocols. There may well be substantial disclosure of documents required of the parties, and technical experts may need to be engaged. This, when taken in conjunction with the involvement of solicitors, barristers and court charges, may mean that court litigation is an expensive procedure.

The parties have to set out their respective cases in detail on paper in their pleadings. Witnesses must produce detailed statements of their evidence, and experts must produce reports. This all adds to the cost. Accordingly, the engineer will, throughout the process, be considering whether it is possible to secure a satisfactory resolution by some other means, such as negotiation or mediation.

1.3.1.2 Arbitration

Arbitration has the advantage over litigation that it is (in the UK and like-minded jurisdictions) entirely confidential, so that the parties involved do not have to expose

themselves or their dispute to public scrutiny. However, the costs overall are generally similar to those incurred in court litigation because similar procedures are used.

A vast number of construction disputes arise in contracts where arbitration is specified within the contract as the agreed form of dispute resolution. In such circumstances court litigation is generally not an option. However, it is still open to the engineer to seek to dispose of the dispute by some other means, such as mediation or adjudication.

1.3.1.3 Expert determination

Although little used, the popularity of expert determination is growing as construction professionals realise that it can provide a satisfactory outcome where there is a particular technical issue. For example, if there is a financial issue where both sides would be prepared to accept the view of an independent accountant, a quantity surveying dispute where both would accept the views of an impartial quantity surveyor, or a technical matter, such as whether a power station boiler is up to specification, where both parties would abide by the view of a jointly appointed consulting engineer, then this procedure may well be appropriate.

If the procedure has not been written into the contract it can only be used if both parties agree to it. If it is used, then it is generally only suitable for a single issue, or for a handful of associated issues, of a particular type. Experts are subject to little court control as their decisions are generally not open to appeal. They may adopt an inquisitorial procedure, and are not obliged to refer the results of their inquiries to the parties before making any determination. Accordingly, this procedure is not suitable in every case. Nevertheless, if there is a single dispute that is preventing the parties from reaching a compromise, this process may be the means of releasing the log jam.

1.3.2 Preliminary determination procedures

1.3.2.1 Mediation

In the UK, mediation generally means a 'facilitative' process where the mediator helps the parties to make a deal. This should not be confused with an 'evaluative' process (more commonly called 'conciliation' in the UK), where the mediator, at the end of the process, gives an assessment of what the outcome should be if no deal has been made.

Where parties do in fact want an evaluative process, a simple solution is to try mediation first, as this is quicker and cheaper than any evaluative process and, if that fails, to try an early neutral evaluation (ENE) (see the following subsection).

The obvious attraction of mediation is that it is reasonably low cost, as it generally involves only a one-day meeting, with minimal paperwork beforehand. It can also be set up very quickly; most mediations are arranged within a matter of weeks, while some are arranged within a matter of days. The success rate is extremely high, depending on the precise type of dispute and the skill of the particular mediator.

1.3.2.2 Early neutral evaluation (ENE)

This process involves a preliminary assessment of the likely outcome of the various issues in dispute. The evaluation is designed to serve as a basis for further negotiation and,

hopefully, to avoid litigation or arbitration. An independent person is appointed by the parties, and that evaluator expresses an opinion on the merits of the issues raised. The opinion is non-binding, but the parties receive an unbiased evaluation of their relative strengths, and guidance as to the likely outcome if they proceed to court or arbitration. Indeed, even if you are already in court you can use a TCC judge to conduct an ENE, and if the case is not settled you can continue to trial with a different judge.

1.3.2.3 Adjudication

This procedure is undoubtedly the most exciting new development in construction dispute resolution. Statutory adjudication was introduced by the Housing Grants, Construction and Regeneration Act 1996 (hereafter 'the Act') and came into force in May 1998. It met a real need, securing the cash flow of interim payments to subcontractors and others, and outlawed 'pay-when-paid' clauses except in certain circumstances.

The payment provisions in the Act are coupled with an adjudication procedure which allows for a fast-track of a dispute determination within 28 days, unless a longer period is agreed. This prevents prevarication by the potentially paying party. In addition, a combination of payment procedures and adjudication machinery has been backed up by a series of robust decisions by the TCC and Court of Appeal judges, which make plain that it is parliament's intention that adjudication decisions should generally be enforced, as they are subject to subsequent litigation or arbitration if a party is dissatisfied.

The success of adjudication in the UK is attested by the fact that broadly similar schemes have now been introduced in other common-law jurisdictions, including particularly Australia, New Zealand and Singapore. In addition, in both Hong Kong and South Africa, important and widely used construction contracts include provision for adjudication. It is even the case that in certain World Bank funded projects the contract terms provide for adjudication, notwithstanding that the projects are based well outside the Commonwealth or any common-law jurisdiction.

1.3.2.4 Dispute boards/panels

Dispute boards (DBs) involve a procedure whereby a panel of three engineers/lawyers (sometimes just one) is appointed at the outset of a project. The DB visits the project site several times a year and deals with any incipient disputes. This generally avoids a dispute crystallising into an arbitration.

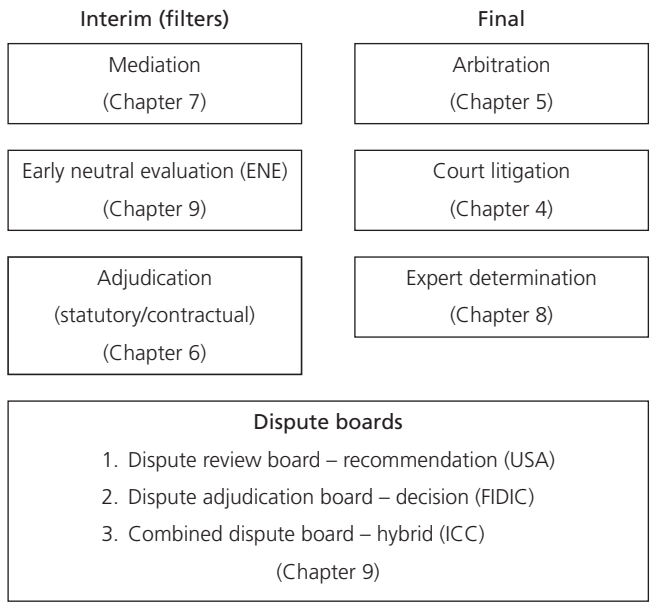
FIDIC (the Federation Internationale des Ingéniéurs-Conseils) has included the DB procedure in its standard forms for some time. The Paris-based International Chamber of Commerce (ICC) has produced a well-received set of DB rules which offer a variety of procedures (see Chapter 10).

In essence, the DB procedure amounts to serial adjudication. Each time the board makes a decision it is similar to an adjudicator producing a decision, and is, generally, temporarily binding unless either party challenges it by commencing arbitration within a stipulated time limit. If there is no challenge in that way, then the decision of the DB becomes binding.

1.4. Plan your strategy

It will be apparent from this brief survey of the various forms of dispute resolution currently available (Figure 1.1), all of which are described in this book, that whatever the nature of the dispute, whatever its size, and at whatever point it arises during the project, there is likely to be a particular procedure, or a combination of procedures, that is most suitable for tackling it and disposing of it in the most cost-effective way possible. This book will enable you to think strategically and to make the appropriate decisions to achieve that outcome.

Figure 1.1 The dispute resolution procedures available



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Chapter 2
Avoiding disputes

Gaynor Chambers

2.1. Introduction

Disputes in the construction industry are often lengthy, complex and expensive to resolve. They can also cause long-term damage to the commercial relationships between the parties. However, many disputes could be avoided (or at least contained) by ensuring that a formalised contract is made, which is drafted clearly and fairly, and contains provisions for early dispute resolution and effective contract management.

2.2. Contractual means of avoiding disputes

There are four basic precautions that contribute to the minimisation of disputes:

- ensure that the parties enter into a finalised contract before works commence
- ensure that the scope and quality of the works are clearly defined at the pre-contract stage
- ensure that the contract terms are fair and clear, and utilise standard forms of contracts wherever possible
- ensure that the contract used contains provisions for the early notification of potential disputes and a well-structured dispute resolution clause that is not limited to arbitration/litigation.

2.2.1 The importance of finalising the contract

Finalising the contract is an essential and yet often overlooked step in construction and engineering projects, many of which commence on the basis of letters of intent. While such letters may be necessary in some situations, they can pose a significant risk to the employer and should not be utilised without careful consideration.

Although there are limited occasions where the lack of an agreed and signed contract could operate in the employer's favour, in general the party which has the most to gain (and which is the most likely therefore to delay formalisation) is the contractor. Prior to contract award, the employer's willingness to pay an amount of money is perhaps the main source of the employer's strength in contract negotiations. Once the employer commits to the contractor and authorises the commencement of preliminary works, this advantage is lost and the employer is exposed to an immediate risk of disputes arising with regard to what was or should have been agreed.

Once the project is underway, sorting out the final form of contract and getting all the relevant parties to physically sign the agreed document are often overlooked in the

Box 2.1 A contractor claiming an entitlement to be paid on a *quantum meruit* basis, while the employer is unable to counterclaim for delay

British Steel Corporation v. Cleveland Bridge Engineering Co. Ltd. (1984) All ER 504

The Defendant (CBE) instructed the Plaintiff (BSC) to start manufacturing certain bespoke cast-steel nodes pending the issue of an official form of subcontract. Manufacturing commenced, but the parties were unable to agree on the terms of the subcontract (the main problem being that each company wanted to use its own set of standard terms). The nodes were delivered with some delay due to industrial action and production problems, but still no contract had been concluded. CBE also contended that the nodes had been delivered out of sequence. BSC sued for the price, and the court held that it was entitled to be paid a reasonable sum for the nodes on a *quantum meruit* basis. CBE's counterclaim for damages for delay and out-of-sequence delivery was rejected. Without a contract, there was no legal basis for this claim.

drive simply to get the job done. However, failure to formalise the parties' relationship has, in the past, led to the following problems:

- The contractor successfully claiming an entitlement to be paid on a *quantum meruit* basis, while the employer is unable to counterclaim for delay (Box 2.1).
- The contractor arguing that there was no contract and that it was entitled to be paid on a *quantum meruit* basis and/or the parties disputing what terms and conditions governed any contract between them (Box 2.2).
- Arguments over the form of contract which the parties intended to enter into (Box 2.3).
- Disputes as to whether or not the letter of intent itself is enforceable or simply an 'agreement to agree', meaning that the parties' respective contractual rights are entirely undefined (Box 2.4).
- Disputes over whether or not a formal contract had come into existence or works were all carried out under a letter of intent (Box 2.5).

The above list is clearly not exhaustive but serves to illustrate the basic principle of *caveat employer* – letters of intent generally favour the contractor and, notwithstanding the time pressures that affect many contracts, should be avoided wherever possible in favour of a properly executed contract.

2.2.2 Clearly define the scope of the works and quality expected

Disputes generally arise in relation to the following matters:

- The scope of the work – what was actually agreed, and whether or not a particular item or area of the works is a variation or was part of the original scope.
- The contract sum – disputes typically centre on what this covers.

Box 2.2 Disputes over the existence of a contract and/or parties disputing what terms and conditions govern a contract between them

RTS Flexible Systems Limited v. Molkeroi Alois Muller Gmbh & Company KG (UK Production) [2010 UKSC 14]

RTS had commenced works based on a letter of intent which provided that the formal contract would be executed within 4 weeks of the date of the letter. The parties had agreed draft terms, and a draft contract had been prepared and was ready for execution. They did not however formally execute this document, which contained a clause stating that it would not become effective until executed and exchanged. These facts gave rise to three entirely different judgments. At first instance, the judge held that the letter of intent had expired after 4 weeks; that a contract had been entered into notwithstanding the fact that no formal document had been agreed; but that this contract did not contain all the terms that appeared in the draft contract prepared for execution, and in particular did not incorporate the MF/1 standard terms. The Court of Appeal found that no contract had been entered into following the expiry of the letter of intent. The Supreme Court found that a contract on the wider terms contained in the draft prepared for execution had been entered into, notwithstanding the express clause which provided that this document would not become effective until executed and exchanged, as the parties had effectively waived the requirement for a signature and/or that the requirement for a formal written agreement had been 'overtaken by event'.

Haden Young Limited v. Laing O'Rourke Midlands Limited [2008] EWHC 1016

The contractor, Laing, had been engaged as the main contractor for the construction of a football stadium and associated facilities. Haden Young was a subcontractor for mechanical and electrical works. No formal contract had been entered into, but the contractor sought to argue that a subcontract had been concluded, as the subcontractor had proceeded with the works and had been paid sums by reference to the terms of a draft subcontract. The subcontractor argued that there was no contract, as all essential terms were not agreed. The court found that no contract had been entered into as the parties had never reached agreement on the essential terms, and in particular had not agreed on the terms of warranties or liability for consequential loss. The contractor was entitled to be paid a reasonable sum for the works carried out in quasi contract or restitution.

- Quality – whether the workmanship and/or materials are of the required quality.
- Time – whether the contractor or employer are responsible for any delays to the project (and any costs arising out of these delays).
- Payment – or more usually non-payment by the employer to the contractor.
- Unforeseen conditions – which party bears the costs risk?
- Employer's risks and compensation events.

Box 2.3 Disputes over the form of contract

Butler Machine Tool Co. Ltd. v. Ex-Cell-O-Corporation (1979) 1 WLR 401 (CA)

This case concerned a contract for the sale of a machine tool. Following initial negotiations, the seller issued a quotation that gave a price and delivery date of 10 months, and stated that the order was subject to the seller's own terms and conditions, which were printed on the back of the order. The seller's terms and conditions included a price variation clause. The buyer responded by issuing an order which stated that the seller was to supply the tool 'on terms and conditions below and overleaf'. These terms and conditions were different from the seller's terms and conditions and, in particular, did not include a price variation clause. There was a tear-off slip at the end of the order, which was duly signed and returned by the seller, under cover of a letter stating that the tool would be delivered in accordance with the seller's original quotation. Proceedings ensued in which the seller sought to take advantage of the price variation clause. In the first instance the judge held that the contract had been concluded on the seller's terms and conditions, but the Court of Appeal held that by returning the tear-off slip, the seller had accepted the buyer's terms and conditions.

Cubitt Building & Interiors Limited v. Richardson Roofing (Industrial) Limited [2008] EWHC 1020

The minutes of a pre-contract meeting indicated that the subcontractor, Richardson, had agreed to waive its standard terms and conditions in favour of the DOM/1. A document described in a covering letter as a 'letter of intent' was subsequently forwarded to the subcontractor by the contractor, Cubitt, on 29 May 2003. This referred to an intention to subsequently enter into a formal subcontract, following which the provisions of the letter would cease to have effect. A few days later, on 6 June 2003, the contractor forwarded an order which stated that it placed the subcontract on its own standard terms and conditions, and subsequently sought to argue that these, rather than the DOM/1, governed the contract between the parties. The judge held that essentially agreement was reached at the pre-contract meeting, in that there was agreement on price and all essential areas which required agreement, including that the DOM/1 would apply to the subcontract between the parties. The 'letter of intent' was, on analysis, acceptance of the subcontractor's most recent offer, and the subsequent formal order of 6 June 2003, which sought to introduce the contractor's standard terms and conditions, was of no contractual effect.

The possibility of lengthy disputes arising in these areas can be minimised by clear and fair contract drafting, a topic which is considered in the following subsection. However, clearly defining the scope and quality of the works in the early stages (i.e. before tender or during the tender negotiations) can assist in preventing disputes. For example, the usual reason why additional time is required is variations (or alleged variations) to the project works.

Box 2.4 Disputes over the enforceability of a letter of intent

British Steel Corporation v. Cleveland Bridge Engineering Co. Ltd. (1984)

As discussed in Box 2.1, the instruction to commence manufacturing was contained within a letter of intent from CBE, which stated its intention to enter into a contract on its standard form of subcontract. The court rejected the argument that BSC had agreed to contract on these terms simply by commencing manufacturing.

Turriff Construction v. Regalia Knitting Mills (1971) 222 EG 169

Design work for a construction project was undertaken following the issue of a letter of intent, but the project was abandoned before a formal contract was entered into. The court found that the employer was liable to pay the costs of the abortive design work because the letter of intent had given rise to an ancillary contract.

The scope of work is easier to define when the plans and drawings are complete at the time the contract is negotiated.

Similarly, the potential for disputes as to whether materials meet the required standard can be reduced if

- recognised standards, such as British Standards, are stipulated where possible
- the particular materials to be used are specified in the contract documents.

Box 2.5 Disputes over whether a formal contract has come into existence or if works were all carried out under a letter of intent

Diamond Build Limited v. Clapham Park Homes Limited [2008] EWHC 1439

The contractor and developer had entered into a letter of intent which referred to the parties' intention to enter into a JCT Intermediate Contract under seal. No such contract was entered into. The letter of intent stipulated a commencement and completion date and a cap on the sums the developer would have to pay the contractor in the event a formal contract was not executed in place of the letter. The contractor sought to argue that a contract incorporating the terms of the standard form had come into existence and further relied upon estoppel, on the basis that the parties proceeded as though the letter of intent had been abandoned and as if the full JCT IFC Contract was regulating their relationship. The court held that the letter of intent gave rise to a simple contract in itself and, as no contract had been entered into under seal, the parties had accepted that the terms of that letter were to dictate the rights and obligations of the parties until the formal contract was executed. The parties had not altered their position on this point by their conduct.

2.2.3 Ensuring the contract terms are clear and fair

Research carried out by the Project and Construction Management Group at the University of Birmingham in 1995 discovered the following.

- The use of a clear form of standard contract (in this case the NEC) did not prevent disputes, as disputes happen between people regardless of the contract form adopted.
- However, there were fewer sources of conflict or dispute within the NEC due to its precise drafting. This meant that when an event occurred or an error was exposed, it was clear on the face of the contract which party was responsible for it. The potential for argument was thereby reduced.

These results expose one of the key difficulties in many construction contracts, namely that the contract fails to make plain which party bears the risk of delay or increased expense caused by a particular event.

Plain language can, of course, assist with this difficulty. However, the potential for dispute can be minimised further by making use of a standard-form contract, some examples of which are listed in Box 2.6.

The use of standard-form contracts can help to reduce the potential for disputes in a number of ways.

- Because these forms have been in wide use for a number of years, there is an existing body of case law in relation to the main sets of standard-form contracts which can assist in resolving disputes as to the interpretation of particular clauses. There are also authoritative commentaries which can be referred to (see, for example, the commentary on the ICE form of contract found in *Keating on Building Contracts*, 8th edition).
- Because of their longstanding use and the fact that they have been revised over time, the standard forms are likely to cover most of the potential dispute scenarios that are likely to arise on a project of the kind for which they are used.
- Because the forms themselves are usually drafted by composite panels which reflect the views of all stakeholders in the contract, the terms are generally fair and recognise the interests and expectations of both parties.
- Because of the above factors, insurers are generally more relaxed when asked to provide insurance for projects that are to be carried out under a recognised

Box 2.6 Standard forms of contract for construction and engineering projects

- The Joint Contracts Tribunal (JCT) range – for building projects
- The Institution of Chemical Engineers/Institution of Electrical Engineers Model Forms MF1–4 – for electrical/mechanical projects
- NEC Engineering and Construction Contract, 3rd edition
- The Institution of Civil Engineers (ICE) forms – for civil engineering

Box 2.7 Unanticipated effects of amendments to standard-form contracts

Wates Construction v. Franthom Property Ltd. (1991) 53 BLR 23 (CA)

The two parties had contracted using the JCT Standard Form of Building Contract Without Quantities, which provided that interim payments should be subject to a 5% retention. Clause 30.5.1 of the standard form provided that the employer's interest in the retention money was fiduciary as trustee for the contractor. However, clause 30.5.3, which provided that the retention money was to be kept in a separate and identified bank account, had been deleted prior to signing. The contractor discovered that the money was not being kept separate from the employer's general working capital and asked the court to order that it should be put in a separate account. The Court of Appeal held that, despite the deletion of clause 30.5.3, the employer was obliged to keep the funds in a separate bank account as part of his duties as trustee pursuant to clause 30.5.1.

standard-form of contract. This means that premiums are lower and the likelihood of a dispute with the insurer, if a claim is made, is reduced.

The use of standard-form contracts can have further incidental benefits for all parties in the construction process

- the production of tender documents is quicker
- tendering contractors can respond more quickly because of their familiarity with the contract form in question
- the work of the contract administrators is simplified if they are using a form of which they have prior experience.

It is often the case that substantial amendments are made to standard form conditions of contract. These are usually based on the relevant party (whether employer or contractor) seeking to allocate additional risk to the other. Such amendments should generally be avoided, as they can remove the benefits of using the standard form. They may also have effects that were not anticipated when they were drafted and which may be contrary to the objectives of the party who originally sought the amendment (see the example in Box 2.7).

2.2.4 Ensure the dispute resolution clause is well structured

The contract should set out clearly what is to take place in the event of a dispute. The dispute resolution clause should ideally provide for an escalating succession of dispute resolution mechanisms in order to resolve the dispute at the earliest opportunity. For example, the following measures could be provided for

1. interparty negotiation
2. mediation

3. expert determination
4. early neutral evaluation (ENE)
5. adjudication.

The traditional means of dealing with engineering and construction disputes has been via litigation in court or arbitration. Both have proven to be relatively expensive ways for the parties to achieve a detailed final determination of a complex dispute. Not all the measures listed above lead to a determination, and any decision that is reached by expert determination or adjudication is generally only temporarily binding (until one of the parties decides to proceed to arbitration or litigation). In practice, however, these measures have proven highly successful in enabling parties to move towards the final resolution of their differences without recourse to an arbitrator or the courts.

It is therefore becoming increasingly common for engineering and construction contracts to have tiered dispute resolution clauses. The first tier is usually some form of non-binding 'alternative dispute resolution'. For example, there may be a provision for the formal notification of any matter with which either party is dissatisfied, with the parties then meeting to discuss and seek to resolve the matter. The clause may then go on to provide for adjudication and/or expert determination and/or ENE, with arbitration being the final means of dispute resolution rather than the first.

This approach of setting out a tiered list of procedures has been adopted (since 2005) in the new suite of JCT standard form contracts. For example, the Major Project Contract expressly provides at clause 41 for the resolution of disputes by mediation (where the parties agree to this), adjudication or legal proceedings.

The tiered approach was also adopted by the Hong Kong Government's Works Bureau on the Airport Core Programme (ACP) contracts, with the stages being an engineer's decision, mediation, adjudication and, ultimately, arbitration. The success of the tiered approach is reflected in the fact that 79% of all disputes on the ACP contracts were resolved at the mediation stage. For details see 'Hong Kong Airport Project provides innovative ADR system' by Wall C.J. (1992) *World Arbitration and Mediation Report*, volume 3, number 6, pages 10–153.

The underlying reason for adopting a tiered dispute resolution process is that the non-binding processes are generally cheaper and faster and should therefore be tried first, before the parties incur the expense of the more traditional formalised methods of dispute resolution. It should be borne in mind that the costs of arbitration or litigation extend beyond those of lawyers and experts, particularly as both parties will have to commit the time of key personnel to the preparation of factual evidence and (eventually) any hearing. It should be noted again that clarity of drafting is essential (Box 2.8).

Although it is, of course, always open to parties to agree to mediate or have an expert determination or ENE regardless of whether such procedures are mentioned in the contract, experience shows that if these procedures are not expressly included in the dispute resolution clause, neither party is likely to suggest them. One reason for this is

Box 2.8 The necessity of clarity of drafting of contracts

Aiton Australia Pty Ltd. v. Transfield Pty Ltd. [1999] NSWSC 1996

In this Australian case, relatively detailed tiered alternative dispute resolution clauses in a construction contract were held to lack sufficient certainty. This led to the defendant's application to stay the court proceedings (in order to first try the contractual dispute resolution mechanisms) being dismissed. The primary reason why the dispute resolution clauses were deemed to lack certainty was because there were no provisions dealing with the appointment of a further mediator should the mediator whom the parties' originally sought to appoint be unable or unwilling to act, or dealing with the remuneration of the mediator.

the perception that the suggestion of mediation or some other form of dispute resolution is likely to be seen as a reflection of the suggesting party's lack of faith in its case.

Another reason for not suggesting mediation, expert determination or ENE can be the employer's reticence to have matters resolved relatively speedily once a project has been completed and a sum of money is claimed as due to the contractor. As part of the adversarial process, an employer may wish to delay matters and make the procedure as costly as possible in an attempt to force the contractor into settling on terms which are relatively advantageous to the employer. This is, however, a dangerous tactic and may well backfire: contractors' post-completion claims relatively rarely fail in their entirety, and once some monies are recovered it is the employer rather than the contractor who will be most likely to pay the costs of the dispute.

It is therefore in all parties' interests to enter into a contract in which alternative dispute resolution procedures are expressly required by the contract, so that the parties can seek to resolve any dispute as rapidly and cost-effectively as possible.

2.3. Effective contract management

Once the project is underway, good contract management will help avoid or minimise the potential for disputes. Following the early notification of disputes it is important to keep thorough records. These records can then be used to stop a dispute developing and ensure that the negotiations that take place are based on fact and not merely on conjecture. (See also the discussion in Chapter 10.)

In the majority of cases, disputes and claims that have been building up over the course of a project will be put forward as a claim at the end of the project. This is understandable given that

- during the course of the project the parties are more concerned with getting the job done than with claims-related matters
- whatever views are expressed during the course of the project, there usually remains some hope of resolving all outstanding claims as part of the final account process.

However, this can mean that the claim is formulated by someone who was not involved throughout the project. The party seeking to claim might instruct external lawyers or claims consultants, who are unlikely to be called in until the stage where things have begun to go seriously wrong and the project is in danger of running at a loss (contractor) or going over budget (employer). Even where a contractor relies on its own in-house lawyers or quantity surveyors, these people may not have been involved from the outset of the claim. It is not unusual for a contractor to call in a senior project manager or other figure when a project is in trouble, who will then be responsible for getting matters back on track and pursuing any necessary claims.

The problem of a lack of contemporaneous knowledge on the part of the people drafting claims can be ameliorated to some extent if either or both parties are able to produce unequivocal records showing the true position at the time of the events in question. For example, if it is claimed that the progress of the works has been affected by particularly adverse weather conditions, site diaries and dated and labelled photographs can provide good evidence of the actual delay caused. Too often, the only evidence relied upon is meteorological records, which go only to show the potential for delay and disruption due to adverse weather (rather than being evidence of the actual delay and disruption experienced).

Finally, it is essential to ensure that these records and contemporaneous documents are preserved in an orderly and accessible manner after the project has ended. For example, in preparing a delay and disruption claim, witnesses often bemoan that, although they cannot remember the precise detail of costs and time expended as a result of a particular event, records were kept which have now been lost. Or a witness may state that he cannot recall exactly what happened in relation to a particular delay event referred to in the correspondence but that he would be able to if he had his site diary, which was left in the site office when he left the project (and has not been seen since).

Accordingly, at the end of a project where there is likely to be a dispute, it is in the interests of both parties to ensure that key personnel on site are made aware of the arrangements for record keeping and asked to bring their own records, such as site diaries and internal memos, to the attention of the designated archivist.

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Chapter 3
When disputes arise

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3.1. Overview

Whatever form of dispute resolution is adopted, there has to be a dispute to resolve. Most people know what a dispute is when one arises. However, a large body of case law has developed on the meaning of the word 'dispute'. In *Amec Civil Engineering v. Secretary of State for Transport* [2004] EWHC 2339 (TCC) Jackson J summarised all the relevant case law and, at paragraph 68 of his judgment, identified seven propositions as follows.

1. The word 'dispute' ... should be given its normal meaning. It does not have some special or unusual meaning conferred upon it by lawyers.
2. Despite the simple meaning of the word 'dispute', there has been much litigation over the years as to whether or not disputes existed in particular situations. This litigation has not generated any hard-edged legal rules as to what is or is not a dispute. However, the accumulating judicial decisions have produced helpful guidance.
3. The mere fact that one party (whom I shall call 'the claimant') notifies the other party (whom I shall call 'the respondent') of a claim does not automatically and immediately give rise to a dispute. It is clear, both as a matter of language and from judicial decisions, that a dispute does not arise unless and until it emerges that the claim is not admitted.
4. The circumstances from which it may emerge that a claim is not admitted are protean. For example, there may be an express rejection of the claim. There may be discussions between the parties from which objectively it is to be inferred that the claim is not admitted. The respondent may prevaricate, thus giving rise to the inference that he does not admit the claim. The respondent may simply remain silent for a period of time, thus giving rise to the same inference.
5. The period of time for which a respondent may remain silent before a dispute is to be inferred depends heavily upon the facts of the case and the contractual structure. Where the gist of the claim is well known and it is obviously controversial, a very short period of silence may suffice to give rise to this inference. Where the claim is notified to some agent of the respondent who has a legal duty to consider the claim independently and then give a considered response, a longer period of time may be required before it can be inferred that mere silence gives rise to a dispute.
6. If the claimant imposes upon the respondent a deadline for responding to the claim, that deadline does not have the automatic effect of curtailing what would

otherwise be a reasonable time for responding. On the other hand, a stated deadline and the reasons for its imposition may be relevant factors when the court comes to consider what is a reasonable time for responding.

7. If the claim as presented by the claimant is so nebulous and ill-defined that the respondent cannot sensibly respond to it, neither silence by the respondent nor even an express non-admission is likely to give rise to a dispute for the purposes of arbitration or adjudication.

These propositions have been generally endorsed by the Court of Appeal in *Collins Contractors (Contractors) Ltd. v. Baltic Quay Management (1994) Ltd.* [2005] BLR 63 and in *Amec* itself [2005] 1 BLR 227. What is clear from them is that, for a dispute to arise at all, a claim has to be made in the first place.

This chapter therefore looks at

- how to initiate a claim
- defending a claim
- instructing lawyers
- direct access.

3.2. Initiating a claim: choosing the dispute procedure

3.2.1 Choosing the dispute procedure

When selecting the procedure to adopt to resolve a dispute, the first point of reference should be any contract between the parties to the dispute. This is for two reasons. The first is that the contract may have clauses which stipulate how disputes are to be resolved. The second is that the contract may be one to which the Housing Grants Construction and Regeneration Act 1996 ('the Act') applies. If it is, each party will also have the right to refer their dispute to adjudication – even if the contract itself contains no express provision for adjudication and even if one of the parties does not want to refer the dispute to adjudication. Adjudication is discussed more fully in Chapter 6.

There are numerous ways in which the contract may stipulate how disputes are to be resolved. By way of example:

- ICE contracts require disputes to be referred to the engineer for a decision before more formal methods of dispute resolution are adopted.
- Some contracts require meetings of senior executives before more formal methods of dispute resolution are adopted. Similarly they may have 'mediation clauses' which require the parties to attempt to resolve the dispute through mediation before they can commence proceedings. In such circumstances, the courts may often prevent court proceedings from continuing unless and until a mediation has taken place (see *Cable & Wireless plc. v. IBM United Kingdom plc.* [2003] BLR 89). Mediation is discussed in Chapter 7. However, such clauses ought not to prevent a party from referring a dispute to adjudication – even if no mediation has taken place before the adjudication is commenced (see *R. G. Carter Ltd. v. Edmund Nuttall Ltd.* (unreported, 21 June 2000)).

- Whether or not the Act applies, the contract may also expressly permit parties to refer disputes to adjudication. Where the contract contains such clauses, their terms need to be considered carefully as they will often detail matters such as how the adjudicator should be appointed, the procedure which will be adopted in the adjudication, and whether a particular party will be liable for the costs of the adjudication.
- The contract may have an arbitration clause. In such circumstances, claims cannot be pursued in court: see section 9 of the Arbitration Act 1996. Arbitration is discussed in Chapter 5.
- The contract may have a jurisdiction clause. This will determine which national courts the dispute can be resolved in.

Especially if the contract has an 'international flavour' (e.g. because it relates to a project in the middle of the sea or because the parties are from different countries), the contract may also have a choice of law clause. This will determine the law by which the dispute is governed, and may therefore determine which lawyers are instructed.

However, the contract should not be the only factor that determines the method of dispute resolution. Other factors which may be of relevance include:

- Confidentiality – the nature of the project may be such that the parties want to keep their dispute confidential. If confidentiality is important, court proceedings should be avoided because they are generally open to the public.
- Working relationship – although a dispute may have arisen between the parties, it still may be desirable for the dispute to be resolved on amicable terms to protect either future trading relations or existing relations (e.g. because the project is not yet complete). If a working relationship needs to be preserved, the parties should consider mediation (discussed in Chapter 7) or early neutral evaluation (discussed in Chapter 9).
- The need for a speedy resolution – if the dispute has to be resolved quickly because, for example, it is holding up the progress of the project or because there is an urgent need for the money, the parties should consider adjudication (discussed in Chapter 6) or early neutral evaluation (discussed in Chapter 9).
- Limitation – a party's right to pursue the claim may be barred if arbitration or court proceedings are not commenced within a specified time limit. That time limit may be specified in the contract (e.g. some contracts contain clauses which provide that claims must be notified to the other party within a certain time) or by statute. In the context of English law, the main statute is the Limitation Act 1980, which provides that claims for breach of contract must be commenced within 6 years from the date of the breach unless the contract is executed as a deed, in which case the claim must be commenced within 12 years.
- Costs/proportionality – the value of the claim and the cost of pursuing it ought also to be considered. Lengthier processes, such as litigation (discussed in Chapter 4) and arbitration (discussed in Chapter 5) are generally more expensive than shorter processes such as adjudication (discussed in Chapter 6), mediation (discussed in Chapter 7) and expert determination (discussed in Chapter 8).

- Complexity – if the dispute is technically complex, it may be better resolved by a decision maker with the appropriate expertise. In such circumstances, the parties should consider a method of dispute resolution such as expert determination (discussed in Chapter 8) or arbitration with a specialist arbitrator (discussed in Chapter 5). Here, the parties can agree (or seek the appointment of) a decision maker with the appropriate expertise.

3.2.2 Making the claim

Not only is the contract important in deciding which method of dispute resolution to adopt, it should also be consulted before a claim is made. Some contracts prescribe the manner in which the claim is first to be made and identify the particulars and type of information which need to be provided in the initial claim document. Sometimes, the contract may simply require some basic information (e.g. names and addresses and the value of the claim). However, some contracts contain detailed requirements as to the kind of information that has to be provided and, for example, can require supporting documentation to be submitted with a letter of claim. These requirements should be complied with because, if they are not, a party's right to pursue the dispute further may be seriously prejudiced. For example, because the contract requirements have not been complied with, it may be held that a dispute has not yet arisen that can be referred to adjudication.

Generally, any claim should be started by sending a 'letter of claim'. Not only is this a prerequisite to the formulation of a dispute (see above) but it is also required as part of the Pre-Action Protocols which have to be complied with in advance of the commencement of court proceedings. Pre-Action Protocols are discussed in Chapter 4.

Irrespective of what the contract provides, it is generally good practice to provide as much relevant information as possible with a letter of claim, including supporting documents and any expert reports that are available. The more relevant information that is provided, the more likely it will be that a claim is taken seriously. It is also always worth concluding the letter of claim by suggesting possible methods of dispute resolution. This again shows that the claimant is serious about the dispute.

A sample letter of claim is set out in Box 3.1.

3.3. Defending a claim

3.3.1 Deadlines

The most important point to remember about defending a claim is that there is almost always a deadline within which the defence or response must be served on the other party. These deadlines can be tight. For example, in adjudication the responding party can have as little as 7 days to respond, and in court proceedings the defendant will have 14–28 days.

Given the nature of such deadlines, it is always important to act as soon as possible once the claim is received. If it is not possible to respond within the appropriate deadline, the responding party should consider seeking an extension of time. An extension of time can

Box 3.1 A sample letter of claim

Dear Sir

Re: Defective Air Conditioning

We write in relation to the air conditioning which you installed at the new office building at 10–25 Smith Street, Smithville.

By clause 15 of the specification, the air conditioning was supposed to maintain the temperature of the building at 10°C throughout the day.

However, the air conditioning does not achieve this target and instead the temperature in the building is 15°C. As is confirmed by the report of Professor Jones, Consulting Engineer, this is due to a fault in the air handling units which he considers need to be replaced.

Given your refusal to replace the air handling units yourselves, we had to engage an alternative contractor (Aircon Ltd) to install new units instead. The total cost of this work was £150,000 plus VAT, and a copy of Aircon's contract and final account is included for your information.

Please therefore pay us £150,000 plus VAT within 14 days. Otherwise, we will be left with no other option but to pursue this matter through more formal means. In this regard, we note that clause 72 of the Contract Conditions entitles us to commence adjudication or arbitration proceedings to recover this money. While we are prepared to use such methods of dispute resolution if necessary, we are willing to meet with you on a without prejudice basis or in a mediation to see if this matter can be resolved on a more amicable basis.

Yours etc.

be sought either by agreement with the claimant or by applying to the tribunal which is resolving the dispute (i.e., the court, arbitrator or adjudicator).

The principles that apply to making a claim apply equally to defending a claim. The responding party should obtain as much information as possible in relation to the claim and see how best it can be defended. Not only may there be good arguments in relation to the substantive dispute, the responding party may have good technical reasons which may be successful in defending the claim in its entirety or, at the very least, in stalling it. Therefore, the responding party should not only consider the substantive issues, it should also consider issues such as:

- Is the adjudication/arbitration taking place without jurisdiction? If so, any decision reached will be unenforceable.

- Are there any grounds upon which court proceedings can be stayed? If there are, this could stall the proceedings and compel the claimant to commence proceedings in another (potentially undesirable) forum.
- Does the contract contain exclusion clauses which preclude an otherwise valid claim or has the claim been made too late? Lawyers may need to be instructed to consider this.

In addressing the substantive issues, a respondent should consider some of the following:

- Has the claimant properly set out the facts? The defence or response should correct any relevant factual inaccuracies.
- What documents are available to contradict the claimant or to support the respondent's arguments?
- Are the relevant people who were involved in the actions which have given rise to the dispute (e.g. the agreement of the contract documents or the carrying out of the works) available to assist? If they are, an account of the facts should be obtained from them so that as full a response as possible can be provided.
- Could an expert provide any useful input? If so, an expert with the appropriate qualifications should be commissioned to prepare a report.

Once all the technical and substantive points have been considered, the appropriate response can be formulated and served within the relevant deadline.

3.4. Instructing lawyers

The vast majority of disputes arising under construction and engineering projects are dealt with at a project level. In some cases, disputes might be resolved by the intervention of the project manager. However, where claims are of significant value, raise complex issues, or depend upon contractual interpretation, every party should take proper professional advice to help resolve the dispute. That means consulting a lawyer.

There are two main categories of lawyer in England and Wales: solicitors and barristers. Although the differences between the two professions has diminished considerably over recent years, as a general rule barristers act as advocates, whether in court or arbitration, whereas solicitors provide a wider range of services to the public (advising on non-contentious issues, such as drafting of contracts). A solicitor will often therefore be the first port of call for any party when a dispute arises. However, the rules governing the legal profession have been extended and in appropriate circumstances it is now also possible to instruct a barrister directly to carry out legal work (see section 3.5).

Whether a party chooses to instruct a solicitor or barrister, the factors to be considered are similar, and in many ways they are identical to those that a commercial organisation would consider when appointing any professional adviser.

3.4.1 Choosing a lawyer

All lawyers have different qualities, and the key to a successful relationship is selecting a firm with the right qualities for the particular dispute and with which the instructing

party feels that it can work effectively and efficiently. In choosing a firm, the following points are important

- experience
- reputation
- resources required and those available
- location.

The importance of location as a factor should not be underestimated. In complicated disputes, regular meetings will be needed. In some cases it might be appropriate to instruct a firm local to the project, where many of the witnesses and personnel are based. In other cases, an office close to the party's head office is more convenient. For international disputes, a London-based firm might be more suitable.

It is also important to be clear about who will have day-to-day responsibility for the conduct of the dispute. Do not be afraid to ask whether this will be a partner in the firm or an assistant solicitor, and if the latter confirm the individual's level of seniority and experience. The success of a party in a dispute is more dependent upon the individual lawyers running the dispute than the reputation of the firm as a whole.

3.4.2 Fees

For dispute work, solicitors traditionally charged their fees based on an hourly rate whereas barristers charged on a lump sum (brief fee) basis. Nowadays, there is much more flexibility with fee structures and charging regimes, and it is possible to take out 'after the event' insurance or obtain specialist third party litigation funding. The most common options are:

- Hourly rates – where lawyers charge for the time spent working on a matter based on a range of hourly rates depending upon the seniority and experience of each individual lawyer. This mechanism has the advantage of transparency, with a party only being charged for the time actually worked on their matter. The downside is that it is difficult to control costs, and legal fees can build rapidly in a complex case.
- Fixed fees – these are most appropriate where the nature and scope of the dispute is well defined and there is more certainty. For complex construction disputes, many law firms would be reluctant to agree to a fixed fee given the uncertainties involved.
- Capped fees – which are quite common, and provide a compromise between cost transparency and the degree of certainty as to the ultimate cost.
- Conditional fees – which are much more prevalent. Although this fee structure tends to be more appropriate for certain types of litigation work, such as personal injury, it is being increasingly encountered in construction disputes.

Whatever the fee structure agreed, it is also important to be clear about what other costs there will be in addition to those of the lawyers. This can include costs such as

- court fees
- tribunal's fees
- expert witnesses

- factual witnesses
- document production costs
- travel costs.

Even if fees are being charged on an hourly rate, a party should always ask for a cost estimate for the conduct of the dispute and ensure that it is updated regularly, so that costs are monitored and budgets adjusted as appropriate. It is also sensible to agree to monthly billing or stage payments, so that both parties can monitor the rate at which charges are accumulating and address any unexpected items as they arise.

3.4.3 Agree lines of communication

Conducting a large piece of complex litigation over a period of 1–2 years is in itself a significant project for any party and needs careful management. This will ensure that not only are costs kept to a minimum, but also that the dispute is conducted quickly and efficiently, thereby minimising costs and maximising recovery. For a large dispute, a single individual should be identified and appointed as the point of contact within the client organisation. That individual should have sufficient seniority to make decisions on a day-to-day basis relating to the conduct of the dispute, and also have a sufficient understanding of the case to be able to provide guidance and answer questions that arise. A project manager familiar with both the implementation of the project and the development of the dispute is often an ideal choice, although they might not always be available at the end of a project when moving on to a new project.

A party should also think carefully about the level of control it wants. An experienced law firm is perfectly capable of conducting almost the entirety of a dispute, and can do so with little input from a client save for key strategic decisions. Other clients may wish to review and approve all letters sent to the opposing party and be copied in on all correspondence, so that they can monitor the progress of the dispute. While that level of involvement is often helpful, there are obvious time and cost implications. The key is therefore for the client to build up a good working relationship with a law firm to ensure that they are kept as informed as is necessary, but without being unduly burdened with all the day-to-day issues that necessarily arise in a complex dispute.

3.5. Direct access schemes

3.5.1 What is direct access?

Direct access is a scheme under which a member of the public or any organisation can consult a barrister directly. It used to be the case that a client had to consult a solicitor or other recognised professional, who would then appoint a barrister. In these circumstances, if a barrister's advice was needed, both solicitor and barrister had to be paid for it. The direct access scheme offers the opportunity to cut out the middleman and save costs.

There are presently two systems under the direct access scheme: licensed access and public access. Public access allows an individual or a non-solicitor intermediary to contact a barrister directly. Licensed access allows organisations and individuals that have been granted licenses by the Bar Council to access a barrister directly. Licensed

access is the 'fast track' version of the two direct access schemes, as the formalities that must be complied with by the client before a barrister's advice can be sought and given are less onerous.

In either system of direct access there are currently certain restrictions on what a barrister may do during the conduct of a case. At the time of writing, the restrictions appear to be coming under political review and may be done away with altogether. At present, however, a barrister cannot do some of the things which a solicitor can do; for example, a barrister may not conduct a course of correspondence with the other side. A client must be aware of this, particularly because it means that, in the absence of a solicitor who would normally control and execute these aspects of the case, the client will be responsible (under the guidance of the barrister) for doing the things a barrister cannot do. This is a relevant consideration when deciding whether the case is one suitable for the instruction of a barrister but no solicitor.

3.5.2 What are the advantages to clients of using the direct access scheme?

The major advantage is that a client saves the cost of the fees he would otherwise have incurred in instructing a solicitor. The only legal fees payable are those for the barrister. Other advantages include

- it allows the client a greater opportunity to manage his own case, under the guidance of the barrister
- the client is able directly to choose his own barrister (as opposed to relying on the solicitor to recommend or select a particular barrister or chambers), thereby potentially affording more consumer choice.

3.5.3 What types of cases are suited to the scheme?

A client seeking the services of a barrister will find that all the services barristers normally perform will be available. These include

- giving legal advice
- drafting documents
- assisting in the preparation of documents to be used in court
- advocacy in court
- conducting negotiations.

Examples of cases in which a barrister might accept direct access instructions include

- advice on discrete points, such as interpretation of payment, termination, and insurance provisions in ongoing or completed construction and engineering contracts
- help with a negotiation between parties to an engineering contract
- assistance in adjudication or expert determination provided as a method of dispute resolution in the contract.

In most categories of cases, direct instructions to a barrister might be a good starting point. However, the cases in which a solicitor may not be needed at all are those of

lesser factual complexity and where there is unlikely to be a need for much extra investigation or gathering of evidence. If a case is complicated or would involve a lot of paperwork and gathering of evidence, the client's needs would probably be better served by having both a solicitor and barrister involved in the case. If the barrister approached by the client believes this to be the case, he will inform the client that the case is unsuitable for direct access. It may also be that a case requires both a solicitor and a barrister for limited parts of the process only.

There are certain practical aspects of a case which a barrister is not permitted to deal with. This is something that public access clients should consider very carefully. It means that the client will be responsible for much of the administration of the case, and must be prepared to devote time and money to doing what is required. The main things a barrister cannot do are

- undertake the management of the case (the barrister cannot undertake day-to-day matters, such as organising production of statements or collection of evidence)
- conduct litigation (the barrister cannot conduct a course of correspondence with an opposing party, although the barrister may draft a letter for the client to send to another person)
- investigate or collect evidence for use in court (e.g. the barrister cannot initiate contact with a potential witness, but may help to finalise witness statements based on the information provided by the witness)
- instruct an expert witness or other person on behalf of the client, or accept personal liability for paying any such person (although the barrister may advise the client on the need and choice of a suitable expert)
- receive or handle client money.

In some circumstances, it may be that the client's needs or the interests of justice would be better served by also having a solicitor. This might happen, for example, where the case is of high value and complexity. If this is the case, the barrister is under a professional duty to refuse to undertake the case on a direct access basis and will inform the client of the need for a solicitor. If a barrister accepts a case on a direct access basis and it subsequently becomes clear that a solicitor is required, the barrister will also inform the client of this.

If this happens, a client may continue to use the same barrister as one half of his legal team, as long as a solicitor is also engaged (the relationship between the parties would then become the traditional relationship, whereby the solicitor and not the lay client generally deals with the barrister).

3.5.4 Types of direct access: licensed access

Licensed access has replaced 'BarDirect' and 'Direct Professional Access' as the means by which members of certain professional bodies may instruct barristers directly. It allows those with the designated qualifications to instruct barristers directly for advisory and advocacy work, without any significant formalities having to be complied with.

A client (organisation or individual professional) wishing to take advantage of this scheme must apply to the Bar Council for a license. Application forms, together with the Licensed Access Guidance and Licensed Access Recognition Regulations can be downloaded from the Bar Council website at www.barcouncil.org.uk.

This license will then enable the client to access the barrister directly. It is a very user-friendly system: there is little administration involved in the initial contact with the barrister; there is a wide pool of barristers available to the client (unlike with the public access scheme below, there are no restrictions under the licensed access scheme as to the qualifications a barrister must hold), and all types of case can be conducted. The practicalities are limited to procuring the license and supplying it to the barrister's clerk.

A list of organisations which have already been granted licences can be found on the Bar Council website in the First Schedule to the Licensed Access Recognition Rules. Part III covers architects and surveyors organisations including RIBA and RICS. Part IV covers the engineers' organisations which already hold licences. Relevantly, they include

- the Institution of Chemical Engineers
- the Institution of Civil Engineering Surveyors
- the Institution of Civil Engineers
- the Institution of Electrical Engineers
- the Institution of Mechanical Engineers
- the Institution of Structural Engineers.

3.5.5 Types of direct access: public access

This is the system by which a member of the public is able to consult a barrister directly. Under the scheme, a barrister may accept instructions either from a member of the public or from a non-solicitor intermediary acting on behalf of a member of the public. There are certain limitations with regard to the type of work that a barrister may do under this scheme. These are discussed below.

As a general rule, a barrister may only accept public access work if he or she

- has been practicing as a barrister for 3 years
- has undertaken a training course on direct access
- and has notified the relevant department of the Bar Council of the intention to take on such work.

There is an exception to this: the Bar Council can, in certain circumstances, waive the first two requirements. This might happen if, for example, the applicant is a former solicitor or can demonstrate experience in an environment where public access to clients has been common.

In practice, these restrictions mean that only those barristers with sufficient experience are able to undertake public access work. Even though they are technically able to do

such work, some barristers choose not to. A barrister is entitled to refuse to conduct a case under the public access scheme, but may not refuse to do advocacy work on a public access basis except on legitimate grounds. A list of some barristers who undertake public access work is available on the Bar Council website.

Even if the barrister is qualified, by the rules of public access a barrister cannot agree to work on a public access basis if the case is

- a criminal matter (except for certain appeals, and advisory work in connection with proceedings not yet commenced, when public access work may be undertaken)
- a family matter (except certain appeals, and advisory work and drafting in connection with proceedings not yet commenced, when public access work may be undertaken)
- an immigration matter.

If a case falls into any one of the above categories, the barrister will advise the client that the case cannot proceed on a public access basis and that a solicitor must be contacted.

3.5.6 Typical arrangements with a barrister under either of the direct access schemes

The initial contact with a barrister will be the barrister's clerk. After receiving the initial details of the case, it is quite common that the barrister will arrange to have a short discussion with the client. This will be solely to determine whether or not the case is suitable for the direct access scheme, and the barrister will inform the client in advance whether or not he wishes to be paid for this meeting. If the barrister decides to accept the case on a direct access basis, a further conference may need to be arranged to discuss the details of the case further. Once a barrister accepts a direct access case, he or she will send out a client care letter. This letter explains the terms upon which the case can be accepted. Once the work has been completed, the barrister will inform the client.

Barristers' clerks set and agree the barristers' fees. In many direct access cases, especially public access cases, the barrister will be able to offer a fixed fee arrangement. However, if the case is more complex, or if the barrister so chooses, an hourly rate may be offered. It is also possible that the barrister may provide that work done on the case will be released to the client only once payment (or a percentage of the total payment) has been received.

Whether under the direct access scheme or under the more traditional arrangement, clients should note that there may be times when a barrister is unavailable to the client, particularly as the barrister will have times when they are in court for several days at a time. There may also be times when a barrister's professional commitments clash, and so the barrister cannot guarantee to be always available to do the work required. However, the barrister and clerk will always do their best to keep the client informed of any potential difficulties with the barrister's availability, and will try to help if such a problem occurs, for example by recommending another barrister.

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Chapter 4
Litigation

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4.1. Introduction

Litigation is a public adversarial contest in a court of law for the purpose of enforcing rights and seeking remedies. Once a dispute has been referred to the court, the court has the power to require the parties to follow procedural rules, to compel the production of evidence, and to make a binding and enforceable decision.

The reputation of litigation as slow and expensive is disappearing. Cases are actively managed by the court and new technology is employed for efficient use of resources. On 26 April 1999 the Civil Procedure Rules (CPR) came into force, the culmination of a wide-ranging review of court proceedings and root and branch reform of the system instigated by Lord Woolf. The overriding objective of the CPR is to ensure that disputes are dealt with expeditiously, fairly and at a cost proportionate to the size and nature of the case (CPR 1.1).

The parties should always explore other forms of dispute resolution before resorting to court proceedings, in order to save costs and valuable time. However, litigation can be the appropriate choice in certain circumstances, such as the following:

- where difficult points of law are involved
- a test case – where there are a number of similar disputes and a clear legal precedent is required
- multiparty disputes – where there are a number of claimants or defendants or where the defendants wish to join others to the proceedings and there is no provision for joinder in any alternative dispute resolution (ADR) procedures
- where there is little or no cooperation and trust between the parties so that management by coercion and speedy enforcement might be required
- where the main remedy sought is an injunction
- where there is no arbitration or other ADR agreement.

4.2. The TCC system

Technology and Construction Court (TCC) claims are claims that involve technically complex issues or are otherwise appropriate for trial by a TCC judge (CPR 60.1). Most engineering disputes will fall into the category of TCC claims.

TCC proceedings can be brought in the High Court or a county court. There is no strict demarcation, but the general rule of thumb is that cases should be worth at least £50,000

to be brought in the High Court (paragraph 1.3.6 of the *Technology and Construction Court Guide* ('the TCC Guide'): CPR section 2C).

When a claim is made in or transferred to the TCC, the court will assign the case to a named TCC judge, who has primary responsibility for case management of the claim, including, where possible, the trial.

4.3. Pre-action protocols

Pre-action protocols are codes of practice that require parties to exchange information regarding their disputes and explore the possibility of settlement prior to proceedings. The purpose of the pre-action protocols is to encourage an early exchange of information, to promote early settlements and, if no settlement proves possible, to lay the ground for the efficient conduct of proceedings.

The Pre-Action Protocol for Construction and Engineering Disputes ('the Pre-Action Protocol') applies to all engineering claims in the TCC (paragraph 1.1 of the Pre-Action Protocol: CPR section C5). It is mandatory, except where the proceedings concern the enforcement of an adjudication award, a claim for an injunction, a summary judgment application or where the same issues have already been the subject of a formal ADR procedure (paragraph 1.2 of the Pre-Action Protocol). If there is a limitation difficulty, the claimant should commence proceedings without complying with the protocol and seek directions from the court.

The requirements of the Pre-Action Protocol are as follows:

1. The claimant sends a letter of claim to each proposed defendant (section 3).
2. The defendants acknowledge the letter of claim within 14 days of receipt (section 4.1).
3. The defendants send a letter of response to the claimant within 28 days from receipt of the letter of claim or such other period as the parties may reasonably agree (up to a maximum of 3 months) (section 4.3).
4. The claimant sends to the defendants a letter of response to any counterclaim within the equivalent period allowed to the defendants to respond to the letter of claim (section 4.4).
5. The parties meet within 28 days after receipt of the last response referred to above to consider whether settlement is possible, whether ADR is appropriate and, if litigation is inevitable, the best way of conducting the litigation (e.g. agreements on disclosure and expert evidence). Such meetings are deemed to be 'without prejudice' i.e. the parties can disclose to the court the fact that such meetings took place, the dates and attendees, but are not permitted to disclose what was said (section 5).

The letter of claim must comply with section 3 of the Pre-Action Protocol. A model letter of claim is set out in Box 4.1.

The response from the defendants must contain the following information (see section 4 of the Pre-Action Protocol):

Box 4.1 A model letter of claim

To: **[Full name and address of each proposed defendant]**

Dear Sir,

NEW DELHI POWER STATION PROJECT – Letter of Claim served in accordance with the TCC Pre-Action Protocol

1. We are solicitors instructed by the Bavarian Power Company Limited of **[Full name and address of the claimant]**, the contractor engaged by your client (New Delhi Electricity Limited) to supply, install and commission a new 240 megawatt generator in your client's existing power station.

Clear summary of the facts on which each claim is based

2. The Contract between the parties is an amended version of the FIDIC Conditions of Contract for Plant and Design-Build ('the Yellow Book').
3. The works were commenced on 1 April 2007 and carried out in accordance with the Contract. The Time for Completion within the meaning of Clause 8.2 was 12 months (i.e. by 31 March 2008) but delays occurred and the Taking Over Certificate was not issued in respect of the works until 31 March 2009.
4. The said delay was caused by numerous and late variations instructed by your clients.
5. On 15 May 2009 our clients submitted their application for an extension of time of 12 months and additional payment in the sum of £1 million, together with full details of the said claims.
6. Wrongfully and in breach of contract, the Engineer failed to grant any extension of time or to certify any additional sums due to our clients and your clients have failed to pay any of the sums claimed.
7. Clause 20 of the Contract provides for any disputes between the parties to be determined by the High Court of England and Wales.

Basis of the claims made

8. Attached to this letter are three schedules of the claims:
   - Schedule 1 – Extensions of Time – identifying the key events causing delay, including relevant contractual provisions relied on, the period of delay and delaying effect on the completion date.
   - Schedule 2 – Variations – including for each claim a brief summary of the facts relied on, the relevant contractual provisions and the sum claimed, valued in accordance with Clause 13.

- Schedule 3 – Claims for Additional Costs – including for each claim a brief summary of the facts relied on, the relevant contractual provisions, details of notification given under Clause 20 and the sum claimed.

Nature of relief claimed (including quantum breakdown)

9. Our clients seek against your clients an extension of the time for completion of 12 months and the sum of £1 million as sums due under the Contract and/or as damages. Full details of the damages claimed are set out in the schedules of claim referred to above.

Experts

10. We have instructed the following experts on whose evidence we intend to rely:
    - Teresa White – programming and planning of **[address]**
    - John Smith – electrical engineering of **[address]**
    - Harriet Black – mechanical engineering of **[address]**
11. You are required to acknowledge this letter within 14 days and to provide a response within 28 days.

Yours etc.

1. identification of any jurisdiction objection
2. summary of the facts agreed and disagreed, including the basis for any disagreement
3. the claims that are accepted and those that are rejected, stating the basis for such rejection
4. response to the claim for damages and the basis for any alternative valuation
5. brief details of any counterclaim
6. names of any experts instructed on whose evidence the defendants intend to rely, identifying the issues to which such evidence will be directed.

The court is concerned with substance, rather than form, when deciding whether or not the Pre-Action Protocol has been followed (*Orange Personal Communications Services Ltd. v. Hoare Lea (A Firm)* [2008] EWHC 223 (TCC); *TJ Brent Ltd. & Anor v. Black & Veatch Consulting Ltd.* [2008] EWHC 1497 (TCC)). If a party fails to comply with the protocol, the court may stay the proceedings to allow the parties to comply, require the party in default to pay money into court or penalise that party through adverse costs orders (CPR 3.1; paragraph 2.6 of the TCC Guide).

The costs of complying with the Pre-Action Protocol can be recovered in subsequent litigation if they can be shown to be incidental to the proceedings within the meaning of section 51 of the Senior Courts Act 1981 but, in the absence of agreement or exceptional circumstances, will not be recoverable if a settlement is achieved or claims abandoned prior to the commencement of proceedings (see *McGlinn v. Waltham Contractors Ltd.* (2005) 102 Con LR 111 (TCC)).

4.4. Commencement of proceedings

4.4.1 Claim form

Legal proceedings are commenced by the issue of a claim form.

- Form N1 is used for Part 7 claims (Practice Direction 7A, paragraph 3 – this is the most usual form for engineering claims)
- Form N208 is used for Part 8 claims (Practice Direction 8, paragraph 4 – where there is no substantial dispute of fact, e.g. where the dispute turns on the construction of the contract)
- Form N8 is used for Arbitration Claims (Practice Direction 62, Appendix A – e.g. appeals from an arbitration award).

4.4.2 Part 7 claims

The claim form (Box 4.2) must be served within 4 months of issue by the court (CPR 7.5 – but this period is extended where service is outside the jurisdiction – see CPR Part 6). The claim form should contain the following information (CPR 16.2)

- a concise statement of the nature of the claim
- the remedy that the claimant seeks
- the value of the claim
- verification by a statement of truth.

4.4.3 Statements of case

The particulars of claim must be contained in or served with the claim form or served within 14 days of the claim form (CPR 7.4).

The requirements of the particulars of claim are set out in CPR 16.4. The purpose of the particulars of claim is to set out the key elements of the claim that will be proved at trial so that the defendant(s) can respond and the issues in dispute for determination by the court can be identified. Boxes 4.3 and 4.4 list the elements that should typically be included in a claim.

The Queen's Bench Guide (CPR section 1B, paragraph 5.6) contains guidelines for the drafting of pleadings, referred to in the Guide as 'statements of case' (including particulars of claim, defence, reply, third party claim).

1. A statement of case must be as brief and concise as possible.
2. A statement of case should be set out in separate consecutively numbered paragraphs and subparagraphs.
3. So far as possible each paragraph or subparagraph should contain no more than one allegation.
4. The facts and matters alleged should be set out as far as reasonably possible in chronological order.
5. The statement of case should deal with the claim on a point by point basis, to allow a point by point response.
6. Where a party is required to give reasons, the allegation should be stated first and then the reasons listed one by one in separate numbered subparagraphs.

Box 4.2 Model claim form

In the High Court of Justice
Queen's Bench Division
Technology and Construction Court
Claim No.
Issue Date

Claimant: BAVARIAN POWER COMPANY LIMITED

Defendant(s): NEW DELHI ELECTRICITY LIMITED

Brief Details of Claim:

The Claimant was engaged by the Defendant under the FIDIC Conditions of Contract for Plant and Design-Build ('the Yellow Book') (as amended by the parties) to supply, install and commission a new 240 megawatt generator in the Defendant's existing power station. The Claimant claims an extension of the time for completion of the said works of 12 months and the sum of £1 million as sums due under the Contract and/or as damages.

Value: £1 million plus interest [or not less than £x]

Defendant's name and address

Amount claimed	
Court fee	
Solicitor's costs	
Total amount	

Does or will your claim include any issues under the Human Rights Act 1998?
☐ Yes ☐ No

Particulars of Claim attached/to follow

Statement of Truth

I believe that the facts stated in these particulars of claim are true.

Signed:

7. A party wishing to advance a positive claim must identify that claim in the statement of case.
8. Any matter which if not stated might take another party by surprise should be stated.
9. Where they will assist, headings, abbreviations and definitions should be used and a glossary annexed; contentious headings, abbreviations, paraphrasing and

Box 4.3 Elements of a typical engineering contract claim

- Parties – identify the parties to the contract
- Contract – identify the material terms
- Summary of the material facts – only those necessary to explain the claim
- Claims made under the contract – e.g. certified sums due, variations, extensions of time, additional payment
- Allegations of breach of contract – identify the terms breached
- Damages claimed – identify the causal link between breaches and loss
- Interest – state the basis of the claim for interest and, if for a specific sum, identify the rate and period applicable

definitions should not be used and every effort should be made to ensure that they are in a form acceptable to the other parties.

10. Particulars of primary allegations should be stated as particulars and not as primary allegations.
11. Schedules or appendices should be used if this would be helpful, for example where lengthy particulars are necessary and any response should also be stated in a schedule or appendix.
12. Any lengthy extracts from documents should be placed in a schedule.

All statements of case must be verified by a statement of truth (CPR 22.1), a statement that the party putting forward the document believes the facts stated in the document are true.

The defendant must acknowledge service of the claim form or file a defence within 14 days after service of the claim form or particulars of claim, whichever is later (CPR

Box 4.4 Elements of a typical claim against an engineer

- Parties – identify the parties involved
- Contract – identify the material terms
- Duty of care – facts relied on to establish the special relationship and the standard of care required
- Summary of the material facts – only those necessary to explain the claim
- Particulars of the wrongful acts or omissions relied on
- Allegations of breach of duty/breach of contract – identify the terms breached/failure to exercise reasonable skill and care
- Damages claimed – identify the causal link between breaches/negligence and loss
- Interest – state the basis of the claim for interest and, if for a specific sum, identify the rate and period applicable

10.3). Any challenge to the jurisdiction of the court (e.g. on the grounds that there is an arbitration agreement in the contract or the contract provides that the dispute should be tried in another jurisdiction) should be made by application within 14 days after acknowledgement of service and before any further participation in the proceedings (CPR Part 11).

If a defendant wishes to defend the claim, a defence must be served (if not served instead of an acknowledgement of service – see above) within 28 days after service of the particulars of claim (CPR 15.4). In the TCC, where the factual and expert issues are complex, this period is often extended.

The requirements of the defence are set out in CPR 16.5. The defence must provide a comprehensive response to the particulars of claim and the defendant must state:

- which allegations in the particulars of claim are (i) admitted; (ii) denied; or (iii) allegations that the defendant is unable to admit or deny (e.g. where the allegation is inadequately particularised and further information or explanation is needed)
- if facts are disputed, the defendant's case as to the correct facts
- if allegations are denied, an explanation for such denial
- if quantum is disputed, any principles on which the sums claimed are disputed (e.g. no loss arguments, wrong basis of calculation).

Where the defendant has a claim against the claimant that it wishes to pursue in the same proceedings (a counterclaim), such counterclaim can be made as a defence by way of set off (if there is sufficient connection between the claim and the counterclaim) and/or as a separate counterclaim (CPR 16.6; CPR 20.4). A defendant is entitled as of right to serve a counterclaim with a defence, but if it is served later the permission of the court must be obtained (CPR 20.4).

The claimant is entitled but not compelled to serve a reply. If no reply is served, the matters set out in the defence are deemed to be in issue (CPR 16.7). A reply should be served in the following circumstances

- where the claimant wishes to admit parts of the defence
- where the claimant wishes to respond to the defence by alleging facts that were not included in the particulars of claim.

Where the defendant has served a counterclaim, the claimant should serve a defence to counterclaim.

Any claim in proceedings other than a claim by a claimant against a defendant is known as an additional claim (CPR 20.2). Additional claims include

- a counterclaim by a defendant
- a claim by a defendant against another person (whether or not already a party)
- a claim by a defendant for contribution against another defendant.

An additional claim is treated as if it were a claim for the purpose of preparing and serving pleadings (CPR 20.3).

4.4.4 Further pleadings

If the parties wish to file additional statements of case after the reply (e.g. a rejoinder to respond to a new issue raised in the reply), permission must be sought from the court and will only be given in exceptional circumstances where the matter cannot be dealt with conveniently by the amendment of other pleadings (CPR 15.9).

CPR Part 18 sets out the circumstances in which a party is entitled to further information in respect of the other party's case. The court may at any time order a party to

- clarify any matter which is in dispute in the proceedings, or
- give additional information in relation to any such matter

whether or not the matter is contained in or referred to in a statement of case and in the absence of an application by any party (CPR 18.1).

A party may make an application under Part 18 (CPR 18.1; Practice Direction 18, paragraph 1) provided that

1. a written request for such information has been made prior to the application – this can be set out in a letter rather than a formal document but should identify the title and number of the claim, set out each request in a separate numbered paragraph and identify the relevant document or part of the pleading to which it relates, or it can be in schedule form
2. the party making the request has fixed a reasonable period of time for the response and no (or no adequate) response has been provided
3. the further information requested is reasonably necessary and proportionate to enable the requesting party to understand the case it has to meet.

The response to a request for further information must be in writing, dated and signed by the party or his legal representative and verified by a statement of truth. If the request has been served in a schedule, the response should be inserted into an additional column in the schedule. Otherwise, the response should identify the title and number of the claim, repeat each request in a separate numbered paragraph and set out the response underneath.

In complex engineering claims, it is not unusual for the parties to amend the pleadings, either because new information has become available or because the basis of the case has changed. Once a statement of case has been served, the written consent of the other parties or permission of the court is needed for any amendment (CPR 17.1). In most cases, the party amending will have to pay the costs associated with the amendments, such as any costs wasted in dealing with abandoned claims and the costs of making consequential amendments to the other pleadings. Relevant factors for the court to consider when exercising its discretion to allow an amendment include:

- Does the proposed amendment have any prospect of success? The court will not allow amendments that are not arguable.
- The lateness of the application to amend – will it disrupt an imminent trial?
- The prejudice to the party seeking to amend if the amendment is not allowed – will it prevent a fair hearing of the real issues in the case?
- The prejudice to the other parties if the amendment is allowed – will it result in an adjournment or will the other parties be deprived of a fair opportunity to respond to the new allegations?

If an amendment is sought to be made after the expiry of a relevant period of limitation (the period of time within which a party must start proceedings in order to preserve his right to claim), the amendment will only be permitted if (CPR 17.4)

- the new claim arises out of the same or substantially the same facts and matters (*Seele Austria GmbH & Co. KG v. Tokio Marine Europe Insurance Ltd.* [2009] EWHC 2066 (TCC)), or
- the amendment is to correct the name of a party to the proceedings but only where there has been a genuine mistake which would not cause reasonable doubt as to the identity of the relevant party – this can not be used to add a wholly new party (*Lockheed Martin Group v. Willis Group Ltd.* [2009] EWHC 1436 (QB)), or
- the amendment is to correct the capacity in which a party claims.

It is important to note that a new claim is not made until the statement of case has been amended with the permission of the other parties or the court (see *Welsh Development Agency v. Redpath Dorman Long* [1994] 1 WLR 1409). Therefore, applications to amend should be made in good time and the court informed if a limitation period is about to expire.

4.4.5 Part 8 claims

The claim form in a Part 8 claim (where there is no substantial dispute of fact) must state (CPR 8.2)

1. that it is a claim to which Part 8 applies
2. the question which the claimant wants the court to decide
3. the remedy which the claimant is seeking and the legal basis for the claim to that remedy.

The claim form should not be lengthy. The question(s) for determination and the remedy sought should be identified concisely and the factual or legal basis for the claim should be in summary form. The claim form must be verified by a statement of truth (CPR 22.1). Any written evidence on which the claimant intends to rely should be filed and served with the claim form (CPR 8.5).

A defendant who wishes to respond to a Part 8 claim or to take active part in the hearing must acknowledge service of the claim form within 14 days of service using Form N210 (CPR 8.3, 8.4; Practice Direction 8, paragraph 5), stating

1. whether the defendant intends to dispute the claim
2. if the defendant intends to dispute the claim, setting out the grounds and any alternative remedy sought
3. whether the defendant intends to contest the court's jurisdiction
4. whether the defendant objects to the use of the Part 8 procedure and, if so, on what grounds.

The acknowledgement of service must be verified by a statement of truth (CPR 22.1). Any written evidence on which the defendant intends to rely should be filed and served with the acknowledgement of service (CPR 8.5).

The claimant is entitled to file further written evidence in reply within 14 days of the service of the defendant's evidence (CPR 8.5).

4.4.6 Arbitration claims

Arbitration claims include any applications to the court under the Arbitration Act 1996 or otherwise concerned with arbitration (CPR Part 62), such as

- challenge to an arbitration award on grounds of jurisdiction under section 67 of the 1996 Act (e.g. no contract, no valid appointment of arbitral panel, award outside the ambit of dispute referred)
- challenge to an arbitration award on grounds of serious irregularity under section 68 (e.g. bias, misconduct of arbitration proceedings)
- appeal on a point of law under section 69
- application to enforce an arbitration award as if it were a judgment or order of the court under section 66
- a claim to determine whether there is a valid arbitration agreement or whether the arbitration tribunal is properly constituted.

An arbitration claim form (Box 4.5) should be issued under Part 8 (see above) using Form 8 and must (CPR 62.4, 62.18)

1. include a concise statement of the remedy claimed and any questions on which the decision of the court is sought
2. give details of the arbitration award challenged or to be enforced
3. identify which parts of the award are challenged and set out the grounds on which the award is challenged
4. show that any statutory requirements have been met (e.g. agreement between the parties that an appeal can be made)
5. state under which section of the 1996 Act the claim is made
6. identify any costs order sought against any defendant
7. identify the persons on whom the arbitration claim will be served; or state that the claim is made without notice under section 44(3) of the 1996 Act (application to the court for an urgent order to preserve assets or evidence) setting out the grounds relied on; or state that the claim is made under sections 66 or 101 of the 1996 Act (enforcement).

Box 4.5 Model arbitration claim form

In the High Court of Justice
Queen's Bench Division
Technology and Construction Court
Claim No.
Issue Date

In an Arbitration claim between:

Claimant: BAVARIAN POWER COMPANY LIMITED

Defendant: NEW DELHI ELECTRICITY LIMITED

And in the matter of an Arbitration between:

Claimant: BAVARIAN POWER COMPANY LIMITED

Respondent: NEW DELHI ELECTRICITY LIMITED

To the Defendant:

This arbitration claim is made:

☐ without notice ☐ on notice to the persons whose names are given above (or set out)

This arbitration claim will be heard by a Judge sitting in public/private
The hearing of this arbitration claim will take place in court [. . .] at [address] on [date] at [time] (or on a date to be fixed)

Grounds of claim and details of what is being claimed:

The Claimant seeks orders pursuant to s. 69(7) of the Arbitration Act 1996:

(a) allowing its appeal against the Award of the Arbitrator Mr Black F.C.I.Arb made and published on the 30th day of November 2009;
(b) varying the Award in whole or in part and/or remitting the Award to the Arbitrator in whole or in part for reconsideration in the light of the Court's determination of the issues determined by the Arbitrator

The grounds of the claim are as follows:

1. The Claimant was engaged by the Defendant under the FIDIC Conditions of Contract for Plant and Design-Build ('the Yellow Book') (as amended by the parties) to supply, install and commission a new 240 megawatt generator in the Defendant's existing power station.
2. The works were commenced on 1 April 2007 and carried out in accordance with the Contract. The Time for Completion within the meaning of Clause 8.2 was 12 months (i.e. by 31 March 2008) but delays occurred and the Taking Over Certificate was not issued in respect of the works until 1 April 2009.

3. On 15 July 2009 the Claimant commenced arbitration proceedings against the Defendant, claiming an extension of time of 12 months and additional payment in the sum of £1 million caused by numerous and late variations instructed by the Defendant.
4. In the award the Arbitrator found in favour of the Claimant on time but awarded £50,000 only in respect of the additional costs claimed.
5. The Arbitrator erred in law in holding that the Engineer's valuation of variations under Clause 13 of the Contract was final and binding.
6. The Arbitrator should have made an independent assessment of the sums due to the Claimant in respect of the variations claimed and should have valued the additional costs at £1 million as claimed.

The Claimant seeks an order for costs against New Delhi Electricity Limited

Statement of Truth

I believe that the facts stated in this arbitration claim form are true.

Signed:

If the application is for permission to appeal on a question of law, the following additional requirements apply (Practice Direction 62, paragraph 12):

1. the arbitration claim form must identify the question of law
2. the arbitration claim form must state the grounds (but not the argument) on which the challenge is made
3. a skeleton argument (of not more than 15 pages) should be submitted in support of the application)
4. evidence may be filed in support of the application if necessary to show that:
   - determination of the issue will substantially affect the rights of one or more of the parties
   - the question is one which the tribunal was asked to determine
   - the question is one of general public importance
   - it is just and proper in all the circumstances for the court to determine the questions raised by the appeal.

The arbitration claim form must be served within one month from the date of issue unless the court orders otherwise (CPR 62.4(2)). The claimant may rely on the matters set out in the arbitration claim form as evidence (provided the statement of truth has been signed). In addition, the claimant may file witness statements in support of the arbitration claim which must be served with the arbitration claim form.

A defendant who wishes to respond to the arbitration claim or to take active part in the hearing must acknowledge service of the arbitration claim form within 14 days of service using Form 15 (this is not necessary if the arbitration application is made during the course of other court proceedings), stating

1. whether the defendant intends to dispute the arbitration claim and/or the claim for costs
2. if the defendant intends to dispute the claim, setting out the grounds and any alternative remedy sought
3. whether the defendant intends to contest the court's jurisdiction.

An arbitrator who is sent an arbitration claim form may apply to the court to be made a defendant or to be permitted to make representations to the court (Practice Direction 62, paragraph 4.1).

The acknowledgement of service must be verified by a statement of truth (CPR 22.1). Any written evidence on which the defendant intends to rely should be filed and served within 21 days from the date by which he was required to serve the acknowledgement of service or, where no acknowledgement is required (e.g. where the application is made in ongoing proceedings), within 21 days after service of the arbitration claim form (Practice Direction 62, paragraph 6.2).

The claimant is entitled to file further written evidence in reply within 7 days of the service of the defendant's evidence (Practice Direction 62, paragraph 6.3).

Unless otherwise ordered by the court, automatic directions are applicable as set out in Practice Direction 62, paragraph 6:

1. The claimant must prepare an agreed bundle of all documents to be used at the hearing, paginated and indexed. This should include documents referred to in the award if relevant to any point of law raised on appeal or to any procedural irregularity relied on.
2. The bundle must be filed at court not later than 5 days before the hearing date together with an estimate of the length of the hearing.
3. Not later than 2 days before the hearing the claimant must file with the court and serve on other parties:
   (a) chronology
   (b) list of persons involved
   (c) skeleton argument identifying *concisely* the issues, the grounds relied on, any submissions of fact and the submissions of law.
4. Not later than one day before the hearing the defendant must file with the court and serve on the other parties a skeleton argument as above.

In arbitration claims or applications of any substance, the practice in the TCC is for bundles and skeletons to be filed earlier than set out in the practice direction. If in doubt, the parties should seek directions from the court as to an appropriate timetable.

4.4.7 Adjudication enforcement proceedings

Section 108 of the Housing Grants Construction and Regeneration Act 1996 introduced a mandatory right for a party to a construction contract to refer a dispute arising under the contract at any time for determination by adjudication.

Where a party wishes to enforce an adjudication award for a sum of money, a claim form should be issued under CPR Part 7. If there is no substantial issue of fact and declaratory relief only is sought, a claim form should be issued under CPR Part 8.

The TCC has a special procedure for dealing with adjudication enforcement proceedings (TCC Guide, Section 9).

The claim form should

1. identify the construction contract (including the parties, date and documents in which the contract was contained or evidenced)
2. state the jurisdiction of the adjudicator and the procedural rules under which the adjudication was conducted
3. set out a summary of the adjudicator's decision
4. state the relief sought and the grounds for seeking that relief.

The following documents should be served with the claim form

2. application notice seeking summary judgment under CPR Part 24 (see Section 4.8)
3. application for abridgement of time for acknowledgement of service by the defendant, time for service of any evidence by the defendant and an early return date for the hearing of the application
4. witness statements setting out the evidence relied on in support of the applications, including a copy of the adjudication decision.

The papers should be marked: 'paper without notice adjudication enforcement claim and application for the urgent attention of a TCC judge' and an estimate given for the hearing. The claim will be assigned to a TCC judge, who will give speedy directions (usually within 3 days) for the service of evidence, bundles, skeletons and the date for the hearing (usually within 28 days of the directions).

Applications for declaratory relief (e.g. disputed jurisdiction of the adjudicator, dispute as to whether there was a valid construction contract) will be assigned to a TCC judge and a CMC fixed promptly (usually within 2 days) so that directions can be given for the dispute to be resolved without causing any significant delay to the adjudication process (TCC Guide, paragraph 9.4).

Where the enforcement proceedings are disputed, subject to any alternative directions given by the court, the parties must provide to the court by 4 p.m. one clear working day before the hearing

- a bundle containing the documents that will be required at the hearing and copies of any authorities which are to be relied on
- short skeleton arguments, setting out a summary of the submissions relied on in support of the party's case and in opposition to the other side's case on enforcement and on any other relief sought (where the hearing is short, i.e. half a day or less, the

skeletons can be filed up to 1 p.m. the working day before the hearing but more notice of any difficult points should be given).

4.5. Case management

As mentioned above, the overriding objective of the CPR is to determine claims justly, ensuring that the parties are on an equal footing, saving expense, dealing with the case in a way that is proportionate to the size and complexity of the case and the court's resources, and ensuring that the disputes are dealt with expeditiously and fairly (CPR 1.1). In the TCC, it is expected that the parties will cooperate so as to assist in achieving that objective (and the absence of cooperation may well result in cost penalties imposed by the court).

The first Case Management Conference (CMC) will be fixed by the court within 14 days of the filing of an acknowledgement of service, a defence or an order transferring the claim to the TCC (Practice Direction 60, paragraph 8.1). The court will consider any proposals for CMCs and any other applications in the claim to be dealt with by telephone, video link or on paper in appropriate cases (TCC Guide, paragraph 4).

Each party is required to prepare certain documents for the first CMC (Boxes 4.6 to 4.8) unless they are agreed. The documents must be filed at court and served on all parties at least 2 days before the CMC (in larger cases, this should be done much earlier to enable the parties to agree as much as possible) (Practice Direction 60, paragraph 8.3).

4.6. Alternative dispute resolution

For a more detailed explanation of alternative dispute resolution (ADR), see Chapter 7.

CPR 1.4 requires the court to further the overriding objective by actively managing cases, and active case management includes encouraging the parties to use an ADR procedure if the court considers that appropriate. ADR is defined, rather unhelpfully, as a 'collective description of methods of resolving disputes otherwise than through the normal trial process'. In the TCC Guide, ADR is taken to mean any process through which the parties attempt to resolve their dispute which is voluntary, and in most cases ADR takes the form of mediation conducted by a neutral mediator (see Chapter 7). Alternative forms of ADR include formal interparty negotiations, conciliation or early neutral evaluation (see Chapter 9) (TCC Guide, paragraph 7.1.1).

Box 4.6 Checklist of documents for the first CMC

- Claim form and any other pleadings
- Any orders made by the court
- Case management information sheet (Box 4.7)
- List of proposed directions (Box 4.8)
- Pre-action protocol material
- Any additional applications (e.g. to join additional parties)

Box 4.7 Matters to be dealt with in the CMC information sheet

- Settlement – is a stay of the proceedings required so that the parties can attempt to settle?
- Location of trial – reasons should be given for any preference expressed
- Pre-action protocols – confirmation that the parties have complied, or explanation if not
- Case management information – size of claim and any counterclaim
- Applications – identify any other applications – e.g. summary judgment
- Witnesses – preliminary identification of the relevant factual witnesses and issues addressed
- Experts – identify the experts and field of expertise – the parties should consider whether a single joint expert would be appropriate (e.g. for quantum)
- Disclosure – state any special orders sought (e.g. issues of confidentiality, proposal for limited disclosure) and identify matters agreed/not agreed in relation to electronic disclosure
- Transfer – consider whether the claim should be dealt with in another division or in the county court
- Estimate of trial length and availability of witnesses
- Proposed directions (see below) – these should be attached to the sheet and agreed where possible
- Costs – estimate of costs to date and overall costs

At any stage after the first CMC (see the CMC information sheet, referred to above) and prior to the commencement of trial, the court will, either on its own initiative or if requested to do so by one or both of the parties, consider whether to facilitate ADR, often by granting a short stay in the proceedings. It should be noted that the court's role is to encourage ADR, not to compel it (*Halsey v. Milton Keynes General NHS Trust* [2004] EWCA Civ 576; [2004] 1 WLR 3002 (CA)). Alternatively, the court may simply encourage the parties to seek ADR and allow for it to occur within the timetable for the resolution of the proceedings set down by the court, without a formal stay of the proceedings.

If the court does consider it appropriate, an ADR order may be made. A draft ADR order is given in Appendix E to the TTC Guide and is reproduced here in Box 4.9.

A party to proceedings should consider whether there are any short cuts that can be taken to obtain relief or resolution prior to a full trial, such as default judgment, summary judgment or interim relief.

4.7. Default judgment

Default judgment means judgment without trial and is available where a defendant (including a defendant to a counterclaim) has failed to acknowledge service or to file a defence within the stipulated period (set by the rules or by the court) (CPR 12.1). The

Box 4.8 Items to be included in the list of proposed directions

- Trial date and estimated length of trial
- Consideration of whether any stay for alternative dispute resolution (ADR) should be ordered
- Directions for preliminary issues or subtrials – the parties should consider whether there are key issues that could usefully be determined in advance of the main trial (Section 8 of the TCC Guide)
- Consolidation with any other related claims and consideration of any additional third party claims
- Further statements of case – defence and counterclaim, reply and defence to counterclaim
- Permission to make amendments
- Scott Schedule (a table setting out each defect, variation or financial claim together with the basis for each claim) – directions for contents of each column and time for service and response by the parties
- Disclosure of documents – provision for paper and electronic disclosure
- Date for service of factual witness statements
- Permission for expert evidence – the issues or disciplines should be identified
- Directions for calculations/tests by experts, without prejudice meetings, joint statements and expert reports
- Directions for any single joint expert
- Direction for provision of documents electronically to the court
- Date for further CMC
- Date for pre-trial review
- Procedural rules for any changes to the timetable (agreed changes can often be dealt with on paper without the need for a hearing)
- Liberty to restore (the parties do not need to issue fresh applications to raise additional CMC issues, although separate applications are required for other interlocutory matters)
- Costs in the case

claimant should issue a notice in form N225 (if the claim is for a fixed sum, e.g. a debt) or N227 (if the amount is to be determined by the court, in which case judgment for liability will be entered with damages to be assessed) (CPR 12.4).

This procedure is not available (i) for Part 8 claims, (ii) where the claim is for relief other than financial (e.g. declaration or injunction), (iii) where the other party has issued an application to strike out the claim or for summary judgment, (iv) where the defendant has satisfied the claim (i.e. paid the sum claimed, including costs), or (v) where the claim is admitted under CPR 14.4 or 14.7 and the defendant has applied for time to pay (CPR 12.2, 12.3 and 12.4). The court can set aside a default judgment where it was wrongly obtained or where the defendant establishes that (i) it has a real prospect of successfully defending the claim or (ii) there is some other good reason for setting aside the judgment (CPR Part 13).

Box 4.9 Draft ADR order

1. By [. . .] the parties shall exchange lists of three neutral individuals who have indicated their availability to conduct a mediation/ENE in this case prior to [. . .].
2. By [. . .] the parties shall agree an individual from the exchanged lists to conduct the mediation/ENE by [. . .]. If the parties are unable to agree on the neutral individual, they will apply to the Court in writing by [. . .] and the Court will choose one of the listed individuals to conduct the mediation/ENE.
3. There will be a stay of the proceedings until [. . .] to allow the mediation/ENE to take place. On or before that date, the Court shall be informed as to whether or not the case has been finally settled. If it has not been finally settled, the parties will:
   (a) comply with all outstanding directions made by the Court;
   (b) attend for a review CMC on [. . .].

4.8. Summary judgment

The court may give summary judgment against a party (determine the claim or an issue without a full trial) if (CPR 24.2)

1. it considers that the claimant has no real prospect of succeeding on the claim or issue; or that the defendant has no real prospect of successfully defending the claim or issue; and
2. there is no other compelling reason why the case or issue should be disposed of at trial.

An applicant may not apply for summary judgment until the defendant to the application has filed an acknowledgement of service or defence (save where the court orders otherwise). When an application for summary judgment has been issued prior to the service of the defence, the defendant is not required to serve a defence until after the application (CPR 24.4).

In the TCC, the applicant should obtain a suitable date and time from the court before issuing the application and should then serve the application notice (Box 4.10) and evidence in support sufficiently in advance of the fixed date so as to enable the respondent to serve evidence in response and, generally, no less than 10 working days before the hearing date (TCC Guide, paragraph 6.2.4). In complex cases, directions should be sought from the court.

CPR 24.5 provides that if a respondent wishes to rely on written evidence the witness evidence must be filed with the court and served on other parties at least 7 days prior to the hearing. Any evidence in reply must be served by the applicant at least 3 days before the hearing. All witness statements should be verified by a statement of truth.

Box 4.10 Formalities for an application notice

1. The application notice must state that it is an application for summary judgment made under CPR Part 24
2. The application notice must state what order is sought – it must identify precisely the claim(s) or issue(s) in respect of which summary judgment is sought
3. The application notice or any evidence served with it must:
   - identify concisely any point of law or provision in a document on which the applicant relies, and/or
   - state that it is made because the applicant believes that on the evidence the respondent has no real prospect of succeeding on the claim or issue or of successfully defending the claim or issue to which the application relates and, in any event,
   - state that the applicant knows of no other reason why the disposal of the claim or issue should await trial
4. The evidence relied on in support of the application must be contained in or identified in the application notice and verified by a statement of truth
5. The application notice should draw the attention of the respondent to Rule 24.5.1 (see below)

A paginated bundle should be provided to the court not less than 2 working days before the hearing and skeleton arguments should be served by each party.

In order to defend a Part 24 application, it is sufficient to show a real prospect or chance of success. It should be more than a fanciful prospect but the court should not embark on a mini trial if the case is reasonably arguable (*Swain v. Hillman* [2001] 1 All ER 91 (CA); *Three Rivers District Council v. Bank of England (No. 3)* [2001] 2 All ER 513 (HL); *ED&F Man Liquid Products Ltd. v. Patel* [2003] EWCA Civ 472 (CA)).

On hearing a Part 24 application, the court can grant summary judgment of a claim, strike out or dismiss a claim, make a conditional order (e.g. a claim can be defended on condition that money is paid into court), give directions for the trial of the claim or make an order as to costs.

4.9. Interim payment

The court can make an order for an interim payment to be made in respect of a claim (CPR 25.7) if

1. the defendant has admitted liability to pay damages or some other sum of money to the claimant, or
2. the claimant has obtained judgment against the defendant on liability with damages to be assessed, or
3. the court is satisfied that at trial the claimant would obtain judgment for a substantial amount of money on the claim against the defendant.

The claimant may not make an application for interim payment until the time for filing an acknowledgement of service has expired (CPR 25.6). The application notice must be served at least 14 days before the hearing of the application and must be supported by evidence. If a respondent wishes to rely on written evidence the witness evidence must be filed with the court and served on other parties at least 7 days prior to the hearing. Any evidence in reply must be served by the applicant at least 3 days before the hearing. All witness statements should be verified by a statement of truth.

The court has a wide discretion as to whether to make any order (*Schott Kem Ltd. v. Bentley* [1991] 1 QB 61 (CA)). Very often, any sum awarded will be assessed on a rough and ready basis. The court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment and must take into account alleged contributory negligence and any relevant set off or counterclaim (CPR 25.6).

4.10. Interim injunction

An injunction is a court order prohibiting a person from doing something or requiring a person to do something. An injunction may be granted by the court at the end of a trial where the claimant has established a right in law and an infringement of that right by the defendant, such as carrying out engineering works on the land of another without permission. However, the court has discretion to grant an interim injunction pending trial (CPR 25.1).

The application for an injunction should be made by an application notice setting out the order sought by the applicant and brief grounds relied on and should be filed with the court and served on the respondent together with a draft order and any witness statement in support, setting out all material facts, verified by a statement of truth (CPR Practice Direction Part 25PD paragraph 2). In urgent cases, the application may be made without notice to the respondent, and in very urgent cases the application may be made out of court hours and/or by telephone (Practice Direction 25, paragraph 4).

On hearing the application, the court will not determine the issue on a final basis but will carry out a balancing exercise (*American Cyanamid v. Ethicon* [1975] AC 396 (HL)) by reference to the following questions (known as the '*Cyanamid* guidelines'):

1. Does the applicant have a good arguable claim?
2. Is there a serious issue to be tried?
3. Would damages be an adequate remedy for the applicant (instead of an injunction)?
4. Would damages be an adequate remedy for the respondent (if the injunction were found to be wrongly granted at trial)?
5. Does the balance of convenience favour granting or refusing the injunction?

Generally, the applicant is required to give an undertaking to pay damages if the injunction proves to be wrongly granted at trial but this is not a strict pre-condition for an interim injunction if there are special circumstances.

The *Cyanamid* guidelines are not relevant to applications for mandatory injunctions, i.e. where the court orders the respondent to do something (*Zockoll Group Ltd. v. Mercury Communications Ltd.* [1998] FSR 354 (CA)). In such cases the court will adopt the course that is likely to involve the least risk of injustice if it turns out be wrong, and generally it is necessary for the applicant to show that he has a strong and clear case in order to obtain a mandatory injunction (*Nottingham Building Society v. Eurodynamics Systems* [1993] FSR 468).

The court may grant a 'freezing injunction' restraining a party from removing assets from the jurisdiction (e.g. transferring funds abroad) or from dealing with assets within the jurisdiction (e.g. selling a development and spending the funds released) where there is a real risk that a party might dissipate its assets so as to avoid a judgment (Section 37 Supreme Court Act 1981; *Mareva Compania Naviera SA v. International Bulkcarriers SA* [1975] 2 Ll.Rep.509 (CA)). An application for a freezing injunction must be supported by affidavit evidence (a written and sworn statement) (Practice Direction 25, paragraph 3).

4.11. Disclosure

Disclosure is the process whereby the parties disclose to each other documents relating to the issues in the claim, including documents that assist the other party, so as to enable a fair trial of the matter.

Standard disclosure requires each party to disclose only documents which are or were in that party's possession (including a right to possession or to inspect or take copies) (CPR 31.6 and 31.8)

1. on which the party relies; and
2. which (a) adversely affect the party's own case, or (b) adversely affect another party's case, or (c) support another party's case; and
3. which the party is required to disclose by a relevant practice direction form.

The duty is an ongoing one until the proceedings have finished (CPR 31.11).

In the TCC, parties are invited to consider whether there should be any limit on the disclosure ordered (e.g. to specific categories), or to dispense with formal disclosure, so as to reduce the volume of documents disclosed and the costs.

Disclosure is generally by list (CPR 31.10). The list should

1. identify the documents in a convenient order and manner and as concisely as possible
2. identify any documents that are not available for inspection (e.g. privilege claimed)
3. identify any documents that are no longer in the party's control, stating what has happened to them, and
4. include a disclosure statement setting out the extent of the search made to locate the disclosable documents, certifying that the party understands the duty to disclose documents and to the best of his knowledge he has complied with that duty.

The parties should consider, and attempt to agree, any special orders required (e.g. for translation of foreign documents, disclosure in tranches, or disclosure of electronic statements, including database systems) (TCC Guide, paragraph 11.2).

A new practice direction applies to all proceedings started on or after 1 October 2010 in respect of electronic disclosure (Practice Direction 31B).

- As soon as litigation is contemplated, the parties must take steps to preserve potentially disclosable documents, including electronic documents, such as emails and documents stored on memory sticks or mobile phones.
- The parties should attempt to agree a protocol for identifying the categories of electronic documents to be disclosed, the extent of reasonable searches to find such documents, and whether the scope of such disclosure should be limited (e.g. by the use of search terms, software to remove duplication, or by limiting the email accounts to be disclosed).
- The parties should attempt to agree the format for disclosure of electronic documents and should consider whether costs could be saved by sharing a database.
- The parties may find it of assistance to use the Electronic Documents Questionnaire in the Schedule to Practice Direction 31B to check that they have considered all aspects of electronic disclosure prior to the first CMC.

A party that considers that inadequate disclosure has been given may make an application for specific disclosure, requiring another party to disclose specific documents or categories, or to carry out a search for such documents (CPR 31.12). The application should be made by issuing an application notice, setting out the order sought and be supported by evidence, explaining the existence or probable existence of the documents sought, and why disclosure was necessary for a fair trial (Practice Direction CPR 31, paragraph 5). In considering the application, the court will take into account the overriding objective in CPR Part 1 but will only make an order if it is proportionate in all the circumstances.

4.12. Witness statements

Evidence at a trial should be given generally by oral evidence, i.e. the witnesses of fact should present themselves for examination by the other parties and the court so as to test their direct evidence. The purpose of witness statements (Box 4.11) is to provide advance warning to the other parties of the evidence to be given, so that facts can be agreed where possible and preparation carried out for an efficient hearing.

Generally, at trial the witness statement will stand as evidence in chief. Where recollection or credibility is in issue, the court may permit oral evidence in chief so as to obtain the witness's account on specific issues.

If a witness is unwilling or unable to provide a witness statement, the party seeking to rely on his evidence at trial should prepare and serve a witness summary instead of the statement (CPR 32.9).

If a party intends to rely on 'hearsay evidence', i.e. evidence not given directly by a witness at trial or documentary records not made by a witness giving evidence, notice

Box 4.11 Contents of witness statements

- A witness statement should be signed by the witness and verified by a statement of truth
- Documents should not be appended to the statement, and the statement should not contain lengthy extracts from documents
- The statement should be in the witness's own words as far as possible
- The witness should make clear what evidence is based on the witness's own knowledge and what evidence is hearsay or a matter of belief
- A witness statement should be concise and not argumentative

(TCC Guide, paragraph 12.1)

should be given of such intention, stating the reason why direct evidence will not be called (CPR 33.2).

Although generally witnesses are expected to attend the trial when required by the court, in appropriate circumstances their evidence can be given by video link. The parties are encouraged to consider whether it is necessary to have oral evidence from all witnesses who have provided statements. In many cases, uncontroversial parts of the witness evidence can be agreed in advance of the trial so as to reduce the hearing length and save costs.

4.13. Expert reports

Expert evidence is evidence on technical or scientific matters given by a person with relevant expertise, including opinion evidence. The overriding duty of an expert is to help the court on matters within his expertise (CPR 35.3). Expert evidence should be independent, regardless of the implications for the party instructing the expert, and should take account of all material facts, including those that might cast doubt on the expert's opinion (Box 4.12).

Generally, the TCC will direct experts of like disciplines to meet to discuss the issues on a without prejudice basis. It is sensible for the parties or the experts to draw up a list of expert issues and an agenda for the meetings to ensure efficient use of time. The purpose of the meetings is to clarify the issues, exchange information and views, narrow the differences and reach agreement where possible. Any matters discussed or views expressed in the meetings must not be disclosed to the court unless included in the experts' joint statement.

Following the experts meetings, usually the court will order the experts to produce a formal joint statement (CPR 35.12) in which the experts identify the issues agreed and those not agreed, with a short summary of the reasons for any disagreement. The legal advisors should not attend the meetings and should not be involved in negotiating or drafting the joint statement (TCC Guide, paragraph 13.6).

Box 4.12 Form and content of an expert report (see guidelines in *The Ikarian Reefer* [1993] 2 Ll.Rep.68 at page 81)

- An expert report should be addressed to the court
- The expert's qualifications should be set out (usually in an appendix)
- The report should set out the substance of all facts and instructions received that are material to the opinion expressed and identify any facts that are within the expert's own knowledge
- The expert should identify all relevant documents relied on, including published technical literature
- The report should state who carried out any tests or calculations relied on and explain the expert's role (e.g. supervisory)
- Where there is a range of opinion on the issues, the expert should summarise that range of opinion and give reasons for the expert's own opinion
- The report should set out a summary of the conclusions reached
- The report should state clearly when any issue falls outside the expert's own expertise, or when for any other reason he is unable to reach a concluded view
- The report should contain a statement that the expert understands the expert's duty to the court and has complied with and will continue to comply with that duty
- The expert's report must be verified by a statement of truth
- If, after producing the report, the expert changes an opinion, the expert should notify the court and all parties as soon as possible

(Practice Direction 35)

4.14. Pre-trial review

The purpose of the pre-trial review (PTR) is to check that the parties are ready for trial and to determine the arrangements for the trial.

The parties should complete the PTR questionnaire and return it to the court in good time before the PTR (TCC Guide, paragraph 14). In all but the simplest of cases, the parties should provide Notes by 4 p.m. one clear working day prior to the PTR, containing the following information:

1. whether there has been compliance with previous directions, explanation for any non-compliance and proposals for dealing with outstanding matters
2. the key issues for determination by the court
3. proposals for the most efficient way of determining the issues at trial, including a timetable for reading, witnesses and submissions.

At the PTR, the court will give directions for bundles, written and oral openings, timetable for evidence, transcripts and any other matters required to ensure a fair and efficient trial (TCC Guide, paragraph 14).

4.15. Trial

Generally, written opening submissions are required from each party in advance of the hearing. They do not have to be lengthy but should provide an overview of the case and an outline of the party's case in relation to each issue. The claimant should produce a chronology, cast list (*dramatis personae*) and a reading list.

There is no fixed rule, but often in TCC cases all factual evidence is heard first, followed by the expert witnesses for each discipline.

Witness evidence in court is usually taken on oath or affirmation. The witness is identified and confirms his or her witness statement(s). Sometimes a few introductory questions in chief are permitted, and then the witness is tendered for cross-examination. When all other parties have had an opportunity to examine the witness, the party calling the witness is permitted to re-examine on any issues raised in cross-examination.

Permission of the court must be sought to introduce new witnesses, new documentary evidence or new expert material. The court will consider whether in all the circumstances the evidence should be admitted so as to ensure a fair hearing without prejudicing the other parties. Late introduction of evidence is to be avoided because it carries with it the risk of an adjournment and/or cost penalties.

Closing submissions may be made orally at the close of evidence or there may be a short adjournment of the trial to enable the parties to produce written submissions, possibly with a further short hearing.

In all but the simplest of trials in the TCC, judgment is reserved and produced in writing.

4.16. Costs

Engineering claims can be expensive to fight. A claimant should check that the defendant (or the defendant's insurer) has funds to pay any judgment, as there is little to be gained by victory against an impecunious party. The court has power to make costs capping orders (CPR 44.18; TCC Guide, paragraph 16.3), although such an order will not be made if costs can be controlled by other case management steps, and they are relatively rare in TCC cases. However, more widely used, particularly in very high cost cases, are orders that the parties should produce cost estimates to the court and that those estimates should be considered to be the likely maximum recovery at the end of the trial, subject to unforeseen circumstances justifying any adjustment by the court (*Derek Barr v. Biffa Waste Services (No. 2)* [2009] EWHC 2444 (TCC)). Costs can be monitored during the procedural stages of the claim by regular updating of initial cost estimates, with explanations from the parties for any significant deviation, requiring the parties to focus on the increasing bills to be paid.

Interlocutory hearings that last one day or less will usually be the subject of a summary assessment of costs (CPR 44.7). The parties must ensure that statements of costs are filed with the court and served on the other parties at least 24 hours before the hearing (TCC Guide, paragraph 16.2.1). For longer, or more complex applications and trials, costs are subject to a detailed assessment if not agreed.

Box 4.13 Factors taken into account by the court when determining whether or not to order security for costs

- Whether the claim is bona fide or a sham (does it have any apparent merit?)
- Whether there is any admission by the defendant, any open offer or payment into court
- Whether the application is being made oppressively (i.e. to stop the defence)
- Whether any want of means on the part of the defendant has been caused by the claimant (e.g. failure to pay sums due)
- Whether the application is made at a late stage in the proceedings

(*Sir Lindsay Parkinson v. Triplan Ltd.* [1973] QB 609 (CA))

A defendant (including a defendant to a counterclaim) has the opportunity to seek security for costs (Box 4.13) in respect of the claim against it, usually by provision of a parent company guarantee, bank bond or payment into court (CPR 25.12). The application should be made by application notice supported by written evidence. The court has a discretion to make an order for security if it is satisfied that:

1. having regard to all the circumstances of the case it is just to make an order, and
2. one of the following conditions applies (CPR 25.13):
   - the claimant is resident out of the jurisdiction
   - the claimant is a company or other body (whether incorporated within or outside the jurisdiction) and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so
   - the claimant has failed to give its address, given a false address or changed address with a view to avoiding payment
   - the claimant is a nominal claimant and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so
   - the claimant has taken steps in relation to its assets that would make it difficult to enforce an order for costs against it.

Any party can protect itself against a costs order by making a Part 36 offer and/or payment into court (CPR Part 36):

- A Part 36 offer must be in writing and state that it is intended to have the effect specified in CPR Part 36.
- A Part 36 offer may relate to the whole claim or part or any specific issue.
- A Part 36 offer must state:
  1. whether it relates to the whole claim or any part, and if so which part
  2. whether it takes into account any counterclaim and
  3. whether it is inclusive of interest.
- A Part 36 offer made not less than 21 days before the start of the trial must:
  1. be expressed to remain open for acceptance for 21 days from the date of the offer, and

2. provide that after the 21 day period the offer can be accepted only if the parties agree liability for costs or with permission of the court.

- A Part 36 offer made less than 21 days before the start of the trial must state that it can be accepted only if the parties agree liability for costs or with permission of the court.
- The court must not be informed of the offer until after the hearing.

If the offer is accepted, the claim is automatically stayed and the claimant is entitled to his costs (CPR 36.10, 11 and 12). If the offer is not accepted (and not withdrawn), when liability and quantum have been determined at the hearing.

- If the claimant fails to beat the defendant's offer or payment in, the general rule is that the claimant will have to pay the defendant's costs from the date when the offer or payment could have been accepted (CPR 36.14).
- If the claimant beats its own claimant's offer (i.e. to settle for a smaller sum than the full claim), the general rule is that the defendant will have to pay interest on the award at a rate not exceeding 10% above base rate, costs on an indemnity basis and interest on those costs at a rate not exceeding 10% above base rate (CPR 36.14).

CPR Part 36 is a self-contained code and the courts will not incorporate any general principles of common law in interpreting the rules (*Susan Gibson v. Manchester City Council* [2010] EWCA Civ 726 (CA)). However, the court is permitted to review all the circumstances of the case in order to determine whether the claimant has achieved more than was offered in negotiations or through any Part 36 offer (*Lisa Carver v. BAA plc*. [2008] EWCA Civ 412 (CA)).

The court has a complete discretion as to orders for costs (CPR 44.3). Subject to the above, the general rule is that costs follow the event (i.e. the overall winner gets his costs). However, the CPR require the courts to be more ready to make separate orders which reflect the outcome of different issues (*Phonographic Performance Limited v. AEI Rediffusion Music Limited* [1999] 2 All ER 299, *Johnsey Estates Limited v. Secretary of State for the Environment, Transport and the Regions* [2001] EWCA 535). Where a party has exaggerated a claim or pursued unreasonable issues, it may be appropriate to make a percentage reduction in the recoverable costs (*English v. Emery Reimbold & Strick Ltd*. [2002] 1 WLR 2409 (CA); *Martine Widlake v. BAA Ltd*. [2009] EWCA Civ 1256 (CA); *Multiplex Constructions (UK) Ltd. v. Cleveland Bridge UK Ltd*. [2008] EWHC 2280 (TCC)).

Generally, costs are ordered to be paid on the standard basis (costs have to be reasonably incurred and proportionate), although there is power to order costs on the indemnity basis (costs have to be reasonably incurred) if the court wishes to express disapproval of the conduct of the trial (CPR 44.4; *McPhilemy v. Times Newspapers Ltd. (No. 2)* [2001] 4 All ER 861 (CA)).

It may be argued that there should be a departure from the general rule on costs because one or more parties unreasonably refused to take part in ADR. As a matter of principle,

the burden is on the unsuccessful party to show why there should be such a departure from the general rule, and the Court of Appeal has in *Halsey v. Milton Keynes General NHS Trust* [2004] EWCA Civ 576, [2004] 1 WLR 3002 (CA) identified six factors that may be relevant to any such consideration

- the nature of the dispute
- the merits of the case
- the extent to which other settlement methods have been attempted
- whether the costs of the ADR would be disproportionate
- whether any delay in setting up and attending the ADR would have been prejudicial
- whether the ADR had a reasonable prospect of success.

As noted above, the court's role is to encourage, not to compel, ADR, but where the court has made an ADR order it will expect each party to cooperate fully with any ADR that takes place, and adverse cost consequences may flow if a party obstructs the process or refuses to participate (*Earl of Malmesbury v. Strutt & Parker* [2008] EWHC 424 (QB)).

4.17. Appeals

If a party is dissatisfied with an order or judgment of the court, it can seek a review of the decision by the Court of Appeal.

Permission is required for an appeal from most TCC judgments or orders (CPR 52.3; *Tanfern Ltd. v. Cameron-MacDonald* [2000] 1 WLR 1311 (CA)). Permission should first be requested from the TCC (when the judgment or order is made) and, if refused, from the Court of Appeal (applications are usually determined on paper, although an oral hearing will be allowed in very complex cases). Permission to appeal will only be given where

1. the court considers that the appeal would have a real prospect of success (e.g. obvious mistake by the Judge or conflicting authorities), or
2. there is some other compelling reason why the appeal should be heard (e.g. matter of public importance).

Unless otherwise directed by the lower court, the appellant must file the appellant's notice (together with any request for permission to appeal) within 21 days after the decision appealed and serve on the other parties within 7 days after filing (CPR 52.4). The appellant's notice must be in form N161 and should set out

- the grounds on which it is said the judgment or order was wrong (errors of law), or
- the basis on which it is said that the judgment or order was unjust (e.g. procedural irregularities).

The appellant's notice should be lodged at court with

- a skeleton setting out a summary of the case, the remedy sought and the grounds for appeal

- a sealed copy of the order or judgment being appealed
- any permission to appeal
- any witness statements in support
- a small paginated bundle of key documents, including relevant pleadings.

A respondent who is seeking permission to appeal or wishes to rely on different reasons for upholding the judgment or order must file a respondent's notice in Form N162 within 14 days after service of the appellant's notice or permission to appeal, whichever is later, or as directed by the court (and a copy served on the appellant within 7 days thereafter) (CPR 52.5). A respondent should also serve a skeleton setting out the arguments it wishes to pursue on appeal.

An appeal is limited to a review of the judgment or order and does not amount to a rehearing (CPR 52.11). If the Court of Appeal is satisfied that the judgment or order was wrong or unjust, it has the power to (CPR 52.10)

- affirm, set aside or vary the judgment or order
- refer any issue back to the lower court
- order a new trial or hearing
- make orders for the payment of costs or interest.

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Chapter 5
Arbitration

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5.1. What is arbitration?

Although arbitration has been employed for resolving disputes in England for centuries, there is a noticeable absence of an accepted definition that is sufficiently wide to encompass the many different aspects of arbitration practice. However, at its most fundamental, arbitration is a private form of final and binding dispute resolution by a third party, based upon the agreement of the parties and according to the applicable law of the contract. The key features that distinguish arbitration from other forms of dispute resolution are:

- *It is private*. Whereas the court system in England is provided by the state and open to the public, arbitration is a private method of resolving disputes that is funded by the parties themselves.
- *It is final and binding*. Other methods of dispute resolution, such as mediation, conciliation and adjudication, are generally neither final nor binding unless the parties agree otherwise or decide not to continue further with a dispute. Except in very limited circumstances, arbitration is final and binding, and an arbitration award will generally be enforced by the courts if one party fails to comply. Arbitration is regulated under the Arbitration Act 1996, which sets out a detailed framework for the regulation and enforcement of arbitration in England, Wales and Northern Ireland.
- *A decision is made by a third party*. A mediator or conciliator, for example, attempts to bring the parties together to reach a mutually agreeable settlement of the issues in dispute, and does not issue a decision on the dispute itself. An arbitrator is like a judge and, having considered all the evidence, will reach a decision.
- *It is based upon the agreement of the parties*. Arbitration is consensual. Therefore, the parties have to agree to resolve disputes through arbitration rather than relying upon the court, which would otherwise be the default position.
- *The decision is made according to the applicable law of the contract*. A common misconception is that choosing to have disputes resolved through arbitration in London will mean that the underlying disputes will be determined according to English law. This is not necessarily the case. The tribunal will apply the governing law stated in the contract.

(Note that care must be taken to draw a distinction between expert determination and arbitration. While expert determination is also a final and binding form of dispute

resolution by a third party, it is not regulated and enforced by statute (Arbitration Act 1996). It is therefore more suited to the resolution of discrete issues, such as a particular technical or valuation dispute, where it can provide a speedy and cost-effective resolution.)

5.2. Advantages of arbitration

Arbitration has a number of advantages over litigation:

- *Privacy and confidentiality*. Arbitration allows the parties to keep their disputes private and confidential. (In this context, privacy means that the general public has no right to attend a hearing before the tribunal. Confidentiality refers to restrictions on the use of documents disclosed in the arbitration by the parties.) This is, of course, in contrast to the very public nature of litigation before the courts. However, confidentiality can be lost if one of the parties attempts to appeal an award before the court.
- *Enforceability*. Arbitration awards in England are enforceable by the courts under the Arbitration Act 1996 in very much the same way as a judgment of the court. Internationally, arbitration awards are readily enforceable in many countries under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards. This convention has been ratified or acceded to by some two-thirds of the countries recognised by the United Nations, which means that an arbitration award in one convention state is readily enforceable in that of another convention state. This is important in the context of international disputes (see Chapter 10), and is one of the primary reasons why arbitration is the preferred method of dispute resolution for international construction and engineering projects.
- *Flexibility and formality*. The fact that the parties have agreed to resolve disputes privately allows them more control over the procedure, including the manner in which evidence is provided and witnesses examined. There are no restrictions on who can represent a party (as opposed to the restrictions in the English courts), and the parties often agree upon the timing and venue for the arbitration rather than having those factors determined by the court.
- *Technical expertise*. The parties are free to decide and agree upon the arbitrator (or arbitrators) to decide their dispute. Accordingly, for a very technical dispute the parties can appoint an arbitrator with technical expertise in that particular field or, if the matter raises specific legal issues, appoint a legal practitioner eminent in that area of the law. In both cases, arbitration allows the parties to choose whomsoever they would prefer to determine the dispute between them.
- *Speed and cost*. For many small construction disputes arbitration is significantly quicker and cheaper than litigation. However, the same cannot be said for complex disputes, where the magnitude of documentary and witness evidence is likely to determine both the cost and duration of the proceedings. Having said that, arbitration is, of course, flexible and allows the parties to implement appropriate measures to maintain the efficiency of the proceedings by, for example, limiting the number of documents disclosed or restricting the length of hearing time.
- *Neutrality*. Arbitration is a politically neutral means of dispute resolution. Internationally, parties are often reluctant to rely on the local courts for resolving

disputes if one of the parties is a state entity, and therefore arbitration at a neutral venue is the general compromise.

- *Finality*. Arbitration is a final form of dispute resolution, with only very limited grounds for challenge. These generally relate to improper procedure or conduct by the tribunal, such as, for example, bias on the part of one of the arbitrators. Under the Arbitration Act 1996, there is a further right of appeal on points of law, but that right is strictly limited, and means that parties are, in reality, rarely able to challenge an arbitration award (see Section 5.12).

5.3. Disadvantages of arbitration

There are, however, a number of disadvantages to arbitration.

- *Pre-emptive remedies*. As the parties have agreed that disputes are to be determined by arbitration, a tribunal has to be appointed and established before either party can seek and obtain a remedy. This can give rise to problems in relation to urgent applications, such as injunctions. In addition, even if the tribunal has the power to grant pre-emptive remedies, it does not have jurisdiction to commit a party for contempt in the event of non-compliance, with the result that pre-emptive orders of the tribunal are coercive rather than mandatory. Nevertheless, the courts have the powers to grant interim or interlocutory relief in support of an arbitration, which can often provide the parties with the necessary remedy.
- *Joinder of parties*. Arbitration is private and consensual in nature, so only those parties who have agreed to arbitrate can be a party to the arbitration itself. Therefore, it is often not possible to join a third party (such as a subcontractor) into an existing arbitration (between employer and main contractor) unless all parties consent. Once a dispute has arisen it can be very difficult, if not impossible, for parties to agree upon anything. If the intention is to have multi-party arbitrations covering all parties to a large project, this can only be achieved through careful drafting of the contractual documentation, or through the use of arbitration rules that make specific provision for the joinder of parties.
- *Parallel proceedings*. The courts are reluctant to allow litigation where a similar dispute is already pending before another court (whether in the same country or elsewhere). However, because arbitration arises from the arbitration agreement in a specific contract, parties can run the risk of multiple arbitrations if there is a series of linked, but different, contracts between the same parties in respect of the same project. In particular, the recent growth in the number of bilateral investment treaty arbitrations means that a party could be faced with the prospect of defending a number of arbitrations arising out of the same facts, but different contractual relationships, resulting in the possibility of inconsistent findings.

5.4. The arbitration clause

The arbitration clause is the basis of the agreement of the parties to refer disputes to arbitration, and it is important that the clause is properly drafted to ensure that it operates in the manner in which the parties intended. One of the first steps in establishing how an arbitration is to proceed is to decide whether the arbitration should be carried out under a set of institutional rules, or by an '*ad hoc*' arrangement between the parties.

5.4.1 Institutional arbitration

There are many established institutions whose arbitration rules have developed over a considerable period of time and address all the issues likely to be encountered in the conduct of an arbitration. Among the more common institutions are

- the International Court of Arbitration based in Paris (ICC)
- the London Court of International Arbitration based in London (LCIA)
- the Stockholm Chamber of Commerce (SCC)
- the American Arbitration Association (AAA)
- the International Centre for Settlement of Investment Disputes (ICSID).

Each one has its own set of rules, and the great advantage of using these rules is that the administration of the arbitration is carried out by the institution. Therefore, the scope for disputes regarding the procedure are reduced, ensuring that a tribunal is appointed relatively quickly and efficiently. (These rules are also of international application, and are addressed in further detail in Chapter 10.) However, the fact that the institution discharges the administration means that this form of arbitration is generally more expensive.

5.4.2 *Ad hoc* arbitration

Rather than have an institutionally supervised arbitration, the parties can agree on a set of procedural rules, and manage the arbitration themselves.

The most commonly adopted set of procedural rules are those of the United Nations Commission on International Trade Law (UNCITRAL) of 1976. The rules were specifically designed for use across the world in *ad hoc* arbitrations and provide a perfectly adequate procedure to allow an arbitration to progress successfully. However, it is important to note that there is no default appointing authority, and therefore any party considering using these rules should nominate an appointing authority, which will then appoint the tribunal if the parties cannot agree. (Possible appointing authorities include the Institution of Civil Engineers, the Institution of Chemical Engineers, or the Institution of Electrical Engineers.)

In addition, the various engineering institutions also have their own sets of rules which are appropriate for disputes in particular disciplines, such as

- the Institution of Chemical Engineers ('The Pink Book')
- the Institution of Civil Engineers (Arbitration Procedure 1997)
- the Construction Industry Model Arbitration (CIMA) Rules.

5.4.3 Arbitration clause

Each of the arbitration institutions and the standard forms of contract recommend an appropriate form of wording, which should be used. However, the following considerations should be taken into account when finalising the exact form of the arbitration agreement.

- Parties should always consider exactly what disputes they want to refer to arbitration and ensure that the clause is sufficiently wide to ensure that all disputes are properly referable to arbitration.

- Consideration must be given to a number of arbitrators. For smaller disputes, a sole arbitrator is normally sufficient. For larger or more complex disputes, a tribunal of three arbitrators is normal (for obvious reasons, it is best to have an odd number of arbitrators).
- The commonly used arbitration rules provide a comprehensive code for the appointment of arbitrators, including default provisions in the event that the parties cannot agree. If the parties wish an arbitrator to have certain professional attributes, this should be specifically stated. For example, 'a Chartered Engineer with at least 15 years experience in the oil and gas industry'.
- The place (or 'seat') of arbitration should be expressly stated. The place of arbitration has important ramifications for both the procedural law applicable to the arbitration (in England, the Arbitration Act of 1996) and enforcement of the award (which should generally be a New York convention country).
- Consideration should be given to the potential for multi-party arbitrations and the need to make provision for the joinder of parties, whether through the arbitration agreement itself or by the selection of appropriate arbitration rules that make provision for joinder.
- For international disputes, it is important to state the language of arbitration, in order to avoid the need for unnecessary duplication and translation of documentary and witness evidence.
- In some jurisdictions, such as England, there is a limited right of appeal to the courts which can be waived by the parties. Many of the institutional rules (e.g. ICC and LCIA) automatically waive that right of appeal, and the parties should decide whether they wish that to be the case or not.
- Finally, consideration must be given as to whether there are any particular mandatory requirements of the governing law of the place (or seat) of arbitration which need to be incorporated into the rules. Overseas contracts are often entered into with government departments or entities, so it is important to ensure that advice is taken on the effect of any state immunities or privileges that are enjoyed by such governmental bodies.

5.5. Commencing an arbitration

In litigation, a matter is commenced when a party issues a claim form in the relevant court upon payment of an appropriate fee (see Chapter 4). An arbitration is commenced when one party issues a relevant notice of arbitration. This notice is important for three reasons.

- It defines the scope of the dispute between the parties and the matters which are to be referred to arbitration. It is therefore advisable to ensure that the notice of arbitration is drafted in wide terms so that all potential claims which a party might wish to make within the arbitration are included within the reference.
- It is important for limitation purposes, which are legal time bars that prevent a party from making claims after the expiration of a defined period of time. For example, under English law, the limitation period for breach of contract is usually 6 years from the date of the breach of contract. The date upon which an arbitration is commenced stops the clock and is, therefore, of crucial importance if a party is close to the expiry of the relevant limitation period.

- If the notice of arbitration is improperly drafted, it might allow the defendant to avoid the reference to arbitration. While such defects can often be cured by the serving of a compliant notice of arbitration, this is not possible if a limitation period has in the meantime expired. It is therefore important to ensure that a notice of arbitration is carefully and accurately drafted.

In order to decide how to commence an arbitration, a party should first refer to the terms of the contract and, in particular, the procedural rules applicable. Many of the institutional rules (e.g. the ICC and LCIA) prescribe the procedure that the parties must follow in order to commence an arbitration, and specify when a matter is commenced for limitation purposes. (For an example ICC notice of arbitration see Box 10.11 in Chapter 10.)

In the absence of a prescribed procedure, an arbitration under English law (in accordance with the Arbitration Act of 1996) is commenced by one party serving a notice of dispute on the other party and inviting the respondent to concur in the appointment of an arbitrator. An example letter before action and notice of arbitration are set out in Boxes 5.1 and 5.2.

Box 5.1 Model letter before action

Dear Sir

New Delhi Power Station Project

1. We are solicitors instructed by the Bavarian Power Company Ltd, the contractor engaged by your client (New Delhi Electricity Ltd) to supply, install and commission a new 240 megawatt generator in your client's existing power station.
2. The Contract between the parties is an amended version of the MF/1 Model Form of Contract for the supply of electrical or mechanical plant, with erection, produced by the Institution of Electrical Engineers and the Institution of Mechanical Engineers. By clause 40.1 here of your client, the Purchaser under the Contract, is obliged to pay our client, the Contractor, the sum certified as due in a Certificate of Payment within 30 days after the date of issue thereof. We are instructed that Certificate No. 10 was issued and dated on 1 February 2005 but that your client has failed to pay the certified sum of US$100,000, notwithstanding that the prescribed payment period of 30 days has now long since passed.
3. Accordingly, we hereby give you notice that if your client fails to make payment immediately (and in any event by no later than 8 April 2005) in accordance with the said clause 40, our client will be obliged to commence arbitration proceedings to recover the sums due.
4. Please acknowledge safe receipt of this letter.

Yours etc.

Box 5.2 Model arbitration notice

Dear Sir

Arbitration Notice: Bavarian Power Company Ltd v. New Delhi Electricity Ltd

1. Please refer to our earlier letter before action, dated 1 April 2005. In that letter we gave your client notice that if they failed to honour the payment provision in clause 40.1 of the MF/1 Model Form of Contract (Rev. 4), 2000 Edition, produced by the IEE/IMechE, our client would be obliged to commence arbitration proceedings to recover the sums owing.
2. Since we and our client have received no response at all to the previous letter, please note that this letter is intended to constitute an Arbitration Notice for the purposes of clause 52.1 of the said Contract. For the avoidance of doubt, the dispute or difference which has arisen between the Purchaser (your client) and the Contractor (our client) is the failure by your client, in breach of Contract, to make payment, pursuant to clause 40.1, of the sum certified in Certificate No. 10 dated 1 February 2005, within 30 days of the date of issue thereof. Your client's failure continues, notwithstanding that the said 30 days payment period expired more than 2 months ago.
3. Accordingly, by this letter the said dispute or difference is hereby referred to arbitration by a person to be agreed upon. Failing agreement upon such person within 30 days after the date of this Notice, the arbitration shall be conducted by some person appointed on the application of either party by the President of the institution named in the appendix (namely: the Institution of Electrical Engineers, London).
4. In order to secure agreement with you as regards the identity of the proposed arbitrator, we now propose the following three persons for you to choose one. Alternatively please propose your own list of three names.
   (i) John Smith, FIEE, of [address];
   (ii) Alex Brown, of [address]; and
   (iii) Peter Green, FIMechE, of [address].
5. Bearing in mind that clause 52.1 provides only 30 days for securing agreement upon the identity of an arbitrator, we would ask for your response to the above proposals within 7 days of the date of this letter. Further and in any event, we would ask for your immediate confirmation of safe receipt of this letter, which is being sent by recorded delivery.

Yours etc.

5.6. Multi-party claims

Where disputes arise under a contract between two parties, the commencement and progress of an arbitration is relatively straightforward. However, construction projects often involve many parties with, typically, an employer, main contractor and numerous

subcontractors (and often numerous sub-subcontractors and subsuppliers). Where there are a number of parties and contracts, but all relating to the same project, it is sensible to execute a separate umbrella arbitration agreement allowing consolidation of disputes. Having a dispute determined by a single tribunal is beneficial in terms of cost and time efficiency, and also eliminates the risk of inconsistent findings.

5.7. Choosing an arbitration tribunal

The number of arbitrators is normally specified in the arbitration clause in the contract. If a contract is silent, the parties will need to consider whether they wish to have the dispute determined by a sole arbitrator or a tribunal (usually of three). In making that decision, the following points are relevant.

- Under most institutional rules, the preference is for a sole arbitrator unless the dispute is complex or of sufficient value to warrant a tribunal (in general, a dispute of more than £1 000 000 would warrant a tribunal).
- There is no reason in principle why even a high value and complex dispute cannot be decided by a sole arbitrator. Nevertheless, parties often perceive that a tribunal containing three members will give them a more balanced award.
- An arbitration before a tribunal is likely to take longer than before a sole arbitrator, simply because of the need for the members of the tribunal to meet at periodic intervals to discuss the dispute and the need to coordinate three diaries for hearing dates with the parties.
- For obvious reasons, a tribunal will be more expensive than a sole arbitrator and is therefore better suited to high value disputes where the tribunal's fees will be low in comparison to the overall sums in dispute.

5.8. Conducting an arbitration

As arbitration is flexible and informal. It is very much up to the parties and the tribunal to decide how to conduct the arbitration. Section 33 of the Arbitration Act 1996 sets out the general duty of the tribunal, and provides that it shall

- act fairly and impartially between the parties, giving each party a reasonable opportunity of putting its case and dealing with that of its opponent; and
- adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matter to be determined.

Subject to that general duty, the tribunal has a wide discretion to decide upon all procedural and evidential matters and to fix the timetable for the dispute.

One of the first steps in many arbitrations is for the tribunal to convene a procedural hearing in which the parties discuss the matters in dispute, the timetable, the extent of the documentation and the need for witness evidence. The parties are often able to agree upon many of these matters, but in the event of disagreement it is for the tribunal to determine and fix the most appropriate procedure. While every arbitration is different, the typical stages leading up to a hearing are set out below.

5.8.1 Written submissions

The notice of arbitration is usually very brief and sets out in general terms the matters in dispute. It will therefore be necessary for parties to provide detailed written submissions outlining both the factual and legal basis of their respective positions. In litigation, these submissions are referred to as 'pleadings', and would be restricted to the essential legal and factual matters in dispute. In arbitration, submissions are typically more detailed, setting out the background to the dispute, the factual and legal issues, together with extracts from relevant documentation, which are often appended to the submissions themselves. In other words, the written submissions in arbitration are often intended to set out the entirety of one party's case.

While the tribunal will give guidance as to the scope and extent of the submissions, a typical exchange would be as follows

- claimant – statement of case
- respondent – defence and counterclaim
- claimant – reply and defence to counterclaim
- respondent – reply to defence to counterclaim.

5.8.2 Documents

In litigation before the English courts, the parties have an obligation to provide the other party with copies of all documents relevant to the issues in dispute, a process referred to as 'disclosure' (for further details see Chapter 4). In arbitration, the process of document disclosure is entirely different and, in many cases, misunderstood.

A common misconception is that by choosing to arbitrate a dispute in London, both parties will be entitled to extensive disclosure from the other party in a similar way that parties are entitled to disclosure in English court litigation. That is, however, not the case. It is entirely a matter for a tribunal to decide all evidential matters, including whether any, and if so which, documents or classes of documents should be disclosed (Section 34(2)(d) of the Arbitration Act 1996). Therefore, the scope of the disclosure obligation on the parties will be determined by the tribunal, which underlines the importance of taking care in choosing the members of the tribunal. While it is often the case that a tribunal of English lawyers will be more amenable to a wide disclosure of documents in arbitration, that is not always the case. If a party wishes to have the right to extensive disclosure, it should do so by providing an express right in the arbitration clause in the contract.

5.8.3 Factual witnesses

Virtually all disputes require witness evidence to bridge the gaps in the contemporaneous documentation and to set the whole dispute in context. Where particular agreements or discussions are not set out in correspondence, it is essential that the relevant witnesses give evidence as to what was said or done so that the tribunal can reach a decision.

5.8.4 Expert witnesses

Construction disputes often concern complex technical issues. These can include

determining whether a particular design is wrong, whether the standard of workmanship is inadequate, and identifying responsibility for defects in the completed works.

For these reasons, it is very common in arbitrations for the parties to appoint their own experts, who provide reports and opinions on the technical matters in dispute. The purpose of these reports is to assist the tribunal in understanding the issues and reaching a decision on culpability. While experts are appointed and paid by each respective party, their overriding duty is to the tribunal, and their reports should provide an impartial and independent opinion on the matters in dispute. In many cases, the entire dispute can turn on a specific technical issue, and the choice of expert can be absolutely crucial.

In addition, a tribunal might appoint its own expert. This can happen when the parties do not think that the matters in dispute justify the appointment of separate experts, or where the tribunal feels that it needs help in understanding and distinguishing between two competing expert reports. While tribunal-appointed experts can often be of invaluable assistance, care must be taken to ensure that the expert is not another unnecessary cost, which does not help to narrow the issues or resolve the underlying dispute.

5.8.5 Typical arbitration timetable

Every arbitration is different. The timetable will depend on the views of the tribunal, the conduct of the parties, the complexity of the matters in dispute and the time needed for the parties to develop their cases and be ready for a hearing. Nevertheless, a typical timetable for a large and complex construction dispute requiring factual and expert witness evidence is set out in Box 5.3.

A large and complex construction dispute can take between $1\frac{1}{2}$ and 2 years to resolve. Conversely, many smaller arbitrations are resolved in a matter of months, especially where there is limited documentary and expert evidence. The parties can also agree to dispose of certain matters without the need for an oral hearing, and can place restrictions on both the length and scope of witness evidence. As the parties have agreed to a private

Box 5.3 A typical timetable for a large and complex construction dispute requiring factual and expert witness evidence

Procedural hearing:	Month 1
Claimant's statement of case:	Month 3
Respondent's defence and counterclaim:	Month 5
Claimant's reply and defence to counterclaim:	Month 6
Respondent's reply to defence to counterclaim:	Month 7
Discovery of documents:	Month 9
Exchange of witness statements:	Month 12
Exchange of expert's reports:	Month 14
Hearing:	Month 18
Award:	Months 20–24

form of dispute resolution, it is up to the parties to follow a procedure that they both want, and at the speed that they want.

5.8.6 Ancillary relief

It is not uncommon for one of the parties to make applications to the tribunal for interim or ancillary relief. This can take many forms, but typically might be for

- security for costs
- injunctive relief
- ordering samples to be taken or experiments to be carried out
- provisional orders for the payment of money.

Often, a reluctant respondent will seek to utilise some or all of the above items in an effort to slow down the progress of the arbitration and avoid an award against it. An experienced tribunal is normally alive to such tactical ploys and would ensure that the progress of the arbitration is not unduly delayed.

5.9. The arbitration hearing

At the hearing the parties make oral submissions, witnesses and experts are cross-examined, and the tribunal can raise issues that it wants to have resolved. It allows each party to have 'its day in court'. However, an oral hearing is not always necessary nor appropriate, and consideration should be given as to whether there are more cost-effective ways of resolving the dispute.

Section 34(2)(h) of the Arbitration Act 1996 gives the tribunal a discretion to decide if and to what extent there should be oral evidence or submissions. As a general rule, where there is contested factual evidence of what was said or done, it will be necessary to have a hearing to allow the tribunal to judge the veracity of the witnesses and ascertain the true position. However, as many construction and engineering disputes do not depend on factual evidence, there are other ways of determining the dispute without the need for a hearing:

- The tribunal could decide a dispute based on documents only. This approach might be appropriate when there is a dispute as to the scope of works set out in a specification attached to a contract, which the tribunal can determine based on a review of the specification alone.
- In disputes concerning defective work, it might well be sufficient for the tribunal to carry out a site visit, inspect the works for itself and reach its decision based on that inspection.
- Where a dispute concerns expert evidence, it is helpful for the experts to meet on a 'without prejudice' basis to try to narrow the issues between them, so that any hearing is limited to the remaining core matters in dispute between the parties and upon which the experts do not agree.

As the hearing is the most expensive part of the whole arbitration process, it is prudent and sensible to consider appropriate steps to limit both the length and scope of the hearing.

5.9.1 Preparation

The hearing is the culmination of many months or even years of work, and the key to a successful hearing is preparation, thereby ensuring that the best possible use is made of the hearing time available.

In litigation, the building and facilities are provided and allocated by the court. In arbitration, everything has to be arranged by the parties or the tribunal, which can take a considerable time, especially in circumstances where one party is reluctant to agree to anything that incurs additional costs. Anyone organising an arbitration hearing should consider the following points:

- A venue needs to be agreed and booked, which must include a room of sufficient capacity to hold the tribunal, representatives from both parties, together with witnesses, experts and documents.
- The place of arbitration is usually neutral to both parties, and therefore consideration needs to be given for retiring rooms where each party can discuss the matter confidentially and prepare submissions or documents.
- It is common in complex arbitrations for a transcriber to be available to take a record of everything that is said during the course of the hearing, which is then typed up into a written document.
- The parties should agree upon a core bundle, which is essentially a series of files containing all the key documents that the parties propose to rely on at the hearing. A clean copy of the core bundle will need to be provided for the witnesses giving evidence.

In respect of all these items, it is important to ensure that the basis upon which arrangements are made is clearly defined and cost responsibility agreed. Typically, the parties would agree to share the costs on a 50/50 basis until the tribunal has issued its award, with any costs reallocated as appropriate.

5.9.2 Opening submissions

It is common for the parties to provide opening submissions at the beginning of a hearing. These can take the form of either written submissions sent to the tribunal prior to the hearing, or oral submissions made by each party at the hearing itself. The purpose of these submissions is to introduce and set out each party's case based on the documentary, factual and witness evidence already before the tribunal, so that the tribunal is able to focus on the key issues in dispute.

5.9.3 Hearing timetable

Arbitrators are busy practitioners and will only allocate a specific period of time for a hearing or, in some cases, have the trial in several tranches. In both cases, it is up to the parties as to how to allocate the time so that it is usefully used.

5.9.4 Closing submissions

Closing submissions draw together each party's case and include the oral evidence obtained from the hearing. They are the last opportunity that both parties will have to

make any points to the tribunal, but should not raise any new issues that have not already been addressed during the course of the hearing. As there is often a considerable amount of oral evidence at the hearing, there is a tendency for written closing submissions to be extremely long, especially where a transcript of the hearing is available. It is therefore not uncommon for tribunals to restrict the length of written closing submissions.

5.10. The arbitration award

A distinction should be drawn between the orders and directions of the tribunal adopted during the course of the arbitration, which address procedural matters, and an award, which is a final determination of a particular issue in dispute in the arbitration. This distinction is important because, under the Arbitration Act 1996, it is possible to challenge or appeal an award to the courts, but not procedural orders or directions.

5.10.1 Final award

The purpose of the tribunal's final award is to determine all the issues in dispute in the arbitration and provide a complete decision which can be enforced without the need for further steps by the parties. Once the final award has been issued and there are no further matters to be decided, the tribunal's jurisdiction comes to an end and it is said to be *functus officio*. The tribunal thereafter has no further power to hear the parties (except in a number of restricted circumstances, described below).

In accordance with Section 58(1) of the Arbitration Act 1996, the award made by the tribunal is (unless otherwise agreed by the parties) final and binding. It is therefore conclusive in respects of the matters in dispute and, unless there is a successful challenge, can be enforced by either of the parties.

Although it is important for most parties to obtain a timely decision, there are no specific time limits by which tribunals should issue their awards. Article 24 of the ICC Rules specifies a time limit of 6 months for final award from the signature of the terms of reference, but the tribunal is entitled to extend that time limit (which is more often the case than not). The parties are therefore reliant upon the diligence of the tribunal to produce a timely final award, which underlines the importance of selecting an appropriate tribunal at the start of the dispute.

5.10.2 Interest

Disputes are usually not referred to arbitration until well after a project is finished, and it may then take 1–2 years for a final award to be made, resulting in one of the parties being kept out of its money for a considerable period of time. The tribunal is given power under Section 49 of the Arbitration Act 1996 to award interest (subject to any contrary agreement by the parties). In particular, the tribunal can award simple or compound interest, from such dates and at such rates as it considers meets the justice of the case. The tribunal therefore has a fairly wide power to award interest, both in terms of the rate and the period. However, it must be remembered that interest should only compensate the winning party for having been kept out of its money, and not be a penal measure designed to punish the losing party.

The contract often provides a rate of interest, or alternatively the tribunal might adopt the prevailing bank rates or court rates over the relevant period. In some cases, it might be necessary for one party to demonstrate the actual cost of not having been awarded and paid the sum earlier by reference to its annual accounts and cost of borrowing.

5.11. Costs

The parties can ask the tribunal to award costs or refer the question of costs to the court for determination. The costs are defined as

- the arbitrator's fees and expenses
- the fees and expenses of any arbitral institution concerned
- the legal or other costs to the parties.

The first two categories are self-explanatory, but the third category is potentially very wide. This category includes all costs reasonably and properly incurred by either party in presenting a case throughout the entirety of the arbitration proceedings (e.g. legal costs, expert fees, and other advisers engaged to assist with the preparation or conduct of the case). It is not uncommon for parties to seek to recover internal management costs on the basis that their employees would have been engaged in other productive work were it not for the need to spend time preparing for and assisting with the conduct of the arbitration.

The English-style approach that costs follow the event is preserved by the Arbitration Act 1996 (Section 61), which allows the tribunal to make an award allocating the costs of the arbitration between the parties and (unless the parties otherwise agree) on the general principle that cost follows the event.

The costs of the arbitration can easily exceed the sum in dispute, and consideration should therefore be given at an early stage to protect the party's costs position. There are a number of ways in which this can be done, but the parties should consider

- persuading the tribunal to exercise its discretion to limit the amount of recoverable costs in advance of the arbitration process (Section 65 of the Arbitration Act 1996)
- putting in what is called a 'sealed offer', which is the equivalent of making a payment into court. A sealed offer is usually stated to be expressed 'without prejudice save as to costs', and will make an offer to settle the matter for a certain sum. If a claimant fails to beat that sum, the defendant is entitled to its costs in any event.

The traditional approach of the courts to costs has been fairly restrictive, with the parties expecting to recover only 60–65% of their legal costs, with often little (if any) recovery for internal management costs. The Arbitration Act 1996 provides a much greater discretion to both the tribunal and the courts to determine the level costs on such basis as it thinks fit. There is a growing tendency for tribunals to take account of the concept of proportionality, whereby costs are only considered to be reasonable if they are proportionate to the sums in dispute and the efforts necessary to conduct the

arbitration an efficient manner. Nevertheless, many arbitrators come from a commercial background and are familiar with the realities of funding and conducting litigation. Arbitrators therefore tend to be more generous in awarding the winning party its costs than might otherwise be the case if the matter was referred to detailed scrutiny by the courts.

5.12. Challenging arbitration awards

Once the tribunal has issued its final award it becomes *functus officio*, with the result that the reference terminates and its authority is brought to an end. The award is final and binding, and can be enforced by any party through the courts in the event of non-compliance.

There are, nevertheless, three limited grounds under which the parties can seek to challenge the terms of the final award.

5.12.1 The slip rule

The tribunal has a limited residual power to correct its final award if there is a clerical mistake or error arising from an accidental slip or omission or if it needs to clarify or remove any ambiguity (unless the parties have agreed otherwise – Section 57 of the Arbitration Act 1996). While many parties regularly attempt to use the slip rule to seek to persuade a tribunal to change its award entirely, the scope of the slip rule is limited to three particular situations

- a clerical error, which often occurs when a tribunal makes an arithmetical mistake in adding up a series of numbers in a column
- an error arising from an accidental slip or omission, which includes the situation whereby something was left out by accident or incorrectly inserted by the tribunal
- to enable the tribunal to clarify or remove an ambiguity in its award – this would not involve making any change to the award itself, but rather clarifying what it meant by a particular phrase or term in the award.

Essentially, the rule allows the tribunal to correct minor slips or errors, but applications must generally be made within 28 days of the date of award and the slip rule is thus of only limited application.

5.12.2 Appeals

A party can try to appeal to the court on a question of law arising out of an arbitral award under Section 69 of the Arbitration Act 1996, although it should be noted that the right to appeal can be excluded by the parties by agreement and many of the institutional rules (including the ICC and LCIA rules) waive that right of appeal.

Even if there is no exclusion of the right to appeal, a party has to obtain the permission of the court to proceed with an appeal. That permission is only granted if the court is satisfied that

- the determination of the question will substantially affect the rights of one or more of the parties

- the question is one which the tribunal was asked to determine
- the basis of the findings of fact by the tribunal on the question is obviously wrong, or the question is one of general public importance and the decision of the tribunal is at least open to serious doubt
- it is just and proper in all the circumstances for the court to determine the question.

The practical reality of these provisions is that it is very difficult to persuade the court to grant a party permission to appeal an arbitration award on a question of law (the tribunal's findings of fact are conclusive and cannot be challenged). Appeals against arbitration awards issued in England are, understandably, rare.

5.12.3 Procedural irregularity

Finally, a party can apply to the court to challenge an award on the grounds of serious irregularity affecting the tribunal, the proceedings or the award, or where it is said that the tribunal had no substantive jurisdiction to determine the issues in dispute.

The right to challenge an award on the basis that there has been a serious irregularity in the arbitration process itself is really a safeguard. It is only exercised in extreme cases where the tribunal has made so serious a mistake in the conduct of the arbitration that the court should not stand by and let that injustice stand without correction. For the court to intervene (under Section 68 of the Arbitration Act 1996), the irregularity has to have caused or will cause substantial injustice to one of the parties. Grounds giving rise to serious irregularity include issues such as fraud, failure by the tribunal to deal with all the issues that were put to it, conduct being contrary to public policy, or the tribunal exceeding its powers.

The right to challenge an award for lack of substantive jurisdiction only arises once the tribunal has issued its final award, and is typically made on the basis that the arbitration agreement was invalid, or that the tribunal issued a decision in respect of matters that were not within the scope of the arbitration or the agreement to arbitrate. A challenge must be made promptly and a party can lose the right to object by taking part in the arbitration without making a timely objection (Section 67 of the Arbitration Act 1996).

5.13. Summary

Arbitration is a private form of dispute resolution which is an alternative procedure to public litigation in the courts. The private and confidential nature of arbitration makes it attractive to many commercial organisations as the preferred method for resolving their disputes, especially internationally where enforcement is important.

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Chapter 6
Adjudication

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6.1. Introduction

Adjudication is the dispute resolution process that construction practitioners are most likely to come across during the course of a project. It is typically a time- and cost-limited procedure aimed at delivering certainty on a particular point disputed by the parties, often concerning cash flow and usually of temporary binding effect, leaving open the possibility of subsequent debate in a more deliberative and thorough manner at a later stage by way of arbitration or litigation. Often described as a 'pay now, argue later' process, adjudication is intended to resolve these disputes quickly in order to allow the parties to get on with the work. A characteristic of adjudication is that the decision of the issue in dispute is made by a third party who is usually not involved in the day-to-day operation of the contract, nor is an arbitrator or a judge.

Adjudication has long been part of the panoply of alternative dispute resolution procedures available to parties to construction contracts, but until recent years was far from universal and, if the case law that refers to it is anything to go by, was not greatly used. Where adopted by the parties it was by express agreement in writing and contained an *ad hoc* set of rules that differed from contract to contract. A decision reached by an adjudicator was then given whatever effect had previously been agreed by the parties in the contract, whether to be a final and binding decision or of temporary effect only. The precise effect of the adjudicator's decision, the procedure to be adopted, the appointment of the adjudicator and the costs of the adjudication were all something that had to be agreed by the parties prior to contract. Contractual adjudication found a place in some standard forms of building contract, such as the JCT Standard Form of Building Contract with Contractor's Design 1981 as amended in 1988, by which adjudication was introduced by the provision of Supplementary Provisions. Provision for adjudication was, however, relatively unusual and it was not until the coming into force of the Housing Grants, Construction and Regeneration Act 1996 (referred to below as the Construction Act) that adjudication became commonplace. Since then knowledge of adjudication and how it can be used by a party to a construction contract is essential for any construction professional playing a certifying, advisory or commercial role in a construction contract.

6.2. The Construction Act and the Scheme

The provision of statutory or compulsory adjudication together with other substantive measures by the Construction Act was the government's response to a perception that contractors in the construction industry needed a legislative helping hand in avoiding

the problems associated with difficulties with cash flow which, in particular, was causing so many of them to fold prematurely. There was a perception that many employers (developers, financiers, main contractors) were using their superior commercial power to process payment applications slowly or even withhold sums otherwise properly due until they themselves were paid. The provisions of the Construction Act were aimed at limiting those cash flow difficulties by, for example, banning 'pay when paid' clauses and by statutory implication providing for adjudication as a dispute resolution procedure in every construction contract.

A useful description of statutory adjudication was given by the judge who presided over the first case concerning adjudication which came to court, Judge Dyson (*Macob Civil Engineering Ltd. v. Morrison Construction Ltd.* [1999] BLR at paragraph 24):

> The intention of Parliament in enacting the Act was plain. It was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decision of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement ... The timetable for adjudications is very tight ... Many would say unreasonably tight, and likely to result in injustice. Parliament must be taken to have been aware of this. So far as procedure is concerned, the adjudicator is given a fairly free hand. It is true (but hardly surprising) that he is required to act impartially ... He is, however, permitted to take the initiative in ascertaining the facts and the law ... He may therefore, conduct an entirely inquisitorial process, or he may, as in the present case, invite representations from the parties. It is clear that Parliament intended that the adjudication should be conducted in a manner which those familiar with the grinding detail of the traditional approach to the resolution of construction disputes apparently find difficult to accept. But Parliament has not abolished arbitration and litigation of construction disputes. It has merely introduced an intervening provisional stage in the dispute resolution process. Crucially, it has made it clear that the decisions of adjudicators are binding and are to be complied with until the dispute is finally resolved.

The introduction of statutory adjudication marked a sea-change in how parties to construction contracts resolve matters in dispute between them. However, it has not been perceived as being without problems, and in 2004 the government announced a review of the Construction Act. The review resulted in the Local Democracy, Economic Development and Construction Act 2009 (hereafter 'the New Construction Act'), which is due to come into force in the Autumn of 2011. Both the existing working and the intended changes are outlined below.

6.3. Application of statutory adjudication

Statutory adjudication applies to construction contracts in England, Wales and Scotland as defined in Sections 104 and 105 of the Construction Act. There are some limitations to the application of statutory adjudication: it does not apply to every contract under which construction activities are to take place.

Construction contracts to which the Construction Act and statutory adjudication apply include contracts for the carrying out of construction operations or the arranging for the carrying out of construction operations. It also includes contracts to do architectural,

design or surveying work, or to provide advice on building, engineering, interior or exterior decoration or the layout of landscape, as long as these are in relation to construction operations. Specifically excluded from the ambit of the Construction Act are contracts where the work is for the extraction of oil, gas or minerals, most work associated with the assembly, installation or demolition of plant or machinery on sites where the primary activity is nuclear processing, power generation, water or effluent treatment, production and processing of chemicals, pharmaceuticals, oil, gas, steel or food and drink. Also excluded are the simple manufacture and supply of materials, plant or machinery. Simple sale of goods contracts do not fall within the Construction Act. Similarly, where the contract is with a residential occupier, the provisions of the Construction Act do not apply. These are the main exclusions; however, the Construction Act should be checked for a comprehensive list of the excluded activities.

At the time of writing, in order for statutory adjudication to apply, the construction contract must be in writing or evidenced in writing (Section 107(2)). This is quite a technical matter and the precise extent of the requirement for writing has been the subject of debate before the courts. That was settled by the Court of Appeal (*RJT Consulting Engineers Ltd. v. DM Engineering (Northern Ireland) Ltd.* [2002] 1 WLR 2344), in which Lord Justice Ward said:

> ... what has to be evidenced in writing is, literally, the agreement, which means all of it, not part of it.

The requirement for writing will, however, change when the New Construction Act comes into force, as it repeals Section 107. This will mean a wider range of construction- and engineering-related contracts will come under the ambit of statutory adjudication, particularly including contracts agreed orally. This change will increase the demands on adjudicators as it will likely increase the number of disputes going to adjudication about the existence and terms of an alleged contract.

The key characteristic of adjudication provided for under the Construction Act is that any party to a construction contract may refer a dispute arising under the contract for adjudication at any time. This and other aspects of statutory adjudication are not possible to contract out of: the contract must provide for adjudication at any time. In other words no conditions may be placed in a construction contract as to when a party may seek an adjudicator's decision on a point in dispute. Any contract terms that state that there is a requirement for the parties to mediate or have a meeting of directors before they have a right to refer a matter to adjudication will be of no effect. This principle has been extended to cover any requirement that one party must pay the costs of an adjudication, whether successful or not, because such a term is seen as fettering that party's right to refer to adjudication and must be treated as of no effect (*Yuanda (UK) Co. Ltd. v. WW Gear Construction Ltd.* [2010] BLR 435). This development in the case law is reflected in a provision in the New Construction Act, which provides for a new Section 108A expressly rendering all such clauses ineffective.

The Construction Act also provides for other mandatory provisions concerning adjudication which, if any of them are absent from the written terms of the contract,

the adjudication provisions of the Scheme for Construction Contracts apply (hereafter 'the Scheme'). The Scheme is a set of regulations that was issued shortly after the Construction Act received Royal Assent. The provisions of the Scheme replace wholesale the non-conforming adjudication provisions provided in the contract. A new set of regulations to reflect and build upon the amendments in the New Construction Act has been formally consulted upon and are expected to be published in Autumn 2011. To avoid the imposition of the Scheme the contract must provide for access to adjudication at any time and:

- Provide for the appointment of an adjudicator and receipt by the adjudicator of a referral notice (which is a document containing details of the claim (described in more detail below)) within 7 days of the claiming party, usually referred to as the 'referring party', giving the other party, usually referred to as the 'responding party', notice of their intention to refer a dispute to adjudication.
- Require that the adjudicator should reach a decision within 28 days of referral, to be capable of extension for up to 14 days with the agreement of just the referring party and the adjudicator. (It is worth noting that this timetable is markedly short for those familiar with the lengthy processes of orthodox construction dispute resolution. This has the great benefit to the parties of limiting the costs to be paid to lawyers, claims consultants and experts. It is, however, perhaps absurdly short for a dispute concerning a complex delay and disruption or final account claim which has arisen over a substantial period of time. It is always open for the parties and the adjudicator in given cases to agree to extend time for as long as they all wish.)
- Provide that the adjudicator acts impartially – the rules of natural justice apply to the extent permitted by the statutorily limited timetable.
- Provide that the adjudicator may take the initiative in ascertaining the facts and the law – in other words, the adjudicator chooses and directs the procedure to be adopted subject to the general framework provided by the Construction Act.
- Provide for the adjudicator to be immune from any subsequent claim made against him or her for any act or omission in the conduct of the adjudication unless done in bad faith.
- Require that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration or by agreement.

This last point is the one that gives statutory adjudication its teeth and is the reason why adjudication must be taken seriously by all parties. The courts have been rigorous in enforcing the decisions of adjudicators in accordance with this requirement, whether or not they agreed with the adjudicator's factual or legal reasoning or conclusions. The reason for this was explored by His Honour Judge Lloyd in his judgment in *Outwing v. Randall* [1999] BLR 156 at 160:

> Parliament intended that adjudicator's decisions and orders, if not complied with, were to be enforced without delay. It is clear that the purpose of the Act is that disputes are resolved quickly and effectively and then put to one side and revived, if at all, in litigation or arbitration the hope being that the decision of the adjudicator might be accepted or form the basis of a compromise or might usefully inform the parties as to the possible reaction of the ultimate tribunal.

An adjudication decision will be enforceable irrespective of challenges to the merits or underlying validity of the adjudicator's decision. Effectively there is no right of appeal to an adjudication decision. In practice it is notable that there is seldom litigation or arbitration on matters which have already been adjudicated. This is probably for reasons of the cost of carrying out further dispute resolution procedures as much as anything else. Adjudication is therefore a powerful tool for a party who is properly geared up for the rigours of what is a swift, rough-and-ready dispute resolution procedure.

Whether in assisting an employer or contractor in putting forward a claim in adjudication or in helping a party in responding to a claim in adjudication, knowledge and understanding of adjudication is an area where a construction professional can provide real additional value in the service given to the employer.

6.4. The technical use of adjudication

Engineers or other professionals advising employers or developers should be particularly careful about the technical use of adjudication by a contractor or subcontractors using other provisions in the Construction Act as to when sums are deemed payable to secure payment of those sums irrespective of the presence of set-offs or counterclaims (e.g. defects in the works). Disputes put to an adjudicator for decision can be carefully identified and circumscribed by the referring contractor so as to preclude any effective substantial defence by the responding employer. This is sometimes described, for obvious reasons, as an 'ambush'.

To understand how an ambush adjudication may occur it is necessary to refer to other statutorily implied contract terms arising from the Construction Act, particularly those relating to payment. It is worth noting that this is an area which is subject to amendment upon the bringing into force of the New Construction Act; a short explanation of the relevant changes follows.

6.4.1 Instalments

Apart from short-term construction contracts, of less than 45 days duration, the Construction Act requires that a contractor is entitled to payment by instalments. The employer and contractor are free to agree the amounts of the payments and the intervals at which, or circumstances in which, they become due. However, in the absence of such agreement the relevant provisions of the Scheme apply.

Where the parties have failed to agree the intervals by which instalments should be paid the Scheme provides that a stage payment becomes due simply on the making of a claim by the contractor. This can, of course, cause an employer great cash-flow difficulties, so a consultant advising an employer prior to agreement of a contract should always advise the employer to agree the intervals at which payments are to be made and normally that they be lengthy periods.

The Construction Act further provides that every construction contract shall provide a final date for payment in relation to any sum that becomes due. The employer and contractor are also free to agree the final date for payment. In the absence of such

agreement, the Scheme again steps in, requiring payment to be made, at the latest, 17 days from the date the payment becomes due. In other words, where the parties have failed to agree any provisions as to payment instalments a sum claimed by a contractor can be finally due just 17 days after simply making a claim. A consultant advising prior to contract may be wise to suggest to the employer to include in the contract a longer period for the final date for payment.

There are also provisions as to when the final instalment falls due, namely, the later of 30 days following completion of the work or the making of a claim by the contractor. Again, in all probability the employer will be better advised to agree up-front a longer period or breathing space before payment of the final instalment in order properly to assess the quality of the contractor's work and ensure that the provisions for retention, if any, are fully integrated with the provision for final payment.

The provisions for instalment payments, and in particular the final dates for payment, may well change with the publication of a new Scheme and the coming into force of the New Construction Act, and the new Scheme should be checked before any action is taken. The draft proposals, however, suggest no significant change in the provisions for instalments, as opposed to the provisions for notices which are substantially changed.

6.4.2 Notices

The Construction Act also requires an employer to respond actively and promptly to claims made by contractors, and imposes a system of notices on an employer. The employer should be live to the very quick responses required by the Construction Act.

First, the Construction Act provides that the employer should provide what has become known as a 'Section 110 Notice' to the contractor not later than 5 days from when the payment in relation to a particular claim becomes due. The Section 110 Notice should set out how much the employer proposes to pay and the basis upon which the amount is calculated.

Secondly, and more importantly, if the employer intends to withhold payments and not pay the whole of a contractor's application or claim, then he must serve within time what has become known as a 'Withholding Notice'. This is provided for in Section 111(1) of the Construction Act:

> A party to a construction contract may not withhold payment after the final date for payment of a sum due under the contract unless he has given an effective notice of intention to withhold payment.

To be effective this notice must specify the amount which is to be withheld and the ground or grounds for withholding payment. If more than one ground is cited the notice must also specify the amount of money attributable to each ground. A valid Withholding Notice must also be issued by the employer 'before the prescribed period', a period of time before the final date for payment. The parties are free to agree what the prescribed period is to be. Again, when advising the employer prior to

agreeing a construction contract the engineer should agree a short period prior to the final date for payment, otherwise the terms of the Scheme apply, which require that a Withholding Notice must be given not later than 7 days before the final date for payment.

The Section 110 Notice may double as a Withholding Notice as long as it contains the required detail. It is certainly simpler to advise the employer to consider what his position will be on payment well before the deadline for service of a Withholding Notice.

The most concerning aspect for an employer in a contract to which the Construction Act applies is that if no agreement about instalment payments or the notices mentioned above is made at the time of contracting it will be the case that just 10 days following the making of a claim, in the absence of a conforming Withholding Notice, the sum claimed by the contractor is simply due without the employer being permitted to make any set-off or counterclaim.

The New Construction Act replaces wholesale the scheme of Section 110 Notices and Withholding Notices. The aim of the reform is to give greater certainty as to what instalment payments are due and when. When it comes into force, the New Construction Act provides for a new Section 110A that will require that the contract must provide that the employer issues a notice specifying the sum to be paid (even if the sum is zero) not later than 5 days after an instalment due date. The notice must include not just the sum due, but also the basis upon which that sum is calculated. If the employer fails to issue a notice the contractor can issue a notice instead (Section 110B). That sum, which is referred to in either the notice by the employer or that by the contractor, becomes the Notified Sum. An employer may then issue a notice of intention to pay less than the Notified Sum (a Reduction Notice), but this must be given no later than the 'prescribed period' before the final date for payment. The new Scheme will set out the default prescribed period to be implied into the contract if the parties have not agreed it. To be valid, the Reduction Notice must itself set out the basis upon which the sum is calculated as well as the sum itself. The short point is that, to avoid paying the contractor simply what is claimed, an employer must issue, at the very least, a compliant Reduction Notice at exactly the right time.

6.4.3 Ambush adjudications or suspension of works

This has been the principal advantage of the Construction Act to contractors. Contractors often exercise the right, where a sum due under a construction contract is not paid in full by the final date for payment and in the absence of an effective Withholding Notice, to pursue the employer for the full sum in an adjudication or to suspend works on the contract lawfully (Section 112). This latter course of action is permitted subject only to the contractor giving the employer at least 7 days notice of intention to suspend, and setting out the ground or grounds for suspension in the notice. A suspension by the contractor will be lawful (and not amount to a repudiation of the contract) even where the employer has a valid set-off, if it has not been raised in a valid Withholding Notice. The right of the contractor to suspend work only ends when the employer makes payment in full of the amount deemed due. The New Construction Act, by

adding a new subsection 112(3A), provides additionally that an employer is liable to pay the contractor a reasonable amount in respect of costs and expenses incurred by the contractor as a result of a valid suspension.

There can be great advantages for the contractor in referring a technical dispute arising out of the Construction Act to an adjudication. Provided that the contractor has complied with such contractual procedures as there are for making payment applications, where there is no Withholding Notice issued by the employer (or, under the New Construction Act, where no Reduction Notice has been issued by the employer), the application or invoice is deemed due in full for payment, and there may well be little scope for a defence by the employer if the adjudication notice (the document by which a party invokes an adjudication, described further in Section 6.7) is sufficiently narrowly worded. In such circumstances it had been thought that the employer may well not even be permitted to raise a counterclaim or set-off in the adjudication in connection with, for example, clearly manifest defects in the works. There have been some developments in the case law in this area, with Judge Coulson warning that adjudicators and referring parties should not be too hasty to assert that an adjudicator cannot consider a defence raised by the responding party (*Pilon Limited v. Breyer Group plc*. [2010] EWHC 837 at paragraphs 25–26):

> It is not uncommon for adjudicators to decide the scope of their jurisdiction solely by reference to the words used in the notice of adjudication, without having regard to the necessary implications of those words . . . Adjudicators should be aware that the notice of adjudication will ordinarily be confined to the claim being advanced; it will rarely refer to the points that might be raised by way of a defence to that claim. But subject to questions of withholding notices and the like, a responding party is entitled to defend himself against a claim for money due by reference to any legitimate available defence (including set-off), and thus such defences will ordinarily be encompassed within the notice of adjudication.
>
> As a result, an adjudicator should think very carefully before ruling out a defence merely because there was no mention of it in the claiming party's notice of adjudication.

In practice, what this means is that, whereas previously an adjudicator might simply say he/she cannot consider the defence on, say, defects, the adjudicator must now consider the defence, but in the absence of a Withholding Notice/Reduction Notice the adjudicator will say that the defence does not bite and will decide that the sum claimed is due.

6.5. Construction consultant's fees

It is worth noting that engineers, along with other construction professionals, can use the adjudication provisions in the Construction Act in much the same way as contractors to secure payment of their own fees arising out of any appointment they have relating to construction operations. The authority for this proposition is the case of *Gillies Ramsay Diamond v. PJW Enterprises Ltd*. [2002] CILL 1901, in which the Scottish Court of Session decided that a letter containing conditions of appointment of a contract administrator was a construction contract under the Construction Act. This applies to appointments as a consultant to either an employer or a contractor.

6.6. Rules of adjudication

Beyond containing all of the express requirements set out above, the rules and process of an adjudication may differ from contract to contract. As described above, in the absence of provisions for adjudication, the rules in the Scheme apply. Adjudication is generally a relatively informal process by which the adjudicator takes the initiative in establishing the facts of a case before coming to a decision. Experience tells that the vague nature of the procedure may on occasion, and particularly in relation to a more complex dispute, lead to an unsatisfactory process where the parties' expectations as to how a matter is to proceed are not met. It may be useful for a construction professional being consulted prior to agreement of the construction contract to suggest to the employer that provision is made for further and additional rules of adjudication in the contract to ensure that all sides know what they can expect and what they need to do in an adjudication should the right to have a matter decided in adjudication be invoked.

There are a host of bodies that have produced and published adjudication rules. These include

- the Construction Industry Council (CIC) Model Adjudication Procedure (now in a fourth edition)
- the Centre for Dispute Resolution (CEDR) Rules
- the Institution of Chemical Engineers Adjudication Rules ('Grey Book', third edition)
- the Technology and Construction Solicitors Association (TeCSA) Procedural Rules for Adjudication (version 2)
- the Technology and Construction Bar Association (TECBAR) Adjudication Rules.

In addition, many standard forms of construction contracts make detailed provision for the process of adjudication. One concern may be the cost of the procedure. The TeCSA rules are the only ones that specify a cap on the amount that an adjudicator can charge and preclude the adjudicator from requiring advance payment or security. As a generalisation, the rules contained in standard forms of construction contracts differ from the stand-alone rules. The former tend to specify the procedure and timetable to a greater degree; for example, the JCT forms, GC Works and Engineering and Construction Contracts all provide for provision of a response by the responding party in a given time.

While there are certain differences, the principles behind the rules are all very similar. This is not surprising given the number of aspects to the process rendered compulsory by the Construction Act. The most important aspect that is common to them all is that the rules bring some certainty to the process being adopted. When deciding which rules to adopt there is no substitute for familiarisation with the different rules prior to making such a decision.

6.7. The adjudication notice

The adjudication notice (or notice of adjudication) is the document which is the first step in initiating an adjudication. The two purposes of the adjudication notice are to inform the responding party of the intention to refer a dispute to an adjudicator and to identify

Box 6.1 An example adjudication notice

IN THE MATTER OF AN ADJUDICATION

BETWEEN:

C CONTRACTOR LTD

Referring Party

– and –

E EMPLOYER LTD

Responding Party

ADJUDICATION NOTICE

1. This is a notice of the intention of the referring party ('C Ltd') to refer to adjudication a dispute with the responding party ('E Ltd'), pursuant to [clause x of the contract between them dated [y] [section 108 of the Housing Grants, Construction and Regeneration Act 1996].

Parties

2. The parties to the dispute are:
   (i) Referring party:
   C Contractor Ltd
   [**INSERT ADDRESS**]
   (ii) Responding party
   E Employer Ltd
   [**INSERT ADDRESS**]

The Dispute

3. The dispute between C Ltd and E Ltd arises out of a construction contract in writing between the parties dated [y] for the refurbishment of Hugh Gaitskell House, 22 High Street, Crawley. A copy of the contract is attached at appendix 1.
4. On 1 January payment application No. 10 was made by C Ltd to E Ltd in the sum of £100,000. There being no provision in the contract for payment terms the relevant provisions of the Scheme for Construction Contracts applies. The sum claimed by C Ltd therefore became due on 1 January.
5. 18 January was the final date for payment. No withholding notice having been issued on or before 11 January the responding party may not withhold payment after 18 January.

6. On 20 January C Ltd again applied to E Ltd for payment on application No. 10, but to date no payment has been made.
7. A dispute has therefore arisen. The adjudicator is asked to decide the following:
   7.1 That E Ltd do pay C Ltd the sum of £100,000 as per C Ltd's payment application No. 10 dated 1 January;
   7.2 That E Ltd do pay all the adjudicator's fees.

Signed ..... Dated .....

and crystallise the dispute being referred. The notice of adjudication, together with the referral notice, prescribes the claim upon which the adjudicator is to make a decision. It defines the jurisdiction of the adjudicator.

Different construction contracts and adjudication rules differently provide what should be contained in the adjudication notice. The existing Scheme requires the nature and brief description of the dispute to be set out and various other requirements. The JCT standard form contracts require only that the notice briefly identifies the dispute or difference.

In any event, the adjudication notice needs to be drafted very carefully so as to avoid unnecessary disputes about the nature and extent of what has been referred to the adjudicator for decision.

As described above, carefully drafted adjudication notices may limit the extent to which a responding party may bring effective defences to the claim being made. To illustrate this the following are two examples of a description of dispute in a notice of adjudication. The first is a narrow dispute where the adjudicator's jurisdiction is limited to deciding whether or not a particular invoice is due, taking advantage of the fact that no Withholding Notice has been served in time, and the second is a wider dispute which will require the adjudicator to investigate the true value of the works carried out:

- Whether E Employer do pay C Contractor the sum of £20,000 as per C's invoice dated 1 November 2010.
- What is C Contractor owed by E Employer under their building contract dated 1 July 2010?

Box 6.1 gives an example of a fully detailed adjudication notice taking a Withholding Notice point. It should be noted again that the minimum content of an adjudication notice may be determined by the adjudication provisions in the contract or the applicable adjudication rules. Careful attention should be paid to these when drawing up the adjudication notice, and more, rather than less, information ought to be included to ensure that the requirements of the agreed rules are met. If in doubt, guidance should be sought from someone with experience in drafting such documents, such as specialist solicitors or barristers or experienced claims consultants.

6.8. Appointment of an adjudicator

There are several ways in which an adjudicator may be identified and appointed.

6.8.1 Naming an adjudicator in the contract

The adjudicator may be named in the contract or otherwise agreed prior to the dispute arising. The advantage of this approach is that it saves time and acrimony in the identification and appointment process. On a dispute arising it should be as simple as referring the dispute to the named adjudicator to start the process. Agreeing the identity of the adjudicator beforehand should give parties more confidence in the whole procedure and may result in lowering the chances of the losing party resisting the enforcement of a decision made by the named adjudicator.

A difficulty may arise if the named adjudicator is unavailable. This can be overcome by naming more than one adjudicator in the contract, although this may lead to some dispute between the parties as to which of them should be chosen. A default procedure ought to be provided for occasions when the named adjudicator or adjudicators are not available.

Named adjudicators may also, ultimately, lead to problems concerning the requirement that the adjudicator be impartial. There is no provision of independence. Thus, in theory, even an individual who is often employed by one party can, if impartial, act as an adjudicator. In practice it is hard to see how such an approach would have the confidence of both parties, and it may provide grounds (so long as it is accompanied with some substantive material) for the losing party to argue that the adjudicator did not act impartially in making his decision and therefore that the decision has no validity.

6.8.2 Naming an adjudicator when a dispute arises

The adjudicator may be agreed by the parties following a dispute coming into being. This approach has the benefit that an individual can be chosen who has the expertise relevant to the particular matter in dispute. The problem with leaving agreement of the appointment of an adjudicator until after a dispute has arisen is that, once the dispute has arisen, the appointment process may itself be acrimonious and, in the context of an adjudication, will be very time-consuming.

6.8.3 Naming an adjudicator-nominating body in the contract

In default of agreement on an individual, an appointing body be named in the contract to appoint the adjudicator. It is always useful to have provision of a method for appointment of an adjudicator in default of a named adjudicator being unavailable or the parties failing to agree. If the Scheme applies in the absence of any provision for the adjudicator to be appointed by a named appointing body, the adjudicator shall be appointed by an 'adjudicator nominating body' on application by the referring party. An adjudicator nominating body is a body 'which holds itself out publicly as a body which will select an adjudicator when requested to do so by a referring party' (paragraph 2(3) of the Scheme). This is broadly worded, and there is a host of such bodies, ranging from the President of the Royal Institution of Chartered Surveyors (RICS) to the Chairman of the Technology and Construction Bar Association (TECBAR) to commercial bodies who are prepared to appoint (usually one of their own members) for the payment of a modest fee. All the

engineering professional bodies offer themselves as adjudicator-nominating bodies. The following are the contact details for some other adjudicator-nominating bodies:

- CEDR Dispute Resolution Service
  Centre for Effective Dispute Resolution
  International Dispute Resolution Centre
  70 Fleet Street
  London EC4Y 1EU
  Tel. 020 7536 6000
- The Chartered Institute of Arbitrators
  International Arbitration Centre
  12 Bloomsbury Square
  London WC1A 2LP
  Tel. 020 7421 7444
- Clerk to the Chairman
  The Technology and Construction Bar Association
  Atkin Chambers
  1 Atkin Building
  Gray's Inn
  London WC1R 5AT
  Tel. 020 7404 0102
- The Technology and Construction Solicitors Association
  Simon Baylis
  Chairman
  TeCSA
  C/o Wragge & Co LLP
  55 Colmore Row
  Birmingham B3 2AS
  Tel. 0121 233 1000

There is no generic format for an application to a body for the appointment of an adjudicator. The adjudicator-nominating bodies, particularly institutional and commercial ones, often have their own forms that they normally require to be filled in. Sometimes a degree of information, including details of the value of the claim and the subject matter, about the dispute is requested to allow the body to place the dispute with suitable individuals.

6.9. The referral notice

The referral notice is the document that contains all the information which the referring party wants to put to the adjudicator in order for the adjudicator to make his decision. The purpose is, of course, to persuade the adjudicator to make a decision in the referring party's favour. The contents of the referral notice should thus be drafted with that aim in mind.

The referral notice is not like a legal pleading, but more like a submission in arbitration, and can be relatively informal. When considering style and content, the particular experience of the adjudicator should be borne in mind and tailored accordingly.

Essential requirements of a referral notice include the following:

- There should be a restatement of the dispute identified in the adjudication notice. Care should be taken not to expand the scope of the adjudication, and therefore the jurisdiction of the adjudicator, by making submissions on points that are not identified in the adjudication notice or which do not need to be addressed in order for the adjudicator to reach the decision sought. Any sub-issues that arise should be identified precisely.
- There should be a complete explanation of the claim. It will be for the referring party to prove its case on the balance of probabilities, and thus it is important that the referral notice fully sets out the basis of the claim, this normally being
  - identification of the parties
  - the contract
  - relevant contract documents
  - the relevant terms of the contract
  - what obligations the responding party is said not to have complied with and how
  - what loss has been caused to the referring party and how the loss has been caused together with the calculation of the loss.
- In the case of each of the above elements of the claim, documentation will be needed to prove the case, perhaps with witness statements from relevant individuals who can explain the case by reference to the documents. Contemporaneous documents should be used wherever possible, and are preferred to documents generated for the purposes of the adjudication (although these may be necessary, e.g. a schedule of the calculation of the interest claim) together with the witness statements. These documents should be identified within and be appended to the referral notice.
- Any points of law that arise should be addressed expressly in the referral notice.
- At the end of the referral notice it may be useful to summarise the answers to each of the sub-issues referred for decision in order to provide the adjudicator with an agenda for the decision. These can double up as draft answers for incorporation in that decision should the adjudicator be persuaded.

Bearing in mind that this may be the only opportunity that the referring party has to make its case, it will usually also be necessary to deal with the following matters at least to some degree:

6.9.1 Costs/offers

Costs are differentiated into the adjudicator's fees and ancillary costs of the adjudicator, and each party's costs of participation in the adjudication. As stated above, by a recent development in case law (*Yuanda (UK) Co. Ltd. v. WW Gear Construction Ltd.* [2010] BLR 435), any requirement in a contract that a party pay the adjudicator's costs irrespective of the outcome or, indeed, the other party's costs is seen as fettering that party's right to refer to adjudication and must be treated as of no effect. Paragraph 25 of the Scheme entitles the adjudicator to payment of such reasonable amount as he may determine by way of fees and expenses reasonably incurred by him. He is also entitled to determine how the payment is to be apportioned between the parties.

In the New Construction Act, a new Section 108A expressly deals with the question of the allocation of costs relating to the adjudication and renders all clauses on this topic in a contract ineffective unless 'it is made in writing, is contained in the construction contract and confers power on the adjudicator to allocate his fees and expenses as between the parties, or is made in writing after the giving of notice of intention to refer the dispute to adjudication'.

There remains the freedom for both parties to agree how costs should be allocated, provided such agreement is in writing and the agreement is reached after the notice of adjudication has been served. To that extent the older law reflected in *Northern Developments v. J & J Nichol* [2002] BLR 158 still applies. At 166 His Honour Judge Bowsher QC confirmed that there was no express or implied power in the Construction Act or Scheme for an adjudicator to decide that one party should pay the other party's costs. In this case both parties asked the adjudicator in writing for their costs. Bowsher QC HHJ construed this as an implied agreement to give the adjudicator jurisdiction to decide on costs.

Given the inherent strategic advantages to the referring party in adjudications, not least the ability to decide the scope of the matters to be decided in the adjudication and to limit the extent of defences that the responding party may bring, it will only be in very unusual cases that the responding party decides to confer jurisdiction upon the adjudicator to decide the parties' costs. Conversely, if confident of the case, the referring party may well wish to confer jurisdiction on the adjudicator to award party costs. If advising the referring party it is often worth trying to get an award of party costs. Otherwise, these costs will never be recovered.

6.9.2 Request for a meeting or a hearing

If the subject matter of the dispute is complicated or for some other reason a face-to-face meeting is thought useful (often where witness statements are relied upon), this should be requested in the referral notice. An adjudicator will often, but not always, call a meeting in any event. Where such a meeting is desired, an express request should be made to ensure that it happens.

6.10. Responding to adjudication proceedings

If responding to adjudication proceedings it is most important that, where possible, the reference to adjudication is anticipated and, on receipt of an adjudication notice, that resources are immediately deployed and work begun on a response. As stated above, ambush adjudications are commonplace, and are made worse when proceedings are issued over holiday periods such as August and Christmas. Notwithstanding the inconvenience, the adjudication proceedings must be taken seriously because, although their effect is only temporarily binding, any decision will have effect until the end of a trial or arbitration, which may take as long as years after the adjudication decision. Furthermore, statistically speaking, adjudication decisions are determinative not only because of the reluctance of the losing party to incur the immense further cost of litigating the matters in dispute, but also because the adjudication decision is often fairly taken as an impartial indication of how a court or tribunal would be likely to make judgment or award.

Before formulating a response to referral it is important to understand the precise extent of the dispute that is brought to adjudication. A responding party should ensure that the dispute referred is clear and unambiguous. If it is not, clarification should be sought. Often, pressing for clarification of an ambiguous dispute might also give grounds for seeking an extension of time pending the clarification. This might not, of course, be granted (see below). Whether or not clarification is given, it is useful to re-state the dispute and then press for agreement to the re-statement.

Any jurisdictional points should be registered as soon as they are identified, and they should be maintained throughout the participation in the process. This may provide the only means by which a negative adjudication decision may be challenged. A clear reservation should be made. Judge Akenhead in *Aedifice Partnership Limited v. Ashwin Shah* [2010] EWHC 2106 (at paragraph 21) has given guidance of the sorts of words to be used: 'Words such as ''I fully reserve my position about your jurisdiction'' or ''I am only participating in the adjudication under protest'' will usually suffice to make an effective reservation . . .'. Good practice requires that a general objection to jurisdiction must be made, together with any specific objections. Even if a specific objection is omitted, the general objection may well suffice (*GPS Marine Contractors Limited v. Ringway Infrastructure Services* Limited [2010] BLR 377 at 384).

Jurisdictional points are dealt with in the discussion of enforcement later in this chapter (see Section 6.14). Essentially they are the only grounds upon which a losing party in an adjudication can resist the enforcement of the decision by the successful party in court. The responding party should not make the error of asking the adjudicator to decide on the jurisdictional points, because asking the adjudicator to decide such a matter brings the whole issue within the adjudicator's jurisdiction, and as a result there will be no appeal from any decision on jurisdiction reached by the adjudicator. This is coupled with the phenomenon that, almost invariably, the adjudicator will decide that he or she has jurisdiction, because if there is not jurisdiction then that is the end of the adjudication, and there may even be a dispute about who will pay the adjudicator's costs. This is an unattractive consequence for the adjudicator, who will usually seek to avoid it where at all possible. For the avoidance of doubt, the rest of the response and continued participation in the adjudication should expressly be stated as being without prejudice to the primary contention that the adjudicator has no jurisdiction, and it should be stated that jurisdiction is not being conferred on the adjudicator to rule on any jurisdiction issue. The jurisdiction points should be included at least in summary form, even though the adjudicator is not being asked to decide them. Notwithstanding what is stated above, there is always a slender chance that the adjudicator might nevertheless resign.

The form and contents of a response are not prescribed. In fact most adjudication rules (in contrast to most standard forms of construction contract) do not even refer to the provision of a response, let alone the format of it. If the adjudicator is to be impartial, however, it is thought that the responding party must be given an opportunity to provide a response. Experience tells that this will invariably be given.

6.10.1 Obtaining an extension of time

The referring party will have had many weeks or months within which to prepare the adjudication notice and referral notice. The responding party will normally only have a share of the time in the total of 28 days usually provided to the adjudicator to consider, prepare and issue a decision. As stated above, many standard form construction contracts provide for the responding party to provide a response to referral within 7 days of receipt of the referral notice or some other short period. The Scheme is silent as to a response or the time for provision of any response. Particularly in the more complicated cases it is often a relatively simple task for the responding party to procure a short extension of time from the adjudicator of up to about a further 7 days for service of the response, because the adjudicator usually has unfettered discretion to direct what the parties do in the 28-day period typically allowed for him to reach a decision.

A more substantial extension of time may be difficult to procure because, under most rules, the referring party holds all the cards in terms of allowing extension of time. Under the Construction Act one of the required terms of any construction contract is that the adjudication rules make provision for the referring party and adjudicator together agreeing to a 14-day extension of time to the 28-day period. It is always open to the parties, together with the adjudicator, to agree an extension of time of any period. This often happens where the adjudicator himself requests additional time in order to complete his decision, as neither party will want to risk upsetting the adjudicator.

If the nature and extent of the dispute is changed or clarified that may also give a good reason by which to persuade the adjudicator of the need for an extension of time to allow for provision of the response. Once the adjudicator is persuaded and states so in writing, the referring party may then be persuaded to agree to an extension of time.

In the context of some complicated final account disputes or delay and disruption disputes, it may be worth trying out an argument that the adjudicator cannot, within the 28-day time period allowed, come to a decision that is 'impartial' (as required in the Construction Act) or a decision that is not in breach of natural justice. In making out this argument, reference may be made to the judgment of His Honour Judge Coulson QC in the case of *William Verry (Glazing Systems) Ltd. v. Furlong Homes Ltd*., where he expressly disapproves of the referral of complex final account disputes to adjudication:

> . . . it [*the Notice of Adjudication*] referred to adjudication the entirety of the dispute about the Verry final account figure. This meant that Furlong wanted the adjudicator, during the statutory twenty-eight days, to reach decisions about disputed variations, extensions of time, loss expense and liquidated damages. In other words, all the potential disputes which can arise under a Building Contract were here being referred to adjudication. There was no express limitation or qualification on the range of matters for decision. It was, to use the vernacular, a 'kitchen sink' final account adjudication. *While such adjudications are not expressly prohibited by the Housing Grants, Construction and Regeneration Act 1997 as it presently stands, there is little doubt that composite and complex disputes such as this cannot easily be accommodated within the summary*

procedure of adjudication. A referring party should think very carefully before using the adjudication process to try and obtain some sort of perceived tactical advantage in final account negotiations and, in so doing, squeezing a wide-ranging final account dispute into a procedure for which it is fundamentally unsuited. (Emphasis added) ([2005] EWHC 138, (2005) CILL 2205 (at paragraph 11))

Ultimately, however, the legislation provides for a short timetable, and the responding party cannot guarantee any significant extension of time and should gear up accordingly.

6.11. Substantive contents of a response

The substantial part of the response will be spent dealing with the substantive dispute contained in the adjudication notice and referral notice. Again, as stated above, prior to formulating the answers to the claims made it is useful to identify with precision the issues and sub-issues referred. This can act as a checklist when putting together the response.

Typically, the response will be a similar document to the referral notice. It will address all the points referred in an informal submission, making reference where useful to attached documents and witness statements. It is important to set out clearly any points upon which the responding party disputes what is stated in the referral notice. In every case the responding party should provide reasons for disputing a matter raised and supply any evidence in support. In addition, any positive points in defence should be made out in the response. It is necessary to stress that this response may be the only opportunity the responding party will have to put its case to the adjudicator.

As with the referral notice, this submission should also deal with whether a hearing or meeting is useful, and the responding party's case on costs.

6.12. Subsequent procedures

Due to the fact that adjudication may be an inquisitorial process, and because all adjudication rules are completely silent on what happens between the response to a referral notice and the adjudicator making a decision, it is not possible to state definitely what the other elements of an adjudication may be. The following are typical examples. The adjudicator may require these elements individually or a combination of them.

6.12.1 The adjudicator provides written questions

The adjudicator provides written questions for answer by the parties. This will arise where the adjudicator, having given initial consideration to the matters referred, is left with specific queries.

6.12.2 The adjudicator calls a meeting

A meeting may be called by the adjudicator. This can take many forms and can be of varying formality, essentially depending upon the wishes of the adjudicator. Some adjudicators in a final-account-type dispute will take a very informal approach, going through large numbers of items of the account with the key witness from each party and generally making his decision on each at the time on an item-by-item basis. In other more formal meetings, each party may be represented by a solicitor or barrister, with

proof of witness statements and cross-examination taking place as if in arbitration. A meeting may be on site and the adjudicator may wish to see some of the work carried out.

There are two key things to ensure if advising a party on a meeting. First, the adjudicator should be persuaded to produce an agenda for the meeting; alternatively, an agenda should be proposed. Experience shows that meetings are an expensive element of the adjudication process, and the time spent should therefore be focused on the important issues in dispute. Without an agenda the meetings can become something of a free for all, and less is achieved. Secondly, preparation should be made to ensure that a party is ready with all the points that it wishes to make to the adjudicator. The party should, of course, also ensure that all these points are then conveyed to the adjudicator at the meeting.

6.12.3 Further rounds of submissions

Further rounds of submissions are provided by each party. This is a very frequent occurrence where a referring party, on receipt of the response, will seek to produce a reply. The responding party may then wish to produce a further response, and so on. As far as an adjudicator is concerned, further rounds of submissions will become progressively less useful, but against this an advisor to a party will want to ensure that important points are not missed. If important points do arise a party should not wait to be directed to produce a reply by the adjudicator, but should simply draw up the submission, and submit it and point out why the additional submission is needed. Provided that the proceedings are handled with broad fairness, the adjudicator is, however, entitled to limit the rounds of submissions, and may even ignore subsequent submissions (*GPS Marine Contractors Limited v. Ringway Infrastructure Services Limited* [2010] BLR 377 at 392).

6.13. The decision

The effect of the decision is prescribed by the Act as described above. Mistakes of law and of fact will not invalidate the decision, and there is no direct appeal available. The decision is binding on the parties, but only temporarily so. The whole matter is open for subsequent litigation or arbitration or, indeed, by agreement.

If a decision is one that concerns money, the effect of the decision is usually to create a debt from one party to the other. In other cases the decision may impact on a continuing contractual relationship between the parties. For example, the dispute referred may concern how a particular valuation clause is to be construed. The decision will take effect every time that clause is utilised subsequently.

The decision is also binding in any future adjudications. It is not possible to adjudicate the same point again, and subsequent adjudicators are bound by the decisions arising from previous adjudications, as well as judgments or arbitral awards.

6.14. Enforcement

The last topic in this chapter concerns what a successful party may do with an adjudication decision where the losing party fails to comply with the decision and, conversely, how a losing party may resist having to comply with an adjudication decision.

As stated above, there is no appeal, and the usual robust approach of the court is to enforce an adjudicator's decision irrespective of any errors in the decision. Enforcement can only be secured through the court. In order to access the court the successful party will invariably need to instruct a solicitor and/or barrister (in many cases barristers can now be instructed directly without an intermediary solicitor, see Chapter 3).

The usual process is for a Claim Form and Particulars of Claim to be drafted and filed at court and served on the losing party, known as the 'defendant' or 'respondent' in the legal proceedings. Normally the defendant would have 14 days within which to acknowledge the claim and a further 14 days within which to supply a defence. This is clearly inimical to the purposes of adjudication under the Construction Act, and the court therefore invariably grants abridgement of the time for acknowledgement to just a few days where applied for. Once the defendant has acknowledged the claim, the claimant lodges a Summary Judgment Application. This consists of submitting a completed standard application form, a witness statement (usually by the solicitor) with appendices (usually including the contract and adjudication submissions) and the decision. A hearing is then provided for on short notice, and the court hears what the parties have to say before giving judgment. A barrister is usually the appropriate person to conduct a hearing for a party.

Usually the court will enforce the decision. However, there is a range of possible outcomes, including that the decision is partially enforced, or that judgment is entered but a stay on enforcement is made, or even that the claim is taken forward to a trial or dismissed. If enforced, the debt becomes a judgment debt and, where necessary, charges can be put on property, bank accounts frozen, etc., until monies are paid. A solicitor is best placed to advise on these matters.

There are only a limited number of grounds upon which a defendant can resist the enforcement of an adjudication decision. Some of the typical and potentially valid points that may be raised include:

- The commercial relationship between the parties does not constitute a construction contract as understood under the Construction Act. The adjudication provisions in the Construction Act and Scheme do not therefore apply and the adjudicator and the decision is without jurisdiction. This may be for various reasons. For example: the subject matter of the work falls within the excluded categories of work; the contract is not sufficiently in writing (although note that this ground falls away once the New Construction Act comes into force and Section 107 is repealed); or one party is a residential occupier.
- There was no pre-existing dispute between the parties. If there was no pre-existing dispute there was nothing to refer for decision by an adjudicator. The decision made is therefore invalid. Putting it another way, before adjudication proceedings are commenced a dispute must have crystallised between the parties, and it must be that dispute which is referred to the adjudicator and not a different dispute. This ground typically arises following poorly prepared ambush adjudications. To avoid this ground it is better for a referring party previously to have put to the prospective

responding party all the substantial facts and matters, including key documents, and, prior to issuing adjudication proceedings, to give that party an opportunity expressly to reject the claim made.

- There is a breach of the requirement of impartiality or breach of natural justice by the adjudicator tainting the decision made. The scope for the application of natural justice is limited by the rough-and-ready nature of the adjudication process and, particularly, the time limitations provided for. Valid grounds might include, for example, where the adjudicator had communication with one party from which the other party was excluded (*Discain Project Services v. Opecprime Development* [2000] BLR 402) or where the relationship between one party and the adjudicator gives rise to an imputation of bias (*Fileturn Ltd. v. Royal Garden Hotel Ltd.* [2010] EWHC 1736).

Enforcement is a technical legal area where the right advice from a legal professional will be necessary.

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Chapter 7
Mediation

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7.1. What is mediation?

A convenient definition of mediation is as follows: a process conducted by an independent third party, in a strictly confidential manner, where the objective is to facilitate the parties resolving their dispute.

In order to understand properly the mediation process, it is essential that those involved in it fully appreciate that the role of the mediator is not to broker a settlement between the parties, but to *assist* those parties in *negotiating* their own settlement of the dispute. Thus, the parties 'own' the dispute and the settlement of it: they, and they alone, must decide whether to settle, and on what terms. It is therefore essential that those representing the parties at a mediation have authority to reach a settlement of the dispute, or, at the very least, that lines of communication are in place so that those with authority can be contacted.

One important difference between mediation and more formal dispute resolution processes, such as litigation, arbitration or adjudication, is that the parties retain control over the dispute and its settlement (see Chapters 4 to 6). Once the more formal dispute resolution processes have commenced, the proceedings will continue along recognised procedural routes, and will be subject to a timetable fixed by the tribunal. Thus, the parties have no control over events, and often find themselves uncontrollably proceeding along the route to a final hearing or trial and decision. All of this should be contrasted with mediation, where the parties are in complete control over the proceedings, and indeed whether to continue to take part in them at all. The parties are free to decide whether to withdraw from the mediation process and whether to settle or not. It is this control of the process that empowers the parties, and leaves them with ownership of the dispute and its resolution.

That said, of course the mediator plays a central role in assisting the parties to the mediation in reaching a settlement. Mediators are invariably well trained, not just in negotiation techniques, but also in techniques to break deadlock within the negotiation process between the parties. These are considered further below. In addition, the mediator should have an understanding of the commercial and technical aspects of the dispute.

Another essential feature of the mediation process is its confidentiality. In fact, mediation is confidential on two levels: first, the whole mediation process itself is private

and confidential. Only the parties and their advisors need be aware of the fact of the mediation and any settlement reached at it. In addition, negotiations and communications within the mediation are without prejudice and will generally be inadmissible in any legal, arbitral or other proceedings.

Secondly, and perhaps more importantly, everything said to the mediator in private meetings is also confidential. The mediator ought not to repeat it to the other party without express permission to do so. The purpose of this requirement is probably obvious. It enables the mediator and a party to discuss options, and that party's real needs, in confidence, knowing that the discussion will not be passed on to the other party.

The mediation is also entirely without prejudice and is non-binding unless, or until, a settlement agreement between the parties is signed.

Importantly, the mediator is, and must always be (and be seen by both parties to be) neutral and independent of the parties, with no interest in the outcome of the dispute. It should be appreciated that the mediator does not take sides, and has no real interest in the terms of settlement of the dispute, and whether one party might or might not consider itself to be a winner or a loser. His interest is in bringing the parties to a settlement that is acceptable to them both. (Generally reference is made to two-party adjudications, but there is no reason not to have multi-party mediations involving three or more parties, and in practice these are relatively common.)

Implicit in this is the fact that the mediator does not act as an arbitrator, judge, adjudicator or expert. His role is not to decide the dispute, or to decide the party's respective rights and obligations, and to impose his decision on the parties, but to assist the parties in achieving their own negotiated agreement. As set out above, the parties own the dispute and the settlement of it, and it is entirely a matter for the parties to decide whether to settle, and if so on what terms.

7.2. Why mediation works

Perhaps the most important, and obvious, reason why mediation works is that it brings the parties together and gives them an opportunity, which might not otherwise arise, to settle their dispute.

A mediation enables senior management to hear the strengths and, perhaps more importantly, the weaknesses of the parties' cases. Often those in the decision-making capacity would only have been briefed by their own personnel or advisors, whose views of the dispute may be less than impartial, and perhaps self-serving, and the mediation day itself may be the first opportunity to hear both sides of the argument.

Of course, in the mediation, the parties are brought together with the mediator. His presence is likely to be instrumental in the settlement process in that, as a neutral, he will be able to bring his independent views to the negotiations. In addition, he will seek to identify the real issues separating the parties, and concentrate the parties on those issues rather than their own (often incorrectly) perceived differences. He will act

as a conduit for communication between the parties and their representatives, and can help the parties to understand each other's case and their strengths and weaknesses, so that the parties can more readily assess their own case realistically.

In addition, the mediator will invariably spend much of the mediation exploring the parties' real needs and interests, as opposed to their publicly stated positions. This is often crucial, as stumbling blocks to settlement can be overcome by recognising and respecting the real needs of the parties, which rarely coincide with their stated positions.

It is possible to add value to a settlement. For example, in a continuing commercial relationship settlement can involve future work, or opportunities for future work; or perhaps one party can, as part of the settlement agreement, provide either free of charge or at an agreed cost, additional goods or services. This is something that is simply unavailable in more formal dispute resolution proceedings, such as litigation or arbitration, where the tribunal can only decide the parties' strict rights and liabilities, and make a money award according to those rights and liabilities.

The mediator will be able to explore with the parties (normally separately) the alternatives to settling their dispute. This can include the 'best alternative to negotiated agreement' (BATNA) and 'worst alternative to negotiated agreement' (WATNA). Here, the mediator can investigate the best, and worst, possible outcomes to the dispute, and by this illustrate the benefits, both financial and emotional, of achieving a settlement. By way of example, even if a party were to succeed in full on its claims (or defences), this would not necessarily reflect irrecoverable costs in litigation or arbitration (or other tribunal) and the effect of management time distracted by the dispute, time that most businesses can ill afford to lose. Relating to this, the mediator can reality test, causing the parties and their advisors to re-evaluate the risks involved in proceeding with the dispute.

Central to the success of the mediation is the role of the mediator. It is essential that he establishes the trust and confidence of the parties to the mediation from the outset so that they can discuss with him openly and frankly their thoughts on the dispute and the mediation. The key to this, of course, is the mediator's duty of confidentiality in the mediation. As will be considered later in this chapter, a substantial part of the mediation itself is taken up by the mediator 'exploring' the parties' interests, emotions, strengths and weaknesses. Armed with this information, the mediator is well placed to understand and overcome the parties' emotions, and any emotional blockages, that may be preventing them from negotiating their settlement. It is surprising how often in practice one party to the dispute may put at the forefront of its deliberations, and indeed the basis for settlement, something that the other party regards as quite unimportant. Thus, not only will the mediator be able to assist the parties in understanding each other's case, he will also be able to assist each party to better understand its own case.

In addition, and importantly, having won the trust of the parties, the mediator is in a position where he can investigate with each party its real needs rather than its publicly stated position on the dispute. Again, for many and, no doubt, complex reasons, a

party may seek to negotiate from what it perceives to be its best, perhaps its most extreme, position, seeking to make minor concessions or changes in position only. With the trust of the parties, the mediator can explore the parties' real needs, thus often reducing the distance between the parties and making settlement much more likely.

The mediator can explore the strengths and weaknesses of a party's case, importantly highlighting potential weaknesses that may not have been perceived by the party. Thus, a party may erroneously start the mediation process in the belief that its own case has few weaknesses and the mediator can investigate with that party the true strengths and weaknesses. The mediator will also be able to investigate (and test) the strengths and weaknesses of the other party's case.

Mediations will often commence once the informal process of negotiation has reached deadlock. Here again, the mediator is in a unique position in that he can overcome the deadlock and, perhaps most importantly, help the parties to save face in moving from what might have been publicly expressed intransigent positions. The mediator can suggest new avenues to explore, perhaps involving 'adding value', or he can break the problem down into discrete elements, each of which can be focused on independently and without regard to the apparent deadlock.

Finally, the mediation will focus the parties' minds on settlement and looking to the future, rather than re-examining the past.

7.3. Facilitative and evaluative mediation

A facilitative approach to mediation is one in which the mediator does not give opinions, or pass judgment, on the parties' respective positions or cases, but seeks to bring the parties together for a commercial resolution of their dispute which meets the parties' real needs. This is done without considering or adjudicating upon the underlying rights and liabilities of the parties in any detail.

In contrast, evaluative mediation will permit the parties to investigate through the mediator the respective rights and liabilities of the parties, and the mediator may be asked to give his opinion on the merits of the dispute, or a part of it.

It would be wrong to consider facilitative and evaluative mediation as two mutually exclusive alternatives. In reality, a mediator is likely to adopt an approach that falls somewhere between the two, and whether this falls closer to the evaluative or to the facilitative approach will largely depend on the style or approach of the mediator, the attitude of the parties or their advisors, and their own perceptions of the merits of their case. It is quite possible that the mediation will involve elements of both approaches. Ultimately, it is a matter for the mediator to assess which approach is likely to be most effective for any particular dispute, and the parties to it.

However, there are dangers in the mediator expressing an opinion on the merits of the dispute. On the one hand, a party may be disappointed at the mediator's expressed perception of the merits, and may feel that the mediator is taking sides against them.

That party may also lose trust or confidence in the mediator, and once this happens it is difficult for the mediator to re-establish it and to communicate effectively. On the other hand, a positive opinion from the mediator on a party's case may cause it to harden its position within the negotiations and may make achieving a settlement more difficult.

Whichever approach is followed, the mediator should avoid losing his neutrality and impartiality. As noted in the definition of mediation set out above, one of the essential elements of mediation is the neutrality of the mediator. By expressing his opinions on the strict legal rights and liabilities of the parties there may be an appearance of loss of neutrality and impartiality. No doubt a mediator will have worked hard with the parties both before and during the mediation to win their trust and confidence, but trust and confidence are commodities that are easily lost, and once lost are even harder to regain.

One of the strengths of mediation as a dispute resolution process is its flexibility, and a skilled mediator will adapt his style and his approach to the mediation to meet the circumstances in each case. Thus, if the mediation is running into difficulty then he can modify his approach to suit.

7.4. When to use mediation

The prerequisite to the need for mediation is a dispute between the parties. Other than the existence of the dispute, there are, and can be, no hard and fast rules as to when is the appropriate time to mediate.

In some circumstances, particularly where there is an ongoing relationship between the parties, the parties may consider it appropriate to mediate their dispute before commencing more formal legal proceedings, such as arbitration or litigation, perhaps even while the dispute is still fresh and parties' developing positions have yet to become entrenched. Mediation is now encouraged by the courts either prior to, or during, the litigation process, and a party may be penalised on costs if it unreasonably refuses to participate in a mediation (this is addressed more fully in Chapter 4). It can also be appropriate during the course of arbitration in the same way.

As to the timing of mediation during a more formal dispute resolution process, there are again no hard and fast rules. In many respects, the earlier the mediation is held the better, as costs of the litigation or arbitration will be lower and they will be less of a factor in achieving a settlement. Thus, for example, if mediation is held shortly before trial when both parties have incurred significant costs, the liability for the costs may itself become a stumbling block to settlement: each party may want some, or perhaps all, of its costs paid by the other, and this becomes a further significant element of the dispute that has to be resolved and a further hurdle to be overcome.

However, one or other of the parties often wishes certain stages in the litigation or arbitration process to have passed, so that they can be better informed as to the case that is being advanced against them, and indeed their own case. Thus, one or other of the parties may seek to mediate after the close of formal pleadings, or perhaps after

the disclosure of documentation has taken place, so that the other party's documents are available for the purposes of the mediation, and so as to permit a party more accurately to assess the strengths and weaknesses of its, and the other party's, case. In more extreme circumstances, parties may agree to mediate after the service of written evidence in the form of witness statements and experts' reports. However, while a successful mediation at this stage will save the time and costs of a trial itself, it should be noted that it is likely that the parties will have incurred significant costs in the litigation or arbitration process in getting to this stage and, as noted above, this may be an additional hurdle to overcome in reaching settlement.

It should also be appreciated that mediating too soon may bring its own problems, particularly if insufficient preparation has been carried out by one or more of the parties, for example in assessing the quantum of any sums claimed. Here the lack of understanding may become a stumbling block to settlement.

7.5. Appointing a mediator: CEDR and other bodies

There is no formal, statutory, or indeed other legal framework for mediation of engineering disputes. The process is entirely consensual, and depends on the agreement of the parties, both as to their participation in the mediation and in the appointment of the appropriate mediator for the particular dispute.

Where possible, the parties, or their advisors, will seek to agree upon an experienced and suitably qualified mediator. However, there are a number of independent bodies involved in mediation, such as the Centre for Effective Dispute Resolution (CEDR; for contact details see Box 10.10 in Chapter 10). These bodies can assist the parties intending to attempt to resolve their dispute by mediation by nominating trained and qualified mediators and providing formal mediation agreements.

Many firms of solicitors specialising or experienced in engineering dispute resolution have experience of mediation and can provide advice on selecting and appointing a mediator or seeking an appointment through one of the independent bodies.

In addition, the Technology and Construction Bar Association maintains a mediation panel containing Queen's Counsel and junior counsel experienced in mediation who can be appointed by agreement between the parties. Some of the specialist building and engineering barristers' chambers also provide a mediation service by which a member of those chambers is appointed mediator, and rooms and other facilities can be provided at the chambers for the mediation.

A mediator will normally insist on entering into a formal multi-partite agreement between himself and all of the parties. Each mediator, or the body that appoints or nominates him, should have his own form agreement. A sample agreement is set out in Box 7.1.

7.6. The mediation

While the mediation day, or even days, gives an opportunity to settle the dispute, it is not necessarily the start of the process (some mediations might take several days, particularly

Box 7.1 A sample mediator's agreement

TERMS OF APPOINTMENT

Mr A. Barrister, Mediator

Once appointed, the Mediator's professional fees will be calculated as follows:

All preparation work will be charged on the basis of [£ insert fee] per hour.

The Mediator's appearance at the mediation meeting or meetings will be charged at [£ insert fee] per hour, which will be offset against a minimum charge of [£ insert fee] per day.

Any work required following the mediation will be also be charged at the rate of [£ insert fee] per hour.

All fees billed are subject to VAT.

The parties will each be invoiced for 50% of the fees incurred and those fees must be settled within 28 days of billing.

The Parties will be jointly and severally responsible for the Mediator's fees.

If the venue for the hearing is outside the London area, travel time will be charged at the agreed hourly rate and full expenses will be payable by the parties. Subject to this, the fees quoted include the cost of all services normally available in Chambers.

The appointment as Mediator will not prevent the Mediator from acting in other disputes either as Counsel or Arbitrator where the Parties or the Solicitors for the Parties are involved, unless there is a direct conflict of interest. In any case of doubt, the Mediator will endeavour to draw the matter to the attention of the Parties.

Neither party may have access to any of the Mediator's notes or call the Mediator as a witness in any proceedings relating to the Dispute.

For the avoidance of doubt the Mediator will be acting as an independent specialist and not as an arbitrator. The Mediator, in performing his functions set out herein, is not and will not be representing or giving legal advice to or upholding or protecting (or attempting to uphold or protect) any rights of any of the parties.

The Mediator shall not be liable to any of the parties for any act or omission whatsoever in connection with the services provided by the Mediator pursuant to this appointment. For the avoidance of doubt, this exclusion extends to negligent acts and omissions.

These terms shall be governed by and construed in accordance with English law.

The parties may accept these terms within 28 days of [Date] after which time the Mediator reserves the right to vary them without notice.

in complex disputes involving more than two parties). Preparation is important, both for the parties and the mediator, and a good mediator will invariably contact the parties, or their representatives, in advance with a view to discussing their position and approach to the mediation, and indicating the likely form of the mediation day. The mediator will probably also seek to establish something about the representatives of each party attending the mediation itself. This initial contact will be the start of the important process by which the mediator seeks to win the trust and confidence of the parties.

As to those representatives, it is important that a representative of each of the parties with authority to settle attends, or at the very least lines of communication are in place between those attending and those with authority to settle. In many circumstances, parties will attend a mediation with their legal advisers, solicitors and sometimes counsel. Experts may attend, but in many respects it is preferred that they do not, as this may result in the parties become unnecessarily reliant on the detailed facts and expert opinions.

As part of his preparation for the mediation, the mediator will probably seek to ensure that there is, where possible, a degree of parity between the parties and their representatives attending the mediation. This ensures that a party does not feel overwhelmed by the presence of large numbers of advisers or other professionals attending for the other party.

It is important that both the parties and the mediator are aware in advance of those attending for each party. In particular, the mediator will be interested to know whether the parties or their representatives have experienced mediation before and whether they are looking for a particular style or approach from the mediator.

Most mediators will request each party to prepare a short position paper setting out its case on the dispute, and what it (at least openly) is seeking from it. Reference will probably be made to previous attempts to settle, and any current offers as between the parties.

The position paper will usually attach documents relative to that party's case, including where necessary copies of contracts, specifications, drawings and correspondence between the parties and their representatives. Depending on the timing of the mediation, it may be that the parties have instructed experts, and their reports (or drafts of them) may be made available as well.

The position paper is an important document, as it gives each party an opportunity to state its case, not just for the benefit of the mediator, but also to inform the decision-making representatives of the other party. It is essential that each party should be provided with a copy of the other party's position paper and documentation. A model position statement is given in Box 7.2.

The mediator will probably also use his initial contact with the parties to ensure that the mediation agreement is itself acceptable to the parties so that, if not signed in advance, it can be signed by the parties on the day.

Box 7.2 A model mediation position paper

IN THE MATTER OF A MEDIATION

BETWEEN:

AB CONSTRUCTION LIMITED

– and –

CD PROPERTIES LIMITED

POSITION STATEMENT OF
AB CONSTRUCTION LIMITED

Introduction

1. This Mediation arises out of a contract (hereinafter 'the Contract') made on the ICE Conditions of Contract, 7th Edition, Measurement Version between AB Construction Limited (hereinafter 'ABC'), as Contractor, and CD Properties Limited (hereinafter 'CDP'), as Employer, whereby CDP engaged ABC to construct and complete certain works (hereinafter 'the Works'), namely the enabling works comprising drainage and sewerage works, and construction of roads, for a housing development at Thames Gateway.
2. The Contract was made on 1 January 2005, and the time for completion of the Works was 30 June 2005. In fact, for the reasons set out below, ABC were not certified as having substantially completed the Works until some six weeks later, namely 15 August 2005.
3. It is ABC's case that it is entitled to an extension of time of six weeks by reason of unforeseen ground conditions encountered during the installation of the drainage and the late provision of information by the Engineer.
4. In addition, the Engineer has ordered variations to the Works. ABC claims the proper value of these variations together with its cost incurred by reason of the ground conditions and late provision of information.
5. CDP on the other hand denies that the ground conditions were reasonably unforeseeable, and also denies that the Engineer provided information late. It accepts variations in principle, but the Engineer has significantly undervalued these.
6. Thus, in summary, the dispute concerns:
   (i) ABC's entitlement to an extension of time of six weeks.
   (ii) ABC's entitlement to cost of some £100,000 either under the Contract, or as damages for breach of contract, by reason of the ground conditions and/or the late provision of information by the Engineer; and

(iii) The proper value of variations. The Engineer has valued the variations at £75,000, but their true value is £125,000.

7. The total value of ABC's claims is some £150,000. In addition, CDP has intimated that it proposes to deduct liquidated damages for the six weeks delay totalling some £60,000.
8. Each of the elements of the dispute is considered separately, and briefly, below.

THE EXTENSION OF TIME CLAIM

Ground conditions

9. This claim arises out of Clause 12 of the Conditions of Contract, and it is ABC's case that it encountered physical conditions which could not reasonably have been foreseen by an experienced Contractor comprising groundwater level some 2 m higher than ABC anticipated from the site investigation provided at tender. Accordingly, ABC gave notice by letter dated 1 February 2005 of the ground conditions, and sought instructions from the Engineer. In the event, the Engineer decided that the conditions were reasonably foreseeable, and rejected the claim, and issued no instructions. Accordingly, ABC carried out the Works including installing drainage in and below the groundwater table, using dewatering equipment as necessary.
10. As a result of the physical conditions, ABC incurred additional costs in bringing to the site and utilising dewatering equipment, and suffered a delay of some six weeks to the drainage works. Accordingly, ABC is entitled to, and claims, a six week extension of time for completion of the Works, together with the additional cost (and profit thereon) pursuant to Clause 12(6) of the Conditions of Contract.
11. By reason of the extension of time, CDP has no entitlement to deduct liquidated damages for delay.

Late information

12. In addition, the Engineer was required to provide to CDP detailed setting out and alignment information for the road works. Although ABC's Clause 14 Programme indicated that earthworks for roadwork would commence on 1 March 2005, it was not until 30 March 2005 that the Engineer provided this information.
13. This delay in the provision of the setting out information caused a further one month concurrent delay with the delay to the drainage works, and resulted in ABC incurring additional costs, including costs of additional earthworks and roadworks labour and plant. A full breakdown of these costs appears at Appendix 1 hereto.
14. Accordingly, ABC is entitled to, and claims, the sum of £100,000 in respect of this claim.

Variations

15. During the course of the Works the Engineer issued variations to the depth and alignment of the drainage and sewage works. The effect of these was to substantially increase the length and depth of drains and sewers to be installed, and the number of manholes.
16. The Engineer has wrongfully valued these variations using rates and prices in the Bill of Quantities but the work was not of similar character or carried out under similar conditions, and accordingly the proper valuation should use higher rates.
17. The difference between the Engineer's valuation, and ABC's true entitlement, amounting to £50,000 is set out in Appendix 2 hereto.

CDP's defences

18. In the course of correspondence between the Engineer and CDP itself, CDP has sought to deny ABC's claims on the basis that:
    (i) The groundwater table did not amount to physical conditions and/or that it should in any event reasonably have been foreseen by an experienced Contractor.
    (ii) The absence of any request from ABC for the roadwork setting out information; and
    (iii) In respect of all claims, the absence of any notice pursuant to Clause 53 of the Conditions of Contract.
19. ABC contends that these contentions are misconceived, in fact and in law, and relies upon the following:
    (i) The groundwater clearly amounts to physical conditions. The site investigation information provided with the tender documents and upon which ABC's tender was based clearly showed the water table at, or below, the maximum depth of drainage and sewerage excavation.
    (ii) While it is right that no specific request was made for the setting out information, this is not fatal to ABC's claim, since the date upon which earthworks were due to commence was clearly stated in the (approved) Clause 14 Programme; and
    (iii) Even if notices were not provided by ABC pursuant to Clause 53, by Clause 53(5), the giving of sufficient notice is not a condition precedent to the validity of the claim. The Engineer has not been prejudiced by the absence of notice.

Summary

20. By way of summary, ABC is entitled to an extension of time (and therefore it is not liable for liquidated damages) together with a total sum of £150,000 plus VAT and interest. At the date of this Mediation, ABC has indicated that

it would be willing to accept a sum of £125,000 (with no liability for liquidated damages) in full and final settlement of its claims. On the other hand, CDP has offered to settle this matter on the basis of a payment to ABC of £40,000 (allowing for ABC's liability for liquidated damages). This is not acceptable to ABC.

21. Both parties have agreed to participate in this Mediation, and have agreed to the appointment of the Mediator. For its part, ABC makes it clear that it comes to the Mediation with an open mind and the firm intention to have this dispute successfully mediated. ABC recognises the value of achieving a settlement, not just for the immediate dispute, but also in recognition of the ongoing commercial relationship between the parties.
22. That said, however, ABC is confident in its position that it is entitled to substantial sums in respect of the clear breach of contract in supplying late information and the true value of variations. In addition, ABC can have no liability to CDP for liquidated damages.

Attachments

23. A copy of the Conditions of Contract, the tender site investigation and relevant correspondence, instructions and valuations are attached to the Position Statement.

As for the mediation day itself, once again there are, and can be, no hard and fast rules. The day itself will often be long and tiring, and one of the first priorities of the mediator is to ensure that the venue is suitable, that the parties are comfortable for the full duration of the mediation and that there are appropriate refreshments available throughout the day. It is also useful to have typing facilities available so that, if an agreement is reached, it can be set down in writing and signed by the parties there and then. There must be a separate room for each of the parties to the mediation, as well as a room in which all of the parties can meet with the mediator in joint session.

The format of the day will largely depend on the approach of the mediator to the particular dispute, but perhaps the most usual two-party mediation procedure would involve the following:

1. The mediator personally meets and settles the parties, having a brief discussion with each as to any developments since any previous communication. The mediator should also take the opportunity to explain a little bit about the process, and the likely course of the day. Once again this is an important part of the process by which the mediator builds the trust and confidence of the parties.
2. A joint session at which the parties are introduced (if necessary), the mediator explains the likely course of the day, and reminds the parties of the essential elements of the mediation (confidentiality, privacy, etc.). The mediator is then

likely to invite the parties, one at a time, and in an order he will have carefully selected and notified the parties of in advance, to make their introductory remarks and opening statement. The opening statement is important, and the mediator will probably have requested the parties to give this their best shot, and what is said should be aimed at those representing the other party. Usually, it is not sufficient merely to read the opening statement. One of the first questions the mediator may ask each of the parties when he first sees them separately following the initial joint meeting is whether they have any thoughts or views on the opening statement of the other party. Often the response will be that they have heard nothing new, and if that is the case, it has been a wasted opportunity.

3. Thereafter, it is likely that the mediator will initially meet with each party separately. These meetings may be long or short, depending on the circumstances, and there may be several rounds of them.
4. The mediator will have the power, if appropriate, to bring the parties back into joint session at any time, and will probably do so at some stage, not least at the settlement phase.

Most mediations will follow a fairly standard three-stage process, although often the parties will not be aware of the three stages or the movement from one stage to the next, which inevitably overlaps at least to some extent. The stages are as follows

- exploration phase
- bargaining phase
- concluding phase.

Each of these is considered separately below.

7.6.1 The exploration phase

This is the opportunity for the mediator to build rapport with the parties, and for him to gain the confidence and trust of the parties. The mediator's role here is largely to listen to the parties, with a view to clarifying and understanding the issues and establishing what their real needs and concerns behind the dispute are. Often, even in a substantial commercial dispute, there is some underlying point of principle, or perhaps personality, that must be resolved in order for the whole dispute to be resolved. The exploration phase gives the mediator the opportunity to talk one on one with the parties and to explore matters so that they can be addressed during the remainder of the mediation.

It is also an important opportunity for the mediator to understand the nature and basis of any previous offers of settlement. This will ensure that the mediation, and any negotiations within it, starts at the correct place. The history of negotiations between the parties, and an analysis of the offers and counter offers by the parties, may give some indication as to the likely basis of settlement and the probable range within which a financial settlement may occur.

It is important for the future conduct of the mediation that the exploration stage is not rushed. There may be occasions when a mediator may spend several hours with one party

or the other in this phase, and this time will inevitably be time well spent. There may be a perception by the parties that the mediator is moving matters too slowly, if indeed at all, but experience suggests that rushing the exploration phase may diminish the prospects of successfully mediating the dispute.

In other circumstances, the mediation may have moved from the exploration stage to the bargaining phase only to find it necessary to return to the exploration phase to investigate a matter not previously or fully addressed.

The mediator should always be conscious of the party with which he is not spending time. Thus, when starting a private meeting with one of the parties, the experienced mediator is likely to explain to the other party what he is about to do, and perhaps give a rough time estimate as to how long he thinks he might be. If he then feels it necessary to exceed that time, he should return to the other party to explain what he is proposing to do, and perhaps give a further time estimate. At all stages, he should inform both parties that they should not read anything into the fact that he is spending more, or less, time with one party or the other.

One of the main tools at the disposal of the mediator is reality testing. While this may take place in the bargaining phase, rather than the exploration phase, the experienced mediator should use the exploration phase as an opportunity to prepare the parties for reality testing, and the fact that settlement is always likely to involve both parties moving from their stated positions.

Central to that expectation of movement are the parties' real needs, rather than their publicly stated position. As noted above, exploring and establishing the parties' real needs is one of the principal reasons why mediation works, and why it has such a high success rate. It is during the exploration phase that the mediator will seek to establish the parties' real needs with a view to identifying (and thereafter addressing) those matters that are truly the differences between the parties.

The mediator will, however, always be conscious of maintaining the trust of the parties, and his undertakings with regard to confidentiality are crucial to this. As noted above, the mediator should treat everything said by a party in private meeting as confidential, and should only seek to pass it on to the other party with express permission. The parties should be sufficiently confident in the mediator to discuss the dispute and their real needs openly and frankly.

It is important during all phases of the mediation that the mediator is conscious of the representatives of each party. Thus, he should seek to involve directly and build a rapport with the representative of the party, rather than only with its professional advisor. The mediator should also be conscious of involving all members of the team and not letting anyone feel sidelined or unimportant, as this itself may become a further hurdle to be overcome before settlement can be achieved. It is important that the mediator listens attentively and equally to all those contributing to the discussion.

The mediator should be conscious that it is the parties that set the agenda, and not the mediator himself. Thus, he should not unnecessarily investigate matters that he considers important but which the parties may themselves consider to be peripheral at best.

Finally, before leaving one party to meet with the other, the mediator may well ask the party, in his absence, to carry out some exercise, perhaps to investigate documents or to review one or the other party's figures. This serves not only to keep the party involved, but can often provide useful information and analysis for the bargaining phase of the mediation.

7.6.2 The bargaining phase

This is the part of the mediation when the possible terms upon which a settlement may be reached can be discussed in detail. This stage will (or at least should) continue until the parties have reached their agreement (or it has come to the point where it is clear that they will be unable to reach an agreement). Parties are often reluctant to be the first to make a new offer in the mediation: it is often seen as a sign of weakness, and a party's perception will be that, by making the first offer, it will be in a weaker position. In fact, the contrary is true, and the party that makes the first offer often has a greater degree of control over this part of the mediation. It is inevitable that during this phase a sticking point will be reached, and here the skilful mediator is essential. His job will be to break the apparent deadlock, and in doing so he will use his own negotiating skills, and techniques such as reality testing, WATNA and BATNA.

It is during this phase of the mediation that time spent in the exploration phase will start to pay dividends. For example, the mediator will have explored the parties' real needs and ascertained any potential emotional blockages. Armed with this information, the mediator will be able to identify what is important to one party or the other. As noted above, often there may be a matter of principle that one party considers to be of the utmost importance, and on which the other party places little value or importance. Here, the mediator can use this knowledge in order to assist the parties in reaching their settlement.

In addition, one technique the mediator can adopt is to enquire of a party making the offer as to what it thinks the receiving party's reaction is likely to be to the offer. This can be a powerful tool, and lead the offering party to reassess its offer.

The mediator can also suggest ways of increasing the attractiveness of an offer, without increasing the cost. Thus, in the exploration phase it might have become apparent that a particular item of claim is one upon which one party feels very strongly, and it might be prepared to accept a lesser overall offer, provided that item of claim is recognised in full. Thus, the mediator can suggest to the offeree that the offer should be structured in a way to achieve this.

It must be recognised that this phase can, and probably will, reach apparent deadlock. There can be many reasons for this, and experience shows that most mediations reach a point such as this at some stage. Once again, the experienced mediator will be

skilled at dealing with apparent deadlock and will seek to identify the cause of it and investigate ways to overcome it.

Causes of deadlock may be the entrenchment of positions by one or both parties, or based on some underlying emotions. Again, time spent in the exploration phase will pay dividends at this stage, as the mediator should have an understanding of the underlying cause of the deadlock.

The mediator will seek to break the deadlock using a number of techniques, perhaps the simplest of which is to ask the parties what they would like him to do. Given that the alternative to reopening the negotiations is likely to be a failure to reach a settlement, this is in practice a powerful tool to break the deadlock. It can, and normally would, be combined with a further reality test so that the parties can fully appreciate and understand the risks they face if they do not achieve a negotiated settlement during the course of the mediation.

During the bargaining phase the mediator can, if he thinks it appropriate, continue to meet with each party on its own, discussing offers and taking counterproposals back and forth, or he can, and in many circumstances will, bring the parties together so that fine detail can be discussed directly between the relevant representatives of the parties.

If the mediator is simply acting as a messenger passing offer and counter-offer back and forth, there may well be a distinct advantage in bringing the parties together to conduct the negotiation themselves. However, the mediator should always be mindful of personalities and the possibility that such a meeting might be counterproductive. He should also consider whether he should suggest bringing both parties' complete teams, including advisors, together, or whether it should be a meeting between the two principal decision makers without legal or other advisors. As is always the case with mediation, there are, and can be, no hard and fast rules, and the parties must to a large extent rely on the skill and experience of the mediator in reading the situation.

Throughout all of this the mediator and the parties must recognise that it is the parties that own the problem and its solution, and the settlement rests in their hands. It is not for the mediator to press the parties for a particular solution in order to break the deadlock. It is always to be left to the parties, albeit with the assistance of the mediator, to achieve their own settlement.

During this phase, it is important that the parties and the mediator fully understand the offers that are being made, and that they are complete and deal with all the matters in dispute. It is not uncommon for broad offers to be exchanged and for agreement to be reached on them only for one party to raise some further outstanding matter (e.g. copyright on drawings, or VAT or interest and costs). If this happens, it is necessary to return to the bargaining phase so that the parties can once again reach a complete and comprehensive settlement. However, these situations are best avoided, and it is important for the mediator, as well as the parties, to understand the exact nature of

the offer that is being made or accepted so that there is no confusion or an appearance of backtracking.

7.6.3 The concluding phase

The concluding phase arises when the parties have, at least in principle, reached a settlement. In the concluding phase, it is the responsibility of the parties (and not the mediator) to draft a formal settlement agreement. Often during this part of the process further disputes over detailed matters that had not occurred to the parties during the detailed bargaining phase will arise, perhaps including matters such as VAT, or VAT invoicing, costs and the like. These matters will need to be resolved in the same way as the principal dispute, and using the same techniques, and often necessitate a return to the bargaining phase.

It is important that the settlement agreement is sufficiently well drafted that it is legally binding on the parties and enforceable should any dispute arise on it. In addition, it is important that it deals fully with the dispute between the parties and the basis upon which they settle, and its terms are clear and certain, so that further disputes as to the meaning and effect of the settlement agreement can be avoided. Often the parties will rely on professional advisers for this part of the mediation process. It should be noted that the mediator will not normally involve himself in the detailed drafting of the agreement, although he will consider it and may raise questions as to potential areas of ambiguity and uncertainty.

The mediator, and indeed the parties, should be careful not publicly to state views on whether the settlement is considered to be a fair or good one, as the case may be. One party may feel that it has done less well out of the mediation and the settlement resulting from it than the other, or than it might have expected, and the mediator should be sensitive to the parties' feelings.

Finally, it must be appreciated that there will be circumstances where settlement is not reached during the course of the mediation day (or days). However, a good mediator will not simply walk away from the parties and their dispute at the end of the day, but will keep in touch with the parties thereafter with a view to continuing informally the mediation process, and continuing to seek to give the parties the opportunity to settle their dispute. The parties should seek to make the best use of this further opportunity as, in practice, it is surprising how often disputes that do not settle during the mediation itself subsequently settle, either with the further involvement of the mediator, or directly between the parties and their advisors using the mediation, and the negotiations within it, as a springboard to closing their remaining differences.

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Chapter 8
Expert determination

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8.1. Introduction

The alternative dispute resolution process of expert determination provides the parties to a dispute with unique opportunities. In essence the term 'expert determination' describes a process by which the parties agree that a third party, who is of a relevant discipline (the 'expert') and who is independent of both parties, is to be engaged to answer a particular question or to determine a particular dispute, and that both parties are to be bound by that expert's decision. The process can, therefore, result in a fast, binding and final resolution of the issues referred to the expert.

Expert determination is also flexible. It is based entirely on an agreement between the parties, and so the parties have opportunity, subject to their mutual agreement, to control and tailor the process to suit their particular circumstances. For example, the parties may wish to agree, either at the time when a dispute arises or, more commonly, in advance by incorporating appropriate terms into a contract between them

- who to appoint as the expert or how the expert is to be selected and appointed
- the question or questions that the expert is to be asked to determine
- the process the expert is to follow
- the period in which the expert is to determine the questions referred
- the finality of the decision
- the parties' liability for the expert's fees and the parties' costs.

Note that the term 'expert determination' is generally used to describe a process that results in a final and binding decision from an expert. However, this is not always the case – it is open to the parties to decide otherwise or to use the process to resolve disputes on an interim basis during a project. For example, in *Rhodia Chirex Ltd. v. Laker Vent Engineering Ltd.* CA [2004] B.L.R. 75 an expert was appointed under the Institution of Chemical Engineers (IChemE) model form of contract to resolve a dispute over the proper value of a provisional termination certificate. The expert's decision was held by the Court of Appeal to be final and binding in respect of that provisional certificate. However, the contract also provided for a final termination certificate to be issued, so the expert's decision in this case could, on issue of the final termination certificate, have been superseded for practical purposes. If parties want to use expert determination to provide a temporary decision, they must make their intentions clear. In the recent case of *Lipman Pty Limited v. Emergency Services Superannuation Board* [2010] NSWSC 710,

the parties had agreed that an expert determination was to be final and binding unless reversed or overturned or otherwise changed under a defined procedure which involves an attempt to negotiate a settlement in good faith and to agree upon a procedure to resolve the dispute. The Supreme Court of New South Wales, Australia, held that if such negotiations did not result in an agreed change to the expert's decision or any agreement for any further procedure to resolve the dispute, then the expert's decision remained final and binding. It rejected an argument that the parties' agreement was wide enough to permit a party that was dissatisfied with the expert's decision to take the dispute to a different tribunal.

The flexibility of expert determination allows it to be used in a broad array of circumstances, sometimes to avoid lengthy and complex disputes from arising and at other times to resolve disputes quickly and cheaply. It is not uncommon for parties to agree that the whole process shall be concluded in a matter of days after an expert has been appointed.

Subject to the agreement of the parties, the expert is free to use his own knowledge, expertise and experience to investigate the issue that has been referred for determination. This is often considered to be one of the greatest strengths of expert determination. In many situations, particularly when the nature of the issue to be decided is technical, the expert will have been carefully selected to do precisely that. So the expert is appointed not, or not just, to hear the parties' various contentions and to select between them, but to investigate the circumstances and to apply specialist knowledge and expertise in order to decide for the parties the answer to the question they have referred for determination.

Obviously, the perceived benefits of expert determination carry with them associated risks. The benefit of finality has to be weighed carefully against the consequent risk of being unable to appeal or, subject to only few exceptions, to challenge the expert's decision. The benefit of agreeing to a fast dispute resolution process has to be balanced against the risk of the procedure not allowing the depth of investigation that other procedures might have allowed.

As with all forms of dispute resolution, it is a matter of 'horses for courses'. However, when used in appropriate circumstances, expert determination can provide what many engineers long for: a fast and final decision from an independent engineer whose discipline, expertise and experience make him or her ideally suited to deciding the issue that has arisen between the parties.

In many of the oldest cases dealt with by expert determination, the expert was used to provide parties with a binding third-party valuation for the subject matter of their contract. This is still common, although more recently the traditional subject matters of such valuations (shares in private companies, property and rents) have expanded across the spectrum of modern commercial activities. Examples include

- fixing the values of computer equipment
- adjusting the price of vessels or equipment depending on their actual condition

- resolving the sums to be paid under engineering contracts in respect of variations or on termination
- deciding whether goods or equipment are of the quality required by a contract
- deciding whether remedial work was required to engineering works
- deciding in respect of a performance bond whether the employer was entitled to call on the bond by reason of a breach by the contractor of its contract with the employer
- decisions over compensation for oil pollution.

In addition, and as familiarity with and confidence in the effectiveness and efficiency of expert determination has become more widespread, it is becoming more common for parties to agree that any dispute arising out of a contract between them shall be, or may be, referred to an expert for a binding decision (e.g. *Thames Valley Power Ltd. v. Total Power & Gas Ltd.* [2005] EWHC 2208 (Comm)). The risk to the parties in making such an agreement does appear to be high, and this would be particularly so in the context of a contract for a complex engineering project. One expert may simply not have a sufficiently broad field of expertise to cover the range of possible issues that could arise from the contract. Expert determination is more likely to be regarded as appropriate where the contract identifies particular questions or subject areas that can be matched to the known field of expertise of the proposed expert.

8.2. Expert determination versus other dispute resolution processes

The most significant feature that distinguishes expert determination from mediation, early neutral evaluation and adjudication is that it will provide the parties with a final and binding decision. Mediation and early neutral evaluation can provide circumstances in which the parties might successfully negotiate a binding agreement, but such an agreement is not always possible. Adjudication is usually conducted on the basis that the decision will be final and binding unless or until it is overturned by litigation or arbitration. It is therefore envisaged that, following adjudication, the decision may only have a temporary effect and that the same issue that was referred to the adjudicator may be decided afresh. By contrast, expert determination will, because that is what the parties agree, result in a decision that is final and binding. There can be no appeal and no rehearing.

Litigation and arbitration can also provide final and binding outcomes, although they are both distinct from expert determination. Most arbitrations are accurately described as 'litigation in the private sector' (per Sir John Donaldson MR in *Northern RHA v. Derek Crouch* [1984] QB 644 at 670); however, the boundaries between expert determination and arbitration can appear somewhat blurred. Circumstances in which parties have agreed to expert determination have expanded from the answering of questions in order to avoid disputes from arising, to include the resolution of any disputes arising out of a contract. At the same time, the Arbitration Act 1996 makes provision for arbitrators to take the initiative in ascertaining the facts and law, thereby allowing an inquisitorial element to be introduced to the traditionally adversarial nature of arbitrations. It remains the case, however, that the two processes are said to be quite distinct. This has been described by J. Cooke in *Bernhard Schulte GMBH & Co. KG and others v. Nile Holdings Ltd.* [2004] 2 Lloyd's Rep. 352 at paragraph 95 in the following terms:

> There is an essential distinction between judicial decisions and expert decisions, although the reason for the distinction has been variously expressed. There is no useful purpose in phraseology such as 'quasi judicial' or 'quasi arbitral' as Lord Simon made plain in Arenson and although the use of the word 'expert' is not conclusive, the historic phrase 'acting as an expert and not as an arbitrator' connotes a concept which is clear in its effect. A person sitting in a judicial capacity decides matters on the basis of submissions and evidence put before him, whereas the expert, subject to the express provisions of his remit, is entitled to carry out his own investigations, form his own opinion and come to his own conclusion regardless of any submissions or evidence adduced by the parties themselves.

This passage emphasises that experts are engaged, subject to their terms of reference, to employ their skills and expertise to conduct their own investigations in order to answer the questions referred to them, taking such account of the submissions of the parties and the evidence that they put forward as they see fit, whereas judges and arbitrators are required to make decisions on the basis of the parties' submissions and evidence. While arbitrators may use their knowledge and experience to probe and test the evidence that is put before them, unlike experts they are not permitted to decide a dispute on the basis of their own investigations or by application of their own specialist (rather than general) knowledge and skill, at least not without fully informing the parties of those matters and inviting their submissions (*Checkpoint Ltd. v. Strathclyde Pension Fund* [2003] EWCA 84 Civ).

At a practical level the following distinctions between litigation, arbitration and expert determination are of note.

8.2.1 Procedure

Unlike litigation and many arbitrations, where the process is usually lengthy and formal, expert determination is usually swift and relatively free of complex procedures. The parties, in their contract, have a free hand in deciding the procedure that is to be followed during an expert determination. If no procedure is specified then the appointed expert is free to reach a decision following whatever procedure he or she sees fit, provided that the expert maintains impartiality and conducts the process fairly. Breach of either of these principles may in some cases permit a court to set aside an expert's decision. However, parties do commonly agree a basic procedural framework by which each party is given an opportunity to provide the expert with relevant document and submissions. They may also provide for a site inspection to be carried out by the appointed expert and for party representatives to attend to answer such questions as the expert may have. Unless prohibited by the parties' agreement, the expert is free to supplement the parties' agreed procedure (see *Bernhard Schulte GMBH. & Co. KG and others v. Nile Holdings Ltd.* [2004] 2 Lloyd's Rep. 352 at paragraph 88).

While it is in the parties' interest to establish a procedure to provide them with adequate opportunity to set out their positions to the expert, it should be remembered that the parties have usually selected expert determination in order to obtain a swift and inexpensive decision (often within a matter of a few days or weeks) and they have engaged the expert to inquire into the matter and use his own skill and judgment, not merely to adjudicate between the stances of the two parties.

8.2.2 Expert evidence

In both arbitration and litigation concerning engineering and construction projects it is common for each party to instruct one or more expert witnesses to express their opinions to the court or tribunal. In an expert determination, where the appointed expert has been engaged to answer a particular question by coming to his own decision on the point in issue, it is fairly unusual for the parties to instruct further experts to prepare reports as independent witnesses. There are some high value cases in which the parties will want to instruct their own expert witnesses in an attempt to persuade the appointed expert that a particular analysis of the issue under consideration is correct, but the expert determining the dispute is not bound to select between the evidence from parties' expert witnesses and is free to reach his or her decision on a different basis altogether, provided that the expert answers the question that has been referred and complies with his or her instructions.

8.2.3 Assistance from the courts

Under the Arbitration Act 1996 the courts have numerous powers to assist in the fair resolution of a dispute referred to an arbitrator. These include the appointment of an arbitrator should the parties' agreed appointment procedure fail, and the making of orders concerning, for example, the attendance of witnesses and the preservation of evidence. No such support is available in the case of an expert determination because the Arbitration Act does not apply. In the context of expert determination the court may assist insofar as difficulties are caused by a breach by one party of an implied duty to cooperate so that the expert determination can be carried out properly (see *Sudbrook Trading Estates Ltd. v. Eggleston and Others* [1983] A.C. 444, and *Smith v. Peters* (1875) L.R. 20 Eq. 511 in which the court ordered one party to grant access to premises so that the expert (a valuer) could conduct his investigation by inspecting the articles he had to value). However, compared to the powers of the court in respect of arbitrations, the assistance available in respect of an expert determination is very limited, and parties are therefore well advised to include adequate procedural provisions in their agreement.

8.2.4 Cost

As to fees and costs, litigation and arbitration are generally very expensive, and the usual position of costs following the event provides considerable uncertainty as to what potential liabilities the parties are exposed to. Due to the contractual basis of expert determination, the parties are free to decide on a swift and cheap procedure. They are also free to decide how the expert's fees and expenses are to be divided (or to give the expert the power to decide this), and similarly whether, and if so how, the parties' own costs are to be divided between them.

8.2.5 Appealing/challenging the decision/award

Although appeals from judges require permission, if it can be shown that a judge made a wrong decision his judgment can be overturned. The circumstances in which one can seek to overturn the decision of an arbitrator or have a matter remitted to an arbitrator are more limited.

Parties selecting expert determination usually agree that the expert's decision is to be final and binding. Once an expert has reached a decision there is no right of appeal and no right to have a rehearing before an arbitrator or a court. The circumstances in which a court will refuse to enforce an expert decision that the parties had agreed was to be final and binding are extremely narrow indeed, and do not include the expert getting the wrong answer to the question that he was asked, even if he made a mistake.

8.2.6 Limitation issues

The Limitation Act 1980 provides a fixed period in which disputes may be started in court or before an arbitrator. Failure to commence a claim within that time can result in it being struck out. Although most expert determinations will be carried out well before any question of limitation arises, because it is generally chosen by parties who want a swift resolution of issues, there are difficult questions that arise if the expiry of a limitation period is approaching. It is generally thought that the Limitation Act 1980 could not apply directly to an expert determination, and some support for this (albeit not a decision) is found in *Braceforce Warehousing Limited v. Mediterranean Shipping Company (UK) Limited* [2009] EWHC 3839 (QB). If the issue were to arise it could be argued that the parties must, to give the contract business efficacy, have implicitly intended that there would be a point beyond which an expert could not be invited to determine an old dispute, and that effect should be given to the same limitation periods as those which apply to litigation or arbitration. In the context of adjudication, where the same point arises, there is some judicial support for the proposition that statutory limitation periods should be given effect (*Connex South Eastern Ltd. v. M J Building Services Group plc*. CA [2005] EWCA Civ 193), and there is no reason why that position should not apply to an expert determination. The point has, however, yet to be decided directly by the courts.

8.2.7 International agreements

Specific legal advice should be sought if it is proposed that expert determination be used as a dispute resolution procedure for international contracts. The enforceability of the parties' agreement to be bound by the decision of an expert may depend on the law that is applicable to the contract, the public policy of the states concerned and the legal procedures of the country in which enforcement is attempted.

The UK is a signatory to the Brussels Convention the Lugano Convention and the New York Convention, such that the decision of judges and arbitrators carry with them the benefit of wide international enforceability without the parties having to address the underlying merits of the dispute again. However, this is not the case in respect of expert determination. In some cases it may be possible to obtain a judgment from an English court (or even an arbitration award) giving effect to an expert's decision. Reliance could then be placed on the judgment or award when seeking to rely on the relevant convention during any international enforcement.

8.2.8 Immunity of the decision maker

Judges cannot be sued by dissatisfied litigants and, unless guilty of bad faith, neither can arbitrators (Section 29 of the Arbitration Act 1996). By contrast, following the House of

Lords decision in *Arenson v. Casson Baeckman Rutley & Co*. [1997] A.C. 405 there is a possibility, subject to any agreement between the parties and the terms of an expert's engagement, of suing an expert to seek redress for any loss suffered if it can be proved that the appointed expert was negligent.

In *Areson v. Casson Beckman Rutley & Co*. a firm of auditors had been appointed to determine the 'fair value' of a package of shares in a private company. This they did. However, within a short time the private company was floated and the price of shares in the floatation was approximately six times the value previously stated. The vendor of the shares alleged that the expert's valuation had been negligent and commenced court proceedings. The valuers sought, but failed in the House of Lords, to have the claim struck out on the basis that, even if their valuation had been made negligently, the law afforded experts immunity from suit. The House of Lords rejected this proposition (following their earlier decision in *Suttcliffe and Tharckrah* [1974] A.C. 727, in which they held that an architect administering a standard form RIBA building contract did not have immunity in respect of any negligence in issuing certificates). They held that there was no basis for such valuers, when appointed as experts, to escape liability if they failed to perform their engagement with the professional skill and care that was reasonably expected of them.

8.3. The question or questions to be referred to the expert

8.3.1 All disputes or particular questions

Although parties may decide that any dispute arising out of or in connection with a contract should be determined by an expert, it is more usual for the parties to identify in their contract defined questions, issues or subject areas about which a reference to an expert can be made. As one of the most significant benefits of expert determination is that an appropriately qualified and respected expert will be engaged to answer a question within that expert's field of expertise, it can easily be understood why this is the case. It may be relatively easy for parties to agree, for example, that any question over whether a complex piece of engineering equipment should be accepted as complete could be resolved by an expert practicing in the particular field in question. It is quite another thing for the parties to agree that every other potential dispute that could arise – perhaps, for example, a dispute over the liability for and consequences of delayed delivery – should also be resolved by the same individual or as part of the same reference.

Expert determination is often considered most appropriate were narrow questions can be referred to an appropriate expert, be that an engineer, an accountant, a surveyor or a lawyer. Some such issues can easily be identified at the time when a contract is drafted. For example, it may be foreseeable that there could be a dispute over whether a project had progressed to the point where a completion certificate was due to an engineering contractor, or over the appropriate price for a variation. By considering these issues before entering the contract and by including suitable terms in the agreement, both parties can enter the contract with the confidence of knowing that if disputes do arise over those issues they have the right to resolve the dispute through a swift, relatively cheap, and binding process, and that concerns over lengthy and expensive litigation or arbitration can be put to one side.

The IChemE has perhaps taken the lead in developing a suite of standard term contracts where expert determination is identified as a dispute resolution procedure available to either party. Expert determination is expressly identified as being available to the parties in respect of disputes on subjects as diverse as objecting to a variation order, disapproval by the project manager of documentation provided by the contractor, whether a completion certificate or final certificate should have been issued, the cost and time implications of suspension orders and the amount payable following termination. The IChemE contracts provide expressly that any dispute concerning one of these identified subject areas shall be referred to expert determination if one party serves notice to that effect on the other. It also provides that the other issues might also be resolved by expert determination if both parties agree.

8.3.2 Identifying the question clearly

Whether the question to be answered by the expert is identified before the parties enter a contract, or whether the question to be answered or matter to be decided arises only after a contract has been entered, it is of utmost importance that the scope of potential references and the terms of any actual reference to the expert are clear.

The issues and questions that the parties agree may be referred to an expert must be defined with sufficient certainty for there to be a valid contract between the parties and between the parties and the expert. Unless the particular question is narrowly defined within the words of the contract, the reference to the expert must itself define the question that the expert is being asked to answer and that question must arise from a subject area in relation to which the parties have agreed to use expert determination.

On a practical level, ensuring that there is clarity is, of course, also prudent because the decision of the appointed expert will be final and binding on the parties. Lack of clarity provides a further potentially serious pitfall. The jurisdiction of the expert derives from, and is limited by, the agreement of the parties. If the expert misconstrues what he has been asked and so answers the wrong question, then his decision may be invalid, allowing any enforcement proceedings to be defended.

8.4. The parties' agreement to refer a question to an expert

Clauses that provide for an expert to answer a particular question or to resolve disputes on particular issues vary widely in their content and complexity.

In the simplest of cases the parties might merely agree, for example, that if they cannot agree on the valuation of particular property then the issue should be decided by an independent chartered surveyor acting as an expert and not as an arbitrator. While such a simple agreement might be effective, it would leave many matters open to debate, such that some of the benefits of expert determination could be lost.

Several organisations now publish standard terms for parties to adopt or incorporate in their agreement so as to ensure that the parties can, insofar as this is ever possible, have certainty over the process and its effectiveness.

The expert determination clause should include, or at the very least the parties should consider including or incorporating, terms covering the points described below.

8.4.1 The selection and appointment of the expert

As the decision of the expert is to be final and binding, the importance of the decision over who to appoint or how that person is to be selected cannot be overstated. The courts do not have jurisdiction to select an expert for the parties, so provision should be made by naming the expert (and possibly alternatives) in the contract or the contract should provide reliable machinery for the selection and appointment of a suitable expert.

The former route (agreeing the identity of the person or firm which is to act as the expert) may be favoured if the question is precisely framed before the contract is entered into.

The contract should provide what is to happen if either no person is selected in advance, or if that person becomes unavailable or unwilling to fulfil the role of expert. This is most commonly done by agreeing, as a backstop procedure, that an appropriate third-party body (e.g. the incumbent president of a nominated professional institution) should appoint an expert. However, an external appointment obviously carries risks for both parties. Before selecting an appointing body, care should be taken: (a) to understand how the appointing body would select an expert; (b) whether the appointing body would restrict itself to a list of potential candidates and, if so, whether that list would be likely to contain a broad selection of highly qualified people from whom a suitable expert could be selected and matched to subjects of a future dispute; and (c) whether the appointing body would receive submissions from both parties as to the relevant discipline for any potential expert to have before proceeding to make an appointment.

8.4.2 The role of the expert

In order to minimise any later argument that the appointed expert was in fact an arbitrator, the agreement should state expressly that the appointee is appointed to act as 'expert and not as arbitrator'.

8.4.3 The procedure to be followed by the expert

The issues that the parties should consider and might seek to reach agreement on include

- the extent to which the expert is to follow any particular procedure and whether he is to be bound by (and given the powers contained in) any set of published rules for expert determination
- whether the parties are obliged to provide documents or materials requested by the expert, and whether the expert is to be afforded rights of access to property and the right to order or undertake tests
- whether the parties are to have opportunity to make submissions to the expert
- whether there should be a hearing
- the procedural timetable
- the date or period for the expert to make his decision, whether he is to provide that decision in writing and whether he is required to state his reasons.

8.4.4 Confidentiality

Should the parties want the expert determination to be confidential or want confidentially to be respected in relation to any documents disclosed to each other or to the expert during the course of the expert determination, then the parties' agreement and their agreement with the expert should state this.

8.4.5 Interest

An expert has no power to award interest on any money that he decides is owed by one party to the other unless the parties agree otherwise. Therefore, if the expert is to be, or may be, invited to make a financial decision, the parties need to agree whether the expert shall have power to award interest on any sums he decides are due between the parties.

8.4.6 The fees of the expert and costs of the parties

It is unlikely that the expert will accept the appointment unless at least one of the parties agrees to pay his fees and expenses. It is important therefore that the parties agree (preferably at the time of entering into the contract and before a dispute arises) whether such costs are to be shared by both parties and, if so, whether they are to be shared in a predefined ratio or whether the expert is to be empowered to decide which party shall bear which share of the costs of the process. Parties might also seek to agree whether the expert could decide that one party should bear the other's costs, but, as the expert determination is usually short, this is not usual.

8.4.7 The effect of the decision

The agreement should state expressly that the decision of the expert is to be final and binding on the parties (or, if this is not the parties' intention, clearly explain its status and the circumstances in which it may be changed). It may be that even without such express words the agreement will be construed in this way (there are a number of examples where this has been the case, insofar as can be determined from the judgments, including *Campbell v. Edwards* [1976] 1 W.L.R. 403), but express words in the parties' contract removes any later argument on the point.

8.4.8 Compliance and set-off

The parties are well advised to state expressly, assuming that this is what they intend, that they agree to comply with the decision of the expert immediately, or within a defined number of days, and that any sums found due by the expert shall be paid without set-off or deduction.

8.5. The terms of the expert's appointment

The agreement between the parties as to which issues or disputes may be, or must be, referred to an expert is only one part of the contractual regime that governs an expert determination. The other part is the agreement of the expert to perform that role.

The two parts must complement each other so that, where the parties have agreed a procedure, the expert must also agree that he will abide by the parties' agreement. There is, therefore, an overlap between the subject matter of the agreement between the parties and the agreement between the parties and the expert. Parties should consider

and include terms that cover the following matters

- agreement of the question that is to be answered (or dispute that is to be decided) and a requirement that the expert answers the question referred to him as an appointed expert and not as arbitrator
- a requirement that the expert follows any procedure agreed by the parties and exercises his powers as expert fairly and impartially
- agreement that the expert is to carry out his duties with reasonable skill and care
- a requirement that the expert keeps matters confidential
- agreement over the fees and expenses to be charged by the expert
- a requirement on the parties to cooperate with the expert as he conducts his investigation, including agreement to the expert having such access to premises, equipment, materials and documents as he requires
- agreement over whether, and the circumstances in which, the expert shall have the right to take advice from others (whether that advice is legal or technical)
- agreement over whether the expert is to exclude or limit some or all of his potential liability to the parties
- agreement over whether the parties are to indemnify the expert in respect of any claims made against him that arise out of his investigations and decisions as expert.

8.5.1 Standard terms and conditions

Several organisations publish standard terms for expert determination clauses, procedural rules for expert determinations, and terms for the appointment of the expert.

Reference has already been made to the IChemE. Its standard forms of contract, together with its published 'Rules for Expert Determination' ('the White Book', now in its fourth edition, July 2005), provides a comprehensive code for expert determination. Annexed to the rules are standard terms for the expert's appointment. It should be noted that the fourth edition, unlike earlier ones, includes a provision that the expert has power to determine the extent of his own jurisdiction. The standard terms of engagement provide a contractual exclusion of liability for the expert except in circumstances of bad faith, thereby mirroring the immunity provided to arbitrators under the Arbitration Act.

The Centre for Dispute Resolution (CEDR) also publishes documents to govern expert determinations. The CEDR Model Expert Determination Agreement incorporates a provision whereby the parties can agree to suspend the expert determination while mediation is attempted. It envisages that the expert might be appointed as the mediator and, later, if the mediation is unsuccessful, resume his role as expert. It should be borne in mind, if the CEDR set of rules is to be used, and if this clause is not to be deleted by amendment, that during a mediation, issues are often discussed between the mediator and each party on a confidential basis.

8.6. Enforcing or challenging the process or the decision

Over the years the courts have had to consider expert determination in numerous cases. Those cases fall broadly into the following categories

- enforcing the process
- failure of the process
- enforcing a decision
- challenging a decision.

8.6.1 Enforcing the process

8.6.1.1 Staying other proceedings

The terms of the parties' agreement should make clear whether the parties are agreeing that either party can insist on expert determination by giving a notice to the other party, or whether expert determination is only an option, which would require further agreement from both parties. If parties agree that a particular question or dispute is to be referred to expert determination but one party ignores the agreement and starts proceedings in court, the court will usually stay that action if the other party applies, at the start of those proceedings, for the court action to be stayed so that the dispute may be referred to an expert.

In *Thames Valley Power Ltd. v. Total Gas & Power Ltd.* [2005] EWHC 2208 (Comm), the court held that it had discretion as to whether to grant a stay or not because the Arbitration Act 1996 did not apply to agreements to resolve disputes by expert determination. The court accepted that the *prima facie* position was that disputes were to be determined in the manner that the parties had agreed. However, on the particular facts of that case, where there was no dispute of fact between the parties and where the only issue between the parties was how the contract should be construed and where the construction contended for by the defendant was 'erroneous and unsustainable', it was held by the court that there was no benefit to be gained in a stay as this would merely result in delay and wasted costs.

The decision in *Thames Valley Power Ltd. v. Total Gas & Power Ltd.* should, however, be regarded as the exception rather than the rule. It is likely to be rare that the facts will lead a court to the same conclusion. A more typical case is *Edward Campbell & Others v. OCE (UK) Ltd.* [2005] EWHC 458 (Ch). In that case the agreement concerned the sale of a majority shareholding in a printing business. The agreement included terms that required a 'completion balance sheet' to be drawn up, and it was agreed that any dispute as to the accuracy of that balance sheet was to be referred to a firm of chartered accountants who were to resolve the dispute, acting as experts and not arbitrators. After the sale of shares, no agreement was reached over the completion balance sheet – the purchaser's position being that the balance sheet was overstated due to prior overcharging of customers by the vendors. Several disputes arose between the parties, and the vendors started proceedings in court. Amongst their claims was a claim for a declaration that no adjustment be made to the completion balance sheet. The purchaser, OCE (UK) Ltd, counterclaimed in respect of alleged breaches by the vendors of warranties that had been given as to the truth of certain statements about the company's affairs. However, in respect of the issue over the completion balance sheet and the declaration that the vendors were seeking, the purchaser argued that the court should strike out those parts of the court proceedings because of the parties' express agreement to refer such matters to expert determination. The court considered argument from the vendors that the court should

accept jurisdiction over the disputed completion balance sheet because the dispute was likely to cover the same factual material as the disputed breaches of the warranties. The court, however, rejected that argument. It held that the parties' agreement to refer disputes about the completion balance sheet was clear and that the terms of the agreement contemplated that some issues would be resolved by an expert and others by the courts. The claim for a declaration was struck out, leaving the vendors to refer the issue to an expert if they wished. The balance of the case was allowed to proceed before the court.

This case demonstrates not only the fact that the court will seek to uphold a party's right to have disputes determined by an expert if that is what the parties have previously agreed, but also that the parties can by the terms of their agreement define the boundaries between issues that they want to be decided by an expert and others where they are content for litigation or arbitration to be used if disputes require resolution by a third party.

8.6.1.2 A court decision on a point of contract construction

The answer to the question that has been referred to an expert may depend on the meaning that is given to particular words in the contract between the parties as well as on the expert's technical analysis of the issue.

As the expert may have been appointed for his or her specialist skill in a discipline other than law, the question arises as to whether the courts will (either during the expert determination or after the expert has made his or her decision) make a binding decision on a point of contract interpretation. Such questions have generally been asked as part of a challenge to an expert's decision by a dissatisfied party after the decision has been made. In each such case the courts have had to consider the particular wording of the parties' contract to decide whether they intended the expert to have exclusive power to decide any points that were necessary and incidental to the central, perhaps technical or accounting, question that had been referred, or whether the parties intended the expert's decision to be restricted to the central question and to be based on a legally correct understanding of the contract without depending also on the expert to interpret it correctly. In *Mercury Ltd. v. Director General of Telecommunications* [1996] 1 W.L.R. 48 it was decided that the courts do retain jurisdiction over the parties save to the extent that the agreement of the parties is such as to exclude jurisdiction from the courts and to confer it on an expert. That issue is one of contract construction, and each case will turn on the particular contract under consideration. On the facts, the House of Lords unanimously concluded that the parties had not intended the Director General simply to apply such meaning as he himself thought that particular phrases in the relevant contract should bear, but that he should apply the principles as correctly interpreted. On those facts they held that a determination based on a misinterpretation of those phrases not be valid because the expert would not have done what he had been asked to do.

The decision in *British Shipbuilders v. VSEL Consortium plc*. [1997] 1 Lloyd's L.R. 106 explains that the analysis in *Mercury* was consistent with the earlier lower court decisions

(*Jones v. Sherwood Computer Services* [1992] 1 W.L.R. 277, *Nikko Hotels (UK) Ltd. v. MEPC plc*. [1991] 2 E.G.L.R. 103, and *Norwich Union v. Life Assurance Society v. P & O Property Holdings Ltd.* [1993] 1 E.G.L.R. 164), which do not at first sight sit easily with *Mercury*), and that the earlier cases have not been overruled. Lightman J distilled five legal principles that have since been cited with approval in the Court of Appeal in *National Grid Company plc. v. M25 Group Ltd.* [1999] 1 E.G.L.R. 65. Of these, the first was that 'Questions of the role of the Expert, the ambit of his remit (or jurisdiction) and the character of his remit (whether exclusive or concurrent with a like jurisdiction vested in the Court) are to be determined as a matter of construction of the Agreement.' Recent examples applying this principle are found in *Homepace Ltd. v. Sita South East Ltd.* [2008] EWCA Civ 1 and *Menolly Investments 3 SARL, and Menolly Homes v. Cerep SARL* [2009] EWHC 516 (Ch).

One question that arises in cases where the court does retain jurisdiction to decide issues of contract construction is whether a party could seek to delay an expert determination pending a decision from a court on that point so that the expert can apply the contract correctly rather than risk a potential waste of time and money if it is later found that the expert based his decision on an incorrect understanding.

In *British Shipbuilders*, Lightman J also decided as his fifth principle that it would only be in exceptional circumstances that a court would be willing to determine questions of construction in advance of the expert determination process. However, in *National Grid Company v. M25 Group Ltd.* the judge at first instance (Pumfrey J, whose judgement, [1998] 2 E.G.L.R. 85, was overturned on appeal on other points) decided on a contingent basis that, while he agreed with Lightman J's principles, he would not have exercised his discretion to stay the court proceedings but would have allowed proceedings in court to proceed so that the court could give decisions on several points of law. He stated that he would have exercised his discretion in this way (if necessary ordering a stay of the expert determination) after taking into account the facts of the case that no prejudice would be caused by any delay in the expert determination pending a court ruling, that the contentions were seriously arguable, central to the question in issue, and could have a very substantial effect on the determination. The Court of Appeal [1999] 1 E.G.L.R. 65 did not find fault in that part of the judgment and adopted the course proposed by the judge.

So where difficult points of construction arise that would have a very significant impact on an expert's decision, then depending on the terms of the parties' agreement it may be possible for a party to apply to the court for answers to those questions and, if necessary, obtain an order from the court to delay the expert determination pending the court's decision. However, such cases will be the exception. The court will be mindful of the fact that such a course might result in increased time and increased legal costs, the saving of which will be presumed to be at least one of the objectives of the parties in agreeing to refer the matter in issue to an expert for determination.

8.6.2 Failure of the process

As stated above, the courts have limited scope for assisting the parties if the expert determination fails. The courts will seek to give effect to the parties', express agreement

as to expert determination, but beyond this any assistance is limited to the enforcement of implied terms.

If the agreed process breaks down, then unless this would be contrary to the parties' intention as expressed in their contract, the court may substitute its own procedure to resolve the question in issue by, for example, ordering that there be a court inquiry as to the point in issue. (See *Sudbrook Trading Estates Ltd. v. Eggleston and Others* [1983] AC 444 and the recent example of *Ursa Major Management Ltd. v. United Utilities Electricity plc*. [2002] EWHC 3041, in which the court held that the court would itself decide the issue in question after the parties had failed for 14 months to agree how the reference to the expert should proceed.)

8.6.3 Enforcing the decision

There is no statutory basis for the enforcement of the expert's decision, but there is, nevertheless, a swift and effective route for the decision to be enforced, if not accepted. The courts will seek to hold the parties to their bargain that the decision was to be final and binding. In *Campbell v. Edwards* CA [1976] 1 W.L.R. 403, at page 407, Lord Denning made the legal position very clear, he said:

> It is simply the law of contract. If two persons agree that the price of property should be fixed by a valuer on whom they agree, and he gives that valuation honestly and in good faith, they are bound by it. Even if he has made a mistake they are still bound by it. The reason is because they have agreed to be bound by it.

Should one of the parties breach the agreement by failing to comply with the decision of the expert, then the remedy available to the other party is to bring an action in court, where the usual remedies of damages, declarations or injunctions would be available. It will often be the case that the claimant will obtain judgment from the court after a short summary procedure, under Civil Procedure Rules, Part 24, by establishing on the basis of a witness statement and documents the existence of the contract between the parties, the agreement to refer the question in issue to the determination of an expert, the appointment of the expert and the expert's decision.

It may be noted that the argument that adjudicator's decisions should be enforced by arbitrators and not by means of court proceedings has been rejected (*Macob Civil Engineering Ltd. v. Morrison Construction Ltd.* [1999] B.L.R. 93 – cited on this point with approval by Neuberger LJ in *Collins (Contractors) Ltd. v. Baltic Quay Management (1994) Ltd.* [2005] B.L.R. 63). In *Macob* it was held that it was not open to a party to deny the validity of a decision for the purpose of resisting a court application, while at the same time asserting that there was a decision that was disputed for the purpose of seeking a stay to arbitration. It should be possible to extend the same argument to allow an expert's decision to be enforced in court, even if there is an arbitration clause in the contract between the parties. However, parties could avoid such argument by introducing suitable words that make clear that disputes over the validity and enforceability of an expert's decision fall outside the scope of the arbitration clause (see, by way of example, clause 48.1 of the IChemE 'Green Book' Reimbursable Form of Contract).

8.6.4 Challenges to the process

Although a challenge to the process will usually have as its aim a decision that the decision of the expert will not be enforced, two points are referred to at this point as they concern the conduct of the expert vis-à-vis the process itself. These are unfairness and impartiality.

8.6.4.1 Unfairness

Experts are required to act fairly (*Sutcliffe v. Thackrah* [1974] AC 727). This is implicit in their appointment, but fairness has been said to be flexible, and what the demands of fairness are in any particular circumstances is factually dependent. In *Bernhard Schulte* (referred to above), where the parties agreed a procedure that permitted each to make submissions to the expert and to be present when the expert conducted a view of the ship which was to be valued, the judge considered it immaterial that the decision of the expert may have been made on the basis of some documents that had been submitted by one party but unseen by the other. The judge's view was that there was no requirement for an expert to observe the 'rules of natural justice' or 'due procedure'. Furthermore, in the different context of an engineer making a decision about a disputed issue as a prerequisite to a party then having a right to start an arbitration to obtain a final decision on the issue, the Court of Appeal has held that fairness did not require that a contractor be given an opportunity to answer submissions made by its employer to the engineer (*Amec Civil Engineering Ltd. v. Secretary of State for Transport* CA [2005] EWCA Civ 291). In contrast, in *Worrall v. Topp* [2007] EWHC 1809, where a final and binding decision on a boundary dispute was being decided by an expert, it was said – albeit without reference to prior authorities – that fairness generally demanded that each party should have the opportunity to respond to contentions made by any other party.

Where an expert is engaged to resolve an existing dispute on a final basis, then in the absence of any agreed procedure it is more likely to be the case that fairness will require some opportunity to be given to each party to make submissions to an appointed expert before the expert makes his or her decision. Fairness may require a party to have the opportunity to answer the submissions of the other party (as the common law rules of natural justice would require), but this is less likely, particularly if it would be inconsistent with an agreed, but short, timetable. Every case will turn on its own facts, and it may be that a particular expert may be able to answer a particular question, quite fairly without submissions from the parties at all. It seems that it will only be in extreme cases that an expert's decision will be declared invalid on the basis of unfairness.

8.6.4.2 Impartiality

Decision may, in the rare circumstances where the facts allow, be challenged on the basis of fraud or collusion (*Campbell v. Edwards* [1976] 1 W.L.R. 403 at page 407, *Baber v. Kenwood* [1978] 1 Lloyd's Rep. 175 page 181). An expert's decision will also be set aside if actual bias is proved, as the expert would have failed to hold the balance fairly between the parties. Actual bias requires evidence of influence by partiality or prejudice in reaching a decision or evidence of actual prejudice in favour of or against a party (*Re Medicament and Related Classes of Goods* CA [2001] 1 WLR 700). The question of whether an expert's decision can be avoided on the grounds of apparent bias (which in

law is determined by reference to whether a fair-minded and objective observer would conclude that there was a real possibility of bias) is less clear. Two legal authorities clearly decided that only actual bias is relevant and not apparent bias. In *Macro & Others v. Thompson & Others (No. 3)* [1997] 2 B.C.L.C. 36 (followed in *Bernard Schulte G.M.B.H. & Co. K.G. and others v. Nile Holdings Ltd.* (see reference above)) Walker J decided that apparent partiality was not sufficient to set aside the decision of an expert, as this might unduly inhibit an expert (such as an auditor, architect or actuary) with a longstanding relationship with his client in continuing to discharge his professional duty to his client. However, in the recent case of *Own Pell Ltd. v. Bindi (London) Ltd.* [2008] EWHC 1420, the judge, who cited *Macro*, nevertheless considered allegations of apparent bias but rejected them on the facts. While there may be circumstances, such as a relationship of the type mentioned in *Macro*, which could understandably justify the exclusion of apparent bias as a ground of complaint, particularly if the parties have selected as expert someone with such a relationship to one of the parties, it is submitted that there will be rare occasions, unrelated to such circumstances, in which a court may, as it appeared to in *Owen Pell*, be willing to consider an implied obligation of apparent impartiality in the conduct of the proceedings.

8.6.5 Challenges to the decision

It is inherent in any decision making by a third party that one party, or both parties, may be disappointed by the decision that is made. Despite the best intentions of the parties, and their appointed expert, there are occasions when one party does feel that the decision should not, despite the terms of the agreement to appoint an expert, be treated as binding.

Several attempts have been made by disappointed parties to defend actions to enforce an expert's decision or to seek declarations that the expert's decision does not bind that party. There are, however, very few circumstances in which a court will refuse to enforce an expert's decision.

8.6.5.1 Expert's mistakes

For the reasons stated by Lord Denning MR in *Edwards v. Campbell*, the making of a mistake by an expert does not provide grounds for resisting the enforcement of his decision.

To temper the potential harshness of this position, some expert determination agreements state expressly that the decision will be binding unless there was a 'manifest error'. The effect of this phrase was considered by Simon Brown LJ in the Court of Appeal in *Veba Oil Supply & Trading Gmbh v. Petrotrade Inc.* (2002) 1 Lloyd's L.R. 295, where he stated that the test for a manifest error should be extended, from that used in an earlier unreported decision of Morison J in *Conoco (UK) Ltd. v. Phillips Petroleum*, to 'oversights and blunders so obvious and so obviously capable of affecting the determination as to admit of no difference of opinion'.

If the expert's decision is binding save for any manifest error, and if the parties have requested that the expert provide reasons for his or her decision, then a court may order the expert to provide reasons or further reasons so that the basis of the decision

can be properly understood (*Halifax Life Ltd. v. Equitable Life Assurance Society* [2007] EWHC 503 (Comm)).

At the other end of the spectrum of mistakes, an expert may, as a matter of an implied term, be allowed to correct a slip in his decision. If an expert acknowledges shortly after he makes his decision that it contains an administrative or arithmetic slip, and if he corrects that slip before any prejudice is caused to the parties, then the corrected decision may be valid. The nature of such a slip must be an accidental error or omission; it must be restricted to correcting the decision so as to give true effect to first thoughts and it cannot involve second thoughts on the substance of the decision (*The Montan* [1985] 1 W.L.R. 625). This narrow concept found favour in relation to an adjudicator's decision in the case of *Bloor v. Bowmer and Kirkland* [2000] B.L.R. 314. The court is, however, unlikely to correct such a slip itself (see *Bouygues v. Dahl-Jensen* CA [2001] B.L.R. 522 and *CIB Properties Ltd. v. Birse Construction Ltd.* [2005] B.L.R. 173).

Mistakes caused by failures of the expert to understand and correctly interpret a contract have been considered above. They may permit a court to refuse enforcement but only if, on a proper construction of the contract, the point of interpretation was not one within the exclusive jurisdiction of the expert as determined from the parties' contract.

8.6.5.2 Expert failing to follow instructions

Although an expert's decision will not be declared invalid in the event of a mistake, an expert must follow his instructions, and a failure to do so is highly likely to render the decision invalid. In *Jones v. Sherwood Computer Services plc*. [1992] 1 W.L.R. 277, the Court of Appeal held that where the parties had agreed to be bound by the decision of an expert the report could not be challenged on grounds that mistakes had been made in its preparation unless it could be shown that the expert had departed from his instructions in some material respect. What is considered to be a material departure has since been the subject of a further decision of the Court of Appeal, *Veba Oil* (referred to above). In that case experts had been engaged to test the density of gas oil using an ASTM testing method known as D1298. The experts used a different and more modern ASTM test known as D4052. It was admitted that the test used was more accurate than the specified test, and that had the correct test been used the experts would inevitably have found that the contractual density threshold was satisfied, just as they had with the more accurate test. The court held that an expert's decision could not be upheld if there was a departure from instructions unless that departure was truly *de minimis* and trivial such that it was obvious that it could make no possible difference to either party. Despite the fact that the test that had been used was more accurate than the one which ought to have been used, the Court of Appeal considered possibilities that the test might have been specified for sound commercial reasons and that use of the wrong test could affect the parties' rights under other contracts, such as an on-sale contract or letter of credit. Taking account of the wider picture, the Court of Appeal held: that it was not obvious that using the wrong test could make no possible difference to the parties; that the parties had not agreed to be bound by a determination using any method other than D1298; and that accordingly the decision of the experts was not binding.

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Chapter 9
Early neutral evaluation

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9.1. Introduction

Early neutral evaluation (ENE) is an alternative dispute resolution (ADR) technique that was developed about 25 years ago by the United States District Courts. The original objective of ENE was to reduce the costs of the litigation process. The district courts decided to offer a programme that would occur very early in the litigation process to help lawyers and clients get an early grip on case development planning and case management.

The process was intended to give perspective to a case already being litigated, sharpen it, and focus not so much on settlement as on improving the quality of thinking of both the client and its lawyers. ENE, however, did help settle many cases. It was so successful that the process, while still a valuable settlement tool after litigation has commenced, has now also moved outside litigation and has become an alternative dispute resolution technique in its own right.

As its name indicates, ENE has at its heart three defining components

- early – it is intended that the process is embarked upon before any formal litigation or arbitration process has started or right at the start of such process
- neutral – the process is presided over by someone unconnected with the dispute or either party (the evaluator)
- evaluation – the evaluator produces an evaluation or recommendation as to what he or she thinks is to be the likely outcome should the dispute proceed.

ENE is different from mediation in that the focus is on the evidence and the law. ENE is explicitly evaluative. In classic mediation, the mediator is not explicitly evaluative and evaluation is not a principal objective of the process. In mediation, evaluation is often indirect and could be based on information learned in confidence. In ENE, evaluation is direct and explicit, and should be based only on information that all parties know the evaluator knows. The principal purpose of mediation is settlement. ENE has multiple purposes, only one of which is settlement.

ENE is different from expert determination in that it is generally a voluntary process conducted on a confidential and without prejudice basis.

9.2. Key features of ENE

ENE is a voluntary procedure, the evaluator's recommendation (the 'evaluation') is non-binding and the process, including the submissions to the evaluator and the evaluation, are confidential.

The success of ENE lies in its ability to help define the legal and factual disputes and identify both the risks and likely outcome before vast sums of costs are incurred in chasing a dispute. Due to its non-binding effect ENE is ideally suited to forming part of an overall settlement strategy. An evaluator cannot only address single issues of fact or law from within a dispute, but he or she may also be asked to recommend a settlement value.

An attractive aspect of ENE is that it does not have the preconceptions sometimes associated with mediations, namely that a suggestion of mediation might appear to be an admission of weakness or a willingness to split the difference. A proposal for ENE indicates confidence in the case because of the willingness to subject it to third party scrutiny.

9.3. The aim of ENE

The purpose of ENE is to clarify the issues in dispute and to give an indication of the likely outcome should the dispute proceed to litigation or arbitration.

ENE assists a party in identifying and clarifying the key legal and factual issues in dispute both in respect of their own position and that of the other side. It encourages and promotes direct communication between the parties about their claims and supporting evidence. At an early stage this can quite often be the key to unlocking the dispute.

The evaluation itself provides a 'reality check' for both clients and their lawyers and advisors and, of course, it informs the decision makers of the parties of the relative strengths and weaknesses of their position. Quite often this process is first undertaken at the door of the court after considerable sums of money have been spent.

Where key questions can be identified, whether they make up the whole dispute or are part of a larger dispute, it is often these simple steps which help to create the right environment for a settlement.

9.4. What does an evaluator do?

An evaluator, depending on the ENE agreement appointing him, sets a procedure for the parties to follow, studies materials provided by the parties, performs independent research into relevant case law (or relies on his own expertise), considers presentations, which can be written or oral, and can clarify the facts and the positions of the parties through written or oral questioning.

When the evaluator has reviewed the parties' positions and the information they have provided against his own research, he or she produces a written evaluation of the relative strengths and weaknesses of each party's position. He may, if asked to, provide reasons for his evaluation.

9.5. When to use ENE

ENE works best when the dispute, or part of a dispute, involves technical or factual issues that lend themselves to expert (usually legal) evaluation. It is ideal where the dispute can be put in the form of a question to which the answer is 'yes' or 'no', or where it can be framed in reference to defined alternatives, such as a question of construction of a contract, or where there are legal issues to be resolved against a factual or technical background.

Almost all legal disputes boil down to questions such as these, and the skill is in identifying the questions as early as possible in the dispute process.

Other reasons to use ENE include where the top decision makers of one or more of the parties could be better informed about the real strengths and weaknesses of their cases, and when a dispute has become polarised and the parties' positions too far apart to consider mediation. Many parties have followed ENE with a successful mediation.

9.6. Appointing an evaluator

When the parties have agreed to an ENE of their dispute, or part of it, the next steps are to agree an evaluator with the other side and to enter into an agreement which will be between the parties to the dispute and the evaluator.

9.6.1 Choosing an evaluator

It is particularly important for the parties to agree on the identity of the evaluator (or panel) and to feel confident that the evaluator is sufficiently expert in the law and the subject matter of the dispute so that the resulting evaluation has the required weight and influence.

The right evaluator will depend on the nature of the dispute in question. Legal and factual disputes generally lend themselves to a legally qualified evaluator, whereas expert factual issues might be better served by an expert in the appropriate field. Where the issues cross a number of areas of expertise, a panel may be necessary to give the evaluation the required weight and influence.

It is customary to suggest more than one evaluator to the other side (usually three) to avoid giving the impression that one particular evaluator has been specifically chosen for the dispute at hand. Alternatively, a party may suggest a body that has more than one evaluator in the appropriate field on its books to make the appointment.

9.6.2 The ENE agreement

In many cases those offering ENE services will have a standard agreement which can stand as it is or be amended by the parties as they see fit. The agreement will cover things such as the procedure to be adopted, and the evaluator's role in that procedure, the type of presentations that may be made (written and/or oral) and whether the evaluation will give reasons or not.

The agreement may define the procedure to be used quite precisely, or it may give the evaluator a greater degree of independence in the procedure. Usually, the evaluator

will be given sufficient rein to enable him or her to investigate the issues thoroughly and the scope to identify, in the evaluation, any matters which may be helpful to the parties.

Often the only real decision that needs to be made is whether the ENE should involve a hearing. Where there is witness or expert evidence which is disputed this can be extremely useful, but many ENEs involve a paper-only exercise, particularly where the only real issues are legal.

Typically an agreement (which will have a hearing) will provide for the following:

- The evaluator shall be responsible for the conduct of the ENE. A preliminary meeting will be held with the parties to discuss the conduct and procedure of the ENE and to give directions.
- The parties will exchange with each other and send to the evaluator copies of a paginated bundle containing:
  - a concise summary of its case in the dispute
  - witness statements (if relevant) to which the summary refers
  - any expert reports (if relevant) to which the summary refers
  - any other documents which the parties wish the evaluator to consider
  - full copies of any case law relied upon.
- Each party will provide to the other side and the evaluator a copy of any written response to the other party's written submission.
- Upon receipt of all the above, the evaluator will organise a conference between the evaluator and the parties. At the conference, each party shall make a presentation to the evaluator summarising its position and addressing any issues identified by the evaluator. The evaluator shall determine the duration of each presentation and response. The evaluator may question the parties and request further written information or evidence.
- The evaluator will issue the evaluation within 10 working days of the conference or such other period as may be agreed with the parties.
- Each party may appoint one or more representatives/legal advisers to assist, advise and/or attend.
- The parties undertake to each other and agree that the entire process of the ENE, including any submissions, the written evaluation and any other documents produced, is confidential and will not be disclosed without the prior written consent of the other parties.
- The fees and expenses of the evaluator as well as any other expenses relating to the ENE will be borne by the parties in equal shares.
- Each party will bear its own costs and expenses of its participation in the ENE.

9.7. Preparation for the evaluation

Usually, the first task will be to prepare a written evaluation statement. The statement should be a clear and logical statement of the dispute and the reasons why your view should be preferred. It should also identify any documents relied upon, a summary of any cases relied upon and copies of the judgments in those cases as appropriate, and a

summary of witness or expert evidence as appropriate. Usually there will be an opportunity to respond to the written evaluation statements of the other side.

The parties may already have engaged lawyers through whom the process has been coordinated. However if there is an oral presentation to be made it is worth considering obtaining legal representation specifically for that presentation, particularly if the issue is one of a legal nature.

9.8. The evaluation decision/recommendation

The evaluation/recommendation itself may contain only a simple answer to the issues in dispute. It can, however, particularly if the parties have given the evaluator a broad jurisdiction to look at the dispute, contain helpful ideas as to the next steps that could be taken. For example, the evaluator may identify the answer to a legal question and indicate the steps that ought to be taken to evaluate the financial consequences of his or her recommendation. If the recommendation was the result of an exercise of judgment, then the evaluation may also contain an identification of the risks to both sides of proceeding to litigation or arbitration.

The evaluation should at least form the basis for further negotiation, and can of course form part of the material upon which a mediation is based. Even if a settlement is not ultimately reached, the process of focusing on the facts and the law together with the evaluation, which should identify the key issues if the parties have not, may enable the parties to narrow the dispute and minimise the costs of litigation or arbitration.

9.9. Summary

ENE is a relatively recent introduction into the ADR market and, in part due to the success of other ADR processes, it has not received the profile it deserves. ENE has recently been recognised by the courts in the UK. The Technology and Construction Court (TCC) now encourages its users in an appropriate case, and with the consent of all parties, to ask a TCC judge to provide an ENE either in respect of the full case or of particular issues arising within it.

The offer of ENE from a judge who may otherwise have been presiding over a lengthy and expensive trial has already proved attractive to some. In a recent article by one of the TCC judges, the judge reported success for ENE in a number of cases, including, perhaps surprisingly, in a ‘fact heavy’ dispute and also a professional negligence claim. In both those cases it seems that the TCC had adapted the ENE process to allow, in the former, the evaluator judge to meet with the relevant witnesses, and in the latter to discuss the issues informally with the experts. There is no doubt, therefore, that, given the active and public encouragement it is now being given, the profile of ENE will continue to rise.

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Chapter 10
International dispute resolution

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10.1. Introduction

As the UK's construction industry regularly secures work worldwide, it is often involved in international construction and engineering disputes. The procedures by which such disputes are dealt with are fixed by the terms of the dispute resolution clause within the contract in question. International construction and engineering contracts invariably specify that, if other attempts at resolving a dispute have failed, the parties should resort to arbitration.

There at least two powerful reasons why arbitration, rather than litigation within a court system, is preferred in such circumstances. First, where a UK contractor or consultant is doing work abroad, it will feel uncomfortable having a dispute about its work in that foreign country being dealt with by a local judge. Arbitration avoids this problem. For small disputes, the arbitration clause will generally permit a sole arbitrator to be appointed, either by agreement between the parties or by an independent international appointing body. For larger disputes, the arbitration clause will generally provide for a three-person tribunal, where each of the disputing parties appoints one arbitrator, and the two appointees then agree a third person to act as chairperson. In this way, both sides have confidence in the impartiality of the tribunal as a whole. Secondly, thanks to the New York Convention, it is relatively straightforward for a party with an arbitration award in its favour to enforce the award anywhere in the world. This does not apply to a court decision, which may only be enforceable in the country in which it was given.

For bigger projects it is becoming increasingly common for the dispute resolution clause within the contract to provide for a dispute board (DB). A DB will often be involved from the outset of the project, attending site about three times a year, and, if necessary, conducting serial adjudications. This results in disputes being 'nipped in the bud' before they can develop into arbitrations. Nevertheless, arbitration remains as the ultimate procedure if either or both parties are dissatisfied with the DB's decisions or recommendations. The contract may also provide for an *ad hoc* DB (of one or three members) to be appointed specifically for a single dispute. Some contracts, such as the FIDIC Gold Book (2008) for Design, Build and Operate Projects, require a DB to deal with a dispute before it may be referred to arbitration.

Besides arbitration and DBs, there is growing usage of mediation, adjudication and expert determination for international disputes. All these procedures are considered in

more detail in the course of this and earlier chapters. However, employing any type of dispute resolution procedure should be avoided if possible (see Chapter 2).

10.2. Choosing the dispute resolution procedure

Assuming that the dispute resolution clause in the contract contains a range of options, an aggrieved party will have some choice with regard to how to resolve its dispute in the quickest and most cost-effective manner. This will involve considering the pros and cons of whichever procedures are catered for in the dispute resolution clause. Generally, for international disputes litigation in the courts is highly unattractive to at least one party, and so need not be considered further.

The following sections in this chapter discuss how the various dispute resolution procedures can be applied to international disputes. The procedures that are regularly considered for use are:

- arbitration (see Chapter 5)
- adjudication/dispute board (see Chapter 6 for adjudication; the DB procedure is dealt with in Section 10.4.2 in this chapter)
- mediation/early neutral evaluation (see Chapters 7 and 9)
- expert determination (see Chapter 8).

10.3. Arbitration

Several types of procedure can be considered for use in international disputes:

- procedures administered by appointing and supervising bodies: the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), Swiss Chambers of Commerce, etc.
- ICSID (the International Centre for Settlement of Investment Disputes) for disputes between state and non-state entities
- the UNCITRAL procedure (see Chapter 5), which the parties themselves administer
- *ad hoc* procedures.

Most international arbitrations are conducted under the supervision of one or other of the principal international appointing bodies, such as the ICC, LCIA or Swiss Chambers of Commerce (Box 10.1). For disputes between a foreign entity and a Chinese entity the appropriate body is generally CIETAC. Using the administrative support of such a body requires the parties to pay fees to that body to cover the appointment of the tribunal and the subsequent supervision of the tribunal's activities through to the final issuing of the award. The parties generally feel that the costs involved are well spent because the involvement of the body's secretariat will often resolve minor procedural disputes, and, when the award finally emerges, the authority of the supervising body gives added weight if and when the successful party needs to enforce it.

Another possibility is for the parties to avoid a supervising body and simply use the UNCITRAL procedure, which is readily available in various textbooks or on the internet. For example, 'google' the UNCITRAL Model Law on International Commercial

Box 10.1 Some international arbitration appointing bodies

International Chamber of Commerce (ICC)

The International Court of Arbitration
International Chamber of Commerce
38 Cours Albert 1er
75008 Paris
France
Tel. +33 1 495 32828
Fax: +33 1 495 32929
Email: arb@iccwbo.org
Website: www.iccarbitration.org

London Court of International Arbitration (LCIA)

The London Court of International Arbitration
70 Fleet Street
London EC4Y 1EU
Tel. +44(0)20 7936 7007
Fax: +44(0)20 7936 7008
Email: casework@lcia.org
Website: www.lcia.org

Swiss Chambers of Commerce (Basle, Berne, Geneva, Lausanne, Lugano and Zurich) Rules of International Arbitration

Chamber of Commerce
Attention: Chief Executive Officer
Bleicherweg 5
PO Box 3058
Ch-8022 Zurich
Switzerland
Tel. +41 1 217 4050
Fax: + 41 1 217 4051
Email: direktinon@zurichcci.ch
Website: www.zurichcci.ch

Arbitration. The Revised UNCITRAL Arbitration Rules became effective on 15 August 2010.

Occasionally, but very rarely, the parties will use neither a supervising body nor the UNCITRAL rules, but will simply attempt to agree their own *ad hoc* procedure. This is not recommended. There will inevitably be disputes about the procedure, and it will be difficult to resolve these. Most probably the local courts will be approached by a disgruntled party and any hope of a straightforward arbitration will disappear.

10.3.1 Initiating an arbitration

A model notice requesting an ICC arbitration is given in Box 10.11 at the end of this chapter. Also see the model letter before action and the model arbitration notice given in Chapter 5 (Boxes 5.1 and 5.2). Great care should be taken in choosing which arbitrators to propose to the other side. A party should avoid the temptation to appoint an arbitrator who has regularly acted as either engineer or lawyer for that party, because any such proposal is likely to be rejected by the other party on the basis that there is plain conflict of interest. In determining whether or not there is such a conflict of interest the parties will find useful guidance in the International Bar Association (IBA) guidelines (Box 10.2). In choosing who to nominate, the party should aim to propose someone with the requisite expertise (whether technical, legal or both), availability, language skills, and a reputation for producing an award promptly.

Where international supervisory bodies such as the ICC or LCIA are stipulated in the arbitration clause, generally the procedure is that for most disputes a panel of three arbitrators is to be appointed. (A sole arbitrator suffices for smaller projects.) Each party nominates one arbitrator, and these two nominees then agree the chairperson of the tribunal. The IBA guidelines state in item 4.5.1 that it is a 'green list' situation (i.e. there is no appearance of, and no actual, conflict of interest), where a party, while considering whether or not to appoint an arbitrator, makes initial contact with him or her in order to discuss availability and qualifications to serve, or as to the names of possible candidates for a chairperson. Of course, there can be no discussion of the merits or procedural aspects of the dispute.

Box 10.2 International Bar Association (IBA) conflict of interest guidelines

The IBA issued in 2004 its guidelines on conflicts of interest in international arbitration. These enable the parties and potential arbitrators to determine whether there is any conflict of interest applying to the appointment of a particular person as an arbitrator for a dispute. It contains red, orange and green lists, covering various possible relationships that might exist between a proposed arbitrator and one or other of the parties to the dispute. For example, if the proposed arbitrator regularly advises the party which wishes to appoint him, then this would fall within the non-waivable red list. By contrast, a proposed arbitrator who has merely previously published a general opinion in a legal journal concerning an issue arising in the arbitration would ordinarily fall within the green list.

International Bar Association

271 Regent Street
London W1B 2AQ
Tel. +44(0)20 762 9109
Fax: +44(0)20 7409 0456
Website: www.ibanet.org

10.3.2 Conducting the arbitration

10.3.2.1 Appointing legal and technical advisors

Soon after the sole arbitrator or panel of arbitrators has been appointed, the tribunal will ask the parties for their views with regard to the conduct of the arbitral procedure. By this stage each party ought to have taken a policy decision as to whether or not it intends to instruct lawyers to represent it. Big companies, whether the purchaser or contractor, often have in-house legal expertise and so are able to conduct arbitrations without involving outside assistance. For most other parties, serious consideration should be given to engaging lawyers experienced in arbitration – points arise where the opposition, with the benefit of legal expertise, is able to secure an advantage by reason of the non-represented party's lack of familiarity with the legal processes of arbitration.

If a party decides to seek legal help, it will usually approach a firm of solicitors (or their equivalent, e.g. attorneys in American law firms) to advise and represent it. Such firms may then choose to carry out the advocacy themselves or to engage barristers (or their equivalent, e.g. advocates in Scotland) for pleading and presenting the case. In international disputes there is no restriction on a party, if it so chooses, directly instructing a barrister to advise and represent it. Even within England and Wales this is now generally possible through the process of Direct Professional Access and similar schemes (see Chapter 3).

10.3.2.2 Pleadings

In most arbitrations, pleadings of some kind are necessary, in which each party sets out in writing the nature of its case. If the ICC arbitration rules apply then, by Article 18 in those rules, the first step after the appointment of the tribunal is for the 'terms of reference' to be drawn up, summarising the parties' respective positions and, usually, formulating a list of issues to be determined. Pleadings are then exchanged in the usual way. The claiming party, the 'claimant', sets out its position in its statement of case, and the other party, generally called the 'respondent', then produces its statement of defence, or defence and counterclaim. The claimant then serves its reply and, if necessary, defence to counterclaim. As arbitrations are confined to the parties who have entered into the contract that contains the arbitration clause, there are usually only two parties involved in exchange of pleadings. In rare cases, if the particular rules allow, or by agreement between the parties, a third party may be added (with its consent) where there is a good reason; for example, Article 4 of the Swiss Rules for International Arbitration caters for consolidation of two sets of arbitral proceedings or for the participation of a third party.

10.3.2.3 Exchange of documents

Generally, international arbitrations will involve the parties exchanging lists of relevant documents upon which they rely, with the opportunity to inspect and make copies of documents. This procedure can often generate squabbles as to whether a party has made available all the documents it ought to have done. The incidence of such disputes is reduced where the IBA rules of evidence are used (Box 10.3).

Box 10.3 The International Bar Association (IBA) rules of evidence (2010)

The updated IBA rules on the taking of evidence in international commercial arbitration are available on the IBA website. The rules provide a mechanism for dealing with matters such as documents, witnesses of fact, expert witnesses and inspections, as well as for the conduct of evidentiary hearings.

10.3.2.4 Gathering evidence (witness statements, experts reports, etc.)

Other than where there is a simple point of law at issue (e.g. a dispute as to the meaning of a clause in the contract), an arbitration will generally involve a variety of legal and factual questions. In order for a tribunal to determine such factual questions it will need to be supplied with witness statements in advance, so that, where necessary, persons to be cross-examined at a hearing may be identified. Arbitrators have a variety of preferences as to how they wish witness statements to be presented. For a complex dispute, a convenient approach is to ensure that each witness statement contains the following elements

- a recent photograph of the witness (so that the tribunal can later recall, when drafting the award, who the witness was, having heard a great many in the case)
- bullet points of what the witness intends to establish
- a summary of the evidence in the statement
- the statement itself
- a CV, where this is relevant (e.g. to demonstrate that the witness has a relevant professional qualification).

10.3.2.5 Experts

Construction disputes almost always involve expert evidence. For smaller disputes a single joint expert may be acceptable to the parties. Where, as is usually the case, each side has its own expert(s), directions should be given for them to meet, produce their own reports and, if possible, to produce a joint report identifying the issues where they agree and those upon which they disagree.

10.3.2.6 Preparations for the hearing

A variety of aids may be employed to assist the tribunal during the hearing, including

- agreed chronology of events
- agreed list of persons involved in the contract
- agreed list of issues to be determined in the arbitration (in the ICC procedure this list is in the terms of reference)
- opening written submissions, accompanied by legal authorities which have been marked in the margin to identify relevant passages
- bundles of relevant documents in chronological order, paginated throughout – if there are many files, there should be a core bundle of key documents.

The order for directions will generally include the tribunal's requirements regarding the various aids it wishes to receive in advance of the hearing so that its preparation is focused on the real issues, and so that it can understand the material put before it. Where, for example, the contract runs to many volumes because of a large number of schedules, specifications and appendices, these can usefully be reduced in size to A5 format so that the parties and the tribunal have a less burdensome bundle of material to take to the hearing. It is also common for submissions and statements to be copied onto CD ROMs and supplied in this convenient format to all concerned, in addition to the paper version.

The ICC Report *Techniques for Controlling Time and Costs in Arbitration* (2007) has many useful suggestions.

10.3.2.7 Arbitration hearing

As each day of a hearing incurs very substantial costs, it is in the interests of both parties that the time for the hearing be strictly limited. Generally, arbitrators from an Anglo-American common law tradition are more sympathetic to applications for lengthy hearings, while tribunals from civil law jurisdictions (such as France) are reluctant to agree to a hearing extending much beyond a week. There is a variety of techniques that can be employed to reduce the length of a hearing. For example, all submissions may be confined to paper, both as regards opening and closing submissions. This leaves the hearing itself for dealing with oral examination of witnesses of fact or expertise. Often, the arrangement will be that each party is allocated half of the available time, to use as it chooses. This is sometimes termed a 'chess-clock' arrangement. As witness statements will invariably stand as evidence-in-chief, this means that the time may be employed for cross-examination by the opposing side, or subsequent re-examination by the party calling the witness. Arranging for the evidence to be transcribed also speeds up the procedure, as a witness need not speak at the pace at which the slowest arbitrator writes. A transcript also avoids subsequent disputes about precisely what was said.

Another technique for making the most efficient use of the hearing time is so-called 'witness conferencing' or 'hot tubbing' (Box 10.4). This may be conducted in various ways, but the usual procedure is for experts (of like disciplines) from both sides to be made available to the tribunal at the same time, so that there may be a direct exchange of their views on the matters where they differ (as identified from their joint report).

10.3.3 Evidence by video link

It is increasingly common for witnesses, for whom attendance at the hearing would be greatly inconvenient, to give their evidence by video link. For example, it may be that a particular commissioning engineer is at a crucial stage of work on a project on a different continent and so the party calling him does not wish to put him (or his current employers, if he has left the employment of the party using him) to the inconvenience of travelling a great distance to give what may be only a few hours of evidence. In such circumstances it is often easy to arrange a video link (Box 10.5). English barristers are generally familiar with this process.

Box 10.4 'Hot tubbing' of experts

This process is also known as 'witness conferencing' or 'concurrent evidence' and it is becoming widely used in international arbitration. *The Technology and Construction Court Guide*, 2nd edition, 2nd revision (October 2010) explains the procedure at paragraph 13.8.2(d). Methods of using this technique vary, but a common procedure is as follows

- the factual evidence of both sides is given before any expert evidence
- the claimant's expert makes a short opening presentation of his evidence, referring to his report, and he is then cross-examined by the opposing counsel
- this process is repeated for the respondent's expert
- both experts are then made available concurrently for questions from the tribunal and further questions from both counsels – the tribunal may use as an agenda for its questions the joint experts' report as to what they agree/disagree upon.

10.3.4 Challenging and enforcing the award

Although parties generally comply with arbitral awards, particularly those supervised by an international body such as the ICC or LCIA, it does sometimes happen that the losing party wishes to challenge the award or otherwise refuses to implement it. In such circumstances there is assistance from a number of international conventions, such as the New York Convention of 1958 for the Recognition and Enforcement of Foreign Arbitral Awards. Over 125 sovereign states are signatories to that convention, and the courts of those countries are obliged to defer to the arbitral jurisdiction whenever an action is brought under a contract containing an arbitration clause (see Article II of the New York Convention). Furthermore, it obliges the courts of signatory states to enforce a foreign award without reviewing the merits of the arbitrators' decision (Article V). There are certain specified defences, such as where the tribunal has exceeded its jurisdiction or failed to give the complaining party a proper opportunity to present its case.

Box 10.5 Video conferencing

Many law firms and barristers' chambers have such facilities. They are also available at, for example,

The International Dispute Resolution Centre

70 Fleet Street
London EC4Y 1EU
Email: info@idrc.co.uk

These facilities may be hired by members of the public.

Box 10.6 *Lesotho Highlands Development Authority v. Impreglio SpA and Others* (6th July 2005) HL

Contractors were engaged to construct a dam in Lesotho. The law of the contract was that of the Kingdom of Lesotho and the currency of account was to be the local currency, the maloti. The contract excluded any right of appeal on a point of law under section 69 of the English Arbitration Act 1996, and provided for ICC arbitration. The contractors successfully claimed for increased costs by way of an ICC arbitration in London. As the value of the maloti had fallen heavily, the arbitrators, in reliance on section 48(4) of the 19961 Act, made their award in the contractors' own currencies converted from the maloti at a rate prescribed in the contract, which predated the maloti's collapse. The employer objected. The House of Lords held that a mere error of law by the arbitrators did not amount to an excess of power under the 1996 Act so as to allow the court to interfere with the award. Lord Steyn said, among other things, that a major purpose of the 1996 Act had been to reduce drastically the extent of intervention of courts in the arbitral process.

A leading example of the reluctance of English courts to interfere in international arbitrations is found in the House of Lords' Decision in *Lesotho Highlands Development Authority v. Impreglio SpA and Others* [2005] UKHL 43 (Box 10.6).

10.3.5 Arbitration in China

Chinese government policy is to encourage international disputes to be resolved by way of arbitration rather than by reference to Chinese or foreign courts. The Chinese Arbitration Act 1994/5 is based, as with many national arbitration acts, on the UNCITRAL Model Law. This provides, among other things, that if there is a valid arbitration clause in an agreement a court will refuse to entertain proceedings and will send a dispute to arbitration (Article 5 of Chapter 1). Enforcement may be somewhat uncertain because of the reluctance of certain Chinese courts to enforce awards which may conflict with the local economic interest.

The two principal arbitration bodies in China are the China International Economic and Trade Arbitration Commission (CIETAC) and the China Maritime Arbitration Commission (CMAC). It is the former which is relevant for the purposes of engineering and construction disputes. CIETAC has its own published rules of procedure (the CIETAC Rules), and operates in a similar fashion to the ICC in Paris. However, the parties are allowed to agree to use procedural rules other than those of CIETAC. CIETAC arbitrators are permitted to act as conciliators as well, provided the parties agree (Article 37 of the CIETAC Rules). As arbitrations progress, the tribunal may actively encourage conciliation. It is rare for *ad hoc* arbitrations, outside of the CIETAC or CMAC procedures, to occur in China.

China is a signatory to the New York Convention. Furthermore, China has entered into a multitude of bilateral treaties relating to arbitrations and award enforcement. The CIETAC

Rules reflect internationally accepted procedures: they permit foreigners to be appointed as arbitrators in China, and many such persons are members of the CIETAC panel. Generally, foreign businesses consider CIETAC to give good value for money. Chinese is specified as the arbitration language by the CIETAC Rules. Generally, all documentation (including correspondence, submissions, etc.) is required to be translated into Chinese. Chinese is also the language adopted for all arbitral hearings. However, the parties may agree on a foreign language. The parties may choose either a sole arbitrator or a panel of three (consisting of a president and two others, each appointed by one of the parties).

A CIETAC arbitration is commenced once the claimant has submitted an application, chosen an arbitrator from the commission's list and paid the appropriate fee. The application should include a statement of the claimant's case and supporting documents. The procedural rules permit the arbitrators to carry out investigations, gather evidence, summon witnesses and consult experts (both Chinese and foreign). Hearing dates are fixed by the CIETAC secretariat after consultation with the arbitral tribunal (but rarely with the parties). The hearing procedure is broadly similar to that used in English arbitrations. Each party puts its case orally, calling witnesses as necessary. Questions are then put by the tribunal to the witnesses, the parties and their representatives. In addition, each party may question the other. Legal submissions then follow. Broadly, the CIETAC Rules permit foreign lawyers to represent parties. CIETAC has its permanent seat in Beijing and most hearings are held there, but there are CIETAC arbitration branches in other cities, such as Shanghai and Shenzhen.

The tribunal may issue interim or partial awards, as well as the final award itself. An award is, generally, not subject to judicial or other review. Once CIETAC has issued an arbitral award, it must be implemented within whatever time period is stipulated by the tribunal. CIETAC is now the biggest arbitration body in the world and continues to grow at an impressive rate.

10.3.6 Arbitration in Singapore

Broadly, the Singaporean legal system is based on the English common law, and its arbitration laws reflect the English approach. The International Arbitration Act 1994, Part II, governs international commercial arbitration. The International Arbitration (Amendment) Act 2009 adopted some of the 2006 amendments to the UNCITRAL Model Law.

Singapore is a signatory to the 1958 New York Convention and the 1965 Washington Convention (which provides for the resolution of disputes between a state or state entity and a private party). Furthermore, the 1958 Reciprocal Enforcement of Commonwealth Judgments Act, applying to judgments of superior courts of the UK and other Commonwealth countries, extended reciprocity to Singaporean judgments (including arbitration awards).

The Singapore International Arbitration Centre (SIAC) was established in 1991. It administers a panel of arbitrators operating in the Association of South East Asian Nations (ASEAN) area, and a further international panel consisting of members from

countries outside the ASEAN area. Its website is www.siac.org.sg. An indication of the popularity of Singapore as an arbitration centre is given by the fact that in 2009 it attracted about 160 new disputes. In early 2009, with government backing, Maxwell Chambers opened, serving as a hub for dispute resolution.

10.3.7 Arbitration in Hong Kong

The Hong Kong Arbitration Ordinance is the principal statute governing arbitration in Hong Kong. It regulates the conduct of both domestic and international arbitration. The Ordinance expressly incorporates the New York Convention (dealing with the recognition and enforcement of foreign arbitral awards) into Hong Kong law. The highly regarded Hong Kong International Arbitration Centre (HKIAC) administers both international and domestic arbitrations, and other forms of dispute resolution. In 2009 HKIAC handled a record 746 cases, of which 429 were arbitrations and 309 were international cases.

10.3.8 Arbitration in the United Arab Emirates

The 1992 UAE Civil Procedure Law governs arbitration in the United Arab Emirates (UAE). Within the UAE the well-known Dubai International Arbitration Centre (DIAC) generally deals with construction disputes. In 2009 it dealt with about 290 new cases. Since 2008 the Dubai International Finance Centre and the LCIA have joined to create the DIFC–LCIA Arbitration Centre, and the DIFC has produced its own Arbitration Law.

10.4. Adjudication and dispute boards

10.4.1 The spread of adjudication

UK adjudication procedures are described in detail in Chapter 6. Other jurisdictions have adopted or are considering adopting similar adjudication schemes, including several Australian states, New Zealand, Texas (USA), Singapore and Malaysia. See the first edition of this book for details of adjudication in those countries.

10.4.2 Dispute boards (serial adjudication)

10.4.2.1 Background

Dispute boards (DBs) generally involve a procedure whereby a ‘board’, often consisting of two engineers and one lawyer (as chairman), is appointed at the outset of a project to deal with complaints as they arise and prevent them from developing into intractable disputes. The cost of retaining such a ‘standing’ board throughout a project is only justified where the project is reasonably large. For smaller projects, a board consisting of only one member is sometimes used, to reduce costs. The board generally visits the site three or four times a year. By immediately addressing squabbles on site, the board is generally able to prevent disputes festering and ultimately going to costly arbitration.

The ICC has produced a set of DB rules and produced all the necessary documents for establishing an effective DB (Box 10.7).

As boards effectively operate by conducting serial adjudications at regular intervals throughout a project, they are becoming increasingly popular with construction industry

Box 10.7 International Chamber of Commerce (ICC) dispute board documentation

- Dispute Board Member Agreement
- Dispute Board Rules
- Standard ICC Dispute Board Clauses

professionals, who are now thoroughly familiar with the adjudication process from the UK and elsewhere. Consequently, usage of the DB procedure internationally is expected to continue to grow.

10.4.2.2 Appointing a dispute board

Invariably, parties will only consider appointing a DB if the contract requires it. This is because having such a board is expensive, involving payment of retainer fees to the board members. It is also intrusive, as the board's functions include visiting site and enquiring into site activities. Nowadays, international construction contracts often require the appointment of such boards. In particular, FIDIC (Federation International Des Ingenieurs-Conseils (the International Federation of Consulting Engineers)) has, beginning in 1995, introduced the process into its various standard forms of contract. Most importantly, the DB procedure was inserted into the well-known and widely used (1992) 4th edition of the FIDIC 'Red Book' (for building and engineering works designed by the employer) by way of a 1996 supplement. This continued in the 1999 version. It is now included (albeit in slightly different formulations) in all the FIDIC standard forms (Box 10.8).

Box 10.8 The Federation International Des Ingenieurs-Conseils (FIDIC) standard form engineering contracts

The current FIDIC 'rainbow suite' of standard form engineering contracts include the following:

- Red Book (1999): for construction of works designed by the employer. A 'measure and value' contract
- Yellow (1999): for design–build for electrical and mechanical plant, and for works designed by the contractor. A 'lump sum price' contract
- Silver (1999): for EPC (engineer, procure and construct)/turnkey projects. The contractor takes virtually all the responsibility. No 'engineer' is required to administer the contract
- Gold (2008): for DBO ('design, build and operate') projects. The contractor is responsible for operating the facility for 20 years for the employer (who arranged the finance originally, owns the asset, and makes interim payments). If the contractor secures finance, there is a 'BOT' (build, operate and transfer) arrangement, where the contractor hands back the facility after 20 years, having taken revenues for that period

The World Bank, the ultimate funder for many major infrastructure projects in the developing world, encouraged this use by FIDIC of the DB procedure, on economic grounds. They found that the costs incurred in dealing with disputes reduced significantly when the DB procedure was implemented. No doubt this is because the procedure has two aspects: it both enables disputes to be avoided, by early DB intervention; and, when disputes do arise, it enables them to be dealt with promptly, before the financial consequences have mounted, and without expensive and time-consuming arbitration or litigation.

Although the classic form of DB is the 'standing' board that is appointed at the outset of a project and remains in place throughout, there is another version, the *ad hoc* DB (often consisting of a single member), which is appointed when a particular dispute arises and which ends once that dispute has been disposed of. Where a three-person board is appointed, each party will nominate one member and, generally, the parties will then consult those nominees and agree upon the chairman (e.g. see clause 20.2 of the FIDIC Gold Book). Sometimes the contract contains a list of potential DB members, and the parties then make their choices from that list. Experience shows that this rarely happens, as when contracts are being negotiated little attention is usually paid to the dispute resolution provisions, and the parties do not wish to delay signing the contract while they seek to agree upon such a list.

Where there is difficulty in agreeing the board members, resort may be had to an appointing entity if such a body is named in the contract (e.g. see clause 20.3, FIDIC Gold Form). Contract forms such as the FIDIC Gold Form contain as an appendix a standard set of DAB terms, which then apply to the appointment of the board members.

10.4.3 Types of dispute board procedure

Broadly, there are three types of procedure employed by DBs, relating to the nature of what they produce

- non-binding recommendations (e.g. see some USA standard form contracts)
- adjudication decisions (e.g. see the FIDIC forms)
- hybrid – recommendations, unless at least one party wants a decision (e.g. the ICC 2004 DB procedure).

Which of the above three models applies to a particular contract will be determined by the wording of the DB clause. Where the contract stipulates that the DB will produce recommendations only, then the board is usually termed a 'dispute review board' (DRB). Where temporarily binding decisions are to be produced, by the operation of a form of adjudication, then the board will generally be termed a 'dispute adjudication board' (DAB). In both cases, DRBs and DABs, if the recommendation or decision is not challenged within a stipulated period of time, often 28 days, then it becomes finally binding. This enables the parties to know where they are and to get on with the contract work. Experience shows that the vast majority of recommendations and decisions are complied with. Very few proceed to arbitration.

Box 10.9 Key elements of a 'standing dispute board'

- It is appointed at outset and remains in place till completion
- It attends site every 3 or 4 months, and if a particular dispute arises
- When it visits it will 'walk the site', hold a meeting to be updated, and subsequently produce a report

10.4.3.1 Operating a dispute board

Ideally, the board should be appointed at the outset of a project so that it is familiar with all the processes that occur on site. This means, for example, that it will know what work has been covered over (e.g. in foundations), even though a dispute about that work may only arise later in the project (Box 10.9).

When the board conducts a site visit it will generally 'walk the site' to see what work is being carried out and hold a meeting with both parties to the contract to hear any complaints. If decisions need to be made, the board can do this, having held reasonably informal and brief hearings. Generally, written decisions and recommendations will be issued and, if one party or the other does not accept the outcome, the matter may proceed to arbitration.

Usually, the board continues until substantial completion of the works, and then remains available to the parties if they wish it to visit site and make any further decisions. Otherwise, it simply terminates altogether when the project is complete. Unfortunately, some parties, hoping to reduce the costs of maintaining the board, only appoint it well into the project, when a dispute is looming, and then attempt to terminate its activities prior to substantial completion of the works. This reduces the effectiveness of the board because it does not have full knowledge of the work carried out and the circumstances in which it was done. Nevertheless, a board operating for only part of the project period is better than no board.

10.4.4 Dispute board procedure

Sophisticated standard forms such as FIDIC generally contain detailed provisions for the procedure to be adopted by the parties and the DB. For example, in the 2007 Gold Book, Clause 20.5 provides for the referral of a dispute in writing to the DB within a stipulated period of the matter arising. The parties should then comply with the requirements as to providing information and site access to the DB so that the latter may make its decision promptly. The clause is careful to note that the DB is not acting as an arbitral tribunal. There is then a stipulated period (84 days in Clause 20.4, Gold Book) for the production of the decision. That decision is then binding on both parties and they should comply with its terms. If a party is dissatisfied with the decision then it must, within a stipulated period, issue a notice of dissatisfaction, giving details of its position, and thereafter it may proceed to arbitration. Otherwise the decision becomes final and binding on both parties.

10.5. Mediation and early neutral evaluation

10.5.1 The differences between mediation and early neutral evaluation

Mediation is an increasingly popular procedure in which a neutral third party helps the disputing parties to reach a deal. In the UK this procedure is generally 'facilitative', so that at no time does the mediator publicly express any views as to the strengths or weaknesses of the parties' cases.

This is what marks mediation out from the procedures of conciliation and early neutral evaluation (ENE). In conciliation and ENE the third party is 'evaluative' and, in the presence of both parties, will express a view as to what the outcome of the dispute should be. With conciliation this expression of a view (which may be binding) generally follows a form of mediation, while with ENE there is simply a brief hearing followed by the giving of the evaluation. (See Chapter 7 for details of the mediation process and Chapter 9 for details of the ENE process.)

There can be significant differences between the mediation procedures used in different jurisdictions. For example, whereas in Europe it is common to have an entirely facilitative process, taking no more than one day in most cases, in South East Asian jurisdictions, such as Hong Kong, it is not unusual to have mediations stretching over several days, if not weeks, and ending with a determinative process. Accordingly, when parties set about agreeing and implementing a 'mediation' process they need to be fully aware of what each other understands by the term, and any mediator they appoint should be fully appraised of the parties' expectations with regard to how the process should be conducted.

An ENE hearing is similar in many respects to a summary judgment hearing before a judge, with the matter being dealt with in one day, or sometimes less. The evaluator will then issue an evaluation, generally in writing.

10.5.2 Initiating a mediation

Parties wishing to mediate may either contact an appointing and supervising body, such as the Centre for Effective Dispute Resolution (CEDR) (Box 10.10) or, if they can agree on the identity of the mediator, contact him or her directly. The ICC in Paris also

Box 10.10 Centre for Effective Dispute Resolution (CEDR)

CEDR Solve

International Dispute Resolution Centre
70 Fleet Street
London EC4Y 1EU
Tel. +44(0)20 7536 6069
Fax: +44(0)20 7536 6061
Email: info@cedr-solve.com
Website: www.cedr-solv~.com

provides mediators. Two agreements then need to be made: one with the mediator, as regards his or her fees and the terms upon which the mediation will be carried out; and a second between the parties, as regards the mediation procedure they have agreed upon. For example, it is common to stipulate in such an agreement that there is no binding deal until there is a written signed document. This avoids the uncertainty which could otherwise arise with an entirely oral compromise in the context of a day of negotiations.

As international mediations generally involve parties from two different countries, it sometimes happens that they are unable to agree on a mediator from either of the countries from which they come. In such circumstances a mediator from a third country is a suitable compromise choice. Thus, English mediators often prove popular where there are disputes between, say, an Asian party and a Scandinavian party.

10.6. Expert determination

The ICC's International Centre for Expertise is able to appoint and administer expert determinations for international disputes. If the parties so choose, the ICC will make an appointment but then leave it to the parties and the appointed expert to continue the process without supervision. However, if the parties prefer, the ICC will supervise the process throughout, until the determination has been issued. (See Chapter 8 for details of the expert determination process.)

10.7. Conclusion

10.7.1 Controlling the dispute procedure

As international disputes involve, by their very nature, parties from two different countries and, potentially, two quite different cultures, it can often be difficult to reach any agreement as to a dispute resolution procedure once the parties have fallen out. For this reason it is essential that the contract, drafted at a time when both parties are being cooperative, sets out in detail the procedure to be adopted when a dispute arises.

As discussed in Chapter 2, a layered dispute resolution clause offers many benefits, as it allows the parties to attempt to resolve their dispute with 'soft' procedures, such as negotiations between senior management, followed where necessary by mediation, rather than simply proceeding directly to a 'hard' procedure such as arbitration. As mediation, for example, has a very high success rate, using it allows the parties to keep control of the process and minimise costs and, where the mediation works, generally end the dispute on reasonably good terms.

10.7.2 Making the best use of the outcome

If it does become necessary to begin implementing a dispute resolution clause, the parties should attempt to secure a deal whenever the opportunity arises. For example, if a specific dispute is dealt with by expert determination, the moment that result is obtained the parties should see if any other disputes can also be resolved amicably at that time. Similarly, if a DB is appointed, whenever a decision or recommendation is produced, it should be used as an opportunity to resolve any other outstanding matters. In this

way the parties will retain control of the dispute resolution processes and minimise their costs. When parties fail to do this, and, in effect, use a dispute resolution clause as a means of conducting low-level warfare, both parties will ultimately suffer. First, the costs will be vast. Second, future business between the parties will become impossible. Third, even when a decision is obtained, at great expense, from the arbitral tribunal, there is the possibility of further skirmishes over challenges and enforcement, with their cost consequences. In summary, parties should pay great attention to the drafting of any dispute resolution clause, and if circumstances arise where it has to be used, they should do their best to make the most of each stage in the process to avoid an engineering project simply turning into a war of attrition from which no one will benefit.

Box 10.11 Model notice requesting an International Chamber of Commerce (ICC) arbitration

CONTRACTOR INC.

– v. –

SUPPLIER LTD

REQUEST FOR ICC ARBITRATION

1. **Introduction**

1.1 This Request for Arbitration is submitted pursuant to Article 4 of the Rules of Arbitration of the International Chamber of Commerce (1998) by the Claimant, Contractor Inc., in respect of the disputes summarised in this document.

1.2 We confirm that we are authorised by the Claimant to submit this request.

2. **Parties**

2.1 ***The Claimant*:** Contractor Inc. is a company incorporated in England. Its principal office is at:

Contractor House
Westminster Road
London
WC1 1AB
United Kingdom
Tel. +44(0)1234 5678
Fax. +44(0)1234 5679

2.2 The Claimant is represented by:

Solicitors LLP
Shoe Lane
London
EC1 1AB
United Kingdom
Tel. +44(0)207 123 4567
Fax. +44(0)207 123 4569
Ref: AB/CD

2.3 ***The Respondent*:** Supplier Ltd ('Supplier') is a company incorporated in the USA. Its offices are at:

Supplier Incorporated
Supplier House
PO Box 1234
Texas
USA
Tel. +1 123 456 7890
Fax. +1 123 456 7891

2.4 The Contract (defined below) provides that contractual notices shall be given in writing and either personally delivered, sent by express air courier service, or sent by telex or telefax.

3. **Relevant Agreement and Agreement to Arbitrate**

3.1 The relevant Contract (the 'Contract') is set out in the following documents:

(a) Purchase Order No. 1234 dated 1 January 2001 (the 'Purchase Order');

(b) Terms and Conditions of Contract (the 'Terms and Conditions') attached to the Purchase Order; and

(c) Technical specification ABC-1234567 (the 'Specification').

3.2 Clause 22.2 of the Terms and Conditions of the Contract provides:

> 'Any dispute, controversy or claim arising out of or relating to this Agreement shall be finally determined and settled by arbitration. Such arbitration shall take place in London, England pursuant to the Rules of Conciliation and Arbitration of the International Chamber of Commerce (hereinafter the 'appointing authority'). The panel of arbitrators shall consist of three persons whose proceedings will be conducted in the English language. Judgment upon the decision and any award made by the arbitrators may be entered by any court having jurisdiction thereof'.

4. **Number and Nomination of Arbitrator**

4.1 Clause 22.2 of the Terms and Conditions of the Contract, as set out in paragraph 3.2 above, provides that any disputes shall be decided by three arbitrators.

4.2 The Claimant nominates its arbitrator as:

Mr. Arbitrator
Arbitration Chambers
London
EC1 1AB
United Kingdom
Tel. +44(0)207 444 4567
Fax. +44(0)207 444 4569

5. **Place of Arbitration**

Clause 22.2 of the Terms and Conditions of the Contract provides that the arbitration shall take place in London, England.

6. **Language of the Arbitration**

6.1 Clause 22.2 of the Terms and Conditions of the Contract provides that the proceedings will be conducted in the English language.

7. **Applicable Law**

7.1 Clause 22.1 of the Terms and Conditions of the Contract provides: 'This Agreement shall be governed by and construed and enforced in accordance with the laws of England'.

8. **Nature and Circumstances of the Dispute**

8.1 Pursuant to the Contract, the Respondent agreed to supply the Claimant with metering stations for the measurement of crude oil and bunker exports (the 'metering system') at an on-shore oil-loading terminal in the Middle East. The purchase price was US$5,000,000.

8.2 The metering system installation was completed in or about September 2002. Commissioning commenced from October 2002. In the course of commissioning, defects came to light in the metering system, including, amongst others, defective valves and problems with the prover loop.

8.3 The Claimant brought the problems of the prover loop and the fact that the valves were defective to the attention of the Respondent. Despite numerous requests from the Claimant to do so, the Respondent failed to remedy all or any of the defects that had been identified.

8.4 The Claimant thereupon took steps to rectify the problems in consultation with the Employer. On 29 July 2003, the Employer completed the replacement of some 36 defective valves supplied by the Respondent pursuant to the Contract. Between April and June 2003, the Employer replaced the prover loop. In August 2003, the metering system was successfully commissioned.

8.5 The total costs incurred by the Employer, and charged to and paid by the Claimant to the Employer, in respect of the replacement of defective valves and the rectification of the prover loop, amounted to US$3,000,000.

9. **Relief Sought by the Claimant**

9.1 The Claimant seeks:

9.1.1 an award in respect of the losses arising from the Respondent's failure to replace the defective valves or to rectify the prover loop, amounting to US$3,000,000;

9.1.2 an award of interest in respect of any amounts found owing to it;

9.1.3 an award of costs, pursuant to Article 31 of the ICC Rules;

9.1.4 all and any such other relief as the Tribunal determines is appropriate.

9.2 The Claimant reserves the right to amend and/or amplify the basis of its claim or the relief sought in its Statement of Case to follow.

10. **Advance Payment of the Administrative Expenses**

10.1 Pursuant to Article 4.4 and Appendix III of the ICC Rules, the Claimant encloses a cheque for US$2,500.

21 September 2010

Solicitors LLP

For and on behalf of
Contractor Inc.

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Chapter 11
Immediate help

Krista Lee

This chapter sets out some explanation about the court system, precedent and law reporting. It also identifies some useful reference points for finding lawyers and the relevant law.

11.1. Court system

The court system in England and Wales is divided between civil and criminal courts.

Criminal courts not only try matters such as murder and robbery but are also responsible for hearing prosecutions under environmental, waste management, and health and safety legislation. Depending on the seriousness of the crime, such prosecutions will be tried in the Magistrates Court or the Crown Court – with the more serious offences being tried in the Crown Court. For further information about the criminal courts and the appropriate procedure, recourse should be had to one of the two core texts: *Archbold: Criminal Pleading, Evidence and Practice* or *Blackstone's Criminal Practice*. Each is published annually.

The civil courts try disputes between private parties such as claims for payment of invoices and claims for compensation. In broad terms, claims for less than £50 000 are tried in the County Court whereas claims for more than £50 000 are tried in the High Court. All civil courts are governed by the Civil Procedure Rules. For further information about the civil courts and the appropriate procedure, recourse should be had to one of two core texts: *The White Book* or *The Civil Court Practice* (*The Green Book*). Each is published annually.

For construction and engineering disputes, there is a specialist Technology and Construction Court. Its main base is in London but it also has regional branches throughout the country (at both County Court and High Court level). Because only judges with appropriate experience in construction and engineering disputes can sit in the Technology and Construction Court, this generally means that parties can have greater confidence that their disputes will be tried by judges who understand the issues in their case. As a result, cases can be tried a lot quicker. Further information about the Technology and Construction Court can be found in its User's Guide which is available at www.hmcourts-service.gov.uk/docs/tcc_guide.htm.

If a party wishes to appeal a decision of either the High Court or the Crown Court, it has to appeal to the Court of Appeal. Thereafter, if a party is still not satisfied with

the decision of the Court of Appeal, it can attempt to appeal to the Supreme Court – the highest court in England and Wales, which prior to October 2009 was the House of Lords.

The rules relating to appeals from decisions of the County Court or Magistrates Court are more varied and are outside the scope of this work. However, although such appeals are not decided by the Court of Appeal in the first instance, they can subsequently be appealed to the Court of Appeal and ultimately to the Supreme Court in appropriate circumstances.

11.2. Precedent

The doctrine of precedent is the process by which the courts look at previously decided cases and apply their decisions to existing disputes. For a detailed explanation on the doctrine of precedent, recourse should be had to Cross' *Precedent in English Law*. However, set out below is an overview of the doctrine of precedent.

In general terms, the enunciation of the reason or principle upon which a question before a court has been decided is binding as a precedent. The underlying principle – or the basis upon which the previous case was decided – is called the *ratio decidendi*. By contrast, comments in judgments which do not form the basis upon which the case was decided are called *obiter dicta* and are not binding as precedent.

Lower courts are bound to follow the decisions of higher courts. So, for example, the Court of Appeal cannot derogate from decisions of the Supreme Court, and the High Court cannot derogate from decisions of the Court of Appeal. Conversely, higher courts are not bound to follow the decisions of lower courts. So, for example, the Court of Appeal will not consider itself bound by the decision of a High Court judge. Nevertheless, higher courts will often have regard to decisions of lower courts, especially when points of law have not been considered elsewhere.

As to how the doctrine of precedent applies to courts of equal jurisdiction, different rules apply depending upon whether the court is the Supreme Court, Court of Appeal or a court of first instance (such as the High Court). The Supreme Court will not depart from its own previous decisions unless it is right to do so; for example, because too rigid adherence to precedent may lead to injustice in a particular case or may unduly restrict the proper development of the law. Similarly, the Court of Appeal will follow its own previous decisions unless: (1) there are two or more conflicting decisions of the Court of Appeal – in which case it is bound to decide which to follow; or (2) its previous decision is not consistent with a decision of the House of Lords; or (3) if its previous decision is *per incuriam*. A decision is *per incuriam* where the court has acted in ignorance of a House of Lords or Supreme Court decision or in ignorance of a previous decision of its own, or in ignorance of a statute or rule having statutory force.

As to how the doctrine of precedent applies where one judge in a court of first instance (i.e. the High Court) is considering the decision of a judge of equal jurisdiction, such

courts are not strictly bound by their previous decisions, although generally, as a matter of judicial comity, the second judge will follow the decision of the first judge unless he or she is convinced that the judgment was wrong.

The doctrine of precedent only applies in relation to cases in England and Wales. Cases from other jurisdictions (e.g. Scotland, Australia and other Commonwealth countries) are often cited to the English courts. However, these decisions are not binding as a matter of precedent, and are only of persuasive authority.

11.3. Law reporting

In order for the doctrine of precedent to work in practice, cases have to be reported. Traditionally, cases were reported in bound volumes of the Law Reports. However, with the growth of the internet, many cases are reported online long before they even reach the press. The final section of this chapter identifies some libraries and websites where various law reports can be found. However, before reading that section, it is important to understand how the courts view various forms of law reporting.

The 'official' series of law reports is called 'the Law Reports' and is published by the Incorporated Council of Law Reporting for England and Wales. This series includes the Appeal Cases, the Queens Bench Division Reports and the Weekly Law Reports. Where a case is cited in the Law Reports, a copy of the relevant report should be provided.

If a case is not cited in the Law Reports, it may be reported in the All England Reports. In such circumstances, the All England Report should be cited to the court.

Otherwise, there are numerous other specialist types of law report, such as the Building Law Reports, Lloyds Law Reports and the Professional Negligence Law Reports. If a case is not cited in either the Law Reports series or the All England Reports, it is appropriate to refer to the version contained in these reports.

Only if a particular case is not cited in any of the published law reports is it appropriate to refer to cases that have been reported online or to rely on a transcript of the relevant judgment.

11.3.1 References

Where a case is cited, a reference to where it can be located ought usually to be provided after the case name. The reference is normally provided with an abbreviation which relates to the relevant report. For example, WLR relates to the Weekly Law Reports and BLR relates to the Building Law Reports. A full list of all abbreviations is available at www.legalabbrevs.cardiff.ac.uk.

The reference will also refer to the year of the report, the volume of the report and the page number within a particular volume. Therefore, a reference to [2005] 2 BLR 327 means that the case can be found in volume 2 of the 2005 Building Law Reports at page 327. A reference to a year in square brackets is to the year of publication of the

report. If a citation intends to refer to the year in which the judgement was handed down by the Court, it will be in round brackets.

In addition, a method of neutral citation has been introduced. However, the neutral citation reference does not actually assist in helping someone find a copy of the relevant decision. All it does is provide a unique reference code and identifies which court the decision was made in and the year in which it was made. Some of the relevant abbreviations include UKSC (Supreme Court), EWHL (House of Lords), EWCA (Civ) (Court of Appeal, Civil Division) and EWHC (High Court). EWHC references also identify in which division of the High Court the decision was made. Hence, references to EWHC (TCC) relate to the Technology and Construction Court.

11.4. Reference sources

11.4.1 Appointing a lawyer

If a party to a dispute does not know any lawyers and is unable to obtain a personal recommendation from an associate, there are two useful reference points: legal directories and the Law Society.

The two main directories are Chambers & Partners and the Legal 500, which can often be obtained at major libraries. Their websites are:

www.chambersandpartners.com
www.legal500.com

The Law Society also has a system for recommending firms of solicitors. Its contact details are:

Ipsley Court
Berrington House
Redditch
Worcestershire B98 0TD
Tel: 0870 606 6575
Web: www.lawsociety.org.uk/choosingandusing.law

11.4.2 Legal resources

There is a growing number of websites that contain legal resources. However, many of them simply contain electronic versions of the bound law reports. Therefore, before identifying some of the useful websites, this section identifies some of the key texts that deal with construction law and the libraries where paper legal resources are available.

11.4.3 Major construction law textbooks

The three major textbooks that deal specifically with construction law are

- *Keating on Building Contracts*
- *Hudson's Building and Engineering Contracts*
- *Emden's Construction Law*.

In the field of arbitration, key textbooks include:

- Merkin, *Arbitration Law*
- Mustill and Boyd, *Commercial Arbitration*
- *Russell on Arbitration*.

11.4.4 Libraries

Not all libraries are well resourced with law books and law reports. However, the following two public libraries have good collections of legal texts:

The British Library
St Pancras
96 Euston Road
London NW1 2DB
Tel. 020 7412 7332
www.bl.uk

Holborn Library
32–38 Theobald's Road
London WC1X 8PA
Tel. 020 7974 6345

Members of professional institutions (such as the Institution of Civil Engineers) should also investigate what resources their own libraries have.

11.4.5 Non-subscription-based websites

There are many websites that provide a variety of information for free.

For case reports:

- www.bailii.org – for general case reports (except House of Lords and Supreme Court judgments)
- www.supremecourt.gov.uk/news/judgments.html – for Supreme Court judgments since October 2009
- www.publications.parliament.uk/pa/ld199697/ldjudgmt/ldjudgmt.htm – for House of Lords judgments between 14 November 1996 and 31 July 2009
- www.scotcourts.gov.uk – for Scottish judgments

For adjudication cases:

- www.adjudication.co.uk

For the Civil Procedure Rules:

- www.dca.gov.uk/civil/procrules_fin/index.htm

For statutes:

- http://www.statutelaw.gov.uk

11.4.6 Subscription-based websites

In addition to the free websites, there are a number of subscription-based websites that provide a variety of additional services (e.g. search facilities) which are not

readily available on the non-subscription-based websites. These sites also contain electronic versions of law reports that are published in hard copy. Such sites include:

- www.westlaw.co.uk – this contains reported and unreported cases, legislation and legal journals
- www.lawtel.com – this contains a number of reported and unreported cases
- www.justis.com – this contains the Law Reports series and legislation
- www.i-law.com – this contains the Building Law Reports, Lloyds Law Reports and Professional Negligence Reports
- www.lexisnexis.com/uk/legal/ – this contains the All England Law Reports, other unreported cases and legislation.

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Chapter 12
Conclusion

Robert Gaitskell

As mentioned in Chapter 1, the purpose of this book is to give straightforward, practical advice to construction professionals as problems arise. Armed with the knowledge that is set out in this book, it will often be possible to avoid a dispute developing at all. For example, if the contract is drafted in a sensible and fair way, allocating risk to the party most able to bear and control it, the likelihood of disputes developing is immediately reduced. Similarly, if good records are kept on site, then when factual disputes arise about, say, on what days bad weather delayed work, they can be quickly resolved by reference to the records. Similarly, properly maintained site minutes can serve a similar purpose.

However, if a dispute does arise, then it is essential that proper steps are taken at the proper time. Various chapters deal with the notices that need to be given, and model pleadings and other documents are provided to serve as useful checklists of the key ingredients necessary.

No matter that you are located on an isolated site in a developing country, there is advice in Chapter 11 on how to access immediate help on the internet, as well as through books and libraries. All the advice in this book comes from practitioners who deal with such disputes on a daily basis and is underpinned by site experience.

In essence, this book aims to help any construction professional to avoid a dispute arising but, if one does materialise, it provides the tools for dealing with that dispute in the most cost-effective and timely way. This book deals in detail with the seven available forms of dispute resolution and, in each case, identifies the circumstances where it is most appropriate and the features which distinguish it from the other processes available.

The contributors to this book trust that you, as a construction professional, will find it helpful. Whatever your experience of it, we would like to hear about it. All feedback will be gratefully received. We may be contacted at: clerks@keatingchambers.com.

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