

Case study

Given the expense and disruption to a business when a dispute arises, not to mention the potential damage to business relationships, dispute avoidance should be paramount. However, disputes are sometimes unavoidable, and when they occur they require resolution. This case study briefly looks at several dispute resolution processes and the role of chartered surveyors.

Importance of the chartered surveyor

Chartered surveyors' clients are diverse and include contractors, employers, consultants, public authorities and others. Chartered surveyors are generally engaged because they 'add value' to the dispute resolution process and not through any formal requirement. When parties find themselves in a construction dispute they may employ a chartered surveyor as their representative, or as an independent and impartial expert. Chartered surveyors have a wide range of skills that the parties to a dispute can make use of. Those skills have been promoted and developed in large measure due to the RICS' focus on the development and training of chartered surveyors in relevant disciplines.

Negotiation

Most chartered surveyors will already have good experience of negotiation in their day to day workload and they can use this to good advantage when disputes arise. Negotiation comes at the beginning of the dispute resolution spectrum and is an informal and non-binding process in which the

parties control the outcome. The dispute remains confidential, and due to the non-adversarial nature of the process it preserves, and sometimes even strengthens, business relationships. The parties may appoint such legal or expert advisors, including suitably experienced chartered surveyors, as they consider necessary. This is often described as 'supported negotiation'.

Mediation and Conciliation

Both mediation and conciliation are now well established in the UK construction industry. Chartered surveyors may be involved in assisting the parties, or they may have had the specialist training to become mediators or conciliators themselves. In mediation and conciliation, the parties retain control of the process. However, the distinguishing feature from negotiation is the addition of a neutral third party " - the mediator or conciliator -" who aids the parties towards a settlement. The terms of the settlement ultimately lie with the parties.

Both mediation and conciliation are voluntary and consensual processes. They are methods of structured negotiation where a third party assists the parties to achieve a settlement. In mediation the mediator generally avoids expressing an opinion or recommendation and purely facilitates a settlement between the parties. Mediation is therefore described as a 'facilitative' process. In conciliation the conciliator will evaluate the parties' cases and make recommendations based on his or her view. Conciliation is therefore described as an 'evaluative' process. The conciliator's

recommendations are not usually binding and are intended to assist the parties in achieving a settlement. Mediation and conciliation are confidential, flexible, quick and relatively inexpensive. At the conclusion of the process the parties can decide whether they wish to agree to the settlement or whether they wish to resolve the dispute by some other means.

Adjudication

In the UK construction industry the term 'adjudication' is used almost exclusively to describe dispute resolution under Part II of the Housing Grants, Construction and Regeneration Act 1996 ("HGCRA"). The process involves a third party, the adjudicator, acting as the tribunal in a dispute. The adjudicator's decision is binding on the parties unless or until the dispute is finally determined by legal proceedings, or by arbitration, or by agreement of the parties. Many chartered surveyors act as adjudicators.

The HGCRA sets out a framework for construction adjudication which must be included in all construction contracts to which the HGCRA applies. The HGCRA defines construction contracts as including agreements to carry out construction operations, as well as professional services in connection with construction operations. The adjudication provisions of the HGCRA do not apply to construction contracts with residential occupiers. The HGCRA provides that a party to a construction contract has the right to refer a dispute arising under the contract to construction adjudication at any time.

There is no appeal against the decision of an adjudicator. If a losing party does not comply with an adjudicator's decision then it is up to the successful party to commence court proceedings to enforce the adjudicator's decision. The courts have generally been very supportive of construction adjudication throughout the UK, only refusing to enforce decisions where the adjudicator has acted in excess of his or her jurisdiction or in serious breach of the rules of natural justice.

Arbitration

Arbitration is a private dispute resolution process in which the parties agree to have their dispute decided by an arbitrator and to be bound by the award that he or she makes. It is essentially an alternative to litigation. Many chartered surveyors are experienced arbitrators. Chartered surveyors may also be employed by the parties as expert witnesses, or as an advocate presenting a party's case.

The legal system which governs the procedure for an arbitration is referred to as the 'seat' of the arbitration. Where the seat of the arbitration is England, Wales or Northern Ireland it is governed by the Arbitration Act 1996 ("the 1996 Act"). Where the seat is Scotland it is governed by the Arbitration (Scotland) Act 2010 ("the 2010 Act"). Both Acts contain mandatory and discretionary parts, which allow the parties to agree how the dispute is to be resolved whilst also providing a fall-back position if agreement cannot be reached.

The agreement to arbitrate is commonly referred to as the 'arbitration agreement'. It can be entered into after the dispute has arisen or, as is more often the case, included in the contract or other legal agreement.

The arbitrator can be chosen by agreement between the parties, or appointed by a nominating body identified in the contract, for example the RICS. The arbitrator must act fairly and impartially, and avoid unnecessary delay and expense whilst conducting the arbitration.

Once the parties have made their submissions, and after any hearing is held, the arbitrator will produce his or her award. The arbitrator's award is final and binding on the parties unless they agree otherwise. The award can therefore be enforced as if it is a judgment of the court. The parties have certain mandatory rights of appeal against the arbitrator's award, including challenging the substantive jurisdiction of the arbitrator or challenging the award on the basis that a serious irregularity has been made. The parties can also choose whether to include a right to appeal on a point of law.

Expert Determination

Expert determination involves the parties instructing a third party expert to decide their dispute. The parties must agree in the contract that a dispute should be referred to an expert for determination. Unlike some other processes, there is no statutory right of appeal and the expert's decision is therefore final and binding. The only exception is where the expert has decided the wrong issue.

Chartered surveyors carrying out expert determination need to take particular care as, unlike some other dispute resolution methods, the expert is usually liable for any losses suffered as a result of his or her negligence.

Litigation and chartered surveyors acting as expert witnesses

If a consensual ADR process is not provided for in the contract, or other legal agreement, and cannot be otherwise agreed, then, with the exception of a construction contract where a dispute may be referred to adjudication under the HGCRA, the only other alternative is litigation. Litigation remains common in construction related disputes.

Litigation involves one of the parties commencing a claim in the civil courts. However, before litigation is commenced, the parties may be obliged to follow the procedures set out in the Pre-Action Protocol for Construction and Engineering Disputes. Although a claim can still be commenced without following the pre-action protocol, certain costs and interest sanctions may be levied even if the claiming party is successful.

The court in which the claim is commenced will usually depend on the value of the claim. Due to the specialist nature of some of the cases in the property, land and built-environment sectors, many are heard by specialist judges and/or in specialist courts. In England and Wales, for example, construction cases are heard in the Technology and Construction Court of the Queens Bench Division of the High Court ("the TCC"). The TCC has a system of efficient 'case management', part of which will include the judges' directions in relation to the number of expert witnesses, whether the parties should be considering alternative dispute resolution prior to trial (for instance mediation), and the setting of a timetable for experts to meet and exchange reports to narrow issues.

Litigation will ultimately involve a formal hearing where both factual and expert witnesses are examined and cross-examined under oath in front of a judge. The judge will then hand down his or her judgment, and the parties have certain rights of appeal. The final court of appeal for civil claims in the UK is the UK Supreme Court (formerly the House of Lords).

Other dispute resolution processes

This case study has outlined the main types of dispute resolution processes being used in construction disputes. Chartered surveyors may also become involved with other less well known processes, some of which are briefly described as follows.

Dispute Boards (Dispute Review Boards & Dispute Adjudication Boards)

The term Dispute Boards (“DBs”) includes both Dispute Review Boards (“DRBs”) and Dispute Adjudication Boards (“DABs”). The distinction between DRBs and DABs is explained below. DBs are common on large scale international construction projects, but they have also been used on large scale domestic projects such as the Channel Tunnel and the Channel Tunnel rail link, and on the construction of the Olympic park and other venues for the London 2012 Olympics.

Many types of DB exist, and they are often tailored to suit an individual project. A DB will often comprise three members, with each party proposing one DB member at the commencement of the project. The third member is then selected by the two nominated members. Ideally, the three members of the DB will have the expertise

between them to deal with most disputes that are likely to arise on the project; for example the combination of an engineer, a quantity surveyor and a lawyer. The precise procedure for the DB will usually be governed by the applicable construction contract, but it is usually a requirement for members of the DB to make regular site visits and to review project documentation and reports as the project progresses. The DB is generally empowered to examine all disputes, and to make Recommendations if it is constituted as a DRB or Decisions if it is constituted as a DAB.

Various organisations have published rules for DBs, including the Federation Internationale des Ingenieurs-Conseils (“FIDIC”), the Institution of Civil Engineers (“ICE”) and the International Chamber of Commerce (“ICC”).

In accordance with these rules, a party is not contractually bound to comply with a DRB Recommendation provided it dissents within the time period set out in the contract, but is contractually bound to comply with a DAB Decision until such time as an arbitrator or court rules otherwise.

Early Neutral Evaluation

Early neutral evaluation (“ENE”) is where one or more parties to a dispute seeks the advice of an independent third party, who may be a judge, lawyer or chartered surveyor, to evaluate the strengths and weaknesses of their case and the likely outcome should it proceed to a formal dispute resolution process. The process is confidential, flexible and geared towards achieving settlement.

Med-Arb

Med-Arb is a two stage process which involves a combination of mediation and arbitration. The Med-Arb process involves conferring the mediator with the jurisdiction to alter his or her role to that of an arbitrator if it appears that the parties will not be able to reach a mediated settlement. Once the switch has taken place and the mediator has become an arbitrator, he or she can make a legally binding award which is enforceable in the courts.

Mini Trial

The mini trial is also a hybrid dispute resolution process. In a mini trial each party presents a summary of their respective cases, as they would in arbitration or litigation, but the distinction is that the case is ‘tried’ by the parties themselves. The parties will often appoint a ‘neutral adviser’, who may have particular legal or technical expertise. The neutral adviser will sit with senior management from both parties and take charge of the hearing.

Summary

Disputes are commonplace in the construction industry and this brief guide aims to give an introduction to the many different dispute resolution processes available in the UK. It is clear that ‘one size does not fit all’, and it is important to select the most suitable process that best meets the aims of achieving an acceptable result in the shortest possible time, with the minimum expense and the minimum stress on the participants.

Further reference

Surveyors acting as advocates (Practice Statement and Guidance Note)

Surveyors acting as expert witnesses (Practice Statement and Guidance Note)

Direct professional access to barristers (Guidance Note)

Surveyors acting as adjudicators in the construction industry (Guidance Note)

Surveyors acting as adjudicators in the construction industry in Scotland (Guidance Note)

Surveyors acting as arbitrators and as independent experts in construction related disputes (Guidance Note)

Surveyors acting as arbiter or independent expert in construction related disputes in Scotland (Guidance Note)

Surveyors acting as expert witnesses (Guidance Note)

Date of publication of this document: October 2009

The information contained in this document is not, and should not be taken as, legal advice. No responsibility for loss or damage caused to any person acting or refraining from action as a result of the material included in this publication can be accepted by the authors or RICS.

© RICS 2009. Copyright in this publication rests with RICS, and save by prior consent of RICS, no part or parts shall be reproduced by any means electronic, mechanical, photocopying or otherwise, now known or to be devised.

