



THE ROBERT GORDON UNIVERSITY

ABERDEEN BUSINESS SCHOOL

DEPARTMENT OF LAW

*A study of the Impact of the Housing Grants, Construction and Regeneration Act 1996 and the Local Democracy, Economic Development and Construction Act 2009 on Resolving Disputes within an Industry which appears to embrace Conflict in the UK and a Comparative Global Study on ADR and Dispute Resolution Techniques and Applications.*

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**By**

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## **ABSTRACT**

This dissertation, by means of literature research and case study, deals with the theories and applications of conflict within the construction industry (both in the United Kingdom and abroad), how it is trying to be resolved through the application of the *Housing Grants, Construction and Regeneration Act 1996* and the *Local Democracy, Economic Development and Construction Act 2009* and how these compare with conflict in other geographical locations.

Conflict is a 'necessary evil' or is 'part of the beast' as we say within the varying construction disciplines, and it is the aim of this dissertation to analyse the theories and practices within the industry in resolving disputes. Further, as the UK is a leading light in the resolution of disputes, a comparative reference shall be made on the resolution of disputes within the South African region as well as Dubai of the United Arab Emirates.

It is hoped that any interested party in this dissertation shall note that conflict within construction is as integral to the construction of any project as its very foundations.

## **ACKNOWLEDGEMENTS**

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My loving wife, Karen, and daughter, Alexandra Mae; who equally give me the cause to constantly push forward.

And my family back home on Scotland, those who are still here, and those who have went for a wee wander, but to be seen again. May, Patrick, Craig, Aunt Jessie,....and Skipper.

.....

**Abbreviations:**

DIAC – Dubai International Arbitration Centre

DIFC – Dubai International Finance Centre

FIDIC – Fédération Internationale Des Ingénieurs-Conseils

HGCR – Housing Grants, Construction and Regeneration Act 1996

ICC – International Chamber of Commerce

ICE – Institute of Civil Engineers

JCT – Joint Contracts Tribunal

LCIA – London Court of International Arbitration

LDEDC – Local Democracy, Economic Development and Construction Act 2009

NEC – New Engineering Contract

### **Table of Cases:**

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A Cameron Ltd v John Mowlem & Co [1990] 53 BLR 24

Drake and Skull v McLaughlin & Harvey [1992] 60 BLR 102

RJI Consulting Engineers v DM Engineering 9Northern) Ltd, (2002) CA

*Bridgeway Construction Ltd –v- Tolent Construction Ltd*

Capital Partners v Tecom 2007, DIAC.

**Table of Statutes :**

Housing Grants, Construction and Regeneration Act 1996

Local Democracy, Economic Development and Construction Act 2009

The Arbitration Act 1996

Local Democracy, Economic Development and Construction Act 2009

The Court of Appeal Medication Scheme

The Scheme for Construction Contracts (England and Wales) Regulations 1998 (“the Scheme”).

Scheme for Construction Contracts (Scotland) Amendment Regulations 2011 (*SSI 2011/ 371*) (Scheme for Construction Contracts (Scotland) Regulations 2011) in Scotland

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## CHAPTER 1

### 1.1 Introduction

#### 1.1.1 Background to the Research

My method of research is based on adopting and utilising the appropriate research techniques. After 14 years in the construction industry I shall utilise the information I have garnered from previous projects, claims and disputes as well as testimonials from previous colleagues. This information shall be based on documentation taken from Adjudications and Arbitrations (ICC<sup>1</sup> and DIAC<sup>2</sup>), as well as Claims (both Employer and Contractor based) and the Dispute Adjudication Boards on which I have had the fortunate opportunity to have been part of.

#### 1.1.2 The Subject and Aim

Conflict is part of human nature, we either knowingly or not, entertain the notion of conflict a myriad of times each day, whether it's a frustrating glance at another driver who 'cut you up' or the dismissive approach to a newsreader who seems to be giving an editorial instead of informing you of the daily news. It's part of 'us', our society and our every day relationships with ourselves, friends, family and strangers.

As a professional in Construction Claims, I believe we can modify and/or better our methods for resolving disputes. I consider the 1996 Act<sup>3</sup> to be ground breaking, but unfortunately the 'nature of the beast' is such that Construction doesn't give itself the opportunity to better manage the conflicts which arise (whether it is the contract itself, the nature of contracting, the parties who are involved and subsequently make a living from disputes, myself included, and so on).

In saying that then, the theory and application of Conflict within the Construction Industry has an inbuilt rationale, which is required and is very much part of the makeup of all construction projects. Indeed, Conflict is a 'functional' (without conflict humans could not progress or evolve, through our lessons learned, e.g. the

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<sup>1</sup> International Chamber of Commerce

<sup>2</sup> Dubai International Arbitration Centre

<sup>3</sup> Housing Grants, Construction and Regeneration Act 1996

United Nations was ultimately created through several World War conflicts), as well as a ‘dysfunctional’ theory and application. Without conflict we would not progress as a species, although the very negative nature of conflict does obviously have its down sides.

In the Construction Industry, we see the dominance of the Main Contractor over the Sub-Contractor(s) and subsequently the Sub-Contractor over its other contracting parties. Indeed, the term Sub-Contractor is a bit of a misnomer as many Sub-Contractors are indeed multi-million pound turn over companies. The relationship is the same between the Employer and the Contractor, but to a lesser extent, depending on the contractual relationship, procurement route etc. In this study, I shall be looking at the Main Contractor and Sub-Contractor relationship, as they battle over cash flow (the life blood of the industry as Lord Denning put it), as well as disputes between the Employer and Contractor and why conflict is inherent in the process, even when we try to avoid it and the methods of resolving the disputes, which are a product of the initial conflict. Case Law, Statute and case studies shall be used to convey the industry in its normal form; that is adversarial, as both parties fight to control their risks and maximise their costs and profits.

The process involved is to explain the theory of conflict, why it arises, its application in the Construction Industry and the methods for resolving these disputes following the Latham Report, 1994<sup>4</sup> and the 1996 Act. Further, discussion shall centre on the 2009 Act<sup>5</sup>, following on from the Latham Report 1994, and the application of this within the industry. I shall then discuss the actual application of these two acts within the industry, their effectiveness and whether there is the need for further development. For instance, the JCT 2011 Contract Section 4 has incorporated terms for Payment, but is this a help or a hindrance?

I intend to research the notion of disputes within daily contracting parties (at home and abroad), the tactics used, before during and after the project (the risks in the various contracting and procurement routes - contracting is purely a risk allocation) and whether parties are actually as risk averse as we would like - there is a lot of

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<sup>4</sup> ‘Constructing the Team’, The Latham Report, Sir Michael Latham, 1994

<sup>5</sup> Local Democracy, Economic Development and Construction Act 2009

money to be made in the dispute resolution world and it is common knowledge that contractors of an ilk are ‘commercially savvy’ so as to increase their margins in Claims and Disputes (Adjudication or Arbitration or indeed Litigation). In saying this, I shall discuss the various forms of Alternative Dispute Resolution, as seen from the 1996 Act and furthered in the 2009 Act, and how these have influenced the world, in particular Africa and the Middle East (we shall look at how parties resolve disputes through the contract, i.e. by Dispute Adjudication Boards, and the use of arbitration and subsequent enforcement of awards).

## CHAPTER 2

### 2.1 The Theory of Conflict

*“So long as human nature is what it is there will always be disputes. And those disputes, whatever their character, must be resolved – if society is to exist in a civilised way- as quickly, as cheaply, and as satisfactorily as possible.”*

Lord Justice Roskill, Alexander Lecture, 1978. Baden Hellard (1988)<sup>6</sup>

The Construction Industry or ‘Contracting’ has a “built in recipe for conflict<sup>7</sup>” as the term ‘Contracting’ itself directly expresses the very nature of what is being carried out, on thousands of sites throughout the world each day. Relationships, or contracts, exist between employers, contractors, sub-contractors, consultants and suppliers, in the ‘team’, from which a prototype project (as each project is unique, in several ways) is to be completed.

Within the ‘team’ there is going to exist conflict, as its inherent in human nature<sup>8</sup> and in particular within the construction industry, as the varying parties compete, ostensibly, to increase their margins. It is easily viewed, from site level to boardroom level, where conflict can be seen as “an interactive state in which the behaviours or goals of one person are to some degree incompatible with the behaviour or goals of some other person(s).<sup>9</sup>” Such examples are viewed where a client wishes to achieve a contract completion date earlier than contractually agreed, but the work force are concerned about future work streams, and as such go on strike. This is in fact a common occurrence in Southern Africa, in my experience, and terms such as ‘Strike Season’ became the norm, as it was expected that during hot summer periods (November – February) the workforce would strike at the lack of welfare facilities, when in fact it was known that the strike was in fact in place to prolong the project duration.

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<sup>6</sup> Managing Construction Conflict, R. Baden Hellard, 1988

<sup>7</sup> Managing Construction Conflict, R. Baden Hellard, 1988

<sup>8</sup> Conflicts: A Better Way to Resolve Them, De Bono, E., Harrap, 1985

<sup>9</sup> Conflict, power, and games: The experimental study of interpersonal relations. Chicago - Tedeschi, J.T., Schlenker, B.R., & Bonoma, T.V. (1973)

Conflict as defined by DeBono (1985)<sup>10</sup>, may be characterised by the 'Four F's', where Fear is based on the fear of losing one's job, or condemnation of one's work rate and/or skill level; Force (as viewed within the 'Strike Season', which did become violent), where the use of physical and emotional force can commence and finish the conflict, with the consideration that physical force always came the fore, "Power comes from the barrel of a gun" Mao (1976)<sup>11</sup>. However, within organisations and most of society, "morale force" is very powerful, as DeBono considered. DeBono considered Fair, in which from our childhood the term "it's not fair" can be a high motivator as well as Funds, in which to be part of a conflict, one must have the financial muscle to compete. This is of course a major aspect to construction disputes, due in part to the long and expensive arbitrations and litigations, which can, tactically, be extended or delayed to see 'who runs out of money first.' These 'Four F's are used by organisations to manage their environment, in fact, the 'Four F's are utilised to design a conflict free environment.

Litterer<sup>12</sup> considers, conflict is a "type of behaviour which occurs when two or more parties are in opposition as a result of a perceived related derivation from the activities of or interacting with another person or group." However, this notion of conflict, and conflicting ideas, is a dynamic process with many guises (Rahim 1985)<sup>13</sup> and is supported by Thomas<sup>14</sup> and confirmed by the many different definitions, "a process which begins when one party perceives that the other has frustrated, or is about to frustrate some concern of his."

Rahim (1985)<sup>15</sup> though manages to tie the many different theories together under one common theme, being that all theories consider conflict to result from the incompatibility of oppositions of goals, activities, or interaction between entities.

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<sup>10</sup> Conflicts: A Better Way to Resolve Them, De Bono, E., Harrap, 1985

<sup>11</sup> Mao, Tse Tung, 1976

<sup>12</sup> Organisations: Structure & Behaviour, J A Litterer, Wiley & Sons, 1969

<sup>13</sup> Managing Conflict In Organisations, M A Rahim, Praeger, 1985

<sup>14</sup> <http://www.ibraavn.dk/238-understanding-conflict.htm>

<sup>15</sup> Managing Conflict In Organisations, M A Rahim, Praeger, 1985

Edward De Bono is perhaps the forerunner in looking at why people disagree, suggesting that there are eleven basic reasons why people see things differently and understanding these reasons can decrease the tensions created.

Looking at each reason, we can evaluate how to understand the tension and consequently conflict more easily –

- **Mood** – Depending on what type of mood a person is in shall colour their judgement. For instance, where a person who has a trait of being antagonistic may ‘take the bait’ compared within a person who is naturally more jovial and relaxed in character.
- **Situation** – For instance, under the process of Mediation, if the situation also involves parties who are also involved in a hostile takeover, it may not be most advisable to enter into the process of Mediation (even if it does stipulate this as a provision of the Contract).
- **Limited View** – confers the point in which a person cannot see beyond a certain distance. In Commercial Disputes, two parties shall have the same wish, to resolve the dispute, but both parties shall be looking at entirely different outcomes.
- **Logical View** – is the difference between something which is logical, but local to the person’s requirements. An example of this, and rather contemporaneous, is a Contractor may see sense in pricing for work so that they only cover their fixed costs (and to allow for a low bid in the hope of winning the contract), during a recession, but this may appear to be illogical in the wider sense (to the banks for instance) if the recession continues for a long period.
- **Logic Bubble** – gives a person the opportunity, upon disagreeing with someone, two choices; to either totally disregard the person, leading to a conflicting situation, or to regard the person as being of intelligent standing, but living in a bubble of preconceptions which dictate their action, which can minimise the conflicting situation.
- **Different Universes** – suggests that people are operating within entirely alien (to each other) spheres of reference and as such the potential for conflict is great.

- **Different Information** – is, as one would expect, where two, or more, parties have different perceptions of the same problem. This, is a common trait within the construction industry, as communication is a management tool which is rarely maximised.
- **‘Part of the picture’** – is a tactic used by parties where they deliberately choose to see only part of the picture, this creating a conflict.
- **Experience** – has an important part in conflict and it’s thinking, as a person with experience will not overreact to a situation whereas ‘new blood’ may be rather more tempted to be reactionary. Conversely, the more experience a person has the more difficult it is for that person to change.
- **Predict** – the application of being able to predict any conflict is vital in conflict thinking, such as being able to identify when the non-payment of sums to a contractor shall result in the crystallisation of the dispute, and the inherent knowledge that this dispute may result in far worse repercussions (loss of future business).
- **Perceive** – and one’s perception are vital also, as people see things differently and once we accept that it is possible for two people looking at the same thing to see it differently, then we can accept that at the core of conflict thinking there is often a different way of looking at the same situation.

De Bono viewed these 11 points as a foundation from which all parties must understand to minimise and manage conflict successfully. Edward De Bono has been at the forefront of conflict thinking since he coined the consideration ‘lateral thinking’ in 1967<sup>16</sup>.

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<sup>16</sup> [www.edwdebono.com](http://www.edwdebono.com)



## **2.2 The Very Nature of Dispute and Conflict within the Construction Industry**

In the 1970's to 1980'S there was an increase of litigation of nearly 100% from the previous years with increases of approximately 15% per annum in the period 1981 – 1991 (Newey 1992<sup>17</sup>). Newey ascribes this to the changes in common and statute law which have made it easier to bring claims, although it is common trait of thought that “conflict between contracting parties may be inevitable” (Langford, Kennedy and Sommerville 1992<sup>18</sup>), due to the simple fact that contracts can and are interpreted differently, by the varying parties to the contract.

Each group of professionals, contractors and sub-contractors have developed customs and practices which frequently continue when the building team carries out the project in hand. This, possible ‘Different Information’ (De Bono) for instance can result in petty conflict as the various parties usually do not want to change, through self serving goals and immaturity.

Conflict can often occur through the simple fact that the client is the only ‘non-expert’ in the team, but who is ultimately the person making the decisions (for instance, the issuance of Variations by the Engineer under FIDIC Conditions, but where under the Particular Conditions, the Employer must agree to the costs. This has resulted in many claims by Contractors and counterclaims by Employers). So, in many occasions, or historically, it was the Architect and Engineer who would take responsibility to explain and administer the contract, particularly with the client and the contractor. A good client, in an ideal world, should pay the sums provided when required (Chappell 1984<sup>19</sup>), based on a professional (Surveyor or Engineer) and their guidance. Unfortunately, much conflict occurs through a clients wish to alter the scope of works (whether in design, material, costs or time); this example does not however preclude the fact that contractors are as liable and as likely to create conflict also.

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<sup>17</sup> The Construction Industry, Newey J (His Honour Judge), E&F Spon, 1992

<sup>18</sup> Contingency Management of Conflict: Analysis of Contract, Langford, Kennedy & Sommerville, E&F Spon, 1992

<sup>19</sup> Contractors Claims: An Architects Guide, D Chappel, The Architectural Press, 1994

The contract (whether it is NEC, JCT, FIDIC or ad-hoc,) is where most of the conflict arises. In the United Kingdom NEC and JCT are the prevalent Standard Forms<sup>20</sup> used, with JCT being the most commonly used than the more punitive NEC<sup>21</sup>. These forms are favoured as they carry each project from inception to completion (Chappell 1984) and it could be said that the contract is a ‘time bomb’ waiting to be interpreted differently by one party, resulting in an explosion of conflict, claims and dispute resolution (Adjudication or Arbitration or even the Courts). It is the contract and it’s “indexicality” (Clegg 1992) which will always cause the problem as it is dependant on who makes the interpretation, what their interests are, how much knowledge they have, at what time during the contract, etc. So, it can be said that through the above events the contract is ‘indexically irremediable’ (Clegg 1992), i.e., where there is indexicality, there will be conflict.

No contract can ever provide for its own interpretation because people will always have an interest in the contract and due to the complexity of site organisation’s (e.g. different knowledge bases, differing hierarchies, etc) people will rarely un-contest any interpretations. Conflict is part and parcel of the contractual system, as for instance I am currently instructed as the ‘expert’ for a client, where myself (claimant) and the respondent are at logger-heads over the interpretation of sub-clause 17.6 [Limitation of Liability] of the FIDIC Conditions of Contract for Construction for Building and Engineering Works, designed by the Employer (1<sup>st</sup> Edition 1999). I shall not go into the facets of the argument (save to say I believe I am correct on direct and indirect costs), but the vast disparity on each party’s interpretation is remarkable. We are reading the exact same index, yet we carry vastly different conclusions.

Experience, has displayed to me that claims and subsequent dispute resolution are part of the ‘life blood’ of the construction industry, to offer a rather ironic twist on Lord Denning’s famous quote<sup>22</sup>. Contractual claims (under the provision of the contract, such an extension of time), ex-contractual claims (made outside the provisions of the contract for some breach of term or a breach under common law or civil code, dependant on location) and ex-gratia claims (made where there is no legal basis, but

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<sup>20</sup> Standard Form of Contract – a term used to form a ‘basis’ or ‘structure’ to a contract, which can be modified by the parties.

<sup>21</sup> [www.practical-completion.com](http://www.practical-completion.com) ‘JCT & NEC – The Brave New World.

<sup>22</sup> Lord Denning, *Dawnay ltd v FG Minter* [1971]

made on moral grounds) (Chappell 1984) are now part of many contractors profit margins (I for instance have been instructed to make several claims, due to a projects decreasing profitability) and are discussed at Board Room level. Unfortunately, it is also well documented in BRE<sup>23</sup> papers that mutual respect between professionals has diminished vastly due to the more complex designs, procurement methods and basic manipulation carried out in the industry, day after day. This complexity has resulted in specialist contracting taking on more responsibilities in design and increasing use of management programme techniques (NEC 3 has harnessed this in Clause 31.3) to try and control the progress of the project. As Davies (1992) stated this has led to the formation of working groups and committees who have the common goal of looking after themselves. Clients and Professionals (sadly) alike are continually confused by Design and Build / Turnkey, Prime Cost Contracting, Just in Time, Management Contracting, Construction Management, etc, as I myself am involved in a dispute where a Lump Sum contract (Design and Build) became a 'Re-Measurement contract' half-way through the projects existence, which has literally led to conflict and disputes. These are industry professionals, with vast knowledge and experience who are for various reasons, happy to enter into conflict, with the expectation of increasing their profit margins.

These various forms, ironically, go back to client dissatisfaction with the building process, and possible ways of making a simple process (building to a specific scope) staying simple'. Unfortunately though, more forms make for more confusion and as Langford (1992)<sup>24</sup> et al noted, a regulating body should be set up to control the industry, from the many various angles (client, contractor, designer, supplier, land owner, planning, etc, etc, etc). Further, it was noted that the greater fluidity (which may already place fear in our hearts as all projects, it appears, more too quickly once the monies are in place) which has resulted from the varying forms, has created construction organisations, whereby the traditional main contractor is now a manager and advisor to the client, while the smaller/medium sized companies are basically sub-contractors. Looking at the market today, a lot ambiguity has arisen on what each

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<sup>23</sup> Building Research Establishment

<sup>24</sup> Contingency Management of Conflict: Analysis of Contract, Langford, Kennedy & Sommerville, E&F Spon, 1992

parties roles are (for instance, the use of Design and Build contracts, but where the line between Client design and Contractor design risk is virtually impossible to tell).

All the uncertainty which arises from working on the various forms creates misunderstanding (deliberate or not), delays, confusion and conflict. Also the uncertainty arising will lead to communication problems within the organisation and/or site, i.e. a lack of knowledge of how to go on (Clegg 1992). An effective communication framework must be planned in advance of commencement on site, as Langford et al (1992) argue, end behaviour needs to change, i.e. getting something done (completing the project is why everyone is on site, is it not), and the use of different interaction may be used to bring about this objective, particularly where several suppliers and specialist contractors are mutually reliant on each other, but not bound together by a contract. This is where site meetings are crucial, but experience also tells me that non-attendance of 'needless meetings' is a causation of conflict also.

Every project will sooner or later come up against some form of conflict, large or small. Baden-Hellard (1992) ascribed to the notion that every project had four frequently conflicting elements which had to be established in **the brief**. These were placed in the acronym F.A.C.T, where Function is all the technical and physical requirements such as servicing the site and access to site; Aesthetics was the satisfaction of all the human aspects of the end of the project; Cost of the project, both capital and eventual running costs, and the Time of completion and occupation. I agree wholeheartedly with this as I myself have been involved in dispute on site access, variations to the price and time constraints not being met by the contractor.

Discussing 'the brief' as noted above, there are many parties involved in providing the brief and its criteria, with some may technologies and techniques, conflict can and does occur even before work actually begins on site. Negotiations then can take weeks and months until a solution is found to satisfy the client's needs and the external party's requirements. However and thankfully, these negotiations have to conclude, whether it is a 'frozen design' or agreed Bill of Quantities with the employers 'contingency' in Provisional Sums<sup>25</sup>. No matter though, as changes in the contract are

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<sup>25</sup> Provisional Sum – an amount which is included in the contract as a employer contingency. Usually used for works which are not yet defined or designed.

common (hence the use of Provisional Sums) and in fact are the norm, which is why there are clauses for Variations (to the work scope, nominated sub-contractor, sequence and timing of works, etc). Every change creates a situation where the cost and time criteria are open to re-regulation and through the number of different forms of contract, which number more than 100 (Baden-Hellard 1989<sup>26</sup>), try their best to cover the varying customs which have now been deployed.

The setting out of the brief should include for allowances and risks which may be unknown (again, Provisional Sums included this to a degree, as well as Force Majeure). Risk and uncertainty is inherent in the construction industry (from political to climatic to financial) and as such it has to be in everyone's best interest to account for as many risks, as everyone has the same common goal – to complete a project on time and to the agreed cost. Or do they?

Construction contracts and projects are about the apportionment of risk; that is, who is willing to accept what risk for what reward. Contractual complexity makes the application of risk management very difficult as a complex 'standard' form of contract and the ever more increasing use of 'amended forms' of the standard contract leaves gaps for onerous conditions, which invariably let the risk migrate it's way down the contractual line to the sub-contractors. Further, the client is increasingly losing any formal relationships with many of the parties, which affords more contractual parties ever more opportunity to cloud the waters; the 'traditional' form of contract is now a dinosaur.

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<sup>26</sup> Managing Construction Conflict, Baden –Hellard, Longman, 1988

### **2.3 The Latham Report 1994 - Adjudication and Arbitration as Dispute Resolution Methods.**

There are interesting parallels as well as interesting differences between the problems identified and solutions recommended in Sir Michael Latham's Report, *Constructing the Team*<sup>27</sup>, and the state of the U.S. Construction Industry in the mid-1990s. Throughout the globe, there are similarities to all problems on site. This chapter reviews selected aspects of the Latham Report and compares the problems identified with the current situation in the U.S., South Africa and the UAE, and compares the various recommendations with current trends or practices in the U.K. construction industry.

As noted previously, the early 1990s were a terrible time for the construction industry in the United Kingdom. There were much overbuilt markets, economies and overly extended developers during this period, which led to greed and an actual decline in construction output (the effect on each country's economy, where construction accounts for 8% of GDP in the UK<sup>28</sup> and 4.4% of GDP in the US<sup>29</sup>, cannot be understated).

However, it can also be argued that the industry's increased propensity toward contentious disputes and litigation as much as anything else played a major role in its decline. In the UK, disputes surrounding major projects such as Canary Wharf and the Channel Tunnel came to sum up how the construction industry was moving; towards a more claims orientated set up (albeit this was a time of high inflation, high interest rates and feverish competition for fewer projects, new procurement options and mass speculative frenzy can all be held accountable also). In the US, where the absolute number of claims peaked in 1989<sup>30</sup> somewhat earlier than reported in the UK, the cost per claim for design professionals insured by one PI carrier climbed steadily from

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<sup>27</sup> *Constructing the Team*, Sir Michael Latham, 1994

<sup>28</sup> <http://www.gfmag.com/gdp-data-country-reports/152-the-united-kingdom-gdp-country-report.html#axzz2RrrgOhdi>

<sup>29</sup> <http://data.worldbank.org/indicator/NY.GDP.MKTP.CD>

<sup>30</sup> "There's No Claims Crisis Now, But New Challenges Loom," Ichniowsky, T. (1995)  
*Architectural Record*, August, 1995

\$179,000 in 1985 to \$268,000 in 1993<sup>31</sup>; and similar results were reported for the aggregate amount of damages claimed in construction arbitration cases in general<sup>32</sup>.

Whether the claims explosion of the '80s and early '90s was a cause, symptom, or effect of the construction industries other difficulties is open for discussion and not part of this thesis. However, what is certain is that the industry's fractiousness cannot have helped to allay an already desperate situation.

In response to this, Sir Michael Latham was commissioned by H.M. Government to lead a year-long, enquiry with the purpose of ending "*the culture of conflict and inefficiency that dogs Britain's biggest industry*"<sup>33</sup>.

The report, '*Constructing The Team, Final Report of the Government / Industry Review of Procurement and Contractual Arrangements In The UK Construction Industry*'<sup>34</sup> ("the Report"), was initially greeted with "universal praise"<sup>35</sup>. Sir Michael made 30 recommendations for improving the industry, among the recommendations were the creation of a standard form of contract based upon the New Engineering Contract<sup>36</sup>; establishment of a building clients' lobbying organisation (called 'New Co' by Sir Michael<sup>37</sup>); implementation of 10-year building defects insurance similar to the insurance utilised in many parts of Europe; implementation of productivity improvements leading to a 30 per cent reduction in real construction costs (Sir Michael points out that construction costs about 30 per cent more in the UK than in the US<sup>38</sup>); requirement of trust funds to ensure companies get paid; broader utilisation of so-called "alternative dispute resolution methods"; and more extensive use of contracting strategies such as design and build.

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<sup>31</sup> A record 5,132 construction arbitration cases were conducted in 1989, Thomson, D. (1994) "Arbitration Theory and Practice: A Study of AAA Construction Arbitrators," 23 *Hofstra Law Review* 1, p. 138.

<sup>32</sup> Arbitration Theory and Practice: A Study of AAA Construction Arbitrators, D Thomson, 1994, Hofstra.

<sup>33</sup> *The Times of London, Business Section*, R Tieman 1994

<sup>34</sup> [HMSO, London, 1994

<sup>35</sup> *Financial Times*, A Taylor

<sup>36</sup> NEC

<sup>37</sup> *Building*, G Barrie, 13 January 1995, p.7

<sup>38</sup> <http://corporate.findlaw.com/litigation-disputes/uk-us-construction-comparison.html>

In the Report, Sir Michael expresses dissatisfaction with the current methods available for resolving disputes in the UK construction industry. He points out that arbitration is unsatisfactory because of frequent delays and the "constant spectre of appeal", and recommends development of a project adjudication process which would permit speedy resolution of disputes essentially as soon as they arise. Ironically, although arbitration has been the subject of criticism in the US and the UAE, it is precisely because in the majority of cases there is no right of appeal from the arbitrator's award. The US construction industry has also moved to establish dispute resolution methods other than arbitration, and seems to have travelled farther down this road than the UK industry, whereas in the UAE, Arbitration is the popular means of dispute resolution, as the use of Adjudication as well as DAB's under FIDIC Conditions are not fully utilised, due in part to the business aspect of DIAC Conditions (this shall be discussed later in this paper).

Further, Sir Michael emphasizes the importance of developing appropriate project and contract strategies so as to establish proper allocations of risk, divisions of authority, and lines of communication. In the US, clients have been utilising design and build on private projects for some time now, and it has proven to be a success. However, the use of Design and Build ('Yellow Book') under FIDIC Conditions both in the UAE and South Africa have in my experience been clouded by where the risk for design sat, at what time and with whom.

Dissatisfaction not only with the frequency of construction disputes but with the manner of resolving them seems strong in both the UAE, South Africa the USA and in the UK. Arbitration, which until recently has been a favoured method of resolving such disputes, is under attack in the UK because of its perceived complexity, slowness, and expense. Similar criticisms <sup>39</sup> have been levelled in the US, where arbitration has been the preferred method of very private construction dispute resolution. Arbitration in the UAE is still trying to garner more support as a centre for dispute resolution, but many cultural nuances must be ironed out for it to be as popular as Paris and London.

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<sup>39</sup> Constructing the Team, A US Perspective.



Despite the similar criticisms levelled against arbitration in the US and the UK, Sir Michael describes a notion with which arbitration in the UK is the *exact opposite* of the main cause for criticism of arbitration in the US. In the UK, according to Sir Michael, it is the "constant spectre of appeal" to the High Court from an arbitrator's decision "which has emasculated the whole {arbitration} process"<sup>40</sup>. In contrast, in the UAE and the US it is precisely the lack of ability to appeal from an arbitrator's decision in most cases, except for the most exceptional of circumstances, such as evidenced fraud or bias<sup>41</sup>, combined with the lack of a requirement for the arbitrator to offer any reasons whatsoever for his or her decision, which has resulted in the most withering attacks upon UAE and US-style arbitration.

There appears to be problems, such as in the US, where according to one study "a significant number of arbitrators" admit to not following the law or the parties' contract in rendering their awards<sup>42</sup>, and although the arbitration award can be set aside because the arbitrators exceeded their authority, in practise since the arbitrators need not explain their decision it is very difficult to establish this ground as a basis for non-enforcement of the award. In the UAE, it is a common tactic to wait until the 11<sup>th</sup> hour within one arbitration, before initiating your own arbitration against the other party, thus 'staying' the original proceedings. This defeats the purpose of having any disputes resolved and leads to more costs and ultimately bullying, financially, by one party to the other.

This attitude appears to enjoy considerable support in the courts, as one writes I am currently engaged in such a tactic on a DIAC case, where one party has had an award enforced by the UAE Court of Cassation (the highest court in Dubai), but there is an appeal against the award (not based on any DIAC Conditions but on local Civil Code jurisdiction) as well as a 'counter claim' under the auspice of an arbitration against the claimant. Thus, we find ourselves in a position whereby no party is any nearer resolving the dispute, with costs escalating and patience wearing thin. The question then is, who has more propensity to continue with the battle? My consideration is, 'what happened to resolving the dispute?'

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<sup>40</sup> [www.nvo.com/vklaw/nss-folder/ukusconstructioncomparison/LATHAM.doc](http://www.nvo.com/vklaw/nss-folder/ukusconstructioncomparison/LATHAM.doc)

<sup>41</sup> [www.practicalaw.com](http://www.practicalaw.com)

<sup>42</sup> [www.nvo.com/vklaw/nss-folder/ukusconstructioncomparison/LATHAM.doc](http://www.nvo.com/vklaw/nss-folder/ukusconstructioncomparison/LATHAM.doc)

## **Chapter 3**

### **3.1 Conflict within the Construction industry and its Resolution, by means of Alternative Dispute Resolution (focusing on Adjudication and Mediation)**

Despite a concerted effort by the industry as a whole (the various Adjudication Society's, CI Arb, ICE and RICS workshops and literature) it is fair to say that the construction industry still has a general lack of awareness of how disputes are resolved, and the various forms of ADR (Alternative Dispute Resolution). In the writer's day to day working environment, the use of arbitration as the descriptive means of ADR is still common practice between engineers and commercial professionals, whereas in the USA, ADR methods and their understanding (i.e. conciliation, mediation and adjudication) have been ongoing for approximately 25 years. The Centre for Dispute Resolution (CEDR) has been ongoing in the UK for approximately 15 years, Miles (2007)<sup>43</sup>.

More effective awareness and understanding of the various ADR processes is required, as again, in my professional experience, many sub-contractors in particular have no idea what a Notice (pursuant to the contract) is never mind the means for remedying any claims or disputes they may have. Traditionally, as Fenn and Gameson (1992) note, the 'macho' aspect is and has been preferred, where some 'tub thumping' across a site hut desk would resolve any disputes. This is a cheaper way, definitely, than any form of ADR, albeit it is bullying (invariably) a cause for celebration? Of course, predominantly, the use of commercial negotiations are more commonly used, but again, there is a perception of the Main Contractor having the upper hand in all of these situations (where for example I have seen the Main Contractor threaten two different Mechanical and Electrical Sub-Contractors on two separate occasions (i was representing the M&E Sub-Contractors) with no future tenders if they did not agree to the very one sided Main Contractors commercial terms. The notion though that using ADR methods may be taken as a sign of weakness, as Fenn and Gameson noted has to the reader this notion seems to have disappeared as the 'macho' aspect is not such a worry, as the cost of the claim and dispute resolution may be more intimidating to the prospective client. To further this,

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<sup>43</sup> The ADR Practice Guide: Commercial Dispute Resolution, Miles, Marsh, Allen & Mackie, Tottel, 2007

the use of ADR methods in contract terms (FIDIC has Dispute Adjudication Board Clause 20, NEC does not have express terms, (Sub-Clause 10.1 does emphasise “a spirit of mutual trust and cooperation”<sup>44</sup>) but ‘particular conditions’ can be incorporated. JCT has Article 4 where any dispute may be referred to Mediation and Article 6 offering either litigation or arbitration (with arbitration being the default if no contractual agreement is stated on either at the time of contracting); with local councils within the UK are now using Mediation as a form of resolving disputes<sup>45</sup>, which may be a sign of why construction has taken up mediation more, as the government is a key client to the industry.

Internationally, the use of DAB’s, as viewed in FIDIC Conditions, are there to ‘nip in the bud’ any possible increase in tension between the parties, as the existence of a dispute which may not be resolved until many years after the completion of the project will obviously create even more tension for the parties on site, and possibly even further conflict and disputes. Where the parties can establish a precedent for settling disputes, hopefully this can enhance the relationship on site, allowing for a more constructive atmosphere, rather than entrenched parties, not collaborating or communicating, yet still engaged on a building site in the hope that a project will be completed, for a client who must be concerned.

Construction claims are a mixture of legal consideration and technical knowhow, therefore more often than not the issues boil down to a technical nature (whether it be payment, payment terms, amounts due, delays resulting in extensions to the time for completion, etc) and as such the involvement of ‘Experts’ in the ADR process brings back into the arena those most suited to the matters being argued (e.g. Engineers, Surveyors, Architects, etc)<sup>46</sup>.

Inevitably though, due to the pressures of today’s market place (particularly during a global recession which is in fact getting worse), as noted previously with the various forms of procurement and risk awareness, coupled with discussions over collateral warranties, it is common practice for the contract to be signed long after the workmen

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<sup>44</sup> New Engineering Contract (NEC 3) ICE Conditions (Institute of Civil Engineering)

<sup>45</sup> [www.defra.gov.uk](http://www.defra.gov.uk) - Review of Use of Mediation Services by Local Authorities and Housing Associations.

<sup>46</sup> ‘Construction Conflict Management and Resolution’, E & FN Spon, Fenn and Gameson 1992

began on site (which brings massive discussions on when the contract was actually entered into, battle of the forms, etc), so literally, disputes and conflict can be created long before a sod of grass has been dug up, and as just discussed where we already have a dispute on when the contract was formed, we clearly have an avenue for possible litigation, out with the contract terms, or possibly arbitration, dependant on what the contract says and the arbitration agreement expressly states. What is important though it that the relations between the contracting parties continue to their goal, of completing the project<sup>47</sup>, as it would become a statement of society as a whole if we simply walked away every time there was an argument – nothing would ever be achieved.

The basis for Arbitration was to minimise costs<sup>48</sup>, but it is the writer's experience which evokes thoughts of escalating costs, legal wrangling and confusion (a tactic) resulting in massive costs down the line. Whereas a Judge within the Court's of the UK are paid for by the Crown, an Arbiter can be on an hourly or daily rate. Both the Claimant and Respondent shall have legal teams consisting of QC's, solicitors and assistants as well as possible experts and advisors, which all add up to an unhealthy hourly charge out rate indeed. Miles, R. (1993) considered this as well as all the other possible 'losses' such as the cost of management time, earning opportunities by the attendants and an overall cost which even the most simplest of cases would result in thousands of pounds being expended.

### **3.2 The form's of Alternative Dispute Resolution (ADR) within the Construction Industry - Adjudication.**

The various forms of Alternative Dispute Resolution (ADR) are attempts at non-contentious forms of resolving crystallised disputes, but without the expensive recourse of the courts, either in Arbitration or Litigation.

Where a disagreement can be settled through bilateral or multilateral negotiations, for instance, between the parties representatives, then this should be explored before any

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<sup>47</sup> 'Alternative Dispute Resolution in Scotland', W Green / Sweet & Maxwell, Moody and Mackay 1995

<sup>48</sup> International Chamber of Commerce (www.iccwbo.org)

more contentions process is considered<sup>49</sup>. Negotiation is used each and every day, and is a natural form for the formation and settlement of any possible conflicts. As my experience as a FIDIC Engineer in various countries can testify, upon determination of any claim by a contractor, the natural process of negotiation is a pre-emptive strike at eliminating any and all possible conflicting interests. However, becoming more prevalent in the UK is the use of Mediation, in particular in Local Government contracts (as can be viewed in cases such as *Cowl & Others v Plymouth City Council* 2001, *Dunnett v Railtrack PLC*, 2002)

In the UK the use of Adjudication is most common, with the use of Mediation becoming more common, particularly in local government and construction. However, as a major player in the dispute resolution industry, Adjudication can be compared as:

### **3.2.1 Adjudication**

Adjudication is best looked at as the process defined by reference to the legislative framework creating it, as well as the forms of Dispute Resolution, slightly, referred (litigation, arbitration and mediation), which have helped to define it.

As means of comparison, Adjudication can be compared with these other forms of dispute resolution as:

#### **3.2.1.1. Adjudication and litigation**

Where adjudication involves an investigation of the facts and the law, a core notion is the adjudicator's decision cannot be challenged merely because it is factually or legally wrong. This is unlike a court judgment, where the adjudicator's decision is not final and does not create an estoppel<sup>50</sup>. The Adjudicator's decision is binding, and will, usually, be given effect to by the court, unless the underlying dispute has been finally determined by litigation or arbitration.

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<sup>49</sup> 'Alternative Dispute Resolution in Scotland', W Green / Sweet & Maxwell, Moody and Mackay 1995

<sup>50</sup> For example, A contractor informs a sub-contractor that Bill of Quantity rates are to be increased, for example, because the price of steel has increased. If the sub-contractor relies on this statement in choosing to remain in the contract and price accordingly, then the contractor could be estopped from collecting the original price of the steel.

### **3.2.1.2. Adjudication and arbitration**

Adjudication is not arbitration since the decision is not final<sup>51</sup>, but like an arbitrator's award, the decision can be challenged on jurisdictional grounds (impartiality or natural justice),<sup>52</sup>. Arbitration is consensual (by agreement), being based on the parties' agreement to resolve any dispute by arbitration. The right to adjudicate disputes under construction contracts is contained in the Construction Act 1996. Arbitration is governed by a detailed code in the Arbitration Act 1996<sup>53</sup>, which provides the court with a range of supportive and supervisory powers.

### **3.2.1.3. Adjudication and mediation**

The adjudicator makes a decision, and does not merely facilitate an agreement between the parties, which is the role defined as a mediator. Also, because an adjudicator is bound by the requirements of procedural natural justice as viewed in *Ridge*, an adjudicator should not have confidential discussions with a party or others concerning the dispute, as seen in *Glencot Developments v. Ben Barrett*<sup>54</sup>, where the adjudicator was seen to act as a mediator in the dispute. Briefly, the adjudicator tried to mediate; this failed, and then continued to adjudicate the proceedings, which is a direct breach of his contractual terms as an adjudicator.

### **3.2.1.4. Adjudication and expert determination**

Adjudication has a lot common with expert determination, in so far as the principal ground of challenge to the decision is, in both cases, based on jurisdictional and bias. However, unlike in adjudication and unless the contract states otherwise, the decision is final and binding and, unlike a statutory adjudicator the expert is not immune from sued for negligence<sup>55</sup>. Furthermore, there is no implied requirement for procedural natural justice in expert determination, thus, the parties' agreement provides for this; an expert is not restricted to reaching a conclusion based on evidence and submissions

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<sup>51</sup> *Cameron Ltd v. John Mowlem & Co* (1990) 53 BLR 24

<sup>52</sup> *Ridge v. Baldwin* [1964] AC 40, where in the House of Lords the judges hearing the case extended the doctrine of natural justice (procedural fairness) into the realm of administrative decision making. As a result, the case has been described as "the landmark case".

<sup>53</sup> The Arbitration Act 1996

<sup>54</sup> (2001) 80 Cost LR 14

<sup>55</sup> [www.ciarb.org](http://www.ciarb.org)

provided by the parties. It may also be the case that an expert cannot be challenged for apparent bias, only actual bias; as viewed in *Bernhard Schulte v. Nile Holdings Ltd*<sup>56</sup> where the test for impartiality or a danger of injustice was viewed, and not just a conflict of interest<sup>57</sup>.

### **3.2.1.5. Adjudication and certification**

At the time that the Construction Act was being drafted, there was a view that the role of the adjudicator was akin to that of a contract administrator certifying entitlements under a construction contract. But, unlike a certifier, an adjudicator is bound, in so far as attainable within the time scales, to comply with the principles of procedural natural justice, as viewed in *Amec v. Secretary of State for Transport*<sup>58</sup> a key case and relevant to adjudication, procedural timing and as Judge Jackson gathered together from several authorities<sup>59</sup> seven propositions concerned with the issue of when a failure to respond to a claim or claim document, as opposed to an outright rejection of that claim, could trigger or crystallise a dispute so as to enable the adjudication process to begin; i.e. the definition of a 'dispute'.

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<sup>56</sup> [2004] EWHC 977(Comm); [2004] 2 Lloyd's Rep 352.

<sup>57</sup> *Macro v Thomson* (No. 3) 1997

<sup>58</sup> [2005] BLR 227 (CA).

<sup>59</sup> *Amec Civil Engineering v Secretary of State for Transport* [2004] EWHC 2339 (TCC), *AC Hatrick (NZ) Ltd v Nelson Carlton Construction Co. Ltd* [1964] NZLR 72, *Beck Peppiatt Ltd v Norwest Holst Construction Ltd* [2003] EWHC 822 (TCC) BLR316, *Cruden Construction Ltd v Commission for the New Towns* [1995] 2LLR37, *Electrosteel Castings Ltd v Scan-Trans Shipping & Chartering SDN BHD* [2002] EWHC 1993 (Comm) [2004] 1LLR190, *Ellerine Brothers (Pty) Ltd v Klinger* [1982] 1WLR175, *Fastrack Contractors Limited v Morrison Construction Limited* [2000] BLR168, *Halki Shipping Corporation v Sopex Oils Ltd* [1998] 1WLR726, *Hickman v Roberts* [1913] AC229, *Hounslow London Borough Council v Twickenham Gardens Developments Ltd* [1971] Ch. 233, *Monmouthshire County Council v Costelloe & Kemple Ltd* [1965] 5BLR83, *Panamena Europea Navigacion (Compania Limitada) v Frederick Leyland & Company Ltd* [1947] AC428, *Peterson Farms Inc v C&M Farming Ltd*, [2003] EWHC 121 (Comm) [2004] 1LLR603, *Sindall Ltd v Solland* [2001] (TCC), *Sutcliffe v Thackrah* [1974] AC727, *Tradax International v Cerrahogullari TAS* [1981] 3AllER344, arbitration, jurisdiction, dispute, the Honourable Mr Justice Jackson.

### **3.2.1.6. The doctrine of separability**

In arbitration law an arbitration clause is a conceptually distinct agreement from the contract in which it is found, thus it can survive to govern dispute resolution even if that contract is discharged for breach or frustration, or is said to be void or voidable<sup>60</sup>. It is unclear to what extent this principle applies to other dispute resolution clauses, such as an adjudication agreement, but viewed in a discharge for breach by error in jurisdiction, such as *Northern Developments v. J & J Nichol*<sup>61</sup>, where an adjudicator had jurisdiction to deal with a claim of set-off for damages for alleged repudiation. The decision clearly establishes which matters can be considered by an adjudicator when deciding how much is due for payment on an application for payment.

The Housing Grants Act creates a right to adjudication, defines the process and, if the parties do not agree compliant procedures, implies a set of adjudication rules into their contract.

## **3.3 The Statutory Right to Adjudication**

### **3.3.1 Under Section 108 of the Construction Act**

The statutory right to adjudication is enshrined in s. 108<sup>62</sup> of the Construction Act 1996. This provides that a party to a construction contract has the right (note: not an obligation) to refer a dispute (including any difference) arising under that contract for adjudication. Some examples (please view Section 108 for the comprehensive list) are:

- 108(2)(c): requires the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred;
- 108(2)(e): imposes a duty on the adjudicator to act impartially;
- 108(2)(f): enables the adjudicator to take the initiative in ascertaining the facts and the law;

Additional statutory requirements from 1st October 2011<sup>63</sup> - By amendment to ss.

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<sup>60</sup> Arbitration Act 1996, Section 7, Separateability Principle

<sup>61</sup> [2000] BLR 158 (applying *Heyman v. Darwins Ltd* [1942] AC 356(HL))

<sup>62</sup> Right to Refer Disputes to Adjudication

<sup>63</sup> Local Democracy, Economic Development and Construction Act 2009 (<http://www.legislation.gov.uk/ukpga/2009/20/contents>)



108(2), (3) and (4), the provisions required by those sections must be in writing.

By new section 108(3A), the contract must include provision in writing permitting the adjudicator to correct his decision so as to remove a clerical or typographical error arising by accident or omission. (there is no period stated for this).

If the parties accept that they have concluded a construction contract, but the provisions for adjudication are not readily ascertainable, it may be that the 'Scheme' applies<sup>64</sup>; also given the statutory basis for adjudication, the concept of repudiatory breach of an adjudication agreement has no application<sup>65</sup>.

### **3.3.2 Compliance with the Construction Act 1996**

If the parties' contract includes adjudication rules, these should be checked for compliance with the s. 108 requirements. For instance, does the contract provide for the adjudication of disputes under that contract? The words "disputes arising under ..." are generally regarded as having a narrower meaning than "disputes in connection with ..." or "disputes arising out of ...", as viewed in *Heyman v. Darwins Ltd*<sup>66</sup>, the agreement contained an arbitration clause with the following terms:

*" If any dispute shall arise between the parties hereto in respect of this agreement or any of the provisions herein contained or anything arising out of the same shall be referred for arbitration in accordance with the provisions of the Arbitration Act 1889, or any then subsisting statutory modification thereof. "*

This is a typical case concerning the jurisdiction of the arbitration tribunal, as the appellants argued that it was not within the scope of the arbitration clause. The appeal was dismissed.

Disputes arising under a contract include claims for payment, damages, repudiatory breach, frustration, etc., but not claims in misrepresentation or for rectification or in

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<sup>64</sup> *PegramShopfitters v. Tally Wiejl (UK) Ltd* [2004] BLR 65 (TCC and CA).

<sup>65</sup> *Lanes Group Plc v Galliford Try Infrastructure Ltd* [2011] EWCACiv 1617.

<sup>66</sup> [1942] AC 356(HL) and applied in *Northern Developments v J & J Nichol* [2000] BLR 158

negligence. The latter type of claims may arise in connection with a contract, but they do not arise under it<sup>67</sup>.

There is nothing in the Act that precludes professional negligence claims being adjudicated<sup>68</sup>, however, not to get too bogged down in the reliance of what may be adjudicated it is reasonable to quote Lord Drummond in *Melville Dundas v. Hotel Corp* [2006] BLR 464 (Scotland: OH Court of Session), page 487:

*“..An agreement,....must in my opinion be considered part of the underlying construction contract, because it has no existence independent of that contract.”.*

Some rules, such as the Scheme for Construction Contracts (Scotland 2011; England and Wales 1998), require that only a single dispute can be referred to adjudication, others do not have this restriction<sup>69</sup>. But there is nothing in the rules that provide for disputes, rather than a dispute, to be referable<sup>70</sup>.

At no time do the rules restrict a party’s right to give a notice of adjudication “at any time”<sup>71</sup>, so any dispute, question or difference arising under or in connection with the sub-contract shall, in the first instance, be submitted to adjudication ...”, exercised its inherent power to stay proceedings, pending the outcome of an adjudication. But, note, s. 108 of the Construction Act does not make adjudication mandatory, it is discretionary. Therefore, in an ordinarily worded adjudication agreement (one that

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<sup>67</sup> *Fiona Trust v. Yuri Privalov* [2007] UKHL 40; [2008] 1 Lloyd’s Rep 254, where, in the context of an international commercial contract, the HL has held that the words “arising under a contract” should no longer be given a narrower meaning than the words “arising out of a contract.”

Also, note also, *Spaymill Contracts v. Baskind* [2010] EWCACiv 120; fraud and deceit can be raised as a defence in adjudications provided it is a real defence to the claims made

<sup>68</sup> *Gillies Ramsay v. PJW Enterprises* [2003] BLR 48 (Scotland); *London and Amsterdam v. Waterman Partnership* [2004] BLR 179.

<sup>69</sup> *Bothma v Mayhaven Healthcare Limited* [2007] EWCACiv 527 (the Scheme)

<sup>70</sup> *Barr Ltd v. Law Mining Ltd* (2001) 80 Con LR 134 (SC), *Allied P&L v. Paradigm Housing* [2009] EWHC 2890, at para. 34, as do the JCT(1998) Standard Forms, see *Durnell v. Kaduna* [2003] BLR 22.

<sup>71</sup> *Carter v. Edmund Nuttal*, 21 June 2000, unreported (mediation before adjudication, non-compliant). *John Mowlem v. Hydra-Tight* (2000) CILL 1650 (contract providing for “notice of dissatisfaction” not Act compliant). *Connex v. MJ Building Services* [2005] BLR201 (CA) (nothing to prevent a party commencing adjudication some 15 months after an alleged acceptance of a repudiation). Note also *DGT Steel and Cladding Limited v Cubitt Building and Interiors Limited* [2007] EWHC 1584 (TCC); [2007] BLR 371, where the court, considering a provision in the parties contract “

merely gives effect to s. 108), there is no basis for a stay of legitimately constituted proceedings, whether arbitration or litigation in favour of adjudication<sup>72</sup>.

Finally, if agreed adjudication rules comply with the s. 108<sup>73</sup> requirements, they govern the adjudication. If the agreed rules do not comply, in any respect, with these requirements, it may be that the party initiating adjudication has a choice. That is to adjudicate under the agreed rules or to adjudicate under the rules in Part I of the Scheme for Construction Contracts (see s. 114(4)<sup>74</sup>. However, note must be taken of *Epping Electrical v. Briggs* [2007] BLR 127 (TCC) where it was held that non compliant rules are invalid and the Scheme applies instead. A similar conclusion was reached in *Aveat Heating Ltd v. Jerram Falkus Construction Ltd*[2007] EWHC 131 (TCC).

As a note, it is best to consider factors where the agreed rules contain objectionable procedures and or whether the additional enforcement powers in the Scheme are important.

### **3.4 The form's of Alternative Dispute Resolution (ADR) within the Construction Industry - Mediation**

The use of Mediation has risen in recent years in particular with Local UK Government bodies<sup>75</sup> as a means of keeping costs low and resolving disputes. The Court of Appeal Mediation Scheme ("the Scheme") is an extension of a voluntary pilot mediation scheme that was introduced in April 2003 which was extended to apply to all contract and personal injury claims up to the value of £100,000 for which permission to appeal has been sought, obtained or adjourned. The Scheme has applied to qualifying claims since 2 April 2012 and is set to run for a year.

The Scheme was developed with the stated aim of reducing the number of claims below £100,000 reaching the courts in order that more court time can be devoted to larger disputes.

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<sup>72</sup> *Cubitt Building v. Richardson Roofing* [2008] EWHC 1020; [2008] BLR 354 (TCC).

<sup>73</sup> <http://www.legislation.gov.uk/ukpga/1996/53/section/108>

<sup>74</sup> The Scheme for Construction Contracts

<sup>75</sup> [www.defra.gov.uk](http://www.defra.gov.uk)

Lord Justice Rix LJ led the working group that was set up by the Master of the Rolls to revitalise the Scheme. He explained the rationale behind the Scheme in the following terms:

*"Judges regularly see cases in the Court of Appeal which could easily have been resolved at an earlier stage through the use of mediation. Parties may not be poles apart, but litigation can have a corrosive effect for which mediation can provide a balm. Mediation in the Court of Appeal can save a great deal of money and anxiety."*

The Scheme is managed and monitored by the Centre for Effective Dispute Resolution ("CEDR"), a London-based mediation and alternative dispute resolution body founded as a non-profit organisation in 1990 to encourage the development and use of alternative dispute resolution and mediation in commercial disputes. CEDR's evaluation of the Scheme will be considered by the senior judiciary.

Qualifying cases will, unless the judge orders otherwise, be recommended for mediation to CEDR. If the parties agree the recommendation to mediate, a mediator from the court-approved panel will be appointed by the parties. If agreement cannot be reached as to the mediator's identity, a mediator will be appointed from CEDR's own panel. The role of the mediator is to bring the parties together with a view to reaching settlement. If no settlement is achieved, the case will be referred back to the Court of Appeal for determination.

The key question is whether the Court of Appeal judges and the parties will abide by the spirit of the Scheme and order and agree to mediation respectively.

Until relatively recently, the Court of Appeal's reaction to the Scheme was uncertain. This is because the recommendation to mediate is not mandatory and the judge may therefore direct that the Scheme should not apply. A further unknown is whether there will be any adverse consequences for a party who chooses to ignore the court's recommendation to mediate.

Two recent Court of Appeal cases have shed some light on the uncertainty. *Faidi v Elliott Corporation* [2012] EWCA Civ 287 related to the enforcement of a covenant in the lease of a flat for reasons of neighbour noise. Judgment was handed down on 16

March 2012, slightly in advance of the Scheme being introduced. Lord Justice Jackson's comments about the way in which the litigation had been conducted by the parties were instructive and he fully endorsed mediation as the recommended approach.

The judgment in *Ghaith v Indesit Company UK Ltd* [2012] EWCA Civ 642 was handed down on 17 May 2012 (around six weeks after the Scheme was introduced) on which date the Court of Appeal provided the first insight into the level of support that it would provide to the Scheme.

As can be seen from the *Faidi* and *Ghaith* cases, the early indications are that the Scheme has the full backing of the Court of Appeal which has little sympathy for those parties who decline to mediate when mediation is recommended. Its commitment to tackling litigation cost by advocating mediation is clear, so if in doubt, you should mediate.

Some might find the Court of Appeal's enthusiasm for mediation surprising. This is because a number of cases that come before the Court of Appeal may well have had failed mediations previously (provided, that is, that mediation was proposed by one of the parties) and for such cases the positions of the parties might have become too entrenched for mediation to be successful. However, this has not proved to be the case. Studies have confirmed that the Scheme has actually achieved a settlement rate of 66 per cent since its inception in 2003<sup>76</sup> and the message seems to be, therefore, that it is never too late to mediate, as it does, in my opinion, help to crystallise what the pure disputes are.

It remains to be seen what impact the Scheme may have on litigation cost. In the *Ghaith* case, the appeal was allowed and the matter was referred back to the County Court for a decision on the level of damages that should be awarded. Therefore, no costs were awarded as a result of the parties' failure to adhere to the recommendation to mediate. However, the discretion to award costs remains and it will be interesting to see how costs will ultimately be allocated by the County Court which may take Indesit's failure to mediate into account when it considers the question of costs.

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<sup>76</sup> The Court of Appeal Medication Scheme

Looking at the Scheme overall, its purpose is to reduce litigation cost and increase the certainty of any final result (i.e. by agreement as opposed to imposition by the court) and therefore it has to be welcomed. However, how this shall be incorporated by the Construction industry is interesting as Local Government has pushed for Mediation to be an express term of all their contracts, and it's commercial advantage of being less costly is an incentive to all parties who have a dispute.

Other forms of ADR are Negotiation, which is the simplest and most cost effective way to resolve disputes. However, due to its non-binding nature, it can invariably be used as a tactic in eliciting information from another party or it can simply be a stalling tactic used. Conciliation is also referred to as a term sometimes used interchangeably with mediation, but there is a distinct difference in that a mediator takes a more pro-active role, whereas a conciliator takes a more facilitative role.

There is the not so common use of Med-Arb (mediation – arbitration) which is available through some commercial ADR associations but many view this role with justified caution as the mediator must be able to act as a mediator and an arbitrator (Brown and Marriott, 1993<sup>77</sup>) There are other forms such as an ombudsman and mini-trials, and the age old 'expert determination' but these are not to be discussed in any depth here.

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<sup>77</sup> 'ADR Principles and Practice', H. Brown and A. Marriott, Sweet and Maxwell, 1993

## **Chapter 4**

### **4.1 To what extent has UK Statute Law assisted in minimising Conflict and Disputes in Construction Contracts?**

Why do claims and subsequent disputes arise? Because one party feels aggrieved at loosing out financially. There may be complex issues surrounding the disputes, but it all boils down to liability under the contract and the sums owed by one party to another.

As Lord Bingham stated, ‘there is a tendency to plan for claims’<sup>78</sup>, and as stated above, disputes and claims revolved around payment, claims for damages due to defects in works or services provided, as well as extension to the contract completion date and/or any loss and expense suffered due to the delay or disruption to the works. These claims are usually framed within the context of the contract, but can also stem from negligence (design) in restitution or even under misrepresentation for damages or rescission.

The Housing Grants, Construction and Regeneration Act 1996 (Part II ss. 104 to 117) and the subsequent Local Democracy, Economic Development and Construction Act 2009 (Section 8) looked to move away from the historical use of litigation or arbitration by aligning with adjudication and payment methods under the contract. These shall now be discussed, looking at their intention and their application in the industry.

Broadly speaking, within construction contracts, construction operations include construction, alteration, repair, maintenance, extension or dismantling of any buildings, structures or works. As you would expect, they also include installation of mechanical and electrical systems, drainage, cladding, site clearance, tunneling, landscaping etc. However, they also include such things as painting and decorating. The Construction Acts also cover agreements to do architectural, design or surveying work or to provide advice on building or engineering in relation to construction operations.

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<sup>78</sup> Lord Bingham; 1996 Kings College Centre of Construction Law Conference

Various exclusions to the Act exist in the oil, gas and nuclear sectors and in relation to the manufacture and delivery to site of building or engineering components or equipment

Historically, adjudication was viewed at the time as a type of expert determination (as discussed above), which was originally limited to and coupled with contract provisions controlling the rights of set off, but as discussed previously by the early 1990's adjudication was being adopted for a wider range of disputes<sup>79</sup>.

In the few early cases where such provisions were considered by the court, adjudication was generally regarded as a form of expert determination leading to a decision which gave rights in contract but which could not be summarily enforced like an arbitral award<sup>80</sup>. But at least where the adjudicator's decision provided for money to be paid to a trustee stakeholder, it might be enforced by mandatory injunction, even in the face of an arbitration agreement<sup>81</sup>.

Just like expert determination, the adjudicator's jurisdiction was regarded as being defined by the contractual provisions under which he was appointed. The decision could not be overturned in the absence of fraud, bias or lack of jurisdiction.

The contentions nature of the industry, coupled with high cost and delays associated with traditional systems of dispute resolution (principally litigation, as noted in the Wolfe Report 1996<sup>82</sup> and adjudication<sup>83</sup>) lead to concerns about cash flow (particularly by subcontractors and specialists) and about the quality of decision making.

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<sup>79</sup> JCT WCD supplementary provisions, NEC

<sup>80</sup> *A Cameron Ltd v John Mowlem & Co* [1990] 53 BLR 24

<sup>81</sup> *Drake and Skull v McLaughlin & Harvey* [1992] 60 BLR 102

<sup>82</sup> Wolfe Report 1996

<sup>83</sup> *Adjudication in Construction Contracts*; John Redmond, Wiley, 2008



As previously discussed, the Government responded through the ordering of the Latham Report in 1994, which contained the recommendations, but summarised as:

- Provision for a speedy system of dispute resolution by an impartial adjudicator, referee or expert, with adjudication being the normal method of dispute resolution;
- Regulation, though the giving of advance notice, of rights of set off;
- A right to suspend work for non payment;
- Abolition of pay when paid clauses, and
- Legislation to be introduced prohibiting the amendment of those provisions that should be included in a modern construction contract.

It is these recommendations to which Parliament sought to give its effect in Part II of the Housing Grants, Construction and Regeneration Act 1996 (ss.104 – 117), brought into force on 01 May 1998 with the enactment of the supporting statutory instruments, The Exclusion Order for England and Wales 1998 and the Scheme for Construction Contracts (England and Wales) 1998. The Act also applies in Scotland and, by 1997 Order, to Northern Ireland, but with different statutory instruments.

The 1996 Construction Act applies only where the construction contract is in writing. The major change brought in by the 2009 Construction Act is to remove that restriction. Therefore, for construction contracts entered into between 1 May 1998 and 30 September 2011, one only need refer to written contracts. From 1 October 2011, all construction contracts are covered, both oral, written and partly oral/partly written.

Under the Act, a party to a construction contract is entitled to stage payments unless the work is to last less than 45 days; every construction contract is to provide an adequate mechanism for determining what payments become due and when and every construction contract is to provide a final date for payment.

Where the construction contract does not contain these provisions, they are imported from The Scheme for Construction Contracts (England and Wales) Regulations 1998 (“the Scheme”).

The importance of the final date for payment is that a party to a construction contract may not withhold payment after the final date of a sum due under the contract unless he has given an effective notice of intention to withhold payment (“a withholding notice”) detailing how much is to be withheld and the grounds for withholding. Where a sum due under a construction contract is not paid in full by the final date for payment and no effective withholding notice has been given, the person to whom payment is due has the right to suspend performance of his obligations under the contract on giving seven days’ notice.

The 1996 Construction Act also outlawed so-called “pay when paid” clauses, where payments, for example to a sub-contractor, were made conditional on the contractor having been paid for the relevant work by the employer.

Ever since the 1996 Construction Act came into force, there have been ongoing discussions on how to improve it. It has taken over 13 years for amendments to be enacted, with resultant amendments to the Scheme<sup>84</sup>, with many industry professionals concerned that the 2009 Construction Act does not go far enough in responding to the industry’s concerns, or alternatively that the cure is worse than the disease (as with the new payment clauses adopted in JCT 2011).

The fundamental change brought about by the 2009 Construction Act is that the regime now applies to all construction contracts, whether in writing or not. This came about because the Court of Appeal, in the 2002 case of *RJT Consulting Engineers Ltd –v- DM Engineering (Northern Ireland) Ltd*<sup>85</sup>, decided that all the terms of a construction contract had to be in writing before the provisions of the 1996 Construction Act would apply. It was felt that this had not been what Parliament had intended, but it is not clear that removing the restriction completely is necessarily going to improve matters.

The adjudication provisions of the 1996 Construction Act say, amongst other things, that construction contracts must contain a procedure requiring the adjudicator to reach a decision within 28 days of referral. That is all very well when the adjudicator is presented with a written contract to construe and adjudicate upon. However, what will

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<sup>84</sup> The Scheme for Construction Contracts (England and Wales) Regulations 1998 (“the Scheme”).

<sup>85</sup> (2002) CA

happen when the adjudicator is presented with opposing views of the terms of an oral contract or even a dispute over whether a contract exists at all? It is going to be much more difficult for adjudicators to make decisions on paper without hearing oral testimony, and delays in the process (already a cause of concern) will inevitably ensue. Time and costs shall escalate.

#### **4.2 Contractual Mechanisms of the 2009 Construction Act**

The 1996 Construction Act provided for a payment mechanism whereby a sum fell due for payment, probably because it was certified by the contract administrator; the payer (usually the employer) gave a “payment notice” saying how much he was going to pay; the payee (usually the contractor) had the opportunity to make representations before the payer gave a withholding notice before the final date for payment. The problem was that the whole mechanism was triggered by a payment falling due, and that could, to some extent, be influenced by the employer.

Under the 2009 Construction Act, the payee (again, usually the contractor) can himself trigger the payment mechanism by giving his own payment notice. This is noted in s.111<sup>86</sup> of the 2009 Act where, for example: The payee’s obligation to pay “the notified sum Section 111(1)<sup>87</sup>: Where a payment is provided for by a construction contract, the payer must pay the notified sum (to the extent not already paid) on or before the final date for payment.

Under Section 111(2), the notified sum is the amount specified in the payer’s or specified person’s, s. 110A(2)<sup>88</sup> notice, the amount specified the payee’s s. 110A(3) notice, in either case where this notice is given pursuant to and in accordance with a requirement of the contract, or the amount specified in the payee’s s. 110(3) notice given pursuant to and in accordance with s. 110B(2).

However, exceptions exist where the payer or specified person gives the payee a valid “payless notice” the s. 111(1) obligation to pay applies only to the sum specified in that notice as “the sum that the payer consider to be due on the date the notice is

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<sup>86</sup> Requirement to Pay Notified Sum

<sup>87</sup> Requirement to Pay Notified Sum

<sup>88</sup> Payment Notice

served”.

Also, under the new machinery it is no longer possible for the payee to dispute payment of the notified sum on the grounds that it was not “due”. The only way payment can be disputed is by issuing a valid “payless notice”. The “payless notice”, under Section 111(3)<sup>89</sup> states the payer or a specified person may give to the payee a notice of the payer's intention to pay less than the notified sum (this is the “payless notice”). The “payless notice” must (s. 111(4) specify (a) the sum (this can be zero) that the payer considers to be due on the date the notice is served, and (b) the basis on which that sum is calculated; and (s. 111(5) (a) must be given not later than the prescribed period before the final date for payment, and (b) where the notified sum is specified in a payee payment notice, whether that notice is required by the contract or is given default of a payer or specified person notice may not be given before the payment notice by reference to which the notified sum is determined. The prescribed period is (s. 111(7) either a period agreed by the parties, otherwise the period provided in the Scheme for Construction Contracts.

It appears that where the notified sum is specified in a payee or specified person notice, than the payless notice can be given before the date of that payment notice. The payless notice is concerned with what is due on the date of that notice. This may create complications if it is issued during a later valuation period than that of the payment notice which it concerns, which in itself is the possible genesis of a claim and subsequent dispute.

If the payer is meant to give a payment notice, but fails to do so, the payee can also give a payment notice at that stage (known as a “default notice<sup>90</sup>”). The amount in the payment notice (whether payer’s or payee’s) becomes “the notified sum<sup>91</sup>”. The payer then has to give a “pay less notice” before the final date for payment if he intends to pay less than the notified sum. It is actually a bit more complicated than that and arguably much more complicated than it needs to be, which again, is probably going to lead to claims and disputes.

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<sup>89</sup> Pay Less Notice

<sup>90</sup> s. 110 B

<sup>91</sup> s. 111

Under the 1996 Construction Act, a contractor could suspend performance of his obligations under the contract if he was not paid by the final date for payment and he had not received an effective withholding notice. Although being useful to the contractor, it is not discussed any further in this paper.

The 2009 Construction Act allows the contractor to suspend all or part of his obligations under the contract and also to claim extension of time and loss and expense for the period of suspension and re-mobilisation. This is good news for contractors, who will now be able, for example, to refuse to come to site meetings or finish a particular element of the works until they are paid. They should also no longer be penalised financially if they decide to pull off site.

The 1996 Construction Act outlawed “pay when paid” clauses (s. 113). However, certain employers found that a way round this was to make payment, for example to a sub-contractor, conditional on the sub-contractor’s work having been certified for payment under the main contract, a so-called “pay when certified” clause. The 2009 Construction Act outlaws these clauses (s. 110). Cynical sub-contractors will tell you that, in reality, “pay when paid” is alive and well, whatever the Construction Acts might say and in the writers opinion this is the case, as the issue surrounding insolvency arises, as considered in *Durabella Limited v J Jarvis*, 19 September 2001 where it was said that it meant that the contractor was not guaranteeing the employer’s solvency and allowed the risk of such insolvency to be shared.

### **4.3 Adjudication Under the 2009 Act**

Adjudication under the 1996 Act and updated in the 2009 Act were here to, contractually not ethically, assist proper payment. Within the 1996 Construction Act there was no provision allowing an adjudicator to correct errors in his decision. In the 2000 case of *Bloor Construction (UK) Ltd –v- Bowmer & Kirkland (London) Ltd*, the Technology and Construction Court decided that such a provision could be implied, by the analogy with the “slip rule” in court proceedings, where any error was clerical or typographical.

The 1996 Construction Act was silent on who should pay the costs of adjudication. The adjudicator was given no power to award costs and it has therefore always been assumed that, in the absence of any contractual provision to the contrary, each party should pay their own costs.

It became a tactic, since it is usually contractors who start adjudications, for employers to include in their building contracts a clause saying that the party who starts an adjudication should pay both parties' costs<sup>92</sup>. They have now been outlawed by the 2009 Construction Act.

Arguably, this amendment was unnecessary because the Technology and Construction Court had already ruled, in the 2010 case of *Yuanda (UK) Co Ltd –v- WW Gear Construction Ltd*, that such clauses were in contravention of the 1996 Construction Act because they restricted the right of a party to refer a dispute to adjudication “at any time”.

Indeed, some commentators even go so far as to say that, because the wording of the 2009 Construction Act is ambiguous, the amendment is actually a step backward from the *Yuanda* decision (the new JCT 2011 as an example of the 2009 Act (Part 8) being incorporated for payment as an example).

The JCT have introduced a new 2011 suite of contracts to take account of the amendments brought in by the 2009 Construction Act. These new contracts are to be used on all projects after 1 October 2011, where attention is drawn to Section 4 [Payment] but the question remains are the payment notices too short a time period (therefore possible disputes) and are the payment provisions still complex and unlikely to alter the amount of claims and disputes.

In 2013 it remains to be seen how the 2009 Construction Act will impact on the running of construction contracts, especially how parties will cope with the complexity of the payment provisions and how adjudicators will cope with deciding the terms of oral contracts.

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<sup>92</sup> Such a clause was upheld in the 2000 case of *Bridgeway Construction Ltd –v- Tolent Construction Ltd* and they became known as “Tolent clauses”

However, it is clear that in the coming years it will be particularly difficult for the industry as parties to come to terms with the new Act. Some questions to be answered over time are: will pre-1 October 2011 contracts novated post-1 October 2011 be subject to the 1996 Construction Act or the 2009 Construction Act? Will pre-1 October 2011 framework agreements drawn down following 1 October 2011 be subject to the 2009 Construction Act? If so, what about payment mechanisms already being operated orally under the 1996 Construction Act, which then become incorporated into a written contract under the 2009 Construction Act? Surely this in itself is going to cause further disputes. And, which, if either, Act does that come under? How do you operate a post-1 October 2011 sub-contract that is meant to be back-to-back with a pre-1 October 2011 main contract? Post-1 October 2011 variations or amendments to a pre-1 October 2011 contract are unlikely to affect the position, but what if the scope of work is increased? Sometimes it is not even clear when a contract has come into existence, particularly if it is not in writing (please note the oral contracts), and even a written contract will usually be held to apply retrospectively to work already performed under it. A construction contract complying with the new rules may be argued to have been breached by things that happened before they came into force. All of this is fertile ground for disputes. In the short term, at least, the “new” Construction Act may just make things worse – until the anomalies are put right in next new Construction Act, but that may be another 13 years away.

## **Chapter 5**

### **5.1 A Global Perspective on Conflict and Dispute Resolution – Taking regard of South Africa, and the United Arab Emirates**

In this chapter analysis and comment shall be passed on the process and procedure used in South Africa, and Dubai of the United Arab Emirate's, two differing jurisdictions, where the UAE relies on the Civil Procedure Code<sup>93</sup> the Republic of South Africa is more of a hybrid based on it's historical influence (British, Dutch and African).

Having worked in both jurisdictions I have noted the differences in how disputes are resolved, either through ADR or arbitration methods, but it appears the reasons for this are not simply based on legal code principles, but also cultural rationales.

### **5.2 South Africa**

In the UAE, it is very common for both parties to have entered into an agreement to arbitrate should a dispute crystallise, whereas in South Africa, after working as a FIDIC<sup>94</sup> Engineer in South Africa for 3 years, I became involved in several disputes, many which were resolved through the implementation of adjudication, or to put it more directly the use Dispute Adjudication Boards (DAB) under FIDIC Conditions of Contract and Adjudications<sup>95</sup> (A more broad discussion may be entered into the differences between 'adjudication' per say, and DAB, but simply, a DAB is a contractual agreement whereas adjudication is more a statutory function (albeit there are various other differences, which this paper shall not discuss)

Adjudication is a relatively new form of dispute resolution, or alternative dispute resolution in South Africa and as such is still relatively unknown<sup>96</sup>, particularly among the medium to small contractors as well as many clients, who are not Government run. Having worked on FIDIC and NEC forms of contract, it was

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<sup>93</sup> [www.diac.ae/idiias/rules/uae/](http://www.diac.ae/idiias/rules/uae/)

<sup>94</sup> Fédération Internationale Des Ingénieurs-Conseils

<sup>95</sup> FIDIC Conditions of Contract 1999 (Employer Design) Sub-Clause 20.4

<sup>96</sup> Construction Industry Development Board (CIDB), South Africa



evidenced that adjudication has been increasingly endorsed within the Construction Industry Development Board (South Africa), endorsed forms of contract, as the standard method of dispute resolution. As with most other countries in Africa, the South African (SA) industry was far more aware of the other forms, as discussed above, but in saying that the use of Adjudication (in whatever form) was widely utilised in my time (I experienced several varying forms of adjudication, which shall be discussed below), however there were issues which shall be discussed later.

The continuation of cash flow within the varying contracts is the premise behind all forms of ADR, as Lord Denning<sup>97</sup> so eloquently stated, and as such so far as disputes arose within my time in SA the application of non-payment or late-payment was the most common form of dispute. It has been argued by Uff (2005)<sup>98</sup> that the ‘pay now, argue later’ format is closely associate with the legislation brought in by the UK as ‘security for payment’ which has been closely looked at and used by countries all over the world, such as SA, Australia and New Zealand, to name but a few.

In SA the use of DAB’s is increasing and where the World Bank, along with other development banks in the world playing a significant role in this aspect, such as the harmonised FIDIC conditions of contract (MDB)<sup>99</sup> it can only have a positive influence, as long, and this is where the problems occur, where the adjudication is understood and carried out correctly and in line with the process and procedures. As Povey (2005)<sup>100</sup> illustrated there was confusion between mediators behaving like adjudicators and vice versa and Van Langelaar (2001)<sup>101</sup> noting that although the system appeared to be successful, the knowledge base needed to be expanded. This expansion will be a prerequisite for functioning adjudications, considering a comparison with the ICE<sup>102</sup>, CIArb<sup>103</sup>, AAA<sup>104</sup> which carry out training and development, which the SAICE<sup>105</sup> must copy and enforce, for instance.

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<sup>97</sup> Dawny v FG Minter [1971] 2 All ER 1389

<sup>98</sup> Construction Law, John Uff, 10<sup>th</sup> Edition, 2005

<sup>99</sup> FIDIC Harmonised Multi Development Bank Conditions of Contract

<sup>100</sup> Mediation Practice in South Africa, Povey & Mitchell, 2005, (Negotiaton Journal)

<sup>101</sup> www.scielo.org.za

<sup>102</sup> Institute of Civil Engineers

<sup>103</sup> Chartered Institute of Arbitrators

<sup>104</sup> American Arbitration Association

<sup>105</sup> South African Institution of Civil Engineering

With regard to the problems of allocation DAB members, problems also surfaced when allocating adjudicators on the tribunal, due to the lack of adjudicators within SA and as such many were brought in from abroad, impacting on time and cost.

As a brief qualitative and quantitative case study, I have used three DAB's I was involved in and offered some comments, conclusions and points to debate.

The information contained is of the highest commercial sensitivity, hence I shall narrate on non-specific terms. Further, information has been elicited from existing professionals on the works, from which much debate has been enjoyed.

### **5.2.1 The Contract and Works**

The project itself was a Coal Fired, Super Critical Power Station, approx value \$16 billion, with major packages being Civil's, Turbine, Boiler, Infrastructure and Coal & Ash. Three DAB's were called upon to determine disputes ranging from \$80m - \$750m.

### **5.2.2. The Dispute Adjudication Board (DAB) and the Contract**

The FIDIC Conditions of Contract for Construction (Employer Design) 1999 'Red Book' comprised three members, one Engineer, one Surveyor and one advocate (the Engineer was the Chairman, with the advocate being agreed by both parties). Various site visits were held, as this was a Standing Tribunal, each three months and in this occasion 6 'Heads' or claims were raised by the Employer, with counter claims from the Contractor.

### **5.2.3 Costs**

The costs to of the DAB equated to 0.4% - 0.6% of the package sum, with the costs being shared equally between the employer and the contractor.

#### **5.2.4 The Objective of a DAB**

It is the purpose and objective of a 'Standing' DAB, to –

- Prevent disputes arising
- When the do to provide a mechanism whereby prompt and binding decisions can be provided during the execution of the works, enabling the injection of cash flow and the minimising of both parties risks
- To avoid the referral of disputes to arbitration.

It is hoped that a decision made by a DAB is respected enough by both parties that a referral to arbitration can be avoided. However where a referral is made to arbitration, the determination made by the DAB is admissible in any subsequent proceedings.

#### **5.2.5 Procedural Rules**

Looking at the process and procedure, the South African industry does need education on the concept of a DAB (as discussed previously), but some constructive criticism can be seen in as:

- The referral process itself was too protracted to facilitate an early referral to the DAB and a prompt decision on an issue;
- Communication between the disputing parties was based on a very formal structure, which delayed, confused and ended up angering the parties;
- There were, on several occasion's, the use by one party whereby issues were debated in at the tribunal stage which were not canvassed at the pre-hearing stage. This was obviously a tactic, but it is a complete breach.
- There were too many heads of claim, which simply involved an application to increase the tribunal's time spent on the submissions. This again defeats the purpose of a 'one head, one DAB'.
- There were aspects of too much 'lawyering', insofar as Engineering process's and what actually happened were superseded by the introduction of legal teams, muddying the water.
- On one occasion the DAB arrived on site with an independent expert, which had not been agreed upon by the disputing parties.

- The DAB's were possibly not the realm to have such massive claims, which in the end are the responsibility of the referring party (although again, a global claim is a tactic widely used). For instance one 'head of claim' involved an extension of time to the Time for Completion (Sub-Clause 8.2 of FIDIC Conditions), but the complexity of the arguments meant the tribunal were constantly asking for more time, which was accepted, as it offered both side's more time also to shore up and/or complicate their respective arguments.

As a positive it was agreed that, in general, the use of DAB's can flush out the extraneous claims, as such and get to the real crystallisation of the matter(s).

Some ways of bettering DAB in South Africa may be –

- Not to place too many Particular Conditions within the contract, which invariably confuse matters (a tactic)
- Try and obtain a DAB panel who have a background in the project in dispute. The use of lawyers can take away from the practical nature of the works (i.e. discuss the delay due to bad weather, not a timeous discussion on the actual legalities of it all). My own consideration is leave the engineering to the engineers and surveyors, with legal arguments kept at a minimum. The whole point of adjudication, from the distant past of 1996 Act was to let the industry regulate itself, but alas too much 'legal' has gotten in the way of simply resolving why party A did not want to pay for the additional bricks used by Party B.
- State your case clearly as quickly as possible. Too many parties (who may not have a strong case of course) offer information at a snails pace;
- Introduce more time constraints.
- Conduct workshops for both the parties and the tribunal.
- The point of a DAB is to not be overly contentious. Therefore the introduction of legal representative can have an adverse effect on the process.

As a summary then, it is held that DAB's are a positive step, but that much education is required to the parties involved, as well as the DAB itself as they should manage the parties and educate them along the way. Generally, it was agreed that the experience of the parties involved, led to an increase in the ability of the DAB to operate and issue a determination which was accepted, although the decision on the

extension of time, as noted above, did disappoint me, merely because both parties used ‘muddying’ tactics to confuse the board.

It was noted that the use of DAB’s should be adopted by other industry’s in South Africa, which is exactly a practice being adopted by the United Kingdom.

### **5.3 The United Arab Emirates (Dubai)**

Arbitration runs the rule in the UAE and for a very good reason, the country’s relatively low oil reserves are likely to be exhausted within 20 years and as such the country has developed itself as a business, rather than a country; and it has succeeded as the writer look’s out of this office window one can view a vista of manoeuvring cranes and the battle for construction claims permeates the air.

Following the establishment of the LCIA-DIFC Centre at the Dubai International Financial Centre (DIFC), and the Dubai International Arbitration Centre (DIAC), Dubai now has two international arbitration centres. This reflects the increasing acceptance of arbitration in the Middle East and the progress made in developing arbitration in Dubai.

The Dubai government recognised at an early stage that, in order to establish Dubai as a regional financial centre, the government needed to improve its legal system. It therefore set up the DIFC as a free zone with its own, common-law-based legal system and established a DIFC Court currently headed by Sir Anthony Evans. Despite this undoubted progress, more needs to be done if Dubai is to become a regional arbitration centre and attract the large and complex Middle East disputes that are regularly referred to London and Paris.

Dubai has a reputation for long, expensive arbitrations (as viewed in *Capital Partners*<sup>106</sup>) with examples such as the UAE’s Court of Cassation’s decision in *Dubai Aviation Corporation v. Bechtel* (2004)<sup>107</sup>, where the UAE’s highest civil court annulled an arbitral award made two years earlier in Dubai on the grounds that the witnesses in the arbitration had not been sworn in.

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<sup>106</sup> *Capital Partners v Tecom* 2007, DIAC.

<sup>107</sup> DIAC 2002

The UAE court's decision dealt a serious blow to arbitration in Dubai, and to the UAE as a whole. The decision also led to significant pressure on the UAE to accede to the New York Convention, particularly following the UAE construction explosion where foreign contractors, undertaking multibillion dollar projects, sought greater certainty in enforcing their entitlements (this is something I shall discuss later).

After a consultation process, the UAE finally acceded to the New York Convention in August 2006. Accession provided a huge boost to arbitration in the UAE because it meant that arbitral awards could be more readily enforced outside the UAE. However, parties seeking to enforce an award, whether under the New York Convention or otherwise – must satisfy the relevant requirements of the UAE Civil Procedure Code. In summary, these state that a party seeking to enforce an arbitration award must show that:

- the courts of the UAE did not have jurisdiction in the dispute that gave rise to the award;
- the award was issued by an arbitrator or tribunal which was competent to hear the dispute in the country in which the award was made;
- the parties were duly summoned and represented in the arbitral proceedings;
- the award is final in accordance with the laws of country in which the award was passed;
- the award does not conflict with or contradict any judgment or order previously made by the UAE court; and
- the award is not contrary to public policy in the UAE<sup>108</sup>.

In practice, this means that the process of enforcing awards can often be lengthy and unpredictable. It is not uncommon for the UAE courts to require that the foreign award satisfies the rules and procedures of the UAE and may refuse to enforce if there is a violation of local laws. One potential difficulty arises in convincing the UAE Court that it did not have jurisdiction to hear the dispute in the first place (irrespective of the arbitration agreement between the parties). The UAE Court typically has a fairly broad jurisdiction over disputes including, for example, claims connected to monies or assets within the UAE and claims arising out of contracts executed or to be

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<sup>108</sup> [www.incelaw.com/whatwedo/.../enforcement-of-arbitration-awards-in-the-uae](http://www.incelaw.com/whatwedo/.../enforcement-of-arbitration-awards-in-the-uae)

performed in the UAE, as well as claims over foreigner's resident in the UAE. As a result, it has proven difficult to convince the UAE Court that it did not have jurisdiction.

All of this creates uncertainty in relation to how the UAE Court will deal with enforcement applications and can mean that what should have been a relatively short-form execution procedure under the New York Convention may turn into a much longer process more analogous with a full-blown court case. These complications can defeat the very purpose of arbitration as a faster and more efficient dispute resolution process. In fact, at the time of writing, a case I am currently involved in, as part of the referral team and one in which the Claimant had costs awarded against them in arbitration (DIAC) had the decision overturned by the Court of Cassation.

The Dubai International Arbitration Centre (DIAC) rules came into effect in May 2007. The changes in the rules represented a considerable advance on the previous rules and brought the DIAC rules in line with other major arbitration centres around the globe. For example, the DIAC rules now provide that on the application of one of the parties, the tribunal has the power to order interim measures (Article 31), and that the proceedings and all awards, evidence and documents produced or disclosed in the arbitration are confidential (Article 41). However, and this sums up the juxtaposition between a 'common law' system of Arbitration and the Civil Procedure Code of the UAE, as confidentiality is not always adhered to; a basic breach of arbitration and its identity.

The DIAC has clearly established itself in Dubai as a leading centre, having attracted approximately 100 cases worth more than US\$2 billion last year (2012)<sup>109</sup>, but it is now facing stiff competition following the establishment of the new LCIA-DIFC Centre and the enactment of the new DIFC Arbitration Law, particularly as the DIFC is governed under English Common Law, where enforcement is not such an issue. Literally, DIAC is a statutory based system, where the Courts govern, whereas the DIFC is more aligned to that of the ICC, where a decision can be more easily enforced.

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<sup>109</sup> [www.diac.ae](http://www.diac.ae)

On 1 September 2008 the DIFC Arbitration Law 2008 came into force, whereas the the previous DIFC Arbitration Law 2004 was based on the UNCITRAL Model Arbitration Law, its application was limited to arbitrations in which one of the parties, or the dispute was connected to the locale of the DIFC. However, under the new setoff rules, parties anywhere in the UAE and beyond are able to choose the DIFC as the seat of their arbitration.

A DIFC award is a New York Convention award and is therefore enforceable in other convention states, just like all other UAE awards. A main advantage of the new DIFC Arbitration Law is that it will make arbitral awards more readily enforceable within the UAE itself. This is because a DIFC award, once ratified by the DIFC Court, is enforceable without any opportunity for challenge in the Dubai courts unlike cases with arbitral awards garnered out with the DIFC (this is because DIFC arbitrations are supervised by special Dubai courts, staffed by judges from around the world “experienced in matters of international commercial arbitration and are known to be supportive of the arbitral process,” write Kwan, Mainwaring-Taylor and Roderick<sup>110</sup>).

A number of decisions in the past two years enforcing foreign awards in Dubai would appear to display a trend towards a more developed pro-arbitration culture (although again, noting the previous Court of Cassations decisionn to overturn a judgment still displays the problems inherent in Dubai). In September of 2012 the highest court in Dubai held two DIFC-LCIA awards under the New York Convention in *Airmech v Macsteel International*<sup>111</sup>. This case is more notable than other examples in that the *Airmech* decision displays the number of potential arguments to enforcement and the strength with which they were dismissed by the Court of Cassation. Briefly, the tribunal rendered two related awards in favour of Macsteel in respect of liability and legal costs. It is understood that Airmech did not make the required payments and Macsteel commenced proceedings in Dubai, seeking enforcement of both awards.

*Airmech*, briefly, depended on the arguments that there was an effluxion of time after the first hearing date (6 months after the date of the first hearing) as well as other

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<sup>110</sup> ‘Obstacles Hinder Foreign Direct Investment’, Dr Samah Al-agma

<sup>111</sup> DIAC



notable arguments, such as there being no copy of the arbitration agreement included in the two awards, a breach of Article 212(5) of the Civil Procedure Code<sup>112</sup>.

The Dubai Court of First Instance and the Court of Appeal both held the awards were foreign arbitral awards and as such the courts jurisdiction was limited to ensuring that the awards did not breach Federal Decree No 43 of 2006 (Federal Decree)<sup>113</sup>, through which the UAE ratified the New York Convention<sup>114</sup>.

The appeal went to the Court of Cassation where a ruling was delivered in which foreign arbitral awards will be enforced by the Dubai Courts. In support of its views, the court noted that the Articles of the Civil Procedure Code upon which Airmech relied were not relevant in the context of the enforcement of a foreign arbitral award and that such provisions should only be applied to awards rendered in the UAE

This was a big step forward for arbitration in the UAE, however the UAE is a civil law jurisdiction and therefore Court of Cassation judgements are only of persuasive value (can't be used as precedent, as in the Common Law). Nonetheless this does

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<sup>112</sup> Article 212 of the Civil Procedure Law states:

1. "An arbitrator shall make his judgment without compliance with the procedures of pleading except as provided for in this part and the procedures for summoning the parties, hearing the grounds of their defences and enabling them to produce their documents. Yet the parties to the dispute may agree on certain procedures to be complied with by the arbitrator.
2. The arbitrator shall make his judgment in accordance with the rules of the law unless he is authorized to undertake reconciliation, whereby he shall not comply with these rules except as relevant to public order.
3. The rules of urgent execution shall be applied to the judgments of arbitrators.
4. The judgment of the arbitrators shall be issued in the UAE otherwise the rules governing the judgments of arbitrators issued in a foreign country shall be applicable in respect thereof.
5. The judgments of the arbitrators shall be given by a majority opinion. They shall be written together with the dissenting opinion and shall include in particular a transcript of the arbitration agreement as well as a summary of the statements and documents of the parties, the grounds for the judgment, the decree date, its place of issue and the signatures of the arbitrators; however, if one or more of the arbitrators abstain from signing the judgment, a record thereof shall be made, and the judgment shall be valid if it is signed by the majority of the arbitrators.
6. The judgment shall be made in the Arabic language unless otherwise agreed by the parties to the dispute, in which case a certified translation shall be attached thereto when it is deposited.
7. The judgment shall be considered to have been issued from the date on which it is written and signed by the arbitrators."

<sup>113</sup> Concerning the accession of the UAE to the New York Convention 1976

<sup>114</sup> The New York Convention 1958 and 1976

display an accord with the UAE's international treaty's obligations and its reputation, which does still need enhancing.

#### **5.4 What Needs to Change?**

What is still required in the UAE is unique, arbitration law to replace the UAE Civil Procedure, Federal Law No (11) of 1992 (CPL), which applies to all arbitrations where the seat is not the DIFC. Basically, this is the vast majority of contracts entered into prior to September 2008 (before parties anywhere were able to choose the DIFC as a seat) and therefore many potential disputes.

There is unanimous agreement that the Civil Procedural Law does not adequately provide for arbitration. In particular, the CPL does not sufficiently restrict parties from challenging awards because it leaves the door open for the opposing party to object to an application for enforcement, which defeats the whole purpose of dispute resolution.

The good news is that the current law is under review and a draft of a new Federal Arbitration Law was circulated last year (16 February 2012) based on the UNCITRAL Model Law. A new law is a key requirement for the progress of arbitration in Dubai, even though the new DIFC Arbitration Law has (at least on paper) provided parties with the ability to circumvent the CPL by allowing them to chose the DIFC as their seat of arbitration.

Interestingly, the use of UNCITRAL Law may take guidance from the many principles of Egyptian Law (which in turn is taken from Napoleonic Law), which in itself may offer differing view points from common law countries, as one of the challenges facing arbitration in the UAE as it may manifest issues relating to evidence, for example under Article 54 of Federal Law No. 10 of 1992<sup>115</sup> (where under Articles 27 and 29 of DIAC Rules<sup>116</sup> on evidence) it has been found that an

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<sup>115</sup> Issuance of the Evidence Act for Civil and Commercial Transactions

<sup>116</sup> [www.diac.ae](http://www.diac.ae)

argument that a director or employee or indeed any party who has any sort of interest in the outcome of the proceedings shall not be permitted to give evidence. This obviously raises questions as well as problems. This is a tactic used by lawyers in the UAE, however it has been the writers opinion (typically, everything is open to interpretation) that Article 54 does not really support a holistic exclusion of evidence. Maybe what is being stated is that a party's evidence shall not be admitted unless he/she has made themselves available for cross examination. Also, the Courts themselves have wide reaching powers to compel witness's to be examined. This is one example of the issues surrounding the law of the land with the agreement to arbitrate.

However it is the writer's opinion that maybe the way forward for Dubai is in the DIFC, due to the very fact that under Civil jurisdiction and the New York Convention, there are obvious glaring contradictions.

## **Chapter 6**

### **6.1 Conclusion and Recommendations**

Conflict is part of Construction, and it should be more pertinent that as professionals we regard the industry as 'contracting' as it's in the allocation of risk and how best to manage and control it that parties become embroiled. Constructing a building or a road is merely part of a bigger picture within which risk, reward are inextricable linked and the 'winner' lives to fight another day.

There is no doubt that through the initial actions of the USA and the UK in the 1980's and 1990's (via Statute and Reports commissioned) that there is clearly an intention to minimise and control Conflict and any subsequent Dispute; however, it appears that the parties themselves (the Employer, Contractor and Legal Teams) may not be so interested in resolving conflicts and indeed 'plan' for claims and their hopeful and subsequent increase in profit margins.

The use of Adjudication, as highlighted in this thesis, is a formidable tool in resolving disputes, and it may be viewed as, the natural format for resolving contemporaneous construction disputes, to allow the cash flow to continue and to minimise on costs to the parties. Mediation has been picked up by the Government of the UK, and it shall be interesting to see how this increases in use in contracting, as the use of a respected construction professional in assisting in the mediation process must surely be more favourable than a painful and expensive continued, arbitral, process.

It may be that the application of the Local Democracy, Economic Development and Construction Act 2009 has not been too well implemented in the JCT 2011 Suite of Contracts, and time will tell, particular on payment and the pre/ post October 2011 discussion which I am sure will rage on, allowing for more costs. But what can be viewed is internationally, countries and parties are trying at least to involved

themselves in formatting an engaging in fair and professional forms of dispute resolution.

In South Africa I witnessed firsthand the party's engagement and wish in determining disputes as quickly as possible, to allow for the 'cash to flow' as well as avoid any acrimonious, long-term arbitrations. However, in the UAE of Dubai, a completely different model exists as Arbitrations are seen as 'money spinners' for the local economy and as such, Adjudication's may be a long way off from being the norm in that area. Any recommendation to utilise the DIFC would be a more sensible and hopefully equitable choice than the DIFC.

Contracting will always be contentious and dispute fuelled because there is additional money to be made, when margins are so tight and a simple delay to site access can in fact make the difference between a corporate profit or loss. It is realm which both fascinates and compounds one's hope for 'humanity', but there is no doubt that we 'humans' will continue to create and construct procurement routes, and contracts which are equally as technical as the very building or bridge we are trying to build.

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### **Other**

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