Alternative Dispute Resolution in the Construction Industry

An Evaluation of UK Research and Practice

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Preface

Construction disputes by their very nature are often complex, sometimes multi-party disputes, many of which are not suited to either adjudication or traditional form of litigation (these being potentially slow, expensive and divisive). The sheer complexity of construction disputes often leading to expensive, time-consuming and stressful paths being trodden through the traditional resolution terrain creates a compelling case for the introduction of alternative approaches within this adversarial industry. The construction industry has become increasingly aware of the substantial legal costs it burdens itself with as a consequence of its high incidence of disputes. Moreover, this expenditure, which globally represents a substantial sum each year, is by no means reflective of the hidden costs of disputes, such as the damage to reputations and commercial relationships; cost of time spent by executive personnel; and cost of lost business opportunities.

Adjudication in the UK has been popularised by the Latham report (Constructing the Team) and latterly the Egan report (rethinking construction). Initially sought as a method of dispute resolution procedure which was low cost, maintained cash flow and settled by an individual familiar with the industry it seemed like a perfect fit for the requirements. However, today's adjudications proceedings are moving far and away from the ambitious ideals that first attracted the UK government, as well as the construction industry in general. Today it is extremely unlikely for an adjudication proceeding not to be drafted and reviewed by a legal team, expert witnesses sought and a significant amount of fees being paid.

The author combines an academic background in Construction Law with over 25 years of industrial experience, helping a range

of construction clients to resolve their disputes. Having worked in the construction industry for over 25 years, the author has seen the enthusiasm that was once there for adjudication begin to wane. More and more adjudications are being launched and the effort and expense being expended to defend claims is becoming more and more significant. The author's experience is mostly in large frameworks using NEC contract provisions and often as a result of adjudications, relationships becoming fractured and the long-term objectives of parties are being lost. This has brought about the author's interest to research the industry view of current dispute resolution practices as well as what alternatives are available.

Over recent years, governments and key players in commerce have emerged as advocates of mediation as a first-choice method of settling disputes. While accepting that Statutory Adjudication, Arbitration has long been one of the most commonly used forms of final dispute resolution for construction and engineering projects, the value of mediation has also been widely acknowledged worldwide, as evidenced by the number of jurisdictions in which the courts enforce obligations on parties to negotiate and adopt mediation to settle construction disputes prior to litigation. Notwithstanding the growing interest in mediation, one of the key trends within the dispute resolution arena is the adoption of multi-tiered procedures that combine arbitration with other forms of ADR, or through alternative methods of structuring the arbitration procedure, allowing it to be managed more effectively.

Recent surveys have also highlighted the development of dispute avoidance strategies, growth of statutory adjudication, the potential role of technology in mediation and arbitration, settlement of cross-border mediation agreements, transparency in the arbitration and mediation practitioner selection process, and the education of future ADR practitioners as among the developments that are likely to shape

the evolution of dispute avoidance and alternative dispute resolution as they adapt to the increasing need for flexibility in the evolving construction and engineering dispute resolution landscape.

Alternative methods of dispute resolution such as negotiation, mediation, adjudication and arbitration have become more widely used in recent years and serve to promote a more collaborative approach to the resolve of disputes. With the use of alternative dispute resolution methods, both parties attempt to agree on a way forward and alleviate the necessity to facilitate costly court proceedings and undoubtedly damaging their relationship with the other side. There appears to be a general aura surrounding the power behind these alternative methods of dispute resolution, however, and their capacity to provide a solution to large scale cost disputes within the construction industry.

Introduction

The word 'alternative' immediately indicates that there are other ways of resolving disputes. The traditional method of resolving disputes is via litigation. The system in the UK courts is an adversarial one, which involves the parties engaging in a contest before an independent tribunal. This contest does not involve a search for the truth; it merely involves each side revealing enough of the truth to establish its case. The adversarial process, by its very nature, leads to conflict. In the business world, the process of dispute resolution can therefore sour existing commercial relationships. In an area of industry where the business community is small, the effects can be far-reaching.

The term 'alternative dispute resolution' may appear to be a modern term but it can be traced back to 1800 BCE when disputes were settled through ADR in many areas. The definition of ADR can differ in terms of its specific elements, but it is generally defined as the resolution of a dispute without the intervention of the courts (Main, 2005). Over time, three main categories of ADR have been identified, which are labelled as the three pillars of dispute resolution: negotiation, mediation and adjudication (Edwards, 1985).

The dispute resolution landscape

Disputes in the UK construction industry are common, with potentially huge sums at stake. Construction projects are highly complex and typically feature challenging deadlines and high demands on quality. During challenging financial times, it is common for contractors to submit tenders at low prices to secure the award of a project and to avoid potential insolvency. Such projects are often plagued with disputes and claims involving delays in requests for additional works

on the part of employers. Whatever the basis of a dispute may be, it is almost certain that some type of dispute will arise in a construction contract. The construction industry is highly litigious and disputes can be costly, not merely in a financial sense but also in terms of the breakdown of otherwise profitable relationships due to the conflict. While arbitration and adjudication are commonly used in the construction sphere as dispute resolution tools, the adversarial nature of such processes may hold deleterious consequences for parties in terms of financial costs, delays, risks and loss of business.

It was not until the late 1980s that it was realised that conventional litigation for construction disputes was far too cumbersome and expensive. This caused alternative dispute resolution (ADR) to develop in the construction sector. Likewise, the courts have also proven eager to embrace ADR during the early stages of litigation proceedings, particularly when litigation costs will exceed the amount in dispute.

The reduced costs and time involved in ADR have prompted its increasing use as a primary method for resolving construction disputes. Parties to construction disputes prefer ADR because they perceive them to be more creative and focused on problem-solving when compared to litigation, which is based on the adversarial, rigid 'win-lose' outcome. Standard forms of construction contracts now typically feature adjudication provisions for the resolution of disputes. There are, however, conflicting reports on the success of ADR in the UK construction industry. Few industry participants appear to have had actual experiences of ADR and there is little empirical data on UK experiences.

References

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Chapter One: The Co-Optation of the Techniques and Language of Alternative Dispute Resolution

1.1. Introduction

Alternative Dispute Resolution (ADR) is a consensual process where the parties agree to come to a solution, which means that autonomy is a central characteristic of this category of dispute resolution processes (Tidwell, 1998). Tidwell identifies that

> *"mediation is predicated upon mediation's flexibility informality and consensuality opening up the full dimension of the problem facing the parties. Parties come to mediation because it is flexible and thus convenient. Mediation is used because it is not adversarial, but rather seeks to satisfy the needs of the presenting parties (Tidwell, 1998, 157)".*

The very nature of mediation and other ADR processes is that it is based upon a consensual process, which is outside of the judicial system (Rozdeiczer, 2006).

The problem with co-optation is that it is judicialising ADR processes through avenues such as mandatory mediation or adjunctive adjudication processes (Katz, 1993). The implication of this is that there is a framework in place that is no longer consensual in nature; rather, it is merely an extension of the coercive power of the judicial system. In the UK, there is arguably a system of co-optation through Civil Procedure Rules (CPR) and Family Procedure Rules (FPR), because instead of promoting consensual mediation and ADR processes they are coercing individuals to comply with an obligation to engage in ADR prior to entering the courts.

Thus, this chapter examines the content of the CPR and FPR to determine whether there is a process of co-optation is occurring within the English and Wales jurisdiction.

1.2. The nature of ADR processes

Prior to engaging with the CPR and FPR, it is necessary to identify the key characteristics of ADR. The primary characteristic of ADR is consensuality (i.e. the parties have to agree to engage in the ADR process) (Gorierly et al, 2002). For example, within mediation it is envisaged that there will be a transformative process, in order to ensure that the parties come to a workable solution that maintains an ongoing relationship (McEldowney, 2012). However, mediation has been identified as an effective and flexible system that can reduce the pressure on national court systems (Gorierly et al, 2002).

The result of this is that national legislatures are developing rules that "promote" or "require" an ADR process to be engaged with, which can be identified as a form of coercion.

There are arguments that the promise of empowerment and independence do not exist within ADR, because there is generally some form of coercive third party (i.e. mediator, adjudicator, legal counsel) (Spencer, 1996). This means that there will be little difference if there was a required mediation process, because it debunks the myth of a truly consensual process (Spencer, 1996).

The problem that arises is that there is a fundamental failure to fully consider the actual nature of mediation and other ADR processes when it is treated as a coercive process, because there is a more complex nature than just the choice to use ADR (i.e. when the parties are engaged in the ADR process there is a right for them to determine how the process is conducted and whether an amicable solution is present or enforcement of an award[1]). These factors highlight that ADR

is a transformative process, which requires consensuality at different levels. Thus, it is necessary to ensure that there is a framework in place that enables the transformative nature of ADR to be promoted.

Baruch Busch and Folger identify that

> *"Transformative mediators allow and trust people to find their own way through the conflict – and even more important—find themselves and each other, discovering and revealing the strength and understanding within themselves" (Baruch & Folger, 2004, 83).*

To create this understanding there cannot be a judicial based process, because this increases the level of coercion and undermines the purpose of ADR (Mironi, 2014). The question that arises is whether promotion of mediation or ADR can be treated as coercion (Abel, 1982).

The concept of co-optation can be more closely related to a mandatory process, but are the CPR and FPR in English law just as coercive when they attempt to "persuade" individuals to engage with an ADR process.

Persuading individuals to engage in ADR processes through the judicial process can be deemed as co-optation, because the choice of the individual to engage in ADR will be undermined if there is some form of legal sanction if s/he fails to do so (Coy & Hedeen, 2005). The trend to judicialisation of ADR processes has been identified by Ryan. As Ryan (2000) argues the compelling of ADR through "the increasing judicialization of ADR represents its co-optation. However, in the context of judicially mandated ADR, the state's involvement argues strongly for - if not compels - prioritizing the protection of constitutional rights".

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[1] Excluding Arbitration, because award enforcement is subject to national and international law principles.

The important factor highlighted is that if there is co-optation then there has to be increased safeguards put into place (i.e. constitutional/ human rights associated with due process). With the increased protections then the co-optation will be minimalized, although inevitably present (Ryan, 2000).

Therefore, this chapter will now turn to an examination of the potential co-optation of ADR processes and then move onto whether there are sufficient protections in place to prevent unfair coercion (i.e. human rights/constitutional processes). The focus of this discussion will be mediation, because it is the form of ADR where judicialisation is occurring in the UK.

1.3 The promotion of mediation

It has been identified that mediation is a transformative process, which is why it has been the focus of the CPR and FPR. For example, in family law mediation has been seen as the most effective process to engage in an amenable process between the parties (Norgrove, 2011;para 4.69). T*he Norgrove Report (Norgrove, 2011; para 4.69)* states:

> *"Our aim is a supportive, clear process for private law cases that promotes joint parental responsibility at all stages, provides information, manages expectations and that helps people to understand the costs they face. The emphasis throughout should be on enabling people to resolve their disputes safely outside court whenever possible" (Norgrove, 2011, para 4.69).*

The implication is that if there is a family dispute where there are children then there has to be an ongoing relationship (Cashmore & Parkinson, 2008). The use of the mediator and additional facilitators is important to ensure that the voice of the children is respected within the ADR process, which can be lost within the judicial framework (McEldowney, 2012).

The rationale is that through mediation there can be a better framework developed to create an ongoing amicable process, as opposed to the judicial system that is adversarial in nature (McEldowney, 2012). Thus, the ADR process (especially mediation) is seen as a better framework to protect vulnerable persons (as long as there is a specially trained mediator) (McEldowney, 2012).

The practice of mediation is not regulated in England and Wales, although many ADR organisations provide mediator qualifications through successful course completion or have their programmes accredited by Civil Mediation Council (Brooker 2011; 2013; Boon et al. 2007; Gould et al. 2010). While the EU Mediation Directive (Directive 2008 /52/EC) provides mediation should be used to settle cross border civil disputes (Cornes, 2008), this system has been criticised as being quasi-mandatory, which means that it can undermine the consensuality of the mediation process (Cornes, 2008). The text of the Mediation Directive does not use absolutist language, which can be seen in the text of Article 4(1):

> "*Member States shall encourage, by any means which they consider appropriate, the development of, and adherence to, voluntary codes of conduct by mediators and organisations providing mediation services, as well as other effective quality control mechanisms concerning the provision of mediation service*"[2].

The obligation of the state is the promotion of medication and not the enforcement of mediation. As Article 4(1) provides, there must be promotion of quality and appropriate mediation processes to enable an efficient and cost-effective regime[3].

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[2] Article 4(1) Mediation Directive

[3] ibid, 38

1.4. Quality and appropriate mediation

The fact that the EU Mediation Directive indicates that there has to be a quality process highlights that mediation should only be required/ promoted when it is appropriate to the circumstances of the dispute (Greatbatch & Dingwall, 1999).

The question is whether this balance is being promoted within English law because the *Norgrove Report* states:

> *"It should become the norm that where parents need additional support to resolve disputes they would first attempt mediation or another dispute resolution service" (Norgrove, 2011, para 115).*

The inference is that there is a framework in place that is promoting mediation, but in such a way that there is a high degree of coercion (i.e. supporting the argument of co-optation). However, this would be incorrect to assume because the English Family Procedures Rules 2010 (FPR 2010) both support the principles that if mediation or ADR processes are engaged then the parties have to agree (and no sanctions will be imposed for reasonable rejection) (Blake et al, 2013).

Rule 3.2 of the FPR 2010 requires that the courts examine whether the ADR process is more appropriate than use of judicial processes.

This is supported by Rule 3.3 FPR 2010, which requires the courts to consider whether: (i) dispute resolution is appropriate in the given context[4]; (ii) there has been fair and proper information given in regards to the ADR process[5]; and (iii) the parties agree[6]. Within the

[4] Rule 3.3.1 FPR 2010

[5] Rule 3.3.1.a FPR 2010

[6] Rule 3.3.1.b FPR 2010

family law context there has to be examination of the context in detail, because if there is domestic abuse or a vulnerable child then there will be enhanced harm to the child (McEldowney, 2012) (or the party that has been subjected to domestic violence).

Article 4(2) of the Mediation Directive identifies that "Member States shall encourage the initial and further training of mediators in order to ensure that the mediation is conducted in an effective, impartial and competent way in relation to the parties".

This principle highlights that it is necessary for there to be quality mediation, which is paramount to ensure that there is not promotion of a process that may undermine justice because the circumstances belie any chance of consensuality due to the power relations that are involved. It is paramount to ensure that mediation retains the central characteristic of a "peace-seeking, transformative conflict resolving and human problem solving" (Genn, 2010) process. Nonetheless, there is an argument that if co-optation is to be the norm then it should not matter whether the parties agree or not.

1.5. The commercial realm

The interaction between court promoted ADR and the judicial process is more developed within the area of commercial law, because there is a greater deal of complexity due to the interaction between promoted ADR and chosen ADR.

A significant strand of Lord Woolf's plans for ADR was that courts should design Pre-action Protocols (PAPs) to deal with specific areas of litigation with the objective of emphasising the prompt settlement of disputes before legal action[7] (Woolf 1996; Brooker 2013; Gerber & Mailman, 2005).

[7] See CPR Pre-Action Conduct 1.1

One of the first cases in the Technology and Construction Court which illustrates how ADR is connected to litigation is *Paul Thomas Construction Ltd v Hyland* (2000), when a builder offered to use ADR with the homeowners but the court found he had made 'unreasonable' conditions over the payment of the neutral and indemnity costs were awarded for contravening court protocols by beginning proceedings without considering other methods of settlement (Brooker 2010; Gerber & Mailman, 2005).

Many TCC judges are renowned for their support of ADR and mediation is often recommended to the parties as a course of action (Brooker 2009; 2010(a); 2010(b); 2013; Brooker & Lavers 2002). For example, in *Brookfield Construction (UK) Ltd v Mott MacDonald Ltd* [2010] after two case management meetings with the parties Coulson J issued a vigorous warning to end their 'uncooperative' approach and to consider some type of ADR because the size of the dispute (combined claims of over £75 million) involving 'finance and documents' made it 'ideally suitable' for mediation and moreover both litigants were forewarned that a failure to mediate by one party would be considered in costs.

There are also some areas where it has been recognised that there has to be specialist training (such as housing law) due to the presence of a weaker party (i.e. the tenant and landlord; consumer and vendor) (Arden, 2013). The power imbalance may create a situation where any co-opted mediation would be unfair. In *Halsey v Milton Keynes NHS and Dunnett v Railtrack* such power imbalances were examined within the context of ADR processes. In the *Dunnet Case* the parties were a private individual and Railtrack where the former was willing to mediate, but the latter party did not, Railtrack won the case and made a claim for costs, the courts refused because Railtrack unreasonably refused to mediate (a better option in the case).

The implication is that the judiciary can promote mediation through sanctions for failing to engage in the process, even if it is in contradiction of the consensuality of the mediation process (Fisher et al, 1991). *Halsey v Milton Keynes NHS* also concerned a private individual and a large organisation (i.e. part of the NHS) where the large organisation refused to mediate.

The private individual lost who tried to avoid costs based upon *Dunnett v Railtrack*, but in this case the court refused, because there was not unreasonable refusal. The implication is that there is still a measure of choice within the mediation process, which means that there is minimized co-optation (i.e. the CPR prefer mediation, but there will be no sanctions when reasonably refused).

Thus, this counters the argument that mediation or ADR will be mandated. One route that may be taken is to have legal professionals consider whether it is relevant.

As Dyson LJ in *Burchell v Bullard* held:

> *"All members of the legal profession who conduct litigation should now routinely consider with their clients whether their disputes are suitable for ADR".*

This means that if the legal professional can provide evidence in the given circumstances that the mediation would be inappropriate then the courts will not impose cost sanctions. In other words, the courts have to assess the suitability of the mediation /ADR process to the particular dispute[8].

[8] Faidi & Anor v Elliot Corporation [2012] EWCA Civ 287

The main factor that the court will determine is whether in the given circumstances there is a chance of success[9]. Nonetheless, there is a presumption that when there are commercial parties with equal power that some form of mediation has been engaged with before using litigation[10].

1.6. Why cooptation in the commercial realm

The rationale for supporting judicial and legislative recommendations of using mediation and ADR processes is that if offers a more efficient and cost-effective system for the parties (and the courts are not clogged up with cases that could have been resolved otherwise)[11]. The reason for mediation and ADR processes being promoted in the commercial realm has been clearly espoused in *Aird v Prime Meridian Ltd*[12] where it was held that mediation is "a form of neutrally assisted negotiation"[13]. In this form of negotiation there is greater independence for the parties, because the process "need not necessarily be based on the underlying legal rights or obligations of the parties. Instead, the parties, with the assistance of the mediator, can reach a solution which is tailored to their real needs and interests"[14]. The inference is that mediation (and ADR processes) will be more capable of supporting the interests of the parties and coming to an amicable solution than objective and abstract judicial determination. Thus, this gives rise to the principle of co-optation within the CPR.

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[9] PGF II SA v OMFS [2013] EWCA Civ 1288

[10] Charlton v Kenny [2010] EWCA Civ 873

[11] Lord Justice Jackson Review of Civil Litigation Costs Final Report (TSO, 2011) para 4.11

[12] Aird v Prime Meridian Ltd [2006] EWCA Civ. 1866

[13] ibid at 5

[14] ibid at 5

The primary reason for co-optation is to enable the courts to deal with cases justly[15], which is best achieved through limiting the burden of cases that reach the judicial system. This is supported by r. 1.1(2) CPR 1998, which provides that alternative processes should be used when practical.

The determination of practicality is based upon (a) equality; (b) saving expense; (c) proportionality in respect to the value of the claim, the importance of the case, complexity of the issues; and the financial position of each party; (d) assurance that the case is "dealt with expeditiously and fairly; and (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases"[16]. These factors will be examined by the courts, in order to promote mediation/ADR. However, it cannot force such processes on the parties.

Rather, it may merely indicate that there may be negative cost implications for the failure to consider a more appropriate alternative to the judicial process[17].

The latest amended Pre-Action Protocol for Construction and Engineering Disputes was published in 2014 and is applicable to 'all construction and engineering disputes (including professional negligence claims against architects, engineers and quantity surveyors).[18]. The TCC Protocol is the only one which requires the litigants to participate in a Pre-action Meeting before issuing proceeding where they have to discuss the issues between them and consider whether there are other methods of settling all or parts of the

[15] r. 1.1(1) CPR 1998

[16] r. 1.1(2) CPR 1998

[17] Practice Direction Protocols CPR 1998 r. 4.7

[18] This protocol can be used in other courts when the dispute relates to construction or engineering.