Introduction

Methods of dispute resolution

- negotiation
- conciliation / mediation
- neutral evaluation
- expert determination
- dispute review boards
- adjudication
- arbitration
- litigation
Introduction

Moving down the list
- formal - informal
- private - public
- co-operative – adversarial
- self determining – imposed
- straightforward - complex
- provisional – final
- less expensive - expensive

Dispute or Difference

A Dispute or Difference?
- what amounts to a dispute or difference?
  - when does a dispute crystallise?
    - *Collins (Contractors) Limited v Baltic Quay Management (2004) Limited*
    - JCT SBC clause 1.11 – failure to issue a certificate
Negotiation

Characteristics
- informal
- private
- relatively quick
- no formal rules
  - compromise
  - commercial basis/not necessarily linked to the merits of case
- binding agreement
  - recorded in writing
  - relatively less expensive

Examples
- JCT Supplemental Provisions eg SBC 05 paragraph 6
- Standard Conditions of Appointment for Architects 2010
  - clause 9.1
Mediation/Conciliation

Characteristics
- informal
- private
- consensual
- difference between mediation/conciliation
- appointment of mediator
- relatively less expensive

Mediation/Conciliation

Characteristics
- mediation agreement
  - without prejudice basis
- mediation process
  - mediator set procedure
- role of mediator
- wasted costs?
- approach of the courts
Mediation/Conciliation

Advantages
- time
- cost

Disadvantages
- dispute not forensically considered
- delaying tactics

SBC 05 Clause 9.1
- the parties may by agreement seek to resolve any dispute or difference arising under this Contract through mediation

RIBA SCA 2010 clause 9.1
- in the event of any dispute or difference arising the Client and the Architect may attempt to resolve by using mediation
  - in-house procedure?
Neutral Evaluation

Characteristics

- a third party
  - particular expertise
- appointed by agreement
- private
- offer an opinion / view
- in writing?
- non binding
- relatively less expensive

Expert Determination

Characteristics

- a third party
  - knowledgeable in field
- appointed by agreement
  - clause in contract?
- private
- gives a determination
  - in writing?
- usually binding
  - provided addressed correct point
  - limited right of appeal
- relatively less expensive
Dispute Resolution Boards

Characteristics
- 'creature' of the contract
  - FIDIC
- panel set up for project
- private
- procedure set out in contract / devised by panel?
- decision usually not binding
- expensive

Dispute Resolution Boards

Typical DRB
- set up before project commences
- 3 members on board
  - one selected by each party and third selected jointly
  - split of professional experience - include a lawyer
- copy of contract documents / visit site
- receive submissions from parties
  - oral / written?
- make recommendation
Adjudication

  - adjudication pre/post Latham?
- Statutory Adjudication / contractual adjudication
  - Housing Grants, Construction and Regeneration Act 1996
- Private
  - Each party bears their own costs
    - expensive?

Adjudication

Housing Grants, Construction and Regeneration Act 1996

- 1 May 1998
- requires the support of the ‘Scheme’
  - The Scheme for Construction Contracts (England and Wales Regulations 1998)
HGCR Act 1996 s108

- S. 108(1) a party to a construction contract has a right to refer any dispute or difference to adjudication
- S.108(2) a construction contract shall
  - enable a party to refer a dispute or difference to a adjudication at any time
  - provide a timetable for the appointment of an adjudicator within 7 days
Adjudication

HGCR Act 1996’s 108.2 (cont’d)

- require the adjudicator to reach a decision within 28 days of receiving the referral. This period may be extended by 14 days with the agreement of the referring party

- impose a duty on the adjudicator to act impartially

- allow the adjudicator to take the initiative regarding ascertaining the facts and the law

Adjudication

HGCR Act (cont’d)

- S.108(3) decision of the adjudicator shall be binding on the parties until finally determined in arbitration or legal proceedings. The parties are at liberty to agree that the adjudicator’s decision will be binding

- S.108(4) adjudicator is not liable unless it can be shown that he has acted in bad faith

- S.108(5) if the contract does not comply with S5.108(1) to (4) then the Scheme will apply
Adjudication


- how adjudication proceedings are to be conducted and the appointment of the adjudicator – clauses 1 to 11
- the powers of the adjudicator – clause 12 to 19
- the Adjudicator’s decision – clause 20 to 22
- the effect of the decision – clauses 23 to 26

Other procedures

- CIC Model Adjudication Procedures
- TeCSA Adjudications Rules
- ICE Adjudication Procedure

Adjudication

SBC 05 clause 9.2
- adjudication under the rules of the Scheme subject to minor qualifications (change from JCT 98)

RIBA SCA 2010 clause 9.2
- adjudication under CIC Procedures / Scheme / Other

General Points

- broad definition of a ‘Construction Contract’ (HGCR Act s. 104 and s.105)
- HGCR Act s.106
- impact of adjudication on architect
  - contract administration / appointments
- The Local Democracy Economic Development and Construction Act 2009
  - Part 8
Arbitration

What is arbitration?
- historically a long-standing method of commercial dispute resolution
- contractual agreement but provision holds special status

The principal advantages
- the technical expertise of the arbitrator
  - architect/quantity surveyor
  - appointing bodies
- flexibility
  - “look and sniff” / documents only / ‘full’ procedure
- private
- expensive?

Arbitration

Limited rights to appeal
- points of law / jurisdiction / irregularity
- enforcement of an arbitrator’s award

Arbitration Act 1996
- to what does it apply?
- provides fall back position for
  - the appointment of the arbitrator
  - the Arbitrator’s powers
  - procedure
  - the Award
Arbitration

SBC 05
- clause 9.3 to 9.8 / Arbitration no longer default
- Construction Industry Model Arbitration Rules (CIMAR)
  - Rule 7 – short hearing
  - Rule 8 – documents only
  - Rule 9 – full procedure

RIBA SCA 2010
- clause 9.3
- CIMAR apply
- any sum less than £5,000 may be litigated

Litigation

Characteristics
- formal
- public
- usually expensive
  - solicitors and barristers involved
  - experts
- procedure governed by a complex set of rules
- decision can sometimes be appealed
Litigation

Courts

- Pre Action Protocol for Construction and Engineering Disputes
- County Court
  - ‘small claims’ – up to £5,000
- High Court
  - Technology and Construction Court
  - division of QBD
- Court of Appeal
- UK Supreme Court (previously the ‘House of Lords’).