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Alternative Action. Litigation is expensive, time consuming and risky, so it's a good job there are other ways of resolving contract disputes, says Niall Lawless.

Every building services project involves a contract and from time to time issues arise which become disputes. Many in the industry are increasingly using Alternative Dispute Resolution (ADR) approaches such as mediation, adjudication and arbitration as effective alternatives to litigation.

Building services projects are often complex and require managers who are able to deal with a wide range of project issues, such as the availability and level of resources, schedules, priorities, standards, procedures, costs, quality and people.

Conflict in contractual relationships can be avoided, controlled or minimised through negotiation. Although almost universally recognised as an important project management skill my experience is that about only one in ten property and construction professionals have ever had formal training in successful negotiation; that is satisfying their needs by agreement with others. Where negotiation fails to resolve differences amicably the parties often become adversarial and when differences become disputes these have traditionally been resolved through the courts using the legal system.

However litigation is expensive in both emotional and financial terms, it is risky and time consuming and diverts valuable company resources away from core business activities reducing profitability.

ADR originated in the USA in an effort to find alternatives to the traditional legal system and it is constantly evolving, driven by the need to find effective, reasonable, efficient and inexpensive ways to resolve conflict in both domestic and international construction contracts. Developments in the last ten years include the introduction of statutory adjudication for UK construction contracts, court support for mediation prior to litigation, the rise of arbitration in domestic contracts but more importantly in those involving an international dimension.

The main ADR approaches are:

Mediation

The goal of mediation is settlement of disputes through compromise. Over 70% of mediated disputes are resolved; with the benefit of acting as mediator in over 40 disputes I believe that there are two main reasons for this.

The first is that mediation facilitates real communication; this requires not only listening and speaking but also understanding. The second is that through the mediation process the mediator is able to work with the parties privately, having access to confidential information. This is often the only time someone can assess if a zone for compromise and agreement exists and guide the parties towards it.

Mediators do not give the parties advice or make decisions for them. However, competent mediators will have dispute resolution experience and be able to use technical and commercial expertise to engage the parties in early 'reality testing', exploring the strengths and weaknesses of their position. The mediator should help the parties examine interests and needs; negotiate the settlement agreement and define a relationship which is mutually satisfactory and which meets their standards of fairness.

Mediation is often effective in commercial disputes because in working out the settlement terms the parties can be creative and go beyond the strict terms of any legal contract involved. Compared to other methods of resolving disputes mediation offers the benefits of speed, privacy, flexibility and cost saving. It's not a formal process and the parties have personal control.

Adjudication

Adjudication is most often a statutory procedure by which any party to a construction contract has a right to have a dispute decided by an adjudicator. It was introduced to the construction industry in the UK through Part II of the *Housing Grants, Construction and Regeneration Act 1996* which applies to most construction contracts made after 1st May 1998. It is intended to be quicker and more cost effective than litigation or arbitration.

The Act provides some mandatory requirements for a construction contract. These are that the contract will enable a party to give notice at any time of his intention to refer a dispute to adjudication; provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within seven days; require the adjudicator to reach a decision within twenty eight days or other timescale agreed by the parties. The adjudicator's decision is binding until the end of the construction contract and where disputed is usually upheld by the Courts.

Arbitration

Mediation is very often effective, but where the parties find themselves with an intractable dispute they have two formal dispute resolution options : arbitration and litigation. It has been said that arbitration is litigation in the private sector, but it is much more. In domestic disputes arbitration has unique advantages but if the parties come from different jurisdictions it is without equal.

Arbitration is powerful formal justice, in that the award is enforceable across international boundaries. But is also less formal, as the parties can choose the arbitrator or the organisation that will choose the arbitrator and they can decide what arbitration procedure they want. Because of this arbitration should be more flexible and cost effective than litigation. Arbitrators may be selected for their special skills to suit the particular dispute. Arbitration awards present the losing party with less opportunity to appeal the decision and it is particularly valuable in some disputes because confidentiality can be preserved.

ADR approaches are flexible and offer the potential to deliver effective solutions which may vary from business sector to business sector. CIBSE undertakes a wide range of learned society activities ranging

from producing information services and acknowledged industry good practice publications and providing extensive networking activities through a series of regional and special interest groups.

However at present it has no special interest group which can develop and promote ADR for the building services industry, because of this a proposal has been made to CIBSE to establish an ADR Group

BOX :- CIBSE ADR Group terms of reference :-

1. Help CIBSE members understand the nature of conflict in business relationships and become more aware of the opportunities that exist for conflict resolution.
2. Encourage best practice in the way that CIBSE members approach ADR.
3. Keep members aware of the latest developments in ADR.
4. Provide a forum to discuss matters relating to ADR and learn from each other.
5. Publish papers in relevant journals and at appropriate conferences.
6. Liase with appropriate committees within CIBSE.
7. Act as a network for industry and ADR practitioners.
8. Provide a central source of links and information related to ADR for building services engineers.

CIBSE members should express their support by writing to Samantha McDonough, CIBSE, 222 Balham High Road, London SW12 9BS or at smcdonough@cibse.org