


Write up of Participant Notes from
**How to have a Dispute
 and come out as friends**

Tuesday 25th June 2013
 at the
 LinkedIn Planning / Management under
 the NEC form of contract conference



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1. Background : Adjudication as intended ?

- > In the original New Engineering Contract, Adjudication was intended to be a **quicker, cheaper, less procedure'lised** and **friendlier** form of dispute resolution compared with arbitration or litigation, so that the parties can **move on**.
- > Then Latham and the Housing Grants, Construction and Regeneration Act happened and :
 - Lack of time barring means that the initiator has all the time– and takes it – to prepare their case leading to long expense documents !
 - Having prepared it, they can 'ambush' the other party by launching the adjudication at the most awkward time.
 - Adjudication, with wider use, has attracted progressively more case law meaning it is becoming progressively more prescriptive in how it is done regardless of the size and nature of the dispute.
- > How do we go back to dispute resolution which satisfies the high level **criteria** underlined and in bold above ?

2. Some alternatives to conventional Adjudication (from Jon and Rob).

1. Independent expert who reviews it from one parties' perspective .
2. Independent expert appointed by both parties to give a non-binding independent view. Variants include :
 - a. Licence to talk to people so not just a desk-based contractual "in a form which can be read, copied and recorded" review.
 - b. Brief can extend to recommendations on tackling causes of dispute.
3. Building on 2. workshop based approach to resolve differences, with either :
 - a. Someone knowledgeable on NEC as facilitator or
 - b. Genuine 'know nothing' facilitator.
4. Negotiation :
 - a. get more senior people in so a 'Disputes ladder' and
 - b. those people need to have authority to resolve.
5. Mediation : needs to be chosen not imposed
 - a. Use of a neutral facilitator to reduce the impact of "personalities".
 - b. Needs to be a problem with "shades of grey"
6. Short and sharp adjudication. Agree beforehand :
 - a. Limited size of submissions
 - b. Emphasis on *Adjudicator* verbally ascertaining facts and 'going to see' documents.
7. Dispute Resolution Boards : consider at project inception
 - a. Is the cost justified on the project ?
 - b. How will you keep the DRB up to date ?
 - c. Do you want a DRB or a DAB ?
8. Other :
 - a. Early Neutral Evaluation
 - b. Party Tribunal
 - c. Med-Arb
 - d. Part 8 Court Proceedings
 - e. 100 day arbitration
 - f. Online dispute resolution

3. The Exercise

The Exercise

- ❖ Move into 6 groups of 5+'ish people to take different sub-topics.
- ❖ These sub-topics are :
 - Criteria for a good dispute resolution process under NEC3 and then one other
 - A. Alternatives to Alternative Dispute Resolution : identification + pro's & con's (JB)
 - B. Collaborative use of Adjudication as originally intended (RH).
 - C. Pro's & Cons of conventional Alternative Dispute Resolution e.g. mediation, adjudication and disputes boards (RH).
- ❖ Organise yourselves - chair, scribe, method or writing up, process etc.- & come up with useful 'write up'able' output in ?? mins.
- ❖ Prepare to feedback for 5 mins each group and to enhance.
- ❖ If you finish earlier, gather your thoughts on another sub-topic.

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Group A1 : Alternatives to ADR

Adjudication	
Pros	Cons
<ul style="list-style-type: none"> > Quick > Cheap > Less procedure > Friendlier 	<p><u>Can be :</u></p> <ul style="list-style-type: none"> > Long Winded > Expensive > Legally driven : procedural and antagonistic

Mediation	
Pros	Cons
<ul style="list-style-type: none"> > Friendly > Less procedure > Cheap > Works when there is a genuine desire to help 	<ul style="list-style-type: none"> > Non-binding decision > Can be used as fishing exercise or as something we have to do avoid litigation costs. > Waste of money
<p>Note small contracts are less likely to use ADR.</p>	

Workshop / Negotiation	
Pros	Cons
<ul style="list-style-type: none"> > Easy to instigate > Cheap 	<ul style="list-style-type: none"> > Same problem passed up the line > <i>PM</i> is not impartial : paid by <i>Employer</i>, own company may have done design and looking at previous decision.

Dispute Boards	
Pros	Cons
<ul style="list-style-type: none"> > Background Knowledge means they are not coming to it cold. > Greater set of opinions to resolve issue > Easy access : within 28 days. > Can be binding if drafted into contract. 	<ul style="list-style-type: none"> > Expensive, especially as percentage on small contracts > Requires ADR person > Normally non-binding

Group A2 : Alternatives to ADR

- ❖ Introduce trigger points for identifying possible or potential disputes throughout each NEC process.
- ❖ Impose timescales for dealing with issues, disputes and / or inaction based on trigger points
- ❖ Develop a secondary option that provides for the regular reporting by both *PM* & *Contractor* on operation of the contract to the *Employer* on progress of early warnings, compensation events, acceptance of programme etc. . Most of the cloud based NEC administration systems can provide do something like this in chart form. This could be supplemented by a commentary on trends and key/large early warnings, compensation events etc.

Group B1 : Collaborative use of Adjudication as originally intended

- ❖ Should encourage a collaborative culture from the outset.
- ❖ Defined communication channels from the outset between the parties is vital; this includes having a dispute mechanism in place.
- ❖ It should not preclude day-to-day closure / negotiation of issues.
- ❖ Should not preclude the opportunity for 'low level' dispute boards.
- ❖ Try to agree the basis of assessment of adjudication in advance i.e. setting protocols for content and timing in advance.
- ❖ Going to adjudication should not be seen as a failure : having an unresolved festering dispute is !
- ❖ Instead encourage closure of issues / disputes on a rolling programmed basis within timescales.
- ❖ This supports and facilitates understanding of time and budget implications which is important in current market.
- ❖ Recognise that Adjudication is a two way street : not just *Contractor* taking *Employer* to Adjudication.
- ❖ Third party adjudication should provide assurance and confidence in closing off disputes.

Group B2 : Collaborative use of Adjudication as originally intended

ADR Criteria	
Objective	Method
<ul style="list-style-type: none"> > Solves problem : <ul style="list-style-type: none"> ○ Definitive ○ Binding / enforceable ? ○ 3rd Party decision > Avoids formal Dispute Resolution > Proportional > Maintains relationships 	Options dependent on : <ul style="list-style-type: none"> > project / dispute size ? > complexity ? > public / private ?

Collaborative Adjudication
<ul style="list-style-type: none"> ❖ More emphasis on negotiation and/or 'soft' conciliation mediate / conciliation ❖ Engage parties on 'positive' adjudication : early, issue by issue, contained, limited size of submissions etc ❖ Flow adjudication terms through into Dispute Adjudication Board, so not starting from scratch.

Group C1 : Pros & Cons of Conventional ADR

CRITERIA :	Cheaper	Quicker	Fairer	Transparent	Certain
Adjudication	BASE				
"Enforced" Negotiation	✓	✓	?	?	X
Evaluative Mediation/Conciliation	✓	?	?	?	X
Escalated Negotiation	✓	X	?	?	X
Bonded Conciliation	?	Same	?	?	✓
Best of 3 Roll of Dice	✓	✓	X	✓	✓

Group C2 : Pros & Cons of Conventional ADR

NEC Criteria
<ul style="list-style-type: none"> ❖ Deal with unresolved issue / dispute at the time that you realise it is unresolved ❖ Once notified, deal with it in a set time scale ❖ Arrive at a decision and move on

Recommendations on Process
<ol style="list-style-type: none"> 1. Categorise / rate on a scale disagreements : <ul style="list-style-type: none"> ○ by urgency, ○ value, ○ complexity etc. 3. Decide on best process given 1. 4. Set a time constraint 5. Use a collaborative escalation process. For example : <ol style="list-style-type: none"> a. Site team b. Senior management c. Director d. Mediation / ADR e. Adjudication

4. Key Points to take away

Each group was asked to summarise their key point / learning from the workshop. These were grouped afterwards :

1. The over whelming key lesson was : **Agree upfront a (non-contractual) issue resolution ladder with strict timescales for when an unresolved issue is elevated to the next level**, which is operated honestly and openly with the genuine intent of not letting unresolved issues turning into festering disputes.

A suggested ladder looked like :

site team > senior site management > director > mediation > adjudication.

2. Both within the above issue / dispute resolution ladder &/or when a dispute occurs, **identify the relative importance of criteria before you select the ADR process to use**. For instance :
 - a. Is it low cost / 'value for money' that you want ?
 - b. A binding decision so that the parties can *move on* ?
 - c. Speed of resolution (you could have a categorisation system for 'Urgent', 'Medium' and 'Long term'.

The criteria by which you select the ADR tool could be in line with the project's objectives.

3. **Other key lessons learnt** included
 - a. Address the negative perception of Adjudication : true failure is failure to address an issue; see Adjudication as a management process for unresolved issues.
 - b. Explore the use of agreed limits to be applied in the Adjudication protocol e.g. size of submissions etc.
 - c. Choose the right contract and the right people for the right price and you will avoid disputes !

5. Contact Details

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