AN OVERVIEW OF

CLAIMS AND DISPUTES ON CIVIL ENGINEERING AND CONSTRUCTION CONTRACTS

FOR SMALLER AND MEDIUM SIZED COMPANIES

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1.0. INTRODUCTION

1. Each party to a contract hopes for and anticipates execution of the contract in line with its expectations at the outset, and each believes those expectations are represented by the terms of the agreed contract. The employer seeks works which are constructed properly and completed within the agreed time and for the agreed price: The contractor wishes to carry out and complete the works for a cost which is less than the price he is paid (by at least the amount of the profit he added to his estimated costs in the agreed contract price).

2. After the contract is made things can start to change (e.g the employer wishes to include a new section of works or remove an existing section) and things can happen (e.g. the employer gives delayed access to the site or the contractor suffers a delay in receiving delivery of a key item of plant).

3. It is not unusual for the actual execution of the works to be very different to that envisaged by the parties when the contract was made. They will often have diverging views on: what has happened, how in reality things have changed from what was envisaged, who or what has caused the change, and what is the resultant effect on the time and cost for carrying out the works. (It should also be noted here that in some instances a change will reduce the cost to the contractor, with a corresponding reduction in the price to the employer. For example, if a section of work is omitted.)

4. In most cases, however, the price to the employer is going to be more than the contract price originally agreed and in completing the changed works the contractor will spend more than his originally estimated costs.

5. This begs the questions "How does this affect the parties' expectations at the outset?"

6. The answer is: The parties retain their initial expectations but in a modified form. The Employer now seeks a well-constructed job within a revised time and for a revised price where the adjustments to time and price correctly reflect the changes: The contractor wishes to be paid correctly in respect of the additional cost he incurs.

7. The parties use the terms of the agreed contract to determine how the time for construction should be adjusted, and how the price to the employer should change (and this will also be the correct payment in respect of the additional cost the contractor incurred). For each change the contract should set down how to determine the corresponding change in time and price (if any).

8. By ensuring that the correct adjustments are made to the contract in respect of each change, each party preserves, to the extent possible, the expectations it had at the outset.

1.1. WHAT IS A CLAIM?

9. One of the principal reasons for the parties having a signed written contract between them is to have within it this agreed method for analysing and evaluating changes.

10. For each change each party puts forward its case to the other referencing the provisions of the contract. They are at liberty to discuss and negotiate as they see fit in order to arrive at an agreed adjustment to the contract (price) to cover the change.

11. If agreement appears unlikely at this stage it is often because the party claiming additional monies (or perhaps the amount by which the price should be reduced) has not provided any evidence or proof to support its assertions [One definition of the verb 'to claim' is 'to state or assert something is the case, typically without providing evidence or proof'.] This is an unsubstantiated claim.

12. It may be that as part of this process the party claiming produces (by agreement or unilaterally) a formal document in order to claim its entitlement. [The second definition of the verb 'to claim' is 'to formally request or demand; say that one owns or has earned (something)'].

13. The document is called a 'claim'. [The two definitions of the noun 'claim' are 'an assertion that something is true' and 'a demand or request for something considered one's due'.] The claim should contain evidence/proof to support (substantiate) the assertions made.

1.2. THE RESPONSE TO THE CLAIM

14. The party receiving the claim may then produce a response document to set down its own view on the matter. The response should similarly contain evidence/proof to support the assertions made.

15. The exchange of documents in this way may continue for some time, especially if the effects of the change are extensive and long-lasting and they have to be recorded in order to evaluate the amount of the claim.

1.3. DISPUTES AND NEGOTIATIONS

16. If there is no agreement, each party 'disputes' the others case and there is a 'dispute' between them.

17. Notwithstanding that they have each produced several documents, the parties remain at liberty to discuss and negotiate as they see fit, such that, at any time, they can arrive at an agreed adjustment to the contract to cover the change and, by doing so, end the dispute.

18. If the parties agree, negotiations may include the use of Alternative Dispute Resolution (ADR) processes such as Mediation and Conciliation.

19. Ultimately, if a resolution of the dispute by a third party is to be avoided, the parties have to reconcile themselves to the actuality of what happened, end the negotiations by coming to a compromise on the adjustment to the contract, and move forward.

1.4. FORMAL DISPUTES

20. If, in the end, parties are unable to reach a compromise they are said to be 'in dispute' and the way forward is for one party to make the matter a 'formal dispute' by placing it in the hands of a third party for a decision. A 'formal dispute' in the context of this document is a dispute which has been place in the hands of a third party for resolution by that third party in 'formal dispute resolution'.

21. Put simply: One party produces a formal document in which it states its case and refers the matter to the third party determiner. The other party compiles its own document in which it provides its defence to the case made against it, and also puts forward its own case. The third party determiner considers the two cases, examines the evidence provided by each party in support, and gives a decision.

22. Disputes are a distraction and can be expensive if resolved formally by a third party. Generally speaking, a primary objective of all parties to commercial contracts must be to avoid the formal dispute resolution process (i.e. to avoid determination by a third party).

23. Equally, however, if a dispute which needs formal resolution is unavoidable, a party needs to be able to effectively and successfully manage the process.

1.5. PARTY OBJECTIVES

24. It is clear from the above that "the" primary objective of a party to a contract is either, to receive its proper entitlement (if making a claim) or, to avoid paying more than the other party is entitled to under the contract (if defending a claim).

25. In summary, each party's objectives in respect of change(s) are:

    a) to agree, whenever possible, an adjustment to the contract price/time to cover each change by discussion and negotiation without protracted written submissions

    b) (when agreement cannot be reached and detailed written submissions are necessary) to ensure it receives its due entitlement if claiming, or to avoid paying more than the entitlement if responding

    c) generally, to settle after negotiating and thereby avoid the matter becoming a dispute requiring formal resolution, and

    d) to be in a position to be successful in third party resolution if it is unavoidable.

26. At first sight these objectives might appear to be almost mutually exclusive. However, the single item which has the greatest bearing on a party's ability to achieve each of these

objectives is the quality of the case and supporting proof/evidence which it puts forward at each step in the process.

27. The better the case/proof/evidence, the more likely an advantageous agreement can be reached in early negotiations before claim and response documents are prepared. If a claim or response document must be prepared, the more convincing a party makes the case/proof/evidence in its document, the more likely a satisfactory settlement can be reached without employing third party resolution. If the matter becomes a dispute requiring formal resolution and the case/proof/evidence is sound and already prepared, a party is ideally placed to be successful in the resolution process.

1.6. REQUIREMENT FOR ADVICE AND EXPERTISE

28. Where early agreement cannot be reached, preparing written submission(s), negotiating and settling a change can be very time consuming, can divert the attention of a party's staff away from the on-going contract works, and can be such as to require specialist experience and expertise.

29. It follows that (particularly where the change is of some significance) each party has a clear requirement for reliable advice and expertise in dealing with its case and in securing its entitlement. Further that if such advice and expertise are not available in-house a party is well-advised to seek external assistance at an early stage in order to ensure that the case it makes is cogent and the best possible from the outset: also to ensure that the necessary evidence is presented (either extracted from available records or collected as the matter progresses).

30. **Basing Contract Consultants ("BCC")** have the experience and expertise required to assist parties in all of these matters.

2.0. CLAIMS AND RESPONSES - PROJECT CONTROL

2.1. CLAIM SITUATIONS

31. If the parties are unable to come to an early compromise (i.e to reach an agreement over what has changed and its effect on the contract) and a 'difference' remains between them (even if it is not particularised), they are said to be in a 'claim situation'.

32. One party is claiming (usually the contractor seeking additional monies and/or an extension of time under the terms of the contract, which it says are the result of one or more events for which the contract makes the employer responsible).

33. The other party (usually the employer) is denying the claimed entitlement and/or the claimed amount. The employer may also be counter-claiming for damages (i.e. the losses it says it has suffered as a result of the event(s) which it says the contract makes the contractor responsible for) or he may simply consider the contractor's assessment of the amount due to be too high.

2.2. CONTRACT CLAIM PROVISIONS

34. Contracts are often silent about the process to be adopted for making and responding to claims. They will, however, probably include requirements for the service of notices and the submission of details at specific times in connection with the event(s). Failure to serve these notices and submit the details on time can often extinguish rights which a party would otherwise have under the contract and thereby disqualify any subsequent claim.

35. Notices are necessary because the responding party is entitled to have the opportunity to make its own contemporary investigations and records in respect of any claim made against it.

36. With notifications and submissions in place, many contracts permit claims to be prepared, presented and defended retrospectively, often after the works have been completed.

37. In some contracts, however, notably the NEC3 ECC, the process for making and defending claims is set down. Furthermore, there is a contractual obligation to analyse each change contemporaneously. The ECC requires additional cost and delaying events and their consequences to be notified and dealt with as they arise. The claim and defence are submitted within specified timescales as part of the contractual compensation event process, with any additional cost or time being determined by forecasting the effect of the event(s) upon the final cost and overall time for the works.

2.3. PROJECT CONTROL

38. The key to a contractor's (the claiming party's) ability to avoid a formal dispute (i.e to successfully prepare a claim and then negotiate an acceptable settlement without recourse to third party resolution), often comes down to the quality of the evidence it has available to back up its case i.e. the quality of the contemporaneous and other records it has kept and of the programmes and the like it has submitted.

39. The employer's (the responding party's) success in preparing a response and negotiating an acceptable settlement without recourse to third party resolution can similarly come down to the quality of its own contemporaneous and other records and of the responses it has made to the contractor's programme submissions and the like.

40. Or to put it another way, the quality of each party's "Project Control" can have a significant bearing on the outcome of early exchanges and (if claim and response have been prepared) on the outcome of subsequent negotiations. Further, the same Project Control information (the output from the Project Control processes) can often be the key to a party's success if the matter proceeds to formal resolution by adjudication, especially if the adjudication is launched at short notice.

41. It should be noted here that, in the United Kingdom, most commercial construction contracts entered into after 1 May 1998 contain the absolute right for a party to have a dispute resolved by adjudication <u>at any time</u> irrespective of the absence of such an express provision within the contract.

42. Adjudication is a fast process. Once a referral is made the defence is often required within one to two weeks.

43. It is therefore important for parties to recognise that their ability to prosecute, or more importantly to defend, adjudication procedures successfully, is very much dependent upon their having immediately available the requisite information. There may be little time for information gathering and problem analysis.

44. Project Control information is the totality of the records which a party holds in respect of the works tendered for and the works actually carried out, under a contract.

45. When a party is preparing a claim or response or facing formal dispute resolution, the value of comprehensive, high quality Project Control information may not be over-stated.

2.3.1. PROJECT CONTROL INFORMATION

46. Examples of Project Control information are:

    a) for the period prior to the signing of the contract:

        i) pre-contract documents submitted and received (invitation to tender, tender documents, correspondence, etc), and

        ii) records of the basis of the tender: (pricing sheets, method statements, programmes, etc), discussion notes etc.

    b) for the period after the start of the works:

        i) documents submitted and received (correspondence, notices, designs, programmes, drawings, progress reports, minutes of meetings, payment applications, certificates, etc. etc.)

        ii) daily diaries

        iii) daily labour and plant usage records, and

        iv) monthly record photographs.

2.3.2. PROJECT CONTROL PROCESSES

47. The objective of a party's Project Control processes is the production of the necessary information (generally as listed above) simply and effectively as part of a client's normal operational practices.

48. The knowledge, experience and expertise of our consultants may be harnessed in assisting companies to put in place effective Project Control processes aimed at providing the comprehensive information needed to calculate and evidence the effects of changes.

49. This does not apply solely when a claim situation or dispute is threatened or appears likely to ensue.

50. Those smaller and medium-sized contractor organisations which are more commercially aware and aiming for sustainable growth may utilise our consultants expertise to assist in improving the company's existing Project Control processes, internal practices, and staff capabilities (by systems analysis and revision and by the provision of training programmes), so that the circumstances which might lead to a claim or dispute may be recognized earlier and steps taken to deal with the situation.

51. Employer organisations will benefit in the same way if our consultants are employed to analyse and assist in improving the company's Project Control systems, internal practices and staff capabilities.

52. A key element of a party's Project Control procedures which is recommended to all (contractor and employer) organisations is the use of regular management review meetings. It is at these meetings that all potential and actual claim situations on a project (or projects) may be monitored in respect of risk to the company such that, as soon as a situation warrants it, any necessary steps may be taken to minimise the risk by mobilising additional outside assistance.

53. In order to assist clients with their Project Control BCC will, if requested,

a) advise its clients on their Project Control procedures before any claim situation has arisen (with the objective of ensuring that the right information is being recorded in the right way as part of the client's normal operational practices),

b) provide commercial and project management advice and assistance to their staff during the execution of the works in

  i) document management and record keeping

  ii) critical path programming and resource analysis, and

  iii) managing compensation events, variation orders and final accounts, and

c) advise and assist with reporting systems and the conduct of regular management review meetings.

54. In addition BCC offers and is experienced in providing staff training in these matters specifically tailored to a client's requirements.

3.0. MANAGING THE PREPARATION OF CLAIMS AND RESPONSES

3.1. INTRODUCTION

55. After the parties enter into a contract it is quite normal for there to arise a wide variety of matters for which the parties will have different views as to how the contract price and time should be altered to accommodate their effect. Many will lead to claim situations, several may require the production of claim and response documents, and there may be a requirement for formal dispute resolution. These matters can arise at any time during the existence of the contract, i.e. during the execution of the works and prior to their completion, after completion and before the end of the maintenance period, after the end of the maintenance period and prior to the end of the statutory limitation period, and after the end of the limitation period. The obligations of the parties and the way in which the claim situation proceeds can be different for each of these different periods. Such considerations are beyond the scope of this document (but within the scope of BCC services).

56. We shall consider here only claim situations which have their origin during the execution of the works and prior to their completion. [The claim may be made after completion, but the event(s) leading to it is/are one(s) which occurred prior to completion.]

3.2. CLAIM SITUATIONS WITH ORIGIN DURING THE EXECUTION OF THE WORKS

57. During the execution of the contract works many changes, issues, contentions, and causes of action will arise and lead to claim situations. For a considerable number of them the parties will be unable to reach agreement on how the matter should be settled. Indeed, on some projects almost every instruction or occurrence, however small, generates a claim situation. Consequently, it is not unusual that once the parties have each put forward a brief case, an interim payment is made and the matter is put to one side. Such matters are disputed (and may continue to be discussed/negotiated) but they are not disputes (or part of one) because neither side has chosen to state its position in sufficient detail (usually by providing a claim document).

58. It is significant or crucial events (usually involving major additional costs and/or delays) which generally lead to a claim situation where the preparation of full claim and response documents is warranted. Such events are also far more likely to generate a formal dispute. This is not to say that if there is a very large number of small matters they may not, when combined, prove to be significant or crucial to one or both of the parties and similarly lead to an exchange of documents, and possibly a formal dispute. However, this exchange usually occurs after the works are complete.

59. If a significant claim situation appears likely or has arisen, BCC can provide timely advice and assistance to support a client in its negotiations before the matter becomes contentious. By examining and reporting on the terms of the contract, the notices given by the parties and the available record evidence, BCC would initially seek to assist a client in identifying its potential to successfully prosecute or respond to the claim.

60. In cases where the client has a high likelihood of success and the other party shows a willingness to settle during negotiations, BCC can assist by providing behind-the-scenes support to ensure the client has the information needed to achieve the optimum settlement.

61. Where, however, the likelihood of success is considered high and the other party denies the principle of the claim or response, BCC would assist the client in the preparation of a succinct statement of the case for use in further negotiations. If the other party continues to deny the case and the client decides to proceed with the claim or response, BCC would assist in preparing a comprehensive document for use in further negotiations and/or for formal presentation {i.e. provide assistance (i) in preparing a statement of the case under the contract, (ii) in collecting the necessary evidence and assembling it, (iii) in describing and analysing what has happened, and (iv) in providing a proper evaluation of the matter in money terms}.

62. BCC consultants have assisted in this way in many claim and response situations during the course of the project and ensured that the appropriate case, evidence, evaluation and documentation are assembled.

63. Where the effects of the event(s) leading to the claim situation are limited in extent and duration it is often the case that the matter is relatively straightforward and might be best dealt with and taken to settlement whilst the works are still being carried out.

64. Where the effects of the event(s) leading to the claim situation are wide-ranging in extent and/or will last for a long period of time the matter is likely to be less straightforward and might be best dealt with and taken to settlement after the works are completed. It is the terms of the contract which (should) determine how the situation proceeds. In general, there are two scenarios to consider:

Evaluation based on costs actually incurred

65. Where the contract requires or permits the evaluation of the effects to be based upon records of the costs actually incurred there are requirements to (i) locate and catalogue for analysis historic records of progress and cost, and (ii) manage the collection of future progress, cost and other evidence over a long time - possibly for the remainder of the contract period.

Evaluation based on effect on forecast of cost to completion

66. Under similar wide-ranging/long-lasting circumstances, but where the contract contains a contractual obligation to analyse each change contemporaneously (as in the NEC3 ECC) and the claim and response must be submitted within specified timescales as part of the contractual compensation event process [with any additional cost or time being determined by forecasting the effect of the event(s) upon the final cost and overall time for the works] the requirement is for rapid collection and analysis of the as-built progress records and the historic actual resource cost data so that the information may be used to prepare the necessary forecasts for incorporation into the 'claim'.

67. BCC has extensive experience of both scenarios. In either case BCC would assist the client in the manner set out at 59 above i.e. BCC would manage the preparation of a comprehensive document for use in further negotiations and/or for formal presentation by:

a) preparing a statement of the case under the contract,

b) collecting the necessary evidence and assembling it,

c) describing and analysing what has happened, and

d) providing a proper evaluation of the matter in money terms.

68. Where contemporaneous cost records are required to be produced over a long period there is likely to be a considerable time between item (a) and the completion of items (b), (c) and (d). During this time, and where the circumstances warrant it, it is important to have set up real-time claims management systems and processes which the client can operate successfully. BCC has considerable experience and expertise in this area and would assist in ensuring that the systems and processes adopted would subsequently facilitate rapid access to the information and facts.

69. Further information on items (a) to (d) in paragraph 65 above is set out in 3.2.1 to 3.2.4 below.

3.2.1. STATEMENT OF THE CASE UNDER THE CONTRACT

3.2.1.1. CONTRACT INTERPRETATION AND CASE LAW

70. The contractual case is made from the written terms of the contract, terms which may be implied, and the law. BCC is experienced in construing the contract in this way (contract interpretation) and in researching and utilising the case law (law made by judgements in earlier cases) which supports the client's case, whether for making a claim or for responding to a claim.

3.2.2. COLLECTING AND ASSEMBLING EVIDENCE

71. It is often records which provide evidence on daily work locations and tasks, progress, and outputs and costs for affected operations, which prove difficult to locate. The consistent recording of this information in an accurate, meaningful format often proves problematical; but

it is vital when demonstrating/analysing delay and disruption and when quantifying the additional costs and extended time which flow from them.

72. The manner in which evidence is collected and presented is dependent to a large extent upon the provisions of the contract with respect to how additional cost and time are to be determined. The two types of contract in this respect were identified in the section above as

a) Evaluation based on costs actually incurred, and

b) Evaluation based on effect on forecast of cost to completion.

73. Where a) applies the contractor is entitled to be paid the additional cost actually incurred as a result of the event(s) and the additional time which is reasonable under the circumstances. The requirement in respect of collecting and assembling evidence is for (i) location and cataloguing for analysis, historic records of progress and cost, and (ii) managing the collection of future progress, cost, and other evidence possibly over a long period.

74. Where b) above applies, the contractor is entitled to be paid the additional cost and time in accordance with a forecast of the effect of the event(s) on the overall cost and time as they would have been before the event(s) occurred. The requirement in respect of collecting and assembling evidence is for rapid collection and analysis of (i) the submitted programmes, as-built progress records, and the actual resource cost data, so that the information may be used to prepare the necessary forecasts for incorporation into the 'claim'.

3.2.3. DESCRIBING AND ANALYSING WHAT HAS HAPPENED

3.2.3.1. FORENSIC INVESTIGATION / COST ANALYSIS

75. BCC is skilled at the forensic investigations and analysis which must be carried out on the assembled evidence in order to accurately portray what has really happened in terms of the actions of the parties and their effect upon the execution of the works. BCC's firmly held opinion is that this critical task is best carried out by personnel with extensive operational experience in the industry; because they are more likely to have the ability to work out what was actually happening (by reading situations correctly), and they are more likely to know where to find the significant evidence which will be required for substantiation purposes.

76. It is of equal importance that suitable records are available for BCC to process and analyse from a cost perspective so that actual resource levels on site and the outputs they actually achieved may be determined. This cost information is essential if the claim value is to be sustainable.

3.2.3.2. DELAY ANALYSIS / DISRUPTION / EXTENSION OF TIME

77. It is necessary to carry out an analysis of the programme and progress data in order to determine the actual effect of the event(s) which are claimed to have affected the execution of the works. The analysis is not, however, limited to a consideration of these events alone: all events (and other factors) which have affected the works are required to be included in the analysis and the delays attributed to the parties in accordance with the contract.

78. The results of the delay analysis and the cost analysis (of resources and outputs) are used to determine periods of delay attributable to each of the parties and periods when the execution of the works were disrupted by event(s) for which the employer is responsible. Ultimately, the analysis produces a period by which, in accordance with the contract terms, the execution of the works was delayed by the employer event(s) in question.

79. Under most contracts, the contractor will be liable for liquidated damages if he does not complete the works within the time stated in the contract. If he is delayed during the execution of the works by event(s) for which the employer is responsible under the contract, he is entitled to have the delay time in respect of each of those events added on to the time stated in the contract: so that his liability for liquidated damages does not start until the end of the extended time. It is therefore in the contractor's interests to ensure that he receives the correct 'Extension of Time' in respect of each event.

80. The Extension of Time due in respect of employer event(s) is the period (determined in the delay analysis in 75 and 76 above) by which, in accordance with the contract terms, the execution of the works was delayed by those event(s).

81. BCC has the experience and expertise to carry out

a) the forensic investigation and analysis which are required to accurately portray what has really happened,

b) the processing of contract records to produce the cost information needed for evaluation purposes,

c) the analysis which is required in order to determine the durations and the liability for the periods of delay and/or disruption which occurred, and

d) the production of documentation to substantiate the Extension of Time due for each event.

3.2.4. PROPER EVALUATION OF THE MATTER IN MONEY TERMS

82. Different methods of evaluation are applicable to

a) the elements of a claim which deal with a change in the nature or amount of work carried out by the contractor, and

b) the elements where the work remains the same, but the contractor's costs are different to what they would have been if there had been no change.

3.2.4.1. VARIATIONS - CHANGE IN NATURE OR AMOUNT OF WORK

83. The first instance in a) above is a variation and, in calculating the changed price an amount for profit is included within the calculation. Put very simply: for increased work, the contractor is entitled to be paid a profit in addition to the extra cost he incurs as a result of the change; for decreased work the price is reduced by the cost associated with the change and by the profit which goes with that cost.

84. BCC consultants have extensive experience in the proper valuation of variations.

3.2.4.2. LOSS AND EXPENSE - CHANGED COST THROUGH DELAY OR DISRUPTION

85. The second instance in b) above is called 'Loss and Expense' in some contracts. It is the additional costs which the contractor incurs as a result of delay and/or disruption to the work required under the contract caused by change(s) which are the employer's contractual responsibility. In this case, again very simply, because the amount and nature of the work has not altered, the contractor is entitled to be paid only the additional costs he incurs as a result of the changes (i.e. the cost of delay and disruption to the works), without the addition of profit.

86. BCC consultants have extensive experience in the determination of additional costs due as a consequence of

a) prolongation of the contract period (i.e. as a consequence of delays caused to completion by events for which the employer is responsible under the contract), and

b) loss of efficiency as a result of disruption (i.e. as a consequence of inefficiencies caused by events for which the employer is responsible).

3.3. EXPERT ADVICE AND REPORTS

87. It is sometimes of considerable benefit when preparing claims and responses to have the benefit of expert advice and/or an expert report. {An expert in a field is a person who is held to have particular expertise in that field and his opinion on a relevant matter may be used as evidence in support of a party's case.}

88. BCC is experienced in managing the procurement of expert advice and reports, and in using them to best advantage to support a party's case.

89. BCC consultants are also able to provide expert advice and reports in their own fields of expertise.

3.4. CONSTRUCTION ACT PAYMENTS

90. A claim situation which often arises (but which does not relate to how the contract (price) should be altered to accommodate the effect of a change) is one which concerns the interim payments made by the employer to the contractor.

91. The making of interim payments is governed by a section of the Local Democracy, Economic Development and Construction Act 2009, often known as the Construction Act. The Act contains strict timescales for the submission of applications by the contractor and for the issuing of notice(s) by the employer if he wishes to pay less than the amount applied for. In the case of a valid application by the contractor, the employer's failure to comply with the notice provision should prevent it from making any deduction.

92. BCC is experienced in these matters and in assisting parties to make or receive payment in accordance with the Act.

4.0. FORMAL DISPUTE RESOLUTION - TYPES

93. Much is said and written about the importance of avoiding disputes. Whilst a number of contractual disputes are almost inevitable during a contract, what really matters is that the parties should strive to avoid their dispute(s) having to be determined by formal dispute resolution. Indeed, the introduction to this document states "Generally speaking, a primary objective of all parties to commercial contracts must be to avoid the formal dispute resolution process."

94. Before considering how to avoid disputes and in order to better understand the rationale behind the contents of the paragraph above, it will be beneficial to look first at what happens if, ultimately, after all avenues have been explored in negotiations (see later) the parties are unable to agree a settlement and they put the matter in the hands of a third party for a decision on what the settlement should be (i.e. for formal dispute resolution).

95. There are two types of formal dispute resolution:

    a) where the decision of the determiner is final and binding, as is the case with litigation and arbitration, and

    b) where the decision is binding but not necessarily final, as is the case with statutory adjudication. In this case, one of the parties may choose to take the matter on to litigation or arbitration for a decision which will be final and binding.

4.1. FORMAL DISPUTES - FINAL AND BINDING DECISIONS

4.1.1. LITIGATION

96. Contract law is based on the simple idea that if two people (in law a company is equivalent to a person) make an agreement where each promises to do something for the other, then they are bound by that bargain (unless they later jointly agree to change it). If one party does not keep to their side of the bargain, and the other (innocent) party loses out as a result, ultimately the innocent party can take the party in breach to court and obtain an award of money (“damages”) as compensation.

97. The word "ultimately" in the paragraph above is used because in practice, in order to take court action, the innocent party must follow a lengthy process in which it attempts to convince the failing party (i) of its failure to keep its promise(s) and (ii) of its liability to pay a specified amount of money as compensation.

98. If throughout this process the failing party denies it has failed and/or denies it is liable to pay the amount specified, there clearly remains between them a difference (or a dispute). It is a difference/dispute which they had the power to settle by agreement at any time during the process and they would have been the only parties involved in determining the details of the settlement.

99. At the end of the process, with no agreement, the innocent party has only two options - to drop its case or to seek to have the difference/dispute decided by a court.

100. Once the parties place their dispute in the hands of the court (i) they have to prepare their cases in the court format (another lengthy process), and (ii) they make the difference/dispute into a 'formal dispute'. In so doing they lose all of the control they had over the outcome and give the court the power to decide the details of the settlement. The decision of the court is final and binding.

101. Court proceedings (or litigation) are therefore the fundamental form of third party (formal) dispute resolution.

4.1.2. ARBITRATION

102. It is generally accepted that due to the interaction of many issues in construction disputes and the court's obligation to examine all of them in detail, the costs of litigation are high, even if the amount in dispute is low. In addition to employing solicitors and barristers a party will often have to procure expert evidence and the whole process of preparing for court can be a very lengthy one.

103. Since the eighteenth century, as a means of avoiding these high costs and shortening the time taken to a decision, parties have been employing an alternative dispute resolution technique known as 'arbitration' to settle their contractual disputes. Arbitration is a process, now subject to statutory control under the Arbitration Act 1996, whereby disputes are determined by a private tribunal of the parties' choosing. Parties can agree to arbitrate once a dispute has arisen or, more usually, they agree within the contract to refer all future disputes to arbitration should the need arise. The parties agree the rules of arbitration which are to apply, usually by their inclusion within the contract.

104. Under the 1996 Act, an arbitration agreement is defined as "an agreement to submit to arbitration present or future disputes" and the arbitrators decision is final and binding. A party may not instigate litigation if the contract contains an arbitration agreement - except by prior agreement with the other party.

105. Although the Act provides that "the objective of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense, it is usually the case that (as with litigation) the parties seek to put forward the best possible case. Therefore (as for litigation) they employ solicitors, barristers and experts in order to prepare their cases. Unlike Litigation, the parties also have to pay for the arbitrator and the court facilities. It follows that whilst arbitration may prove quicker than litigation, the costs are not dissimilar.

4.1.3. SUMMARY

106. Litigation and Arbitration are the only two forms of third party dispute resolution under which the parties submit their dispute to a third party who will determine and impose a legally binding decision - and the decision is final.

107. The strength of a party's case is the only means it has of influencing the decision, and it is for this reason that parties will (and consider they have to) spend large amounts of money on legal and other expertise to produce and present their cases.

4.2. FORMAL DISPUTES - BINDING DECISIONS - FINAL UNLESS / UNTIL LITIGATION OR ARBITRATION

4.2.1. ADJUDICATION

108. For most of the twentieth century adjudication was a second alternative dispute resolution technique which some parties chose to incorporate into their contracts. In adjudication, as for litigation and arbitration, a neutral third party gives a decision which is legally binding on the parties in dispute. It is usual, however, for a contract to make an adjudication decision binding only until the matter goes to litigation or arbitration. If neither party subsequently refers the dispute to litigation or arbitration the decision becomes both binding and final. The parties are at liberty, by agreement before the adjudication, to make the decision final and binding.

109. However, by virtue of the Housing Grants, Construction and Regeneration Act 1996 ("the HGCR Act 1996") which brought in 'statutory adjudication', most commercial construction contracts entered into after 1 May 1998 have contained the absolute right for a party to have a dispute (which 'includes any difference') resolved by adjudication <u>at any time</u> irrespective of the absence of such an express provision within the contract.

110. Prior to statutory adjudication, it was the contract alone which gave the adjudicator his powers and determined their extent. This did not change after 1 May 1998 and it remains the case, with one proviso: that the framework for adjudication within the contract (the adjudication procedure) meets the minimum requirements stated in the Act. Should the adjudication procedure in the contract fail to meet these minimum requirements then the adjudication provisions within the contract are replaced in their entirety by the statutory 'Scheme for Construction Contracts'.

111. The provisions of the HGCR Act 1996 were amended by the Local Democracy, Economic Development and Construction Act 2009, and it is this modified version of the provisions in the HGCR Act 1996 which apply to adjudication today (together "the Construction Act").

112. Hereafter all references to 'Adjudication' are references to 'statutory adjudication' in accordance with the Construction Act.

113. The key elements of Adjudication are

a) the speed with which the adjudication is started. From issue of a notice by one of the parties (the 'referring party') to the other, the intention is that the adjudicator is appointed within 7 days. The referring party's complete written submission (the Referral) together with copies of documents relied upon, must be issued to the other party (the responding party) and to the adjudicator as soon as the appointment is confirmed.

b) the speed with which the decision is reached (the Act states 28 days from the Referral; which the adjudicator may extend by 14 days if the referring party agrees: further extension requires the agreement of both parties), and

c) the enforceability of an Adjudication decision in a court of law. The courts have unequivocally supported the decisions of adjudicators and provided a decision is made correctly in accordance with the Act, the court does not look into its content.

114. The parties may not agree a longer period for the Adjudication prior to the appointment of the adjudicator.

115. The opportunity to benefit from the 'fast justice' which Adjudication gives has been embraced by the construction industry, and it is now true to say that most matters are resolved in this way. Subsequent references of an adjudicated dispute to litigation/arbitration are rare.

116. It is usual for Adjudications to be decided on a 'documents only' basis, or on documents and very limited meetings with the adjudicator. This makes the written presentation of the cases in the Referral and in the Response paramount.

117. The referring party is at an advantage with respect to the time available to prepare its case because it decides when to issue the Notice of Adjudication (provided the other party has not pre-empted the situation and issued first). It should be noted that the adjudication notice may be issued by either side, it does not have to be the claiming party (although it usually is).

118. The adjudicator does not have much time in which to understand the case because the adjudication procedure must provide for the adjudicator's appointment and for his receiving the dispute details (the Referral) within 7 days of the Notice; and the Response is often required within 7 days of the Referral.

119. If the referring party is to be successful it is essential that it possesses the ability to prepare an easily understood and well-evidenced case for Adjudication.

120. With the Response often required within 7 days of the Referral, if the responding party is to successfully defend its position then a speedy and timely recognition of the issues is vital. This will enable the responding party to provide either a pre-emptive defence to a Notice of Adjudication or a meaningful response in the Adjudication proceedings. As for the Referral, an easily understood and well-evidenced document is required for the Response.

121. BCC has the expertise and experience to provide the support necessary for (i) the production of a clear and well-supported Referral and (ii) the drafting of the appropriate Response documentation within the time required by the Construction Act.

122. BCC will liaise with its client's staff to determine the facts. For the Response this will be done as quickly as possible. Client documentation will be analysed and used to produce the appropriate level of detail and documentation for use in the Referral or Response.

4.3. CONCLUSION

123. Litigation and Arbitration are the two forms of third party dispute resolution under which the parties submit their dispute to a judge or an arbitrator who will determine and impose a legally binding decision which is final. The strength of a party's case is the only means it has of influencing the final decision, and it is for this reason that parties will spend large amounts of money on legal and other expertise to produce their cases.

124. Adjudication is a third form of third party dispute resolution under which the parties submit their dispute to an adjudicator who will determine and impose a legally binding decision but, unlike litigation and arbitration, the decision is not always final. If a party is not satisfied with the outcome of Adjudication it can take the dispute on to litigation or arbitration. If neither party instigates further action the decision becomes final.

125. In recognition of the high usage of Adjudication, further information on its use for the resolution of disputes is provided in section 6.0.

5.0. AVOIDING FORMAL RESOLUTION - NEGOTIATIONS - ADR

126. Anything which happens in respect of attempts at settling a dispute before one of the parties gives notice for its formal resolution by a third party, may be said to fall under the heading of 'negotiations'. In saying this, the more sophisticated procedures such as Dispute Review Boards, Dispute Adjudication Boards, and the like are not considered here because they are outside the scope of this document.

127. The parties are, however, at liberty to include within their contracts any means of avoiding disputes they consider expedient. In this respect some parties have successfully appointed a Dispute Resolution Adviser or Early Settlement Adviser whose function is, when a claim situation arises and when requested, to monitor what passes between the parties and to give his own early and impartial advice on their validity, in order to facilitate negotiations aimed at compromise and settlement and avoid unreasonableness and polarisation. BCC offers this service to parties who require it.

128. In the UK, in reality, the term 'negotiations' covers basic negotiation and two further procedures which the parties might adopt in order to try to settle a matter in dispute without recourse to third party resolution. In what follows these three procedures are referred to as:

    a) Direct Negotiation

    b) Mediation, and

    c) Conciliation.

129. It is by the use of procedure a) and where necessary procedure b) and/or c) that parties are encouraged to reach a settlement and thereby achieve the primary objective of avoiding formal third party dispute resolution with its high costs and long delays.

130. Mediation and Conciliation are now generally referred to as the two types of third party 'Alternative Dispute Resolution' or 'ADR' which are available sitting alongside the principal methods of resolution: Litigation, Arbitration and Adjudication.

5.1. DIRECT NEGOTIATION

131. Direct (or basic) Negotiation takes place between the parties without outside input. Nicholas Gould in his paper on Dispute Resolution called it 'problem solving' and stated "Problem solving between the parties represents the informal, non-binding approach to resolving a dispute, the successful outcome of which is an agreement to 'settle'."

132. Whilst in this basic form there is no outside input, in reality, the process is unchanged if one or both parties introduce advisers (or they jointly employ a Dispute Resolution Adviser). The essential feature is that control of the outcome remains with the parties (unlike litigation, arbitration and adjudication where the parties submit their dispute to another who will impose a legally binding decision).

133. "Negotiation is a process of working out an agreement by direct communication. It is voluntary and non-binding. The process may be bilateral (between two parties) or multilateral (many parties). Each party may use any form of external expertise it considers necessary and this is often described as 'supported negotiating'".

134. It goes almost without saying that the simplest, cheapest and best method for settling a dispute is for the parties to negotiate, i.e. to discuss the matter between themselves, arrive at a mutually acceptable position, and then formalise it into an agreement to settle.

5.2. ADR

135. If the parties have attempted to negotiate the dispute between them and have been unable to reach a settlement, it is a widely held view that there may be advantages to the parties (because they will avoid the high costs associated with formal dispute resolution procedures) if they employ one of the two ADR processes referred to above i.e. they use the services of a third party facilitator who will assist them to arrive at a voluntary, consensual, negotiated settlement using either Mediation or Conciliation.

136. To mediate or conciliate means to act as a peacemaker between disputants. Mediation and Conciliation are essentially informal processes in which the parties are assisted by one or

more neutral third parties in their efforts towards settlement. The facilitators do no judge, arbitrate or adjudicate the dispute. They advise and consult impartially with the parties to assist in bringing about a mutually agreeable solution to the problem. They do not impose a decision on the disputing parties, they assist them to reach their own settlement.

5.2.1. MEDIATION AND CONCILIATION

137. It is clear from the above that mediation and conciliation are essentially the same process in that the third party facilitator(s) are trying to assist the parties to come to their own settlement.

138. The difference between the two is subtle:

a) Mediation is a process where the facilitator simply tries to reopen the communication between the parties and assist in exploring the options for settlement without openly expressing his/her own opinions on the issues.

b) Conciliation involves the same process of reopening the communication between the parties. The facilitator is, however, also expected to arrive at his own evaluation of the issues and to attempt to move the matter forward by introducing his opinions into the discussions between the parties where he considers it will be beneficial.

5.2.2. BENEFITS OF MEDIATION/CONCILIATION

139. The perceived benefits of using mediation/conciliation are as follows:

a) An average mediation/conciliation lasts one to two days compared to trials and arbitrations which last months and sometimes years. It should be pointed out that parties may not be in a position to come to a settlement early in the dispute process and it may take many months before they are in a position to mediate/conciliate effectively.

b) Clearly, a mediation/conciliation is cheaper than a trial or arbitration, especially if, as it can be argued, lawyers are not necessary.

c) Mediation/conciliation is a private process whilst litigation is public and arbitration may become public if there is an appeal. This confidentiality make it appealing to some clients.

d) Mediation/conciliation is less confrontational and may help to maintain the business relationship between the parties. The mediator/conciliator focuses on the parties' interests and needs and encourages them to look for a commercial solution which meets those needs for both parties: as opposed to litigation and arbitration which focus on the parties' rights and obligations and are therefore very confrontational.

6.0. FORMAL DISPUTE RESOLUTION BY ADJUDICATION

140. Section 4 introduced the resolution of formal disputes by statutory adjudication ('Adjudication'). Adjudication is now the civil engineering and construction industry's preferred method of resolving disputes and this section looks in more detail at the salient points which parties who are contemplating the issue of a notice stating their intention to refer a dispute to Adjudication (or are expecting to receive one) should consider and understand.

6.1. WHICH DISPUTES MAY BE REFERRED?

141. In section 3.2 reference was made to the numerous claim situations disputed between the parties during the execution of a contract which were put to one side without either party making a detailed case, and to more significant situations where claim and response documents were prepared. Whilst the first might be very loosely termed a dispute, it is the more significant situations (where at least a claim document has been prepared, negotiations have taken place and a final rejection received) that are held to have crystallised into disputes which a party may refer for resolution in Adjudication.

142. The Construction Act refers to a (single) dispute and not to disputes. It is usually the case therefore that, where more than one previously disputed matter is notified, it is because together they form one dispute e.g. a contractor who is in dispute over the amount unpaid in respect of its final account may argue that it is a single dispute even though the unpaid amount is made up of many different parts, each of which is the subject of a separate dispute.

143. It should be noted that a claim and its submission to the other party do not necessarily constitute a referable dispute. The claim has to be rejected or contested and, in normal circumstances, it must be demonstrable that the each party has had an opportunity to consider the other's position and to modify its own after an open exchange of views in an attempt to resolve it. There is a requirement that the rejection is in clear language and is an obvious refusal. In circumstances where a party refuses to answer a claim, however, this may be taken as rejection and a referable dispute can arise.

6.2. THE NOTICE OF ADJUDICATION

144. The most important document in the adjudication process is the 'Notice of intention to refer a dispute to Adjudication'. It is this notice alone which determines the nature, scope and extent of the dispute which is being notified for Adjudication and defines the limits of the adjudicator's jurisdiction (the extent of the matters about which the adjudicator will be empowered to decide). The notice must also state the remedy which is sought by the referring party.

145. Any jurisdictional issues (party claims that the adjudicator does not have the power to do something or acted outside of the powers he was given) will be determined by reference to the notice. The later documents, in particular the more detailed Referral document, cannot extend the scope of the dispute beyond that set out in the notice.

146. The extent of the dispute may be narrowed or widened only by an express agreement between both parties and the adjudicator. Such agreement may not be implied from the subsequent actions of the parties (submission of documents or arguments).

147. The notice should not to seek to make a dispute out of something which the other party was unaware of or had little or no time to consider. If this happens the other party may have grounds to claim that the dispute in the notice had not crystallised i.e. there is not a dispute, and the adjudication should not proceed.

148. It is also important and in the interests of both parties to note that:

    a) when referring a dispute to Adjudication, a party can refine any arguments it has made previously during negotiations, abandon some of them, and introduce a measure of new argument (provided in its entirety it is relevant to the dispute at hand), as it sees fit

    b) what the referring party may not do is alter fundamentally the nature of the dispute by abandoning in their entirety facts previously relied on or arguments previously advanced, putting forward details which the other party has not seen before, and then contending that because the redress claim is the same, the dispute remains the same

c) the responding party is at liberty to advance in its response to the Referral any form of defence it wishes. The referring party is not limited to restating the defence argument(s) it used previously in exchanges of documents or during negotiations prior to the Adjudication.

6.3. THE REFERRAL

149. The Referral must contain a detailed explanation of the referring party's case in respect of the dispute identified within the notice, together with a statement of the remedies sought. All documentation relied upon in the Referral must be supplied with the Referral document.

6.4. THE TIMETABLE

150. Following his appointment and his receipt of the Referral and supporting documentation the adjudicator will set out a timetable for the conduct of the Adjudication. The timetable will usually include for the issue by the responding party of a Response to the Referral, the issue by the referring party of a Reply to the Response and the issue of a Rejoinder to the Reply by the responding party: Any meeting(s) or visit(s) the adjudicator considers necessary will be included in the timetable. The adjudicator will also allocate the amount of time he requires at the end of the process in order to produce his decision.

151. The Adjudicator may, however, after receipt of the Referral, consider that one submission per party is sufficient, direct accordingly, and set the timetable to suit.

152. The adjudicators directions do not prevent the parties from making additional submission(s) which the adjudicator has not sanctioned. The adjudicator is required to act impartially by the Construction Act and the courts have consistently held that adjudicators are also under a duty to comply with the rules of natural justice. This duty requires them not only to act impartially but also to adopt fair procedures and to give proper consideration to both parties' arguments and submissions. The adjudicator may not ignore these unsolicited submissions but the weight given to them is dependent upon when they are issued within the overall timetable and any prejudice caused to the other party.

6.5. THE RESPONSE

153. The Response is the responding party's opportunity to advance its defence to the case presented by the referring party, and to itself advance any counter-claim. On the assumption that the referring party did not alter fundamentally the nature of the dispute when it submitted its Referral, the responding party should have previously encountered many of the arguments in the Referral and, if it is prudent, will have much of its defence and supporting documentation prepared.

6.6. THE REPLY TO THE RESPONSE

154. It is usually the case that the referring party is generally aware of the details of the defence which the responding party will put forward to the adjudicator in the Response because the defence is substantially that which the responding party has used in negotiations prior to the Adjudication.

155. Under these circumstances the referring party should have little difficulty in dealing with the defence points raised in the Response.

156. However, in the light of paragraph 142 (c) above which states:

"the responding party is at liberty to advance in its response to the Referral any form of defence it wishes. The referring party is not limited to restating the defence argument(s) it used previously in exchanges of documents or during negotiations prior to the Adjudication."

it may be that it is only when the referring party receives the Response that it sees for the first time the details of the actual defence which the responding party is putting to the adjudicator.

157. The Reply to the Response is the referring party's opportunity to deal with the actual defence which the responding party has used and the referring party must be ready to deal with arguments which it had not seen before the Adjudication, including any new counter-claim which the responding party advances.

158. If the counter-claim has merit and warrants it, it may be that the adjudicator will seek the parties' agreement to revise the timetable for the whole Adjudication. [The following is on the basis that this is not the case.]

159. In theory, the Reply should be limited to dealing with defence points which were made in the Response by the responding party, whether they have been considered previously or not, and including dealing with any newly-advanced counter-claim. This is not always the case. Having dealt with the defence points and any counter-claim, it is not unusual for the referring party to make further points which it believes support its own case.

6.7. THE REJOINDER

160. The parties made their cases in the Referral and the Response, and the referring party was able to respond to anything new in the defence in its Reply. In theory, in the Rejoinder, the responding party should simply be dealing only with what the referring party said in its Reply.

161. If, however, the referring party made further points in support of its own case in the Reply (or even if it did not), there is a tendency (rarely resisted) for the responding party to also make additional points in the Rejoinder which it believes support its case.

6.8. COSTS

162. It is usual for each party to bear its own costs in dealing with the Adjudication.

163. The Adjudicator will decide how his costs are to be paid by the parties and they are normally apportioned in relation to success.

164. If the parties have agreed beforehand to permit it, the Adjudicator may decide that one party should pay a portion of the other party's costs in dealing with the Adjudication, again in relation to success.

165. The Construction Act has attempted to negate any contract terms which purport to make one party responsible for all of the Adjudicator's and/or all of the other party's costs whatever the outcome.

6.9. PARTY REPRESENTATION IN ADJUDICATION

166. BCC will act as Party Representative throughout the Adjudication process for either the referring party or the responding party.

167. For the referring party our services would include preparation of the case, service of the Notice and service of the Referral. For the duration of the Adjudication process we would correspond with the Adjudicator on behalf of the referring party (including dealing with any jurisdictional challenges), prepare any submissions which he requires to be made (including the Reply to the Response) and represent the referring party at meeting(s); all as required by the referring party.

168. For the responding party our services would include dealing with any jurisdictional issues, appraisal of the Referral (in conjunction with the responding party) and preparation and service of the Response. For the duration of the Adjudication process we would correspond with the adjudicator on behalf of the responding party, prepare any submissions which he requires to be made (including the Rejoinder) and represent the responding party at meeting(s); all as required by the responding party.