WHEN THINGS GO WRONG - AN ARBITRATOR'S VIEW OF HOW TO MINIMISE CONFLICT

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Inevitably, some contracts will go wrong. It does not seem to matter whether we look at standard form contracts or at contracts drawn up specifically for a particular piece of work. There will be occasions when the interests of the two parties diverge and there will be times when each will understand the contract in a different way.

Of course, with a standard form, the draughters will have done everything they can to anticipate the problems that may arise. As experience develops, they will adapt the wording of the form to deal with new difficulties. Sometimes that will be in the light of practical events, sometimes that will be in the light of changes in the law. Standard forms have the great advantage that usually they have been developed by people with no immediate axe to grind. One trouble with contracts drawn up specifically for a particular task is that, however amicable the parties may be, there is always the thought that an ingenious piece of wording will give one or the other an unsuspected benefit.

In manufacturing and exporting business, the formal contract document may include standard or special forms of contract which run to many pages, perhaps several dozen pages or more. On the other hand the formal contract may be no more than an exchange of letters. Whether disputes are made more likely or less likely by one approach or another is very hard to say. The fact is that some contracts go wrong and there has to be some way of solving problems sensibly and preferably with a minimum of expense of money, time and spirit. Those factors are, perhaps worth emphasising. It is obvious that money and time are important to commercial and professional people. Equally important, I suggest, is the effect of conflict on personal relationships and motivation. It would be difficult to say precisely how involvement in conflict can affect the efficiency and performance of an individual or the organisation in which he or she is working. Certainly there are people who thrive on conflict, but for most of us serious conflict can be severely unattractive, using up valuable management time and creative energy to little or no purpose. Lewis Carroll's Red Queen understood how conflict affects one's mind when she told Alice to run as fast as she could to stay in the same place.

My task is to deliver an Arbitrator's view of how to minimise conflict. The short answer is that, to minimise conflict, it would be best to avoid it altogether. To avoid conflict in a commercial contract, I suggest that neither party should seek to provide for itself an unfair advantage in the wording of agreements, that both parties should be as open as practicable about how they see the work and that decisions should be taken carefully, openly and speedily. Pious words from one, part of whose living is made from other people's problems. Nevertheless, it is a matter of record that the construction industry is beset with conflict, but the specialist areas, mechanical, electrical and chemical engineering, still see very little in the way of disputes, to the point at which it is extremely difficult to find decided cases in which the standard model forms of the IEE/IMechE and of the IChemE have been construed by the Courts. Historically, conflict has not been a way of life in the specialist divisions of industry, at least in part, I suggest, because margins have been more practical. Contracting parties have been able to absorb the consequences of some of their problems.

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When things go wrong. An Arbitrator's view.

An Arbitrator, an Arbiter in Scotland, is only someone that the two parties invite to decide something they are unable, or sometimes unwilling, to decide together. There is law to give effect to that invitation and to the decision that is made, but it is really wrong to talk of "taking them to arbitration" in the way that plaintiffs take defendants to Court. Arbitration only happens because both parties have agreed upon it. That may be after their dispute is known. It may be, as is the case with many standard form contracts, that they have made the arrangements in advance, just in case, so to speak. In England, you do not even have to be bound by an Arbitrator's decision if you agree to seek a non-binding decision[1]. That is a suggestion for avoiding conflict, particularly about some complex issues: Appoint an arbitrator to make a non-binding decision. That will give the parties a decision upon which they can base some further negotiation, a deal if you like. Because the decision will be non-binding, the process can be simple and relaxed. No-one will be trying to seek some forensic procedural advantage, because a settlement, although it will be a strongly informed settlement, will require goodwill.

A conciliator, or an expert brought in to determine a technical issue of some kind, may operate in much the same way as I have suggested. There is a whole spectrum of third party intervention available to those who seek a way out of conflict. The so-called New Engineering Contract, developed by a team for the Institution of Civil Engineers, provides for an Adjudicator. He or she is a person who decides some fairly narrow issues to enable work to continue and may be subject to appeal in an Arbitration later on. Some commodity associations, of which the Grain and Feed Trade Association is an example, have a similar arrangement where an Arbitrator looks into the dispute, sometimes even without lawyers, and makes a decision which can be appealed to an appeal tribunal which is not a Court but part of the Association.

Whether the parties are on the one hand to arrive at their own decision with the help of a conciliator, an expert adviser or a non-binding arbitrator or on the other to have the decision made for them by an adjudicator, an arbitrator or a binding expert, they are in control. The professional will guide them and, in an arbitration will decide what is to be done when they do not agree. Nevertheless, the opportunity is there. There is no need for the conflict that characterises litigation in Court. The parties are in control. The new legislation for arbitration, drafted by the Departmental Advisory Committee of the Department of Trade and Industry, under the leadership of Sir Mark Saville, will make that very clear.

I would be wrong to suggest that any of the third party options will avoid confrontation and conflict. Much arbitration, mediation and conciliation are anything but conciliatory. Parties are sometimes compelled to accept deals which are unsatisfactory simply because the conflict has become too expensive to sustain. Inevitably there will be unscrupulous people who conduct their affairs in precisely that way. Mediation and Conciliation may simply come to an end if the parties cannot be brought together, although there are procedures which

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1. S.16 Arbitration Act 1950 - the "fall-back" position, however, is that an award will be binding. "Unless a contrary intention is expressed therein, every arbitration agreement shall, where such a provision is applicable to the reference, be deemed to contain a provision that the award to be made by the arbitrator or umpire shall be final and binding on the parties and the persons claiming under them respectively."

effectively give a conciliator's recommendation the force of an arbitrator's award if it is not challenged within a fixed time[2].

There is a limit to what a third party, however neutral, can do. He or she can, however, try to persuade the parties that they will get a fair result without acrimony and, indeed, that conflict is likely to be counterproductive, leading only to increased expense which neither party is likely to recover in full.

I have said that the parties are in control. That is true of all the techniques I have mentioned. To exercise that control usefully, however, they need to be in some measure of agreement about how their problems should be addressed. They are entitled to assistance from their own advisers and from the neutral they choose[3]

Let me give some examples of the kind of suggestion that an Arbitrator might make with a view to minimising conflict while moving towards a determination of a dispute.

Often, the two parties in dispute will have asked experts to investigate and report upon technical issues or particular details. An arbitrator may suggest that, instead of having those experts examined and cross-examined at length as they are in the Court, he or she sits down with them at a round table, with or without the parties legal representatives, simply to discuss the differences between them so that the arbitrator can decide. Alternatively, the arbitrator may make a decision based only on files or dossiers submitted by the parties, sometimes with some further questions, sometimes followed by a very brief hearing at which the arbitrator asks questions to clarify what has been written. Those procedures are used, for example, as options in the Arbitration procedure of the Institution of Civil Engineers.

Disputes about performance of plant sometimes can be resolved by an inspection or by tests, conducted in the presence of an Arbitrator and subject to his agreement as to how the test will be done, what is to be observed or measured and how it is to be recorded. I can give you the example of a dispute between the owner of a major manufacturing plant and the repairers of a very large high-voltage electric motor which failed in service. The arbitrator was given drawings and the details of the repair, went to the works where the damaged machine was set up for examination, examined it with representatives of the two parties, interviewed the two representatives, who had been involved in the incident, gave them his award orally before leaving and issued it in written form the following day.

In another reference, about generators, a trial was set up and attended by the arbitrator, during which each party sought to simulate what were alleged to have been the circumstances leading to the failure of a number of similar machines. That was only a part of the reference but it would have been possible for a so-called

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2. This procedure, in which the conciliator is asked to give a recommendation which will be binding on the parties unless one or the other gives notice of arbitration or applies for a writ within a prescribed period, may not necessarily attract all the features of the Arbitration Acts but the agreement to abide by the recommendation, subject to that notice, may be enforceable as is an ordinary contract. Whether or not such a conciliator's decision would be subject to judicial review or other Court supervision is another matter. It could be argued that it was an implied term of the conciliator's appointment that he would conduct himself fairly.

3. That choice may be a simple matter of agreement or it may be made for the parties by an appointing body such as the IEE or other professional institution. There are commercial concerns who undertake to provide mediators and conciliators, but it is probably better for parties to agree their own choice where possible, if only to keep free of fixed notions of procedure.

interim award to have been made, declaring the facts and enabling the parties to consider negotiating the other issues.

Where there is a single topic, the determination of which is likely to affect the entire course of the reference and enable the parties to think again about settlement, that can be determined as a preliminary issue. A well-known technique, which can save a lot of time and money, is the determination of liability as a separate matter of principle, to be followed only if the parties cannot agree with formal determination of the amounts due. Again, that can be done in arbitration, whether binding or not. It can also help to clear the air as a part of an attempt at conciliation. Mediation is not determinative, but it would be practical for parties in mediation to agree to have a report from a jointly appointed expert and to use that report to guide them.

A technique of resolution tried in the United States is the Mini-Trial. An executive of each party sits with a neutral to hear brief presentations of each parties' case, perhaps over a day. Having heard both sides, the executives get together to settle the matter. The neutral may or may not advise. A deal often results. UK ADR specialists have considered the same idea, while UK arbitrators invite executives of the parties to preliminary meeting at which a very similar process occurs. Each party outlines its case and the kind of evidence it expects to call. If the executives can see their way to a deal, that is an end of it. The Arbitrator does not express a view but, if there is no agreement, he or she has a good picture of the way the reference is likely to develop, so that the most practical procedure can be designed to suit the task.

Those are but a few suggestions as to how the parties to a contract can cooperate to make use of a neutral third party to resolve or determine their differences sensibly and amicably without fighting one another in Court. It is fair to say, however, that the distinctions are becoming blurred. A modern Court will encourage the parties to cooperate in simplifying procedure, while arbitration, if the parties want to play expensive forensic games, can become every bit as protracted as the famous matter of Jarndyce against Jarndyce, in Dickens' "Bleak House" - and very bleak it can be. Already, there are people trying to formalise mediation and conciliation procedures and others seeking to work out how to manipulate those procedures in such a way that the whole flexibility and purpose of such approaches is in danger of being lost.

How then shall we minimise conflict when things go wrong?

I suggest that a desirable first step would involve early warning of possible differences, followed by frank and open negotiation before either party has become entrenched in its attitudes, whether for reasons of amour propre or of expenditure and risk.

If that does not succeed then it seems to me that the parties must find someone that they trust to be honest, fair and competent, whether as arbitrator, expert, mediator or conciliator, and place themselves in that person's hands as soon as is practicable and preferably before they commit themselves to a choice of procedure. Then as a three-way team, the best way forward can be discussed. There is yet another type of third party coming on the scene, particularly for some of the larger contracts. That is a disputes adviser, whose sole purpose is to discuss with the parties how best to determine their dispute, leaving someone else to be appointed to do it. How useful that will be remains, I think, to be seen. The important point to remember is that disputing parties, if they agree, can have their problems solved as they wish. Conflict is an expensive indulgence and unlikely to lead to solutions any better that can be found amicably.

Two interesting developments ought to be mentioned. The first is the new Arbitration Bill that has been proposed. The draft is predicated on the principle that parties have a right to choose to determine their differences themselves, using a person of their choice who will settle matters as they wish and not perform according to a rigid formula. If passed into law, it will achieve what was intended in the Act of 1950 but became frustrated by indifferent wording and worse interpretation. It will be a major step forward, substantially in line with international practice.

The second development is a proposal to provide a single set of rules for dealing with disputes in the construction and engineering industries. The initiative was launched at the Society of Construction Arbitrators in late October and it is hoped to combine the best features of a number of existing sets of rules, which may embrace Arbitration, expert determination and a number of other third party methods of resolving disputes. Invitations have gone to the principal institutions, including architects, surveyors and engineers both in civil engineering construction and in the specialist fields of engineering which we espouse here in Savoy Place, in St. James's Park and in Rugby.

I think that may be the first time that we have all been linked together in such an enterprise. If it is successful, another step will have been taken towards minimising conflict when things go wrong.

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