



## **SOCIETY OF CONSTRUCTION LAW**

**ARE WE ALL IN THE WRONG JOB?  
REFLECTIONS ON CONSTRUCTION  
DISPUTE RESOLUTION**

**Professor John Uff QC**

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# **ARE WE ALL IN THE WRONG JOB? REFLECTIONS ON CONSTRUCTION DISPUTE RESOLUTION**

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## **Introduction**

One of the special features of construction law is that it attracts professionals from all parts of the construction industry, as well as different sorts of lawyers, academics and former (and even serving) judges. Many of these participants begin their association in one role, but then become attracted to another which seems to promise more in the way of job satisfaction, or fees. Overall one has a powerful impression that those involved in performing construction activities see their careers as progressing towards management, while those already involved in management see their careers progressing towards dispute resolution, irrespective of the profession in which they started life.

In his address to the Society of Construction Law annual dinner in May,<sup>1</sup> Alan Crane of M4I made the important point that construction lawyers face the choice of continuing to operate in parasitic isolation (not his words) or of joining the industry and trying to resolve its problems. This is indeed a profound choice. He did not, however, go on to suggest how the second alternative could be achieved. That will be one of the objectives of this examination of the industry. For it is suggested that most of us are in the wrong job.

## **Quantity Surveyors**

I start with the easiest proposition to establish, which will command universal support: namely that quantity surveyors have largely taken over the construction industry and are responsible for most of what has gone wrong in the past 50 years. No doubt the proposition that even part of this statement is true would command a large degree of support. However, even if *any* part of the statement is true, it does not begin to explain why the UK construction industry is as it is, and why quantity surveyors have (as I believe) found the opportunity to fill a vacuum in a number of significant areas. Those areas include many of the important economic decisions in the management of construction projects, decisions about mounting and drafting claims and (increasingly) decisions on the merits of claims and disputes pursued through statutory adjudication. Quantity surveyors in large numbers are here to stay and it is no surprise to see the profession expanding into countries with little tradition of quantity surveying, such as North America and Europe.

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<sup>1</sup> 23rd May 2001, Middle Temple Hall.

What job should quantity surveyors be undertaking? As in the case of civil engineers who had humble beginnings at the end of the 18th century, quantity surveyors had equally humble origins at the end of the 19th century, advising contractors on tendering for lump sum contracts. This is said to be the origin of bills of quantities which, for many decades, had no formal existence under contracts (a situation still common in North America and elsewhere). Bills of quantities then took on more significant roles both as a vehicle for calculation of interim payments and doubling as the specification, under the Joint Contracts Tribunal (JCT) with quantities forms of building contracts. These are still lump sum contracts, but under the institution of Civil Engineers (ICE) and other types of contract, the bill of quantities later acquired full contract status, the work becoming subject to 're-measurement'. In the past few decades both natural evolution in forms of procurement and conscious policy have led to a move against bills of quantities, towards milestone interim payments and lump sum contracts of an increasingly turnkey nature. No one today wants to incur the cost of interim measurements, nor to run the risk of interim payment disputes.

An even clearer and obviously beneficial example of improvement in contract practice is in the calculation of escalation (or fluctuation) payments. There was a time (in the early 1970s) when inflation hit 30% and contractors without adequately drawn escalation clauses were going bankrupt. Armies of surveyors and others were employed calculating monthly fluctuation payments on a 'net increase' basis. Then along came Baxter and the NEDO formula<sup>2</sup> and the whole process turned into a much simpler process, with swings generally balanced by roundabouts. The process was also aided by several decades of progressively lower inflation. With these developments, and the demise of monthly valuations generally, quantity surveyors have now progressed (or perhaps gone back) to becoming 'construction cost consultants'. So where is the problem?

Fortunately (or unfortunately depending on your standpoint), the quantity surveying profession has also acquired enormous expertise in how contracts run and how construction economics operate. Of all the construction industry professions, they are uniquely qualified to recognise, quantify and pursue 'loss and expense'; and those facing claims for massive sums of money based on complex factual and legal arguments, must turn to other quantity surveyors to unthread the massive volumes presented to support the claims. As an adjunct to these roles, quantity surveyors have acquired expertise in programming and delay analysis issues and in the contractual issues which go with them. I shall return later to the question whether those who perform these functions are in the right job. However, it is no coincidence that expertise in construction costing should now be seen as including these additional areas of expertise. One thing is quite clear, quantity surveyors as a profession have moved into another dimension from their original job title. The profession is seriously in need of re-labelling.

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<sup>2</sup> See generally, Hudson's *Building & Engineering Contracts*, 11th ed, Butterworths, para 8.057.

## Consulting engineers

Their heyday was in the second half of the 19th century, before the present over-regulated professional structure was established but when the construction of canals, railways, roads and bridges, docks and harbours and major industrial installations required the rapid development of new design techniques. Contractors were regarded as suppliers of labour, most of it manual, and were entirely subservient to the exclusive expertise of the engineer. The gradual acquisition of expertise by contractors was slow and had little support from the engineering 'Institutions' which wielded great power and influence. The attitude of the Institution of Civil Engineers is epitomised by their refusal to recognise reinforced concrete as a proper field of study for civil engineers, leading to the founding of the rival Institution of Structural Engineers, a move which the latter, at least, never regretted. A similar debate took place in the 1980s, fortunately with the opposite result, concerning the admission of engineers whose initial training was in the field of geology. Such debates can now be seen as spectacularly irrelevant to developments in what should be called 'construction engineering', where a large proportion of relevant expertise has now passed to contractors.

This is nowhere better illustrated than in the field of geo-technical engineering where no practitioner can acquire proper experience without working in a hands-on capacity with contractors. The procurement process commonly used for ground investigation shows the extent to which established practices die hard. Contracts for bore-holes, sample recovery, testing and other forms of investigation are still habitually let as though they are contracts to construct defined works, which are accordingly required to be measured and valued in the usual way. Site investigation contracts are let on a variety of forms of contract, not excluding the JCT and the conventional ICE Conditions. Under such contracts, the works are under the supervision and direction of the appointed supervisor, irrespective of the fact that most or all of the relevant expertise (in terms of the proper direction of the works and the need for changes) lies with the contractor.

As a result of treating site investigation as routine construction work, it is routinely subject to competitive tendering in the same way as most construction work, in which contractors compete to quote the lowest possible price for the major cost components, particularly the excavation of bore-holes. The result has been a general and widespread lack of quality and loss of expertise at the top end of the profession. Despite attempts to improve procedures, site investigation continues to produce low quality investigations which are required only to demonstrate minimal compliance to applicable standards, with the works being designed and directed on the basis of the blind leading the sighted. The result is that, at least so long as unforeseen ground conditions continue to be an employer's risk, massive claims continue to be made while ground investigation continues to be subject to budgetary squeeze.

No one involved in ground investigation can fail to be impressed by contrasts between the 'usual' standards applied to routine commercial ground investigation and the Rolls Royce service (accompanied by leading experts)

which is rolled out in the service of arbitration and litigation concerning ground conditions. Who can indeed blame the experts for seizing upon the occasional opportunity to charge at proper commercial rates, rather than having to tender rock bottom prices to secure the job in the first place.

Engineering is, of course, a hugely diverse and numerically large profession, including disciplines from earth moving to electronics, covering both the static and the dynamic. All such disciplines are capable of impacting, to some degree, on construction. The common factor in all engineering disciplines is that they employ a mathematical (as opposed to arithmetical) approach, coupled with a healthy (and usually very necessary) degree of empiricism. Engineers should be ideally placed to lead the construction disputes industry out of the dark ages and into the enlightened world of computerised analysis, whether in terms of critical path analysis or merely document handling. Unhappily, neither potential revolution has yet made much progress, nor have engineers as a profession made a great import on construction law practice, compared to other participants in the construction law industry.

Given that statutory adjudication encompasses time issues and that the engineer can no longer take months or years to decide upon extensions (other than by a refusal), it is surely appropriate that engineers should devote their efforts to devising systems and procedures which can effectively keep track of delays. In the interests of the client, there is a palpable need to be able to demonstrate to an adjudicator, within 28 days, what the true position is in regard to extensions of time, rather than have the adjudicator take a figure out of the air, or simply split the difference. As in many other areas, statutory adjudication requires a radical re-think of contract procedures, and engineers ought to be taking the lead.

## **Architects**

They are the Cinderellas of the construction industry, the one profession currently protected by statutory registration. Historically, this legislation has had a seriously inhibiting effect on what registered architects were able to do, in stark contrast to other countries where architects have dominated the field of construction professionals. This is changing in the UK, but architects are nevertheless way behind the field when it comes to new and innovative career patterns.

Curiously, at the Centre of Construction Law at King's College, architects have always represented the smallest numbers of applicants within the construction industry professions, although it should also be emphasised that those who have taken up construction law in this way have often achieved distinguished results. As a member of the Bar I have always found it most difficult to find adequate numbers of experienced architects to act as expert witnesses or as arbitrators, in contrast to the sister professions of quantity surveying and engineering.

The remarks above concerning statutory adjudication apply with even greater force to 'the architect' under traditional building contract forms. His controlling function, backed up by contractual sanctions, has now gone.

Despite fiercely argued opposition, the architect no longer has effective control of time, cost or quality issues, which can be made subject to the judgment of an adjudicator at any time. So far, the JCT (in common with all other standard contract promulgators) has merely provided more extensive and complex dispute resolution procedures to accommodate the requirements of statutory adjudication. What is needed is some radical re-thinking of the proper role and structure of construction contracts in the post-Construction Act<sup>3</sup> world. If architects do not take a lead here, their role in construction law will be further diminished.

## **Accountants**

They are relative newcomers to construction law, yet their entry should cause no surprise. At present, the accountancy role is regarded as largely confined to quantum issues, but there is no logical reason why accountants should not develop the same level of expertise in construction contract law as quantity surveyors routinely display. Accountants have a long tradition of advising on tax law (although they are invariably keen to emphasise that they are not giving legal advice). Construction law would be a relatively small step to take.

Accountants bring with them very little professional baggage. They are not troubled by issues of 'profession status' and are seemingly impervious to questions of 'established roles' in the construction hierarchy. They seem able to take a broader view of quantum issues by looking at balance sheets and profit and loss accounts rather than star rates and provisional quantities. For those who are neither quantity surveyors nor accountants, there is a suspicion that the two disciplines in fact work at different and irreconcilable levels. I personally look forward to the day when the senior Technology and Construction Court judge will be called in to decide a quantum issue in which a quantity surveyor on one side and an accountant on the other have arrived at entirely different answers, each according to his own professional practice and principles. For the present it is, to say the least, refreshing to have an alternative view on quantum questions, sometimes asserting that the contractor cannot have suffered any loss because his balance sheet shows there to have been none; or on the other hand, asserting that the company accounts demonstrate a much greater loss than could be calculated purely from the bill of quantities.

## **Lawyers**

Their initial role in construction law matters should be in drafting contracts to facilitate the smooth operation of construction projects, the appropriate placing of risk and minimising the incidence of disputes. Unfortunately, since the earliest days of construction contracts, the contribution of lawyers has been in ensuring that the interests of their particular client are protected, so far as legal draughtsmanship can do so. This can be seen in the earliest forms of contract, no doubt drafted by clerks to Public Works Boards and typified by the words

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<sup>3</sup> As Part II of the Housing Grants, Construction and Regeneration Act 1996 is usually known.

of Lord Chief Justice Coleridge, when commenting on the contract drawn up by the Port of Whitehaven Trustees in the following terms:

Now the contract is a contract substantially in the terms which are very common in cases of this sort, whereby the contractor is, if the literal terms of the contract be adhered to, handed over, bound hand and foot to the other party to the contract or to the Engineer of that other party...<sup>4</sup>

This style of drafting has hardly changed, save that, where the contractor's lawyer has had a hand in the drafting, the effect can be the other way around, with contracts seemingly providing that the contractor is to be entitled to bring a claim for additional payment whatever the circumstances. For example, the JCT contracts have always provided the traditional range of means for the valuation of any variation, instruction or change. This is coupled with a provision allowing the contractor to recover any additional 'loss and/or expense' which cannot be recovered through the valuation clauses. And as a third alternative, such provisions are usually stated to be 'without prejudice to any other rights and remedies which the Contractor may possess'.<sup>5</sup> With the aid of the usual implied terms, the contractor will, therefore, naturally be disappointed if he cannot find some means of recovering virtually any loss arguably attributable to an instruction of the architect.

In other cases one finds that both parties have been given the opportunity to bind the other 'hand and foot'. A good example is the seemingly schizophrenic provisions governing risk in ground conditions under the successive ICE Conditions of Contract. Clause 11 traditionally sets out to protect the employer by requiring the contractor to take all the risk; while clause 12 then provides to the opposite effect by allowing extravagantly worded claims, providing the contractor can bring himself within the hallowed words defining conditions which 'could not ... reasonably have been foreseen by an experienced contractor'.<sup>6</sup> The net result is seemingly a guaranteed recipe for dispute, where loss occurs in circumstances which might arguably give rise to a claim. The question we need to ask is whether lawyers undertaking such drafting are in the right job.

Once they have drafted the contracts, lawyers need only sit back and wait for the product of their handiwork to come back to them, in the form of requests for advice about what the contract really means or, more likely, instructions to draft claims or defences to claims arising out of the contracts. This gives rise to the next inquiry as to who should do the job of documenting claims. In such a competitive industry as construction, the degree of overlap and overkill in drawing up formal claim documents is astonishing. First, there will be lengthy documentary exchanges direct between the parties, including presentation of claims for additional money and extension of time, or perhaps disputes about quality. These documents are then liable to be entirely superseded by further claim documents drawn up by claims advisers; and then subsequently superseded yet again by 'pleadings' drawn up by lawyers.

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4 Hudson's *Building & Engineering Contracts*, 4th ed, Butterworths, 1988, vol 2, pp 122, 124.

5 Standard Form of Building Contract, 1998 ed, Private with Quantities, The Joint Contracts Tribunal Ltd, clause 26.6.

6 ICE Conditions of Contract, Measurement Version, 7th ed, September 1999.

Perhaps one of the real benefits of statutory adjudication is that the 28-day timescale will preclude or reduce such excessive duplication of documents. The timescale will not, however, prevent the intended claimant from lavishing as much attention as he can on the claim document before initiating adjudication. Nor will it prevent the parties repeating the process if adjudication leads to (or is substituted by) arbitration. When the case finally comes on for hearing, the task of the adjudicator or the arbitrator is to try to get back to what really happened, as opposed to what is set out in the pleadings and claim documents.

How can lawyers' time be better employed, and how can parties avoid the enormously wasteful and costly process of preparing the huge volumes of documentation usually generated by construction disputes? One answer is that construction disputes should, so far as possible, be channelled into narrow issues capable of precise formulation and resolution on limited amounts of material. To achieve this requires a very different approach to the drawing up of construction contracts and the avoidance of any form of generalised dispute. By way of example, the types of dispute arising under insurance contracts can usually be reduced to a straightforward issue, which may depend on a mixture of fact and interpretation, where the answer will be 'yes' or 'no'. Such disputes can be formulated and brought on for hearing relatively quickly, even though the evidence and arguments may be complex. Similar issues can and do arise under conventional construction contracts. They can be dealt with properly and in short order, whether by adjudication, arbitration or in the courts, provided they are not overlaid by complex factual investigations.

Where lengthy arbitration proceedings are unavoidable, the lawyers' traditional role becomes that of the project manager, organising the most favourable presentation of the available evidence and arguments. Which witnesses should be called and which should not be called? How can the case best be presented and how can the case of the other side best be undermined and destroyed? Can the opposition be lured into running arguments which can be defeated? How can we prevent the opposition discovering and exploiting our weak points? The procedure becomes more like a game of football, or perhaps a military campaign. Given that such considerations require little by way of legal training, and that lawyers do not come cheap, it is then appropriate to consider whether this is the right job for a lawyer, or otherwise how he or she should best be employed. The key to this question may lie with the tribunal.

Ultimately, all construction disputes must be a function of the construction contract. The need for development of a new generation of post-Construction Act contracts has already been mentioned. Surely this is the prime task of construction lawyers, who should be capable of addressing more than just dispute resolution mechanisms. Contracts will need to be restructured on the basis that every issue which can arise under the contract must be subject to 28 day review. The challenge will be to devise a contract structure which makes positive use of the new statutory rights.

## Arbitrators

Traditionally, they have played a somewhat passive role in the process of arbitration, occasionally giving directions but generally waiting until it suits the parties to move the case forward. Arbitrators too, are conditioned to expect each party to appear with its own advocate and team of experts and witnesses, each party having carefully planned its conduct of the proceedings in advance, like two teams competing in an elaborate and slow sporting event. Analogies with test cricket are tempting, but even test matches are usually concluded in five days.

Old habits indeed die hard. The traditional format is largely a product of the 1950s when arbitrators were expected to remain silent at all (or most) times. Now, with the positive encouragement under the Arbitration Act 1996 for arbitrators to ‘take the initiative’,<sup>7</sup> has the time come for the tribunal to make itself heard? Is there any reason why arbitrators should not themselves (subject to the views of the parties) decide upon the procedure and themselves set the order and form of the proceedings?

This, of course, does already happen, although usually in circumstances where the parties are not represented by barristers, and more likely where they do not have legal representation at all. The late Leonard Fletcher, who sadly died in 1999 while still in harness, had a long and distinguished career in which he conducted every form of construction arbitration from local quality disputes to the new Hong Kong Airport Dispute Resolution Board. Leonard practised for many years as a quantity surveyor in Bakewell, Derbyshire, where he was well known both to local contractors and solicitors. When a dispute arose which looked too complex for the local solicitors, the usual advice was to ‘call upon Mr Fletcher’. He would tell the parties exactly what to do and see that they did it. Disputes were resolved quickly and cheaply and no one went bankrupt as a result of legal costs. The same sort of anecdote was told by the late Leslie Alexander, who practised for many years as an architect and arbitrator in Liverpool. Leslie learned the game in the 1930s as assistant to his father, to whom a ‘long’ arbitration meant two days.

The point of these reminiscences is that the excessive technicality to which construction arbitration progressively became subject from the 1950s onwards is not to be regarded as the proper or even usual way of conducting construction disputes. Arbitrators have, in the past, played a much more interventionist role and they should do so again. It may be that bad practices developed during the post-war era as a result of huge investment in construction by public authorities. It will not have escaped anyone’s notice that such clients have almost disappeared from the scene. Construction is now substantially run by private enterprise and clients are no longer subject to the threat of audit. With a healthy and respectful knowledge of history, we should not hesitate to leave it firmly in the past.

What, however, can and should arbitrators do in order to ‘take the initiative’? It should be noted that section 34(2)(g), in which these words appear, is part of

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<sup>7</sup> Arbitration Act 1996, section 32(2)(g).

a list of 'procedural and evidential matters' which it is for the tribunal to decide upon 'subject to the right of the parties to agree any matter' (section 34(1)). Accordingly, unless the parties agree that the arbitrator shall *not* so act, he is empowered to take the initiative 'in ascertaining the facts and the law'. He must also comply with other sections of the Act including 'giving each party a reasonable opportunity of putting his case and dealing with that of his opponent' (section 33(1)(a)). But he is under a positive duty to 'adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined' (section 33(1)(b)). The arbitrator must, therefore, achieve a balance. But it is suggested that this is not a difficult balance to achieve provided that the arbitrator gives the parties a 'reasonable opportunity' to be heard and (perhaps most important) provided he treats the parties with reasonable equality.

So far, little has changed procedurally as a result of the Arbitration Act 1996. One view of sections 33 and 34 is that they are merely 'declaratory' of what has always been the case. If so, I would take the view that arbitrators in the past have certainly not applied these principles to the full and there is now little excuse for not doing so. It is helpful to bear in mind the terms of section 12(1) of the Arbitration Act 1950, which required the parties to 'do all other things which during the proceedings on the reference the arbitrator or umpire may require'. This section was rarely tested to establish the extent of the statutory power so conferred. Arbitrators are no doubt constrained by thoughts of committing misconduct or of facilitating appeals, particularly when being addressed by lawyers. Now, however, the situation has changed, not only with the statutory duties imposed by section 33 of the Act but, more significantly, in terms of the supportive attitude of the courts. Arbitrators should use their new powers and seek to control the proceedings in the way that the statute envisages.

I was pleased to note that a recent review of *The Construction Act: Time for review* lighted upon a comment in my own chapter as being supportive of statutory adjudication.<sup>8</sup> The comment in question, in fact, welcomed the effect which statutory adjudication has had on adjudicators who had previously acted in a somewhat passive role as arbitrators. As adjudicators faced with tight time limits, they had suddenly grown into Titans, demonstrating what a robust tribunal can achieve. That remark was well intended and it is worth repeating that adjudicators ought to carry their adjudicating skills with them when they sit as arbitrators. Even if this is the only benefit of the Construction Act it would have been worth the effort.

## **Adjudicators**

Despite the current prominence given to statutory adjudication, adjudicators are still to be regarded as a junior branch of dispute resolution, because their functions are limited and because the true nature of adjudication is still to be

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<sup>8</sup> Professor John Uff QC 'Is the Construction Act achieving its purpose?' Frances A Paterson and Philip Britton (eds), *The Construction Act: Time for review*, Centre of Construction Law, King's College London, 2000, p 21.

adequately defined. It is still somewhat early to judge whether the claimed huge numbers of adjudication cases represent a beneficial step for the industry as a whole. A recent statistical survey of the impact of the Construction Act on subcontracts provides some interesting data on what has happened during the first two years of the new regime.<sup>9</sup>

My views about statutory adjudication have been published elsewhere and do not need repeating. I have also proposed that adjudication has a proper place within the umbrella of arbitration.<sup>10</sup> The question that arises in relation to the theme of this paper is what job should adjudicators be doing? I adhere to the view that the proper role of an adjudicator is not to decide 'any dispute' at 'any time' within a fixed period of 28 days. While this approach may successfully apply a degree of temporary shock treatment to the industry and discourage non-payment of legitimate claims, the real use of adjudication should be for relatively compact payment disputes and for other issues suitable for summary treatment. In the absence of a power for the adjudicator himself to extend the time to what is necessary to give the dispute proper consideration, adjudicators ought to (as some reportedly do) decline to give a decision on disputes which can not adequately be dealt with, including giving the respondent a reasonable opportunity to deal with the case against him. While the courts have so far declined to intervene (or to refuse enforcement) on human rights grounds,<sup>11</sup> there is surely a professional duty upon adjudicators to have regard to such basic rights (which hardly represent an innovation in English procedure) and to ensure that they are not overridden by the statutory 28-day period.

Given the undoubted success of statutory adjudication as a process, the question naturally arises why arbitrators (who have available to them at least equal powers) have not been pursuing the same or similar procedures, if that is what the parties really want? While statutory adjudication is teaching the arbitration fraternity a lesson, it should also be showing parties and their lawyers what is achievable in practical terms. Certainly, one of the real material benefits of adjudication is in freeing up adjudicators from the constraints which apparently bound them when acting as arbitrators. Having achieved this much, the same adjudicators should continue to conduct arbitrations with the same boldness and resolve.

## **Mediators and conciliators**

In keeping with the holistic approach to dispute resolution, which was the subject of a paper I delivered recently in Dublin,<sup>12</sup> exponents of ADR must be kept within the mainstream. The techniques that they employ form an invaluable part of the means of resolving any dispute, and dispute resolvers ought to have all the available techniques at their command, both in terms of ability and powers. Arbitrators, adjudicators and mediators/conciliators (most of the practitioners belong to all three clubs) should talk the same language

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<sup>9</sup> David Greenwood and Rudi Klein, 'The Impact of the HGCR Act on sub-contract formation: results of some early research', *Constr LJ*, (2001), vol 17 no 2, 122.

<sup>10</sup> John Uff, 'Dispute Resolution in the 21st Century: Barriers or Bridges?' (2001) 67 *Arbitration*, 4.

<sup>11</sup> *Austin Hall Building Ltd v Buckland Securities Ltd* [2001] CILL 1734, TCC.

<sup>12</sup> See note 9.

and be capable of applying their techniques to the same disputes. The goal of holistic dispute resolution should be to resolve each element of the dispute (in an appropriate order) by the most appropriate and cost-effective means, so that the whole dispute is disposed of in the most economic manner. That should be the proper job of all dispute resolvers. I would echo the valuable suggestion of Michael Joyce<sup>13</sup> that ADR should be understood as ‘appropriate dispute resolution’. The definition recently put forward by Derek Roebuck is particularly apposite, when he described arbitration as a process where parties submit a dispute to the arbitrator ‘to resolve if necessary by decision’.<sup>14</sup>

## Judges

I start this section of the paper by paying a warm and well deserved tribute to that specialised branch of the Queens Bench Division which I shall continue to think of as Official Referees. The office was formally abolished by the Courts Act 1972 but managed to survive for another 27 years in the form of judges undertaking ‘Official Referees’ Business’. I hope the term will continue to survive in some equally clandestine fashion. I strongly deprecate the practice of changing names simply because the office in question has changed out of all recognition. Parliament has, after all, thrived under the charge of a Speaker who does not speak and the Court of Appeal has continued to go from strength to strength under a Master of the Rolls who ceased to preside over the Rolls some centuries ago.

The Technology and Construction Court, as it should now be called, is unique in the world in producing a specialised jurisprudence which is now systematically and enthusiastically reported. The judges are undoubtedly doing the job they should be doing, particularly now that the hearsay of *Crouch*<sup>15</sup> has been swept away by *Beaufort v Gilbert-Ash*.<sup>16</sup> One of the cruel twists of history is that this occurred almost on top of the decision to abolish (or rather not to re-enact) the court’s discretion to refuse a stay in the face of an arbitration clause on the ground that this might be distasteful to Brussels. The result, unhappily, was that the courts could no longer be used to solve the ‘multi-party’ problem, since any party could obtain a stay as a matter of right. Thus, in the absence of consent, the industry has been permanently deprived of the opportunity of asking a judge of the Technology and Construction Court to open up and review certificates, grant extensions of time and do all things necessary to secure justice in two or more related contracts. A comprehensive solution through the medium of arbitration is still lacking, and no machinery for multi-party adjudication exists at all.

One thing which the judges, both in the Technology and Construction Court and the Commercial Court, now strive to avoid is interfering with the process of arbitration, save in the most clear and obvious case meriting removal. So much was established prior to the Arbitration Act 1996.<sup>17</sup> Now the 1996 Act

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13 Chartered Institute of Arbitrators, North East Branch meeting, 8 June 2001.

14 Derek Roebuck, *Ancient Greek Arbitration*, The Arbitration Press, 2001.

15 *Northern Regional Health Authority v Derek Crouch Construction Co Ltd* [1984] QB 644, CA.

16 *Beaufort Developments (NI) Ltd v Gilbert-Ash NI Ltd* [1999] 1 AC 266, HL(NI).

17 See *Three Valleys Water Committee v Binnie* (1990) 52 BLR 42, GBD (Comm Ct).

follows the UNCITRAL Model Law<sup>18</sup> almost to the letter by providing that ‘the Court should not intervene except as provided’ by the Act.<sup>19</sup>

There is, unhappily, one area in which the judges, both of the Technology and Construction Court and the Commercial Court, are in the wrong job. In entertaining appeals on points of law from arbitrators, even under the supposedly tough regime of the Arbitration Act 1996, the courts continue to do violence to the agreement of the parties that their disputes shall be finally determined by a private consensual process and by a tribunal of their choice. What possible grounds can there be for allowing the decision of an arbitrator, reached after due process in which the parties are given at least a reasonable opportunity of putting their case and dealing with that of the opponent, for the court then to exert a power to reconsider, confirm, vary or reverse that decision merely on the ground that a judge is persuaded to take a different view of the law? How can this possibly accord with any notion of party autonomy?

The argument is not new. Professor Sir Roy Goode in his 1991 Freshfields Lecture,<sup>20</sup> arguing against the application of the right of appeal introduced under the Arbitration Act 1979 to international cases, described the situation in this way:

Where, then does this leave us? The parties to a contract, who have chosen arbitration in order to secure informality, finality and confidentiality, find all their expectation frustrated because the judge considers that an issue of law in their private dispute raises questions of general importance which will help *other* parties in *future* cases and will add to the clarity and certainty of English commercial law. Now I am perfectly happy to accept the underlying premise that English commodity associations and English arbitrating parties share a burning enthusiasm to enrich English jurisprudence – or that if they do not, then they jolly well should! But why should foreign parties be exposed to the delay, the expense and the breach of confidentiality involved in an appeal to the Court? Why should such parties have to face the uncertainty of a procedure so utterly dependent on judicial discretion? Why, in short, should parties to an international commercial arbitration be served up as cannon fodder for the English legal system? As that great lawyer Lord Devlin sardonically remarked: “The next step would, I suppose, be a prohibition placed on the settlement of cases involving interesting points of law.”<sup>21</sup> If there is indeed a general interest in the authoritative determination of a particular issue there should be no difficulty in organising an agreed test case in litigation or arbitration. If no two parties can be found who are willing to initiate a test case, it suggests that the point is not of such interest after all except, perhaps, to the academics and the judges!

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18 The UNCITRAL Model Law on International Commercial Arbitration, 1985.

19 Arbitration Act 1996, section 1(c) and see UNCITRAL Model Law, article 5.

20 Roy Goode, ‘The Adaptation of English Law to International Commercial Arbitration’, (1992) 8 *Arbitration International* 1, p 10.

21 *The Judge*, Oxford University Press, 1979, p 106.

Since then, we have had lengthy debate over the drafting of the 1996 Act, in which Sir Roy Goode continued his implacable opposition, without success, save for the addition of a few words inserted as section 69(3)(d), providing that leave to appeal shall be given only if the court is satisfied: ‘... that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question’.

Perhaps some thought that the words ‘just and proper’ contained within them the same seed as was found in the words ‘just and reasonable’ which initiated the progressive collapse in the application of the law of negligence to defective buildings.<sup>22</sup> If so, they would be sadly mistaken at the result, which is indistinguishable from the position under the 1979 Act. Even the requirement of section 69(5) (court to determine an application for leave to appeal without a hearing unless one is required) has had little or no effect on practice, which has reputedly gone back to the bad old days of hearing the application for leave at the same time as the appeal itself. So much for party autonomy.

The present position with regard to appeal seems to be somewhat worse than the situation which existed prior to the Arbitration Act 1979 and which was found to be so seriously wanting as to call for the intervention of Parliament. The debate leading to the 1979 Act concentrated on the perception that London was no longer a suitable venue for international arbitration, and ICC arbitration in particular. This followed the much publicised ordering of a special case to be stated by ICC arbitrators in 1972.<sup>23</sup> The root cause of the problem was that English law regarded as void any agreement to preclude an application to the court for case stated, as being (supposedly) against public policy.<sup>24</sup> For most of the 20th century, during the great period of development of English arbitration law, appeals by case stated had been under relative control by the courts, who exercised a discretion on whether to order a case.

This was all changed by the leading case of *Halfdan Greig v Sterling Coal*<sup>25</sup> where, in 1973, Lord Denning reversed Mr Justice Kerr who had supported the decision of very experienced shipping arbitrators who had refused to state a case in their discretion. In doing so, the Court of Appeal laid down new guidelines which substantially enlarged the circumstances in which the Court would order a case to be stated. Mr Justice Kerr, as part of his reasoning, included the fact that the issue in question was ‘one which is well within the experience and capacity of this tribunal, which has great experience of legal disputes relating to shipping matters, including of course, any questions of construction of agreements in this field’. Had the decision of the Court of Appeal gone the other way, effectively reducing the incidence of appeals, perhaps history would not have taken the course that it did.

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22 See *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1985] AC 210, p 241 (Lord Keith).

23 Unreported but see lecture by Johnny Veeder QC to Worshipful Company of Arbitrators, 1996.

24 *Czarnikow v Roth Schmidt and Co* [1922] 2 KB 478, CA.

25 *Halfdan Greig & Co A/S v Sterling Coal and Navigation Corporation and AC Neleman's Handel – en Transportonderneming (The Lysland)* [1973] 1 Lloyd's Rep 296, CA.

It is also interesting to note that in 1977, when the call for a new Arbitration Act was already in evidence, Mr Justice Kerr again criticised the effect of appeals by case stated in the following terms:

There are nowadays many complaints that the special case procedure in commercial arbitrations is being abused. Special cases used to be the exception, but they are becoming the rule and increasingly frequent as a means of delaying the speedy resolution of commercial disputes for which arbitrations are designed, and which the business men themselves want when they agree to London arbitration. Such complaints come from arbitrators and business men who believe in the importance and usefulness of this procedure in appropriate cases, but not as a means of merely gaining time. Again and again they find, and this Court finds, that in these times of economic difficulty respondents with weak cases use the decision of the Court of Appeal in *Halfdan Greig v Sterling Cole* merely as a means of gaining time in order to postpone a final award against them. In the result we are in danger of suffering a loss of reputation in our system of commercial arbitration.<sup>26</sup>

These seemingly historical observations now acquire more relevance, as it can be seen that we are moving back towards a situation in which applications for leave to appeal are becoming more frequent.

So what has changed? Three things only. First, Parliament was finally persuaded in 1979 that it was proper, in an international case, to recognise the rights of the parties to contract out of appeals, at least in limited circumstances. These limitations were subsequently swept away, by a side wind, in the Arbitration Act 1996, when the right to contract out was finally established.<sup>27</sup> The second change is in the ‘two-stage’ appeal procedure by which an initial application for leave is intended to filter out anything but clearly meritorious appeals. Although replacing the previous two-stage system, the grant of leave to appeal should be much more sparing than the former ordering of a special case. It is this aspect of the new regime which appears to be operating too liberally at present. Thirdly, however, it must not be forgotten that the present regime (by definition) allows the loser to seek to appeal. There is a loser in every case. Part of the attraction of the case stated procedure was that the application had to be made to the arbitrators or to the court *before* the award was delivered. The arbitrator would then deliver his opinion which could be the subject of appeal. What a party would wish to avoid at all costs, is applying for case stated only to find that it had won! In the result, the old procedure automatically ruled out a substantial proportion of cases where the losing party decided to take a chance.

Overall, it would be difficult to say that the volume of appeals is materially reduced from pre-1979, given that even an application for leave is a form of appeal which necessarily holds up finalising the proceedings. There will doubtless come a time when England will again review its policy on appeals. When it does so, there can be little doubt that any movement will be back

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<sup>26</sup> *The Kavo Peiratis* [1977] 2 Lloyd’s Rep 344, QBD (Comm Ct), p 349.

<sup>27</sup> Arbitration Act 1996, section 69(1).

towards international normality and the general exclusion of appeals. When that time comes, the judges will be able to concentrate on their proper job of supporting the arbitration process.

## Conclusions

Starting with the drafting of contracts, it is hardly necessary to develop the argument that they should be drawn up utilising both legal and technical/construction skills. This is the way in which the New Engineering Contract (ECC) was drawn up. Unfortunately, in my experience at least, this contract can prove to be just as adversarial as any other. When the 'compensation events' are analysed it is difficult to see why substantially the same disputes should not arise as under the ICE Conditions, at least in relation to matters such as valuation of variations ('changes to works information' in the ECC), late or conflicting instructions or site conditions which an experienced contractor would not have made allowance for (ie unforeseen conditions). What has been suggested in this paper is that there should be a different objective in drafting contracts, namely of insuring that such disputes as may arise are capable of rapid decision (on a yes – no basis) by reference to clearly defined criteria.

In the case of alleged unforeseen ground conditions, there are many suggestions in the literature as to how an appropriate clause could be drafted. One solution is to place all risks of the site squarely on the contractor, but that has been seen not to work and to give rise to alternative claims in extreme circumstances.<sup>28</sup> An alternative approach is to define a detailed set of 'reference conditions' to which the tender is deemed to be referable. Any conditions encountered which depart materially from these defined conditions would be a ground of claim. It should be possible to apply the same approach in principle to other sources of disagreement, with the objective of reducing the dispute to one which is readily formulated and quickly resolved.

The root cause of many claims and disputes under construction contracts is the failure to place risk plainly on one party or the other. Where the possibility of mounting a claim after the event exists, the contractor can afford to take the risk by reducing his tender, but knowing that he will need the assistance of the claims branch of the industry if he loses out. Would it not be more beneficial all round if such risks were placed firmly and squarely on the contractor, so that the skills of the quantity surveyor could then be employed, not in trying to recover losses after the event if the risk eventuates, but in calculating the price for taking on the risk under the contract.

The clear and unequivocal placing of risk on one party or the other is consistent with the suggestions made above for the drafting of post-Construction Act contracts. These must be drawn up on the assumption that anything which is vague or uncertain may be the subject of a summary and temporarily binding decision which may surprise and inconvenience one party, if not both. Routine disputes about valuation may benefit from the threat of adjudication, which can be seen as creating an incentive to agree. More

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28 See *Mitsui Construction Co Ltd v Attorney General of Hong Kong* (1986) 33 BLR 1, PC.

complex matters, particularly those concerning quality, may be put beyond the reach of the adjudicator by clear and ‘dispute proof’ drafting. It should not be forgotten that English law supports and indeed encourages the achievement of contractual finality through devices such as final certificates, which are untouched by the Construction Act.

Given that delays are likely to occur under any construction project, extension of time issues should also be capable of being resolved within the contract framework, or at least of being reduced to narrow issues to be placed in the hands of dispute resolvers. All arbitrators will be familiar with critical path techniques applied by experts on each side in a delay dispute (usually reaching diametrically opposed conclusions). There is no reason why these techniques should not be applied in a consensual manner within the contract and on a real-time basis, in order to generate a regularly updated analysis of employer and contractor delay periods.<sup>29</sup> The difficulty, of course, is in agreeing or determining the appropriate input data for the programme. However, given an agreed baseline programme, it should be possible to utilise the skills of programmers to resolve disputes during the contract or within a short time after completion, rather than by way of complete reconstruction involving newly created programmes, sometimes years after the event.

Returning to the original theme of this paper: what jobs should quantity surveyors, engineers and architects be doing? I suggest that, in addition to restructuring contracts to regulate the nature of disputes which can (and will) arise, they should also be engaged in creating roles within the contract structure which they, uniquely, can fulfil. In the case of quantity surveyors this should include identification and valuation of risks under the contract and (in conjunction with accountants) devising appropriate and fair means of valuing cost or loss within the terms of the contract so as to minimise subsequent disputes. Engineers and quantity surveyors should provide the expertise to achieve proper management of delay and extension of time issues, again within the contract structure.

Arbitrators, adjudicators, mediators and other dispute resolvers should, as an overriding objective, take on the aim of resolving any dispute by the most appropriate means or combination of means. All dispute resolvers should regard it as part of their function to take the initiative, not only in ascertaining the facts and the law (subject to any contrary agreement of the parties) but also, crucially, in proposing appropriate means of dispute resolution other than those initially agreed by the parties themselves.<sup>30</sup> Disputes should be formulated and resolved in a logical and sequential manner using appropriate dispute resolving powers and techniques, all under the holistic umbrella of arbitration.

If a point of law arises during the course of arbitration proceedings which the parties consider should more appropriately be decided in court rather than by the appointed dispute resolver, the parties have the right under section 45 of

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<sup>29</sup> Jeremy Winter and Peter Johnson, *Resolving Complex Delay Claims*, a paper given to the Society of Construction Law in June 2000, summary available from SCL.

<sup>30</sup> Refer to discussion of case experiences at Chartered Institute of Arbitrators, North East Branch meeting, 8 June 2001.

the Arbitration Act 1996 to refer the matter to court. This mechanism should be regarded as a sufficient safeguard where both parties (or one party and the arbitrator) consider that the point should be decided in court. The notion of 'appeal' from an arbitrator on a point of law continues to relegate England and Wales to the bottom of the league in terms of arbitral finality. Section 69 of the Arbitration Act 1996 will, in due time, be repealed. That time cannot now be far off. The proper role of the judges should be to support and guide the process of consensual dispute resolution, not to interfere with it or to take over its main function.

Finally, to return to the question posed at the outset, how can lawyers help to resolve the problems of the construction industry? It is suggested that construction lawyers occupy a unique position in having the ability, collectively and individually, to bring about structural changes of the sort proposed in this paper; or to put the matter negatively, without the support of the construction lawyers, few of the changes discussed stand any hope of realisation. Given that English construction contracts and English construction law professionals seek to operate in a wide overseas market as well as at home, there is surely a powerful incentive to pursue enlightened reforms, and to promote the best interests of the industry from which we all draw our daily bread.

**Professor John Uff QC** is a practising barrister, arbitrator and Nash Professor of Construction Law at King's College, London.

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