

HOW FINAL SHOULD DISPUTE RESOLUTION BE?

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1. *Interest reipublicae ut sit finis litium.* Although a banned language, the Latin neatly expresses the principle that dispute resolution should indeed be final, but subject to just a few exceptions. It is, of course, the exceptions which create the problem.
2. Part of that problem is that we are dealing not with one dispute or one class of dispute, but with an industry. It is a commonplace that dispute resolution (DR) has, in the last few decades become a major growth area in the field of construction, such that it now occupies a major slot in any course on construction law. It has been suggested that dispute resolution is in fact the core subject of construction law and that the study of law of contract and tort, standard forms and management issues are only minor components which will automatically be swept up in the study of DR. This is not a view that commands universal support, and certainly not mine.
3. The growth that has occurred has been both in the numbers of disputes brought and in the number of DR procedures available, which now produce 2 or 3 alternatives at almost every stage. In terms of the volume of disputes (under whatever procedure) a distinction needs to be drawn between the numbers of primary disputes and of secondary disputes in the form of challenges, either to the process or to the result, including disputed enforcement proceedings. It is with these secondary disputes, or “*disputes about disputes*”, that this paper is concerned. While they have a professional and social purpose in ensuring that DR complies with the applicable rules, they naturally give rise to the question addressed in this paper: to what extent should challenges to the process or to the result be allowed; or How Final should Dispute Resolution Be?
4. There is a perception that things were different in the past, when the construction industry was run by engineers and architects and disputes were resolved round a table

without the assistance of lawyers or quantity surveyors. It is instructive to examine the disputes industry pre Circa 1996 to see what has changed and what has not. The first point to make is that the standard forms then in common use contained serious restrictions on what could become the subject of a formal dispute. For example, the JCT Forms, up to 1980 contained a conditional embargo on defects claims after the giving of the Final Certificate, an issue which led to at least two major House of Lord decisions¹ before the bar was progressively lifted. There were, as a result, many secondary disputes as to whether defects claims could be pursued at all.

5. The ICE and FIDIC forms made no provision for a final certificate which barred claims, but instead contained a regime which made the Engineer's decision on a dispute a condition precedent to arbitration or litigation, which could not usually be pursued until after completion. This limited the incidence of primary claims, but certainly promoted "secondary disputes" about whether claims could be pursued and when. This simple device (now entirely removed as a result of the statutory right to adjudication) effectively placed the engineer in control not only of the physical works but of the contractor's cash flow and the interim resolution of claims². The requirement for an engineer's decision a condition precedent to the right to proceed to arbitration gave rise to a plethora of decisions, both in the English Courts and in a succession of published and unpublished Arbitration awards (many from ICC cases) on whether particular disputes had been properly referred so as to give the Tribunal jurisdiction. This sub-topic of Dispute Resolution gave rise to many articles and academic writings³ which are still relevant under current International Contracts using earlier versions of the FIDIC Form of Contract.

Technology and Construction Court

6. Once these hurdles had been overcome the parties, pre 1996, usually had a classic choice between arbitration or litigation in what was once called the "*Official Referees*" Courts, now the TCC. In both cases, as with the forms of contract, the general approach was that decisions were to be final, with only a few exceptions. In

¹ *East Ham v Sunley* [1966] AC 406, *Kaye v Hosier & Dickinson* [1972] 1 WLR 146.

² There were contractual exceptions allowing arbitration on disputes about certified sums, but the proceedings were necessarily cumbersome and the numbers of such "*interim arbitrations*" was very small.

³ See I.N. Duncan Wallace: *Construction Contracts, Principles and Policies in Tort and Contract* (1986) Vol. 1, Chapter 18.

the Official Referees' Court, it had been the rule for many years⁴ that no judgment, order or decision of the court should be called into question by appeal or otherwise, for the simple reason that the subject matter was regarded as too complex to entertain any further challenge. However, two exceptions were introduced. First, to avoid loss of business, an appeal on fact relevant to a charge of breach of professional duty (professional negligence) was allowed; and second there was a general right of appeal on "a point of law"⁵. The way the rules were dealt with in practice is illustrated by the successful appeal (from the Deputy Official Referee) in the landmark case of *Peak Construction (Liverpool) v McKinney Foundation*⁶ whose facts are well known. The Court of appeal concluded that the judge had

"acted without any evidence or upon a view of the facts which could not reasonably be entertained" and that the primary facts "not only do not justify [the finding] but lead irresistibly to the opposite inference or conclusion".

This did not fall within either exception but was resolved by application of the principles of judicial review, by which a decision could be set aside on the ground that no judge properly instructed could have come to the decision given⁷. The rules permitting appeals were then progressively changed, in 1988 to allow an appeal on fact with leave⁸, and again in 1999 to require leave (in common with other courts) for an appeal on a point of law, now bringing the TCC into line with the rest of the High court.

7. In the two decades up to 1999 it is interesting to recall that the TCC experienced an enormous growth of business and generated many appeals of far-reaching importance to the law generally. The growth can be seen in the number of judges which in 1980 was three: Sir William Stabb QC (Senior OR), HH Judge Lewis Hawser QC and HH Judge Edgar Fay QC who retired in that year, to be replaced by HH Judge John Newey QC. By 1990 the number of judges had grown to seven, and was to reach nine in 1994. The main reason reasons for this growth in business was the incidence

⁴ Since the Administration of Justice Act 1932 at least.

⁵ RSC Order 58, Rule 4(1).

⁶ (1971) 69 LGR 1, 1 BLR 114.

⁷ *Edwards v Bairstow* [1956] AC 14. In more modern times attempts to apply judicial review principles to adjudication have not so succeeded: see Julian Bailey Public Law and Statutory Adjudication, Const L J 2008 24, 461 and *Galliford Try v Michael Heal* (2003) 99 Con LR 19 and *GPS Marine v Ringway* [2010] EWHC 283, TCC

⁸ See *McAlpine v McDermott* (No 2) 58 BLR 61

of a number of enormous “multi party” cases involving multiple claims and cross-claims in contract and tort arising mostly from defects claims on major projects⁹. This particular area of growth was relatively short-lived and multi-party cases began to fall out of fashion after *Murphy v Brentwood DC*, decided by the House of Lords in 1990¹⁰. However, the overall volume of litigation did not subside, the total number of judges reached an all-time peak of ten with the appointment of Mr Justice Dyson, as he then was, to head the Division in 1998.

8. Appeals on issues of law during this period gave rise to decisions of the House of Lords in *Anns v Merton*¹¹, *Peabody v Parkinson*¹² *Murphy v Brentwood*¹³ and *St. Martins v McAlpine*¹⁴. At the same time there were, after 1988, a very small number of appeals on fact, a notable example being the long-running case of *McAlpine v McDermott*¹⁵. It seems ironic that, of all the tribunals now available for construction disputes, the only one in which an appeal on fact is permitted is that which is likely to have weighed the evidence most carefully—the TCC.

Arbitration

9. Turning to arbitration, its recent history can be stated shortly. Since the mid 19th Century it had been settled that an award of an arbitrator could not be impeached on the grounds of error of fact or law¹⁶ subject, however, to a form of judicial intervention called “case stated”¹⁷. It was through case stated that arbitration was able to generate a major part of English commercial law, including construction cases such as *Northern Hospital Board v Bickerton*¹⁸. In fact, until 1979, the notion of an “appeal” from an arbitration was somewhat illusory, because awards were delivered

⁹ Most of these cases settled after a period of hearing coupled with negotiation: two of the most notorious were *Cory v Wingate Investments (London Colney)* involving some 10 parties, closely followed by *Black & Decker v WS Try* involving at least 8 parties. Both cases were heard in 1983 in the only venue that could be found as to how so many counsel, solicitors, witnesses and experts: the basement (ex billiard room) of the National Liberal Club. A photograph exists of the Court Room in which many well known barristers are pictured, many of whom later went onto the Bench.

¹⁰ [1991] 1 AC 398.

¹¹ [1978] AC 728.

¹² [1985] AC 210.

¹³ [1991] 1 AC 398.

¹⁴ [1994] 1 AC 85.

¹⁵ (1992) 58 BLR 1.

¹⁶ Mustill & Boyd Commercial Arbitration, 2nd Edition 1989, p.439.

¹⁷ Arbitration Act 1950 s 21

¹⁸ [1972] WLR 607

without reason, usually consisting of nothing beyond recitals and the result¹⁹. By 1979 concern that case stated “appeals” were driving away international cases led to a new Arbitration Act which ushered in the concept awards with reasons and a closely regulated system of true appeals on points of law. The same appeals regime was carried through into the Arbitration Act 1996 where, after 3 decades of bedding in, the now settled approach to leave is such that few cases of any commercial importance now get through to the courts, certainly in the construction field.

10. What has survived all the changes in arbitration law, and is now of increasing importance in the wider fields of dispute resolution as well as international arbitration, is the principle that no award or decision will be allowed to stand where the tribunal has committed what was once known more directly as “misconduct”²⁰, now called “serious (procedural) irregularity”²¹ or in other parlance, lack of due process or breach of natural justice. As an early but classic illustration of the principle I can take a case which would never have got off the ground but for the faith of the arbitrator that, if he explained everything, the court would see it his way.

11. In *Fox v Wellfair*²² the arbitrator, who was a surveyor and a barrister, had delivered a short form award, apparently entirely at variance with the evidence given, but devoid of reasons. When challenged, he volunteered to the Court a full account of how he had arrived at his conclusions. This led the Commercial Court (and the Court of Appeal) to set aside the award and remove the arbitrator for misconduct in having failed to observe the principles of natural justice. The arbitrator’s particular error was not in concluding that the expert evidence called was a “try on” (which he was entitled to conclude) but in keeping silent while the parties naturally thought that unchallenged evidence would be accepted. As Lord Justice O’Connor robustly put it, what had happened was that the arbitrator had given evidence to himself and not told

¹⁹ One of the most famous examples in the construction field was the award in *Mitchell Construction v East Anglian Regional Hospital Board* which commenced in 1972 and ran for 260 days over some three years. The award, after appropriate recitals stated only that “*The claim is dismissed.*”

²⁰ Arbitration Act 1950 s 23

²¹ Arbitration Act 1996 s 68

²² *Fisher v PG Wellfair* [1981] 2 Lloyds Rep. 514

the parties²³. The principle still holds good in regard both the arbitration and adjudication decisions, where natural justice requires that the parties have the opportunity to deal with all the material which the Tribunal intends to take into account. The case also has relevance on the issue whether and to what extent an arbitrator or adjudicator can make use of his own expertise in a specialist field.²⁴

12. To illustrate what has changed and what has not changed in 30 years it is interesting to look a little further at the cases that were current in circa 1980, which can be read very conveniently in a single source—volume 15 of the then relatively novel Building Law Reports. They were novel because decisions of the Official Referees were usually to be seen only in unofficial transcripts. The BLR were launched in 1976 by the enterprising (now late) Dr. John Paris and started life as a series of “themed” volumes, the first volume being on set-off and damages for delay²⁵. It was not until Volume 15, published in 1981, that the chosen theme was arbitration. Of the nine cases there reported, one was a decision of HH Judge Edgar Fay QC on an appeal by way of case stated²⁶ concerning the workings of Clause 23 of the 1963 JCT form²⁷; two cases concerned the court’s discretion to stay proceedings for arbitration (a discretion finally removed by the Arbitration Act 1996); one case concerned the anomalous right to challenge the arbitrator’s award on costs²⁸ (again no longer available); and four cases concerned “misconduct” or “serious irregularity”. Interestingly, in three of these four cases, the irregularity was sufficiently serious, involving breakdown of confidence in the impartiality of the arbitrator, for the court to order his removal²⁹.
13. The final case, in which the arbitrator’s conduct was upheld by the court, was conducted by the legendary pairing of the late Norman Royce as arbitrator and Mr.

²³ The Arbitrator, Mr Spencer Rogers claimed long after that Lord Denning, who presided at the appeal, said to him at a social function “Spencer, you were right and we were wrong” The account is, however, unsubstantiated. It is an interesting question whether an award would be set aside today on the same grounds.

²⁴ See more recently *JD Wetherspoon v Jay Mar Estates* [2007] BLR 285, where a rent review arbitrator was held entitled to rely on own assessment without giving parties opportunity for further comment

²⁵ and including the first accessible report of *Peak v McKinney*, which had been decided in 1970

²⁶ under section 21 of the Arbitration Act 1950

²⁷ *Henry Boot v Central Lancashire New Town Development Corporation*, 15 BLR 1.

²⁸ *Thyssen (GB) v Afan BC*.

²⁹ *Pratt v Swanmore*, *Maltin v Donne Holdings* and *Modern Engineering v Miskin*.

John Tackaberry³⁰ of Counsel (as he then was) in support.³¹ The arbitration concerned 83 allegedly defective roofs and the issue was whether Mr. Royce could properly deal with the case by hearing evidence concerning a maximum of 25 roofs, to be agreed between the parties or decided by him. The issue also came before the court by way of case stated. The question for the court was whether the arbitrator had power to act as he proposed, which the court (Robert Goff J) answered in the affirmative. In the course of the judgment the judge observed that, while the arbitrator had left the door open for future applications:

“It cannot be said that he is refusing to allow either party a fair opportunity to present its case to the tribunal or to prove its case. Nor do I see how it can be said that he is acting unfairly. I know of no requirement that an arbitrator must allow each party to call all the evidence which he wishes to call. It must depend on the circumstances of the particular case whether or not the arbitrator decides, in the exercise of his discretion, to conduct the arbitration in a particular way.”

14. It is worth noting that the relatively benign approach to Mr. Royce’s “threat” of misconducting himself could not have been challenged in the same way under the Arbitration Act 1979 or 1996, where the only remedy by which a procedural decision during the course of the reference could be challenged would be by way of application for removal.³² It might be noted also that the final case in Volume 15³³ was one of the first decisions (again of Robert Goff J) on an application for leave to appeal on a point of law under the Arbitration Act 1979. Leave to appeal was refused on a number of points, and was specifically refused on a question of whether the arbitrators had made a finding of fact for which there was no evidence, confirming that the new Act was not to be used as a backdoor means of appeal on fact. The practice on granting leave to appeal was subsequently developed by the House of Lords³⁴ and later enshrined in the arbitration Act of 1996.³⁵

³⁰ Founder of SCA in 1983 and immediate past president of SCA

³¹ *Carlisle Place Investments v Wimpey Construction*.

³² See *Damond Lock v Laing* (1992) 6D BLR 112 and *Three Valleys v Binnie & Partners* (1990) 52 BLR 42.

³³ *Mondiall Trading v Gill & Duffus*.

³⁴ *The Nema (Pioneer Shipping v PTP Tioxide)* [1982] AC 724 and *The Antaios (Antaios Corp v Salem Redeveirra)* [1985] AC 191.

³⁵ Section 69

15. I cannot leave the subject of arbitration without mentioning the rich vein of jurisprudence on challenges to the process to be derived from arbitration cases not just from England but from the many jurisdictions from which reported decisions are now available through various sources. I take three cases almost at random, which illustrate novel grounds of challenge.

(i) A Swedish court was reported to have acceded to an application to set aside an award after the successful party publicised the fact of its success and, incidentally, facts about the arbitration.³⁶ The decision was, however, reversed on appeal.

(ii) A court in Dubai, refused enforcement of an award on the ground that witnesses had not been sworn, despite counsel and the arbitrator having agreed to dispense with oaths. The decision was upheld on appeal in Dubai. Subsequent enforcement proceedings on the award were successful in Paris³⁷ but failed in New York.

(iii) A recent Irish case addressed the issue of the “*sleeping arbitrator*”. In a number of decisions courts have found that such conduct could be excused as not affecting the result, including the case of the English judge who had been woken up by the sound of his own snoring³⁸. In this case, however, the arbitrator had made a series of procedural and legal errors which led the court to observe: “*It is bad enough that a losing party should be required to accept a decision by a person who they may feel has not fully understood their case, but a party should not be required to accept a decision by a person who has demonstrably not been paying full attention to a significant part of the matter. Still less should a party be required to submit further disputes to an arbitrator where that party has justifiably lost faith in their capacity to determine them.*” There was a transcript but the award was devoid of any reference to it. The award was set aside and the arbitrator removed³⁹.

³⁶ *AI Trade Finance* case Disp Resol Journ, May 2007

³⁷ 29 Sept 2005, Rev Arb 2006, 695

³⁸ *R v Betson* [2004] EWCA 25

³⁹ *Galway City Council v Samuel Kingston Construction & Anor*, Court Of Appeal, Ireland, 25 March 2010

Adjudication

16. It is now appropriate to move to adjudication, a process that has dominated construction dispute resolution in the UK for the past 12 years or so and has spread, albeit in several different forms of varying attraction to clients, to a significant number of other common law jurisdictions.⁴⁰ There are several surprising things about the development of adjudication as compared to the intentions of the drafters. First, the process was apparently intended to achieve a “pay now argue later” regime, similar to that created through the decisions of the engineer or architect under the common forms of construction, but with the adjudicator being an impartial person owing no allegiance to the Employer. Instead, it is said that over 95% of adjudication decisions are not followed by any further argument, other than in the enforcement proceedings. Secondly, while the legislation and statutory scheme make no provision for any form of appeal, parties have now established a raft of grounds on which enforcement can be challenged, albeit against the background of continual reminders of the intention of Parliament and the necessary truncating of standards of fairness.

17. The result has been that adjudication has continued the development of cases on what is, in the adjudication context, called breach of natural justice. Here it is evident that the courts will exercise an even wider degree of restraint in acceding to challenges than in the case of arbitration. The cases on challenge to adjudication decisions often mirror earlier cases in arbitration and have developed further the principle that the adjudicator should not act on new evidence without giving the parties the opportunity to comment on it.⁴¹ However, adjudication has also generated a new raft of challenges based on “jurisdiction”. Thus, a dissatisfied party or a party who anticipates being dissatisfied, can at the outset challenge whether the issue referred to the adjudicator has yet crystallised into a dispute. This type of challenge is almost unique to statutory adjudication and arises in most cases as a result to the strict time limits applicable. It is virtually unknown in contractual adjudication, where the reference to an adjudicator is usually to be preceded by some form of mediation which effectively precludes the subsequent argument that the dispute had not crystallised.

⁴⁰ Including all the states of Australia, New Zealand and Singapore

⁴¹ *Balfour Beatty v L B of Lambeth* [2002] BLR 288 and cf *Fox v Wellfare*

18. Then the process or the decision itself can be challenged on more classic jurisdictional grounds, if there is contended to be any defect in the appointment of the adjudicator or if the issues decided are alleged to have gone beyond the ambit of the dispute referred. All such issues have their counterparts in the law of arbitration, as found in the UNCITRAL Model Law, the New York Convention and, under English Procedural Law, ss. 24 and 66 of the Arbitration Act 1996. Of particular interest is that, both under the Model Law and the English Arbitration Act, any alleged lack of jurisdiction must be raised as soon as the complaining party is or should be aware of the issue; and lack of such timely objection will prevent the challenge being further pursued, effectively confirming the Tribunal's jurisdiction. The same result may be achieved at common law as a result of waiver or ratification, for example, where additional claims are added without objection, including a counterclaim by the Respondent in response to a dispute initially raised solely by the Claimant.
19. In adjudication, any such time provisions would be difficult to impose, given the tight time-scales which apply. However, given the huge sums in cost which can be expended on adjudications in which the decision is then challenged on jurisdictional grounds, the possibility of devising tighter rules to avoid such disputes should not be discounted. In arbitrations subject to institutional rules, arguments about jurisdiction are usually avoided by provisions which expressly empower the arbitrators to admit, or reject, new claims which would enlarge or re-define the dispute submitted. Such an approach could also be applied to adjudication rules
20. It must not be forgotten that statutory adjudication grew out of contractual adjudication, which first appeared in Sub-Contract Forms in the late 1980s as a means of easing Sub-Contractors' "cashflow"⁴². Contractual adjudication enjoyed limited success in the 1990s but, since the advent of statutory adjudication has come into widespread use under Contracts which fall outside the ambit of the "Construction Act", well known examples being the PPP contracts for refurbishment of the London Underground network as well as many major PFI contracts. As noted, contractual adjudication is generally free from jurisdictional challenges and is usually concerned not with short-term cash-flow issues, but with contractual disputes which are not

⁴² See *Cameron v Mowlem* (1990) 52 BLR 24.

infrequently followed by formal arbitration or court proceedings. For this reason enforcement challenges are rare: contractual adjudication has acquired a distinct place in construction dispute resolution.

21. An issue which has arisen in several statutory adjudications is whether the dispute set out in the Referral is too large or complex for a decision to be given consistent with the requirements of natural justice. It is not infrequent, in such a dispute, for the Referral to be accompanied by some dozens of lever-arch files containing both witness statements and copies of the documents relied on, which must then be responded to in kind and a Decision given, usually after further exchanges of pleadings and what may be a daily barrage of correspondence from the parties' representatives. The adjudicator will indicate to the parties if additional time is needed to come to a proper decision, and the parties will respond. Such a case was *CIB Properties v Birse*⁴³ in which the decision was eventually enforced by HH J Toulmin CMG QC, who dismissed the objections on the grounds set out by him. It appears still to be the case that there is no instance of a Decision in such a case being refused enforcement on the ground of size and complexity⁴⁴. However, it is to be noted that Judge Toulmin observed in *CIB* that "*The test is not whether the dispute was too complicated to refer to adjudication, but whether the adjudicator was able to reach a fair decision within the time limits allowed by the parties*". What awaits a ruling of the court is whether a decision can be enforced (if given) where the non-referring party does not agree to extend the time.

22. Among the latest grounds of opposition to enforcement is the challenge to a legal ruling in the adjudication decision by way of final ruling of the court. Earlier cases had accepted the possibility of such a challenge⁴⁵ and in *Walter Lilly v DMW Developments*⁴⁶ Coulson J accepted that a CPR Part 8 application could be entertained as part of enforcement proceedings and granted one (relatively uncontroversial) declaration while refusing others as being contentious. Most recently, Edwards-Stuart J in *Geoffrey Osborne v Atkins Rail*⁴⁷ gave a declaration

⁴³ [2005] BLR 173

⁴⁴ See review by Coulson J in his book *Construction Adjudication* at paragraph 9.04 to 9.10.

⁴⁵ See *Abbey Developments v. PP Brickwork Ltd.* (2003) CILL 2033

⁴⁶ [2009] TCLR 3

⁴⁷ Judgement 8 October 2009

under Part 8 which effectively reversed part of the decision of the adjudicator, thereby constituting a “*final determination*” of one of the issues in the dispute. These cases raise the interesting question of whether the court can, within the ambit of enforcement proceedings, routinely entertain challenges on issues of law arising in the Decision and requiring no or no further evidence⁴⁸. One difficulty is the inclusion of arbitration as the default process for final determination; but that can be resolved as a matter of simple drafting. The inclusion of decisions on points of law would put adjudication on the same footing that Arbitration once was, in providing regular clarification of legal issues for the benefit of the industry as a whole. Perhaps if the process took off, the court would need to invent a system of granting permission to challenge only where the decision on law was obviously wrong, with a broader discretion where the point was of general importance.⁴⁹

23. One valuable lesson which adjudication generally has brought us is the realisation that dispute resolution can be almost infinitely flexible in terms of the way in which the parties are invited or required to present their cases. There is generally no requirement for an oral hearing and the way in which adjudications are conducted in practice varies widely, depending upon the nature of the issues, the timing and complexity of the submissions and whether the parties agree or propose extension of the basic time period. Again one finds examples of the same issues having arisen in relation to other seemingly different modes of DR.

24. One such example occurred in what must be the last ever contested challenge to the validity of an engineer’s decision, under a contract which spanned the introduction of statutory adjudication and significant changes to the ICE Form of Contract. The contract in question was for renovation works to the Thelwall Viaduct which carries the M6 over the Manchester Ship Canal, practical completion having taken place in December 1996. In June 2002 defects appeared in the roller bearings, leading to letters of claim being submitted to the contractor, AMEC Civil Engineering Ltd, in early December 2002, only weeks before expiry of the six year limitation period. The “dispute” was rapidly referred to the engineer who gave a decision on 18th December,

⁴⁸ The idea is not new: see inter alia construction.practicallaw.com/blog/construction “A sea change in adjudication enforcement” 19 Feb 2010

⁴⁹ Compare Arbitration Act 1996 s 69

allowing the Highways Agency to refer the matter to arbitration just within the limitation period. Subsequently AMEC contended there had been no valid engineer's decision (and therefore valid arbitration) on the ground that AMEC had not been permitted to make submissions to the engineer. In rejecting the challenge May LJ set out the basic requirements for the Engineer's decision, which has resonance with the position of other decision makers:

“There will be circumstances in which an engineer, using his knowledge of the course of the contract and its progress and incidence, can properly make a decision under clause 66 on request from one of the parties without formal reference to the other. There will be other occasions when he needs information from one or both of the parties. If he entertains representations from one party over and above those inherent in making the request for a decision in the first place, fairness may require him to invite representations from the other party. But I would not go so far as to say that this is a straightjacket requirement in all circumstances. He may well be aware, as in the present case, what the other party's position is. I do not consider that [the letter of 6th December] should be seen as containing representations which oblige the engineer to invite balancing representations from AMEC.”⁵⁰

Expert determination

25. The ever-present possibility of challenge to the dispute resolution process or to the result has led parties to take up an alternative to arbitration and adjudication generally called “expert determination”. This is a process which has been recognised in the cases for many decades⁵¹ as a convenient way of resolving matters which require decision not necessarily involving any dispute, for example the valuation of property or shares. It has come more into prominence following John Kendall's book “Expert Determination” first published in 1992⁵², which reviews the wide gamut of activities in which an “expert” can be involved including what is effectively a formal dispute resolution process in which the expert takes the role otherwise filled by the arbitrator or adjudicator, without the process being subject to appeal, challenge or re-hearing. In short, it is a process by which the parties are to be bound by the result for all purposes.

⁵⁰ [2005]BLR 227

⁵¹ See *Dean v Prince* [1954] Ch. 409, *Campbell v Edwards* [1976] 1 WLR 403.

⁵² 3rd edition 2001

26. It was settled by *Jones v Sherwood*⁵³ that the report of an expert, in this case accountants reporting on issues relevant to the valuation of shares, could not be challenged unless the expert had departed from his instructions in a material respect. In particular, the expert process, even if extended to encompass what would otherwise be an arbitration conducted before the expert, was not open to challenge on grounds under the Arbitration Act or otherwise, provided the process was conducted in accordance with the terms agreed by the parties. In many contracts the mandate of the expert has become virtually indistinguishable from that of an arbitrator, save for the word “*acting as an expert*”, often with the added precautionary words “*and not as an arbitrator*” Parties entering into such agreements sometime do so in the expectation that the decision will be less binding than that of an arbitrator, only to find the reverse.
27. However, the courts have not been idle in exploring ways in which the process might be challenged outside the ambit of *Jones v Sherwood*. In *Halifax Life v Equitable Life*⁵⁴ an expert determination clause required the expert to give reasons. After examining the decision the Court decided that the reasons given were insufficient to explain the conclusions and remitted the decision to the expert; and in *Homepace v SITA*⁵⁵, where the expert had volunteered additional reasons (the original decision disclosing no error), the Court of Appeal decided that the additional reasons revealed the decision to have been given on a mistaken basis and that it should not therefore be enforced⁵⁶.
28. My purpose in mention these cases, apart from making the point that nothing can ever be assumed to be settled in the law, is to draw attention to a similar though wholly unrelated development in the law of arbitration in Australia. In *Oil Basins Ltd v BHP Billitons*⁵⁷ the court of appeal of Victoria upheld a decision of first instance setting aside an award of a panel of 3 arbitrators on the basis that the reasons given were inadequate. The court of appeal differed from the judge only in regarding the manner in which the proceedings were conducted as more relevant than the fact that two of the

⁵³ [1992] 1 WLR 277, CA

⁵⁴ [2007] EWHC 503

⁵⁵ [2008] EWCA Civ 1

⁵⁶ Described by Hew Dundas as “*another retrograde step*”: 2008, 74 Arbitration 188

⁵⁷ [2007] VSCA 255

arbitrators were former judges. Such an approach to the finality of arbitration proceedings is, of course, directly contrary to all the traditions of English arbitration on which the Australian state legislation is based. It might be added that, when “*error on the face of the award*” was formally abolished by the 1979 Arbitration Act, the better view at the time was that there had never been such a rule in English Law. While still applicable in Victoria, *Oil Basins* has more recently not been followed (and by implication disapproved) by the New South Wales Court of Appeal in *Gordian Runoff Limited v Westport Insurance Corporation*⁵⁸ which emphasised that commercial arbitration should be both efficient and final. The court found the appropriate test, from English commercial law⁵⁹, to be that:

‘All that is necessary is that the arbitrators should set out what, on their view of the evidence, did or did not happen and should explain succinctly why, in the light of what happened, they have reached their decision and what the decision is.’

This particular battle will be settled in the Australian way, but the cases illustrate the danger in judges yielding to the temptation to afford remedies in deserving cases without due regard to the wider interests of the commercial community.

Mediation

29. Finally I turn briefly to what is perhaps the most venerable mode of dispute resolution—mediation. This ought to be devoid of any possibility of challenge to the finality of the resulting contractual settlement. However, the fact that the only legal basis of the settlement is a contract, it is unavoidable that circumstances may exist which will lead one party to wish to avoid the settlement on the classic grounds on which a simple contract may be set aside⁶⁰.
30. The recent decision of Ramsey J in *Farm Assist v Min of Environment*⁶¹ is an example of the application of the common law rules on setting aside of contracts, in this case on the ground of alleged unconscionable conduct by one party to the mediation by which the other claimed to be prejudiced. The case itself did no more than to

⁵⁸ [2010] NSWCA 57

⁵⁹ *Bremer Handelsgesellschaft mbH v Westzucker GmbH (No 2)* [1981] 2 Lloyd's Rep 130 at 132-133

⁶⁰ *Montagazza v Neil Holland* (2006) CILL 2381

⁶¹ [2009] BLR 80

recognise that the complainant was entitled to call the mediator in support of her case. But the possibility of other contractual remedies being invoked remains, including a claim that the settlement was induced by misrepresentation.

31. At least there should be no possibility of challenge to a settlement on grounds of excess of jurisdiction, for example contending that the settlement included matters outside the dispute referred. The addition of other benefits into the deal (new contracts in the future, or payment of disputed sums under old contracts) may be an essential part of the bargain struck.

Conclusion

32. The finality of any mode of dispute resolution should be governed primarily by the principle of party autonomy, a principle which inspires most modern arbitration law, such that cases such as *Bechtel v DCA* should have no place in modern commercial life. However, given that parties to construction disputes are invariably parties to an earlier contract, the question of party autonomy extends to how far decisions and actions under the contract should be open to review at any time?
33. It is clear that, under English law at least, the clock can never be turned back to create any condition precedent to the right to pursue a dispute under the contract. What can be done is to bind the parties under contracts to provisions which may not subsequently be challenged. In the modern world this cannot include administrative decisions of third parties. It can include such matters as agreed prices and time limits, provided the employer can refrain from changes or acts of prevention.
34. The short history of the TCC presents the opposite of party autonomy, whereby parties were bound by or allowed to challenge decisions of the court at the behest of the executive. However, despite the restrictions which have applied in the past, there has been no shortage of appeals; and the court has now settled into a much more mature role in which its decisions are no more or less binding than those of any other division of the High Court.

35. In arbitration, while the procedure is subject to party autonomy, the right of challenge by appeal on a point of law is not, but this is subject to a major exception in that it is still possible to contract in to such an appeal – a provision that might be seen as increasingly out of touch. The bulk of commercial arbitration is subject to institutional rules (typically LCIA or ICC) which, on the contrary, exclude any appeal, thereby representing a different aspect of party autonomy. What is unavoidable in arbitration and adjudication is the need for a supervising or enforcing court to step in where the tribunal has fallen below minimum standards of fairness, variously expressed as irregularity or breach of natural justice. The process will ultimately promote higher standards among arbitrators and adjudicators and fewer such challenges. It is interesting to compare the somewhat elementary errors committed by the arbitrators whose misdeeds are chronicled in Volume 15 of BLR, and to suggest that modern arbitrators (and adjudicators) would generally know better.
36. Challenges to jurisdiction are another unavoidable ground of challenge which, however, is now more closely restricted under modern arbitration law. Consideration might be given to means of restricting or minimising jurisdictional challenges in adjudication, which are generally unproductive and conducive of wasted costs.
37. But however parties or courts may strive to achieve finality, there will always be cases in which the courts are persuaded to explore new avenues of challenge. Sometimes the challenge will turn out to be a cul-de-sac. Others, however, such as the combining of declaration on legal issues with rulings on enforcement of adjudication decisions, may open up a more fruitful path towards generating decisions which are useful to the industry as a whole.
38. Finally, where an arbitrator, adjudicator or Expert has issued a decision which, on its face is enforceable, he or she should hesitate long and hard before volunteering any further explanation, which is a likely to end up with a decision which is no longer being enforced.

