Construction projects financed by the World Bank are let on a modified FIDIC 1996 contract which provide for either a Dispute Board or a Dispute Review Expert

Colin Wall's paper, 'The Hong Kong Perspective', deals with the pre-action procedures in that jurisdiction in detail. They can be very briefly summarised as:-

• All standard forms of contract & sub-contract	Mediation/Arbitration
• Government building & civil engineering forms	Architects or Engineer's Decision/mediation/arbitration
• HKIA/HKIS private sector building form	Executive negotiation /mediation/arbitration

Conclusions

The traditional way of resolving UK construction disputes by arbitration has been mainly replaced by construction adjudication with the number of disputes currently being arbitrated being very substantially reduced and amounting principally to those arising from 'unsuccessful' adjudications.

While Mediation and Dispute Board type processes have led to substantial reduction in the number of disputes that might otherwise reach arbitration in Honk Kong in respect of government contracts, arbitration remains commonplace in private sector building disputes.

The author would be very interested to hear from other members about the existence and success or otherwise of pre-arbitral procedures in parts of the world other than the UK and Hong Kong.

J Neville Tait
jnt@jntait.co.uk

- relate to the same or substantially the same issues as have been the subject of recent adjudication under the 1996 Act, or some other formal alternative dispute resolution procedure.

Existing pre-action procedures in Construction Arbitration

With regard to Domestic UK Construction Arbitration, the vast majority of disputes since 1998 have been referred initially to statutory adjudication under the provisions of the Housing Grants, Construction and Regeneration Act 1996 ("the 1996 Act"). In exempting disputes that have already been subject to Construction Adjudication from Pre-action Protocol, the TCC Protocol implicitly recognises Construction Adjudication as an effective pre-action procedure.

Apart from the 1996 Act there are very few mandatory pre-action procedures remaining in standard UK construction contracts.

Prior to 2004 all the ICE Conditions provided for a mandatory Reference to the Engineer for a Decision under Clause 66 as a condition precedent to referring a dispute to Arbitration. In addition an optional Conciliation procedure was available. There was no similar procedure under the JCT Standard Building Contracts. The ICE Conditions were however revised in 2004 so as to omit the Engineer's Decision entirely and a series of non-mandatory options were introduced instead comprising:-

- Cause 66A (2) –'Amicable dispute resolution' consisting of negotiation, conciliation or mediation.
- Clause 66B – Adjudication (the parties have a right to adjudicate but it is not mandatory)

The only other domestic UK construction contract containing any kind of pre-arbitration procedure of which the author is aware is the National, House-Building Councils ("NHBC") Buildmark Warranty which is a tripartite agreement between the NHBC, Homeowner and Builder and which includes a 'Resolution Service' to be carried out by the NHBC in connection with any dispute between the Homeowner and Builder concerning Defects prior to the reference of the dispute to arbitration (at the option of the Homeowner only) or the court. This process is very successful with only a very small number of disputes being referred to arbitration. The author is not, however, aware of how many disputes are referred to the courts.

On the international front the 4th Ed [1987] of FIDIC mirrored the ICE Conditions in providing for an Engineer's Decision (Clause 67) as a condition precedent to arbitration.

The 1996 Supplement to FIDIC replaced the Engineer's Decision with reference to a Dispute Adjudication Board (Clause 67) and the 1999 Edition of FIDIC provides a pre-action sequence of:-

- Determination by Engineer (Clauses 3.5 & 20.1) – in respect of certain matters only.
- Reference to Dispute Adjudication Board (Clause 20.4)
- Optional Amicable Settlement (Clause 20.5)
- Arbitration (Clause 20.6)

The above objectives are achieved as follows:-

1 Claimant

Prior to commencing proceedings, the claimant shall send to the defendant a letter of claim which shall contain the following information:-

- the claimant's full name and address;
- the full name and address of each proposed defendant;
- a clear summary of the facts on which each claim is based;
- the basis on which each claim is made, identifying the principal contractual terms and statutory provisions relied on;
- the nature of the relief claimed: if damages are claimed, a breakdown showing how the damages have been quantified; if a sum is claimed pursuant to a contract, how it has been calculated; if an extension of time is claimed, the period claimed;
- where a claim has been made previously and rejected by a defendant, and the claimant is able to identify the reason(s) for such rejection, the claimant's grounds of belief as to why the claim was wrongly rejected;
- the names of any experts already instructed by the claimant on whose evidence he intends to rely, identifying the issues to which that evidence will be directed.

2 Respondent

- Within 28 days from the date of receipt of the letter of claim the defendant shall send a letter of response to the claimant which shall contain the following information:-
- the facts set out in the letter of claim which are agreed or not agreed, and if not agreed, the basis of the disagreement;
- which claims are accepted and which are rejected, and if rejected, the basis of the rejection;
- if a claim is accepted in whole or in part, whether the damages, sums or extensions of time claimed are accepted or rejected, and if rejected, the basis of the rejection;
- if contributory negligence is alleged against the claimant, a summary of the facts relied on;
- whether the defendant intends to make a counterclaim, and if so, giving the information which is required to be given in a letter of claim.
- the names of any experts already instructed on whose evidence it is intended to rely, identifying the issues to which that evidence will be directed;

Exceptions

A claimant shall not be required to comply with the Protocol if the proposed proceedings:-

- are for the enforcement of the decision of an adjudicator to whom a dispute has been referred pursuant to section 108 of the Housing Grants, Construction and Regeneration Act 1996
- include a claim for interim injunctive relief,
- will be the subject of a claim for summary judgment pursuant to Part 24 of the Civil Procedure Rules, or

Society of Construction Arbitrators
Annual Conference 4th – 7th May 2007
Lisbon, Portugal

Do pre-arbitral procedures work, are they necessary or are they simply killing construction arbitration as we used to know it?

Notes of talk given on 6th May 2007

Background to the discussion

Introduction

The Courts in England and Wales already insist upon certain pre-action steps being taken before an action is commenced. The Technology and Construction Court ("TCC") has recently up-dated its Pre-Action Protocol for Construction and Engineering Disputes. The purpose of is brief paper is to describe the requirements of the TCC's Protocol, to review what similar procedures, if any, already exist in connection with construction arbitration and to consider whether similar pre-action procedures might be beneficial in arbitration.

Requirements of the TCC Pre-Action Protocol for Construction and Engineering Disputes - 2007

The objectives of the Protocol are:-

- to encourage the exchange of early and full information about the prospective legal claim;
- to enable parties to avoid litigation by agreeing a settlement of the claim before commencement of proceedings; and
- to support the efficient management of proceedings where litigation cannot be avoided.

The general aim of the Protocol is to ensure that before court proceedings commence:-

- the claimant and the defendant have provided sufficient information for each party to know the nature of the other's case;
- each party has had an opportunity to consider the other's case, and to accept or reject all or any part of the case made against him at the earliest possible stage;
- there is more pre-action contact between the parties;
- better and earlier exchange of information occurs;
- there is better pre-action investigation by the parties;
- the parties have met formally on at least one occasion with a view to defining and agreeing the issues between them; and
- exploring possible ways by which the claim may be resolved;
- the parties are in a position where they may be able to settle cases early and fairly without recourse to litigation; and
- proceedings will be conducted efficiently if litigation does become necessary.