Keating Construction Dispute Resolution Handbook

Keating Construction Dispute Resolution Handbook

Third edition

**By a specialist team of authors
in Keating Chambers**

Edited by
Dr Robert Gaitskell QC CEng

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CHAMBERS

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Foreword to the third edition

It is a pleasure to introduce this third edition of what has become an increasingly successful handbook on dispute resolution or, as the book itself emphasises, dispute avoidance – which is always the better course. But as the Latin maxim tells us, *Si vis pacem, para bellum*: If you want peace, prepare for war. In the present context, the aphorism becomes: If you want to avoid a formal dispute, ensure you are prepared for one, by the keeping of proper records, the serving of timely notices and making yourself familiar with all the steps that will be needed if the dispute cannot be resolved. By these means you will achieve the best outcome, whether by avoidance of the dispute or by prevailing if it becomes inevitable.

An essential element in preparing for a dispute resolution process is to know all the alternative processes so that a truly informed choice can be made when it comes to committing a client to the inevitable costs of pursuing one of the processes. Not only does this involve knowledge of the processes themselves and the way in which they interact, but also appreciating all the preliminary stages such as how to secure appropriate legal advice and whether to start by consulting a solicitor or a barrister and when this is permitted under the prevailing rules.

The backdrop to all dispute resolution is the court system in whatever jurisdiction the dispute may arise. The courts are there as the fall-back for the final resolution of any dispute that cannot be resolved by other means, including enforcement of decisions given as a result of other dispute resolution processes. The courts' functions also include the support for and enforcement of those other processes, including staying any legal proceedings brought by one party in breach of an agreement to resolve disputes by other means, whether those means are arbitration or some other process.

The full repertoire of private dispute resolution processes is here presented in separate chapters, the available techniques now numbering seven, with additional hybrid processes for international disputes involving particular combinations of processes. All these are explained and presented by individual specialists from Keating Chambers, all of whom are otherwise engaged in dealing with the same issues on a day-to-day basis and therefore able to present the latest thinking and the latest techniques in this ever-evolving world.

It is no wonder that the success of this small book has led to its successive name changes, the original *Engineers'*

Dispute Resolution Handbook having become for the second edition the *Construction Dispute Resolution Handbook*, and now, taking account of the attraction of the work in a wider field, including oil and gas, energy, and ship and rig construction, the book has taken its proper place in the series of volumes carrying the Chambers' brand as the *Keating Dispute Resolution Handbook*. I warmly commend this introductory volume to all who have to consider embarking on the resolution of a dispute in any of these related technical fields and, of course, also to those about to sign contracts for such works who may find a dispute looming rather earlier than expected, and have an urgent need to be prepared for a dispute, while hoping it can be avoided. Knowledge of what may be involved is the key to achieving the best outcome.

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Foreword to the second edition

The success of the first edition of this work, *Engineers' Dispute Resolution Handbook*, is not a surprise. The book covers the complete spectrum of dispute resolution expertise required by engineers and other professionals involved in substantial construction projects, which is otherwise available only in separate and unconnected texts. As pointed out in the Foreword to the first edition, the challenge is not simply the effective use of one dispute resolution procedure, but making effective use of the whole range of procedures available.

The basic procedures available now number at least six, all of which are well covered in this work. But it will be found that parties are quite capable of 'inventing' other procedures with new names which, however, invariably turn out to be one of the existing systems, or perhaps a combination of these, repackaged for the particular needs of the case. An example of this is a 'conciliation' procedure introduced into a number of high-value contracts in Taiwan which required disputes to be conciliated by a panel, but if the parties did not reach settlement, the panel was to issue a decision which was contractually binding until a final decision by a court or arbitrator, following the UK adjudication model. The moral is that the principles remain the same, whatever the label.

In deciding how particular disputes should be resolved, the choices facing the parties are: (1) an initial choice between state court or private dispute resolution; and if the latter, (2) a choice between procedures supported by court powers such as arbitration or adjudication and *ad hoc* procedures such as mediation, expert determination and early neutral evaluation (ENE); and then (3) a choice as to the extent to which a decision or result is to be binding. It is perhaps this last element that can surprise the non-lawyer, as it is the judgment of the High Court that is most likely to be reversed on appeal, and, conversely, the relatively informal decision in an expert determination is least likely to be open to challenge in any forum. And although adjudication is, in theory, binding only until the dispute is 'finally determined' in another tribunal, the reality is that adjudication is about cash flow and, depending on your source of statistics, something well in excess of 90% of adjudication decisions are not challenged further. At the other end of the scale, mediation and ENE create no binding result unless the parties enter into a binding contractual settlement as a result. Even here the courts are beginning to entertain limited

challenges, but the processes themselves remain relatively risk free.

One might ask why all these procedures are needed and why could we not return to the old days when the engineer was king (see Foreword to the first edition). One answer is that the world inevitably moves forward and lawyers and contract draftsmen will be dragged along with the rest of humanity. Another answer is that contracts, and therefore the disputes that they generate, are vastly more complex today than at any time in the past, and call for a corresponding spread of remedies such as those described in this work. Another significant new facet of modern dispute resolution techniques is that they are infinitely more available than at any time in the past. A mere 20 years ago the only remedy available to a contractor under an Institution of Civil Engineers (ICE) Form of Contract who was dissatisfied with the engineer's certification was to refer the matter back to the (same) engineer, who was then given 3 months to reconsider and, if he thought fit, to affirm his original decision. Compare this to the current availability of adjudication 'at any time' or, if preferred, arbitration or any other agreed method of resolution, also at any time. However, it may be that this abundance of availability now carries with it the danger that parties may be precipitated into a formal dispute resolution process earlier than is necessary, and before steps have been taken that might reduce or even avoid the dispute. Hence the importance of dispute avoidance (a phrase that would not have been understood in the past) and the systematic consideration of the steps to be taken when a potential dispute looms. Both these subjects are well covered in this book.

While the basic principles remain unaltered, this edition has updated the law and practice in a number of respects, which are reviewed in Chapter 1. The book has rightly attracted a wide following, and will become one of the standard pieces of equipment needed by those whose business it is to see engineering disputes properly resolved.

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Foreword to the first edition

There was a time when the engineer was king. In those days disputes were, in the first place, settled by the engineer acting as quasi-arbitrator, usually following his own decision as certifier. Sometimes he changed his mind, and only rarely did a dispute get beyond the contractual mechanism and out into the world of arbitration. And even then the invariably sole arbitrator would be another engineer, who could be expected to look at the issues in the same way as the original engineer. Partly for these reasons it was rare for a formal dispute even to arise. Most matters would be dealt with by informal discussion, with the engineer certifying what he thought was appropriate. Engineers in those days were said to command great respect.

But all was not necessarily well in the world of engineering contracts, even in the heady days of 19th century industrialisation. Isambard Kingdom Brunel is still revered as one of the greatest engineering geniuses. But his treatment of contractors shows him in another light. Brunel's appalling treatment of William Ranger, one of the contractors for the Great Western Railway, is fully documented in the report in *House of Lords Cases* (1854), volume V, page 72. Ranger had taken on a series of contracts, including that for the Avon Bridge, which was to be constructed in stone from the tunnels and cuttings eastward of the bridge. Ranger complained that he was deceived by reports as to the nature of the rock, which proved to be much harder than stated. When the project inevitably slowed down, Brunel took the work out of Ranger's hands and charged him with the additional cost of completion as well as delay penalties, eventually driving him to ruin. Ranger's final plea to the House of Lords that Brunel was a substantial shareholder in the company, and for that reason his decision could not be binding, was dismissed with a mixture of disbelief and regret that such a point should be taken. From that stage on, for more than a century the engineer remained king.

Ironically, it was not the great power wielded by the engineer which eventually led to his demise, but something quite different. By the 1970s there was general dissatisfaction in the construction industry that both engineers and architects, as the principal certifiers of cash flow to contractors, were no longer the independent spirits they once had been. They tended always to err in the employer's favour, rejecting claims which had then to be pursued in arbitration. Sometimes the engineer reacted cautiously, through fear of being sued himself for

overcertification; and sometimes he was under pressure to avoid exceeding budgetary limits of which the contractor was unaware. Yet under the Institution of Civil Engineers (ICE) Standard Form Conditions of Contract, and many others, arbitration against the engineer's decision could not generally be pursued until after completion of the works, leaving the engineer in sole charge of the contractor's cash flow.

In the case of the ICE Conditions of Contract, the first sign of change began with the seemingly innocuous introduction of 'conciliation' as an alternative to the engineer's decision. One thing rapidly led to another, the next step being a reduction in the 3 months allowed for the engineer's decision, to a more familiar 1 month. This was followed by the groundbreaking introduction of arbitration available at any time, without the necessity of waiting for completion. This was the situation at the time the Housing Grants, Construction and Regeneration Act came onto the scene in 1996.

No one quite predicted what would be the effect of the statutory adjudication on the construction industry. The ICE initially attempted to preserve the traditional but reduced role of the engineer by relabelling the initial 'dispute' as a 'matter of dissatisfaction' so that the contractor remained bound to submit the matter to the engineer before a dispute could arise for the purposes of adjudication. This device was considered by some to be legally ineffective, and by others to be contrary to the spirit of the new Act. At all events, it was soon abandoned, leaving hardly a trace of the former regime. The latest 2005 amendments to the main ICE Conditions of Contract, mirrored in all the other ICE forms, thus presents the parties (it must never be forgotten that the employer may initiate disputes) with a seemingly bewildering choice between negotiation, mediation, adjudication, arbitration or even litigation. All these options must now be packed into any form of construction contract, and they present their own challenge to the parties. Rather than searching for a remedy within the inadequate procedures provided up to the 1970s, parties wishing to pursue a genuine dispute now have an *embarrass de richesses* in terms of available channels of resolution. The danger thereby created is that the would-be claimant may fail to identify the quickest and cheapest means by which the dispute may be resolved. The prospect of multiple concurrent resolution procedures carries with it the alarming possibility, if not probability, of multiple costs, all of which have to be

paid by someone. None of the dispute reformers have yet devised a way of reducing the cost of legal services or the disruption that a formal dispute procedure can cause to normal economic activity.

So there is the challenge that dispute resolution now presents to engineers, contractors, lawyers and all those involved in engineering and construction disputes: how most effectively to make use of the huge variety of available techniques and procedures, and particularly whether to use the procedures singly or in combination. That is why this handbook is now invaluable as a source of essential expertise in making these unavoidable choices. Whatever choice is made, the initiating party inevitably commits to a particular course; and even if that course can be switched before reaching its conclusion, costs will have been incurred which must be paid. Parties must now decide, at the outset of a dispute, their particular strategic route to achieving satisfactory resolution. This presents choices and challenges not dissimilar to those of programming and managing the construction work itself, and involves no less serious outlay of expenditure.

For the task of overcoming these novel hurdles, I am delighted to commend this handbook to anyone embarking on dispute resolution, whether as a theoretical study, in preparation for disputes to come, or in support of actual disputes that need immediate decisions and commitment to a particular course of action. The work is written by a team of specialists who can offer practical help and guidance in all the intricate stages described, and particularly in making the strategic decisions that will ultimately determine whether the dispute is resolved satisfactorily or not. Dispute resolution is no longer to be embarked upon without the guidance offered in this handbook.

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