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DISPUTES IN THE CONSTRUCTION SECTOR

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EXPERT FORUM

DISPUTES IN THE CONSTRUCTION SECTOR

PANEL EXPERTS

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Adrian Cole focuses on disputes relating to energy and infrastructure development. A partner in King & Spalding's projects and construction, and international arbitration practices, Mr Cole leads the Middle East dispute resolution area. He represents clients in a variety of construction and engineering matters. Before becoming a lawyer, Mr Cole was already a qualified engineer and quantity surveyor. With wide experience in the construction and engineering industries, he brings a pragmatic approach to representing clients in an array of construction-related disputes.

CD: Reflecting on the last 12 months or so, how would you describe the level and intensity of disputes in the construction sector? Are any sector-specific challenges reverberating through the construction industry to cause friction and commercial conflict?

Appelbe: In 2017 and the preceding years there were many new enquiries, primarily arising from international arbitration in the oil and gas and transportation sectors. The level of oil and gas enquiries has slowed again during the first quarter of 2018. There may be a link between an increase in recent settlements and the steady oil price recovery since the 2014 price drop. Algeria, a not-infrequent user of construction arbitration, is in the process of settling many of its biggest energy infrastructure disputes amicably to reinstate an investor-friendly atmosphere in the country. We are seeing a high proportion of cases related to projects in the Middle East, where there continues to be diverging views on the cost and time effect of change. We have seen a significant number of large complex disputes in the last 12 to 24 months involving sums in dispute over $100m. Enquiries in relation to disputes between employers and the designer or project manager have been coming in more frequently than historically. It is not clear what is driving this. It may be that companies are less able or willing to allow their professional suppliers' contribution to an underperforming project to go unchallenged.

Lowe: The construction sector has been a hotbed of disputes for as long as anyone can remember. The intensity and ferocity of dispute resolution has changed over time, though it is doubtful whether the volume of claims has really changed. It is the approach to resolving claims which is different from how it used to be, with long-running battles in the courts or arbitration commonly being replaced by less resource demanding and expensive means of remedying disputes, such a mediation, adjudication and negotiation. The challenge now facing the sector is how to deal with the consequences of the collapse of Carillion. The Public Accounts Committee has warned that "Carillion could happen again, and soon". There are lessons which the sector needs to take on board in response to this warning, including ensuring risk is allocated to the party best placed to manage it, having robust internal control systems, prompt payment, and assurance of the financial strength of the companies one does business with.

Cole: Disputes remain a common feature of the construction sector; disputes are pretty much guaranteed given the structure of the industry, procurement practices adopted and the commercially and technically complex projects undertaken. Despite a modest escalation in the price of oil, disputes in the energy sector prevail, and

particularly so in relation to energy infrastructure. The mothballing or rescoping of a number of projects has triggered claims for compensation and the tightening of fiscal belts has caused employers to delay making contractual payments. Elsewhere in the industry, poor commercial practices encourage inappropriate risk transfer, generate confused or unclear work scopes or otherwise cause myriad issues that can escalate into disputes.

Walker: The efforts made by public sector employers to limit expenditure and obtain more value from private sector suppliers has continued to give rise to a number complex disputes. There have been well-known insolvencies in the construction sector. The most notable example is Carillion. Another is Lagan. Both were carrying out a number of substantial public sector projects. The demise of Carillion has thrown renewed emphasis on security of payment for the supply chain and generated payment disputes. The construction industry has the benefit of its own legislation – namely the Housing Grants, Construction and Regeneration Act 1996 – to protect payees but the legislation is complex and it has generated uncertainty. Among other things, the Act contains detailed provisions for the giving of payment notices and such notices were thought to crystallise the sum due to the payee in respect of interim payment. However, in the 2018 case *Grove Developments Ltd v S&T (UK) Ltd*, the judge found that previous decisions of the courts concerning payment notices were wrong and that a payer could seek a reevaluation of the sum stated to be due in the relevant notice, contrary to earlier decisions.

CD: Do particular types of construction projects seem to be particularly susceptible to disputes?

Lowe: It would be great if it was possible to predict the types of contracts which are most likely to succumb to a dispute. Sadly, life is not that simple. There are predicators, such as projects with a high degree of innovation, those which are loss making, and projects where risk has been transferred to a party which is not able to manage it – but these are only rough indicators. The overarching consideration for the construction sector is that it operates on very low margins. It does not take much volatility for an otherwise successful project to move quickly from profit to loss, and then into claims territory.

Cole: All types of projects have the potential to generate disputes. However, large scale public works projects and significant real estate projects are perhaps the most common generator of disputes. Often disputes arise because of delays in employers issuing their design requirements or because those requirements are subsequently changed. Contractors will invariably seek extensions of time for completion of works to avoid liability to pay delay damages to the employer, as well as additional payment in

compensation for such delays. Disputes about the cause and effect of such delays are very common, which prevent the parties from agreeing on any entitlements under the contract that each party may be entitled to. Such disputes are frequently compounded by commercial and legal positions taken, sometimes initiated by advisers who have not taken the time or have not been able to fully understand the underlying factual matrix. It is, then, only later in a dispute that meaningful analyses related to delay and quantum are performed – and by then, the parties are so entrenched in their positions that a third party, such as a dispute board, adjudicator, judge or arbitrator, is required to decide respective rights.

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Graham Lowe, BAM Nuttall Limited

Walker: All construction projects have the potential to generate disputes about time, quality and cost. However, private finance initiative (PFI) contracts and contracts for the delivery of renewable energy have had a high profile recently. In the case of PFI contracts, the courts have described how long and poorly drafted the contracts can be. In relation to renewable energy, many of the projects involve cutting edge technology or, in the case of offshore wind, hostile marine environments. The 2017 decision of the Supreme Court in *MT Højgaard A/S (Respondent) v E.ON Climate & Renewables UK Robin Rigg East Limited* is a good example of a dispute arising in the context of a relatively young industry where an error in the relevant design code was only discovered following the construction of numerous offshore wind farms.

Appelbe: Airports have seen a high frequency of disputes in recent years and continue to do so. The energy and oil and gas sectors continue to provide a steady workload, particularly in relation to process plants and offshore facilities generally. These are complex projects with limited scope for learning from previous projects, as many components and delivery conditions are unique, leading to uncertainty in terms of cost, time and risk. There also appears to be a consistent theme of difficulties in finalising multiple state agencies' end user requirements and appropriate allocation of those risks to the party best

placed to manage them. Projects which are highly exposed to weather risks, such as offshore wind farms, are likely to leave one party exposed to higher than expected costs, as it is difficult to allocate the risk share. The cost impact of bad weather is significant and yet not linked to poor performance. A high number of recent disputes have had issues with labour disruption, access to visas and issues with changes to customs processes and requirements. While the impact of these events can be clear, the entitlement is not always so.

CD: Are you seeing an increase in the use of adjudication to resolve construction-related disputes? What kinds of dispute are suitable for this forum?

Cole: Adjudication is widely accepted as a highly successful means of resolving disputes without recourse to courts or to arbitration. Many common law countries have adopted statutory adjudication where parties to qualifying construction contracts have a right to commence an adjudication at any time. Ontario in Canada is the latest jurisdiction to compel adjudication. In addition, or elsewhere, parties may agree to contractual adjudication such as through the FIDIC forms of construction contract that provide for 'dispute adjudication boards' under their 1999 suite of contracts, and 'dispute adjudication/ avoidance boards' under their new 2017 suite of contracts. Such dispute boards may be ad hoc where the board is appointed when a dispute arises, or 'standing' where the board is appointed at the outset of a project. The latter allows the board to assist the parties when difficulties arise, utilising its knowledge and experience of the parties and of the project accumulated through periodical visits to the project as well as receipt of key documentation as the project proceeds. Adjudication is most suitable for simple disputes, such as those concerning interim valuation of the works performed or the interpretation of contractual provisions, with such disputes open to being resolved within a short time frame and without the necessity or cost of extensive factual or technical evidence.

"Many common law countries have adopted statutory adjudication where parties to qualifying construction contracts have a right to commence an adjudication at any time."

Adrian Cole, King & Spalding

Appelbe: When there is a significant sum of money at stake, lawyers and clients may consider cases to be too large for the adjudication process. Ideally, disputes to be determined by adjudication need to be as defined as possible, easy to particularise and articulate. As the courts have confirmed, even if the adjudicator makes an error on the law or facts, the decision cannot be set aside, and it is therefore important the issues are clearly and concisely defined. Multifaceted disputes, for example, with complex contractual and delay issues, may not be served as well in adjudication, as finding the right person to adjudicate with the appropriate mix of expertise can be difficult.

Walker: I think that the use of adjudication has been steady over the last 12 months or so. The process is most commonly used in relation to payment disputes but it can be used to resolve all kinds of issues, including legal issues and issues surrounding time and quality. The choice of adjudicator is important and parties are increasingly appointing adjudicators by agreement. Where the parties cannot agree on the identity of the adjudicator they use a nominating body. In recent years, I have seen the use of the Technology and Construction Bar Association (TECBAR) for nominations grow significantly and research published by the Adjudication Reporting Centre supports my experience that barristers in particular are increasing their share of the appointments.

Lowe: Adjudication is an important tool in the dispute resolution toolkit, though it is rarely used for the purpose for which it was originally intended. In the UK, all parties to a construction project have a statutory right to adjudicate at any time during a project. It was in the mind of Parliament and the expectation of the draftsman of contracts like the new engineering contracts, that adjudication would be used to resolve problems on an ongoing basis, as they occur throughout the lifecycle of a project. Indeed, some mechanisms in the new engineering contracts do not function correctly unless adjudication is used in this manner. Adjudication is most suitable for the prompt resolution of simple, discrete issues. Its rough and ready nature does not lend itself to the resolution of multiple, complex, interrelated matters. In practice, however, the parties to construction projects often lack the confidence to use adjudication while the project is ongoing and potentially miss out on the benefits this can bring.

CD: To what extent has the use of new engineering contracts (NECs) resulted in fewer disputes?

Appelbe: The requirement under NECs to assess the impact of events at the time, before issues become intertwined and the facts forgotten, should result in fewer disputes. The disputes tend to involve a failure to administer the process, or a disagreement in relation to a project manager's

assessment, which can be quicker and cheaper to resolve if done at the time and before events become compounded. However, it is not the end of disputes as, if the process is not followed or there is a large number of compensation events that are not agreed in a timely manner, then the diverging views of a fair outcome are just as likely as other forms.

Walker: It is impossible to say whether use of the NEC family of contracts has resulted in fewer disputes. The NEC form is certainly very different from other forms of contract – for example, the absence of final account provisions – but I have been involved in many disputes that have arisen under NEC contracts. It is also common to see the NEC form amended by lengthy 'Z' clauses which seek to dilute the standard terms. The new NEC4 does not address some of the uncertainties about the meaning of NEC3. Further, the 2017 decision from the High Court of Northern Ireland in *Northern Ireland Housing Executive v Healthy Buildings* on the interpretation of an NEC3 contract has generated some controversy.

Lowe: NECs are not a well-drafted suite of contracts. It is a sorry indictment of the public sector in the UK, and many substantial commercial clients, that it has become the contract of choice. In combination, weak drafting – not limited to the use of the first person which is the superficial complaint – and ill thought-through concepts such as 'disallowed cost' and 'defects' as contractually defined, causes NECs to be a constant source of dispute and uncertainty. This is to the advantage of neither client nor contractor. That NECs have not featured more frequently in law reports is testament not to a robust contract which engenders fewer disputes, but to a flawed document which, when faced with a serious dispute, leaves all parties scratching their heads wondering what the contract really means.

Cole: It is commonly claimed that NECs result in fewer disputes, although the extent of empirical studies on this are limited. Nevertheless, the adoption of NECs for mega-projects such as the London Olympics is cited for the lower level of disputes that those projects have experienced compared to equivalent projects under different forms of contract. However, the NEC is not a panacea for all ills. We have seen very significant disputes relating to the NEC in connection with a mega project, due to inexperience in administering the contract and in interpreting its complex payment provisions. Without doubt, the more prescriptive provisions in the NEC for addressing claims when they arise, rather than leaving them until later when memories have faded or evidence is lost, can be of material assistance in avoiding or reducing the size of disputes.

CD: What are the advantages and disadvantages of on-site dispute resolution processes, such as Dispute Review Boards, that might be used while a project is ongoing?

Lowe: It is good to talk. Any process which encourages engagement while a project is ongoing can add value by engendering early resolution of claims and avoidance of formal dispute resolution. How effective 'on-site' dispute resolution processes are varies enormously depending on the approach of the parties and characters of the individuals involved. For these reasons alone, it would be naïve to place too much store in their power to achieve early dispute resolution. When it comes to DRBs, their constitution is commonly set by the client and membership often biased in the client's favour. This creates a risk that such a board can simply become another hurdle on an inexorable path to litigation or arbitration, in which case it will have failed in its purpose.

Appelbe: A DRB has the benefit of being familiar with the project and its context, as it exists from the outset, and any disputes referred to it can be opined on very quickly. The presence 'on site' allows for early involvement in difficult issues and allows quasi mediation-style involvement between the parties to guide them towards a resolution before positions are established. This can help to maintain good working relations on site and prevent the proliferation of disputes and issues through the breakdown of trust in a working relationship. Similarly to adjudication, the DRB can be used to prevent contractual posturing and encourage early resolution of issues rather than an aggregation of claims and issues. The disadvantages are the cost of paying for a DRB that needs to attend site regularly and may not be needed. Large complex infrastructure projects with multiple contracts are ideal for DRBs. However, as the DRB is established at the outset, it may not have the skills or experience to address the specific issues that arise.

Cole: It is generally accepted as both a matter of common sense and commercial reality that addressing claims early can prevent them metamorphosing into more complex disputes. One means of doing so is to embrace the range of alternative dispute resolution (ADR) forms that often feature in tiered dispute resolution clauses commonly found in construction contracts. This includes amicable settlement, expert determination, dispute boards or other initiatives. Early engagement of the parties while relationships remain constructive can avoid the resentment and distrust that often arises souring relationships when claimed entitlements are not addressed timeously. Dispute boards are particularly productive in avoiding litigation or arbitration because the decision of an independent DRB consisting of legal and technical experts can be

obtained with little delay and for relatively modest cost.

Walker: DRBs are well-suited to international construction contracts where the primary form of dispute resolution is arbitration. A DRB offers something similar to adjudication in the domestic area, namely an impartial tribunal which can resolve disputes quickly on an interim basis. A DRB is essential for security of payment because without one any dispute may take some time to proceed through arbitration. The main disadvantage is cost but that is mitigated by the fact that a tender may be higher where there is no DRB because the contractor may increase its price due to the risk of non-payment and cost of arbitration.

CD: Does arbitration tend to be a popular choice for resolving construction disputes? If so, why?

Walker: Arbitration is popular for international contracts for several reasons. An arbitral award can, generally speaking, be more readily enforced than a judgment of a national court can be. Arbitration also offers a neutral panel comprising one appointee from each party and confidentiality. In the domestic context, arbitration has declined in popularity due to the introduction of adjudication and reforms to the court processes which have made the courts a more attractive forum.

Cole: Arbitration is often the only realistic choice for resolving finally construction disputes concerning international projects or where parties are from different countries. Outside of the European Union and other trading blocks, the judgements of one country's courts are often not recognised in the courts of another. Furthermore, the local courts of one state may not be considered to be sufficiently independent of the project or the parties to be relied upon. In contrast, 161 countries have acceded to the New York

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which requires contracting states to recognise and enforce arbitral awards issued in another contracting state.

Appelbe: International arbitrations are certainly a popular way of resolving a dispute. The reason given for international arbitration tends to be confidentiality, perception of neutrality and enforceability. I am convinced it is not a cheaper process than litigation, but it does provide more flexibility and control in terms of timelines. The outcomes are also private, although they will, to a certain extent, become public through financial reporting.

Lowe: There is no doubt that arbitration has an important role to play in effective dispute resolution. There are two situations when arbitration is frequently the dispute resolution forum of choice. First, in international contracts with cross-border relationships, where arbitration in one of the international centres, such as London or Paris, gives confidence to the parties that the domestic courts of the parties' home countries cannot. Second, when the matters at stake are sufficiently commercially sensitive to make privacy an overriding consideration. In either situation, the contract dispute resolution clauses should provide for arbitration as the primary dispute resolution forum. As a general rule for domestic contracts in the UK, and where privacy is not an overriding concern, litigation will provide a faster, cheaper and more certain outcome than is likely to be achieved through arbitration.

CD: In your experience, what are some of the challenges that might arise in connection with enforcing awards and judgements arising from construction disputes?

Cole: One of the biggest challenges of enforcing any award or judgement is to ensure that the paying party has sufficient accessible assets to enforce against in the event that that party refuses to abide by the court decision or arbitral award. This can be a challenge as some parties are very experienced at trying to put their assets beyond the reach of creditors. However, skilled lawyers appropriately supported by investigators can defeat the efforts of even the most evasive debtors. Losing parties may seek to challenge or avoid enforcement of judgements or awards by relying upon the limited grounds available under the New York Convention or the laws of a particular state.

Lowe: Getting hold of the money is the overriding challenge when it comes to enforcing awards and judgments in the construction industry. First, one needs to be confident that the judgment debtor has the wherewithal to satisfy the judgement. Second, it is preferable to know that there are sufficient assets available in the jurisdiction to be able to enforce locally. This will be a whole lot easier than relying on, for example, either the European regime for the enforcement of a judgment or the New York Convention in respect of arbitration awards. It is prudent to undertake financial due diligence with this in mind before getting into contract and putting appropriate assurance in place through parent company guarantees, bonds or letters of credit.

Walker: Many of the cases heard by the Technology and Construction Court (TCC) are applications for summary judgment to enforce adjudicator's decisions. The grounds on which the court will refuse summary judgment or grant a stay of execution continue to evolve, with the 2018 decision in *Gosvenor London Ltd v Aygun Aluminium Ltd* being an example of the evolution. The enforcement of arbitration awards is often challenged on the basis that the arbitral tribunal lacked jurisdiction.

CD: Have you been surprised by the outcome of any adjudications or arbitrations, and whether the 'right' result was achieved?

Lowe: The day when I am surprised by the outcome of an adjudication or arbitration will be when the 'right' result is actually achieved. Sadly, the quality of adjudicators in particular, and arbitrators to a lesser extent, is highly variable and, at times, produces some truly astonishing outcomes. It is not unknown for a decision to include grounds which were not raised by either party to the dispute. While on the face of it, this may present grounds for challenging the decision, more often than not the parties choose not to take the matter further and to accept an element of rough justice.

Appelbe: Some outcomes have been very surprising, with strengths and weaknesses of a case as envisaged by the legal teams being turned on their head by the award. I wonder if we are seeing the required blend of skills and experience on tribunals and whether the process is being managed effectively to put the tribunal in the best position possible. Parties can be left with a distinct lack of clarity on the reasoning behind a decision from some tribunals. One of the original intentions behind arbitration was that it allowed for the selection of a technical panel with the appropriate expertise and this, in some cases, would be preferable to a court. In relation to delay, which can be a hugely complex matter and is surrounded by much legal uncertainty, my experience is that the lack of the required technical knowledge on the panel of arbitrators is often surprising. Even on a panel of three, the profile of the arbitrators is similar and generally with a legal bias, as they largely comprise solicitors and barristers.

Walker: Construction disputes often raise difficult legal issues and require an analysis of complex facts which can be difficult in the context of a speedy process like adjudication. Adjudication is recognised as being a rough and ready process, and that brings with it a higher degree of uncertainty than would be the case in court or in arbitration. That said, most adjudicators are experienced professionals with extensive experience in construction disputes and their decisions are, in my experience, reasonably predictable. The same is true of arbitrators. Decisions which have surprised me, or which I considered to be obviously wrong having regard to the law and the evidence provided, do occur but they are, in my experience, the exception.

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Steven Walker, Atkin Chambers

Cole: Ordinarily, construction specialists will know the range of likely outcomes from any particular procedure, leaving little scope for surprise. However, one recent case involved a binding expert determination that the contractor and employer had conducted. For three years the parties had been discussing a claimed variation with respective valuations of between US$50m and US$120m. Unfortunately, the parties had not

drafted the agreement for expert determination with sufficient care, with the result that both parties were surprised when the expert determined a valuation of zero dollars. Despite the expert determination being stated to be binding on both parties, the expert determination was eventually overturned in arbitration on legal grounds.

CD: In your opinion, how important is it for construction companies to ensure they have plans and strategies in place to manage and resolve disputes when they arise?

Walker: Construction companies have to manage a range of disputes and a range of responses is likely to be required. Early identification of likely sources of conflict is essential and that is not possible without adequate monitoring and reporting within the business. An independent analysis of contractual rights and obligations will often be appropriate to ensure that the position adopted by the project team is sustainable and is advanced in a way that is consistent with the contract. It should be remembered that in the event of formal proceedings the project correspondence will be scrutinised by lawyers and the tribunal. Many contracts contain onerous notification clauses and it is important that those managing contracts understand what the requirements are to ensure that valid claims are not lost due to lack of notice. Careful consideration has to be given to the desired outcome, whether it is payment to or from the counterparty or some other relief such as carrying out remedial works, the strength of the claim, relationship issues, reputational issues and costs.

"Construction companies should be in constant dispute management mode, whether it be managing client expectations, administering the contract or gathering and putting relevant facts on record."

Stuart Appelbe, Accuracy

Appelbe: Construction companies should be in constant dispute management mode, whether it be managing client expectations, administering the contract or gathering and putting relevant facts on record. You must be conscious of the burden of proof and in a position to put your case forward to a third party when you meet a client who simply is not in a position to pay, whether financially or

politically. In my experience, it is seldom beneficial to allow disputes to prolong. The further away from the change or event, the more confused the facts become and the more experts, whether legal or technical, become involved and invested costs increase.

Cole: Claims are a recognised part of construction contracting, as are disputes which arise when claims are rejected. Accordingly, it is vital for construction companies to have informed strategies in place to deal with what is often the inevitable. Strategies should include ensuring that contractual notices are issued in the proper form at the right time to avoid time bar defences being employed. Furthermore, utilising specialist construction lawyers and professionals to compile claims that accord with contractual and legal requirements, making use of available evidence and presenting it in the most persuasive fashion, are important steps to achieving success.

Lowe: To fail to plan is to plan to fail; never a truer word was said when it comes to construction sector dispute resolution. It is essential to have a holistic, strategic view of the 'battlefield' before engaging in any significant dispute. Key factors which should feature in the plan include putting the right 'General' in charge of the campaign, identifying and preparing relevant documents including destruction 'hold' instructions until the dispute has been resolved, ensuring the availability of your witnesses and that they have not been moved on to a new project which will detract their attention from achieving a successful outcome, appointing the best expert witnesses and appointing them early to prevent the opposition from instructing them. Above all, know your opponent and ensure that channels of communication with them remain open. Most disputes are settled by negotiation, which will only happen if the parties keep talking to each other.

CD: What advice can you offer to parties on drafting dispute resolution clauses as part of their commercial contracts?

Walker: This depends on a number of things such as the governing law, the jurisdiction, the nature of the disputes that might arise, the internal and external resources available to the parties and the outcome that is desired. Multi-tiered dispute clauses have many supporters who believe that they prevent disputes from escalating. The first tier is usually an obligation for senior personnel to meet to try to resolve the dispute. The second tier may be some form of ADR, such as mediation. The third tier may be arbitration or litigation. Such clauses have generated case law regarding their enforceability and effect. The case law illustrates the potential for clauses to generate significant satellite disputes – for example, whether each tier is mandatory and whether a referral to arbitration is premature due

to non-fulfilment of an earlier tier. Such disputes add to the time and cost of resolving the original dispute. Where parties are entrenched, a multi-tier clause can provide an additional front for conflict and a means of generating delay to the resolution of the claim – though, in the UK, the statutory right to adjudicate will override any contractual provision that seeks to exclude a right to adjudicate, where the Act applies.

Cole: The incidence of pathological or defective arbitration agreements or other dispute resolution clauses is unfortunately common. This can expose parties to unnecessary delay and cost in trying to resolve them at the outset of a dispute or unnecessary risk to the resulting award being challenged at the completion of proceedings. This is a classic case of where great value can be achieved at low cost by engaging specialist dispute lawyers to review the dispute clause at the time of contracting, avoiding the enormous waste of time, cost and energy that can be caused by defective clauses.

Lowe: It does not matter how well a drafted contract may be, its terms will not prevent disputes from happening, though a well-drafted contract may help to resolve a dispute when it arises. The best dispute resolution clauses contain provisions which encourage, if not require, the parties to engage in dialogue at each stage of the dispute process and, more importantly, include an escalation process for engagement and negotiation between increasingly senior tiers of management before the parties lock horns in formal dispute resolution.

Appelbe: Though the involvement of experts on the decision panel does not guarantee the right outcome, I would still insist that clauses require the arbitration panel or adjudicator to include relevant technical experts. It is essential that the tribunal, or equivalent, has the knowledge and the opportunity to interrogate the issues. The range of answers provided by 'independent' experts is often unhelpful to the tribunal and technical insight and competency at the 'award' table is essential. Lawyers and counsel may have experienced delay cases for example, but this does not make them suitably qualified to interrogate two divergent expert reports, particularly where the process requires simultaneous exchange. Expert input can be kept aligned by agreeing the instructions up front and ensuring that the experts are at least answering the same questions, even if there are two scenarios as a result of legal interpretations that have yet to be decided. Indeed, the tribunal may have its own opinion as to the right question to help it reach the right decision. CD