

Out of court settlement

by Michelle Smart

The engineering and construction industries are notorious for disputes and conflicts between contractors. Disputes can become messy, often ending up in court, and cost the industries millions of pounds in legal fees and compensation. It frequently ends with both parties vowing never to work with the other again, damaging reputations along the way.

All that is about to change.

A Pre-Action Protocol came into force at the beginning of October, regulating the way disputes in the construction and engineering industries are dealt with. The objective is to help resolve construction disputes early, avoiding the time and expense of litigation. It is applicable for professional negligence claims.

The Protocol works through a four-stage procedure. Firstly, the claimant sends a detailed letter of its claim. The proposed defendant must then acknowledge receipt of the letter within 14-days and give a detailed response within 28-days. Shortly after the response has been given, the parties meet to discuss the case on a "without prejudice" basis.

If one party fails to comply with the protocol the courts can penalise that party to pay up to all the costs of the action. Non-compliance does not prevent the party from pursuing a claim or defence through the courts.

Michael Frisby, Commercial Litigation Partner at Stevens & Bolton Solicitors said: "The Protocol builds on the 1999 Woolf Reforms of the civil justice system, which encourages parties to avoid litigation and to settle early. This can only be a positive step for the industry and I predict a healthier operating environment because of it."

Companies can avoid disputes getting this far.

ResoLex is a new company founded by the Chambers of Roger Henderson QC in partnership with consultancy, management and design company, Symonds Group.

ResoLex has formed a service known as 'Contracted Mediation.'

Companies involved in development and construction projects, among others, can hire the Contracted Mediation Panel from the outset.

Before work begins, the relevant parties agree that any disputes, conflicts of opinion or plain old disagreements, will be resolved with the assistance of the Panel.

A legal specialist, normally a barrister, and a commercial specialist form the framework of the panel and are given full access to the contract documents and the parties involved. If a specific project requires specialist expertise, a third member may be co-opted onto it.

Chris Boov OBE, Executive Chairman of Symonds Group, said:

"ResoLex represents the positive side of a project relationship, where funniers, clients contractors and suppliers have instant resource to practical independent advice before differences become disputes. I am confident this form of mediation will quickly become a vital component of property

funding agreements."

The way the panel operates on projects varies depending on the type and level of service needed and agreed upon.

To begin with, the panel will usually attend a 'Partnering Meeting' with the parties, requiring sight of all contract documents, progress reports, certificates and other relevant documentation.

Site visits are then jointly agreed on between the panel, representatives of the main contracting parties and other relevant parties. This allows the panel to become familiar with the project and its progress, and see where potential problems or disputes could arise.

The actual need for mediation can stem from parties referring disagreements and differences, or from the panel noticing that a problem is occurring from its observations and communications with the parties.

If a formal request for mediation is submitted, the panel will send a copy of the request to the other parties, asking them to explain their understanding of the dispute in writing.

At this point, the panel will usually set up a preliminary meeting, during which the procedure and timescale for resolving the dispute is agreed.

Each party will then submit a written statement highlighting their own case and the background of the dispute, provide relevant documentation and name their authorised representative.

Once all relevant parties have submitted their statements, a 'Mediation Meeting' will be held. At that, a binding settlement agreement will be signed by the parties, agreeing terms to resolve the dispute.

Failing this, any party can advise the panel that in its personal view, settlement cannot be reached and that it would like to end the mediation. Likewise, if the panel believes that a dispute cannot be resolved, it will thus advise. This is highly unlikely though, as the panel will be so familiar with the project that most problems are resolved before they have had a chance to become an issue.

Roger Henderson QC said: "This new service is not a panacea for all contractual ills, but empirical evidence suggests that Contracted Mediation should be welcomed by insurers and contractors alike. Problems which should never reach the courts or arbitration, will be defused at far less cost En far less time."

MTRC (Mass Transit Railway Corporation) engaged the services of JCP (John Carlisle Partnership) — see page 25 — in early 1999, working in a similar vein to Contracted Mediation. The (then) MTRC Project Manager said: "In one of the tunnelling contracts, we have already seen savings of around £3m which we can directly attribute to saving.

Between them, the Pre-Action Protocol and the Contracted Mediation/JCP services can potentially save the industries millions of pounds, keeping good reputations intact.