

RESOLUTION

The Newsletter of ARBICON ADR Ltd

VOLUME 7 ISSUE 1

OCTOBER 2009

In this issue:

- **UNDISPUTED GOOD NEWS – FIND OUT MORE**
- **WHEN IS AN AGREEMENT NOT AN AGREEMENT?**

The key members of the Arbicon Team are:

Ian J Purser
Director

Jon Nugent
Director

Jack Kirk
Senior Consultant

Mike Norrish
Senior Consultant

Tim Dyson
Senior Consultant

Derek Wakefield
Senior Consultant

Louise Steel
Marketing Manager

Undisputed Good News!!

Fee funding for disputes



All we hear at the moment is doom and gloom, what with the economy and now with the onset of darker mornings and nights rapidly approaching, where will it all end? Well let's start here..... Arbicon ADR have seized the moment to launch there latest UNIQUE package to the construction industry, which is in desperate need of good news and favour.

Arbicon's experience has enabled them to analyse the current market and they believe they have the perfect antidote for the present economic and winter blues. Arbicon's success allows them to assess the likelihood of success of a multitude of disputes, claims, non-payments, etc. All they need is a clear picture of the arguments, preferably both sides to give a balanced view and prevent future issues or disappointment.

Decisions are taken at director level on the viability of a dispute or claim, so clients can be assured of clear and concise advice from key decision makers, whilst minimising their exposure to irrecoverable costs by prompt analysis of individual and specific circumstances.

The package works by offering an initial low cost single page report on the single dispute in question, which is completed by an Arbicon ADR Director and enables the client to easily assess their probability of success based on the information provided. The key to receiving an accurate probability statement is the information provided. As they say garbage in, garbage out Once the client has decided to proceed with an action, the most suitable route of ADR or negotiation is proposed for consideration and approval. The next step allows the client to opt for a financing package, whereby the Arbicon fee (excluding necessary disbursements) is delayed until such a time as the decision of the adjudicator is published or the negotiations are concluded and can be linked to the decided outcome and payment.

This significantly reduces the risk of adjudication or ADR action for the client and improves their cash flow at a difficult time allowing them to concentrate on other elements of their business.

At the conclusion of the action, which in the case of adjudication would be the publishing of the decision, the fees become due within an agreed defined timetable allowing the client to either fund them from the proceeds of the action or however they should choose. The fees can be linked to a defined "win" such that the success enables the client to benefit from Arbicon's proven exceptional track record, to maximize his value and reward that success.

Should you require further details of this or any other matter please do not hesitate to call Arbicon ADR on 01480 426560. We look forward to hearing from you and sharing in our success.

**Professional Quantity Surveying Services &
Alternative Dispute Resolution Services**

Tel: 01480 426560 Fax: 01480 426561 email: advice@arbicon.co.uk
or visit our website at www.arbicon.co.uk



RESOLUTION

The Newsletter of ARBICON ADR Ltd

When is an agreement not an agreement?

How can a matter that is agreed, later be said to be not agreed? Common sense suggests that such a statement does not add up or does it? Construction projects invariably do not remain the same, there are always changes, omissions, additions and circumstances that can lead to an increase in costs. The contract agreed is usually legally finite and unless there is a very clear deed signed to discharge or alter it the contractual rights survive. It is generally held by the courts that the contract will be interpreted on a *laissez-faire* or objective way so if one party denies an obligation which is clearly written in, there is no escape. The court will interpret the contract, subject to doctrines such as consideration, illegality, frustration, duress and overriding statutes such as the Unfair Contract Terms Act 1977, the Housing and Grants, Construction and Regeneration Act 1996 (HGCR Act) as examples, which may make the contract or terms within it void. A good example is where a "pay when paid" clause is in the contract, this is voided by section 113 of the HGCR Act 1996.

So there can be problems with contracts being void and agreements can be invalid, thus careful drafting and checking is recommended. Problems then occur during the contract or after it is completed as changes take place and the final account pencil is sharpened leading to disputes. A common problem is where one party will assert that certain variation items are agreed and cannot be opened again and an adjudicator must decide. As an example, during the course of the contract in the interim, the paying party pays a lump sum of money of

say £50,000 for wasted concrete, he does this on account even though the net measurement has been agreed, separately but the payer realises that the job needs to be completed and the sum will probably be due one way or the other in the final analysis. So to avoid upset he consents to and pays the sum of money, worse still the payment schedule has the word "agreed" next to the sum. At final account stage the parties fall out and the sum is withdrawn, it is a considerable amount, but on the true interpretation of measurement under the contract it is simply not due, there is no entitlement to it. But is it agreed, so due under that heading? The answer may be in the contract, most standard sub-contracts at least have a variation mechanism which defines how variations to the contract price are dealt with. If a pre-pricing mechanism exists and is clearly adopted there will be little chance that the paying party will be able to later reduce the agreed sum. If no agreement is reached the variation is assessed on the basis of a fair valuation. It is also generally accepted with standard contracts that there is an interim payment procedure and a final account procedure, with the latter often incorporating a term that states that "full and final settlement" will only be reached when certain conditions have been met or say a deed is signed with wording to that effect. In such a case the objective view normally taken by the courts is that there can be no final agreement on any part of the account until that final deed is signed. So subject to doctrines and statutes parties are able to engage in the "freedom of contract" without court interference, but what happens if there is no variation

clause, interim payment or final account procedure that might define how "agreement" can be reached? Does the interim "agreement" for the extra concrete become a legally binding agreement? The answer is, possibly. There is a risk that a binding agreement exists or even a separate contract was formed, it is open to interpretation by a court or adjudicator. Implied terms could be argued on the custom, but at the end of the day risk will be unnecessarily introduced through lack of certainty.

In conclusion, the importance of properly drafted contracts with a clear agreement procedure is essential to reduce the risk. Training should also be given to enable Quantity Surveyors to use words such as "agreed" appropriately in written exchanges. In the case of the Client's Quantity Surveyor it is entirely possible that he may not have the power to agree anything on behalf of the Client, if the Client does not expressly provide him with that power, but that is for another article altogether, with a twist in the tale!

Should you require further details of this or any other matter please do not hesitate to call Arbicon ADR on 01480 426560

**Arbicon ADR is now
regulated by the Royal
Institution of Chartered
Surveyors (RICS)**

Professional Quantity Surveying Services & Alternative Dispute Resolution Services

Arbicon ADR Limited

**Arbicon is a leading provider of Professional Quantity Surveying,
Cost Management Services and Alternative Dispute Resolution**

Services including the following:

Pre-Contract Services

- Cost planning
- Estimating & tendering (including audits)
- Bills of quantities preparation and production
- Commercial audits and reports
- Budget and cash flow forecasts
- Quantity and procurement checks
- Material scheduling
- Contract procurement
- Drafting of Employer's Requirements

Post-Contract Services

- Preparation of final accounts
- Contractual procedure advice
- Re-measurement
- Cost reconciliation reports
- Sub-contract account management
- Valuations for interim payments
- Variation and day work account valuation and control
- Extension of Time claims
- Loss and Expense claims
- Dispute Resolution, Mediation, Adjudication and Arbitration
- Support in Litigation
- Risk Management and Dispute Prevention
- Expert Witness

Arbicon ADR - Seminars

Contact us if you would be interested in any of our future seminars on Managing Your Risks. Many have benefitted from these informative seminars since we started running them over three years ago. Contact us on advice@arbicon.co.uk or call 01480 426560.



Arbicon ADR Ltd will under no circumstance be liable for indirect, special or consequential damages including any loss of business, revenue, profits, or data in relation to your use of the newsletter. All intellectual property of Arbicon ADR Ltd such as trademarks, trade names, patents, registered designs and any other automatic intellectual property rights remain the property of Arbicon ADR Ltd. The information is provided on the understanding that the newsletter is not engaged in rendering legal or professional advice and should not be relied upon when making any related decision or to evaluate any case problems. The information contained within the newsletter is provided on an "as is" basis with no warranties expressed or otherwise implied relating to the accuracy, fitness for purpose, compatibility or security of any components of the newsletter.