Arbitration – The Best Thing Since Jackson

There has always been debate as to whether in full and final resolution of disputes it was better to have an arbitration clause in sub-contracts, or not. Under the Arbitration Act 1950 it was easy for a responding, or defendant, party to delay the arbitral process and stories of arbitrations taking 3 years and occasionally longer were prevalent in the late 1980's and early 1990's causing lawyers to advise their clients not to have arbitration clauses in their contracts as litigation, which at that time was only marginally better when it came to the speed of obtaining resolution of the dispute, was preferable.

Then, in 1996, two Acts of Parliament totally changed the landscape for resolving disputes in a full and final manner and, in addition, a third Act of Parliament was passed for disputes on construction contracts to be temporarily resolved, but binding until they were finally resolved. The first two Acts of Parliament being the Arbitration Act 1996 and the Civil Justice Reform Act 1996 and the Construction Act 1996 introduced statutory adjudication for the temporary, yet binding, resolution of disputes.

Because of the improvements in the procedures that have been adopted in both arbitration and litigation under the two above relevant Acts, there was little to choose from between arbitration and litigation and to a large extent this meant that there is ambivalence as to whether there was an arbitration clause, or not, in contracts.

However, the Jackson Reforms to the Civil Procedural Rules for litigation in Courts have been introduced and are effective on all litigation commenced after 1 April 2013 in England and Wales. The introduction to the Jackson Reforms states that they have been introduced to improve access to justice, but having considered them and having had dealings with them as an Expert Witness, they have absolutely nothing to do with improving access to justice, but everything to do with reducing the recoverable costs that are payable to the successful party.

Whilst recoverable costs have always been defined as "reasonable costs, reasonably spent", meaning that lawyers for years and possibly decades have advised clients that this will mean that if successful they will probably recover approximately ⅔ to ¾ of their costs, under the Jackson Reforms you will be fortunate if you recover ⅔ of your costs and, more likely, only recover half of them. This is because the Court is going to issue directions as to the sum of recoverable costs that the successful party will be allowed to have and, furthermore, even if the overall budget is maintained, if your solicitor incurs additional costs on an element of the litigation process, you will not be able to recover that overspend, even if the overall budget is adhered to. Furthermore, if through skill and efficiency your solicitor does not expend the directed budget on an element of the litigation process, neither will you recover the amount of under-spend. Therefore, having had the budget reduced by the Court in the first place, any elements of over spend are irrecoverable, as are the elements where there are savings from the Court directed budget.

This is important for a claimant contractor or sub-contractor, because claimants have the onus to prove their case and, therefore, claimants' costs will probably be higher than defendants' costs, because defendants do not have to fulfil this obligation.

I have already experienced the effects of the Court's interest in reducing costs because an instructing solicitor requested that I submit a budget, based upon a minimal amount of documentation, for compiling an Expert Report on a civil engineering dispute for him to include in his overall budget. Also, I added in £1,000.00 for time spent answering questions of clarification that may be raised by either party concerning my report. On presenting my estimate of costs to the Court to finalise the budget for dealing with the litigation, the Court halved my budget to compile the report and totally crossed out the £1,000.00 that I requested to be made for my time to answer questions of clarification, therefore, my instructing party had to accept from an early stage in the litigation that, if it is successful, less than half my costs would be recoverable, or find an expert who was prepared to compile the Expert Report and provide expert evidence for the sum determined by the Court, before the majority of evidence had been disclosed.

Initially, my prospective instructing solicitor proposed to instruct an expert that was prepared to compile the report for the directed budget, however, subsequent telephone conversations with that solicitor have already indicated a question mark regarding that expert's knowledge and experience concerning the subject matter and his client is considering instructing me after all and accepting that, if successful, less than half my costs will not be recovered.

Having to appoint an expert that will provide expert evidence where the Court has arbitrarily decided upon the cost of the expert evidence is not an improvement of access to justice, particularly if the cut price expert lacks the necessary experience and knowledge required in assisting the Court on the matters he/she has been instructed upon, such as recently occurred in the Liverpool Museum litigation.

Furthermore, there are further reforms that Lord Jackson has implemented. These are limitation on the extent of disclosure of documents, limitation on the length of witness statements and limitation on the issues for which expert witnesses can be appointed.

Whilst it is accepted that in recent years the cost of disclosure has increased significantly, caused by the extent of emailing that now exists on an average contract and not only do these emails have to be produced, but there is a cost in ensuring that the same email isn't copied ten times because it happens to be on four or five strings of emails, if there is a limitation of disclosure then, for example, a party may have opportunity not to disclose the "smoking gun documents".

I have been involved in two arbitrations in which settlement was reached before a hearing was heard because of "smoking gun documents". One concerned meeting minutes that referred to a document compiled by a director who was not a witness in the arbitration and the document had not been disclosed, which directed that plant that was parked up in the yard was to be moved to the subject contract to improve the size of the claim and obtain some payment for that plant, which otherwise would be a complete cost to the company. On the other one an email was disclosed from a managing director of a main contractor to his senior site quantity surveyor instructing him not to make any payments to the sub-contractor, because it was in financial difficulties and there could be a significant saving in cost to the company if the sub-contractor was to enter insolvency.

Therefore, comprehensive disclosure of documents can save money in the long run, not cause additional cost.

Remembering that claimant contractors and sub-contractors have the onus to prove their case, it will not assist and may even hinder them if they specialise in an area of work or field of expertise and the Court decides to limit the length of witness statements, especially if the claimant's manager is a specialist expert in the area or field of work, because requiring all statements of opinion to be deleted from the factual witness statement could seriously hinder that claimant's case. Whilst witness statements should only deal with factual issues, specialist contractors and sub-contractors usually have managers who are also experts in their field and, therefore, have a right to include expert evidence within the witness statement based upon their extensive experience and knowledge. Refusing this evidence to be presented is not access to justice, but access to injustice.

Not only will claimant specialist contractors and sub-contractors have to consider the sums that the Courts are prepared to allow as recoverable cost for the experts they choose to use, but the Courts will also limit the issues upon which expert witnesses can report. As an example on how this may affect a specialist contractor or sub-contractor, it may mean that a specialist contractor or sub-contractor who does not job cost all of his costs and, therefore, allows elements of dedicated site generated costs to be an overhead, may require a forensic accountant to provide evidence of costs incurred in having an owned resource based upon a site for an extended period of time. If a Court prevents this evidence from being produced, then the specialist contractor or sub-contractor may fail to recover a significant item of cost caused by the prolongation of the contract for which the employer or main contractor is culpable.

In deciding whether to pursue a claim through arbitration or litigation has always meant that risks will be encountered throughout the procedures, irrespective of which procedure is chosen, but previously if successful, there was a knowledge that ⅔ to ¾ of your costs will be recovered.

Under the Jackson Reforms, the claimant contractor and sub-contractor doesn't only encounter the risk that was there before, but may be prevented in presenting its case needed to satisfy the onus of proving its entitlement because of limitations directed by the Court and then even if successful may fail to recover a substantial proportion of its costs incurred to ensure that it was successful.

Now it is unequivocal. There is a clear benefit that if there is a requirement to get full and final resolution of a dispute, it is better to do this in arbitration, rather than litigation, because a knowledgeable arbitrator is going to be prepared to allow a claimant party to be able to present its best case, whereas now a Technology and Construction Court Judge's main aim is to restrict the sum of recoverable costs if the claimant is successful and this takes precedence over the claimant being allowed to present its best case to ensure that it is successful.

Therefore, all contractors and sub-contractors should now ensure that there is an arbitration clause in their contracts and not allow themselves to be at the risk of not being able to present their best case because of the restrictions, possibly made following the request of opposing defendants to the Courts, of being prevented from being able to present their best case and, even when successful, being prevented from recovering reasonable costs, reasonably spent, in presenting their best case.