

THE ROLE OF CONSTRUCTION CONSULTANTS IN ADR—COMPARING THE UK MODEL

By IAN CARTWRIGHT, C.ENG.

Many aspects of professional practice vary from state to state both in the United States and certainly in an international context. The way in which construction disputes are resolved is no exception. This article looks at the ways by which construction disputes are resolved in the UK and contrasts and compares them with the methods used here in the US. Specifically, it looks at the role of construction consultants who, as a professional group in the UK, frequently assume a more prominent role in the process, including serving as the client's primary representative.

This article concludes with the opportunity for you to take part in an on-line survey and express your opinions on whether the construction dispute resolution process in the U.S. can or should allow professional construction consultants to assume a more prominent role in the resolution process, and what, if any, additional training and experience would be required to qualify them to fill such a role. The results of the survey will be presented in a follow-up article in October.

The UK—A Split Legal Profession

America and the UK share many similarities in the structure of their legal systems and in how disputes are resolved. For example, both are based upon English common law and the law of precedent. Both adopt an adversarial approach in contrast to an inquisitorial approach adopted by some European countries. However, the operation of the legal profession in the UK is markedly different in that it is split between two professionals, i.e. solicitors and barristers (advocates).

A solicitor is an attorney, which means he/she stands in the place of their client for legal purposes, and may conduct litigation by making applications to the court and writing letters in litigation to the client's opponent as examples. A solicitor represents and advises clients but cannot generally appear before the court and advocate for a client; that role is reserved for the barrister.

A barrister's primary role is to provide advocacy at trial and he/she may be retained to render legal opinion on complex matters. A barrister is forbidden, both by law and by professional rules, from conducting litigation.

Solicitors have primary and predominant contact with the clients, whereas barristers are rarely, if ever, instructed by clients directly. Instead, the client's representative (solicitor or another professional—see below) will instruct a barrister on behalf of the client when appropriate.

By contrast, the role of solicitor and barrister in the USA (and Canada) are fused, and an attorney in the USA is permitted to conduct all aspects of litigation and appear before those courts where they have been admitted to the bar.

Alternative Dispute Resolution (ADR)

A construction contract will normally specify the method of dispute resolution; if it does not, then the only recourse (without additional agreement) is litigation. Therefore when planning a construction project, it is very important to consider contract provisions for dispute resolution, and parties should solicit professional advice if they are uncertain.

Construction disputes are resolved formally by litigation in a court of law, or by one of many forms of alternative dispute resolution (ADR). These forms include Arbitration, Dispute Review Board, Court of Contract Appeals (Army Corps of Engineers), Contract Review Board (various state agencies) and Mediation.

Only a qualified attorney may represent a party in a court of law, whereas ADR typically provides that parties may be represented by a person of their choosing. For construction disputes that proceed to ADR, parties in the US almost always engage an attorney, in contrast to the UK where construction consultants frequently represent parties. It is somewhat incongruous that in the UK—where arbitration is a quasi-judicial process (i.e. follows law and precedent)—construction consultants are apt to represent clients, but in the USA—where arbitration is based in equity (i.e. not bound to follow law and precedent)—construction consultants are less likely to act as a representative. Apart from custom and practice, it would appear that a professional construction consultant may also be an appropriate choice. This article examines the current practice in the US and the prospect of engaging professional construction consultants, similar to the UK, as representatives in ADR.

Statutory adjudication is very successful in the UK and held as one of the principal factors responsible for a significant reduction in litigation and arbitration in recent years. With adjudication, an adjudicator provides a contemporaneous and temporarily binding determination of a dispute that may later be challenged. However, most adjudication decisions are upheld by the Court and this has led to widespread acceptance by parties of adjudication decisions. The bulk of construction industry adjudications in the UK are dealt with by construction professionals, notably members of the RICS. As expected, what is most important to the process and successful adjudication is that the representatives are competent and knowledgeable in the area of the dispute.

Qualifications for a Client Representative

Construction dispute resolution is a complex process involving not only the subject matter area, but also the areas of law, anthropology, sociology and psychology, to name a few. In short, it requires a wide range of explicit and tacit skills and years of experience, the aggregate combination of which will determine the competence of the professional to represent a party in an ADR proceeding.

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Narrowing to the most important, the principal knowledge and skills needed to successfully represent a client in ADR are:

- Subject matter expertise
- Knowledge of construction/contract law
- Negotiation skills
- Advocacy skills

Subject matter expertise sits at the center of any dispute, and for many forms of ADR (e.g. arbitration), is historically a quintessential prerequisite for representing a party.

Arbiters of a dispute will evaluate the subject matter in conjunction with the underlying contract and to varying degrees the law and legal precedents. Knowledge of contracts and law of the subject matter is therefore important.

Negotiating skills are another essential. It is always important to consider the alternatives of objective-based resolution of disputes over rights-based resolution. Losing the war may not be worth the victory in a battle.

The ability to frame and present arguments in ADR is important but probably less so than with litigation. With ADR the dispute is heard (or least it should be) by a tribunal or panel comprised of one's experienced peers, rather than a judge and jury. An ADR panel is less likely to be swayed or prejudiced by courtroom-type histrionics.

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The best qualified representative will have acquired the necessary skills in part by education, training and experience and in part by his or her intrinsic qualities. Advocacy and negotiating skills, for example, are frequently an individual attribute enhanced by training and experience.

Working with Law in ADR

In the UK there is an established academic/professional pathway for construction professionals to specialize in construction law and ADR. This unique and valuable route for mid-career construction professionals benefits the industry in that working knowledge of the industry is retained and reinvested. In essence, it offers a type of self-regulation.

Construction professionals in the UK may specialize in matters of contract and construction law and offer such services in-house or as an external service. UK universities offer a wide range of graduate degrees in Construction Law and (Alternative) Dispute Resolution for those wishing to specialize, and professional bodies in engineering and construction research, report and educate on matters of law affecting the professions and industry. UK construction professionals are frequently qualified to advise clients in routine matters of contract and construction law and do provide such services.

In contrast, construction professionals in the US by custom and practice do not participate in matters of law regardless of the individual's knowledge and expertise. Concerns for being accused of the unauthorized practice of law frequently cause the construction professional to defer to the attorney.

Selecting a Client Representatives

The two most likely choices facing a client when selecting a representative are to use an attorney or, as is examined by this paper, to engage a professional construction consultant.

In the UK, it is common for a professional construction consultant (individual or firm) to be the client's primary representative in ADR. Two factors encourage this: the first being that professional construction consultants are recognized in that role and are competent to offer advice on law, and second, construction professionals have equal access to advocates (i.e. the barrister) for complex legal opinions and to present their case, should that be required. In a commercial context, construction consultants “compete” with solicitors for clients. The reality is that clients have a wider choice over who they retain to represent them and will choose the best-qualified candidate.

In the US, the choice that theoretically exists for clients in selecting a representative for ADR is limited in practice by the ability of attorneys to provide, by virtue of a fused profession, a “one-stop shop” and by the stigma attached to construction professionals who venture outside a technical role. The important question to ask is whether the resolution process is best served by this approach.

Professional construction consultants are often the first to be retained by a client. They develop and analyze the issues and make reasoned and informed opinions. This often involves extensive document inspection, technical analysis and contract review. Frequently, the consultant's work is sufficient to facilitate negotiation and settlement—witness the success of adjudication in the UK. Sometimes it is not. If the dispute heads to court, the client must retain an attorney. If it moves to ADR, the client may continue using the consultant to represent him/her or choose to retain an attorney.

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Selecting a Client Representative

One reason US clients may be predisposed to hiring an attorney is their understanding of what makes an attorney (e.g. education and training) and uncertainty over what makes a professional construction consultant qualified to represent a client in ADR.

Given the often high stakes involved in construction disputes, it is logical and appropriate to qualify persons as competent—through appropriate education and/or experience—before they can represent clients. However, is it necessary to require the all-encompassing education and training of a qualified attorney when the areas of law involved are largely limited to the professional's subject matter expertise?

Perhaps, as in the UK, there is a viable option and alternative. One can conceive the creation of the "Alternative Dispute Resolution Professional" similar to how the medical profession created the Physician's Assistant. This model, which has been extremely successful in the medical profession, provides for regulation and control, while affording broader and more economical choices to the parties. This subject is explored in the [linked survey](#).

Summary

ADR is not bound by the same regulatory controls as is litigation. Parties are free to select who represents them. In the UK, construction professionals frequently represent parties in ADR whereas this is much less common in the US.

Clients should evaluate the needs of their dispute and select a representative with the most suitable qualifications and experience. To date, the only option typically followed in the US is to engage an attorney. In light of the expertise and qualifications of professional construction consultants, the engagement of such an individual may also be appropriate.

Parties in construction disputes likely desire, and should be afforded, assurances that their representative is qualified. In the US, construction professionals may be overlooked only because there is a lack of understanding of their education and training and a corresponding accreditation system for ADR service.

Improvement in education and/or training, as well as the accreditation of construction professionals in ADR may provide necessary assurances of their competence. This would provide to clients more options in their selection of the most appropriate professional for the dispute at hand.

[You decide...](#)

YOUR OPPORTUNITY TO EXPRESS YOUR VIEWS

Please take part in the online survey that accompanies this article and researches areas related to this subject. This is valuable research being overseen by two leading international schools in Construction Management.

The findings of this survey will be reported in the October 2008 issue of the *Innovator* eNewsletter.

Take Survey

If the above link does not work, please copy and paste the following address into your Web browser:

<http://www.zoomerang.com/Survey/?p=WEB227Q9FQZBNH>

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