While lawyers and claims consultants may get very excited about the minutiae of dispute resolution, not to mention their fee stream that comes with it, for the parties involved a dispute is only ever a disruption to their business of procuring or constructing tunnels. Any sizeable dispute will be a significant drain on what will likely be senior management resources on both sides. Even in a formal dispute, it is very unlikely there will be any recoupment for this resource and more importantly it distracts from the management's primary tasks of creating new business and delivery of ongoing projects.

For the above reasons and those of pragmatism, the best course is often for parties to settle without recourse to formal procedures. In practice this is in any case how a majority of disputes will be resolved.

**Formulation of the dispute**

While settlement is intended to reduce the amount of time, energy and money invested in reaching a resolution rather than entering into a formal dispute, the preliminary steps in formulating and reviewing claim submissions should be the same, whether this be in the valuation of variation items or submissions for additional time and money arising out of delay and disruption to the works.

A well-formulated submission gives both parties an opportunity to come to a realistic assessment of their respective entitlements and liabilities. Providing clarity as to the legal and contractual bases upon which that entitlement is made, and logically linking those principles to a rational assessment of the losses suffered, should assist both sides in evaluating where any strengths and weaknesses lie. A poorly formulated claim with submissions made on indistinct legal bases and global assessments of loss leads to confusion and suspicion of 'claimmanship', and in short, to a very bad start for any settlement negotiations.

**Exchanges**

Following submission of a claim, there should typically be an opportunity for the resolving party to have time and opportunity to review its contents and respond with any observations as to principle or quantum. Apart from this process starting to give some shape to the parties’ respective positions, it is in any case a pre-requisite, even in formal
dispute process, that the claiming party notifies the receiving party of the details of the case being made against it before a dispute can be said to exist.

Risk assessment
Before beginning any settlement negotiations each side should undertake an internal risk assessment and peer review of the claims made. Risk assessments need not be of any complicated Monte Carlo type, although some organisations may have the specialist knowledge and capacity to undertake such advanced techniques. More usually what is required is a consideration, in turn, of the individual heads of claim. The process will be made more accessible and meaningful if the points made above regarding the logical formulation of the subheadings have been adhered to.

Each head of claim should be reviewed, firstly applying a percentage likelihood of success of the legal and contractual principles involved, followed by a separate review of the quantum attached to each principle. The product of this two-part assessment will give a percentage likelihood of success of each head. The process is repeated until risk assessed figures have been arrived at for all heads and a total reached. Ranges of percentages can be used in the consideration of each head, this will give an eventual risk assessed upper and lower limits of settlement. This latter approach can be desirable when reporting to internal management, as giving a range conveys the necessary degree of approximation, which is the nature of a risk assessment.

The influence of personalities
Many disputes are often driven by strong personalities on both sides. The complex and technically challenging environment of completing underground works can sometimes mean that they are driven by sheer force of personality. It is likely therefore that there will be few ‘wallflowers’ in the senior management of both the contracting and client side of any project. This otherwise desirable attribute can mean such personalities might not be best suited to making the necessary dispassionate assessment of entitlement and liability, which is an essential prerequisite if the matters at odds are to be resolved short of a formal dispute process.

It is for these reasons that the risk assessment should be carried out in the manner of an independent peer review. This may be by a senior person from within the organisation who has been unconnected with the project, or better still by external advisors who themselves are strong enough to give realistic dispassionate advice. In this way the conclusions reached can be de-personalised, objective and provide a more sound basis for what is essentially a business decision-making process.

Negotiations
There can be no ‘formula’ for the conduct of negotiations themselves, these will be dependent on the scale and subject matter of the claims themselves, the stage of completion of the project, and very probably the contribution and interaction of the aforementioned personalities. There will inevitably be some tactical gamesmanship centred around one or other of the parties wishing to approach matters on an issue-by-issue basis (known as salami tactics) or approaching all issues on a broad front in order to achieve an overall settlement without being seen to make admissions in respect of any particular issue.

What should always be clear however is that the negotiations are being made ‘without prejudice’, that is, without prejudice to the positions of the respective parties in the event that settlement negotiations fail and resort has to be made to a formal dispute process. A clear understanding of without prejudice basis of any discussions should also assist in promoting a degree of openness that may assist resolution.

It should be obvious those attending any negotiations have the authority to make agreements, or at least it be made clear the extent to which any representatives need clearance from other management or their board, before a deal can finally be struck.

The settlement agreement
The outcome of a successful negotiation should be an agreement that encompasses the matters that were in dispute. If the settlement is after completion of the works then it should ideally include all matters pertaining to the project so that further management time is not expended on returning to matters left in abeyance at some future date. Careful attention needs to paid to the drafting of the settlement agreement itself. It is not unheard of for much time, energy and legal fees to be expended in trying to ‘unpick’ a deal, which has later been seen as unfavourable.

The legal status of any settlement agreement will be that it replaces the underlying contract as the basis of the bargain between parties, the settlement is in effect a new contract and it is the binding force of that new contract, which in the event of any reneging of the deal can be presented to the courts for enforcement. In this respect it should be noted that the without prejudice status of negotiations falls away with the final agreement. In that eventuality, the courts will interpret the settlement agreement in the same way they would any contract, which is an objective interpretation of the intention of parties based on the words of the document.

Great care must be taken in drafting the agreement, as any matters that are not expressly dealt with will be swept up in the generality of the agreement. For example, a settlement agreement for the payment of a lump sum by the Employer will, without any express provision to the contrary, be deemed to include for all releases of retention and taxes payable within the amount of the lump sum. So that, if it is the Contractor’s intention that retention and tax are to be dealt with outside of the lump sum, then the agreement should be clear on this.

It would be rare that a settlement agreement would include the Employer’s abandonment of his contractual right to the remedying of work defects and again, if this is the case, then the settlement agreement should be clear. This can readily be done by a term stating that the provision of the original contract should apply in this regard.

Third Party Actions
Another important aspect of drafting the settlement agreement, though probably only for the Contractor, is that whilst there may be compelling reasons to reach a wrap-up agreement by way of an undefined lump sum with the Employer, in many instances the root causes of the claim may well be the liability of third parties, such as the Contractor’s sub-contractors and suppliers. Difficulties begin to arise then in claims that the Contractor may, in turn, make against those third parties; in that he will not be able to show with the required precision which parts of the lump sum pertain to the matters claimed against individual third parties.

The law in England recognises, in principle at least, that settlement agreements reached in head contracts can be used as evidence of loss in claims further down the contractual chain. This long-standing policy is based upon the desirability that cases should be settled rather than pursuing all the way through the court system and a recognition that a party may be disuaded from reaching such settlement if it compromises its claims against third parties.
The leading case on the matter being that of Biggin v Pernante [1951] 2 KB 314, CA. In the more recent case of Bovis Lend Lease Limited v RD Fire and Others [2003] EWHC 939 (TCC), His Honour Judge Thornton extracted various principles from Biggin, which included:

"As a starting point, a claimant may recover the sum paid in settlement if it can establish that that settlement was reasonable and that it was reasonable to settle the third party's claim. It is only necessary for the claimant to prove, in general terms, that the settlement was reasonable. It is not necessary for it to establish in great detail the extent and quantum of the third party's claim."

Whilst this may sound like a charter for a contractor to simply settle his claim and then deduct the sum settled from his sub-contractor/supplier's account, HHJ Thornton went on to say:

"The claimant must establish by normal methods of proof and to the normal standard of proof that the defendant was in breach of contract and that that breach caused the claims to be made. Equally, it must establish that the defendant's breaches of contract led to 'breaches by it of its contract with the third party.'

(In this case the claimant is the Contractor, the defendant is the Sub-contractor/Supplier and the third party is the Employer.)

It may therefore be that for the Contractor's purposes something more detailed than a single lump sum needs to be shown in the settlement agreement between him and the employer to evidence the various losses he may then want to recover from sub-contractor-suppliers. This however is very delicate ground, as any collusion between the Employer and Contractor in their settlement agreement to 'finesse' certain figures to assist the Contractor's recovery down the chain, could possibly be framed as conspiracy to defraud the sub-contractor/supplier.

"IN MANY INSTANCES THE ROOT CAUSES OF THE CLAIM MAY WELL BE THE LIABILITY OF THIRD PARTIES SUCH AS SUB-CONTRACTORS"

Settlement during formal disputes

It should be borne in mind that even if a formal dispute process is begun efforts at a settlement should be continued by the parties and their representatives. Arbitration and litigation will offer various stages at which it is prudent to at least undertake a review and new risk assessment of the state of play at that particular point. For instance, once pleadings are exchanged each side will have a better idea of the strength of the others case being made, which may alter perceptions of the likelihood of success. Parallel, without prejudice discussions can be had at any point during a formal process.

Conclusion

For cost, commercial good sense and in the interest of continuing relationships it will, generally, be preferable to reach a settlement agreement than enter a formal dispute process. However, settlement discussions should be approached in a structured manner so as to understand what would be a good or a bad deal and the terms of any agreement so reached should then be captured in a properly drafted settlement agreement.

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