INTRODUCTION TO THE GLOBALISATION OF LAW

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Introduction : The purpose of this paper is to introduce the principal procedural legal issues involved in the international settlement of trade disputes, with particular reference to the various resolution processes available to the parties, questions of choice of substantive law to govern the contract and choice of jurisdictional law that governs settlement processes and the enforcement of the settlement. In addition, the impact of private international codes of practice and international conventions that may become terms of the contract are considered.

Private international law. Despite the existence of concepts of Public and Private International Law it is arguable that there is no such thing as International Law. Rather, both in the public and in the private field there are a large number of agreements between nations regarding mutual co-operation in respect of specific topics. The number of such agreements is gradually increasing, particularly with the advent of the United Nations, to the extent that they are given the rather grand titles of Public and Private International Law.

Closely allied to these agreements are a wide range of agreements between industries that are applied on a virtually universal basis, particularly in the banking and maritime fields. To the extent that the terms of such agreements are incorporated into international contracts and are enforced by the courts as terms of contracts, they give the appearance of a legal code though not strictly law.

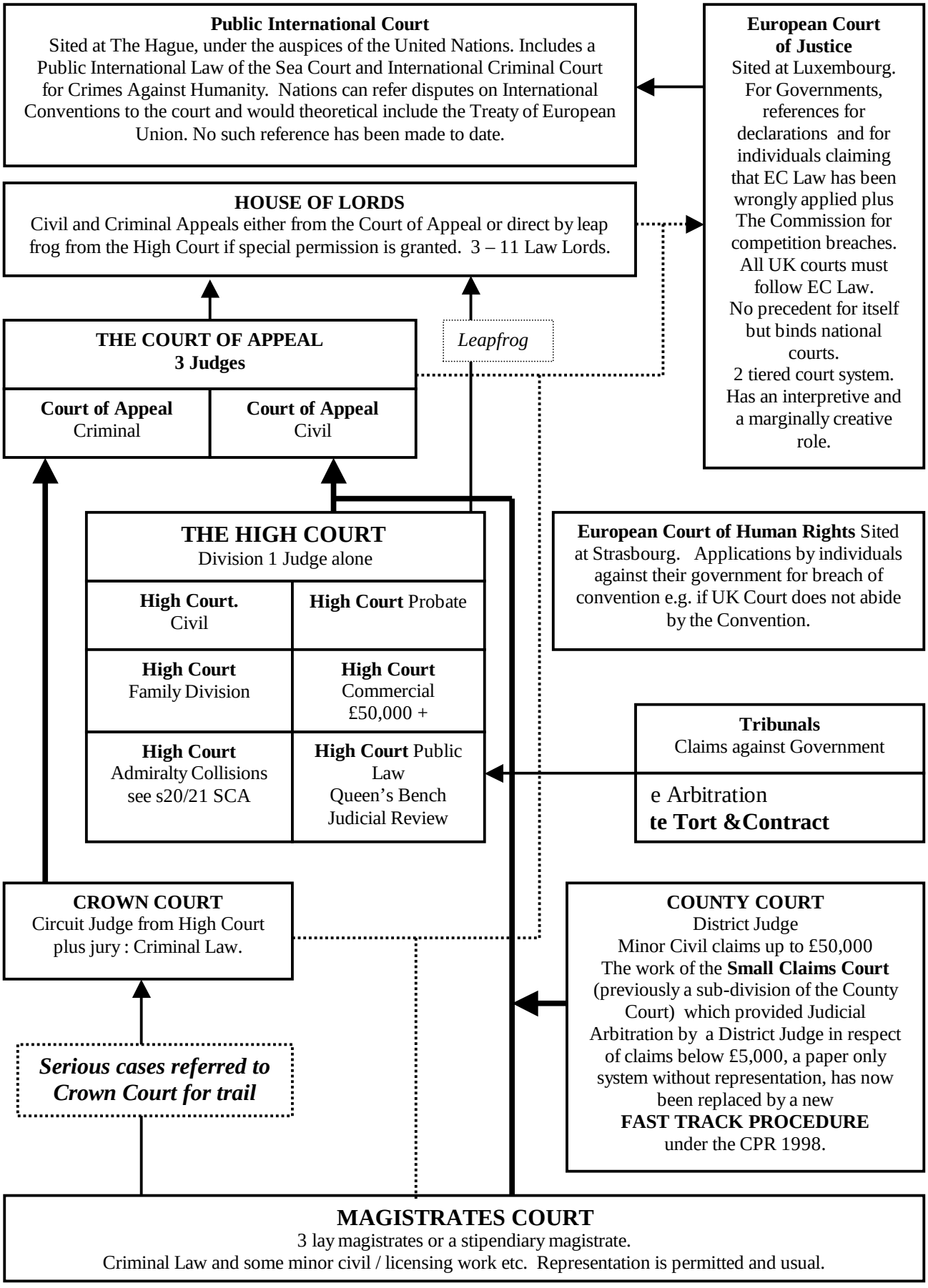
In respect of Public International Law, the absence by the courts of any absolute power of enforcement means that it does not qualify in the strict sense of the word to recognised definitions of law. Compliance with the decisions of Public International Courts and Tribunals is dependent on the good will of the parties to the action. Whilst comity and the desire to be seen in a positive light by the world community ensure a reasonably high level of compliance, particularly since states do not want to give other states an excuse for refusing to comply, the lack of enforcement is still inimical to a legal system. The singular exception relates to the powers of the Hague in respect of offences against mankind, as demonstrated by the Nuremburg Trials and the subsequent trials of individuals for atrocities in Rwanda and the former Yugoslavia. However, the distinction is that those on trial are individuals not States.

Private International Law is even less a global legal system. Each state operates its own version of conflicts of law. Whilst there is some communality between the versions operated by most Western States, nonetheless a wide degree of divergence also exists. There are no Private International Courts of Justice. There are a number of regional legal systems, most notably the United States of America which whilst giving the appearance of a State, is in fact a regional legal system since Texas is an independent Nation which does not have to comply with many Federal Laws. To differing degrees a number of other states owe only limited allegiance to the Union. For a large part of the 20th century the Soviet Union represented a regional legal system and the European Union is gradually developing into a powerful regional legal system. However, none of the above can be regarded as truly global legal systems.

The interaction between the legal systems of independent states and international agreements and conventions varies considerably. Some states have made certain of the conventions that they have signed up to part of their constitutions. However, the force of law of most conventions in domestic states relies on domestic legislation. The enforcement powers of the United Nations in respect of international peace and security relies on the consent of the members by way of resolution. Meetings of the Security Council cannot be equated with court proceedings and hearings, though the role of the United Nations as world policemen at times gives the appearance of a legal system in operation. However there is no United Nations International Criminal Court of Justice and no United Nations prisons.

A chart illustrating the principal civil courts, both domestic and international, from the British perspective, is set out on the following page.

HIERARCHY OF THE COURTS



International Conventions governing International Trade agreements.

There are very large number of public international law agreements and conventions, of both a bilateral and a multi-lateral nature, that impinge upon international trade transactions. The aim here, is to introduce the reader to the general concept of international conventions and through the analysis and application of a selected number of conventions, to show how to apply such conventions to the settlement of disputes in respect of private international agreements that are governed by international conventions.

The inter-relationship between private international agreements & international conventions.

There are several ways in which an international agreement can be affected or governed by international convention.

1 **The contract can expressly incorporate rules contained within a convention.**
Care has to be taken when this occurs that the convention rules do not conflict with mandatory rules of the state which cannot be contracted out of, as with **The Komninos S**,[1] where a contract said to be governed by the Hague Visby Rules was nonetheless still subject to mandatory provisions of the Greek Maritime Code governing the standard of care imposed on sea carriers.

2 **The law of a signatory state may specify that the contract is subject to the rules of a convention.**
The Hague-Visby Rules provide an example of this in the UK. Similarly, the Hamburg Rules are automatically incorporated in signatory states such a Egypt.

3 **The law of a signatory state may permit the parties to contract into a convention.**
s1(4) Uniform Laws on International Sales Act 1967 permits parties to contract on the basis of Uniform Laws on International Sales (ULIS). The Hague Convention 1964.

4 **The law of a signatory state may be based on or incorporate a convention as an integral part of its own law.**
The People's Republic of China provides an example of this in respect of the United Nations Convention on Contracts for the International sale of Goods, Vienna. 1980.

5 **The law of a signatory state may require the parties to incorporate a convention, by means of a clause paramount.**
The Hague Rules as applied in the US[2] provide an example of this. Problems occur where the parties omit to include a clause paramount as in the Vita Food Case. The domestic state may or may not have criminal sanctions for failure to insert a clause paramount – but nonetheless the result is that the convention does not govern the contract.

6 **An arbitrator is given the power to choose the rules or law that he or she will apply to a contract and the arbitrator chooses to apply the rules of a particular convention**
A contract may contain an arbitration clause governed by the Model Law. In the absence of a choice of law clause and there is no clear domestic law applicable to the contract, and in particular where the arbitrator is permitted to decide ex aequo bono, resort may be had by the arbitrator to the rules of a convention, a fortiori if the parties are citizens of a signatory state to the convention.

1 **The Komninos S** [1991] 1 Lloyd's Rep 370
2 The Carriage of Goods by Sea Act 1924

The inter-relationship between domestic contract law and the rules of conventions.

Few, if any, international conventions, succeed in incorporating a complete code that governs all aspects of a contract. It is likely that on times a dispute will involve issues not provided for by the convention that need to be settled by a domestic court or private arbitrator. When this occurs, the judge / arbitrator must have recourse to the underlying principles of the law of agreement contained in the substantive law governing the dispute. The more complete a code is the less likely it is that this will occur. The general principles of law governing agreement are by enlarge very similar world wide, and the international codes reflect this, to the extent that they cover particular areas. However, there are also differences and the judge / arbitrator needs to be fully conversant with the domestic law of agreement that he or she has to apply. English Law frequently provides the substantive law governing international trade agreements, often by express incorporation, and hence it is useful to be aware of the provisions of English Law governing the international sale of goods.

Sources of law governing the international sale of goods in the UK.

1 **The Common Law**.
Much of the law governing the sale of goods and international sales of goods are to be found in the common law. In particular :- the law of agreement, offer, acceptance, counter offer; consideration : the parties to a contract and privity : the terms of the contract, exclusion clauses, limitation clauses and liquidated damages clauses : general damages : breach : and vitiating factors such as duress, frustration and mistake.

2 The Sale of Goods Acts.
There have been a series of Sale of Goods Acts, the most significant being the Sale of Goods Act 1979. Subsequent sale of goods amendment acts have been incorporated into the 1979 re-enactment by addition. Take care to use the latest version in Current Statutes rather than the Public and General which does not contain the amendments. Out of date statute books are similarly deceptive.

3 General statutes.
These are too numerous to provide an exhaustive list but include Limitations Act 1980, Unfair Contract Terms Act 1977, Misrepresentation Act 1967, Privity Act 1999 (or pending)

4 Custom of the trade.
Covers issues as diverse as trade terms on goods, e.g. timber and on methods of loading and insurance cover. **Hillas v Arcos**.[3]

5 **In house rules appropriated to the contract**.
INCO Terms[4] governing import export contracts such as cif and fob, bills of lading, charterparties, road haulage standard term contracts and most construction contracts.

6 European Community Law.
Treaty Obligations, in particular Art 30 TEU et seq, and Art 80 TEU et seq, Regulations, EC Directives and ECJ reports on the same.

7 European Convention of Human Rights.
To become part of English Law by virtue of the Human Rights Act 1998. Recently private contracts have been made subject to the ECHR by the court at Luxembourg.

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3 **Hillas & Co Ltd v Arcos Ltd** [1932] All ER Rep 494 HL

4 International Chamber of Commerce Official rules for the interpretation of trade Terms.

International Conventions ancillary to international sales of goods.

The most obvious cover contracts for the carriage of goods, such as the Hague, The Hague Visby and the Hamburg Rules and liability for expense incurred during carriage, such as the York Antwerp Rules and the international pollution conventions.

These are closely followed by the UNCITRAL[5] Conventions covering the financing of, and the guaranteeing of finance of, international sales agreements.

Criminal type legislation covers contracts for international drug sales, intellectual property and in particular scientific products, money laundering etc.

Conventions covering jurisdiction such as the Brussels and Lugano Conventions, The Rome Convention on the choice of law and conventions on dispute resolution and the enforcement of arbitral awards such as the New York Convention.

International Conventions on Sales of Goods.

Clearly, it would be highly desirable if an effective, fair, comprehensive international convention could govern all international sales of goods, freeing the parties from the uncertainties of the diverse provisions of domestic laws of sales of goods. All parties could contract without fear of strange foreign provisions frustrating their intentions. No party would have to fear being prejudiced by biased foreign laws. A universal international sales convention has been the holly grail since the turn of the century. However, domestic law makers have not been in such a hurry to embrace such a convention and drafting one that has all these qualities has not been easy, nor has the task of persuading states to sign up to such a convention.

Part of the problem has been in deciding how much to cover in such a convention. Should it cover the law of agreement, mandatory terms and conditions and base standards, jurisdiction provisions and conflict of laws provisions, safe guards for domestic trial, enforcement mechanisms, ancillary matters such as delivery and carriage and conditions to govern them etc ?

The first major international convention to receive any significant attention in the UK was ULIS incorporated into English Law by virtue of the Uniform Laws of International Sales Act 1967. However, by virtue of s1(4) and articles 3 and 4. The UK provided a derogation from the automatic incorporation of the Convention into contracts for international sales of goods governed by English Law, leaving it to the parties to expressly incorporate the Convention into the contract. The take up on this option by commercial men was insignificant. For this reason we will not discuss the provisions of the Convention.

The United Nations Convention on Contracts for the International Sale of Goods, made at Vienna in 1980 has however been embraced by commerce and is standard practice for trade with China and forms the basic law governing CIETAC[6] Arbitrations for trade with China.

Whilst much of the Convention bears a striking resemblance to English law there are also differences. In particular, privity of contract is different (though the significance of this has lessened in the light of the Third Parties (Rights) Act 1999) and there is no reference to the passing of property at all. Again, since the introduction of the 1994 amendments to the Sale of Goods Act this is of less significance than previously.

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5 United Nations Committee on International Trade Law

6 Arbitration Rules of the China International Economic and Trade Arbitration Commission (Adopted on March 17, 1994 at the First Session of the Standing Committee of the Second National Congress of the China Council for the Promotion of International Trade (China Chamber of International Commerce). Effective June 1, 1994.)

PRIVATE INTERNATIONAL DISPUTE RESOLUTION

ADR is short for alternative dispute resolution. ADR provides a voluntary alternative to the accepted practice of using the courts to settle civil disputes. The principle forms of ADR are adjudication, arbitration, conciliation and mediation. The best known and most commonly used forms of ADR in the UK are arbitration and mediation but adjudication is also rapidly becoming established as a valued method of settling disputes quickly, fairly and cheaply. It has become popular in some quarters, in particular for lawyers and mediation service providers, to regard conciliation, negotiation and mediation alone as ADR. For these people a negotiated settlement is an alternative to having a dispute brought to an end by a third party such as an adjudicator, an arbitrator or a judge. This narrow definition ignores the significance of the voluntary aspect of private dispute settlement and the role that is played in all forms of ADR processes by experts and professionals outside the legal profession.

Civil Disputes : These are disputes between private individuals and or organisations in respect of differences about the parties' respective legal rights and interests. Some legal rights are inherent, such as personal safety, ownership of property, personal integrity and reputation whilst other rights arise out of agreements. The difference or dispute is likely to centre around a failure by one person to perform legal duties owed to another which result in harm to the legal interests of that other person. The principal categories of civil dispute involve claims founded in the law of contract, the law of tort which is concerned in particular with accidents and professional negligence, breaches of trust and the redistribution of shared property following the break up of relationships. Insurance, the construction and maritime industries and employers are the most common users of ADR processes.

Where ADR is not applicable : ADR is not available for criminal cases which are dealt with by and on behalf of the State before the Criminal Courts. Public Law disputes between individuals and the State, for example a complaint that an application for planning permission has not been dealt with properly by a planning and development licensing authority, are normally dealt with by specialist decision making bodies such as administrative tribunals which whilst distinct from the courts remain part of the State Judicial Machinery. Often the decision making body may be called an adjudicator or an arbitrator but since the decision making process is not voluntary, despite the similarity in name, the process is not part ADR. However, where the organs of state engage in the same type of activities as ordinary people and organisations, such as driving vehicles and business agreements, resultant disputes are civil and can be disposed of by either the civil courts or ADR.

WHAT IS THE SIGNIFICANCE OF ADR ?

Amongst other things, "Going to Law" to settle disputes is often

1 an intimidating experience for the parties
2 expensive – especially in respect of legal costs and fees,
3 time consuming with lengthy meetings between the parties and lawyers.
4 long winded and protracted as correspondence flows back and forth between the parties and their lawyers and in waiting for court hearings. It may take 2 or more years to get to court.
5 damaging to business interests. Court hearings result in private business being aired in public, jeopardising public confidence in ones business affairs
6 harmful to relationships since the win/lose adversarial aspect of litigation tends to alienate the parties making it difficult to maintain business relations after the trial.
7 considered to result in unfair and illogical outcomes which do not reflect commercial realities. Lawyers and judges are perceived by many as being out of touch and as having little empathy for the concerns and the needs of clients and the people who appear before them in court.

By contrast, to varying degrees, ADR processes are likely to be :-

1 Less formal and far more consumer friendly than attending court hearings.
2 Less expensive than going to law.
3 Less demanding on personal time in respect of preparation for the process.
4 Much quicker, enabling parties to get on with business sooner.
5 Conducted in private, protecting business confidentiality and reputation.
6 Less divisive and assists reconciliation between the parties.
7 Conducted by individuals with commercial and industrial experience.

It is hardly surprising therefore that many people and organisations choose to settle their disputes in private, bypassing the judicial system. Arbitration has been used in the United Kingdom and internationally for going on for 400 years. Adjudication is now a significant part of the dispute resolution process in the United Kingdom. Conciliation has played a significant role in employer / trade union dispute settlement for almost half a century. Many large employers today operate an internal grievance procedure which helps to keep disputes out of industrial tribunals and the courts.

Modern Developments : Starting in the United States in the late 1970'ies and spreading out into the global community in the 1990'ies there was a significant return to negotiated dispute settlement processes as business became disenchanted with the cost and delay associated with the judicial process. Whilst negotiation has always been central to dispute resolution (most court cases settle at the courthouse door) it was not treated as a professional skill. The degree of expertise possessed by modern ADR practitioners has led to ADR Practice taking on professional status in its own right. Today's industry specialists are encouraged to develop sophisticated decision making and negotiation skills enabling them to play an active role in ADR processes.

Litigation and ADR Contrasted : A crucial distinction between litigation and ADR is that whilst many legal practitioners engage in ADR processes, there is no legal or professional requirement for either the ADR practitioner or for party representatives at ADR processes to be legally qualified or to be members of legal professions such as the bar or the law society. Many of those who engage in ADR practice are first and foremost experts in particular fields such as architects, builders, civil engineers, mariners, scientists and social workers, albeit with a thorough understanding of ADR processes and some knowledge and understanding of law. In house legal experts in large corporate organisations can take part in the entire ADR process without engaging professional lawyers thus cutting costs further, both in terms of time lost through communicating with the professionals and in respect of legal fees and costs.

It is also the practical knowledge and understanding of industry and commerce which assures the parties to ADR processes that the people responsible for settling their dispute or assisting them to reach a settlement understand their business and their concerns. It further assures them that the outcome will not be based purely on legal technicalities but will take into account commercial practicalities and technical details which lawyers may not fully comprehend.

Time & Cost Savings : Adjudication and mediation processes take only about a month to conclude from start to finish. Arbitration processes tended to take between 6 months to a year to conduct but the advent of fast track arbitrations has cut this time scale radically in recent times. By contrast it is not unusual for it to take up to a year for a major case to be heard by the courts. It is attractive for commerce to settle disputes quickly and put an end to uncertainty about future financial commitments. This enables business men to settle their affairs and get on with business without having to ring fence funds to meet potential liabilities. Payments into court and guarantees for security of costs can also have adverse effects on cash flow.

The interest that may accrue over a two year period between the commission of a wrong and the court decision can far exceed the cost of ADR processes. The losing party is likely to be ordered to repay this interest to the winning party. Even if taken into account interest may in reality cost nothing at all using ADR since the interest that accrues over a short period is minimal.

HOW TO GET TO ADR INSTEAD OF GOING TO COURT ?

ADR service providers have standard forms to enable parties to a dispute to refer that dispute to ADR. The forms can often be downloaded from the net. Many lawyers' offices hold copies. ADR service providers will supply forms upon request.

1 Terms in a contract providing for ADR if needed.

An ADR provision may be built into an agreement. The Construction and Maritime Industries frequently make use of ADR clauses. It is wise when concluding an international agreement to provide for the law of the state that applies to the contract. Once the parties have put their minds to this matter they often go one step further and provide for ADR at the same time, e.g. English Law and London Arbitration. It is even better if the clause specifies the ADR service provider and the rules governing the ADR process.

If an ADR provision is built into a contract the parties are obliged to exhaust that process before attempting to go to law. Submission to the ADR process then becomes a mandatory pre-requisite of court action. It is too late, once a dispute arises, to change one's mind and decide to go to court instead. The voluntary aspect of ADR lies in that the parties choose to adopt the ADR clause in the first place. However, even after a dispute has arisen, the parties can reach a mutual agreement to dispense with ADR and go to court instead.

Many contracts do not make any provision for dispute settlement mechanisms because it is not something that the parties think about at the time. No one stops to consider what will happen if something goes wrong, how the dispute might be settled, how much time and money it might take to settle the dispute or what adverse effects a protracted dispute might have on their businesses and their relationship.

2 Agreements to submit existing disputes to ADR.

Even if there is no ADR provision in a contract, once a dispute arises, the parties are free to agree to refer the dispute to an ADR process rather than go to law. Disputes which have nothing to do with contracts, such as accidents, can likewise be referred to an ADR process if the parties wish. However, in these circumstances both parties have to agree to the reference. If only one party wishes to use an ADR process the other party can ignore that wish and go to law instead.

Under the new Civil Procedure Rules 1998 your lawyer must advise you of the benefits of ADR and where a judge thinks ADR is advantageous the court may recommend that the parties try out ADR first. A party can ask the court to give them time to go to ADR. The court has the power to adjourn court hearings pending an attempt at settlement using ADR.

WHAT IS INVOLVED IN ADR ?

What follows is a brief explanation of what the principal forms of ADR are, highlighting the relative advantages and disadvantages of each, to enable the reader to choose a dispute resolution process suitable for his or her social and business needs out of the wide range of available services.

ARBITRATION : Arbitration represents the principal alternative to the court system and is widely used by the construction industry and international commerce. Arbitration provides an attractive second stage in the event of the break down of negotiated settlement. Arbitration offers the concept of party autonomy. This means that the parties have the right and power to decide many of the procedures that will govern the conduct of their arbitration. Default systems for the conduct of arbitrations are provided by arbitral organisations and by international and domestic arbitration codes. However, the parties can chose to derogate from the default provisions. The parties can decide on the degree of formality they desire, how much time will be allocated to various aspects of the process and how documentation, discovery and the taking of evidence will be handled. Arbitration therefore offers the possibility of informality, speed, cost savings and privacy. Speed and informality are encouraged by the Arbitration Act 1996. Whilst arbitration is often less expensive than litigation it can be more expensive on times especially if the parties engage in protracted hearings and chose to adopt cumbersome procedures

Arbitration emulates the courts in some respects and has been described as a private court dispute settlement system. It is therefore a more formal procedure than mediation. There are significant differences between arbitration and litigation. Arbitration in the UK under the auspices of NADR, The Chartered Institute of Arbitrators and the London Court of International Arbitration, offers disputing parties considerable benefits especially since the Arbitration Act 1996 became law. The courts support the arbitral process in a number of ways, in particular in respect of orders for disclosure of information and in the preservation of funds that may be needed to finance an arbitral award. The courts are less likely to interfere with the arbitral process than was the case before the 1996 Act was passed. Although arbitration is one of the best methods to settle commercial disputes the parties to such proceedings often fail to maintain a commercial relationship following the award. Arbitration is essentially adversarial and judicial in nature and leads to a winner takes all result. In this respect arbitration differs little from litigation. The New York Convention on Enforcement of Arbitral Awards allows for international enforcement of awards. This is a major advantage compared to the court system.

ADJUDICATION : To adjudicate means to decide the outcome of a dispute between other people. Hence arbitrators, judges, tribunal panels and ombudsmen are all adjudicators. However, the Housing Grants, Construction and Regeneration Act 1996 introduced a specific form of adjudication, for the settlement of disputes between commercial parties to construction contracts. Adjudication has now started to become a term of art. Adjudication is a quick and inexpensive method of dispute resolution resulting in an immediately enforceable, non-binding dispute settlement, by a third person, known as the Adjudicator. The Adjudicator is likely to be an expert first and foremost but may also be a qualified lawyer. Most construction adjudicators are qualified builders such as architects, civil engineers and quantity surveyors. This helps the process because the adjudicator will not need to hear or read large quantities of expert evidence to help him understand how the industry operates. This keeps time down to a minimum and avoids much unnecessary expense. The time scale for adjudication depends either on the 28 day statutory provision in the Housing Grants Act 1996, or on an agreed time frame in an adjudication clause incorporated into a contract. Voluntary adjudication clauses can be inserted into any contract and are not limited to the construction industry. The only difference is that instead of being governed by the statute the adjudication is governed by the contractual provisions and the rules of the ADR provider. Adjudication proceedings may be conducted with or without a hearing.

Adjudication is normally a paper only process. The parties submit written claims, defences, counterclaims and legal submissions to the adjudicator along with expert reports and supporting evidence, having engaged in the usual exchanges of documentation. At an appointed time, the adjudicator goes through all the paperwork, makes a decision and publishes it. Whilst there is no opportunity at a paper only adjudication to make oral pleading and to engage in cross-questioning, the low cost of such adjudication proceedings is attractive. It is an ideal process for the settlement of disputes involving technical issues and straight forward differences of opinion between the parties. However, it is possible for the adjudicator to hold hearing unless the adjudication agreement otherwise requires. When this occurs, the process is very similar to a fast track arbitral hearing with strict time limits imposed on submissions and cross questioning.

The adjudicator is given the authority by the parties to a dispute (or by Statute if applicable) to make a determination which is immediately enforceable, subject to the terms of the decision. Typically the losing party is ordered to pay the winning party a sum of money within a specific period of time. Early settlement of the dispute enables the parties to get on with business. The decision is not final in that having complied with the order, the losing party is free to commence arbitration or litigation. Judging from the UK experience so far, it is rare for the parties to so dissatisfied with the adjudication decision that they decide to continue the dispute. Assuming that both parties are completely satisfied with the decision the dispute is at an end. Even if one of the parties is dissatisfied with the decision award the parties are able to continue their business relationship, on the basis of the decision, pending arbitration or litigation.

Arbitration / Litigation and Adjudication. The arbitrator / judge will be aware that an adjudication has taken place and inevitably will be aware that the claimant / plaintiff was not satisfied with the outcome of the adjudication. The arbitrator / judge will not know the details of the adjudication decision until he has made his final award or ruling and turns his attention to the award of costs. The reason for the adjudicator's decision therefore has no impact on the subsequent decision and from this perspective the subsequent hearings differ significantly from an appeal from a previous finding of an arbitrator or lower court.

If the claimant wins the arbitration or court case he will recover the monies paid out complying with the adjudication decision and the costs of the claim. If he fails the adjudication decision is undisturbed and the claimant covers the cost of the failed claim. If the arbitration award or court judgement is less than the adjudication decision the claimant will have to pay the costs of the action. There is therefore considerable risk involved in deciding to take the claim to arbitration or to court. In the two years since adjudication came into being there have been very few subsequent challenges. To all intents and purposes therefore for most people adjudication ends up being the final stage of the dispute resolution process.

The great value of adjudication is that the parties quickly get a decision which enables them to get on with business and put the dispute behind them. Even if one of the parties decides to proceed further the parties have a firm basis upon which to proceed in the interim period. Prior to the introduction of construction adjudication it was common for building sites to grind to a halt until a dispute was settled. This is no longer the case. Projects are completed quickly and the industry has saved a great deal of money by avoiding unnecessary disruption. The same benefits can be enjoyed by parties to contractual, as opposed to statutory based, adjudication processes

MEDIATION : Mediation is regarded as being the most flexible and fastest of the ADR techniques as well as being the most cost-effective. It is a proven means of dispute resolution which can generate a settlement equitable to both parties at an affordable price. Mediation is a voluntary, non-binding, without prejudice process. Trained third party mediators attempt through negotiation techniques to bring the parties to a dispute together in a binding or non-binding settlement agreement. Where the mediation process ends with a binding agreement between the parties, that agreement can be enforced simply and quickly, by the courts should the need arise. If any of the parties to the mediation process, including the mediator, are dissatisfied with the process at any time, that party can terminate the process. The claimant may then proceed to assert his legal rights through the court system or through arbitration.

The problem with the court system is that it is adversarial and leads to a ***winner takes all*** outcome. Often the court's decision is the result of a very fine distinction drawn on the basis of a mere ***balance of probabilities.*** There is little room for compromise and the parties may be left with a feeling that justice has not been done. The system guarantees that at least one of the parties may be disgruntled with the judicial decision. ***Mediation avoids these problems.*** In mediation the parties are in charge of the dispute resolution process.

Why Mediation Works and Advantages of Mediation : Mediation allows the parties to a dispute to air their views in an informal setting. The mediator explores potential ways of settling the dispute with each party, guiding the parties to a more realistic view of their situation by highlighting the strengths and weaknesses of their case the risks inherent in failing to reach a settlement. The parties are in control of the process and the outcome. Even where a mediation fails the parties often narrow down the scope of the dispute to a single issue which can then be dispensed with quickly by the court. The advantages of mediation are :-

1. speed of dispute resolution (usually 3-4 weeks with a 1 day mediation)
2. cost savings – both for the process and in respect of the extent of legal fees
3. improvement in communication between the parties
4. a flexible informal procedure
5. addresses unreasonable claims and expectations. Should produce a fair outcome.

THE SPREAD OF ADR FROM THE US TO THE GLOBAL COMMUNITY

The Problem : Pursuing actions through the courts for breaches of international commercial obligations fails to meet the needs of the parties involved, both financially and emotionally. One solution is to include the concept of ADR, in particular adjudication, arbitration and mediation in the "contract" between the parties. Any difficulties and problems which occur will be provided with an outlet to release frustrations and emotions at a forum away from the confrontational atmosphere of the court room. The beauty of the mediation process in particular is that no lawyers are needed to represent the clients.

Recent developments in the UK : In the UK, the Government's primary concerns have been to minimise the role played by the courts in dispute settlement in order to save money, to reduce the burden of work on the judicial system and to prevent disputes disrupting commercial relations and economic development. The chancelleries of several of the member states of the European Union are currently addressing the same problems. The second concern is with speed of dispute settlement and consumer satisfaction. The UK Government has introduced a compulsory adjudication process for preliminary dispute settlement in the construction industry. The amended UK Civil Procedure Rules 1998 introduced by Lord Woolf demonstrate[7] that ADR is to play a central role in dispute resolution. Although the reforms fell short of introducing USA style, Court Ordered Mediation, the case management powers of the court allow judges to delay a case to enable parties to go to mediation and failure to mediate will lead to cost penalties.[8] The Civil Procedure Rules[9] also make it compulsory for lawyers to advise clients of the benefits of ADR.

It is likely that any industry or profession that does not address the problems of speedy, cost-effective dispute resolution could find Governments imposing a compulsory system on them. If the new UK systems result in significant savings and commercial advantages it is very likely that other European states will emulate it. Indeed, in the spirit of harmonisation and consumer satisfaction, the European Union might well choose to impose the UK model on the whole of the community.

INTERNATIONAL TRADE AND MARITIME DISPUTE RESOLUTION

Introduction. Why should those engaged in maritime activities be concerned with Dispute Resolution? It sounds like a rather boring topic and you might be inclined to the view that Dispute Resolution is something best left for the lawyers to deal with if and when the need arises. I would agree that, unless you are a legal beagle type with a taste for legal niceties, then there are much more interesting things to concern yourself with, such as getting on with the business of making a living, than delving into the arcane details of maritime law. Nonetheless, there are good reasons for gaining a better insight into the Dispute Resolution Process, not least of all being that engaging a lawyer is an expensive luxury. A little time and effort expended on choosing an appropriate Dispute Resolution System for the settlement of disputes that arise during the course of business can help to keep your legal bills in check.

What is a dispute ? No doubt the last thing a businessman wants is to get into a dispute with anyone. Haggling over a deal is part and parcel of everyday business life where prospective trading parties seek to negotiate the best deal possible in a given situation. What is being bargained over is the shape of business opportunities. The parties may not initially be in agreement about the terms of the prospective deal. This difference of expectations however is not a dispute because no rights are at stake. If no agreement is reached the proposed venture simply fails to materialise. Any costs and expenses incurred trying to set up the deal are irrecoverable from the other party. A full-blown dispute is quite different. Apart from the stress, expense and inconvenience involved, the added

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7 s1(4) & s26(3) Civil Procedure Rules 1998, Practice statement on ADR, [1998] Commercial Court, per Cresswell J; District Judge Monty Trent NLJ 149 No6880 at 411; Biguzzi v Rank Leisure plc CA 26th July 1999, Times 5.10.1999; Torith Ltd v Stweart Duncan-Robertsean [1999] LTL C8200316

8 s44.3(1)-(6) Civil Procedure Rules 1998.

9 S23(3) Civil Procedure Rules 1998.

ingredient is an assertion of harm done to a legal right. Disputes detract from the real business at hand and are unwelcome. However, welcome or not, apart from adopting good business practice to minimise the likelihood of problems occurring which might give rise to a dispute, once a bone of contention arises between two parties, there is no option but to address and resolve the difference. There is no point in ignoring the issue hoping it will go away. If the stakes are significant the aggrieved party will pursue the matter.

Even if the stakes are so minor that the cost of enforcing a claim exceeds the value at stake, there is a strong likelihood that a valuable trading partner might be lost if the debtor resorts to delaying tactics which result in the claimant dropping the matter. That said, however unethical it might be, it is not uncommon for large organisations, faced with a claim by a smaller trader, to engage in a war of attrition to try and wear the claimant down. Even in respect of relatively minor disputes a great deal of stamina may be required to successfully assert and enforce one's rights.

Types of dispute : apart from the enormous range of activities involved in maritime business which have the potential to give rise to disputes, the types of dispute can be divided into two distinct legal forms of action, namely Contract (including Bailment) and Tort. Disputes involving the performance or non-performance of business agreements are founded in Contract Law and amount to allegations of breach of contract. Apart from the types of business transactions common to all commercial operatives, such as labour relations and the sale and supply of goods and services, contracts that are peculiar to the Maritime industry include ship building and ship sales, charter party contracts for the hire of vessels and contracts for the carriage of goods. Contract disputes have tended, at least until recently, to be limited to the two parties to the contract. The contract is likely to be one of a chain of contracts for, for instance, the sale and delivery of goods but each dispute is dealt with by a separate dispute resolution process.

When the parties make a contract there is the opportunity at that stage to set out in advance the way that any future dispute between the parties in relation to that agreement will resolved. The parties can even agree the process for the settlement of any other type of civil dispute that might arise between them in the future, including Tort claims. The parties can subsequently agree to a different process but one party cannot unilaterally decide to ignore the agreed dispute resolution process and use a different method or process.

Disputes that involve allegations of injury to other legal rights and interests, which were not created by a contract between the parties, are founded in the Law of Tort. The consequences of collisions provide the most common source of tort action involving personal injury claims, damage to other vessels and damage to other interests. Tort actions often involve multiple claimants and or multiple defendants. Whilst the claims are likely to be dealt with by separate dispute resolution processes, the multiple defences in relation to a particular claim may be dealt with at the same time during a single dispute resolution process. The non-contractual nature of tort claims means that the process cannot be agreed in advance by parties who have had no prior dealings before the incident occurred. The parties can agree the process that will be adopted for the resolution of that particular dispute.

Disputes can involve contractual and tortious matters at the same time. Whilst both types of claim can be dealt with at the same time so there is no need to engage in separate dispute resolution actions for the different types of claim. A peculiarity of the maritime industry is that most maritime activities are covered by contracts of insurance. Frequently an assured will claim against his insurance policy and leave the underwriter to battle out the legal issues with the other party or as is often the case, with the other party's underwriter. Underwriters pursue actions in subrogation of the assured's rights. A court action is conducted in the name of the assured, so the extent to which claims are pursued by underwriters, rather than the parties themselves is not immediately apparent. Insurance is a good way of avoiding disputes but will not cover all eventualities. Unfortunately, because underwriters are better at taking money off you than they are at paying you, it is common for a dispute to develop between the assured and the underwriter who resists paying out on an insurance claim.

Types of dispute resolution process available for the settlement of trade disputes : There are four principal dispute resolution processes available to the parties to a civil dispute, namely mediation, adjudication, arbitration and litigation. There are a number of variations on each of these. A dispute may be resolved by a combination of these processes such as arbitration / litigation or mediation / arbitration. The process ends as and when the dispute is resolved. In the maritime industry arbitration & litigation are the most common forms of dispute resolution.

Issues that affect trade and maritime dispute resolution : The principal function of vessels is to carry goods from one country to another. The vessel is likely to be owned by an organisation based in one country & chartered to an organisation that may well be based in another country. Neither organisation will necessarily have links to the countries where the goods are loaded and discharged. The insurance carriers for various aspects of the venture may well be based in another state. Tortious incidents can occur in foreign waters and affect the interests of people from many other lands. Not surprisingly therefore, one of the first major hurdles to overcome in settling a dispute is to decide where the settlement process will take place, the laws of the State that will govern the conduct of the dispute resolution process and the law of the State that will govern the settlement of the dispute itself. These are separate issues even if they appear at first sight to be the same thing. It is perfectly possible for the process to take place in Paris, with the process governed by English Law, whilst the contractual or tortious rights are governed by the substantive law of Holland.

The parties will seek to establish a venue for the process which is convenient and accessible to them. The parties will hope to ensure that the procedural law governing the dispute is fair, impartial and expeditious. The parties will hope to ensure that the substantive law governing their rights is certain, predictable and familiar to them. All of this is a tall order ! Can it be done ?

Choosing the procedural and substantive law : Whatever process is adopted for the resolution of a dispute there is still a need to establish the governing procedural and substantive law of a dispute. It is a general principle of "Private International Law" that the process is governed by the procedural law of the State where the resolution process is conducted. Furthermore, the governing substantive law is that of the State with the closest connection to the place where the central purpose of the business at hand is carried out. This all sounds straight forward enough until one realises that it is no easy task to determine exactly what is the central purpose of a multi-purpose contract and therefore no easy matter to establish where that duty will be performed. A variety of International Conventions regulate the legal default position in different parts of the world. The convention provisions are not uniform. The courts of different States have provided differing interpretations of the meaning of sections of these conventions. Much money, time and effort has been expended on settling these issues before the courts. It does not have to be this way.

The maritime industry is fortunate in that most of its business dealing are conducted by written, standard form contracts. With varying degrees of success, most standard form contracts have something to say about which dispute resolution process will be applied to future disputes about the performance of the contract, where the process will be conducted, the applicable procedural jurisdiction and the substantive law that will govern the dispute. By enlarge, the courts will respect the contractual choices of the parties and so expensive litigation to settle these issues is avoided by a well drafted jurisdiction and choice of law clause. There are special circumstances where jurisdiction is prescribed by law but these have little impact on maritime dispute settlement. Thus for example under the E.U. Brussels Convention[10] land disputes must be settled in the State where the land is located. The conduct of the dispute will be subject to the jurisdiction and law of that State. Any "jurisdiction and or choice of law" clause will be over ridden by the Convention provisions.

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[10] Article 16 1968 Brussels Convention on Jurisdiction and the Enfocement of Judgements in Civil and Commercial Matters, Civil Jurisdiction and Judgements Act 1982 ; See similarly the mirror 1988 Lugano Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters.

The problem in inserting a choice of jurisdiction and law provision in a contract is that at the time of drafting it might not be possible to determine whose law will best satisfy your interests. That will only become apparent once the dispute arises. A simple illustration of this is that awards for damages tend to be higher in the US to the UK. If you are the claimant US law would be preferable. If you are a defendant UK law has much to commend it. Legal rights and duties are far from internationally uniform. International conventions have improved some aspects of international dispute settlement but provision is far from all embracing.

Where should one choose to settle a dispute ? In as much as the location of the dispute settlement process tends to determine the governing procedural law what difference does it make where the process is conducted ? If the location had no legal consequences the choice would depend simply on the most convenient location for the parties, their representatives and witnesses. Paris in spring sounds like a good idea. At least at the end of each day's business a good time can be had by one and all provided they can still afford it. Personally, Harrods and Selfridges make London an attractive proposition.

The procedural law governs both the way that litigation is conducted and the role of the courts in respect of alternative dispute resolution processes. Actions in Rem and the concomitant power to arrest ships to provide security for an award are not available in many Civil Law jurisdictions. Statutory time bars under various limitation acts and the extent of limitation of liability vary world wide despite attempts by way of International Conventions to impose a degree of uniformity on this area of the law. Powers in relation to security of costs, disclosure, commanding witnesses to attend and seizure of assets vary from State to State. A simple illustration is that currently arbitration in the UK is governed by a new Arbitration Act 1996,[11] which limits the scope for judicial interference with the process. The 1952 Malaysian Act, modelled on the old UK 1950 Arbitration Act continues to result in excessive and unwelcome judicial challenges to the arbitral process.[12] Even the adoption of the UNCITRAL Model Code, to govern the conduct of an arbitration, is no guarantee that the courts will not, on the application of one of the parties, interfere with the process.[13]

Finally, location can have an impact on enforcement. There is little point in suing someone in a State where they have no assets unless the award can be enforced in the State where their assets are located.

The efficiency of the legal systems of the world is variable as is personal perceptions of the quality of justice dispensed by these courts. In consequence a small band of States has captured the bulk of the global dispute resolution market. Despite the high costs involved London is high on the list of chosen venue. Whether or not it is a wise choice I will leave each of you to decide for yourselves. Note that where criminal charges are involved there is no choice about venue, jurisdiction or choice of law. Frequently criminal issues are settled locally whilst the civil issues are settled over seas.

The substantive law is yet another matter. There is a considerable degree of harmonisation in some areas, as with The Hague and Hague Visby Rules in relation to claims regarding the contract of carriage of goods. However, there is considerable variation in the international regimes governing the laws of obligations. It may be impossible to predict in advance of a dispute whose law will be most favourable to you should a dispute arise. The end result is that frequently even though a contract contains a choice of jurisdiction and a choice of law clause a party, having realised that in the circumstance the choice is unfavourable, seeks to overturn the provision.

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11 s1(c) Arbitration Act 1996 "in matters governed by this Part the court should not intervene except as provided by this part.

12 The Arbitration Act 1952 retains the 1950 Arbitration Act provisions for case stated references to the court.

13 However, under the s34 amendment to the Arbitration Act 1950, any international dispute referred to the Kuala Lumpur regional Centre for Arbitration is immune from reference to the courts.

Process	Party Autonomy Appointment / process	Formality	Effectiveness Enforceability
Self Help	**YES**	**INFORMAL**	**SOMETIMES**
Negotiation	**YES**	**INFORMAL**	**SOMETIMES**
Pre-trail Negotiation	**YES but lawyers take the lead**	**INFORMAL**	**SOMETIMES**
Conciliation Binding	**NO – usually a pre-set format**	**DEPENDS ON CONCILIATOR**	**YES : No control over outcome : Review ?????**
Conciliation Non-Binding	**YES – perhaps but format usually pre-set**	**INFORMAL**	**MAYBE Not enforceable**
Mediation	**YES – Format in contract**	**INFORMAL**	**SOMETIMES**
Courts	**NO**	**FORMAL**	**YES No control over outcome**
Tribunals	**NO**	**SEMI FORMAL**	**YES**
Ombudsmen	**NO**	**Not Applicable**	**POSSIBLY**
Adjudication Statutory	**YES for one party to appointment Joint autonomy only for process subject to minimum statutory requirements**	**INFORMAL Hearings rare**	**YES but only temporarily binding Results in immediate payment but subsequent challenge possible. Judicial Review No control over outcome**
Adjudication Voluntary	**YES for appointment – agreed by parties in the contract. Joint autonomy only, for process**	**INFORMAL Hearings rare**	**YES but only temporarily binding Results in immediate payment but subsequent challenge possible : Judicial Review No control over outcome**
Expert Determination	**YES for appointment NO for process**	**No hearings Not applicable**	**YES : Judicial Review – appeal or challenge possible**
Arbitration	**YES for appointment Joint autonomy only, for process**	**MAYBE Joint party autonomy over the process Parties can choose – but invariably less formal than the courts.**	**YES Binding award, but subject to both judicial review and to appeal or resistance during enforcement proceedings. Internationally enforceable. No control over outcome**
Judicial Review	**NO**	**FORMAL**	**YES – but a review of process not merits**

Flexibility	Privacy	Speed	Cost of process and representation	Legal / Self Representation
VERY	MAYBE	YES	LOW	Not applicable
VERY	YES	CAN BE	LOW	EITHER
VERY	YES	CAN BE	STANDARD RATES	LEGAL
VERY	MAYBE	CAN BE	VARIABLE	EITHER
VERY	YES	CAN BE	VARIABLE	EITHER
VERY	YES	QUICK	VARIABLE – not always cheap	EITHER
NO	NO	SLOW	HIGH	LEGAL
NO	NO	REASONABLE	VARIABLE	EITHER
NO	NO	VARIABLE	NONE	NONE
VERY Adjudicator chooses process and acts inquisitorially	YES Subject to later court action	28 DAYS Statutory Process with 7 day submission time and right to 14 day extension	LOW – normally restricted to scope of reference so there may be many adjudications related to a project	EITHER Professional non legal representation common – mostly paperwork only
VERY Adjudicator chooses process and acts inquisitorially	YES Subject to later court action	As above – subject to terms of contract – likely to be quick	LOW – normally restricted to scope of reference so there may be many adjudications related to a project	EITHER Professional non legal representation common – mostly paperwork only
YES for expert	YES	YES – time scale set in contract	LOW – Professional rates	NONE – paper only
YES, may be agreed in contract : subsequently joint autonomy only, over the process	YES But privacy may be jeopardised by enforcement proceedings or by appeal	REASONABLY QUICK Fast tract arbitration is normally pre-set to very short time schedules	VARIABLE Considerable party autonomy as to choice of procedure Can be dearer than the courts if the parties require long hearings etc.	EITHER Professional non legal representation common
NO	NO	YES	REASONABLE	LEGAL

Litigation : In the absence of choice to the contrary, a dispute will find itself before the courts. This is good news for lawyers. It is expensive to engage the services of lawyers. Even the best and most efficient judicial systems tend to be slow and laborious. However, State courts enjoy a great deal of power and have the authority to enforce the process. Confidence in the judicial system is the courts greatest asset. The legal knowledge and understanding of a judge may be highly valued by the parties. Judges are perceived as being dispensers of justice. Many maritime disputes are settled before the courts despite the problems of cost and delay. Indeed, delay often suits a party who does not want to pay, whilst the coercive powers of the court are the only way to ultimately ensure that a recalcitrant party appears at a hearing and is ultimately brought to account.

Arbitration : After litigation, this is the most common dispute resolution process adopted by the maritime industry. Arbitration has several distinct advantages over litigation. It is private so the dispute does not end up being discussed in the papers which can have adverse implications for public confidence and can give rivals an insight into your trading practices. Assuming the court's role in the process is kept to a minimum, the process can be conducted relatively quickly. It should take no more than 6 months to get to Arbitration. Two years or more is not unusual for the commencement of a trial. The time aspect went somewhat awry in the 80'ies and early 90'ies but globally arbitration is now regaining the time advantage over the courts due to new regimes which encourage less formal arbitral procedures. Arbitration tends to be less expensive than litigation. This is not uniformly true. The procedural rules of some judicial systems have done much to improve judicial efficiency in particular by the introduction of strict time limits on aspects of the process. An inefficient arbitral process could result in excessive discoveries and argumentation which push the costs up to exorbitant levels. The parties get the arbitral process they ask for.

Despite the legal expertise of judges the parties frequently feel that a judge does not understand the commercial and technical realities of their industry. The lawyers can try to explain how it is to the judge but at the end of the day the judge is unlikely to have much understanding or empathy with the industry. Arbitration can solve this problem in that many arbitrators start out their professional life as architects, surveyors, mariners or whatever before converting to "*legal practice*". There is less need to explain to an arbitrator with relevant industry experience how the process which went wrong should have been carried out. The arbitrator can make decisions of fact reinforced by his own personal expertise, knowledge and understanding of the industry. There is less likelihood of a party walking away from an arbitration declaring "The Law is an Ass, the judge simply doesn't understand the way things are on board a ship. The man should get real !"

Arbitration has distinct advantages over the courts in terms of jurisdiction and procedural and substantive law. International arbitrators are far more familiar with foreign law than domestic judges and frequently apply foreign laws during the course of their deliberations. Arbitrators tend to be far more familiar with the provisions of International Conventions. It is common for international contracts to be governed by the provisions of such conventions rather than by domestic laws of obligations. The Vienna Convention on International Sales of Goods is a classic example of a convention that is often incorporated into contracts as terms of the contract in circumstances where the convention would not otherwise apply.. Most UK judges would only be familiar with the Sales of Goods Acts. Under the Arbitration Act 1996[14] and under the UNCITRAL Model Law[15] it is possible to opt out of law altogether and to give the arbitrator a discretion to decide a dispute on "equitable principles" alone.

Finally, arbitration awards are enforceable in 128 countries world wide by virtue of the New York Convention on the enforcement of Arbitral Awards and are therefore more useful than court awards. The limited number of reciprocal agreements made by the UK with other countries limits the enforcement of UK court judgements to a mere 20 countries.

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14 s46(3) Arbitration Act 1996

15 Article 28(3) UNCITRAL Model Law

Expert Determination : Frequently, the only issue to be settled in a dispute is "How much is this worth ?" or "Has the contractual duty been carried out or not ?" Questions of law and legal interpretation may have little or no role whatsoever in the settlement of such a dispute. An expert may well be far better suited to deciding the issue than a judge. Once the issue is settled it is clear what to do next. Pay the established price, or pay or not pay for the contractual service. It is common to employ an expert evaluator to determine the contract price for something, be it the sale of a house or a ship. The role of surveyors in the classification and valuation of vessels is common place. However, there is no reason why an expert cannot be employed to settle factual questions. The process is extremely quick and inexpensive. Judges and arbitrators can perform the same function but it is an expensive luxury. Sadly expert evaluation is used far less than it should be. It was very popular at one time but has fallen into disuse possibly because lawyers rarely think of advising clients of the value of their services. After all, a lawyer will make far more money if the dispute goes to court whereas he will have little role to play in the expert evaluation system since the expert applies his own knowledge and understanding without recourse to legal submissions.

Adjudication : What is an adjudicator and what is adjudication ? Whenever someone, duly empowered to do so, makes a decision affecting some one else's legal rights they adjudicate over that person's rights. Expert determinators, judges, arbitrators and government officials often perform an adjudicatory function. Clearly therefore, adjudication here refers to something else. A new form of dispute resolution process has developed in the UK which is known as Adjudication. By virtue of the Housing Grants Construction and Consolidation Act 1996[16] (subsequently referred to as the Housing Grants Act) construction industry disputes may be subject to an adjudication process.

Adjudication has much to commend it and has proved to be a very valuable addition to the arsenal of construction dispute resolution processes. However, there is no reason whatsoever why parties to any civil dispute cannot adopt an adjudication process for the resolution of their dispute. Voluntary adjudication processes do not have to be limited to the construction industry and could be adopted by the maritime industry to achieve the same types of benefit as those currently enjoyed by the UK construction industry.

The distinct features of adjudication are that it is a private, immediately enforceable binding, temporarily final process and is carried out very, very quickly. The process is very inexpensive. It tends to be carried out on a documents only basis though it is possible to have oral hearings and pleadings. The role of the lawyers is kept to a minimum. Under the Housing Grants Act the process takes 28 days from reference to determination but a voluntary system could extend or limit that time scale at the behest of the parties or the organisation running the adjudication process. Adjudicators are drawn from industry just like expert determinators. They do not have to be qualified lawyers though many do in fact have dual qualifications.

The words "immediately enforceable and binding" and "temporarily final" appear at first sight to be contradictory and demand some explanation. The decision is immediately enforceable on the due date. In the event of non-compliance the courts will enforce the decision. There is scope to challenge the scope of jurisdiction of the adjudicator and judicial review is available to supervise the conduct of the process, as with any other legal decision making process, but that apart there is little point in refusing to pay. Enforcement before the courts is a simple straight forward debt action.

The great value of this is that within a very short space of time the parties receive an authoritative statement of their respective positions. This enables them to get on with business quickly with a clear understanding of what is required of them. Compare this with arbitration or worse still litigation where clarity will not emerge for months at best or even years. Experience indicates that

[16] s108 Housing Grants Construction and Consolidation Act 1996; see also supra p9

most disputes end at this stage. The parties tend to be more than satisfied with the outcome. As a definitive statement of rights an adjudication award also provides the basis for recovery under an insurance policy. If the insurance company does not like the result it can always move on to stage two, described below, in subrogation of the assured's rights.

"Temporary finality" refers to the right of either party[17] to take the dispute forward to arbitration or litigation. The subsequent process will take place without reference to the adjudication process. However, since the parties were initially forced to gather evidence and witness statements to present to the adjudicator, much of the preparation work for trail will already have been carried out, quickly before anyone had suffered from lapses of memory and whilst all the relevant persons were still available. Contemporary photographs and evaluation reports will be available for the trial greatly enhancing and facilitating the trial process. Both in the construction industry and in the maritime industry this often presents serious problems for subsequent dispute resolution processes because of the mobility of labour within both industries.

The arbitrator or judge makes an award without any reference whatsoever to the adjudication. The arbitrator or judge will be aware of who prevailed in the adjudication but will not know details of the award and will not therefore be influenced by the adjudication when assessing damages. However, as with a payment into court or settlement offer, the judge can take the adjudication award into account when making an award on costs. It is a risky business to challenge an adjudication decision. A party would need compelling reasons to take the matter further.

MEDIATION : At the present time mediation is virtually unknown in the shipping industry outside the US. Mediation shares many of the benefits of adjudication in that it is private, quick and relatively inexpensive. However, the parties themselves maintain control over the decision making process rather than handing it over to a third party. There is an obligation to participate in the process but no obligation to reach a settlement. If no settlement is achieved the parties are free to proceed to adjudication, arbitration or litigation. However, having canvassed the issues thoroughly in advance pre-trial preparation will be at an advanced stage and many side issues will have been resolved resulting in a quicker and more efficient trial.

At a mediation, the mediator acts as a go-between, exploring issues with each of the parties in turn, facilitating them to find a way to broker a settlement. The process has much to offer where the parties realise that a settlement is necessary and are prepared to broker a settlement. Many court cases settle on the steps of the court. Mediation achieves a similar result but involves the parties directly and leads to far more satisfactory settlements than are brokered by the hands off approach of settlement through the auspices of lawyers. Mediation settlements frequently include agreements for the future conduct of business rather than a mere settlement of the dispute at hand.

Mediation has less to offer, apart from a reality check on the parties, in situations where one party simply adamantly refuses to recognise any liability whatsoever and refuses to pay or perform a service or put something right. Even here, participation in the process can result in the recalcitrant party realising that their stance is unrealistic, paving the way for a settlement. Apart from being relatively inexpensive mediation is a valuable tool for repairing damage to commercial relations.

Mediation is a serious process successfully used to settle disputes involving very large sums of money. A great advantage of mediation is that it lends itself to multi-party dispute settlement and can therefore replace an entire series of arbitrations or court actions. Mediation agreements are readily and easily enforceable before the courts if the mediation agreement is breached.

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[17] s108(3) Housing Grants Act "The contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement.
The parties may agree to accept the decision of the adjudicator as finally determining the dispute."

DISPUTE REVIEW PROCESSES AND BOARDS : Dispute Review Processes developed in the US. They initially applied to the labour market and to the construction industry. DRPs can combine the concepts of negotiation, conciliation, expert determination, mediation and arbitration into one seamless operation. DRPs have been successfully employed in the UK and in Hong Kong. DRPs have resulted in major improvements in efficiency and have savaged the legal costs involved in disputes on major projects. There are many variants on the dispute review process and processes can be tailored to the specific needs of parties engaged in joint ventures. The process is particularly useful where several organisations work together on a project and therefore has much to commend it to the maritime industry, particularly for off shore operations involving oil drilling, transportation, storage and servicing. Employment DRBs are also highly commended.

DRB's involve the appointment of a Board, which may contain industry experts and perhaps a lawyer or an arbitrator / mediator. Single member boards are often used for small projects. The Board is introduced to the technicalities of the operation at the initial stage and through regular consultations with all of the parties advises on any potential problems or pitfalls, informally facilitating the brokering of solutions to those problems. If a dispute arises which cannot be settled informally, or by mediation if a med/DRB model is used, the DRB turns itself into an advisory / adjudicatory / arbitral tribunal and hands down an advice, decision or award thereby facilitating the settlement of the dispute, temporarily settling the dispute or finally settling the dispute.

One advantage of this type of facility is that frequently disputes arise because an operative refuses to acknowledge that there is a problem. If senior management had had any inkling of the problem they would invariably have nipped the problem in the bud and settled the problem. The operative, perhaps fearing that his job is on the line, pushes the issue to one side. Since the operative is the point of contact there may be no way of getting past the operative to higher management in the early stages of the dispute. The problem festers and turns into a major problem requiring arbitration or litigation to settle. Major disruption to commercial activities ensues. The DRB process provides a way of getting such problems out into the open and dealing with them at an early stage.

The various models of DRB's provide different outcomes and the rules for the conduct of different types of outcome vary accordingly. Outcomes include :-

- Recommendations which may be private or admissible in subsequent litigation / arbitration.
- Temporarily Binding – i.e. adjudicatory.
- Immediately Binding – i.e. arbitral.

DRB's are mandatory for the settlement of all disputes arising out of funded by the World Bank. It is reported that DRB's of all complexions bring 99.8% of disputes referred to them to an end. Subsequent litigation is virtually unknown. How many disputes are prevented is unknown.

CONCLUSION

Whilst the majority of international trade contracts do not result in disputes that require third party settlement the costs in terms of time and money of settling international trade disputes when they arise are considerable and the outcome is potentially fraught with risk. The parties to such agreements are well advised to seek professional advice before signing such agreements, to ensure that the contract adequately provides for an appropriate dispute settlement mechanism that will both minimise the costs of the settlement process and will ensure enforcement of any settlement. In particular the agreement should ensure that the conduct of the agreement itself is governed by law and rules which reflect the intentions of the parties in terms of their reciprocal rights and obligations and secondly provide an effective legal mechanism for the enforcement of those obligations. Sadly this is often not the case and the result can be a very expensive for both parties and the terms of the settlement often proves to be very surprising for one or both of the parties and frequently very different from anything either party envisaged at the time the contract was concluded. Worse still, even if successful, it is often the case that in practical terms, the settlement proves to be totally unenforceable and thus worthless.