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(The Evolving Concept of Dispute Attrition)

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Arbitration Innovations – Dispute Review Boards and Adjudication (The Evolving Concept of Dispute Attrition)

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Disputes between people are common. Disputes between parties engaged in complicated business projects are virtually certain. The probability of disputes in the complex world of international construction projects is yet exponentially greater. International businesses have recognized this inevitability for thousands of years. From the days of the founding of Athens and the Roman Republic to modern times, various forms of arbitration have been the primary international business dispute resolution mechanism. The goal of expert dispute resolution, while avoiding the slow, expensive uncertainly of a court trial before an elected judiciary and jury of questionable comprehension was as familiar to the Roman businessmen of antiquity as to a modern American business executive. Ancient arbitrators like Cicero and Julius Caesar would immediately recognize a contemporary arbitration. Yet, innovative parties have acted to ensure that arbitration remains a dynamic, continuously evolving dispute resolution technique.

Classical arbitration, despite widespread use, has never been a panacea and is not appropriate for, nor effective in resolving every type of dispute. It has been increasingly attacked in recent years for excessive costs, delays and a generalized inability to meet parties' actual needs. Various critics have asserted that too frequently arbitration now resembles an expensive, over-lawyered, junior varsity court with a near wholesale importation of superfluous formalistic court procedures and rules. The original intent of creating a reasonable mechanism for the resolution of commercial disputes in an efficient, cost-effective and timely manner is often alleged to have been abandoned. Alas, surveys of senior business executives, especially in the construction industry reveal those perceptions are widely viewed as accurate in the United States, the United Kingdom and everywhere American and British companies operate. Consequently, the construction industry throughout the world has led the way in experimenting with the new creative innovative dispute resolution techniques which will be the focus of this paper.

The construction industry has been an exceedingly fertile incubator for new dispute resolution devices because disputes are commonplace. This is hardly surprising given the sheer range of complex activities involved and the number of professionals and specialist sub-contractors needed to see even a medium sized project through from design to commissioning. Planning and design rarely cater for all eventualities and project variations to accommodate unanticipated obstacles are normal. Accidents and misadventures are par for the course. The enormous sums of money involved in construction projects mean that delay, an inevitable consequence of variations and misadventures, has very significant cost implications. Disputes centre around who should bear the costs of changes and the financial burden of misadventures and accidents. Notions of fault underpin the jurisprudence of the allocation of liability under the common law.

Well versed in the mechanics of dispute resolution, the construction industry regularly resorts to self help negotiated settlements, lawyer assisted negotiated settlements, mediated settlement and third party determination by expert evaluators, arbitrators and judges. Each mechanism has a valuable role to play. The respective advantages and disadvantages of each mechanism result in different types of disputes being best settled in different ways. Negotiated settlement processes are relatively inexpensive and speedy but cannot resolve intractable disputes which then fall to third party determination. Expert evaluation, while a central mechanism for dealing with changes and variations, if challenged as it frequently is, gives rise to further disputes.

Dispute settlement costs the industry a great deal both financially and in terms of energy and lost opportunity. Lawyers are an expensive, undesired luxury. Personnel are distracted from productive activities during the settlement process. Sites may remain idle pending settlement of the dispute. Manpower is laid off, plant deteriorates, security costs escalate and cash flow stagnates. Whilst time is of the essence, the courts are expensive and slow. Arbitration, whilst potentially more economic and quicker than the courts, often fails to deliver as each party, jockeying for advantage stretches the process out pushing costs ever higher. Even worse, the spectre of appeal looms over the courts and, though to a lesser extent, likewise over arbitration.

The dilemma for the industry is that whilst the market place imposes ever tighter margins on profit and demands tight scheduling from contracting to commissioning, third party dispute settlement processes eat up the profit and delay acceptance or commissioning, giving rise to penalty provisions. Tight profit margins mean the parties fight even more tenaciously because they cannot afford to lose, thereby exacerbating the problem. Multi-dispute settlement processes such as Dispute Review Boards where expert, often admissible, recommendations provide a basis for informed negotiation, which if unsuccessful then leads seamlessly into arbitration provide an effective partial solution for larger projects. Alas, that mechanism was not originally designed for use with subcontractors and can be perceived as too expensive for smaller to medium sized projects. Thus the industry was forced to re-examine the problem of how to best resolve disputes.

The industry began experimenting with mediation. Despite its utility in certain types of legal disputes, mediation has not been particularly successful in complex commercial disputes and has had even less success in construction disputes. This is frequently attributed to the fact that it is often difficult to locate knowledgeable and experienced construction mediators. Many, if not most, of the mediators in the United States, United Kingdom and the rest of the developed world were trained to use facilitative techniques which were developed for primarily interpersonal disputes. These mediators have neither the substantive industry or legal knowledge, nor the background or training to credibly use evaluative techniques. They have not been particularly successful in complex commercial matters and certainly not in construction disputes. Compounding this problem is the fact that substantial time can be required to locate a suitable mediator, organize a mediation, assemble the requisite parties with decision-making authority and then educate the mediator about the relevant industry practices. All the while expenses continue and the project may be delayed with the attendant undesirable consequences. Yet, the fact that mediation is non-binding, flexible and creative remains appealing. Maximum party autonomy and control are maintained. Unfortunately, mediation is not designed to, nor does it provide the parties with any useful expert guidance for potential resolutions of their particular problem. Arbitration can provide an expert resolution of the dispute, but it is much slower and far more expensive. Even worse in the view of many business executives, it removes from the parties any opportunity to actively control the resolution of their dispute. Consequently, every experienced construction professional has wished for a cost effective dispute resolution mechanism that would give the parties timely expert guidance or a recommended decision, yet preserve their ability to negotiate the ultimate resolution of their dispute while the construction work proceeds without interruption.

While traditional arbitration continues to be widely used, new evolutionary arbitration variants have been designed to satisfy the specific needs of particular sets of commercial parties. This is most especially true in the construction industry where time and money have always been inextricably intertwined and parties must be innovative to survive and prosper. That industry is most acutely conscious of the necessity of having a variety of fast, flexible, cost effective dispute resolution mechanisms. After experimenting with the hope of

mediation and finding it as deficient as classical arbitration, the construction industry continued to innovate and finally succeeded in generating two new hybrid arbitral evolutions dispute review boards and adjudication.

The industry effort began with the realization that neither classical arbitration nor mediation will ever achieve the perfection of being able to effectively resolve all disputes. But the basic question is whether such perfection was actually necessary? Would not the rapid, systematic resolution of just significant percentages of disputes more efficiently and cost effectively than classical arbitration and mediation suffice as a worthy and desirable goal? This is the essence of the evolving concept of dispute attrition now accomplished by dispute review boards and adjudication. These provide a set of mechanisms to timely and efficiently eliminate disputes as early as possible and so preclude or peel away as many disputes as cost effectively possible through an innovative reconfiguration of the most useful aspects of classical arbitral methods. Fortunately, those in the construction field recognized that they were only as limited as their ability to creatively address their particular needs. And as practical people in an eminently practical field, they engineered the evolution of arbitration into the more useful mechanisms of dispute review boards and adjudication.

Some may object to the characterization of these devices as forms of arbitration. In the context of certain hyper precise statutory definitions those objections appear facially valid. Yet, a review of the history and purpose of arbitration discloses that both of these new mechanisms incorporate many of the best attributes and features of arbitration, while avoiding a number of the worst deficiencies. The key point is that the original purpose of arbitration was to permit businesses to quickly resolve commercial disputes in a commercially reasonable manner. Now that we have several years of experience with these two mechanisms it is readily apparent that they both meet the original intent underlying the creation of arbitration as a commercial dispute resolution technique.

The dispute review board ("DRB") as currently used in the United States and major international projects such as the Hong Kong airport typically consists of a board of three (or more) construction experts, most frequently consisting of an engineer, an attorney and a contractor or architect. Facially, it resembles a traditional three-member arbitration tribunal. Like a standard construction arbitration tribunal, the dispute review board is contractually created to resolve the disputes arising on a particular construction project. However, while a dispute review board resembles an arbitral tribunal and discharges somewhat similar functions, it also possesses several significant differences. Those distinctions are the key reasons why it is such a phenomenally effective dispute resolution mechanism.

In contrast to an arbitration tribunal, the dispute review board is contractually created at the inception of the project and then the members are appointed before construction begins. Unlike classical arbitrators who must render a decision based upon the parties assertions and their lawyers' re-creations of long past events, a dispute review board has regular personal knowledge of and familiarity with every aspect of the project. The dispute review board receives and reviews copies of all of the project documents including the Request for Proposals, the awarded contract, the plans, specifications, drawings, change order requests, change orders, project meeting minutes etc. It visits the construction site at the start of the project and returns for site visits at least every two months, or more frequently if needed. That basic project knowledge and regular presence through site inspections permits the dispute review board to immediately address problems and informally resolve them before they metastasize into disputes. If informal but informed suggestions are insufficient, then the dispute review board can conduct a hearing and issue formal written recommendations.

Typically those recommendations will only need to address the issues of entitlement. Based on the board's recommendations the parties will thereafter proceed to negotiate such resolution as they deem appropriate. If necessary, the board can also address quantum issues. Since formal board recommendations are usually specifically agreed in the contract or dispute review board agreement to be admissible into evidence in any subsequent arbitration or litigation, they are almost inevitably complied with. After all, those are the recommendations of the parties chosen experts for their project! Thus a dispute review board affords the parties the benefits of a readily available informal quasi-mediation mechanism with a panel knowledgeable about all aspects of that particular project who have the additional benefit of being able to offer expert, but non-binding arbitration awards like formal recommendations. In short, the dispute review board is an evolutionary hybrid of arbitration with beneficial elements of mediation that is far more efficient and cost effective than either classical mechanism alone.

In addition to the direct cost of litigation or arbitration, another major problem faced in all construction projects is that of insuring the timely completion of the project within the prescribed budget. Every problem or dispute threatens delay and expense. If not promptly addressed, a minor problem originally presenting minimal expense or delay may balloon and cause substantial expense and untimely completion of the work. The use of a dispute review board and/or adjudication can reduce or eliminate this problem. The very presence of the dispute review board frequently spurs parties to negotiate solutions to their problems. The ability of the dispute review board to rapidly assemble and assist the project serves to keep it on time. When formal hearings are required, they are speedily conducted and recommendations are issued promptly, often within days. This further serves to prevent or reduce delays.

Dispute review boards offer the promise of achieving significant cost savings, but the precise amounts of any such savings are still in the process of quantification. However, the figures reported through January 2002 indicate that dispute review boards have been used on 822 projects of a gross contract value of USD $ 68,700,000,000. While numerous informal, quasi-mediated oral recommendations resolving many disputes have been made, no record of the number of informal recommendations have yet been assembled. What is known is that dispute review boards have issued a total of 1038 formal written recommendations. To date, only 31 of those recommendations have been pursued beyond the dispute review board into arbitration or litigation. This results in a formal recommendation settlement rate of 97.1 %, which is significantly more successful than from mediation, but not the 100% rate of classical arbitration. Considering how the easily construction litigation or arbitration costs in a case can surpass USD $ 100,000.00, those 1038 recommendations suggest party litigation savings of approximately USD $ 103,800,000.00! In fact, the engineers with one U.S. state Department of Transportation assert a 17 percent reduction in the cost of every mile of highway built under contracts mandating the use of a dispute review board. The engineer supervising the construction of a highway interchange in a western U.S. state claims the use of a dispute review board saved over $5 million on that project and materially assisted in insuring its completion substantially ahead of schedule. Those assertions are also consistent with the experiences of one author as chairman of a dispute review board, which succeeded in informally resolving all of the disputes on a USD $37,000,000.00 construction project without the need for any hearings or written recommendations. That dispute review board materially assisted that project in being completed on schedule, under budget and without any litigation or arbitrations. A current survey by one of your authors of the cost savings directly attributable to dispute review boards will hopefully lead to a demonstrable quantifiable cost analysis of the benefits, if any, associated with using dispute review boards. Anyone interested in participating in that survey should contact us.

While dispute review boards have been asserted as extremely efficient in reducing or eliminating disputes between the owners of major projects and their general contractors, it has less often been utilized to address the problems arising between various tiers of subcontractors with each other and/or with the general contractor. However, the newest arbitral evolution, the British device of adjudication is specifically designed to superbly address those parties' problems in a way that has dramatically facilitated the timely completion of construction projects in the United Kingdom.

Historically, the most vulnerable sector of all within the industry is the sub-contractor. Cash flow as ever is the perennial problem for small specialist sub-contractors particularly if they wish to retain skilled personnel. Prompt payment from one job is often essential to finance the next. Stage payments assist but can fall victim to allegations of unsatisfactory work and set off for spurious claims of damage, while the costing of and payment for changes and variations necessary to see a job through pose further problems. Fast-track procedures and paper-only arbitration processes offer an attractive solution for the sub-contractor but the finality of an unreasoned arbitral award places the risk squarely on the main contractor who invariably is in no rush to settle in any case.

The contractor prefers to wait until a project is completed and then to enter into a major dispute settlement process at the end when all the various aspects of claim and counter-claim have materialized. By doing so, the contractor may set off claims against counter-claims. The passage of time wears down many sub-contractors who drop claims particularly since they may well be looking for further contracts and to be in dispute with a potential client is not a good way of getting more work. The contractor's cash flow benefits from this process but many sub-contractors go to the wall. The lawyers had a field day with long drawn out expensive trials becoming the norm. Ultimately the industry loses out, becoming inefficient, weak and divided with the lawyers siphoning off large amounts of the profits in fees.

While the industry has lived with this problem for over fifty years it will not be able to do so for another fifty. The number of sub-contract specialists involved in the industry only grows as technology advances and specifications rise. General contractors need sub-contractors. It is no longer financially feasible or practical for the general contractor to carry out all the construction processes involved in a major program. Specialist sub-contractors need to operate within a financially stable environment. General contractors need to build long-term relationships with specialist contractors and to be able to plan to take them along with them from project to project.

What the industry needed was a third party dispute resolution process that is quick and inexpensive, to address and bring to an end the plethora of small disputes that arise during the course of every project. The terms and conditions of construction contracts have traditionally been drawn up by and been agreed to between the employer and general contractor. While the various (united Kingdom) Institutes[1] have done much to safeguard the bargaining power and status of the professionals involved in the industry such as architects, surveyors and civil engineers, who have played a significant role in the evolution of and drafting of many of the standard form contracts used within the industry, the sub-contractor has until recently had to ride the roller coaster of market forces during the contracting process. Coming rather late in the day, after the initial contracting event has been concluded, the sub-contractor often has had little scope for dictating terms and conditions favourable to him. Frequently the contract price reflects a successful tender or bid placed by the sub-contractor but little more. Indeed, the professions under most of the standard form contracts assume the role of expert determinators, with the power to decide when sub-contract work is satisfactorily carried out

[1] Royal Institute for Chartered Surveyors (RICS); Chartered Institute Of Builders (CIOB) ; Institution of Civil Engineers (ICE)

and stage payments become due for work done. The prevalence of "pay when paid" provisions in sub-contracts turned sub-contractors into reluctant project financiers and potentially into insurers, carrying the burden of financing the supply of goods and services to the contractor pending payment to the contractor by the employer but subject to the risk of non-payment should the employer go into bankruptcy. In such an event the contractor survived but the sub-contractor often went under. The advent of the single project subsidiary "project employer company" exacerbated the problem so that the parent company of an employer might well survive, with only the subsidiary project company going into bankruptcy. In all of this the sub-contractor became the one who lost the most.

Tentative steps were taken within the industry to address dispute resolution issues from 1980 onwards.[2] The concept of the construction dispute adjudicator started to emerge. Initially the scope and powers of the construction adjudicator were rather limited, but in England and Wales the government has taken the initiative and with the assistance of the industry has created[3] an effective, inexpensive, speedy new mechanism for the resolution of construction disputes.

Construction Dispute Adjudication (CDA) is distinguishable from arbitral and judicial adjudication in that the CDA process has a built in mechanism to protect the parties against off the wall decisions by rogue adjudicators. CDA introduces the concept of "temporary finality." Whether or not this is really needed is considered in more depth below, but certainly it was an essential ingredient for the initial launching of CDA to allay fears that the rough and ready, quick but somewhat dirty, fix process could lead to major injustices. While this has happily not occurred, it is perhaps advisable first to consider exactly what CDA involves before returning to the issue of finality, which, as events indicate, in fact, became almost a non-issue.

In the present context the Housing Grants Act 1996 introduced two important dispute resolution processes. First, it introduced mandatory CDA in England and Wales for commercial construction projects and second, it introduced mandatory payment provisions.

The provisions under the Housing Grants Act 1996 for CDA are remarkably brief and succinct and are given some further clarity and definition by a Scheme developed between the ministry and the construction industry. The Scheme was subsequently introduced by statutory instrument. Together the Act and the Scheme provide the legislative foundations for a process which has been further developed and fleshed out by an extensive judicial jurisprudence over the last three years. The Scheme has been closely supervised and it is likely that in light of experience it may well be modified in the not too distant future to deal with some minor criticisms of the CDA process. Minor criticisms apart, however, the CDA process has proved to be a resounding success. So much so that there are serious moves to adapt a voluntary version of the process for general use by other areas of commerce and industry. CDA has done much to remove long-term conflict from the construction industry in the United Kingdom. Everyone has benefited from owner, employer, contractor, and construction professionals to supply and fix sub-contractors. In consequence, the United Kingdom construction industry is in a far more healthy position today than it was in the mid 1990s. There has been a significant decrease in large-scale litigation and with the exception of some lawyers, there have been no real losers. Indeed, far more lawyers are now able to contribute to construction dispute resolution than previously, so that perhaps only a small elite of construction lawyers and arbitrators may have lost out by its introduction. For many lawyers it has led to a steady stream of regular small claims in place of large set-piece trials.

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2 DOM /1 1980; DOM/2 1980; NEC; PAS/1; GC/Wks/1; FIDIC; ICC Pre-arbitral procedure etc.

3 s108 Housing Grants Construction and Regeneration Act 1996.

The reputation of lawyers in the industry has in consequence also been enhanced and the fear of going to law has diminished.

In respect of CDA, The Act and The Scheme together provided:

1) Either party to a relevant construction dispute can refer the dispute to an adjudicator, chosen by the parties or nominated by an Adjudicator Nominating Body (ANB);

2) The adjudicator will, having received documentation from both parties, take control of the process, determine what else is needed in order to reach a decision and request that the parties provide such information, or go in search of it himself. The adjudicator may hold a hearing if appropriate but does not have to do so;

3) The adjudicator will reach a decision within 28 days (subject to a 14 day extension at the request of the claimant) from receipt of the referral documentation from the claimant;

4) The parties and the adjudicator are required to ensure that all other concerned parties are given equal access to all communications and relevant information about the dispute;

5) The adjudicator's decision will be immediately enforceable, pending final determination by arbitration or litigation;

6) The decision will, subject to the parties otherwise requiring, be without reasons;

In respect of payment, the Act makes "pay when paid" provisions unlawful. The Act and the Scheme establish minimum requirements for payment and advance notification with reasons of any intent to withhold payments or set them off against other items that must be put into construction contracts by the parties. If the contract does not fully comply with the Statutory Scheme then the Scheme is inserted in lieu of all provisions regarding both Adjudication and Payment. It does not simply replace non-compliant terms but ALL TERMS so it is important to get it right since additional provisions that are permitted would also be swept aside by the insertion of a non-compliant term.

Since most construction disputes feature claims by sub-contractors for non-payment of sums allegedly due, the dual content of the Act and Scheme have had a significant impact on the cash flow of sub-contractors. Strangely enough, general contractors have not suffered since they have put more pressure on the employer to pay promptly. Indeed, the process has resulted in a faster turn around in projects which has benefited employers and contractors alike.

Inevitably, there have been occasions when the losing, paying party has not been satisfied with the outcome. One remedy is to refuse to pay and then challenge the decision during action for enforcement. This is not an appeal process. The only valid basis of challenge is to assert that there has been a breach of natural justice or ultra vires. Only a few challenges have been successful. The alternative is to take the matter forward for final determination at arbitration or before the courts. While the adjudicator's decision and reasoning, if any, is not disclosed to either the arbitrator or the judge, who approaches the dispute de novo, the result is disclosed before costs are taxed. Following the notion that costs follow the event, if the final outcome represents no significant advance on the adjudication decision the winner may be deemed a loser, so it is not wise to take an adjudication decision forward to trial unless there are very serious doubts about the decision and a belief that trial would significantly alter the outcome.

Herein lies the genius of adjudication. Adjudication is aimed at incrementally picking off issues and settling them as they arise. Like the dispute review board, it is a device for dispute attrition. It is not intended to cover multi-faceted end of project disputes. Rather it is intended to prevent them from arising. The claimant defines the scope of the dispute by his

terms of reference to adjudication. The respondent can introduce relevant counter-claims and set off related to the same issue but cannot introduce brand new issues not within the scope of the initial reference. These should be sent to a subsequent adjudication. The disputes, being relatively tight and compact can be easily dispensed with by the fast track process. Little would be gained or added to the justice of the process by the use of a set piece trial. While it is true to say that skilled advocates can sometimes turn a trial around and win on technicalities or by pushing forward the barriers of the law by distinguishing a case on the facts, the probable outcome of the majority of cases can normally be predicted at an early stage. The luxury of the set piece trial is justified by the exceptional minority of cases. Adjudication clearly cannot address the exceptions but is likely to produce a sound result at a reduced price for the majority. Clearly, where a party seeks to establish a new legal precedent, adjudication is not the process to achieve it. Construction adjudicators must fall back on established legal principles. Unlike judges, they cannot break new ground. The number of cases challenged during enforcement proceedings or taken forward to a full trial has been remarkably small. The losers have either accepted that the decision was fair or that they could live with it. In most cases the financial risk of trying to overturn a decision has proved unattractive. Furthermore, since many decisions concern stage payments there is always the opportunity to claw back any perceived excess payment when the next stage payment comes up for consideration. In the meantime the project has remained on track. Initial fears that the loser who subsequently wins at a full trial could find that the sub-contractor had dissipated the funds and could not repay the monies have proved largely to be unfounded.

Early forms of adjudication, such as the Dom /1 1980, addressed this problem and provided for monies found payable by the adjudicator to be paid into a form of trust or into escrow. The problem is that this achieves virtually nothing apart from denting the cash flow of all parties concerned. The contractor's funds are tied up but the sub-contractor does not benefit either since the funds remain out of his reach. Since a question mark remains over the question of whether or not at the end of the day the sub-contractor will be able to recover the money means that it does not even form the basis of collateral upon which the sub-contractor might borrow funds. The end result is a no win situation for everyone concerned except the trustee who is paid for handling the costs.

Clearly the risk of liquidation has to be born by one of the parties. The question is who should bear it? The "pay as paid" device put the risk squarely on the sub-contractor's shoulders even though he was subject to the tightest of competition constraints and as a minor player was least able to bear the risk and would draw the smallest profit out of the project. General contractors play for the highest stakes. They are most able to determine and bear the risk. In the past, the contractors have exploited payment processes to their advantage, bullying sub-contractors into taking less than they are legally entitled to and protecting their own cash flow by delaying payment for as long as possible. While it is possible that one day a contractor will get an adjudication payment overturned only to find that the sub-contractor no longer has funds to repay the monies, this is likely to be the exception rather than the rule. For the contractor, such a loss can at least be off set against the profits made by all the other aspects of the project whereas the sub-contractor has only one single interest and revenue source arising out of the project. Logic dictates that if any one therefore should bear the risk it is the contractor that should do so. There cannot be a perfect solution to the problem but this represents the best solution in an imperfect world.

The problem is in fact more academic than real and therefore does not detract in any significant or meaningful way from the overwhelming advantages that CDA has given to the industry in the United Kingdom. Since the process is designed to safeguard the cash flow of suppliers, sub-contractors and construction professionals, the likelihood of a claimant going to the wall and being unable to reimburse an overturned payment are further reduced.

From the perspective of operating CDA as a private voluntary system and particularly in adapting it to international applications there is a problem related to what to call the process and how to classify it, particularly as to whether or not it is an arbitral process governed by The New York Convention on the Enforcement of arbitral awards (NYCEAA). This issue will require careful consideration and artful contract drafting. However, in the United Kingdom CDA decisions are enforceable by virtue of the provisions of the Housing Grants Act 1996. For disputes falling outside the scope of the Act, the opportunity exists to enforce the decision as a contractual term. In the alternative, should the parties agree it is possible to reduce the decision to a settlement deed which is immediately enforceable albeit that the parties are free to move forward to final determination elsewhere should they so desire. Clearly, as long as the mechanism contains the concept of "temporary finality" it cannot be classified as an arbitral award and the provisions of the NYCEAA do not apply. A number of voluntary international construction adjudication processes such as FIDIC provide mechanisms for turning the temporary nature of the decision into a permanent decision either by default and the passage of time in that an application to take the dispute forward to litigation or arbitration must be lodged within a specific period of time or alternatively the parties are invited to sign off the decision as a final determination of the dispute. In most countries Statutes of Limitation would also ultimately render the decision final. The question arises as to whether or not the application of such mechanisms which end the temporary status of the decision turn it into an arbitral award and confer the benefit of the provisions of the NYCEAA on it. There is no answer to this question at the present time, but the authors are researching it.

The nature of the CDA process, which relies heavily on the use of adjudicator qualified construction professions such as architects, engineers and surveyors rather than lawyers and judges, is eminently adaptable to incorporation into the Dispute Review Board process. One model that has been used with considerable success in the United Kingdom is the Mediation / Adjudication process, whereby a dispute is referred to mediation either to an ad hoc mediator or to members of a Dispute Review Panel that have been involved in the project from its outset and have provided advice and support to the project management board. If the parties to the dispute are unable to negotiate a settlement the mediator then becomes an adjudicator and renders a decision. Because the mediator / adjudicator is already privy to all the relevant information, once the parties have submitted statements of claim, defense/ counterclaim and response, the adjudicator should be in a position to render a very prompt decision. Combining the processes ensures that rather than having two one-month periods first for the mediation and second for the adjudication, the adjudication decision can be rendered within a maximum of five weeks. If a Dispute Review Board has been engaged throughout the process a mediation can be convened within a week, with at most one more week for the adjudication decision.

Finally, it should be remarked that unlike the CDA process under the Housing Grants Act 1996 which automatically applies to all parties to a construction project, whether they are in fact privy to all aspects and relationships within the project, there is a need when the voluntary process is adopted to ensure that all parties to the project sign up to the CDA process with all other parties to the project. A number of small contracts between other parties not directly related to the immediate contract may well be needed to draw tort claims into the CDA scheme. Thus a sub-contractor would need to sign off a CDA agreement with the employer, the architect, the engineer and the surveyor. Otherwise the notion of privity of contract might bar use of the process.

While it is true that many other factors such as the introduction of team work, project management and partnering have contributed to the regeneration of the construction industry in the United Kingdom over the past six years there is no doubt that CDA has played a major role. In the early 1990s the United Kingdom borrowed heavily from U. S. models in the development of mediation, partnering and dispute review boards. Now perhaps it is the turn of the UK to return the favor and share the CDA experience with the US construction industry.[4]

Arbitration creatively employed remains a dynamic dispute resolution method capable of continuously evolving to meet the needs of contemporary commerce. The evolution of adjudication and dispute review boards demonstrate that the potential of innovative adaptations of arbitration are limited only by the creativity and imagination of contracting parties. Separately, dispute review boards and adjudication have contributed to the timely cost effective completion of thousands of construction projects. Innovatively combined, adjudication and dispute review boards now offer the potential of virtually ensuring that major construction projects are consistently completed on time, within budget and without litigation.

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[4] See further : C.H.Spurin. "Failsafe Adjudication". NMA Press 2001 ; C.H.Spurin & Tony Bingham : "Adjudication and Claim Settlement for the Construction Industry". NMA Press in conjunction with The Institution of Surveyors, Malaysia, Sarawak Branch, 2001 ; Tony Bingham, Mark Entwistle and C.H.Spurin : "The International and Domestic Adjudication of Construction Disputes" NMA Press, 2nd Ed 2002.