ADR NEWS

Volume 4 Issue No 1 April 2004

For current developments in Arbitration, Adjudication, Dispute Review Boards and Mediation

EDITORIAL :

Adjudicators come and go. If the latest initiative by the Home Secretary, David Blunket, goes ahead, the immigration adjudication process[1] will soon be replaced by a new Immigration Tribunal. Under the proposals the decisions of the Tribunal would be final, particularly since the proposals seek to oust the supervisory jurisdiction of the courts, removing the ability of disgruntled applicants to seek judicial review of the decisions of the Tribunal. If the provisions make the statute book we will have to see whether or not they will survive scrutiny under the Human Rights Act 1999. It is submitted that as currently drafted they would not do so. Lord Woolf indicated in his Cambridge Lecture on Wednesday 3rd March that this might provide the very first example of the court's striking down an Act of Parliament. He has urged the House of Lords to reject the bill and also to reject the abolition of the Office of Lord Chancellor and the creation of a new Supreme Court. However, with the final stages of the reform of membership of the House of Lords due this year, it is far from clear that a newly constituted House will oppose the government's proposals.

In many respects the principles of justice are based on natural justice. The difficulty with this is that these principles are subjective in orientation. When parties submit their dispute for settlement they not unreasonably expect an objective answer to their dispute. However well intentioned the judge, arbitrator or adjudicator is there is always a subjective element to the process. The skill of the decision maker is in satisfying the parties that they have had a fair hearing and that the decision has been made with regard to the evidence presented to the tribunal.

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Parties also appreciate that there is usually another step that can be taken if there is an obvious shortcoming in the decision-making processes. The ultimate arbiter is the House of Lords. This is a cornerstone of "British Justice" and the English Legal System. This process has been regarded as unchallengeable until now! This concept would appear to be under threat from the Government and its recent proposals.

The worry is that the checks and balances of the British Constitution are under threat. Administratively the immigration adjudication process cannot deal with the numbers of asylum seekers involved. This however, is no reason for undermining the Constitution. If reforms are needed it must be the administration, not the legal processes that underpin justice in the UK that are reformed.

Tribunals are not unique to immigration. If David Blunket's proposals are enacted then the concept of a Tribunal as being part of the Court system is brought into question. Tribunals and their members will then be part of the executive, as an administration process rather than being part of the judiciary. This would be a radical and fundamental change of direction for the United Kingdom as a whole and one that strikes at the very foundations of the concept of British justice. It would appear that the Home Secretary regards the civil service as government and not crown servants. We no longer have a Crown Prosecution Service or H.M.'s Prisons. What will be next? Such fundamental changes should not be brought in through the "back door", but need rather to be debated fully in public! G.R.Thomas : Editor

[1] Immigration Adjudication I & II, S.Randhawa. ADR News, July 2003 / January 2004.

The Development of Mediation in Wales

The mediation movement in Wales took yet another major step forward with the formal launch of the Association of Welsh Mediators at the Civil Justice Centre, Cardiff on February 16th this year. This follows on from the establishment of the court sponsored mediation scheme for South Wales in November 2003.

The well-attended launch meeting was chaired by Phillip Howell Richardson, who was duly elected as chairman of the association. Corbett Spurin and Gareth Thomas, William Jeremy, Jacky Smith and Anthony Vines were elected to the association's standing committee, which also includes the following officers, namely Paul Hopkins, Andrew Lewis, David Milliken, Paul Newman and John Roche. Judge Graham Jones was proposed and appointed as the founding president of the Association. The Association's Secretary is Dr Mair Coombes Davies, and Richard Frances takes up the post of Treasurer. An initial rate of £25 per annum membership fee established.

The stated objects of the Association were discussed and a draft constitution proposed, amended and then adopted. A full program of events is planned for the forthcoming year. Members will be informed as soon as is practicable of the events and dates.

The first committee meeting of the Association took place on Tuesday 9th March, at the offices of Morgan Cole, in Park Place, Cardiff.

NADR wishes the new Association well and encourages all NADR mediator members based in Wales to join the Association, play an active part in its activities and help to make it a resounding success. Applications to join should be addressed to Dr Mair Coombes Davies, m@coombesdavies.co.uk

The CIArb in Wales

On the 24th February 2004, the Welsh Branch of the CIArb held its AGM at 30 Park Place, Cardiff. Mr Gareth Thomas has accepted the position of secretary to the branch following the retirement of Mr Glyn Jones. Mr Corbett Spurin has also been elected to the committee.

Mr Dennis Baldwin has taken over the chair this year from Mr Gwyn Owen and all due thanks go to Gwyn for the tremendous effort he put in whilst in office and all our good wishes go to Dennis for his year in office.

An exciting range of activities for 2004/5 were discussed at the AGM and already plans have been made for a joint venture with the University of Glamorgan. The event, to be staged at the Management Centre on the main university campus will feature a construction adjudication moot preceded by the presentation of papers on key related aspects. The date to be pencilled into the diary is the afternoon of Friday, the 7th May. All who have an interest in construction disputes are encouraged to attend. CPD points are available for attendees.

As soon as a program of events for 2004/5 has been announced by the CIArb, members will be informed.

NATIONWIDE MEDIATION ACADEMY

TRAINING FOR PROFESSIONAL PRACTICE IN ARBITRATION, ADJUDICATION AND MEDIATION

Seminar : Introduction to Mediation at Glamorgan University (UoG)

Friday	**3:00 pm to 6:00 pm**	**30th April**	**2004***

Mediation training at Glamorgan University

Friday	**1:00 pm to 6:00 pm**	**18th June**	**2004***
Saturday	**9:00 am to 6:30 pm**	**19th June**	**2004****
Sunday	**9:00 am to 4:30 pm**	**20th June**	**2004****
Friday	**1:00 pm to 6:00 pm**	**02nd July**	**2004***
Saturday	**9:00 am to 6:30 pm**	**03rd July**	**2004****
Sunday	**9:00 am to 4:30 pm**	**04th July**	**2004****

Venue : UoG, (Main Campus) Glamorgan Business Centre*

Venue : UoG, (Glyn Taff) Law School**

Contact : Helen Merchant, UGCS Ltd, University of Glamorgan, Pontypridd, CF37 1DL

Tel No: 01443 482482

Fax No: 01443 485916

Email: hlmercha@glam.ac.uk

Website: www.glam.ac.uk/business

Impending NADR Training Programs

Amman –Jordan – Meridian Hotel.

Construction Adjudication
Led by N.Turner and C.H.Spurin
Saturday – Tuesday 3rd –6th April 2004
+ accreditation examination

FIDIC Green Form Adjudication Practice
Led by N.Turner and C.H.Spurin
Wednesday – Thursday 7th –8th April 2004

FIDIC – Green Form Users Course
Led by R.Faulkner and L.Rogers
Saturday – Sunday 10th –11th April 2004

DRBF Panel and Chairman Courses
Led by R.Faulkner and L.Rogers
Monday – Tuesday 12th –13th April 2004

Details of further courses scheduled for June/July to be announced in due course.

For Seminar Rates and Booking forms contact
Mr Hussam Tafish
Office No 208, 2nd Floor,
Royal Jordanian City Terminal Building,
7th Circle, Amman, Jordan
P.O.Box 2303, Post Code 11821
Tel : 00962 (0) 6585 3091
Fax 00962 (0) 6585 4902
Email hussam@nadr.com.jo

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DRBF US CALENDAR

Administration and Practice

26th February	2004 : Dallas, Texas
15th March	2004, San Diego, CalTrans
18th March	2004, Scarmento, CalTrans
17th April	2004, Atlanta, Georgia
25th October	2004 San Francisco

Chairing Workshop

16th March	2004, San Diego, CalTrans
19th March	2004, Scarmento, CalTrans
18th April	2004, Atlanta, Georgia
26th October	2004, San Francisco

Annual Conference 2004 – San Francisco
23rd – 24th October 2004

International Conference, Stuttgart, Germany
Friday 18th-Saturday 19th June 2004

Apply on line www.DRB.org

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Impending University of Glamorgan Arbitration Award writing course

(For LLM Graduates only)

Monday – Friday 19th-23rd April 2004

Contact : **Helen Merchant,** UGCS Ltd, University of Glamorgan, Pontypridd, CF37 1DL
Tel No: 01443 482482
Fax No: 01443 485916
Email: hlmercha@glam.ac.uk
Website: www.glam.ac.uk/business

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National Mediation Academy Inc

Training Calendar 2004-03-07

Basic Civil and Commercial Mediation Classes

5th – 8th	February	2004
18th – 21st	March	2004
13th – 16th	May	2004
10th – 13th	June	2004
26th – 29th	August	2004-
23rd – 26th	September	2004
4th – 7th	November	2004
9th – 12th	December	2004

Basic Family and Interpersonal Mediation Classes

29th – 1st	Jan / February	2004
26th – 27th	June	2004
23rd – 24th	October	2004

Arbitration Training Classes

17th – 18th	April	2004
9th – 10th	October	2004

Contact : national@mindspring.com
6688 N.Central Expressway
Suite 600 – Dallas – Texas 75206
Tel (216) 361 4998
Fax (214) 361 2343

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FIDIC / ICC Conference - Paris

The resolution of disputes under international contract.

29th – 30th April 2004 at Hotel Concorde La Fayette

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CIOB / RICS - London Masterclass

Management, analysis and avoidance of delay and disruption in construction contracts

20th – 21st May 2004 : Tel: 020 7089 7020

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Membership Subscriptions

Members are reminded that the NADR administrative year runs from 1st April to 31st March and that their annual membership fee is now due.

We are working hard to ensure that members of NADR receive value for money. This quarterly ADR News is but one of the benefits of membership, coupled with the web site publications section which is growing all the time.

Nomination to adjudication, arbitration and mediation in the UK is still in its early days and is currently running at a modest rate. We have made great efforts to publicise the services of our members and hope that gradually this effort is rewarded.

Members are reminded that NADR can only nominate members on the information that you supply us with. So please keep us informed of your career developments. If we do not know about any new areas of expertise that you have developed we cannot take it into account when making nominations. A fundamental aim of NADR is to provide a quality service to both our clients and our members. To do this we need your input so "do not be backward in coming forward".

NADR Subscription rates for 2004/2005

The annual subscription rate for members has been set at £75 or Euro 100.

Members will shortly be receiving membership renewal reminders. Members will be required to attach a photo-copy of their current professional indemnity insurance policy along with their renewal fee.

NADR had intended to move to the full membership rate in 2004 but because we have not achieved some of our stated objectives a view was taken that the imposition of the full rate at this time would not represent value for money for our members and that a flat rate would therefore be more appropriate for the current year.

Regrettably, the high cost of professional indemnity insurance means that NADR is not in a position to continue to extend the £20 introductory membership fee into 2004/2005.

It had originally been intended to introduce the NADR Journal in January 2004, but this proved to be too ambitious. As stated below, planning is now underway to launch The Journal in 2005.

The NADR web server has been suffering from some severe problems, which have prevented regular up dating of the site. We understand that the problem is partly a consequence of virus attacks which have targeted servers over the last few months.

The reconfigured server system conflicted with our management system, preventing both members and NADR technical staff registering on the web site. Whilst the problem is largely solved now, NADR has been developing a new site and will move to a new server, which will hopefully be more secure, in the near future. A consequence of this has been that many articles, the adjudication case data-base and facilities such as member listing have not yet gone on line.

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The NADR Journal

2003-2004 saw the successful re-launch of the NADR Newsletter. 2004-2005 hopefully will see the launch of a new venture for NADR, namely a refereed journal. The journal will be aimed at ADR practitioners and all those who have an interest in the subject. It will not concentrate on any one aspect of ADR and dispute resolution, but will adopt a broad church approach to ADR. We already have in place a distinguished panel of referees and reviewers, but we would like more of our members and readers to put their names forward for inclusion on our refereeing list.

If you would like to join the panel and believe that you have the necessary qualifications and experience please contact a member of the NADR editorial staff or alternatively please send or e-mail a copy of your c.v. with your experience and qualifications for our records.

Similarly we are asking our members and readers to submit articles for the journal. It is envisaged that initially there will be two editions per year, but there will be scope and opportunity to increase this further depending on the number and size of the articles submitted. No firm date has been set for the launch date, but January 2005 is envisaged if sufficient material has been submitted and refereed.

If you have an article looking for publication please do not hesitate to submit it to NADR for inclusion in the journal, subject to approval by the review panel.

Alternatively if you have an idea that you wish to develop as an article please submit a proposal to the review panel.

Mediator Skills by G.R.Thomas

For a mediator to be successful he or she must possess a wide range of skills. One of the most important, but perhaps least appreciated, is the ability to actively listen to what a party is saying and to note what the party is not saying. All too often we hear what we expect someone to say rather than what is actually said. It is a fundamental principle that mediators must not prejudge the case nor impose their own prejudices on the parties. Furthermore, a mediator has to be able to tune into "*where the speaker is coming from*" and read the "*sub text*" or hidden messages given out by the parties.[2]

This article focuses on one of the most fundamental tools in the mediator's armoury, that of actively **listening** and taking on board what the parties are saying and acquiring an awareness of what they consciously and subconsciously leave out. The aim of this paper is to show how this skill can be used as a tool to enhance settlement rates.

Prior to the commencement of a mediation, the mediator should be "armed" with at the very least the skeleton arguments of the parties and their statements of case. This background information enables the mediator to prepare for the session and to plan a strategy for the conduct of the mediation. The mediator's ideas of the case will be formed from these submissions. This scenario relies on the premise that the parties have identified their needs and have provided the mediator with all relevant information in advance.

There is however, a flaw in the assumption that providing this information will ensure the mediator has everything needed to fulfil his duties. The problem is that one or both of the parties may have a "hidden agenda." A failure to deal successfully with such an agenda can fatally damage the process. The question that needs to be asked is, how does a mediator discover what hidden agenda, if any, exist? The answer is simple. The mediator must listen to the parties. Hidden agendas, if they exist, can be successfully dealt with whatever form they take, once they have been identified.

[2] For the most part mediations are conducted in person with the mediator and the parties present at the same venue. There are, however, exceptions to this rule with e-mediation and telephone mediation being championed by some mediators. The latter two forms of mediation require different skills to the face-to-face mediations usually undertaken. This article is not the appropriate place to examine the differences that exist.

An important point to consider is the assumption that settlement is synonymous with resolution. In most cases it is! There are however, situations where settlement does not result in satisfactory closure for one or other of the parties. The question has to be asked, how can this situation arise? The parties have voluntarily entered into an agreement to settle the case, so they should be satisfied with the outcome, otherwise why settle? The answer may be that the hidden agendas have not been satisfactorily addressed.

Joint and private sessions are equally important stages of the mediation process. They provide the mediator with the opportunity to garner the information needed to assist the parties in their quest for closure. Active listening is important not just for the mediator but also for the parties. A skilled mediator will take steps to ensure the parties are hearing and responding to what the other party says. The most striking example of a failure to listen is where the mediation exposes the fact that there is in fact no dispute at all, simply a failure by the parties to clarify their positions. Once clarification is brought about with the assistance of the mediator the dispute vanishes.

The mediator needs to "investigate" the dispute with the parties and to question them if he is to successfully bring the dispute to a settlement. The mediator must build up a complete picture of the case if he is to explore methods of settlement with the parties. To do this the mediator must carefully question, listen to and examine the responses, to hear what the parties are saying and to look at what they are not saying. The skill lies in identifying the parties' needs, not in dealing with what the mediator considers the parties dispute to be about and to then encourage them to address those needs rather than their stated wants.

Mediators are not judges. The parties are the people who have to agree the terms of a settlement. The parties will have greater confidence in a mediator who actively listens. Listening enables the mediator to get "on top of" the case. Active listening is not inherent. It is not necessarily an easy skill to acquire, but it is essential. It is a skill that can be both learnt and cultivated. Doing so is the key to success.

Conclusion The skill of listening is fundamental to the settlement of cases at mediation. It is a "*sine qua non*" of successful mediation practice. To be a successful mediator, listen to the parties!

"ACCREDITING MEDIATORS" Part I

Currently, if the parties to a dispute wish to avail themselves of the services of a mediator they have several options. Either they can defer to a mediation service providing organisation, (MNB) which offers some guarantee as to the mediation credentials of their members, to appoint or nominate/ recommend a mediator; they can choose an individual on the basis of personal recommendation; or they can consult a list of mediators and make a selection from it. There is no shortage of mediators who offer their services on the web and through other commercial directories supported by glossy presentations, which often make sweeping, grandiose statements in support of the mediator(s) and their apparent track record of success. The choice for the uninitiated is baffling. Which, if any, of the mediation service providers should they put their trust in? There is no single official source of mediators. Anyone can legally declare themselves to be a mediator and set themselves up in business.

The services of a commercial mediator do not come cheap. How can the parties to a dispute be sure that the mediator chosen to assist them in their search for a resolution to their dispute will be "*up to the job*?" A debate is currently raging about quality assurance in the mediation market.[3] It is hardly surprising. All of us will have heard anecdotal evidence of mediations that have failed miserably, apparently because the mediator was incompetent, or of settlements that have been achieved in-spite of the worst efforts of the mediator. Happily there are also those of us who have been congratulated on bringing about a resolution to a dispute, to the mutual satisfaction of the parties, by a party who entered the process as a confirmed "Doubting Thomas".

There is a danger that the mediation movement, with all the benefits that it has to offer, could be derailed by loss of consumer confidence, if quality assurance mechanisms are not introduced to ensure that clients are protected from incompetent mediators. There are strong arguments for and against regulation. If compulsory regulation is to be adopted, who will provide it, a state body or the industry itself? For the industry to provide effective self regulation it would need first to acquire an overarching body recognised by all providers and individual practitioners, somewhat like the Law Society or Bar Council. Voluntary recognition of such a body is unlikely, so statutory intervention to make membership a prerequisite of practice would be required. However, once in existence the body could render superfluous the pre-existing organisations. Furthermore there would be a cost implication for the profession in establishing such a body, which would no doubt quickly acquire disciplinary powers. Where would the body draw its officers from and who would appoint them? Who in turn would regulate the conduct of the body and what degree of accountability would it have towards the professionals it holds sway over?

How practicable is it to firstly regulate the conduct of mediators, secondly to accord a quality stamp of approval for mediators and thirdly, what happens to the quality assurance body if and when a rogue mediator slips through the net and the parties, having relied upon that stamp of approval, end up with a mediation that goes pear shaped? A further difficulty lies in the fact that the reason why a mediation fails is often because the differences between the parties simply proved to be too great to be bridged, or because one or both of the parties was either not prepared to compromise at all, let alone make realistic concessions.

The problem is compounded by the plethora of organisations that act as mediation service providers, trainers and accreditors, both domestically and internationally. This is amply demonstrated by the European Commission Green Paper, which charts the principal providers across Europe and examines the range of differing governmental / institutional approaches of member states to mediation. Whilst it is possible that the European Union may produce a Mediation Directive in due course, the extent to which it will regulate the profession and establish minimum standards, as opposed to merely providing broad generalist guidance, is yet to be seen. It is submitted that the flexible nature of mediation is part of its strength given the diverse range of social interests that are served by it. Any form of regulation that imposed too severe a straight jacket on the conduct and practice of mediation would inhibit both its present use and its adaptability for the future.

The contrast between the approach to date of the US and Europe to this issue is very telling. The modern mediation movement was invented by an initially

[3] See Commission of the European Union Green Paper COM (2002) 196 ; See also The Department for Constitutional Affairs at http://dca.gov.uk/civil/adr, previously the Lord Chancellor's Department (LCD), which has taken a keen interest in the ADR movement and the scope for regulation.

small group of US legal practitioners, judges and interest groups, who were dissatisfied with the high costs of litigation, the time element involved in litigation and the hazards of jury trial. The practices and procedures of mediation developed by trial and error and different sectors adopted radically different approaches to the art to suit their various needs. The client base for mediation expanded rapidly as its value and worth gained recognition.

No doubt the progress of the movement was littered with examples of both good and bad practice, but as long as the positive outcomes outnumbered the failures, the risk of mediation for users, despite its lack of regulatory quality assurance mechanisms, was patently less than that of litigation. The movement evolved to critical mass before the authorities even took cognisance of its existence. Eventually first individual states such as Texas[4] and latterly the Federal Government[5] produced mediation legislation, an event that R.Faulkner and I made a humble contribution to. Even so, the legislation, which represented an extremely light touch, leaves regulation primarily in the hands of the ADR industry. The primary effect of the legislation is not to regulate but rather to encourage the use of ADR and forges a link between ADR and the courts. The US courts have in turn broadly supported the ADR movement, enforcing mediated settlements. A similar process is currently underway with respect to the Dispute Review Board movement. The courts have intervened on a few occasions in respect of patently biased mediators and in respect of misconduct by DRB panellists[6] but otherwise both movements have been largely left to their own devices by the law.

That said, both in the US and in the UK the flood gates of professional liability have been well and truly opened. It is too late to try and bolt the stable door. As King Canute found, attempts to stem the tide are futile. All areas of commercial and professional practice have been forced to take a belt and braces approach to protecting themselves against liability both by the adoption of best practice rules and professional conduct regulation and further by taking up professional indemnity just in case these measures prove to be insufficient to ward off legal action for the consequences of events that in previous times would not have been deemed to involve a duty of care.

Despite the standard provisions in mediation appointment documents that seek to provide immunity for the mediator, it is advisable that all mediators carry professional indemnity (PI) insurance. Equally, despite the fact that it is the parties who ultimately accept / appoint the mediator not the mediator nominating, appointing, recommending body (MNB), again it appears that it is now necessary for the MNB to also carry PI cover. All this despite the fact that, as the law currently stands, in the absence of bad faith, neither is likely to be held to account by a court.

The requirements for a careful MNB are not too difficult to ascertain. What it would take for them to fulfil the requirements is less easy to deal with.

The MNB should first ensure that the mediators they recommend are competent, but what is the measure of competence? Is it professional qualifications? If so, how rigorous should the examination be when one is assessing skills as opposed to academic achievement? It is prior track record? If so, how does a mediator acquire a track record in the first place? "Chicken and Egg" and "Catch 22" come to mind.

Secondly, the MNB should ensure that the mediator has a clean record establishing that he is professional. Whilst, it is possible for the MNB to monitor through feed back forms the performance of its active mediators (assuming parties bother to make returns), first time mediators present a problem for the MNB. Furthermore, the private nature of mediation is such that the short comings of a mediator engaged in mediations outside the sphere of influence of the MNB are unlikely to become public knowledge.

Addressing both of these issues may therefore be difficult, though that alone is no reason for doing nothing, unless it can be demonstrated that the danger represented by the problem is insignificant and the cure would be potentially worse than the disease.

In the next edition consideration will be given to regulating the conduct of mediators, the establishment of and use of criteria to measure mediation competence and the role of disciplinary boards in establishing fault and imposing sanctions.

By CHSpurin

4 S154 Texas Civil Practice and Remedies Code 1987.

5 Federal Arbitration Act : Alternative Dispute Resolution Act 1998 : Uniform Mediation Act. 28 USC 651 :

6 **Los Angeles County Metropolitan Transportation Authority v Shea-Kiewit-Kenny**. 4 Dec'97 Cite as 97 C.D. O. S. 8960

HASHEMITE KINGDOM OF JORDAN
The Mediation Law for Civil Disputes Resolution
No. (37) of The Year 2003

English translation by Fadi and Rami Hashem[7]

SECTION ONE : CITATION[8]

1 This Law shall be called (The Mediation Law for Civil Disputes Resolution of The Year 2003) and shall come into effect from the date of its publication in the Official Gazette.[9]

SECTION TWO : MEDIATORS

2(a) There shall be established within the Court of Cassation a judicial department called the (Mediation Department), pursuant to a specification by the Minister of Justice of the courts in which this Department shall be established.

2(b) The Mediation Department shall be composed of a number of Cassation and First Instance judges, called (Mediation Judges), chosen by the President of the Court of Cassation, for the duration he specifies and he [*The President]* shall select from the employees of the Court the number [*of employees*] needed for this Department.

2(c) In addition to the Mediation Judges, the Minister of Justice may nominate (Private Mediators[10]) consisting of retired judges, lawyers and professionals known for impartiality and honesty. The Minister shall specify the conditions that Private Mediators must satisfy.

SECTION THREE : APPOINTMENT AND REFERENCE OF DISPUTE TO MEDIATION

3(a) The Case Management Judge may of his own accord and, after meeting with the legal attorneys of the disputants, refer the dispute to the Mediation Judge or one of the Private Mediators[11] if he discovers that the nature of the dispute so necessitates, and he shall refer the dispute to mediation at the request of the parties in order to settle the dispute amicably, and in all cases the Judge shall when nominating the Mediator take into consideration the consent of both parties to the extent to which that is possible.

3(b) The First Instance Judge may of his own accord and after the attendance of the parties, refer the dispute to the Mediation Judge if he discovers that the nature of the dispute so necessitates, and he shall refer the dispute to the Mediation Judge at the request of the case parties, in order to settle the dispute amicably.

3(c) The parties may, with the approval of the Case Management Judge or the First Instance Judge, agree to settle the dispute by mediation by referring it to any person they deem fit, and in this case the mediator shall determine his fees, with the agreement of the parties of the dispute, and the Claimant shall recover the judicial fees that he paid, if the dispute is settled amicably.

SECTION FOUR : STATEMENT OF CLAIM / DEFENCE

4(a) The case file shall be passed to the Mediation Judge when the dispute is referred to him, and he may oblige the parties to present brief statements of their claim or defence.

4(b) When a dispute is referred to a Private Mediator, each party to the dispute shall present [*to the mediator*], within a period not exceeding fifteen days from the date of referral, a brief statement containing a summary of his claims / defences [*as the case may be*] together with the most important documents he relies on, and those statements and documents shall not be exchanged between the disputing parties.[12]

7 Hashem Law Office, www.hlo-lawyers.com

8 All italic text in square brackets and foot notes and section headers do not form part of the original text and have been added by the editors to provide commentary and ease of use.

9 Date of first publication : 30th April 2003

10 In order to operate such a system, it is supposed that someone, perhaps the Minister of Justice or an employee of the Ministry will be, or already has been, tasked with compiling an informal list of individuals and contact details, thereby creating an informal panel of Private Mediators. Such a list would be needed for use by the Case Management Judge under section 3a below.

11 See supra, foot note 9.

12 Whilst the parties will have already exchanged statements of claim/defence and counterclaim making further exchange unnecessary, it is not clear from the text why other documents, which will be relied on should not be exchanged, particularly if the

SECTION FIVE : ATTENDANCE

5(a) The attendance of the disputing parties, in addition to their legal attorneys if the circumstance so entails, shall be a condition for convening the mediation sessions, provided that if one of the disputing parties is a legal personality, the attendance of an authorized management representative, other than legal attorneys, shall be a condition for settlement of the dispute.

5(b) If without lawful excuse one of the disputing parties or his attorney fails to attend [*the Mediation*], the Case Management Judge or the First Instance Judge may drop the case [*where a claimant fails to attend*], cancel the defence [*where the defendant fails to attend*], or impose a penalty of not less than twenty Dinars[13] and not exceeding two hundred Dinars in the First Instance Cases, and not less than fifty Dinars and not exceeding one thousand Dinars in Cassation Cases.

SECTION SIX : DUTIES OF THE MEDIATOR

6 The mediator shall :

6(a) Schedule a session [*for the mediation*] and serve notice on the disputing parties or their attorneys of its date and place of convening in accordance with the procedures prescribed in the Civil Procedures Law.

6(b) Meet the disputing parties and their attorneys and discuss with them the issues involved in the dispute and their claims, and he may meet with each party independently.

6(c) Take the measures he deems fit to close the gap between the views of the parties for the purpose of achieving an amicable settlement of the dispute, and for this purpose he may give his opinion, evaluate the evidence, present legal documents and judicial precedents and adopt other procedures which facilitate the mediation process.

SECTION SEVEN : CONCLUSION OF THE MEDIATION

7(a) The mediator must end the mediation process within a period not exceeding three months from the date of referral of the dispute to him.

7(b) If the mediator is able to achieve a settlement of the dispute, partially or fully, he shall present to the Case Management Judge or the First Instance Judge a report and attach to it a settlement agreement signed by the disputing parties to be certified by the Case Management Judge or the First Instance Judge and this agreement after it is certified shall be considered as a final binding judgment not subject to any means of appeal.

7(c) If the mediator is not able to achieve a settlement of the dispute, he shall present a report to the Case Management Judge or the First Instance Judge stating in it that the parties have not achieved a settlement, provided that he shall clarify in this report the extent of their own and their attorneys' commitment to attend [*participate in*[14]] the mediation sessions.

7(d) At the end of mediation the mediator shall give back to each party the statements and documents they had presented to him and the mediator shall not keep copies thereof, subject to legal liability.

SECTION EIGHT : CONFIDENTIALITY AND NON-ADMISSIBILITY

8 Mediation procedures shall be considered confidential and shall not be relied upon or any compromise therein by the disputing parties before any court or any other authority whatsoever.

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providing party has consented to such exchange. However, discovery of documents in mediation is not the norm in any case. The bar against non-consensual disclosure by the mediator ensures that in the event that the mediation fails and the case proceeds to trial the presenting party's case is not prejudiced by the mediation process. A voluntary advance exchange of documents however can do much to facilitate the mediation process, sending out a message of good will and co-operation between the parties.

[13] About twenty eight US Dollars nowadays.

[14] Attending alone would appear to be insufficient to address the question as to commitment since attendance would be a matter of the record. A failure to attend would naturally be a direct indicator of the level of commitment, whereas it is possible to attend without participating, merely going through the motions to satisfy any instruction to mediate.

SECTION NINE : COSTS OF THE MEDIATION PROCESS

9(a) If the dispute is fully settled by judicial mediation, the claimant may recover one half of the judicial fees he paid, and deposit the other half of the fees in a safe box to be distributed at the end of every month to judges and employees of each of the Case Management and Mediation Departments as the president of the Cassation Court deems fit.

9(b) (1) If a Private Mediator [*nominated by the court*[15]] achieves a full settlement of the dispute, the claimant may recover one half of the judicial fees he paid, and the other half shall be paid to this Mediator as fees provided that they shall not be less than three hundred Dinars, and if it is less than this minimum the disputing parties shall be obliged to equally pay to the mediator the difference between this sum and the decided minimum.

9(b) (2) If the Private Mediator shall not achieve a settlement of the dispute, his fees shall be determined by the Case Management Judge provided that it shall not exceed two hundred Dinars which the claimant is obliged to pay to him, and this sum shall be considered as part of the case expenses.

SECTION TEN : MEDIATION JUDGE BARRED FROM CONDUCTING SUBSEQUENT TRIAL

10 The Mediation Judge shall not subject to nullity,[16] examine the matter of the case which was previously referred to him for mediation.

SECTION ELEVEN : APPLICABILITY OF MEDIATION PROCESS[17]

11 The provisions of this Law shall apply to cases being examined by Case Management and First Instance Judges, which have not yet been determined by a final binding judgment.

SECTION TWELVE : PRIORITY OF MEDIATION LAW

12 Any provision in any other legislation, which contradicts the provisions of this Law, shall not be effective.[18]

SECTION THIRTEEN : REGULATIONS

13 The Council of Ministers shall issue the regulations necessary for the application of the provisions of this Law.[19]

SECTION FOURTEEN : RESPONSIBILITY FOR APPLICATION OF PROVISIONS

14 The Prime Minster and the Ministers shall be charged with the application of the provisions of this Law.

[15] This does not refer to party appointed mediators because the fees of party appointed mediators are agreed between the parties and may exceed the 300 dinar minimum

[16] ie if the judge were to hear the case the decision would be null and void. This reflects the view expressed in **Glencot Dev & Design Co. Ltd v Ben Barrett & Son (Contractors) Ltd** [2001]BLR 207. TCC that information learnt by an adjudicator during mediation has the potential to prejudice the outcome of a subsequent trial.

[17] It would appear that in order to benefit from the provisions of this law the parties to a dispute should first commence litigation. The question that therefore arises is, what is the status of the settlements of private mediations conducted without recourse to litigation?

[18] Editors Comment : Whilst the translators consider that the intention of the legislator is for this legislation to prevail over all prior and subsequent legislation, does the legislature intend the legislation to form a central plank of the constitution which cannot be changed in the future?

[19] No regulations have been issued to date, but if, as and when issued, such regulations will appear in the Official Gazette.

CONSTRUCTION CASE CORNER

ADONIS CONSTRUCTION LTD v MITCHELLS AND BUTLER. [20]

It is becoming increasingly clear that as with arbitration, where under the Arbitration Act 1996 the courts play a significant role in supporting the process, that the courts are equally prepared to not only scrutinize the adjudication process but also to accord support to it in relevant circumstances. In **Adonis v Mitchells and Butler** Kirkham J considered an application for a declaration that an adjudicator had jurisdiction under a construction contract governed by the Scheme.

Whilst speed is necessary in order to take advantage of this facility it is clearly a sensible approach to the question of jurisdiction and appears to be very effective. Tony Bingham has pointed out in his column in Building a number of times that when it comes to the question of his or her jurisdiction an adjudicator has a vested interest in the issue and to ask him to decline jurisdiction is an invitation to turn down remunerative work. On the other hand, the claimant has much to lose if the process is rendered invalid by a subsequent ruling that the adjudicator lacked jurisdiction. The cases demonstrate that on a significant number of occasions adjudicators have made the wrong choice. A declaration provides an effective insurance policy against such eventualities. Even if the declaration goes the wrong way the claimant may be able to redirect efforts and adopt other means to resolve the matter.

Jurisdictional challenges are common, with parties routinely throwing the issue into the pot but continuing the adjudication without prejudice. Should a claimant seek a declaration when it appears that the challenge is somewhat half hearted and thrown in simply on the off chance that it might work? Providing the applicant for a declaration can recover the costs of the declaration from the challenger then the claimant has little to lose. In such an instance, a notice advising an intention to seek a declaration would likely result in the other party rapidly withdrawing the challenge in order to avoid throwing costs away needlessly.

ABBEY DEVELOPMENTS LTD v PP BRICKWORK LTD.[21]

Can a declaration on a point of law be sought after an adjudication has taken place, in lieu of arbitration or a trial in order to defeat an adjudication decision? It would appear that this is a valid course of action in appropriate circumstances, though in the current case the declaration was refused because the language used was not sufficiently clear. An adjudicator had previously decided that a sub-contractor was entitled to damages for wrongful termination of the contract by the employer. The tender invitation letter, which was incorporated into a labour only bricking contract attempted to introduce a "termination at will with right to re-tender without liability" provision into the contract for additional aspects of the work, which had not yet been commenced. The employer sought a declaration that this provision was enforceable, thereby justifying the termination and setting up grounds for resistance of the adjudicator's decision.

The legality of such termination at will clauses (common in the US and internationally) is examined. English law has consistently found against such clauses in traditional supply and fix contracts, particularly because they conflict with determination for cause provisions. The right to complete the works by contractors has been supported, though the courts have permitted provisions allowing the reduction in the scope of works at will clauses (though Hudson seems to support a justification requirement). Part of the rationale lies in the fact that once a party has committed himself to supplying resources, cancellation of stages would have financial repercussions. However, since in a labour only contract there is no such resource implication, the court was prepared to countenance such a provision.

[20] Adjudication Society Newsletter December 2003.
[21] HT 0373 04.07.2003

COSTAIN LIMITED v STRATHCLYDE BUILDERS LIMITED[22]

In the January edition of ADR News we looked at the nine principles underpinning judicial review of adjudication proceedings put forward by Lord Drummond. The adjudicator requested a four day extension from the referring party, in order to consult with his appointed legal advisor. Neither party objected and the adjudicator subsequently issued his decision. Neither party objected. However, when the prevailing referring party commenced enforcement proceedings the respondent objected that he had not been given any details of the advice given by the legal advisor and had not been afforded an opportunity to address that advice and therefore resisted the enforcement action on the grounds of natural justice. Lord Drummond concurred. He likened adjudication to arbitration in that the construction industry, despite the facility to refer to another forum for final binding settlement, tended to treat the adjudication decision as final and binding. The court cited the Scottish equivalents of the major English cases on the right to be heard. All elements of the case that go to the root of the decision must be disclosed. *CHSpurin*

MEDIATION CASE CORNER

Valentine v Allen, Nash and Nash [2003] EWCA Civ 1274

A dispute arose regarding the access of the various eventual owners of six properties arising out of the development of farmland. At an early stage of development, conveyances to effect the division of common access and private land went badly wrong because an earlier defunct plan was followed. A road was laid out and building proceeded by stages. The dispute concerned whether the claimant's or the defendant's garage created a blockage of the access road and as to whether equitable or legal ownership prevailed. Since access to the properties meant someone's private land had to be crossed, one or other of the parties must equally have committed many trespasses. The court at first instance found that the claimant was estopped from asserting legal title since he was the primary developer who was aware of the subsequent plan and because he had not originally complained when the defendant's garage was built. The claimant realised fully that he had had a windfall because of the mix up. The judge regretted that the parties had not mediated a settlement, but ordered that costs follow the event, 75/25 on the basis that whilst the claim failed the defendants had thrown costs away by involving third parties unnecessarily. The Court of Appeal rejected the claimant's appeal, upholding the original order of costs, though the legal basis of the decision was revised. It is clear that no one party was responsible for the failure to mediate, so a refusal to award costs against one party on that basis would have been inappropriate. C.H.Spurin

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PROFESSIONAL INDEMNITY INSURANCE : AMMENDMENT TO NADR RULES

Following the advice of our insurance company and their requirements for renewal of premium, NADR needs to ensure that all members, upon nomination have professional indemnity cover. Previously, NADR relied upon an assurance by members, following appointment that they have such cover in place. We have however been advised that we should institute a quality assurance mechanism on a yearly basis and for this reason the NADR membership rules have been revised, to require that members supply a photo-copy of their current policy when submitting their annual membership fees. The practicing certificate will be issued upon receipt of payment and copy of certificate.

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NADR UK Ltd Company Number 4734831

Published by NADR UK Ltd. and NMA UK Ltd. Registered Office, Stockland Cottage, 11 James St, Treforest, Pontypridd, CF37 1BU
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[22] OPINION OF LORD DRUMMOND YOUNG : COURT OF SESSION CA96/03 17 December 2003