NATIONWIDE ACADEMY FOR DISPUTE RESOLUTION

ADR NEWS

January 2000

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

INTRODUCTION TO ADR NEWS

Welcome to ADR News, the news letter of the Nationwide Academy of Dispute Resolution. This occasional news letter will bring you information on the latest trends in dispute resolution practice around the globe and on the activities of NADR. This first edition explains what ADR is, who NADR is and what it does.

WHAT IS ADR ?

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 rapidly becoming established as a valued method of settling disputes quickly, fairly and cheaply.

It has become popular in some quarters, in particular amongst 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 process 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 of 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 and in preparing evidence and discussing strategies,

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 two 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 business affairs,
6 harmful to relationships since the win/lose adversarial aspect of litigation tends to further alienate the parties making it difficult to maintain business relations after the dispute has been brought to a judicial conclusion,
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 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 at least 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. If interest is taken into account it may in reality cost nothing at all to settle a dispute using an ADR process since the interest that accrues over a short period is relatively little.

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, eg English Law and London Arbitration. It is even better if the clause specifies the ADR service provider and the rules governing the ADR process. This ensures that there is no need agree these details later. Frequently the parties to an open agreement fail to agree on the details after a dispute arises and are forced to go to court to ask a judge to decide for them.

Voluntary and mandatory aspects of ADR contrasted. The voluntary aspect of ADR lies in that the parties choose to adopt the ADR clause in the first place. Once an ADR provision is built into a contract the parties are obliged to exhaust the chosen process before attempting to go to law. Submission to the chosen ADR process is a mandatory pre-requisite to court action. It is too late, once a dispute arises, to unilaterally change one's mind and decide to go to court instead. It is open for both parties to 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 consider at the time. No one stops to think 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 A DISPUTE 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 ?

This leaflet provides a brief explanation of what the principal forms of ADR are, highlighting the relative advantages and disadvantages of each. We are confident that you will be able to choose a dispute resolution process suitable for your social and business needs, out of the wide range of services now available to you.

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 override 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. However, whilst arbitration is often less expensive than litigation it can be more expensive as for instance when 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.

STEPS IN THE ARBITRATION PROCESS

1 Dispute arises (Start)
2 Request for and submission of dispute to arbitration (This may be to a specific arbitrator or to an arbitral institution. Choices may be predicated by a pre-contractual term in an agreement which has given rise to the dispute.
3 Parties agree on an arbitrator or an arbitrator is appointed by an arbitral institution or a court.
4 Arbitrator accepts appointment.

5 Preliminary meeting at arbitrator's request. This may be a joint session with everyone present or may be conducted by telephone conference.
6 Arrangements for the arbitration including hire of venue and travel arrangements, usually done by the parties with or without the assistance of an arbitral institution.
7 Arbitrator issues directions.
8 Preliminary hearings and interim awards possible in respect of security of costs, scope of arbitration agreement etc.
9 Submission of pleadings: claims / counterclaims and response to counterclaim.
10 Discovery and preparation of agreed documents
11 Preparation of expert reports
12 Hearing (all parties, representatives, witnesses and experts and arbitrator)
13 Award : decision and costs (The End)
14 If non compliance – action for enforcement or challenge of or to award.

REQUIREMENTS OF AN EFFECTIVE FAIR ARBITRATION PROCESS

1 An arbitration agreement
2 The arbitration agreement must apply to the issue in dispute.
3 Appointment of a qualified & skilled expert arbitrator.
4 Clarification of the jurisdiction of the arbitrator and the applicable law.
5 Party representation.
6 Co-operation between parties and arbitrator to make the process run smoothly.
7 An effective and fair arbitration process with rules of conduct and procedure.

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.

Paper only Adjudication. 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.

Adjudication proceedings with hearings. The process is very similar to a fast track arbitral hearing with strict time limits imposed on submissions and cross questioning.

Immediately enforceable. 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 award. Typically the losing party is ordered to pay the winning party a sum of money within a specific period of time. The settlement of the dispute at an early stage enables the parties to get on with business.

Temporary Finality. The decision is temporarily determinative of the dispute 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 statutory adjudication started to be used in the UK 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

COMMON REQUIREMENTS FOR ADJUDICATION AND ARBITRATION

1 Party confidence in the professionalism of the Arbitrator or Adjudicator
2 Party confidence in the rules governing the process.
3 A well administered process.

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.

STEPS IN A MEDIATION

There are many different ways of conducting a mediation. However, the model to be adopted should reflect the needs of the industry and or the parties it is serving.

The mediation commences with a request for mediation, to a mediator or an ADR service provider, by one of the parties. Once the other party consents to the mediation the parties may exchange relevant information and provide the mediator with information. Arrangements for the mediation may be made by the parties, the mediator or the ADR service provider. The mediation may be held in one of the party's premises, at one of the party's legal representatives offices, an independent venue such as a hotel or at the ADR service provider's mediation suite.

Most mediations will commence with a joint session with all the parties and the mediator present where the mediation process is explained to the parties. The parties are given an opportunity in the joint session to outline their position explaining how they feel, what they need and what they hope to achieve out of the process. This sets the parameters for subsequent negotiations. In exceptional circumstances a joint session may not be adopted if there is so much animosity present that the joint session might result in an irreconcilable confrontation between the parties. To avoid confrontation, it is possible to brief the parties separately or to show them a video explaining the process.

After the opening joint session the mediator will often conduct a series of sequential private meetings (sometimes known as caucuses) with each of the parties and their respective representatives. Private sessions are used to explore each party's situation and possible solutions to the problem as the mediator attempts to help the parties reach an agreement, playing ***"devil's advocate"*** and asking searching questions about the strengths and weaknesses of the case.. The mediator will use as many private sessions as circumstances require to broker a settlement. Meetings are entirely confidential. No information will be given to the other party unless expressly agreed.

The mediation will end with a joint session where the agreement is finalised, committed to paper and signed by the parties.

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.

CONCILIATION AND MEDIATION CONTRASTED

The main difference between mediation and conciliation is that the outcome is a non binding agreement, that is to say an agreement binding in honour only. Conciliation is used extensively for negotiations between large employers and trade unions.

Unlike commercial mediations which can often be concluded, even in respect of highly complex matters involving large sums of money, within a single one day mediation session, employment conciliation will often involve many sessions conducted over several days or even weeks. The same is true of international mediations between governments as epitomised by the Camp David negotiations.

GROUND RULES FOR SUCCESSFUL MEDIATION

1. **Party Co-operation.** Mediation is a voluntary, non-binding, without prejudice process which will not take place or succeed unless the parties enter into the process in a spirit of co-operation and with a commitment to try their best to attain a settlement or at the very least to enter the process with an open mind.
2. **The dispute must be a suitable case for mediation.** The parties must have the legal right to reach a settlement so disputes about issues in which the state or society has an interest may not be suitable for mediation. Criminal and divorce cases are examples of this since it is a court that will punish criminals and grant divorce petitions.
3. **The parties must have scope for and a preparedness to compromise.** Where the validity of a claim is not in doubt and there is no reason to compromise, the case should go to court, as with an undisputed claim for a non payment of a debt. Even in these circumstances the parties may be able to negotiate a rescheduling of the debt. If a party is totally opposed to compromise a court hearing needed.
4. **Professionally mediator.** The mediator must be trained and skilled in the art of mediation. The negotiation and communication skills of the mediator are central to the success of the process.
5. **Independent expertise.** The mediator should be an expert in the field of the matter in dispute. Unlike a court the party representatives are not advocates, so the representatives will not set out and argue all the legal issues of the case and present expert evidence and cross question witnesses so it is essential that the mediator has a firm grasp of the customs and practices relevant to the dispute in order to assist the parties in reaching a realistic settlement.
6. **Party Confidence in the mediator.** The mediator must assure the parties that he is not biased and will act in an even handed manner. The mediator is not there to judge the merits of the case. The mediator helps the parties to make a realistic assessment of their expectations based on their legal rights and practical realities leading to an agreement which is fair and acceptable to both parties. A mediator should not give either party legal advice. The mediator will give an indication of what the other party is prepared to settle for and may ask a party to consider whether what that party wishes to achieve is in fact realistically achievable. A mediator should not express an opinion about the merits of an offer or coerce the parties into a settlement. A coerced agreement is no agreement.

7. **Party Confidence in the process.** The process should be efficiently organised and governed by a strict code of conduct and ethics.
8. **Party Representation.** It is not strictly necessary for the parties to be represented at mediation but it is highly desirable.

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 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. Lord Woolf 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.

ADR in South East Asia : There is a rapidly growing recognition of the commercial values and benefits of mediation in Malaysia and South East Asia. The Asia-Pacific Economic Co-operation (APEC) recommends that commercial organisations on the Pacific Rim adopt mediation as a principal form of dispute resolution to facilitate trade and commerce in the region. The Singapore Bar and the Singapore Arbitration Centre have already done much work to promote the adoption of mediation by commerce. The Malaysian Bar Council has recently followed suit by launching their own Mediation Regional Centre as interest has been shown by legal practitioners on the use of ADR in dispute resolution in Malaysia.

SOURCES OF DISPUTE RESOLUTION SERVICES

Until now the main fora for international commercial dispute resolution have been

The Courts : The problem here is that the court systems of most countries are legalistic, formal, slow, expensive, public and only enforceable within the jurisdiction of the court, which may be of little use if the losing party has all his assets in another jurisdiction. Less than 7.5% of litigants ever succeed in maintaining commercial relations following a judicial dispute. There is no common private international law.

Mediation : The American Arbitration Association has been active in the promotion of mediation as an alternative to or as a precursor to, arbitration both domestically in the USA and internationally for over 80 years. The International Chamber of Commerce (ICC) at Paris, provides mediation and conciliation services. Mediation and conciliation have been provided by the Arbitration Conciliation Advisory Commission (ACAS) in the UK for over 40 years and the London City Disputes Panel has provided commercial mediation services since 1994. In the People's Republic of China mediation is the primary method of resolving commercial disputes. Mediation now accounts for 20% of dispute settlement business in Australia. Court ordered mediation has been available in Canada since 1998. The international enforcement of mediation settlements is straightforward. Since June 2000 The Chartered Institute of Arbitrators (CIArb) lists and nominates mediators. NADR has provided mediation in the US since 1982 and in the UK and Malaysia since 1999.

Now that a significant number of the major global trading nations have firmly established mediation as a viable alternative to the judicial settlement of disputes the time has arrived for the development of unified global mediation services. International mediation offers the opportunity to settle disputes without recourse to legalistic procedures - though the basis of the mediated agreement will be a recognition and understanding of the reciprocal legal rights of the parties.

In the international sphere this is of particular importance. Litigation and arbitration calls for the application of ***"The conflicts of Laws".*** This can lead to arcane disputes about the substantive and procedural laws of the respective nations that govern the dispute and the jurisdiction of and procedures of the courts. Years can be spent settling these issues, before the actual dispute is considered by the courts. Mediation can transcend international boundaries of language, law, jurisdiction, ideology and culture, with the agreement being concluded subject to the law and jurisdiction of the state where the agreement will be enforced. Parties can be represented at a mediation by company personnel, insurance claims officers, practising and non practising solicitors, barristers, attorneys or even be self represented.

Mediation is a viable option for International Commerce trading in the ever expanding European Union, signatory nations of the Asia-pacific Economic Co-Operation (APEC) and member nations of the General Agreement on Tariff and Trade (GATT). Mediation cuts through bureaucratic red tape, enables parties to bypass intergovernmental restrictions that strangle international commerce and empowers the parties to co-operate together in an efficient and effective manner.

Organisations proposing to engage in international trade now have the option of including mediation/arbitration dispute settlement clauses in their contracts. Mediation removes the threat of expensive litigation should a dispute arise and enhances the commercial spirit of co-operation, maximising the concepts of dispute management and dispute resolution as opposed to the prevailing mania of distrust and litigation fever. Mediation provides a viable and valuable security against default. However, in the event that the mediation fails, the adjudicative ADR process provides a fail safe mechanism which guarantees to bring the dispute to an end.

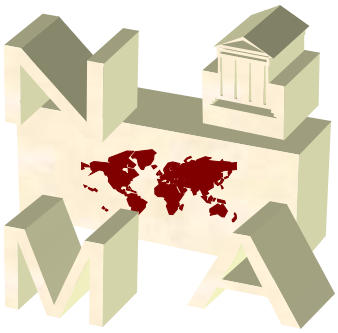
The leading US corporations listed in the Fortune 500 have embraced the commercial advantages and protection of mediation. Internationally mediation can enhance international trade and international commercial relations enabling both commerce and nations to maximise their participation in the global economy. In the USA and increasingly in the UK, government designed dispute resolution systems are being introduced. In order for businesses to retain control of dispute settlement, industry and commerce would be well advised to consider seriously embracing a system of ADR, designed and tailored to meet its needs.

Adjudication : The adjudication model introduced into UK law by the Housing Grants Act is limited to commercial construction disputes. Within the industry adjudication has been a resounding success. However, the scheme has no international application. The model can be used for non-construction contracts in the UK and globally by voluntary adoption, governed by terms and conditions that echo the statutory provisions. NADR established its international adjudication service based on contract terms in September 2000.

Arbitration : Arbitration has been the primary alternative to the courts in the UK for over 400 years and has been the main dispute resolution mechanism for international contracts for two centuries. The Chartered Institute of Arbitrators (CIArb) and the London Court of International Arbitration are the main providers in the UK and operate a global remit. The American Arbitration Association is the main provider in the US. The People's Republic of China has established CIETAC arbitration for international trade disputes. The International Chamber of Commerce (ICC) provides global provision. There are many other arbitration providers. NADR has provided arbitration services in the US since 1982 and in the UK and Malaysia since 1999.

Nationwide Mediation Academy UK Ltd

GLOBAL MISSION STATEMENT



To provide accredited training programs in the practice of Alternative Dispute Resolution to the international community, thereby encouraging and facilitating the global use of Alternative Dispute Resolution as the primary mechanism for the settlement of disputes in order to assist in the maintenance of good relations between members of the global community and build bridges towards the maximisation of international commercial and social harmony.

OBJECTIVES

1 To train a new generation of ADR personnel from a diverse range of commercial and legal backgrounds and to inculcate within them the highest standards of ethics, knowledge and expertise.

2 To enable members of the global community, through the certification of ADR Practitioners, to confidently select ADR practitioners endowed with high levels of skill and knowledge in the practice of dispute resolution to guide them through the settlement process.

3 To spread the Concepts and Practice of ADR, to a cross-section of industry, professionals (both legal and non-legal), educational institutions and the public in general in order to ensure that the various forms of ADR enter the main stream of commercial practice and become the primary mechanism for commercial dispute resolution.

4 To assist and advise governments on the introduction of legislation to better facilitate the adoption of ADR mechanisms by commerce.

5 To forge a new spirit of co-operation and confidence between the providers of Dispute Resolution Services and commerce.

To co-operate with and work alongside governments, educational institutions and the longstanding bastions of dispute resolution to achieve the above stated objectives

NADR MISSION STATEMENT

"To enable those engaged globally in domestic and international commerce to achieve the optimum climate of good relations, by facilitating the settlement of differences between trading partners through the establishment of and provision of an internationally homogenous, wide and comprehensive range of dispute resolution services, grounded on the highest ethical standards which guarantee impartiality and fairness, by synthesizing the best practices in Alternative Dispute Resolution from around the world, and which are tailored to the specific purposes of the various aspects of industry and commerce, whilst bridging the cultural and jurisdictional barriers which traditionally separate and divide them, at a price compatible with commercial needs and within a prompt and appropriate time frame."

NADR OBJECTIVES

1 To spread the Concepts and Practice of ADR, to a cross-section of industry, professionals (both legal and non-legal), educational institutions and the public in general in order to ensure that the various forms of ADR enter the main stream of commercial practice and become the primary mechanism for commercial dispute resolution.

2 To assist and advise governments on the introduction of legislation to better facilitate the adoption of ADR mechanisms by commerce.

3 To forge a new spirit of co-operation and confidence between the providers of Dispute Resolution Services and commerce.

4 To train (in association with the NMA) a new generation of ADR personnel from a diverse range of commercial and legal backgrounds and to inculcate within them the highest standards of ethics, knowledge and expertise.

5 To create and provide a wide range of cost effective Alternative Dispute Resolution services ranging from adjudication, arbitration and conciliatory project review boards through to mediation, to commerce and to the consumer.

6 To recruit ADR specialists old and new from the global community to participate in the provision of the above stated Alternative Dispute Resolution services and to make their services available to commerce though the promulgation of lists and by providing appointing services as appropriate.

7 The maintenance of a strictly enforced barrier between the provision of ADR services and legal advice guaranteeing a total absence of conflicts of interest. ***(NADR does NOT and WILL NOT provide legal advice to parties.)***

8 To co-operate with and work alongside governments and the longstanding bastions of dispute resolution to achieve the above stated objectives.

NATIONAL MEDIATION ARBITRATION INCORPORATED US

National Mediation Arbitration Inc was founded in 1991 by Judge Richard Faulkner and Larry K. Montgomery in Dallas Texas. Richard Faulkner has been active in ADR since 1978 and was a founder member of the modern US ADR movement. Richard Faulkner is a District Judge, an international arbitrator and mediator and dispute panel chairman and is Executive Director of NMA Inc. L.K.Montgomery, The Company President was a Federal State Judge and Executive Director of the Texas State Bar. The Directorate includes a Supreme Court Judge.

NATIONAL ASSOCIATION FOR DISPUTE RESOLUTION Inc. US

NADR US is a dispute resolution service provider organisation and a related company of National Mediation Arbitration Inc.. NADR provides mediators, trained, experienced attorney-mediators and retired judges, qualified by actual experience and/or classroom training in mediation, negotiation and arbitration. NADR US provision covers the full range of ADR services ranging from Adjudication, Arbitration, Conciliation, Expert Determination, Mediation and hybrid amalgams of the above including Dispute Review Services and Dispute Review Boards. NADR specialises in the design, drafting and implementation of complete, customised, comprehensive and sophisticated alternative dispute resolution systems. These systems are marketed to the private sector for all commercial, employment and other disputes. NADR provides everything needed to put an alternative dispute resolution in place. The NADR systems and services include a comprehensive set of documents (including state of the art rules for mediation and arbitration proceedings for all types of cases), implementation assistance, personnel training, availability of the NADR panel of neutrals, administration of all cases and support thouigh an 800 number, e-mail, the NADR website, periodic newsletters and updates of all materials based on changes in legislative and/or case lasw. NADR systems are used in all 51 states. NADR US has over 50 major commercial clients with 3/4m employees subject to its DRS Schemes and offers e-commerce internet dispute resolution services.

NADR US EXTERNAL SERVICES

NADR US is currently providing significant levels of ADR services and training in Mexico and in a number of South American Countries but as yet local incorporation has not taken place in these countries. NADR US is a major provider of international arbitration and mediation services on the American Continent.

NATIONAL MEDIATION ACADEMY Inc. US

NMA US is a private education organisation, and a related company of National Mediation Arbitration Inc. NMA US is a fully accredited US ADR education provider under both Texas State and US Federal Legislation entitling graduands to be court listed and to practice in all areas of ADR in all states in the USA.

The NMA has trained over 58.000 ADR practitioners in the US through courses comprised of 40 hours of basic classroom training followed by advanced subject specific courses, using the same casebook and teaching outlines as are used at Harvard Law School. NADR requires of its NMA trained panel members the highest standards of ethics, education, training and experience.

NATIONAL MEDIATION ARBITRATION, NADR & NMA, INC US
BOARD of DIRECTORS

President NADR : **Larry K Montgomery** J.D. Attorney.

He is an attorney with over 35 years experience in an office and trial practice, representing both plaintiffs and defendants, in civil, commercial, business and property matters. Mr Montgomery, active in state and national bar association activities throughout his career, also served the legal profession as Executive Director of the State Bar of Texas, during which term he played a major role in the passage through the Texas legislature of the first state alternative dispute resolution statute in the United States. After service at the State Bar of Texas, he was a prominent lobbyist and was the administrative law judge for the Texas High Speed Rail Authority, involving a $5 billion franchise case. He is a certified mediator and sits as both a mediator and arbitrator in the Dallas/Fort Worth metroplex area, as well as being a frequent guest lecturer and speaker. He has also co-authored several publications with Richard Faulkner.

Executive Director : **Richard Faulkner** J.D. LL.M FCIArb Attorney

He holds a Juris Doctor degree, a Master of Laws and is a Fellow of the Chartered Institute of Arbitrators in the UK and Commonwealth. Active in the ADR field since 1978, he has been a trial attorney, a state judge, a law professor and has served in thousands of cases as mediator and arbitrator. Judge Faulkner is widely published and speaks regularly before local, state and national and international groups. He has taught mediation and arbitration in England and Malaysia for neutrals to serve in Europe, China and South East Asia. He is a member of a panel of worldwide, international arbitrators, and is one of the prominent mediators of employment cases in the state and federal courts in the Dallas/Fort Worth metroplex area.

NADR UK Ltd and NMA UK Ltd

In the UK two associated companies of The National Mediation Arbitration Inc US were incorporated on the 28th April 1999, namely NADR UK Ltd and NMA UK Ltd. The Boards are constituted of experienced and renowned ADR practitioners.

NATIONWIDE ACADEMY for DISPUTE RESOLUTION UK Ltd

NADR UK Ltd. provides international and domestic dispute resolution services. NADR UK certifies members according to qualification and experience for international practice in ADR and acts as an administrative and nominating body for Adjudication, Arbitration and Mediation Processes. Membership ranges from Associate, via Member to Fellow culminating in practice certification. NADR membership is subject to Academic and Practice certification including NMA Certification and Accreditation of Prior Learning with other ADR providers such as the CIArb. NADR provides pupilage facilities for junior members.

NATIONWIDE MEDIATION ACADEMY UK Ltd.

NMA UK Ltd. provides education and training in dispute resolution practice to the international community. NMA UK provides academic certification for the global community and for NADR Membership.

NATIONWIDE ACADEMY for DISPUTE RESOLUTION Malaysia Sdn Bhd

An independent, fully NADR US & UK Ltd licensed, mirror dispute resolution service providing organisation, NADR Malaysia Sdn Bhd., incoprorated in 1999, is an associate company of NADR Inc US & UK Ltd. NADR M Sdn Bhd provides domestic certification for ADR practice. International certification is provided by NADR UK Ltd and US certification is provided by NADR Inc USA.

NAME CHANGES

The changes of name signify nothing beyond an accommodation of the prescription of English Company Law which prevents use of the word National which is reserved for use by wholly owned UK companies. The word Association is not available to Ltd companies in the UK.

MEMBERSHIP OF NADR.

NADR has over 2,800 registered mediators and arbitrators covering a wide range of expertise from employment, tort, family, medical, construction, insurance, maritime and export / import in the PRC, the Middle East, the US, the UK and Malaysia. Most listed personnel are also registered with the AAA in the USA and many are also listed internationally with the CIArb, LCIA, ICC, CIETAC etc.

BENEFITS OF NADR MEMBERSHIP

Membership and listing is a prerequisite of NADR nomination and appointment for NADR ADR processes. Members are supported by The NADR Website, The NADR Newletter, NADR Briefings and The NADR ADR Journal. The conduct of members in respect of NADR ADR processes is regulated by the Rules, Regulations and Codes of Conduct of NADR.

NADR UK Ltd BOARD of DIRECTORS

Company Secretary : **Corbett Haselgrove-Spurin** LLB LLM FCIArb FNADR (US)
Maritime & Trade Arbitrator, Mediator, Trade & Maritime Law Consultant

He is course leader of the LLM in Commercial Dispute Resolution, Law School University of Glamorgan and visiting lecturer to the University of Wales College Cardiff. Before joining the University of Glamorgan he was a professional musician in the UK and France, a music teacher and administrator for Trinity College of Music London, a time served bricklayer and clerk of works on major construction sites throughout the UK, and Managing Director of Duffryn Sundry Supplies, wholesalers, retailers and importers. His research interests lie in the field of maritime and construction law, with a particular emphasis on international dispute resolution. He is the author of a series of texts on Arbitration, Dispute Resolution, International Trade and Finance, Construction Law, Carriage of Goods By Sea, Marine Insurance and Admiralty Law published by The University of Glamorgan Law School Press. He is an arbitrator and mediator with experience in the US.

Director : **Sharifah Mariam Syed Ibrahim** LLB Dip.CDR, FNADR (US)
International Executive Director NADR M Sdn Bhd)
Development Mediator, Management & Marketing Consultant

She has worked as an administrator in the Hotel Industry, the banking industry, advertising and in a number of leading law firms in Kuala Lumpur. She is an experienced para-legal with an honours degree in law and a Diploma in Commercial Dispute Resolution from the University of Glamorgan. She is a dynamic experienced conference organiser with significant international business connections.

Director **Gareth R Thomas** BDR LLM MSc FNADR US
Environment Dental Surgeon, Solicitor, Environmental / Medical Consultant
& Medical Mediator & Party Neutral.

He is a dental surgeon, solicitor, mediator and party neutral, medical consultant and environmental management specialist. A visiting University Lecturer, he is a regular participant in international conferences and has widely published in dental law and ADR applications for health service providers. He has a track record as a formidable lobbyist on environmental matters.

Technical Director : **Patrick Smith**
Computer Systems Power Supply Engineer, Web Designer

A hands on experienced power supply engineer, working for cutting edge commercial electronics service providers in London, he is one of the self taught generation of upwardly mobile computer technologists who are currently making the UK a world centre for cutting edge computer programming, and Director of PageFusion Co Ltd – Web Designers for Commerce and Industry.

Director : **Richard Faulkner** J.D. LL.M FCIArb Attorney
(Chief Executive NADR US) Arbitrator, Mediator, Admiralty & Employment Lawyer

NADR MIDDLE EAST CO LTD (Jordan) BOARD of DIRECTORS

Managing Director : **Hussam Tafish** LLB LLM Lawyer

He is a practicing lawyer and business manager with outside interests in shipping and hotel management.

Director : **Majed H. Armoush,** MinstD.

Honorary Consul of the British Consulate Aquaba Chairman of a wide range of companies in Jordan and the Middle East including shipping and insurance.

Director : **Yousef Tafish**

Director of major transportation business and many other companies in Jordan and the Middle East.

Director : **Corbett H Spurin** LLB LLM FCIArb FNADR US
Maritime Dept Arbitrator, Mediator, Party Neutral, Maritime Consultant, Lecturer

NMA UK Ltd BOARD of DIRECTORS

Education Director : **Geoffrey M B Hartwell** Eur Ing, FIMechE MCIWEM FCIArb FNADR (US) FNADR Int : Professor of Law, Adjudicator, Arbitrator, Mediator, Engineer

He is a Senior Partner of BHA Cromwell House, Consulting Engineers of London. A former marine engineer, his practice is principally in construction, in process engineering and power generation. His practice also extends to mechanical, electrical and electronic engineering, including IT and computer control. His background includes periods in autopilot design, the nuclear industry, maritime engineering, infrastructure and manufacturing. An External Professor in the Law School of the University of Glamorgan and at Kingston University London, he has been engaged in dispute resolution variously as an arbitrator, mediator and tribunal expert for over twenty years, during much of which he has made a particular study of the philosophy and ethos of independent dispute resolution. He has been appointed as a Special Referee in the High Court of the Isle of Man and practices as an Arbitrator and Mediator in international and other disputes. He is an Engineer-Arbitrator. He does not hold himself out as authorised to practice law or give legal advice.

Company Secretary : **Corbett H Spurin** LLB LLM FCIArb FNADR US
Maritime Dept Arbitrator, Mediator, Party Neutral, Maritime Consultant, Lecturer

Director: **Richard D Faulkner** JD LLM FCIArb
US Operations Executive Director NADR US, Arbitrator, Attorney, Mediator

Director International: **Sharifah Mariam Syed Ibrahim** LLB
Development Executive Director NADR Malaysia Sdn Bhd, Mediator

Director Environment **Gareth R Thomas** BDR LLM MSc FNADR US
& Medical Dept Dental Surgeon, Solicitor, Environmental / Medical Consultant Mediator

NATIONWIDE ACADEMY for DISPUTE RESOLUTION MALAYSIA BOARD of DIRECTORS

Company Secretary : **Ernest Jai Kumar Azad** B.Sc UM, Dip Ed LLB (Hons) London, CLP, MMIArb MNADR (US), MNADR (Int).

A scientist and university lecturer, he subsequently converted to legal practice specialising in commercial matters and has developed expertise in international commerce and shipping. As head of a niche practice in Brickfields KL, he represents an exclusive group of international entrepreneurs and as an experienced negotiator and arbitrator has represented clients on the Indian Sub-Continent and in London and Paris. An all round lawyer, who likes to keep his hand in, from time to time he takes on major criminal defence work and has taken part in a number of major murder trails in the capital city.

Education: **Ramdas Tikamdas** BA Int Relations UM, Dip Ed LLB (Hons)
Director London, LLB (Hons) NSW, MNADR (US), MNADR (Int). Arbitrator, Mediator, Lawyer

A trained diplomat and university lecturer, he subsequently entered into legal practice. An experienced and highly respected litigation lawyer, arbitrator and mediator, he has an intense respect for the dignity of mankind and the protection of human rights, being an esteemed international speaker at conferences and seminars, who provides an object lesson in humility and the art of diplomacy, to all who are fortunate enough to come into contact with him in the course of business. He is a natural born ADR practitioner.

Director : **Kalearasu Veloo** LLB **(**Hons) Lond, CLP, MNADR (US), MNADR (Int). Lawyer, Mediator

He is a respected lawyer, mediator and educator. A quite, unassuming family man, he is deceptively astute. Little escapes his attention and it is the power of observation and critical analysis that makes him a gentle but highly effective negotiator and ADR specialist, with a disarming calm which masks a firm hand controlling the process for the mutual benefit of all concerned.

Managing Director : **Sharifah Mariam Syed Ibrahim** LLB (Hons) FNADR (US)
Director NADR UK FNADR (Int) Executive Director NADR M Sdn Bhd) Mediator, Management & Marketing Consultant

NADR SUPPORT SYSTEMS

NADR seeks to establish itself as the premier Private International ADR Service Provider by 2010. NADR ADR Systems and Services include the provision of qualified personnel to conduct the following dispute settlement processes which are administered and regulated by NADR :-

Adjudication : Arbitration :

Conciliation : Dispute Review Boards : Dispute Review Systems :

Expert Determination : Mediation

NADR nominates and lists ADR practitioners for ADR practice. Nomination is not limited to NADR's ADR processes. NADR will provide the parties to a dispute with a list of ADR practitioners with relevant experience from which the parties may make an appointment for the settlement of a dispute governed by non-NADR rules and processes. A simple, if somewhat crude analogy would therefore be to regard one aspect of NADR's services as being a specialist form of elite / professional "Employment Agency" for ADR practitioners.

NADR nominated and listed ADR practitioners are highly experienced and fully qualified in the art and practice of ADR. NADR seeks wherever possible to nominate ADR practitioners with relevant vocational experience and expertise in the commercial or industrial activity related to each referral in circumstances where such experience and expertise will contribute to the resolution process. NADR prides itself on the high quality and flexibility of its services and the credentials of those who are listed and nominated by it. NADR accreditation is demanding and continued membership and listing is subject to adherence to strict codes of practice and high ethical standards.

Arrangements for facilities are co-ordinated by NADR. Hearings may be conducted at NADR Dispute Resolution Centres or in independent venues at the parties behest.

In order to fulfil its objectives NADR also provides the following ADR facilities :-

a) Advice on the advantages of ADR.
b) Advice on how to incorporate ADR clauses into contracts.
c) Advice on how to refer tort and other non-contractual disputes to ADR.
d) NADR, as a commercial concern, actively promotes its services to industry and commerce and solicits ADR business.
e) Co-operates with the established bastions of ADR world wide and with Universities to enhance knowledge and understanding about ADR and to encourage the creation of a large body of ADR practitioners to operate both with and independently of NADR.

NADR ADR SERVICES

1 **NADR Adjudication Services** seek to establish a global system of immediately enforceable, binding, temporarily final dispute resolution mechanisms for all sectors of industry and commerce, which transcends the Construction Industry boundaries inherent in current UK legislation.

2 **Arbitration Services.** NADR offers a range of arbitration services including Fast Track Arbitration (two options short procedure or paper only arbitration for small claims(which will be available on line shortly) and standard arbitration services – with a range of fees reflecting the size and scope of the dispute.

3 **Expert Determination Services**. NADR offers expert determination – and lists and nominates experts drawn from the UK Academy of Experts.

4 **ADR Dispute Review Services**. These involve a package to contracting parties including education, professional support and systems administration with a particular emphasis on the supply of goods and services, contracts of employment and Construction Industry Dispute Review Boards.

5 **NADR mediation services.** These include impartial mediators with legal and practical expertise in specialist fields, the venue for the mediation and all necessary facilities and administrative support regarding the date of hearing, time, venue, and inter-party correspondence relating to the mediation; on successful conclusion of the mediation, copies of the binding agreement between the parties. The procedures are informal, speedy, inexpensive (each party pays its own costs unless the parties otherwise agree), privileged and private.

6 **Consecutive ADR Provision.** NADR provides conjoined ADR services such as Mediation / Adjudication and Mediation / Arbitration to provide for continuing ADR Service provision in the event of a break down in negotiations at a mediation. The DRS is frequently a Conciliation/Med /Arb or Conciliation/Med / Adjudication service. NADR will also provide a Conciliation/Med/Adjud/Arb service where required.

All NADR services are backed up by comprehensive rules, regulations and operations guidelines and submission documentation to guide disputants through the processes. Appeals against nomination are conducted by outside independent bodies. NADR operates its own internal disciplinary board to review the conduct of NADR operatives.

HOW TO INCORPORATE NADR ADR CLAUSES INTO CONTRACTS

These clauses are the copyright of the International Group of NADR Companies. NADR cordially invites private citizens, corporations and governmental organisations to avail themselves of the services of NADR and hearby licences and authorises the incorporation these clauses, in their entirety, without alteration or amendment in any way whatsoever, into contracts governing relationships with other legal personalities. NADR will work with the parties to draft variations of these clauses tailored to the specific needs of the parties and their industry. Detailed incorporation clauses are contained in each of our ADR systems. Advice and assistance is available on request. These clauses may be used for educational purposes by Universities and other bodies provided they are reproduced without abridgement or alteration. The adoption of these clauses for use by other ADR service providers is strictly prohibited.

ADJUDICATION CLAUSE

Any dispute hereafter arising between the contracting parties / any dispute hereafter arising out of or in respect of this agreement (delete as required) to be referred to the National Association for Dispute Resolution Inc, US / Nationwide Academy for Dispute Resolution UK Ltd / (M) Sdn Bhd / Middle East* for adjudication, subject to the relevant Adjudication Rules, Regulations and Codes of Practice of NADR applicable at the time of referral. Unless the parties otherwise agree, adjudication to take place within ..... days (insert the required figure) of referral of the dispute to adjudication. The Adjudication decision to be immediately enforceable and non-binding. The main agreement, and this adjudication clause are governed by ..... Law (insert the governing law). The adjudication process is a pre-requisite to arbitration and / or judicial settlement. This adjudication clause is independent of and severable from the main agreement and will remain in force irrespective of whether or not the main agreement is lawfully enforceable. The adjudicator to have full jurisdiction to decide matters in relation to the scope of this adjudication agreement and in relation to the enforceability of the main agreement. The main agreement and this adjudication clause are subject to the jurisdiction of the courts of ..... (insert required jurisdiction). In the event that any provision of this Agreement is invalid, the parties agree that all remaining provisions shall be deemed to be in full force and effect.

* Delete as required

ARBITRATION CLAUSE

Any dispute hereafter arising between the contracting parties / any dispute hereafter arising out of or in respect of this agreement (delete as required) to be referred to the National Association for Dispute Resolution Inc, US / Nationwide Academy for Dispute Resolution UK Ltd / (M) Sdn Bhd / Middle East* for arbitration, subject to the relevant Arbitration Rules, Regulations and Codes of Practice of NADR applicable at the time of referral. Unless the parties otherwise agree, arbitration to take place within ..... days (insert the required figure) of referral of dispute to arbitration. The arbitration award to be immediately enforceable and binding. The main agreement, and this arbitration clause are governed by ..... Law (insert the governing law). The arbitration process is a pre-requisite to judicial settlement. This arbitration clause is independent of and severable from the main agreement and will remain in force irrespective of whether or not the main agreement is lawfully enforceable. The arbitrator to have full jurisdiction to decide matters in relation to the scope of this arbitration agreement and in relation to the enforceability of the main agreement. The main agreement and this arbitration clause are subject to the jurisdiction of the courts of ..... (insert required jurisdiction). In the event that any provision of this Agreement is invalid, the parties agree that all remaining provisions shall be deemed to be in full force and effect. (* Delete as required)

DISPUTE REVIEW BOARD CLAUSE.

Relations between the parties to this agreement are governed by and subject to the provisions of the NADR ..... (insert code) DRB Agreement The parties hereby agree to co-operate fully in the implementation of the DRB Agreement. Full compliance with the requirements of the DRB Agreement is a prerequisite to any court action or arbitration, adjudication or mediation to settle any dispute arising out of this agreement without the full consent of both parties to this agreement.

MEDIATION CLAUSE

Any dispute hereafter arising between the contracting parties / out of or in respect of this agreement (delete as required) to be referred to the National Association for Dispute Resolution Inc, US / Nationwide Academy for Dispute Resolution UK Ltd / (M) Sdn Bhd / Middle East* for mediation, subject to the relevant Mediation Rules, Regulations and Codes of Practice of NADR applicable at the time of referral. Unless the parties otherwise agree, mediation to take place within ..... days (insert the required figure) of referral of the dispute to mediation. Any agreement arising out of the mediation to be immediately enforceable before any court of law. The main agreement, and this mediation clause are governed by ..... Law (insert the governing law). The mediation process is a pre-requisite to adjudication, arbitration and or judicial settlement. This mediation clause is independent of and severable from the main agreement and will remain in force irrespective of whether or not the main agreement is lawfully enforceable. The main agreement and this mediation clause are subject to the jurisdiction of the courts of ..... (insert required jurisdiction). In the event that any provision of this Agreement is invalid, the parties agree that all remaining provisions shall be deemed to be in full force and effect. (* Delete as required)

MEDIATION / ARBITRATION CLAUSE

Any dispute hereafter arising between the contracting parties / any dispute hereafter arising out of or in respect of this agreement (delete as required) to be referred to the National Association for Dispute Resolution Inc, US / Nationwide Academy for Dispute Resolution UK Ltd / (M) Sdn Bhd / Middle East* for mediation, subject to the relevant Mediation Rules, Regulations and Codes of Practice of NADR applicable at the time of referral. Unless the parties otherwise agree, mediation to take place within ..... days (insert the required figure) of referral of dispute to mediation. Any agreement arising out of the mediation to be immediately enforceable before any court of law. The main agreement, and this mediation clause are governed by ..... Law** (insert the governing law). The mediation process is a pre-requisite to adjudication, arbitration and or judicial settlement. This mediation clause is independent of and severable from the main agreement and will remain in force irrespective of whether or not the main agreement is lawfully enforceable. The main agreement and this mediation clause are subject to the jurisdiction of the courts of ..... ***(insert required jurisdiction). (* Delete as required)

In the event that the parties fail to reach a negotiated settlement at mediation, the dispute to be referred to NADR as above stated*, for arbitration, subject to the relevant Arbitration Rules, Regulations and Codes of Practice of NADR applicable at the time of reference. Unless the parties otherwise agree, reference to arbitration to take place within ..... days (insert the required figure and delete as required) of referral of dispute to arbitration. The Arbitration Award to be immediately enforceable and binding. The main agreement, and this arbitration clause are governed by the law stated above**. The arbitration process is a pre-requisite to judicial settlement. This arbitration clause is independent of and severable from the main agreement and will remain in force irrespective of whether or not the main agreement is lawfully enforceable. The arbitrator to have full jurisdiction to decide matters in relation to the scope of this arbitration agreement and in relation to the enforceability of the main agreement. The main agreement and this arbitration clause are subject to the jurisdiction of the courts stated above***. In the event that any provision of this Agreement is invalid, the parties agree that all remaining provisions shall be deemed to be in full force and effect. (* Delete as required)

DISPUTE REVIEW SYSTEM CLAUSE.

Relations between the parties to this agreement are governed by and subject to the provisions of the NADR ..... (insert code) DRS Agreement. The parties hereby agree to co-operate fully in the implementation of the DRS Agreement. Full compliance with the requirements of the DRS Agreement is a prerequisite to any court action or arbitration, adjudication or mediation to settle any dispute arising out of this agreement without the full consent of both parties to this agreement.

CONSTRUCTION ADJUDICATION CASES

A&D Maintenance v Pagehurst [1999] 64 Con LR
A&D were the sub-contractors responsible for boiler works to a school. A&D submitted and were paid for initial interim payment. Payment 3 was not honoured. Work was running behind schedule. The main-contractor and employer for the purposes of this action gave notice that work was due for completion in October and later notified A&D that if work was not completed by 9th November then they would give notice of determination. A&D gave notice of completion on the 13th November and applied for final payment on the 14th. On the 19th the main contract was determined on the grounds of defective boilerwork and Pagehurst issued a notice of determination against A&D stating that all payments would be suspended pending making good. On the 27th a Schedule of Outstanding works was issued but the following day a fire damaged the school. Insurers assert that the cause of the fire was the defective boiler. On the 8th February, with the final application outstanding A&D commenced and prevailed in adjudication for payment of applications 3 & 4, followed in default by an action for enforcement of the decision. Pagehurst meantime commenced an action against A&D for breach of contract.

Pagehurst resisted enforcement on a number of grounds including a) no written contract b) the implied right to adjudication dies with the termination of the contract c) the adjudicator did not examine the applications for payment in respect of due time for payment under the Scheme – so the court should reopen and examine his decision d) enforcement should be stayed pending outcome of trial.

HHJ David Wilcox dismissed each of these in turn. There was a written sub-contract order and further during the adjudication on in the present action both parties referred to that order providing additional written proof of a contract (*This application of the Adjudication Act 1996 to adjudication has not subsequently been adhered to*). The Adjudicator's jurisdiction survives the termination of contract under s108 HGCRA. There is no scope for the reviewing/enforcing court to open up the decision – this is for a subsequent arbitration or litigation – **Outwing v Randall** applied. There were no special circumstances that would justify the court not enforcing the decision. TCC. 23rd June 1999.

Allied London v Riverbrae Construction [1999] Scot.Cs 170
Riverbrae submitted payment disputes to an adjudicator who found for Riverbrae and determined that Allied London should pay Riverbrae within 14 days. Allied London in this action sought to have monies paid into an account pending the outcome of larger disputed claims by Allied against Riverbrae, on the basis that they feared Riverbrae would not be financially able to meet those claims, if successful. Lord Kingarth agreed with the adjudicator that neither the arbitrator nor the court had the power to order payment into an escrow account. Stay refused. Outer House Court of Session. 12th July 1999.

Bouygues UK Ltd v. Dahl-Jenson UK Ltd [1999] EWHC TCC 182
Claims and counter claims in respect of a construction contract were referred to adjudication. The adjudicator made a decision. Whilst the adjudicator did not accept, His Honour Dyson J found that the adjudicator had clearly made a mistake during his calculations, applying a gross figure at one stage which included sums covered by retension provisions. The outcome was that the retention monies were effectively released prematurely. The adjudicator, having declared after the event that there was no mistake, refused to operate the slip rule and amend his decision, but clearly felt that if required he would be permitted to do so. Bouygues were aggrieved since if the correct figures had been applied they would have been creditors rather than debtors and so they sought declarations or remissions in respect of the decision.

Having reviewed **Macob, Project Consultancy v Gray Trust, Palmer v ABB Power, Jones v Sherwood, Cambell v Edwards** and **Jones v Jones**, Dyson J adopted the general principle applied by Knox J in **Nikko Hotels v MEPC** to the effect that *"if he has answered the right question in the wrong way, his decision will be binding. If he has answered the wrong question, his decision will be a nullity."* Bouygues asserted that it was not within the adjudicator's jurisdiction to release retension monies. Dyson J held that whilst that may have been the practical result, in reality it was the consequence of a mathematical mistake – not an intentional release of retension monies. He was within his jurisdiction. 17th December 1999.

Homer Burgess Ltd v Chirex (Annan) Ltd No1 [1999] ScotCS 264
Homer Burgess contracted to carry out pipe and steel fabrication works at Chirex premises, a chemical plant. A dispute arose which H.B. referred to adjudication. The adjudicator considered whether or not the work was plant work to a chemical plant within the exception s105(2) HGCRA or construction work subject to the Act. He concluded that pipe work etc was not plant (or machinery) and thus he had jurisdiction. He proceeded to find for H.B. who sought to enforce the decision. Chirex opposed enforcement on the grounds of an s105(2) exclusion. H.B. countered that whether or not the adjudicator was right in his decision with regard to the nature of plant and the application of s105(2) once made the court had to enforce the outcome.
Lord MacFadyen considered a number of Public Law cases and then reviewed **Macob and Project Consultancy v Gray Trust** and concluded that if the adjudicator erred on jurisdiction, the decision would not be enforceable (but

declined to find that the adjudicator had no right to form such a view). He further concluded that a broad non-technical view of the meaning of plant had to be taken. In the circumstances the pipe work and steelworks formed an integral part of the chemical plant. That being the case, the adjudicator had no jurisdiction over the dispute. The decision was not enforceable. 10th November 1999.

John Cothliff Ltd v Allen Build Ltd [1999] CILL 1530
A construction dispute was referred to adjudication. The referral requested costs of the adjudication. The adjudicator considered whether or not he had power to award costs and reached the conclusion that since the HGCRA and the Scheme were silent upon this that he had power to so award. Accordingly, having found for the applicant he ordered an additional sum to cover costs of the adjudication. The respondents resisted enforcement. His Honour Marshall Evants J held that the adjudicator could award costs unless expressly stated otherwise, but only if a party applied for them. Liverpool County Court. 29th July 1999.

Lathom Construction Ltd v Brian & Ann Cross [1999] CILL 1568LTL 10/1/2000
A construction dispute having been the referred to adjudication, the parties brokered a compromise agreement and the adjudication lapsed. Disagreement arose as to whether or not the compromise was binding and enforceable. A second reference was made to the same adjudicator who first decided that there was a binding enforceable compromise and secondly ruled upon the construction of that agreement. His Honour MacKay J held that whilst the adjudicator was validly appointed both times, once he had found that there was a binding compromise he ceased to have jurisdiction over interpretation of the terms and impact of that compromise. There was thus a triable issue for the court and the matter was accordingly set down for trial. 29th October 1999

Macob Civil Engineering Ltd v. Morrison Construction Ltd [1999] EWHC TCC 254
Macob concerned an application for stay of adjudication on the grounds that the adjudication process was not conducted fairly. The adjudicator did not hold a hearing and refused additional opportunity to make further representations into the adequacy or otherwise of payment provisions. The court (Dyson J) held firstly that the process as conducted by the adjudicator was in the circumstances fair. Secondly, he held that if the procedure adopted had not been fair then the decision would be unenforceable. Whilst the HGCRA requires even a wrong decision to be enforced by summary hearing, this does not preclude judicial review of the process. Any challenge on the merits would have to go to another place at another time, be it arbitration or litigation. HHJ Dyson : 12th February 1999.

COMMENT : Essentially the process requires the parties to spell out their contentions in the referral and response documents and response to defence. The adjudicator only needs to do more if he is not then in a position to make a decision.

The application failed and the statutory adjudication process was supported by court. This was the first case to be heard under the HGCRA and established the legality of the process.

Outwing Construction Ltd v. H. Randell & Son Ltd [1999] EWHC TCC 248
A dispute arose over payment of elements of a final account in respect of a DOM/1 Contract for ground works. The adjudicator found for the claimant and ordered peremptory payment of the sum, his fees and the nomination fee. He further authorised application for enforcement, subject to his approval upon notification. As an aside, His Honour Humphrey Lloyd J observed that since he was *functus officio*, this was unnecessary and nothing turned upon it..

The claimant gave notice that unless paid, in accordance with **Macob** they would seek enforcement. The respondents replied stating they were aware of the implications of **Macob** but contended that the adjudicator had exceeded his powers and further stated that payment on final account was not due under the Scheme for another 6 weeks. The claimants commenced this action for summary judgement and costs subject to an abridged timetable. The respondents then paid by cheque leaving only the question of costs of this application to be dealt with The respondent essentially complained about the haste with which this action had been pushed through the court – which is why they were caught out by events.

The court noted that the enforcement of peremptory orders is a novel procedure provided for by the amended s42 Arbitration Act 1996. Application for abridgement of time is in line with the unique speedy process envisaged by Parliament. The claimant was further entitled to recover costs of that application. 15th March 1999.

Palmers Ltd v ABB Power Construction Ltd [1999] BLR 426
Palmers (scaffolders) were sub-sub-sub-contractors to a project for the installation of boilers and infra-structure, including pipes and steel work. A dispute arose on non-payment of interim payments and counter-allegations of delay through inadequate workforce. Palmers gave notice of intention to suspend and reference to adjudication, applying the terms of the Scheme since there was no provision for the HGCRA in the contract This application was made for a declaration regarding jurisdiction ABB asserted that the works were plant not construction and hence the HGCRA did not apply. They further asserted a right to set-off for delay and disruption.

His Honour Thornton J found that this was a construction contract – apart from the expressly exempt operations under s5(1)(2) HGCRA, the Act made it clear that plant infrastructural work is construction work for the purposes of statutory

adjudication. He further found that there had been no effective withholding notice and finally stated that it is appropriate for the court to deliver declarations in respect of jurisdiction, rather than to leave the adjudicator to form a view – even where an adjudicator would have the power and jurisdiction to deal with it. 6th August 1999

ADDENDUM : Thornton J considered that there may be situations where the main contractor was exempt in his relations with the employer from the HGCRA whereas the sub-contract would be subject to the Act. If however the test is whether the primary purpose of the site is for an exempt or non-exempt purpose should ensure that there is no need to draw statutory pencil lines around part of an application for payment and only apply it to part of the work. All or none of the work should be within or outwith the Act.

Further, it should be noted that unless granted expressly by the contract, or by agreement of the parties, the adjudicator does not have implied power to decide upon his jurisdiction – only to form a view. Hence, the facility to seek a declaration is invaluable to ensure that time and money is not expended unnecessarily – though the declaration needs to be procured promptly – or a joint agreement to stop time running is needed if the adjudication is not to run beyond its 28 day timescale, rendering the adjudicator functus officio.

Project Consultancy Group v Trustees of The Gray Trust [1999] BLR 377
Professional construction services were provided to the Trust by PCG. A dispute about the payment of fees arose which was referred to adjudication. The question as to whether there was ever a contract or alternatively that if there was it pre-dated the HGCRA were raised and considered by the adjudicator – but subject to a disclaimer by the Trust that they would not be bound by the decision. The adjudicator determined that the HGCRA applied and proceeded with the adjudication. The Trust participated under protest. The adjudicator found for PCG who sought enforcement. His Honour Dyson J clarified that it is permissible to resist enforcement on the grounds of absence of adjudicatory jurisdiction and further found that the Trust had not accorded jurisdiction over jurisdiction to the adjudicator.
Dyson J found that there was an arguable and triable issue as to whether or not there had ever been a concluded contract. As such the adjudication decision was a nullity and the case was put down for trial on that and the further issue of a quantum meruit – assuming the work was not performed on an "at risk" basis. A further question regarding abatement of adjudicator's fees was not considered. 16th July 1999.

Rentokil Ailsa Environmental Ltd v Eastend Civil Eng Ltd [1999] CILL 1506
This concerned minor engineering works over 15 sites, with contracts spanning the period during which the HGCRA came into force. Three post HGCRA contract dispute were referred to adjudication. Rentokil asserted counterclaims for defects but never quantified them at the adjudication. The adjudicator found for Eastend who ultimately commenced enforcement proceedings. The day before the hearing Rentokil sent a cheque for the full amount of the decisions but simultaneously secured an arrestment as security for defects claims that exceeded the value of the cheque. Arrestment is a process peculiar to Scotland, whereby the arrested funds are secured by the court.

At first instance Sheriff Gilmour found that the arrestment was an abuse of the HGCRA process and held that there could be no set off against subsequent claims. There had been no withholding notices. Accordingly the decision became immediately enforceable. Lanark Sheriff Court.12th March 1999.

On appeal, Sheriff Principal Cox confirmed that there could be no arrestment in respect of matters covered by the adjudications. However, he upheld the general right under Scottish Law to apply for an arrestment, and permitted arrestment in respect of claims that concerned disputes not referred to the adjudicator. 31st March 1999.

Straume Ltd v Bradlor Dev. Ltd [1999] CILL 1520
A contract was entered into on a modified JCT 1980 Private without Quanties Form for construction and renovation work to a derelict mill. Some extensions of time were granted but completion was not achieved. The contractors went into administration and the administrators issued a referral notice in respect of £172K of outstanding payments. The employer served a notice to recover £268K for liquidated damages, rectification work and delay.
His Honour Behrens J held that under s11(3) of the Insolvency Act 1986 leave of the court is required to commence any legal proceedings against a company in administration. He further held that HGCRA adjudication is a relevant legal proceedings and is not on par with expert determination and valuation. He further considered whether or not it was desirable to have two adjudications or even one adjudication in such circumstances. Since any application for set off would be considered by the court in insolvency proceedings, there was no advantage in holding adjudication proceedings so the application to consent was denied. Chancery Division. 7th April 1999.

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Tel : 0044 (0)1443 486111 : Fax : 0044 (0)1443 404172 : e-mail : The Editor@nadr.co.uk. Web-site : www.nadr.co.uk