



# ADR NEWS



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

## EDITORIAL

A new year and new challenges await. With the Christmas and New Year festivities barely behind us, I and my colleague Corbett Spurin are bound to Egypt to take part in the Arab Fertilizer Association 9<sup>th</sup> Annual Conference, at Cairo, consolidating the relationship established between NADR and the AFA by Husam Tafish, of NADR Middle East, and following on from the success of last October's Seminar in Amman on the settlement of disputes in fertilizer freight contracts.

December 12<sup>th</sup> 2002 saw the culmination of a year's hard work for the full time (two years part time) graduates of the LLM in Commercial Dispute Resolution at the University of Glamorgan who were rewarded for their efforts at the post graduate Award Ceremony. It is hoped they will all go on to Fellowship status with the CIArb and then go forward to make a valuable contribution to dispute resolution in due course.

2002 was a busy year, with a delegation from NADR UK and NADR Sdn Bhd travelling to Brunei in April, the launch of the NADR adjudication training program in Dallas, Texas, the Society of Expert Witness Conference in Reading, London, the DRBF Annual Conference in Orlando USA in October and the Aman, Jordan Freight Seminar. Also, in April NADR took part in the 2<sup>nd</sup> National Conference on recent developments in intellectual property, organised by the Intellectual Property Division of the Ministry of Domestic Trade and Consumer Affairs, Malaysia, the Malaysian Intellectual Property Association and the Asian Patent Attorneys Association, Malaysia Group. The focus of the conference was Intellectual Property, The Impact on Developing Countries. The event was held in the Park Plaza International Hotel, Kuala Lumpur on the 26<sup>th</sup> and 27<sup>th</sup> March 2002.

Immediately after the conference NADR Malaysia conducted a construction adjudication seminar in Bangsa, K.L., before jetting off to Darasalam, the capital of Brunei, to extol the virtues of ADR to government officials and delegates from the local legal profession.

Events lined up for 2003 include an Adjudication Forum at the University of Glamorgan in the UK in association with the Chartered Institute of Arbitrators on the 3<sup>rd</sup> March 2003. Plans for the establishment of the new ADR Centre in Aman, Jordan to serve the Middle East are well advanced and it is hoped to launch the centre in July, once the refurbishment of newly acquired premises is complete.



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### Editorial Board.

General Editor : G.R.Thomas  
Assistant Editor : C.H.Spurin  
R.Faulkner  
S.M.Syed Ibrahim.

We are in the process of designing a new logo for the NADR News which we hope to have ready by the next edition. Much work is being done to improve facilities available on line on the NADR web site and it is intended to expand the publications section to facilitate research by members of diverse aspects of ADR.

In September the DRBF holds its International Conference in Paris and its Annual Conference in Washington. Hope to see you in Paris or DC, or both, if you are involved in ADR in the construction industry.

G.R.Thomas  
Editor

**“MEDIATING SHIPPING DISPUTES”**

G.R.Thomas &amp; C.H.Spurin

**INTRODUCTION**

Mediation is a dispute resolution process. It is extensively used for the settlement of commercial disputes. The roots of the modern mediation movement date back to the mid nineteen eighties when, frustrated by the expense and delay involved in litigation and the uncertainties of jury trial, a small band of businessmen and lawyers in the United States started to experiment with alternative ways of settling commercial disputes. The experiment was a resounding success and in excess of 40% of all civil disputes are now settled by mediation in the United States. Increasing the process is being used on a global basis for the settlement of both domestic and international commercial disputes, ranging from the supply of goods to allied services such as banking, insurance and transportation.

There is little doubt that the process is making a valuable contribution to commercial dispute resolution. This is self evident from the fact that it is has been firmly embraced by the commercial community. This is because mediation, when it works, is speedy and cost effective. Furthermore, unlike litigation, be it through the courts or arbitration, mediation tends to facilitate the maintenance of ongoing business relationships.

Mediation is not a magic “cure all”. It does not render litigation and arbitration redundant. Each dispute resolution process has advantages and disadvantages. Ideally disputants should use the process most appropriate for the resolution of a given dispute. The aim of this paper is to examine when mediation can be beneficially used to settle International Trade and Transport disputes, highlighting the conditions that need to exist in order for the parties to a dispute to avail themselves of the process, together with an examination of how and why the process works.

**SOME OF THE PROCLAIMED ADVANTAGES OF MEDIATION**

- Speed – days to weeks rather than months to years to commence the proceedings.
- Short hearings – one day is often sufficient – witnesses and experts are rarely called.
- Private – no press reports or adverse publicity – proceedings are privileged / not admissible in subsequent court proceedings and not recorded : all records and evidence are destroyed or returned to the parties apart from the written settlement agreement.
- Cost - relatively inexpensive – due to short hearings and absence of discovery processes and cross questioning.

- Convenient location- two rooms in a hotel or offices are all that is needed – in the country of choice of the parties and the mediator.
- Informal – no judges, robes, official recorders or court procedure.
- Lawyers are optional – though expert advice is very desirable. Self representation is permitted.
- The parties remain in control – there is no judge and no enforceable judicial award – so there is little to lose from taking part but potentially everything to gain.
- Works domestically and internationally – ideal for international trade and maritime disputes - and more sympathetic to multi-cultural issues.
- Linguistically flexible – can be conducted in the language of choice of the mediator and the parties.
- Not restricted to legal solutions and thus more flexible than going to law.
- Not restricted to the law of one country – so truly international solutions possible.
- More amenable to the preservation of business relations – less likely to result in outright winners and losers – enables the parties to retain “face” and where possible to continue trading after ending the dispute
- Mediators are experts drawn from the industry and understand the issues and the business – whereas few judges have worked in commerce or in the maritime industry.
- Multi-party mediations are possible and can include interested parties such as banks, financiers and insurers and inter-related business partners – particularly useful in international chain sales involving transportation

**THE NATURE OF THE MEDIATION PROCESS**

Mediation is an independent, third party assisted, negotiation process. The role of the mediator is to help the parties to find a “*mutually acceptable*” solution to their dispute. Unlike an arbitrator or judge, the mediator cannot impose a solution. Each party maintains control of the process. No solution is possible without the consent and cooperation of “*both*” parties. Mediation is thus deemed to be the most “*consensual*” of all the available alternatives to litigation.

Business is the art and practice of the negotiated purchase or supply of goods and/or services. Business practice is about cost effective management and delivery.

The “*art*” of business lies in striking the right balance between profitability and the risks inherent in any given ventures. It is usual for the sales and service contract to identify a number of different foreseeable factors that could go wrong during the course of the venture and allocate the risks of those factors occurring to one or other of the parties. Sometimes

this risk allocation is keenly negotiated between the parties, indicating that the parties are competent and experienced negotiators themselves. However, frequently the allocation is based on pre-established pro-forma contracts where the parties merely adopt established business practice reflecting the market price for the product.

Business disputes tend to arise because one party perceives that some loss causing event has occurred, which in his opinion is contractually the responsibility of the other party, whereas the other party refuses to accept that the problem is his responsibility or, even if he does accept responsibility, is not prepared to do everything that the complainant demands to put the problem right. Alternatively disputes often arise as to how to deal with an unusual problem that subsequently arises which is not governed by or anticipated by the terms of the contract. It is the failure by the parties, despite their negotiating experience and expertise, to find or negotiate an agreeable solution to such problems that gives rise to the disputes.

The question that has to be answered is *"How can mediation, which relies on mutual consent and cooperation, solve a dispute when negotiations between the parties has already failed to do so ?"* Put another way *"If experienced negotiators have already failed to solve the problem between themselves why might a mediator succeed where they have failed ?"* The answer lies in the fact that frequently the parties to a dispute develop tunnel vision. The longer a dispute goes on the harder it becomes for the parties to separate themselves from their view as to who is responsible, what the contract requires them to do and most significantly of all, what will happen if a solution is not found. As an independent outside observer the mediator is able to take a fresh, objective view of the situation and help the parties to re-evaluate the risks that they will be exposed to. The mediator is not a magician or miracle worker. A mediator cannot make the parties agree and cannot impose a solution. The mediator's skill lies in the art of communication and to help the parties to explore solutions which are in their best commercial interests. Disputes generate a climate of animosity where parties will frequently choose to take a course of action which is commercially detrimental to their organisation simply to prevent the other party gaining an advantage. If a party can prove that the chances of success at litigation are high and that it will produce the greatest advantage to their

organisation, mediation is unlikely to succeed. However, where the chances of success are evenly spread between the parties and the likely outcome is less advantageous than settlement, an experienced mediator should be able to guide the parties towards a settlement.

There is an added value to mediation, in that mediated settlements are frequently more evenly balanced than party negotiated settlements. I often hear business people in this region stating that they do not have disputes. Either they have simply been lucky up to date or business people in the region are very reasonable and sensible and always manage to negotiate solutions to trading problems. A more likely explanation is that frequently the stronger of the parties is able to force the weaker party to compromise without any genuine negotiation taking place and without a meaningful evaluation of their respective commercial rights and duties. Mediation can address this problem.

#### **MEDIATION & LITIGATION OUTCOMES**

Mediation has been described as a *"WIN/WIN"* process, whereas litigation is considered to be a *"WIN/LOSE"* process. What does this mean and why?

In litigation a third party arbiter, that is to say a judge or arbitrator, is asked to decide a specific question, namely which of the parties is responsible for a loss causing event. Once this is determined the arbiter will proceed to assess how much money, if any at all, is due to be paid by the person responsible to the other party. Frequently the loser will also be required to pay the costs of the trial and the legal expenses of the other party. In effect litigation results in a *"WINNER"* and a *"LOSER"*. There is no middle ground. Whilst there are legal mechanisms that can reduce the award, perhaps because the winner has in some way contributed to his own losses by for instance failing to take steps to mitigate or limit the amount of harm suffered after the event or by failing to take precautionary self protective measures which resulted in more harm being suffered than would otherwise have been the case, these factors apart there is no scope for the arbiter to share the costs of the problem between the parties. Put bluntly, it is not the job of the arbiter to cut the cake. One party gets the whole cake. The other party gets nothing. There is no requirement that the decision be either *"fair"* or *"just"*. It has been famously stated by a judge in session that *"This is not a court of justice. It is a court of law."*

The arbiter makes a determination of fact, applies the applicable law to the facts and circumstances of the case, as proved before him in the court or tribunal and thereby produces a decision or ruling. The scope for decision making by the arbiter are limited by the law. If the law is just and fair then there is a chance that the decision will be but that is not always the case and where it is not it is unlikely to be the arbiter's fault. Why might it be that the law cannot guarantee a fair or just outcome ? A number of examples will suffice to show how this can occur.

**Wining on a technicality :** As discussed above, the circumstances when an arbiter can apportion responsibility under the law are severely limited and restricted. However, frequently neither party has acted in a particularly irresponsible manner and the loss causing event is simply the result of a combination of unfortunate circumstances. In the absence of a clear contractual allocation of risk for the loss neither party is likely to be prepared to shoulder responsibility and frequently comes to believe that the loss must be due to some form of failure or wrong doing by the other party, often fuelled by hindsight. In effect the allegation becomes "If he had done X the problem would have been avoided, so it is his fault." Foreseeing the need to do X at the time may not have appeared prudent, though clearly after the event it is easy to see why it would have been a good thing to do. The decision of the arbiter in such circumstances is likely to appear to be an arbitrary decision based on legal technicalities. Whilst a fair result might be to share the responsibility evenly between the parties, as discussed above, this option is not available to the arbiter.

**The unhelpful trading partner :** Many loss causing events are the result of a combination of actions and events which both parties have to a greater or lesser extent contributed to. Often one party could have done something to assist the other party but had no legal duty to do so. The failure to assist may have been due to an oversight, self protection or because it would have involved financial loss or inconvenience, albeit perhaps relatively minor compared to the problem it would cause the other party. Whilst perhaps harsh or callous it may well have been perfectly lawful to fail to provide assistance. In the absence of wrong doing the law cannot apportion loss between the parties to take account for such harsh or careless conduct. The law will limit itself to apportioning loss on the basis of proven wrong doing alone.

**Proving facts :** The ability to establish in court what actually occurred is fraught with difficulties. The tribunal decides on the basis of what is presented to it what in the opinion of the court occurred. There is no guarantee that this will be what actually occurred. The tribunal draws a conclusion on the basis of the credibility of the witnesses and their ability to recall and describe the events. A witness with a poor reputation for reliability may not be believed by the tribunal even if telling the truth. Witnesses frequently have a distorted view of events which they portray to the tribunal in a very convincing and compelling manner. Time has a tendency to play tricks on memory. The party who has kept the best records or events and perhaps engaged in the most written communication has a distinct advantage in court.

**Quantifying loss :** Establishing the amount of loss that has been sustained as a result of the wrong doing of the other party is a question of fact for the tribunal. Evaluating the loss is more of an art than a science and the outcome is often far from predictable. The failure to recover sufficient damages in court to cover the winning party's perceived losses because of problems in proving the losses often leads to dissatisfaction with the judicial process.

**Interpretation of contracts :** The precise meaning of the terms of contract is a question of fact for the tribunal. Both parties may be convinced that they know what the contract meant and assert that the contract provides in their favour. However, the contract can only have one meaning and hence, even though the decision may appear arbitrary and based on a technicality, one party will inevitably lose. The loser is unlikely to derive a sense of justice or fairness out of the decision.

**Causation :** Many of the follow on consequences of loss making events are not legally recoverable. The law only allows a party to recover losses directly arising out of an event. Indirect losses can however frequently be far more significant for one or even both path parties and can outweigh the costs to either party of solving the problem quickly at minimal cost at the outset.

**Conclusion :** There are rarely any real winners in conflict. No one ever recovers all their costs and expenses from litigation, which is also emotionally draining and time consuming. Furthermore, litigation is disruptive and detracts from the real business of making money. Where it is clear that a party is in the wrong and cannot win, all that litigation achieves is to postpone the time when they will have to account



for their wrong doing. An early settlement, even at full cost will save on legal expenses. The other party may well be prepared to accept a lesser sum in order to avoid the costs and risks of litigation and view the discount as beneficial particularly where it maximises cash flow at an early date. The mediator, by outlining the advantages of settlement to both parties, can often bring about a settlement in the most difficult cases and unlikely circumstances.

This is not to say that litigation is never necessary. Where the rights and wrongs of a situation are not clear the parties may only be prepared to accept the decision of a judge, particularly if the decision will help establish guidelines for future relationships. A loss resulting from a court judgment may be easier to justify to stake/shareholders or to superiors than a negotiated settlement on terms that might otherwise be open to criticism, and so a judgement is needed. Finally, where a wrongdoer is totally unwilling to take responsibility for their actions the other party may be left with no option but to go to court.

#### **THE ROLE OF SUBSTANTIVE LAW IN MEDIATION AND LITIGATION CONTRASTED.**

With the exception of the rare "*Ex Aequo Bono*" equitable arbitration process where parties agree to an arbitrator settling a dispute on the basis of fairness without reference to law, courts and tribunals apply the law governing a dispute to the settlement of the dispute. Much time will be spent proving facts to the satisfaction of the court or tribunal. International trade and maritime law is complex. Legal advisors in such areas tend to be experts and charge a great deal for their services and judicial proceedings often involve protracted legal argument about the law. Going to law for the settlement of trade and maritime disputes is by common agreement an expensive business.

In a mediation the parties do not have to prove any facts to the mediator. Nor do the parties have to prove what the law says they are entitled to. The reason for this is because the mediator does not make a decision. A mediation settlement is based on what each party is prepared to agree. Often a party will pay more than he believes he is strictly required to pay under the law or agrees to settle for less than he believes he is legally entitled to. Unlike a court judgement, a mediated settlement represents what each party considers is fair, just or practicable and amounts to what they consider to be the best deal that can be achieved in the circumstances. Where the wrong doer is in severe financial difficulties and is

not in a position to pay any award made against him there is a strong likelihood that an award will drive the wrong doer into bankruptcy. Apart from some sense of justice, the winner will reap little or no commercial benefit from the judgement. A settlement agreement however could include joint financial measures or even the terms of a take over, of mutual benefit to both parties. Courts and arbitrators cannot achieve such results.

The fact that mediation is not a judicial process does not mean that law has no role to play in the negotiation settlement. In fact law is crucial to the effectiveness of the process. The legal alternative to mediated settlement is the principal reason for reaching a settlement and the legal requirements that would be enforced at law set the framework for shaping the actual settlement itself. The courts are essential for the enforcement of mediation settlements.

Any mediated settlement, whilst inevitably not a mirror or what a court would award, is likely to be shaped by the legal rights and obligations of the parties, subject to concessions financed out of the avoided cost of litigation, rapid cash flow benefits and uncertainty as to exactly how much might be recovered from a court or tribunal. The primary instrument of persuasion for the commercial mediator is the "*REALITY CHECK*".

#### **The reality check and claimants :**

**Risk Assessment :** The starting point is the potential recovery sum through litigation. The mediator will invite the claimant to evaluate both the strengths and weaknesses of the claim or claims based upon both the legal ground or grounds that would be relied upon and the ability to discharge the burden of proving relevant facts. The assessment might reveal that in the claimant's view the claim has a 75% chance of success overall, but that whilst the claim is for \$100,000, even if the claim succeeds \$80,000 is a more realistic assessment of what the court would be likely to award.

**Cash Flow :** If the mediation fails the claimant will have to proceed to litigation which could take from between 6 months to several years. During this time the claimant will be deprived of any money that might be available as a settlement sum and will have to finance the trial. Even if successful claimants rarely recover all their legal costs and it is likely that the claimant will incur lost opportunity costs in allocating time and energy to a trial that could be better used in commercial endeavour.

**Enforcement** : Whilst court orders are readily enforceable, recourse to the courts may be needed to enforce an arbitration award. The claimant needs to consider whether the defendant will have any money at all at the time of enforcement and most particularly whether that money would be available to the enforcing court.

**Assessing an offer to settle** : If the defendant were to offer immediate payment of a sum of between \$60-70,000 in full settlement of the claim the 25% risk of losing would be negated, cash flow would receive an immediate boost without any need for additional finance to prosecute the claim and immediate payment would avoid enforcement problems.

**The reality check and claimants :**

**Risk Assessment** : The mediator will invite the defendant to evaluate both the strengths and weaknesses of the defence based upon both the legal ground or grounds that would be relied upon and the ability to discharge the burden of proving relevant facts. The assessment might reveal that in the defendant's view he has a 60% chance of successfully defending the claim. Furthermore, the defendant feels the claim, should it succeed, is worth only about \$70,000. However, if the claimant succeeds, the defendant will have to bear both parties legal costs and the cost of the court / tribunal, all of which could cost an additional \$50,000.

**Cash Flow** : Whilst putting off payment produces a short term cash flow benefit, it might be necessary to set aside a contingency fund to cover the risk of losing, so cash flow may not benefit as much as it would at first sight appear to do.

**Enforcement** : If litigation goes against the defendant, resisting payment would only increase legal costs and would probably not be economic where the defendant intends to remain in business and has no intention of liquidating the business.

**Assessing an offer to settle** : If the claimant were to indicate a preparedness to settle for a sum of between \$60-70,000 in full settlement of the claim the 40% risk of losing would be negated, the accountants could immediately set up a financial plan to move forward and an outside risk of having to pay out in excess of \$120,000 would be avoided. The defendant could therefore potentially save \$50-60,000 and maximise opportunity costs immediately.

**Conclusion** : It is only by having a reasonable understanding of the relevant law as it would be applied in a court seized with jurisdiction over the dispute that the parties can assess the legal

implications of the claim and defence. Whilst the degree of legal knowledge and expertise required to litigate is far higher than in mediation, a lack of legal understanding during the mediation process can result in undue optimism or excessive pessimism, leading either to a failure to make realistic concessions or alternatively to uncalled for generosity.

**ENFORCEMENT : AWARDS & SETTLEMENTS**

**Enforcement of Court Rulings** : The effectiveness of court rulings varies from country to country. The courts of a country with a poor or ineffective enforcement regime will be distinctly unattractive to the parties to an international commercial dispute, though parties to local domestic disputes will be left with little alternative. The most significant limitation on the power of enforcement of any court is that the court's power is limited by national jurisdiction. A number of International Court Award Enforcement Conventions or Treaties, e.g. The Brussels Convention between member states of the European Union, result in a broadening of enforcement to the courts of participating states, but such agreements are very limited in terms of international coverage. In International Trade and Maritime disputes it is unlikely that both parties will reside in and have assets in the same country. National courts are often reluctant to accept jurisdiction over disputes unless security can be secured to ensure that the court can effectively enforce attendance by the defendant and subsequently enforce its rulings. A court ruling against a foreign citizen outside the jurisdiction and without assets in the jurisdiction is often not worth the paper it is written on.

**Enforcement of Arbitration Awards** : Arbitration awards rely entirely upon the courts for enforcement. Domestic arbitrations rely on the domestic courts and thus the awards are or no more nor less value than the enforcement effectiveness of the domestic court. Sadly, in some countries the courts act as if they are in competition with arbitration and may offer little support to the arbitral process or even be obstructive. Fortunately, the large number of states that have signed up to the UNCITRAL MODEL LAW and now actively support arbitration means this is less of a problem than previously. However, it is in international arbitration that arbitration has distinct advantages over domestic courts. In excess of 126 nations have now signed up to the New York Convention on the Enforcement of Arbitral Awards. This Convention allows for the international

enforcement of arbitral awards. If the losing party fails to comply with an international arbitral award the winning party can apply to a court of any signatory state for enforcement. This means the claimant can chase the assets of the defendant around the world and hiding places are few and far between. Sadly however, as might well be expected, the effectiveness of court enforcement is not of a universal standard world wide.

**Enforcement of mediation settlements :** The enforcement of mediation settlements differs radically from court and tribunal award enforcement. A mediated settlement is the equivalent of a new contract which replaces the original contract. The agreement is enforceable as a simple contract under the normal law of the land of the state where enforcement is sought. Mediated settlements tend to be in the nature of a debt and are more easily enforceable than general contract terms since there is no need for the court to determine the meaning of the terms of the contract. Most national courts will enforce mediation agreements. Often a settlement can be lodged with a court and any failure to comply will be treated as contempt of court. Alternatively, it may be advisable to sign a deed of settlement to ensure enforcement. Frequently payment is made immediately after the settlement agreement is signed and before the parties leave, which renders enforcement unnecessary unless the payment proves to be defective. Immediate direct electronic cash transfers are one way of ensuring payment.

**Enforcement of international mediation settlements :** In a few countries such as the Lebanon the courts reserve the sole right to amend contracts and thus the enforcement of mediated settlements is problematical in these jurisdictions. This will only prove to be a problem if recourse is made to a court in such a state for enforcement. If the paying party has assets in a foreign state which enforces mediation settlements then by ensuring that the settlement agreement is made subject to the law and jurisdiction of that state, problems of enforcement can be avoided. It should be noted that there is neither a need nor a requirement for the settlement agreement to retain the choice of law and jurisdiction provisions that governed the original disputed agreement. Indeed unless the defendant is a resident of that state or has assets there, it would be unwise to do so.

## GETTING INTO MEDIATION

If Mediation is such a useful process, how can a party to a dispute ensure that the dispute is submitted to mediation ? The answer is that unless the contract provides for mediation it may be very difficult to do so. It is impossible to make a party actively engage in mediation, though in some countries the law may impose financial penalties on defendants who refuse to use the process and may even prevent claimants from going to court unless an attempt at brokering a mediated settlement is attempted. However, the law cannot force parties to agree. At the best it can encourage active participation but no more because by nature agreement is a purely voluntary process.

It is increasingly common for contracts to contain a mediation provision. In the absence of a mediation clause it is possible for parties to agree after a dispute has arisen to submit to mediation but such agreements are rare because relationships have often deteriorated to such an extent that the parties are no longer capable of agreeing on anything at all at that late stage, ensuring that litigation is then the only way of ending the dispute. On the other hand in 2001 P&I Clubs used ad hoc mediation to settle trade and maritime disputes with a combined value in excess of £2 billion, simply because of the large savings that could be made by avoiding litigation. Mediation can be used at a number of different points in the Maritime Insurance Claims process :-

- i) To settle personnel disputes, cargo claims, charterparty disputes, collision claims, pollution claims and sale/supply disputes.
- ii) To settle disputes that arise when a claimant / assured disputes a claim adjuster's evaluation or a claim rejection is challenged
- iii) Disputes between the underwriter and third parties in subrogation of the assured's legal rights following a pay-out to an assured.
- iv) A multi-party mediation between the assured as plaintiff, third party as defendant with claims adjusters for both underwriters in attendance.
- v) Inter-underwriter negotiations over linked claims.

**Sample Mediation Clause :** *"Any dispute between the parties arising out of this contract to be settled by mediation ....."* Whilst this would be sufficient a further number of provisions is recommended.

It is useful to specify the rules for the conduct of the mediation by for instance making it subject to the rules of an organisation. In particular many problems

can be avoided by ensuring a mechanism for the appointment of the mediator, a factor covered by most institutional mediation rules. It is advisable to provide for an alternative form of dispute settlement to ensure an effective trial is available in the event that the mediation fails. The mere existence of the fall back process is often enough to ensure that the mediation process is taken seriously by both parties.

The local courts will always be available for the settlement of domestic disputes if the mediation fails, but if arbitration is perceived of as a preferable fall back process then a Mediation / Arbitration clause is advised. For the reasons outlined above, arbitration is the most common method of settling international trade and maritime disputes and thus a Mediation / Arbitration clause is highly recommended.

**Incorporating Mediation agreements into Trade and Maritime contracts :** The greatest barrier to the use of mediation in international trade and maritime disputes lies in the fact that most of the industry conducts business on the basis of long established standard form contracts. The majority of these at present provide for arbitration or a choice between court or arbitral settlement. Sometimes the arbitral institution is specified, sometimes it is not. However, few standard form contracts currently provide for Mediation / Arbitration.

Where there is no standard form provision, if mediation is required, the contract needs to be deliberately amended before it is concluded. This is not as difficult as it might seem. Most institutional bodies providing mediation and arbitration provide free and ready access to standard form mediation/arbitration agreements which can be electronically down-loaded from the web and inserted as an addendum to the contract. These include the Chartered Institute of Arbitrators, The American Arbitration Association and the International Chamber of Commerce amongst others. The UNCITRAL RULES provide model clauses and model rules for both conciliation (another word for mediation) and arbitration which can be incorporated into contracts.

Trade contracts tend to use in house standard form contracts, incorporating standard international provisions by reference only, for example c.i.f. INCO TERMS 2000. INCO TERMS itself is silent on dispute resolution leaving it to the parties to incorporate separately along with the other details of the sales contract. There is nothing therefore to prevent a traders legal drafting department from incorporating

a mediation / arbitration clause into the contract.

Charter party contracts are traditionally standard form. The shipper tends to dictate the terms so incorporation should be relatively straightforward. This could be facilitated if a standard form version were to be made available of common charters used in the trade. Thus, if the AFA were to produce a version of the Red Sea Charter Party which included a mediation / arbitration clause as an option, this would do much to encourage use of the process by members.

Contracts of carriage independent of charters are normally drafted by carriers as are bills of lading. It is likely that if local charters started to used mediation / arbitration clauses, the convenience of contracts of carriage reflecting the terms of the charter would result in carriers adapting their contracts to include mediation/arbitration.

It is anticipated that as the standard form contract providers update their contracts the option of using mediation / arbitration will become more common. Already the insurance industry is voluntarily availing itself of the process even without express incorporation.

Contractors need to be aware of the importance of establishing a dispute resolution process at the contractual stage. Many standard form charter parties provide a range of dispute resolution options which require the parties to choose a particular process and to choose the relevant ruling law and jurisdiction. It is surprising the number of times the courts have had to consider what process applies because the parties have failed to make an express choice. Making the choice is not difficult. All it involves is crossing out the unwanted alternatives and filling in the blank spaces, but all too often nothing is crossed out and the blanks are not filled in. The result is expensive litigation, not to resolve the dispute, but merely to determine which dispute resolution process should be used and to determine the relevant governing law and jurisdiction.

A sample NADR mediation / arbitration clause governed by NADR mediation and arbitration rules is provided below. Note that the clause enables the parties to determine in advance the time for the commencement of mediation and if mediation fails for the subsequent commencement of arbitration. The parties also need to chose the governing law and jurisdiction.



**NADR 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 NADR for mediation, subject to the relevant Mediation Rules, Regulations and Codes of Practice of NADR applicable at the time of reference. 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).*

*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.*

**NADR RULES FOR MEDIATION**

1. **Definition of Mediation.** Mediation is a process under which an impartial person, the mediator, facilitates communication between the parties to promote reconciliation, settlement or understanding among them. The mediator may suggest ways of resolving the dispute, but may not impose his own judgment on the issues for that of the parties.
2. **Agreement of Parties.** Whenever the parties are required or have agreed to mediate, through the provisions of a Dispute Resolution Agreement, by operation of law, by Policy or otherwise, they shall be deemed to have made these Rules, as amended and in effect as of the date of the submission of the dispute, a part of their agreement to mediate.
3. **Mediator Appointment.** The mediator shall be selected and appointed by the Executive Director of the Nationwide Academy for Dispute Resolution, U.K. Ltd., for the time being, from the Nationwide Academy for Dispute Resolution, U.K. Ltd's list of mediators. The Mediator shall act as an advocate for resolution and shall use his best efforts to assist the parties in reaching a mutually acceptable settlement.
4. **The Mediator.** The Mediator shall not serve as a mediator in any dispute in which he has any financial or personal interest in the result of the mediation. Prior to accepting an appointment, the Mediator shall disclose any circumstance likely to create a presumption of bias or prevent a prompt meeting with the parties.
5. **Authority of Mediator.** The Mediator does not have the authority to decide any issue for the parties, but will attempt to facilitate the voluntary resolution of the dispute by the parties. The Mediator is authorized to conduct joint and separate meetings with the parties and may also offer suggestions to assist the parties achieve settlement. If necessary, the Mediator may also obtain expert advice concerning technical aspects of the dispute, provided that the parties agree and assume the expenses of obtaining such advice. Arrangements for obtaining such advice shall be made by the Mediator or the parties, as the Mediator shall determine.
6. **Commitment to Participate in Good Faith.** While no one is asked to commit to settle his/her case in advance of mediation, all parties commit themselves and their representatives to participate in the proceedings in the fullest good faith with the intention to settle, if at all possible.
7. **Parties Responsible for Negotiating Their Own Settlement.** The parties understand that the Mediator will not and cannot impose a settlement in their case. They recognize and agree that they are responsible for negotiating a settlement acceptable to them. The Mediator, as an advocate for settlement, will use every effort to facilitate the negotiations of the parties. However, the Mediator does not warrant or represent that settlement will result from the mediation process.
8. **Authority of Representatives.** **PARTY REPRESENTATIVES MUST HAVE FULL AUTHORITY TO SETTLE AND ALL PERSONS NECESSARY TO THE DECISION TO SETTLE SHALL BE PRESENT.** The names and addresses of such persons shall be communicated in writing to all parties and to the Mediator.
9. **Time and Place of Mediation.** The Mediator shall fix the date, time and location of each mediation session. The mediation may also be held at any convenient location agreeable to the parties and the Mediator, or at the offices of the Mediator or of Nationwide.
10. **Identification of Matters in Dispute.**

- a) Prior to the first scheduled mediation session, each party may provide the Mediator with a Confidential Statement of their position and reasons. They may also provide all parties and their attorneys, if any, with a Position-Statement setting out their position with regard to the issues that need to be resolved.
- b) On or before the first session, the parties will be expected to produce all information reasonable required for the Mediator to understand the issues presented. The Mediator may require any party to supplement such information.
11. **Privacy.** Mediation sessions are private and confidential. The parties and their attorney, if any, may attend mediation sessions. Other persons may attend only with the permission of the parties and with the consent of the Mediator. The Mediator shall exclusively determine what other persons, if any, may attend each Mediation session or parts thereof.
12. **Confidentiality.**
- a) Confidential information disclosed to a Mediator by the parties and/or by witnesses in the course of the mediation shall not be divulged by the Mediator. All records, reports or other documents received by a Mediator while serving in that capacity shall be confidential. The Mediator shall not be compelled to divulge such records or to testify in regard to the mediation in any adversary proceedings or judicial forum. Any party that violates this agreement shall pay all fees and expenses of the Mediator, N.A.D.R. and all other parties, including reasonable attorneys' fees, incurred in opposing the efforts to compel testimony or records from the Mediator.
- b) The parties shall maintain the confidentiality of the mediation. Accordingly, they stipulate and agree that no party or their representative shall rely on, attempt to, or introduce as evidence in any arbitral, judicial or other proceeding: a) views expressed or suggestions made by another party with respect to a possible settlement of the dispute; b) admissions made by another party in the course of the mediation proceedings; c) proposals made or views expressed by the Mediator; or d) the fact that another party had or had not indicated a willingness to accept a proposal for settlement made by the Mediator.
13. **No Stenographic Record.** There shall be no stenographic, electronic or any other record of the mediation process.
14. **No Service of Process at or near the site of the Mediation Session.** No subpoenas, summons, complaints, citations, writs or other process may be served upon any person at or near the site of any mediation session upon any person entering, attending, or leaving the session.
15. **Termination of Mediation.** The mediation shall be terminated: a) by the execution of a settlement agreement by the parties; b) by declaration of the Mediator to the effect that further efforts at mediation are no longer worthwhile; or c) by a written declaration of a party or parties to the effect that the mediation proceedings are terminated.
16. **Exclusion of Liability.** The Mediator is not a necessary or proper party in judicial proceedings relating to the mediation. Neither the Mediator(s) nor any law firm or mediation firm employing Mediator(s) shall be liable to any party for any act or omission in connection with any mediation conducted under these rules.
17. **Interpretation and Application of Rules.** The Executive Director of the Nationwide Academy for Dispute Resolution, U.K. Ltd., shall have the sole and exclusive power to interpret and apply these Rules.
18. **Fees and Expenses.** The Mediator's fees and expenses shall be assessed and set by the Nationwide Academy for Dispute Resolution, Malaysia, Ltd., and each party shall deposit and pay their assessment at least twenty one (21) days in advance of the date of each mediation session. The expenses of witnesses for either side shall be paid by the party producing such witnesses. All other expenses of the mediation, and the expense of any witness and the cost of any proofs or expert advice produced at the direct request of the Mediator, shall be borne equally by the parties unless they agree or have agreed otherwise.
19. **Waiver of Forfeiture of Mediation.** The failure, refusal or neglect of any party to timely comply with the mediation procedure, the payment of any assessments or deposits or otherwise to cooperate in setting up and/or participate in a mediation may operate as a waiver or forfeiture of any right to the mediation of their claims, dispute or controversy. Upon the complaint of any party to the Nationwide Academy for Dispute Resolution, U.K. Ltd., that any other party is engaging in such activities, Nationwide, in its' sole discretion, may terminate the mediation procedure and permit the immediate filing of a demand for arbitration.
20. **Emergency Proceedings.** Neither the request for, nor the use of any Nationwide A.D.R. Emergency Arbitration Procedure(s) shall be inconsistent with, nor a waiver of any right to mediate under these Rules. Once those Emergency Arbitration Procedures are concluded, a mediation may proceed under these Mediation Rules. The concurrent use of Court process to enforce the Award(s) of an Emergency Arbitrator while a mediation is pending or being conducted is expressly permitted by these Rules.
21. **Revisions of the Rules.** NADR U.K. Ltd., shall enjoy the right to modify and amend these Rules at any time and without Notice to any person. Those Mediation Rules in effect on the date(s) when any particular mediation is actually being conducted before the mediator shall govern those proceedings.

**AVOIDING MEDIATION**

Can a party to a contract with a mediation provision go to court or arbitration and over-ride a mediation provision ? The answer is YES if the other party agrees to over-ride the provision or takes an active part in litigation, providing the courts or the arbitrator do not object.

In Australia, Canada, Greece, Hong Kong, Singapore, the US and the UK the courts will often object and insist that the parties attempt mediation and will only go ahead with a trial if the defendant refuses to mediate or if the mediation has failed to settle the dispute. The same will apply to the whole of the EU if the current mediation proposals of the European Commission Report on ADR are adopted.

The courts of most other countries will accept jurisdiction over the dispute in the absence of an objection by the other party. The courts of many, but not all, states will stay a legal action pending mediation if the defendant objects and the contract contains a mediation clause.

It is essential that the mediation process be over-ridden at the request of a claimant if a defendant refuses to take part in a mediation, since otherwise the claimant would be denied justice.

In the UK, the US and a number of other states a party who fails to take an active part in mediation when it is specified in the contract or is recommended by the courts may suffer financial cost penalties in that even if they prevail in litigation the court may refuse to award costs and even order payment of the costs of the other party if the court feels it is justified in the circumstances of the case. Thus the rule that "*costs follow the event*" is overturned in such circumstances.

**WHAT HAPPENS IN MEDIATION?** A typical commercial mediation is described below :

**Where will the mediation take place ?** A mediation can normally be convened at a location mutually acceptable to the parties and the mediator. Local mediation, avoiding expensive foreign travel and the engagement of foreign advisors is both easily attainable and desirable.

**Arrival and Registration.** The parties will normally be met by a receptionist and directed to separate waiting rooms. Once everyone has arrived the parties assemble in the mediation conference room. The mediator then invites everyone present to be seated, introduces himself and invite everyone present to introduce themselves.

**The Opening Joint Session.** Whilst each mediator will have his own particular style, the mediation will then proceed as follows, though not necessarily in the order described below.

The mediator will invite each of the parties and their representatives in turn to briefly set out their position and how they view the events leading up to the mediation. Mediators often seek to get the parties to confirm that they have the legal power to settle the dispute and to provide assurances that they will actively participate in the process and negotiate in good faith with the view to settling the dispute.

The parties can exchange documents and give the mediator copies of anything new disclosed or exchanged at that time not already supplied to him in advance. The scope of the dispute is established at this time so it is essential that the parties listen to what is said and do not interrupt. The parties are not likely to agree with each others views and in order to prevent tempers becoming frayed it is essential that the parties treat each other with respect and civility. There are plenty of opportunities later for the parties to comment on anything said during the opening joint session.

The mediator may choose to briefly summarise each party's submissions at this stage, following which he will explain how the mediation will proceed establishing ground rules for the conduct of the mediation and providing the parties with any information about the facilities available, such as smoking areas, use of mobile phones and refreshments.

**Witnesses** (if any). If the parties have chosen to call witnesses this is likely to be the time when they will be invited to give evidence and an opportunity provided for the other party to ask the witness questions.

**Private Sessions / Caucus.** At the end of the opening joint session the mediator will usually invite one of the parties to accompany him to a private meeting room. The mediator will then meet each of the parties in turn for private sessions or what is known as "*caucus*". (If the mediator considers that the best way to proceed is by round table discussions between the parties everyone will remain in the same room and the joint session will continue.) The mediator will use his discretion to decide which party to commence the private session with. There is likely to be a series of these private sessions with the mediator commuting between the parties.

The mediator will exercise his discretion and judgement to decide how much time is needed in any particular session to take the negotiations forward and at the end of each session will indicate how long he is likely to spend with the other party at the next session.

The purpose of private sessions is to afford the parties the opportunity to explore the situation freely with the mediator without prejudice to their position. The mediator will discuss with each party in turn the reasonableness of their position and as and when appropriate, in the light of information he/she has gathered from the other party, give the parties an indication of whether or not their position is acceptable to the other party.

The mediator may well suggest potential avenues for settlement that the parties might wish to explore. Private sessions are confidential. The mediator will only convey information and documentary evidence to the other party that he has been authorised to disclose. The mediator will not disclose anything to the other party without consent and is likely to summarise what has been offered in a session and confirm that he has authority to disclose / convey that information to the other party at the end of a private session before going to meet the other party again.

The mediator will use his discretion to decide if, as and when, to disclose such information to the other party and may well chose not to do so if an offer, for instance, is likely to be regarded as totally unacceptable by the other party and disclosure at that stage might harm the mediation process. Instead the mediator may indicate a willingness to move without specifying how much movement is on offer.

**Final Joint Session.** If, as and when the mediator considers that the differences between the parties have been bridged and that an agreement can be concluded, he will reconvene the joint session for a final time so that the parties can finalise and sign the agreement. The mediator will draft the agreement with the assistance of the parties and have it reproduced in a presentable form for the parties to sign and witness. Payment is likely at this stage. As discussed above, it is advisable in international settlements that where immediate payment is not made, that enforcement procedures and governing law and jurisdiction for enforcement form part of the settlement.

**Interim Joint Sessions.** On occasions, the mediator may decide that it is necessary to interrupt the private

sessions and convene one or more joint sessions in order to either conclude agreements on particular aspects of the dispute or to break stalemate situations, following which, private sessions will resume. The mediation will normally continue in session for as long as it takes to broker a settlement. A settlement can usually be reached in one day. If it becomes apparent to the mediator that a settlement is not possible the mediation will end. Either party may chose to end the mediation session at any time without concluding an agreement. Attendance at and participation in the mediation process is entirely voluntary. There is no obligation to conclude an agreement and particularly, there is no obligation to sign a totally unacceptable settlement.

**Continuation Sessions.** Often even when the parties fail to reach an agreement, the parties having had time to reflect on the process, agree to return some time later and continue the mediation at which time a settlement is usually reached.

**Time Scales :** It is often possible to conclude a commercial mediation in a half or full day session. Tight deadlines tend to concentrate the mind and produce better and speedier results. It is often a mistake to schedule a commercial mediation over several days, since it allows the parties to harden their positions and makes it more difficult to broker a settlement.

## CONCLUSION

There is nothing wrong with commercial disputes. It is inevitable that from time to time commercial partners will be confronted with problems that lead to disputes. Often settlement negotiations provide solutions to wider problems and help to keep the partners in tune with current trends in the industry. The problem is that commerce cannot maintain its momentum without settling disputes. In the absence of choice to the contrary, a dispute will find itself before the courts. This is good news for lawyers. It is expensive to engage the services of lawyers. Even the best and most efficient judicial systems tend to be slow and laborious. However, State courts enjoy a great deal of power and have the authority to enforce the process. Confidence in the judicial system is the court's greatest asset. The legal knowledge and understanding of a judge may be highly valued by the parties. Judges are perceived as being dispensers of justice. Many maritime disputes are settled before the courts despite the problems of cost and delay. Indeed, delay often suits a party who does not want to pay, whilst the coercive powers of the court are the



only way to ultimately ensure that a recalcitrant party appears at a hearing and is ultimately brought to account.

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

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

Mediation has less to offer, apart from a reality check on the parties, in situations where one party simply adamantly refuses to recognise any liability whatsoever and refuses to pay or perform a service or put something right. Even here, participation in the process can result in the recalcitrant party realising that their stance is unrealistic, paving the way for a settlement. Apart from being relatively inexpensive mediation is a valuable tool for repairing damage to commercial relations. Mediation is a serious process and has been successfully used to settle disputes involving very large sums of money. A great advantage of mediation is that it lends itself to multi-party dispute settlement and can therefore replace an entire series of arbitrations or court actions. Mediation agreements are readily and easily enforceable before the courts if the mediation agreement is breached.

Arbitration and litigation have a valuable role to play in the future of maritime dispute settlement. However, mediation has much to commend itself and

the industry will be well advised to take a close look at what is now on offer. The maritime industry is continually evolving. The same is true of the dispute resolution industry. The industry must embrace change in order to prosper.

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### **“THE SETTLEMENT OF MANUFACTURING PLANT CONSTRUCTION DISPUTES”**

by C.H.Spurin

#### **INTRODUCTION**

Modern construction processes are complex and highly technical. The construction process is very fluid and unpredictable. Frequently unanticipated ground site conditions create problems ; designs which looked fine on paper prove to be impracticable ; designs often have to be altered to incorporate new requirements ; labour and material fluctuate in price and supply may be variable ; the intended use of the development may change due to market conditions or because of a change of intended user ; time scales and targets can be set back by inclement weather conditions ; accidents and mistakes can have serious and far reaching consequences, whether by architects, engineers or direct / subcontract constructors. This list, whilst far from comprehensive, provides a fair indication of the types of issue that the parties to a construction project need to take into account and provide for in the terms and conditions of a contract.

Construction contracts can be neatly divided into two parts, the first technical describing the commissioned product and the second allocating risk and financial liability for the product, variations to the works and for other foreseeable though not necessarily anticipated events that might occur during the construction process. Most contracts also provide for contract administration and a mechanism for the expert determination of facts likely to be otherwise contested by the parties. Despite the fact that contracts establish contractual mechanisms for the allocation of risk and financial liability, it is hardly surprising, given the large amount of money

frequently involved and the complexity of the mechanisms themselves, that disagreements arise as to the application of the rules to given facts and circumstances and thus as to who should actually shoulder the financial responsibility when things go wrong during the construction process. Accordingly most contracts also provide dispute resolution processes and procedures.

Whilst disputes are therefore perfectly normal, the failure to resolve disputes promptly can have serious implications for the prosecution of business. Disputes frequently result in delays in the construction process, particularly where suppliers and sub-contractors temporarily deprived of funds suffer cash flow problems preventing further work or simply because a party is not prepared to risk *"putting good money after bad"* until the issue is resolved. Projects put on hold suffer from decay and pilferage exacerbating losses which are frequently irrecoverable. Unresolved disputes and concomitant payment failures are a significant contributor to corporate failures, both of clients, financiers and developers/constructors.

This paper examines the dispute resolution processes that are available to the industry, highlighting their respective advantages, disadvantages and limitations. The processes discussed are adjudication, arbitration, dispute arbitral and review boards, (DAB and DRB), expert determination and litigation, which will be examined both from domestic and from international perspectives. The previous paper discussed the role that mediation plays in dispute resolution in the trade and maritime industry. Whilst there are significant differences between the construction industry and international trade, the role played by mediation in both industries is broadly similar. Accordingly, references to mediation here will be limited to highlighting construction specific factors.

There are a wide range of standard form contracts available to the construction industry, both domestically & internationally. There are champions for all of the various forms who will assert that a particular form provides the clearest, the best, the most comprehensive, the most practicable or fairest mechanism for administering construction projects and allocating risk and financial responsibility. In addition, there are a variety of alternate forms from most providers to cater for different types of project, including domestic and international projects, or alternatively to allocate aspects of responsibility or control to one or other of the main parties. It is not intended to evaluate here the balance of fairness

achieved by the various forms of contract, but reference will be made to the different forms of dispute resolution and fact determination mechanisms used by some of the principal forms.

The overall aim of this paper is to provide the parties to prospective construction contracts with an overview of the mechanisms available for the settlement of disputes that might subsequently arise during the proposed construction process. The objective is to encourage the parties to give more thought to dispute resolution provisions at the contractual stage.

Parties are encouraged to seek further advice on which process would in the circumstances be most suitable for incorporation in the contract. The forms often offer a choice of dispute resolution process. The paper should help parties to make more informed choices. Where a standard form contract does not include a dispute resolution clause the parties are advised to attach/incorporate a dispute resolution provision to prevent disputes arising about how to settle disputes. Even where a standard form contract contains a dispute resolution clause there is often scope to amend / modify the clause. The parties should be aware however that where the standard form contract providers also operate an in-house dispute resolution service, governed by their own rules of conduct, these are likely to be displaced. Any new / replacement dispute resolution clause should therefore specify a proposed dispute resolution service provider and the rules / regulations / codes of practice that will apply to the chosen process where the dispute resolution service provider does not automatically provide such regulation. In particular it may be necessary to specify who will have the power to appoint the dispute resolution practitioner be it mediator, adjudicator or arbitrator in the absence of agreement between the parties.

#### CONSTRUCTION CONTRACTS

Whilst the parties to a construction dispute have the right to expect that recourse to a dispute resolution process, be it the courts or some private alternative, will result in a settlement of the dispute in accordance with "the law" it would be wrong to imagine that the settlement will produce what both parties consider to be a fair and just outcome. In particular the aim of dispute resolution is *"NOT"* to right any imbalance that might exist in the contract but rather to ensure that the duties under the contract are fulfilled and to provide compensation for any breaches of those duties. It is important therefore to get the contract

right in the first place. Thus it is not the job of the court to compensate for defects in the procurement process and to increase the price to assist a contractor who has under priced the works and subsequently discovers the profit ratio is not sufficient to justify the works or even that a loss is inevitable.

In the US construction contracts are frequently drafted on a one off, case to case basis. The contracts are drafted by each parties legal team who compete to negotiate the most favourable terms for their clients, drawing on commonly used provisions within the industry. In the UK and internationally on the other hand, standard form contracts are the norm. Nonetheless, many goods and service providers and specialist sub-contractors contract on their own standard forms, drafted clearly for their benefit. Many prime / main contractors also have standard form sub-contracts which are used as the basis for putting work out to tender. Often these people have variations on their contracts which they will use if pressured during negotiations, which provide a better balance of rights and duties between the parties. Rather than simply accept what is offered it pays to ask and negotiate best terms, not just about price but also about other aspects of the performance of the contract. It will be too late to complain later if and when a problem arises.

There are a wide range of such standard form contracts available, developed over many years and amended in the light of experience to address issues and problems that have arisen, taking into account changes in the law. Theoretically each contract is designed to provide a manual for the efficient and effective operation of a construction project. It is commonly asserted that these contract manuals are for the mutual benefit of all concerned, but in reality each of these contracts is likely to favour one or other of the parties in one manner or another since they apportion risk for various aspects of the process and place control in the hands of one or other of the parties or their nominees.

The standard form construction contracts are drafted / designed with different types of project in mind. Thus the Joint Council of Tribunals (JCT) family of contracts provide a range of contracts for different types of general and specialist projects, whereas the IChemE contracts and the J.C. Institute of Electrical and Mechanical Engineers and Associate Consulting Engineers (Model Form 1 and Model Form 2) contracts are designed for plant supply and installation rather than for the construction of general

works. The Institution of Civil Engineer's (ICE) and the Federation Internationale Des Ingenieurs-Conseils (FIDIC) construction contracts are designed specifically with international contracts in mind and it is for this reason that they are used by the World Bank as the basis of its international construction contract work. By contrast, local organisations and industry institutes have produced local versions of common contract forms, tailored to meet local legislation requirements which are used by virtually the entire local industry. The Malaysian Standard Form of Building Contract (PAM 1998 Form) is an updated and revised form of an early version of the JCT contract.

Apart from the industry divisions between the Developer and Prime / Main Contractor relationship and the Prime / Main Contract and Sub-Contractor relationship the other significant distinction in forms of contract lies in those that place control and responsibility for design with the developer and his appointed professional advisers including engineer and architect and those that vest responsibility with the main contractor. The Institution of Civil Engineers contracts are primarily designed for the former whereas the JCT Design and Build contract is designed for the latter. Further sub-divisions cover contracts with and without quantities and there are versions of many of the main contracts designed specifically for private and government projects, as with the JCT Public and Private Building Contracts.

There are in fact several hundred different standard form construction contract, each providing a different apportionments of both risk and responsibility between the parties. Some contracts specify the remedies available to the parties<sup>1</sup> excluding remedies for other events. Specialist advice is recommended in selecting the most appropriate contract for a development, though it is not unusual for companies to rely on a particular form which they are familiar with and to attempt to impose that form of contract on the other party. It is important for both parties to be fully aware of their rights and duties under the contract. I never ceased to be amazed by the number of clients who approach me for dispute resolution advice who have a very poor understanding of the terms and conditions of their contract. I have even had sub-contractors who have submitted tenders, and whilst they know the financial terms and the works specifications they have never received or

<sup>1</sup> eg IE&ME Model Form 1 & Model Form 2. Similarly force majeure clauses exclude liability for certain events.

alternatively have never read the legal parts of the contract. Unsurprisingly such people often run into problems over payment because no withholding notices have been issued or alternatively they have no written record of instructions, variations or day works as required by the contract.

Most of these standard form contracts will either provide for a specific mode of dispute resolution or provide a range of options for selection. Only time will tell which is the most appropriate mechanism. A flexible dispute resolution process that minimises aggravation and can potentially assist in producing an enforceable settlement, quickly at minimum cost without disruption is the ideal. Which if any of the processes gets closest to this ideal ?

### LITIGATION

The courts provide the principal mechanism for settling commercial disputes. Judges are normally highly qualified, experienced and held in high regard by society. Even though a losing party may not be pleased with the outcome, the decision of a court is likely to be accepted and respected by both parties. Only courts have enforcement powers, though often the court will exercise those powers in support of alternative dispute resolution processes. For this reason, where there is no dispute about the existence of an obligation to pay monies or about how much monies are due, recourse to a court with the power to enforce payment is the natural and obvious option for a claimant. Domestic courts are the most appropriate way of ensuring the payment of debts where both parties are residents and have assets within the jurisdiction of the court. Any alternative to the courts will achieve little if the defendant will resist payment until forced to do so, since enforcement of the decisions of an alternative decision provider will require the assistance of the court in any case.

The principal disadvantage of using the courts lies in the fact that it may take a long time to get a court hearing. The courts have to deal with a wide range of judicial business ranging from civil law, public law, family law and criminal law and so the resources of the state are often insufficient to ensure the rapid settlement of commercial disputes. Most alternatives to litigation tend to be far quicker and since businessmen need to resolve problems quickly in order to concentrate on commerce, they have a distinct advantage over the courts. Whilst the courts are needed for enforcement, because the court does not have to deal with questions of fact and law,

merely issuing an enforcement order, this can normally be achieved relatively quickly.

The longer a dispute drags on the greater the expense for the parties. The failure to resolve problems quickly means that the parties have to allocate both time and money to the resolution process. The sooner a dispute is ended the sooner the involvement of lawyers can be brought to an end. The services of lawyers tends to be expensive so limiting the amount of input required by lawyers can result in significant savings for the parties. Whilst lawyers fees in support of ADR are broadly similar to those involved in litigation, the fact that most ADR processes take less time than court hearings means that legal expenses are kept to a minimum.

A significant advantage of ADR processes is that they are private, avoiding adverse publicity and keeping business secrets which could be useful to competitors out of the public domain.

The effectiveness of domestic courts in securing jurisdiction over international disputes and subsequently enforcing judgements against parties outside the jurisdiction is severely limited. Many contracts for manufacturing plant will involve overseas suppliers and installers and thus it may be advisable for the contract to provide more effective mechanisms for the settlement of disputes arising out of such contracts than are available in the domestic courts.

### ARBITRATION

Arbitration is the principal alternative to litigation for the settlement of both domestic and international construction disputes. In many ways the arbitration process resembles litigation. The arbitrator acts as a private as opposed to a state appointed judge. The arbitrator will make determinations of both fact and law and apply these in order to produce a decision about who must bear legal responsibility and liability for losses arising out of a breach of duty, be it contractual or tortuous, as governed by the terms of any relevant governing contract and having apportioned liability will quantify the loss, award damages (if any) and award costs.

The potential advantages of arbitration include :

- 1) Speed to get to the process and often quicker proceedings.
- 2) The cost of arbitration is often less than the cost of litigation.



- 3) Less formal than the courts. The parties often have control over the process, which is not prescribed by rules of court.
- 4) Choice of venue and potentially more convenient to the parties and witnesses.
- 5) Specialist arbitrators with industry experience and knowledge.
- 6) International awards are globally enforceable by virtue of the New York Convention on the Enforcement of Arbitral Awards.
- 7) More amenable than courts to choices of law and jurisdiction.

**Speed** : It takes as long to get to court as it takes. Court listing is governed by the judicial system and depends entirely upon how busy the domestic court is. It may take as little as a few weeks as for instance in Brunei or several years in countries where the courts are completely overloaded and overwhelmed by the volume of business relative to the number of judges and courts available for the settlement of civil disputes. How long it takes to get to arbitration depends upon the system, if any, put in place by the arbitration service provider. Some arbitration clauses or rules require that the arbitration commences within a specified period of time or enables the parties to specify a time. However another governing factor is the availability of a suitable arbitrator or arbitrators and the ability of the parties and the arbitrator to schedule a mutually acceptable time for the hearing. In complex disputes involving a great deal of information and where both parties need a considerable amount of time to prepare for trial, the period leading up to a court or arbitral hearing may be broadly the same. As demonstrated below, the fact that the parties have control over the process can result in arbitration taking longer than litigation, particularly if an appeal to the courts is involved.

**Costs** : How much arbitration costs is extremely variable. Fixed cost and fixed time, fast track arbitral processes are very cost effective, particularly for small sub-contractors but they are not usually used for main contracts because the complex issues that tend to arise do not lend themselves to limited proceedings. Arbitrators are relatively expensive and legal representation is normally charged at the same rate as litigation. The parties will also have to pay the arbitrators accommodation and travel expenses, particularly where overseas arbitration is involved. Where a three person tribunal is engaged the costs of the tribunal may be considerable. The parties will have to pay for the venue, which unlike the courts

will not be subsidised by the state. The filing fees and administrative charges of some arbitration service providers are very expensive and may even involve substantial deposits. Savings will only therefore occur if the parties exercise restraint when controlling the arbitration process, keeping hearing within tight schedules. If an arbitral award is appealed or subject to judicial review then costs can escalate. Judicial review provides a protective device against unfair and incompetent arbitrators and is thus valuable, but if the parties so wish the potential for review can be severely restricted by the parties agreeing to an award without reasons, which makes judicial review almost impossible. Where the parties so require, an arbitration clause can exclude appeal. In conclusion, there is no guarantee that arbitration is cheaper than litigation, though it usually is more cost effective. Much depends on what the parties want.

**Formality** : Arbitral hearing are conducted in private rooms not courts, are less imposing and do not have court officials and strict codes of conduct for addressing the arbitrator. Rules of civil procedure do not apply. How formal the proceedings are depends very much on the personality of the tribunal. Arbitrators do not wear gowns and are normally addressed as Sir or by name. However, the broad functions of a tribunal and a court are the same, so parties can anticipate that the tribunal will control the proceedings with a firm hand and it is likely that witnesses and experts will be required to take an oath of some sort and be subject to cross questioning. Arbitration may be adversarial though it is more likely that the modern arbitrator will adopt an inquisitorial role and take the initiative in the discovery of facts and evidence. Common law courts in the commonwealth countries, the UK and the USA are rather more adversarial in approach whereas the courts of civil law jurisdictions such as mainland Europe tend to be inquisitorial.

The parties have considerable autonomy over arbitral procedure which may be prescribed by the chosen rules governing the process or by agreement between the parties as the process progresses. Thus if the parties so require the proceedings may be as long as and as formal as a court or alternatively very informal and tightly constrained in terms of the time allocated for each party to present their case, the extent to which witnesses and expert opinion is permitted and the time allocated for cross questioning. A useful way of keeping time to a minimum is to require affidavit evidence to be submitted to the tribunal and for

expert opinion to be limited to written reports. The tribunal may even appoint a single expert to advise the tribunal, eliminating lengthy trials involving a battle between a series of experts, each delivering extensive reports which are then cross examined in detail.

The UNCITRAL MODEL LAW and the UNCITRAL ARBITRATION RULES have done much to ensure that modern international arbitral proceedings are cost effective, fair and efficient and modern arbitrators have considerable powers to keep the process on track, balancing the demands of the respective parties against the need for hearings which are proportionate to the size and value of the dispute at hand. Many countries have adopted the MODEL LAW or introduced reforms reflecting its aims and objectives. Thus the UK introduced a new Arbitration Act in 1996. The Act also requires the courts to play a supportive role to the arbitration process and severely restricts the powers of the court to interfere with the process. In conclusion, it is normally the case that arbitration is quicker and less formal than litigation but again the process is very much in the hands of the parties.

**Convenience** : The location of courts is fixed. Whilst some arbitration service providers have dedicated premises it is normally possible for a tribunal to convene at any location mutually acceptable to the arbitrator and the parties. The parties negotiate the time for the hearing whereas a court will allocate a time whether it suits the parties or not. However, availability of the arbitrator may result in hard choices and some degree of inconvenience.

**Specialism** : Judges are allocated to a trial by the state. The parties have little or no influence over the allocation and the grounds for objection to an appointment are limited. Arbitration regulatory bodies and arbitration service providing bodies set high standards for the qualifications of their listed arbitrators, many of whom become extremely well known in due course to the business community. Depending on the appointment mechanism for the tribunal the parties may appoint the tribunal by mutual agreement or alternatively select the panel from a list provided by an arbitral institution. Often in the case of three panel tribunals each party selects an arbitrator and the two selected arbitrators select a third as chairman or umpire. Where the parties are unable to agree, a court or arbitral institution may appoint the tribunal. Some contracts provide for direct institutional appointment. The contract or

institutional rules may, in the case of international disputes, require that the tribunal is composed of overseas arbitrators or that the chairman is foreign to both parties. It is normally possible to request an alternative nomination if the parties do not consent to institutional appointment. To a very large extent the parties rely heavily on the expertise, reputation and integrity of the institutional body that is involved in the appointment of the tribunal and regulation of the arbitration proceedings.

**International Enforceability** : The international coverage of the New York Convention on the Enforceability of Arbitral Awards is very wide but not every state is a signatory. The result is that international arbitral awards are readily enforceable worldwide, with all major states enforcing the convention.

The Convention itself provides a mechanism for challenging enforceability on the grounds of breach of due process (judicial review), illegality, lack of and excess of jurisdiction by the arbitrator and for public policy reasons. This provides a valuable safeguard against abuse. Challenges are however restricted to the extent that often the governing procedural law will require a party to raise objections to breaches of due process and jurisdiction during the hearings, so that in practical terms only a person who has refused to participate or has not been given sufficient notice or opportunity to participate can rely on these grounds to prevent an award being enforced.

It should be noted that, rather than challenge the enforceability of an award, a party may either appeal against an arbitral decision or apply for judicial review, assuming the party can establish grounds for appeal or review and or that there is a right to appeal under the contract. A contract can state that an award is final and binding preventing appeal. This guarantees finality and protects the privacy of the arbitral process. As observed above, judicial review is severely restricted if, as is common in the US the award is made without reasons. Note that under the Arbitration Act 1996 in the UK and likewise under the UNCITRAL MODEL LAW reasoned awards are required unless the parties specifically otherwise agree.

**Choice of Law** : It is very important in international contracts to determine the substantive law that will govern a contract. Apart from the unifying effect of international conventions such as the Vienna Convention on the International Sales of Goods there is little global uniformity in commercial law. The

statutory rights and duties of the parties to commercial contracts vary in many ways from country to country and rules governing offer, acceptance, rectification of contractual terms, frustration, mistake, undue influence, legality and remedies for breach contract vary in significant ways. Contracts tend to be written with the laws of a particular state in mind and different versions may exist for projects in different countries. Incorporating international conventions is one way of reducing the problem.

**Choice of Jurisdiction :** This is closely related to but distinct from the choice of arbitral seat. The parties may chose to have disputes settled by the courts of a particular state, which is a simple choice of jurisdiction clause. However, if the dispute is to be settled by arbitration, the courts will play a secondary rather than a primary role. The procedural law of the state where the seat of the arbitration is located will govern the arbitral process. Thus an arbitration subject to English Law and Jurisdiction will be subject to the rules of arbitration procedure set out in the Arbitration Act 1996. The Act determines the powers of the court in support of the process, the default powers and duties of the arbitrator, and a number of mandatory statutory rules which cannot be overridden by the parties.

**Conclusion :** It is virtually impossible to eliminate or prevent disputes arising during the course of commercial transactions. As and when they arise, disputes have to be dealt with and brought to an end, but dispute resolution is never cost free. On balance, compared to litigation, arbitration provides the best chance of resolving international commercial / construction disputes in the shortest period of time, at the least expense to the parties and in the most informal and user friendly manner. Nonetheless, arbitration is not fool proof and problems can and do arise which negate the anticipated benefits of using the process.

#### **EXPERT DETERMINATION**

Because construction projects involve a wide range of variables and the right to payment depends upon the satisfactory completion of works or part works, which can involve answering highly technical issues, construction contracts often provide for an expert determinator to certify questions of fact that govern the right to payment. Thus under the Institution of Civil Engineer's (ICE) and the Federation Internationale Des Ingenieurs-Conseils (FIDIC) construction contracts the resident engineer, who is

an employee of the employer, administers significant aspects of the project, certifying work and extensions of time etc. In others the certification role is carried out by Chartered Surveyors, Quantity Surveyors or architects as under the Joint Council of Tribunals (JCT) range of contracts. Increasingly today, contracts such as the Institute of Chemical Engineers (ICChemE) state that the administrator must be a wholly independent expert appointed jointly by both parties to the contract.

The value of using an expert determinator is that many day to day issues that could potentially lead to disputes are dealt with automatically, quickly and inexpensively as a matter of course. However, there is considerable variation between the various contracts regarding the scope of power of determination of the expert, the effect of expert's decisions and finality of the decision and the inter-relationship between expert determinations and dispute settlement. Contracts frequently make the issuing of a decision by an expert a pre-requisite to a dispute, preventing arbitration / litigation from commencing until after an expert has considered a matter and issued a decision.

Contracts which do not involve the use of an expert determinator often state that payments will only be made in respect of work certified by the site manager who is also required to authorise day works and variations. Such arrangements often lead to dissatisfaction and to disputes, particularly when the site manager, whose job after all is to look after employer's interests, makes his presence known whenever it comes to giving out instructions but becomes mysteriously hard to find whenever a written instruction or authorisation is needed. Often work is done without authorising paperwork, because without the work other essential work is held up, leading to disputes over payment which is not officially due in the absence of written authorisation. Expert determination provides a better alternative, but the parties to a contract need to be clear about the terms and conditions under which they operate and choosing the form of contract which provides an effective but fair and balanced mechanism is important.

#### **ADJUDICATION**

A number of domestic standard form construction contracts<sup>2</sup> and international standard form construction contracts provide for what is known as

<sup>2</sup> The DOM 1 introduced a limited form of adjudication in 1980 (now revised for the UK).

adjudication.<sup>3</sup> The ICC<sup>4</sup> provides a pre-arbitral procedure for the settlement of all types of dispute be it construction or commercial. The process resembles adjudication. NADR provides adjudication / arbitration services for both construction and commercial contracts.

Adjudication here is used in a specialist, technical sense, rather than the general meaning of the word which applies to what all judges and arbitrators do, which is “*to adjudicate*”. What then is this thing called adjudication ? In essence it is a method of achieving a quick decision, using an inquisitorial approach with limited hearings, which is immediately binding upon the parties but is not a final resolution of the dispute because the parties can subsequently proceed to a full, start from scratch / “*de novo*” arbitral hearing which may reach a completely different result to the adjudicator and require repayment of monies and a fresh award which turns winners into losers and vice versa.

The adjudication process so impressed the UK legislators that by virtue of **Part II Housing Grants Construction and Regeneration Act 1996**<sup>5</sup> they made it compulsory, at the option of either party to a UK construction dispute. However, overseas construction disputes are not subject to the provisions of the Act even where the law of England & Wales applies to the contract. Australia and New Zealand have also introduced statutory adjudication processes. A number of US states are currently considering adopting the process. Adjudication is likely to grow substantially world wide over the next decade, particularly with regard to the construction industry to which it is ideally suited.

What is it about adjudication that has impressed so much ? Where the process has been most successful, it is the low costs, speed, informality, use of industry experts, and general satisfaction with the quality of decisions that has led to it winning general approval from the industry, though it must be said that the process does have its detractors. The statutory process in the UK has been thoroughly tested by the courts over the last three years since its introduction. Attempts to evade the process by reluctant parties have proved by enlarge to be unsuccessful and rapid enforcement coupled with a very low percentage of challenges to adjudication decisions has effective

shown that despite the fact that the decision is not automatically final, the decisions of adjudicators have turned out to be final in over 98% of cases. The challenge process, rather than being routinely used has thus proved to be merely a safety net provision which has rarely been called into use.

Hearings are rarely used in adjudication, though they can be if the adjudicator or the parties consider that a hearing would be useful. Rather the process relies primarily on paper submissions. The statutory process runs to very tight schedules, namely 1 week from notice of dispute and appointment of the adjudicator to submission of claim and 4 weeks for the submission of defence, response to defence, hearings / site visits (if any) and the issue of the decision. The claimant can ask for a two week extension of time, resulting in a time scale of between 35 to 49 days in total. Whilst lawyers are frequently involved in client representation, there is little scope for the running up of vast legal costs. Hence, the overall cost of adjudication is quite modest. Adjudication is very affordable for the small contractor who might not otherwise be able to pursue a claim through arbitration or litigation because of the high costs involved.

Adjudicators are drawn from the ranks of established construction arbitrators reinforced by newly trained adjudicators mostly with experience as civil engineers, surveyors and architects. It is this expertise and understanding of the industry that has helped to ensure that the standard and quality of adjudication decisions has been very high in the UK. The process has proved to be most valuable between the prime and the sub-contractor including suppliers of goods and services to the industry, though it has been used between employer and prime. The process has even been successfully used by civil engineers and architects

The ICC pre-arbitral procedure has not yet been widely used so little comment can be made about its effectiveness or otherwise. The FIDIC adjudication process differs substantially from the UK model in that the initial time scale up to adjudication is 6 months and there are a number of differences in the procedure applied. The NADR adjudication rules and regulations incorporate the central features of the UK process as contractual terms for the conduct of the process. Ideally the adjudication / arbitration clause should feature in both the main contract between employer and prime and in subcontracts between prime and sub-contractors. The HGCRA also

<sup>3</sup> eg the FIDIC adjudication process.

<sup>4</sup> Note that the ICC does not provide standard form construction contracts.

<sup>5</sup> Hereinafter referred to as the HGCRA.



introduced payment rules including the issue of withholding notices which must be complied with if the employer wishes to withhold payments from the prime or if the prime wishes to withhold payment from subcontractors. The Act banned “pay when paid” provisions. It is wise to adopt similar provisions as terms of the contract.

Perhaps one of the greatest successes of adjudication is the least easily measurable, in that it deters parties from behaving unreasonably. Evidence is perforce anecdotal, but I am personally aware of a number of disputes that were promptly settled upon issue of a statement of claim, without proceeding to adjudication and have witnessed the prompt dismissal of groundless defences by adjudicators that might otherwise have taken up to two years to get to court.

#### **DISPUTE REVIEW PROCESSES (DRP)**

Dispute Review Boards (DRB) are widely used in the US for large public and private construction contracts and Dispute Arbitration Boards (DAB) are mandated by the World Bank in the construction contracts it finances throughout the world. The principal body responsible for the promotion and development of the DRB / DAB concept is the Dispute Resolution Board Foundation. The Dispute Review Board Manual,<sup>6</sup> produced in 1996 provides the only definitive guide to the operation of DRB's to date. The authors and many of the contributors, early DRB pioneers and practitioners, formed the Dispute Review Board Foundation in 1996. It changed its name to the Dispute Resolution Board Foundation last year and now has almost 500 members spread over 30 countries world wide.

There is substantial and compelling evidence that construction projects involving DRB / DAB process have virtually no formal disputes and that advisory opinions / arbitral awards are hardly ever required. The processes appear to offer the prospect of dispute free construction projects. What are DRBs and DABs, how and why do they work and what is the difference between a DRB and a DAB ?

Dispute Review Processes evolved in the US out of an experiment by the parties to a series of major tunnelling contracts to try and ensure that the second stage of the project avoided the protracted disputes that had plagued the first stage. The first documented DRB was used on The Sokane Dam in Washington in

the mid-1960's. Over the last 20 years the process has been refined and its proven track record in dispute avoidance has resulted in the process being mandatory in many states for public projects. DRPs combine the concepts of negotiation, conciliation, expert determination, mediation and arbitration into one seamless operation. DRPs have been successfully employed in the UK e.g. on the Channel Tunnel Project and for the Channel / London Fast Rail Link and in Hong Kong for the major new airport development. DRPs have resulted in major improvements in efficiency and have savaged the legal costs involved in disputes on major projects. There are many variants on the dispute review process and processes can be tailored to the specific needs of parties engaged in joint ventures. In the UK a number of Joint Public Private Finance Projects where the finance for the construction of a facility is provided by the private sector and subsequently recouped out of operational profits from the facility by contractor/financier have successfully used the DRB process. Once construction is completed the composition of the DRB is altered and it continues to assist in the settlement of disputes that arise during the court of operating the facility.

The central distinction between a DRB and a DAB is that a DRB produces a recommendation which if not followed is admissible in evidence to any subsequent court or tribunal that considers the dispute, whereas a DAB issues an enforceable arbitral award. DRB's are commonly used in the US because in the few cases where a dispute has gone to court, the courts have tended to adopt and follow the recommendations of the DRB, rendering such recommendations highly coercive. FIDIC and the World Bank have adopted the DAB model principally because of a lack of confidence in domestic courts around the world adopting mere recommendations, whereas the New York Convention on the Enforceability of Arbitral Awards provides a well proven and reliable enforcement mechanism. A consequence of this distinction is that the DAB tends to be far more legalistic and formal than the DRB process, since the outcome has a direct impact upon the respective legal rights and duties of the parties and thus natural justice and due process requires a more rigorous approach. It is possible to vary the DAB process so that the Board produces an adjudication decision as opposed to an arbitral award, which provides a mid-point between the traditional DRB and DRB.

<sup>6</sup> Matyas, R.M., A.A. Mathews, R.J. Smith and P.E.Sperry. *Construction Dispute Review Board Manual*, McGraw-Hill, 1996. 2<sup>nd</sup> ed due October 2003.

## WHAT DISPUTE REVIEW BOARDS SEEK TO ACHIEVE ?

The purposes of the DRB process are:-

- 1 To identify problems in advance and provide an informal mechanism for solving issues before they develop into disputes.
- 2 To provide a mechanism for the settlement of on-going construction disputes, involving the assistance of an independent panel of industry experts.
- 3 To minimise the cost to the industry traditionally arising out of the litigation of disputes
- 4 To provide a speedy mechanism that prevents damage to the interests of both parties.
- 5 To preserve the working relationship between the parties.
- 6 To keep disputes out of the public arena as much as possible.
- 7 To provide industry informed solutions to disputes.

## WHAT IS A DRB AND WHAT DOES IT DO ?

The Board consists of three industry experienced, respected, impartial reviewers, appointed by the parties in accordance with the construction contract terms after the contract is formalised. The board is organized before construction begins. The board is provided with contract documents and has the opportunity to become familiar with the project and the parties. The board meets with the owner and contractor representatives during regular site visits, receives progress updates and encourages the resolution of any disputes identified during those visits, at job level through informal negotiations between the parties with the guidance and assistance of the board if necessary. Where settlement is not possible the board holds hearings and makes recommendations for the resolution of the dispute.

## HOW A DRB IS ORGANISED

The owner initially evaluates the applicability of a DRB to a project. If it is decided to use the process the bidding documents will specify the appointment of a three person DRB under a three way contract to be concluded between the parties and the board as and when appointed. After the contract is awarded each party nominates one member to the board. The parties approve each other's nominee and the first two members are provided with contract documents. The First two members then select a third member and both parties approve that third member. The

third member then receives the contract documents and a three-party agreement is signed. This is followed by organizational meetings to establish how the board will operate.

## THE REPOSIBILITIES OF A DRB

A DRB should conduct periodic site-visits, keep abreast of activities and developments, encourage the resolution of disputes by the parties (though apparently the informal meetings where this is achieved are not the equivalent of mediations – perhaps because the parties themselves draft and agree any settlement without any formal involvement by the board) and if and when a dispute is referred to the board, conduct hearings, complete deliberations and prepare a timely recommendation. One to two weeks is the target timescale for recommendations.

## THE NINE ESSENTIAL ELEMENTS OF A SUCCESSFUL DRB as per The DRBF<sup>7</sup>

1. All three members of the DRB are neutral and subject to the approval of both parties
2. All members sign a Three-Party Agreement obligating them to serve both parties equally and fairly
3. The fees and expenses of the DRB members are shared equally by the parties
4. The DRB is organized when work begins, before there are any disputes
5. The DRB keeps abreast of job developments by means of relevant documentation and regular site visits
6. Either party can refer a dispute to the DRB
7. Once a dispute is referred, an informal but comprehensive hearing is convened promptly
8. The written recommendations of the DRB are not binding on either party but are admissible as evidence, to the extent permitted by law, in case of later arbitration or litigation.
9. The members are absolved from any personal or professional liability arising from their DRB activities.

## COMMON MECHANICS OF DRB PROCESSES

- The dispute resolution process is provided for in the contract.
- A five way contract is established between each member and the parties and between members.
- The board is appointed before work commences.

<sup>7</sup> Matyas, R.M., A.A. Mathews, R.J. Smith and P.E.Sperry. *Construction Dispute Review Board Manual*, McGraw-Hill, 1996. 2<sup>nd</sup> ed due October 2003. p17 para 1.3.

- Board members are supplied with all necessary documentation in advance.
- The board meets on a regular basis, is updated by the parties on progress during site visits and provides both informal and formal facilities for the settlement of disputes as they arise.
- The board ceases to exist when the project is completed.
- Lawyers play a less significant role than in arbitration and litigation. The objective is for the parties to set out their views in a non-legal manner whenever possible.
- The board is party appointed, one from either side and the chairman by the parties' appointees. The objective is to achieve a balanced membership with wide but differing expertise.
- Majority outcomes are permitted.
- The parties share the costs equally.
- Members are paid on an equal, pro-rata basis.
- Either party can refer a dispute to the board.
- All members are neutral and serve both parties equally and fairly.
- The board only meets "in toto" particularly on site visits and never meets with parties without inviting both parties to attend, and never meets with a single party without the permission of the other party.
- All communications are shared with all other parties and members. Wherever possible telephone conferencing is used to avoid any perception of bias and allegations of breach of due process.
- Members may not receive payments in cash or kind from one party.
- Members are absolved from any personal or professional liability arising out of DRB activities.

#### WHY DO DRB's WORK ?

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

getting such problems out into the open and dealing with them at an early stage. By creating opportunities for cooperation the process reduces the likelihood of disputes.

#### VARIATIONS ON THE DRB THEME

Whilst the DRBF does not approve of deviations from to their preferred format, with the exception of the DAB which it approves of for international contracts under the auspices of the World Bank and FIDIC, it should be noted that other organisations have used a variety of slightly different formats.

The appointment of a DRB involves considerable financial commitment which may be impracticable for smaller projects. Whilst appointing a DRB is a form of dispute insurance policy, a three person board may be perceived of as an expensive luxury that eats into profits, to guard against a danger that might not materialise. For this reason one man boards have been used on some smaller projects with the parties jointly selecting the member from a list or giving an external body powers of appointment. This produces some of the benefits of the DRB at a more affordable price. The disadvantage is that whilst a three person board can be made of up a variety of industry experts, for example a civil engineer, an architect or surveyor and a construction lawyer, this depth and range of expertise is not achievable with a one person board. Furthermore the recommendation of a three man panel is likely to have far greater authority than that of a single expert and thus is more coercive and effective. It may in such circumstances be necessary to institute a one man DAB instead, vested with the power to produce an enforceable award.

An alternative to the admissible recommendation is the private recommendation. These have been tried in an attempt to make it easier for the parties to commit to a non-binding settlement during informal meetings. Whilst the concept appears to encourage negotiations, it would seem that the lack of coercive power has resulted in a poor success record for this model with many more disputes ultimately having to be resolved by arbitration or litigation.

#### REFLECTIONS ON THE DRB PROCESS

A DRB cannot provide any assistance to the parties if it does not meet. However, in order to save money there has been a reluctance to convene regular DRB meetings, particularly where the panel members are remunerated on an attendance basis for attendance time and expenses. Frequently therefore, the parties have only convened a DRB after a dispute has arisen.

The problem with this approach is that the dispute prevention role of the DRB is lost. By the time the DRB meets attitudes have already hardened and the DRB hearing turns rapidly into a hard fought trial, making agreement difficult and the recommendations of the board less acceptable to parties committed to their own hard held views. To combat this, if the contract provides for the payment of a minimum fixed retainer for the panel members, the only saving that can be made by not convening a meeting arises from expenses. This greatly encourages regular meetings and has proved to be a successful mechanism for maximising the benefits of the DRB process.

One draw back of the DRB process is that it is most effective in terms of the Employer/Prime relationship but has little to offer the Main / Sub-Contractor relationship. Even where sub-contractors are invited to meetings where their interests are involved, the short period of time that many sub-contractors are present on site and are involved in the project means that they are unlikely to develop any sense of ownership in the overall project and little rapport with the members of the DRB. In fact most DRB contracts do not provide for sub-contractor involvement and the board has no jurisdiction over disputes between the Main / Sub-Contractor. This can be a serious problem because subcontractors often fulfil a central role in projects and subcontractor disputes can cause serious delay and disruption.

#### GENERAL CONCLUSIONS

Traditionally, the construction industry has developed a reputation for poor commercial relationships and destructive disputes. This is regrettable since there are seldom any overall winners from disputes which damage the interests of all the parties involved. Much progress has been made introducing new codes of practice into the industry and a modern ethos of integrity, mutual respect, cooperation and partnership founded upon negotiation and concepts of best value. However,

when the talking stops and compromise and negotiation fails, as it inevitably will from time to time, time efficient, cost effective dispute resolution processes are required.

Innovation is the hallmark of the construction industry which has had to cope with an amazing range of technical developments to meet the needs of modern society, commerce and industry. This same talent for innovation is now being extended to dispute resolution systems within the industry. The days when litigation and arbitration provided the only means of settling disputes are fading fast. The new systems and hybrid combinations of the various systems are likely to predominate in the near future. One potential way forward is to adopt a two process dispute resolution approach to large contracts, with the Developer / Prime relationship being assisted by a DRB / Arbitration dispute resolution process and the Prime / Sub-Contractor relationship being regulated by an adjudication / arbitration dispute resolution process.

It is likely that most Manufacturing Plant Construction Contracts will not be large enough to justify the appointment of a three person DRB or DAB for international contracts. Whilst a one man DAB might be appropriate, perhaps the model provided by IChemE provides a useful compromise where an independent engineer deals with day to day issues that might otherwise lead to disputes. The incorporation of an adjudication clause to provide rapid relief and enable the parties to get on with the project and plan for the future for issues that cannot be dealt with by the expert or where the parties disagree with the expert, backed up by arbitration as a fail safe mechanism provides a viable model for the future. Alternatively much can be achieved by incorporating a fast track arbitration process for smaller, less complicated disputes. Whatever the future holds, one thing is sure, change and innovation is inevitable.

**IF YOU HAVE A FRIEND OR ASSOCIATE WHO YOU THINK MIGHT BE INTERESTED IN READING THIS NEWS LETTER, PLEASE FEEL FREE TO FORWARD THIS EMAIL.**

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