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"ADJUDICATION AND CLAIM SETTLEMENT FOR THE CONSTRUCTION INDUSTRY."

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"THE ROLE OF LAWYERS AND MEDIATORS IN THE SETTLEMENT OF CONSTRUCTION CLAIMS"

FOREWORD

After what seems like a lifetime of lecturing construction law to students in Schools of the Built Environment and the like at a number of Universities, it is apparent to the writer that the majority of those working in the construction industry would prefer to have as few dealings with the law in their working lives as possible. This is quite understandable. After all, the thought processes underlying the use of bricks and mortar and the intricacies of structure and design are far removed from the machinations of jurisprudence and legal practice. The end result is that constructors construct leaving the lawyers to sort out any legal disputes that arise during the construction process. Claims settlement becomes the sole preserve of the lawyers. The lawyers make a meal out of the settlement process, which is protracted and expensive. The outcome frequently fails to satisfy.

The advent of "Alternative Dispute Resolution" [1] in the guise of mediation[2] and variants such as Dispute Review Boards and Panels appears to offer the construction industry a means to settle disputes without recourse to lawyers and the legal process. Much has been written about how wonderful "ADR" is, asserting that it offers the industry cheap, quick fix solutions for the settlement of disputes. Is ADR really as effective as it has been proclaimed to be ?

The absence of detailed explanations of how and why ADR processes work however, has led to many in the industry dismissing it as an unworkable fad or a pipe dream which is not worthy of real consideration. Disbelief has been compounded by the myriad systems of ADR that appear to be on offer. Tales abound of mediations that have produced spectacular results and of others that have completely failed to deliver the promised settlement or have produced highly unsatisfactory settlements.

This paper seeks to shed some light on the various negotiated claims settlement processes available to the construction industry, which include negotiation, conciliation, mediation, Dispute Review Boards, Dispute Review Panels, adjudication, arbitration and litigation. It will be demonstrated that ADR does in fact have much to offer the industry. However, ADR is still in the evolutionary stage. It means different things to different people. Great care needs to be taken to chose an ADR process that is right for the parties and the construction project at hand. In order to make a choice the parties need to know what process they are choosing, how it operates and what it can and cannot do for them.

If the parties fail to make a choice then claims will inevitably go to law. Even if the parties chose an ADR process it is unlikely that lawyers will be kept out of the process altogether. In fact, it will be demonstrated that settlements, which do not pay due regard to legal rights and liabilities, are unlikely to be satisfactory. ADR can however provide an alternative to the legal process. Assuming the settlement achieved is satisfactory this will be of benefit to the industry in that it should result in savings in both time and in settlement costs. Replacing adversarial court settlement with a consensual settlement process can also do much to preserve business relationships between the parties

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1 Alternative Dispute Resolution is often shortened to ADR.

2 The writer does not prescribe to the view that ADR embraces purely the negotiated dispute settlement processes such as conciliation and meditation and excludes extra-judicial settlement such as expert determination, adjudication and arbitration, but acknowledges that this is a view commonly held by many in the dispute settlement industry.

to the dispute. ADR has much to offer the construction industry but it is not a panacea for all ills and will not work without the co-operation of the parties. This paper is one small step towards empowering those in the industry to make informed choices as to the dispute resolution processes they wish to adopt to govern construction projects they engage in. [3]

Introduction to the terminology of Dispute Resolution.

The evolving world of ADR has spawned a new vocabulary to describe the alternative processes of dispute resolution embraced by the term. Unfortunately there is no consensus as to what these terms mean. For the purposes of this paper the author provides a personal definition of the most common terms with the aim of distinguishing between differing methods of dispute resolution. It is hoped that these definitions will provide the reader with a useful tool of analysis for comparing and contrasting the various ADR services currently in use.

Definitions of ADR processes with short commentary.[4]

Unassisted Negotiation.[5] The bargaining process undertaken by prospective partners to broker a commercial agreement.

Assisted Negotiation.[6] The bargaining process undertaken by prospective business partners, with the assistance of a third party, to broker a commercial agreement.

Unassisted Negotiated Dispute Settlement. [7] The bargaining process undertaken by the parties to a claim arising out of a commercial agreement, to broker a settlement of the dispute. It is to be hoped that this is the most common method used to settle construction claims.

Whilst no specific mechanism or formula is required to institute settlement negotiations many modern contracts contain a "good faith" negotiation clause, requiring any dissatisfaction with performance under a contract to be communicated to the other partner, usually in writing and frequently in a specified format. A process is set out for negotiations to be conducted within a certain period of time. Often once an issue is raised a solution can be found quickly, especially if the issue is raised promptly. This ensures that minor issues which the other party is not aware exist are not referred to lawyers and prevents mountains being built out of mole hills. The inclusion of and the implementation of such clauses is no more than good project management.

Binding Conciliation : Assisted Binding Negotiated Dispute Settlement.[8] The bargaining process undertaken by the parties to a claim arising out of a commercial agreement to broker a settlement of the dispute with the assistance and guidance of a third party, whereby the third party conciliator devises, proposes and recommends solutions to the problem to the parties.

There are two distinct versions of this form of dispute settlement which depend on which aspect of the process is deemed to be binding :-

i) **Binding Settlement Agreement** : If the parties successfully broker an agreement that agreement is reduced to a binding settlement agreement. This model has much of the characteristics of mediation and differs only to the extent that the conciliator takes an active role in formulating, proposing and selling a solution to the parties.

ii) **Binding Conciliation Decision :** If the parties fail to broker an agreement the conciliator has the power to impose a solution on the parties. This model has much of the characteristics of third party determination affording the conciliator a quasi-adjudicative role. However, unlike the mediation/arbitration or mediation/adjudication processes where at a given point in time the dispute resolution practitioner adopts a new hat and engages in a

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3 See also the website : http://www.icfox for a comparative table of the various ADR services available to the construction industry in Malaysia.

4 See also Dispute Processes ADR & primary forms of decision making. M.Palmer & S.Roberts. Butterworths.

5 For further reading on negotiation see Successful Negotiation : R.Maddux Kogan Page; Making Global Deals, J.Salacuse, Times Books; The Negotiating Game, Negotiate to Close & Give and Take, C.Karrass, Harper Business; The Win-Win Solution, S.Brams & A.Taylor, Norton; You can negotiate anything, H.Cohen , Lyle Stuart; The Complete Negotiator, G.Nierenberg, Berkley Books; The Manager as negotiator, D.Laxx & J.Sebenius, Free Press; Manager's Negotiating Answer Book, G.Fuller, Prentice Hall.

6 See Chapter 9 Managing conflict negotiation. Lawyering Skills and The Legal Process, C.Maughan & J.Webb, Butterworths.

7 See Designing Conflict Management Systems, C.Costantino & C.S.Merchant, Jossey-Bass.

8 The conciliator does not have to be a lawyer but some legal expertise is desirable.

separate adjudicative process, the conciliator is empowered to make a decision solely on the basis of the information made available during the conciliation proceedings. Uncertainty exists as to the degree of judicial control that may be exercised, by way of judicial review, over such decision-making processes. This is not a very common form of conciliation.

Non-binding Conciliation : Assisted Non-Binding Negotiated Dispute Settlement. . The bargaining process undertaken by the parties to a claim arising out of a commercial agreement to broker a settlement of the dispute with the assistance and guidance of a third party, whereby the third party conciliator devises, proposes and recommends solutions to the problem, to the parties. The parties are free to accept or reject the proposals. The conciliator cannot impose a solution on the parties. [9]

Binding Mediation : [10] The bargaining process undertaken by the parties to a claim arising out of a commercial agreement to broker a settlement of the dispute, with the assistance and guidance of a third party, whereby the third party mediator chairs joints sessions and acts as a barrier between the parties to prevent direct confrontation. The mediator does not have to be a lawyer [11] but some legal knowledge and experience is essential for commercial mediations. By the same token industry specific experience is highly desirable. By the use of private meetings the mediator explores avenues for settlement with the parties, bringing the parties together to conclude the mediation process if a settlement agreement is reached. Assuming a settlement is brokered, the agreement is reduced to writing to produce a binding settlement agreement, that is to say an agreement enforceable by domestic courts in the same way that any other commercial agreement is subject to judicial enforcement.

The key to international enforcement of mediated settlements is to carefully chose the governing law and jurisdiction of the settlement agreement, which can differ from the choice of law and jurisdiction provisions of the original contract. The country where the paying party has assets which can be secured by the court is the obvious choice. The issue does not arise of course if a cheque is handed over in settlement at the end of the mediation process.

Note that the actual settlement process is non-binding. The parties are free to leave at any time, so binding mediation does not guarantee a settlement of the dispute. This is the most common form of mediation.

Mediation processes can be mandated in a construction contract. However, there is nothing to prevent the parties to a dispute referring that dispute to mediation even if the contract or the law provides some other method of settling the dispute, such as adjudication or arbitration. Out of court settlements of disputes and ad hoc references of disputes to mediation are generally welcomed by the courts. Indeed, in the UK such references are encouraged and recommended by the CPR Rules 1998 s1(4). The courts can even impose cost penalties for a failure to actively engage in the mediation process where the parties have opted for mediation or where the judge has, during the case management stage, recommended mediation to the parties.[12]

It would appear that a mediation agreement can make engagement in the mediation process a prerequisite to the commencement of arbitration proceedings and or contractual adjudication proceedings [13] but it has recently been held that mediation is not a prerequisite to adjudication under the Housing Grants Act 1996.[14] Ways of dealing with this are discussed later in the context of Dispute Review Boards where adjudication provides a particularly attractive follow on fail-safe mechanism in the event of an unsuccessful mediation.

In the light of the above, the mediation provisions under PAM 1998 [15], clauses 35(1) and (2) are quite surprising in that they permit mediation under the auspices of a mediator appointed by the President or Deputy President of PAM but specifically prevent

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9 This form of dispute settlement is frequently used for Public Sector / Trade Union negotiations in respect of pay and conditions of work by the likes of ACAS, amongst others in the UK.

10 The NADR Mediation Manual. C.H.Spurin, NADR Press 2000; The Mediation Process, C.Moore, Jossey-Bass. Dispute Resolution, W.Goldberg, Aspen Press.

11 Some mediation systems providers only list lawyers and do not mandate industry experience, whilst others will not list lawyers except in exceptional circumstances. In the US lawyer / mediators must be state registered lawyers. There are a number of standard form mediation clauses which expressly preclude the appointment of lawyers as mediators.

12 CPR 1998 s26(4) and s44(3).

13 see Torith Ltd v Stewart Duncan Robertson EAT 1999

14 see RG Carter Ltd v Edmund Nuttal Ltd 2000 and John Mowlem & Co plc v Hydra-Tight Ltd 2000.

15 For further reading on PAM see The Malaysian Standard Form of Building Contract (The PAM 1998 Forms), S.Rajoo, Malaysian Law Journal Sdn Bhd 1999.

the mediation process from becoming a pre-requisite of arbitration.[16] PAM 1998 does not provide for adjudication.

It is perhaps understandable, that the courts in the UK were not prepared to allow mediation to delay or otherwise interfere with the statutory adjudication process but it is not immediately obvious why PAM should seek to undermine the mediation process since this deprives the arbitrator of the ability to penalise non-co-operative parties when dealing with awards of costs.

In the UK and in Malaysia mediation is currently virtually unregulated by the law and depends almost entirely on the rules and regulations of the body administering the mediation for quality control. It is therefore very important to ensure that the mediation service provider maintains high standards and is held in high regard. Mediation is however gradually being made subject to state legislation around the world, most notably in the US and Canada at present.

Nonbinding-Mediation. The bargaining process undertaken by the parties to a claim arising out of a commercial agreement to broker a settlement of the dispute, conducted as above under the chairmanship of a mediator. Any settlement that is brokered, even if it is reduced to writing, is enforceable in honour only and thus is unenforceable by the courts. This form of mediation is not common in commercial dispute settlement but is frequently used for the settlement of labour disputes, family disputes and social disputes.

Dispute Review Processes. There are a number of different bodies with various dispute settlement functions and powers. These include :-

Dispute Review Boards. These are common in the construction industry in the US [17] and have been used in Hong Kong and in the UK. A body is appointed to work alongside a construction team. The Board Members, usually constituted of two construction practitioners, often architects and civil engineers, and a lawyer, are briefed on the project at the outset and then meet periodically with the construction team to be updated on progress. The Board will advise the team as to any problems identified by the Board and can advise or assist the team to broker a solution. In the event of a failure to negotiate a solution the Board or members of the Board, will upon application of the parties, turn themselves into a dispute resolution body. The Board can become a mediation panel, an adjudicator or an arbitral tribunal or a combination of these such as mediator/adjudicator or mediator/arbitral tribunal. The advantage of such Boards is that the members of the Board are aware of the background to the dispute from the outset so little time is spent ascertaining and establishing facts, resulting in a fast track decision making process.

Dispute Review Systems and Panels.[18] These are commonly used for employment dispute settlement and involve codes of practice and procedure for internal disciplinary hearings between the employer and employee, followed by either some form of adjudication/arbitration hearing or a mediated settlement process coupled with adjudication or arbitration, with or without a right of appeal to the courts. The dispute resolution practitioner does not have to be a lawyer and will frequently be someone with extensive experience in personnel management, either for a company or other major organisation or for a trade union. If the dispute resolution process is adjudicative in nature the decision will be subject to supervision by the courts. Mandatory state provisions for the settlement of employment disputes cannot be over ridden by

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16 PAM 35(1) **Mediation Under PAM Rules** : Notwithstanding Clause 34(1) of the Conditions, upon the agreement of both the Employer ad the Contractor, the parties may refer their dispute as to any matter arising under or out of or in connection with the carrying out of the Works and whether in contract or in tort, or as to any direction or certificate of the Architect or as to contents of or granting or refusal of or reasons for any such direction, instruction or certificate for mediation under the Mediation Rules of the Pertubuhan Akitek Malaysia before a mediator to be appointed by the President or Deputy President for the time being of Pertubuhan Akitek Malaysia.
PAM 35(2) **Prior Reference to Mediation Does Not Prejudice the Parties' Rights to Arbitration.** For the avoidance of doubt, prior reference of the dispute to mediation under Clause 35(1) shall not be a condition precedent for its reference to arbitration by either the Contractor or the Employer, nor shall any of their rights to refer the dispute to arbitration pursuant to Clause 34.0 of the Conditions be any way prejudiced or affected by this clause.

17 For further information on DRB's see The Construction Dispute Review Board Manual, Matyas, Mathews, Smith & Sperry, McGraw-Hill. 1998; The Dispute Review Board Foundation Directory, 1999. See also C-opetition, A.Brandeburger & B.Nalebuff, Currency Doubleday, on the value of teamwork.

18 See for instance the NADR Employment Scheme and NADR DRS Clauses.

Dispute Review Systems, which in such situations operate on a purely voluntary basis.

Adjudication. [19] A method of third party settlement of a dispute by an adjudicator. As a general term adjudication includes court proceedings and arbitration, but in the context of alternative dispute resolution it refers to a system of immediately enforceable, binding dispute settlement where the decision may be displaced by any subsequent arbitral or judicial process. Thus, once the adjudication decision is made the parties must comply with the award. However, the rights of the parties to pursue the dispute elsewhere are unaffected by the adjudication. Adjudication enables the parties to get on with business pending subsequent court or arbitration action if they are not satisfied with the outcome of the adjudication.

The statutory construction adjudication process introduced by the Housing Grants Act 1996 is initiated by a submission to adjudication by one of the parties to the dispute. Following a submission the adjudication process becomes mandatory for the other party. A plethora of recently created government "adjudication bodies" regulating passport applications and other aspects of public service provision in the UK provide mandatory adjudication processes. By contrast there is nothing mandatory about the private adjudication process, which like arbitration, requires either a clause in a commercial contract mandating the settlement of contract disputes by adjudication or alternatively a post dispute ad hoc reference to adjudication by both parties to the dispute. Adjudication decisions are enforceable in the courts. The decision of the adjudicator is judicial in nature and therefore amenable to the supervision of the courts. Nonetheless, most private adjudication service providers have extensive rules of practice and procedure.

Arbitration. [20] A method of third party settlement of a dispute by an arbitrator. Arbitration may be provided by a government agency or by a private or chartered body. Arbitration procedures are subject to domestic statutory requirements and judicial supervision. Arbitral awards are enforceable in the courts both domestically and overseas where the New York Convention on the Enforcement of Arbitral Awards 1957 applies. Arbitration may be invoked as a result of an arbitration clause in a contract or by means of an ad hoc, post dispute reference to arbitration. Arbitration is subject to judicial supervision and most private arbitration service providers have extensive rules of practice and procedure.

Expert Determination. [21] Expert determination involves the parties to a dispute as to facts placing the decision in the hands of an expert. Expert determination is frequently mandated in a contract in respect of specific types of dispute such as the value of property. The decision is subject to judicial review by the courts.

Litigation before the courts : This is the traditional default process for civil commercial dispute settlement which once initiated by a claimant becomes mandatory for the defendant in the absence of any provisions in the contract to the contrary. The legal process varies considerably from country to country but the common feature is that the judicial decision of the court is enforced by the State and may be enforced by the courts of other states subject to a reciprocal enforcement of judgements treaty.

The reader is reminded that the labels attached to the above definitions are not universally accepted in the dispute resolution industry. The definitions are provided to enable the reader to identify distinct forms of dispute resolution process.

The Role of Lawyers in the Dispute Resolution Process.

Ask the average businessman the world over, whether engaged in the construction industry or any other industry for that matter, what he thinks of lawyers, or the law, and the response is unlikely to be flattering. There is no doubt that the services of lawyers are expensive. Coupled with that, it is generally perceived that lawyers tend to be impersonal and use specialist terms that are so meaningless to the ordinary man that they might as well be speaking a foreign language. Whilst the businessman is the eternal optimist, looking for the next big opening, lawyers are pessimists always

[19] See The Academy for Construction Adjudicators Foundation Training Course Manual for Adjudicators; Arbitration, The Journal of the Chartered Institute of Arbitrators provides regular coverage of current adjudication issues. Likewise see The Arbitration and Dispute Resolution Law Journal, LLP.

[20] For further reading see The Substantive Law of Arbitration, C.H.Spurin & G.Beresford Hartwell, University of Glamorgan Press 2000; Handbook of Arbitration Practice, R.Berstein. Sweet & Maxwell; Arbitration Law, K & A Tweedledale, Blackstone Press; Gill : The Law of Arbitration, E.Marshall, Sweet & Maxwell 2001

[21] See Expert Determination, J.Kendall, Allen & Overy.

looking to guard against every conceivable misfortune that perfidy might bring to pass. Hence, from the businessman's perspective lawyers are best avoided if at all possible, providing a port of refuge as a last resort in case of dire emergency.

This adverse view of lawyers is reiterated in a leader article in the Daily Mail. Ian Jack[22] writes that "*over the past 25 years, the number of lawyers in Britain has risen by 400%. Between 1994 and 1999 the number of applications to study civil engineering at British Universities declined by 40%. These statistics should worry us. Lawyers are not dab hands at flood plain drainage, slaughter-house construction, railway and road building*." Clearly, even if lawyers believe that they make good managers and administrators, that opinion is not generally shared. Nonetheless, when relations between construction partners break down as a result of an unresolved dispute as to how to solve a project problem or most frequently, as to who will pay to remedy that problem, resolution of that dispute is promptly handed over to the lawyers. Thus clear water is placed between the role of the artisan as producer and the lawyer as dispute settlement practitioner.

Ian Jack implies that lawyers have made things worse and contributed to a lowering of standards and efficiency and have turned Britain into an incompetent country. The visitation of a plague of locusts upon the legal fraternity would he opines be no bad thing. How or why lawyers have, in his opinion single-handedly achieved this is unclear. It is submitted that, contrary to the general view espoused by such writers, the problem lies in the establishment of administrative committees and bodies to oversee major public-private projects. These watchdogs keep the partners apart and act as a conduit for information between those who should be working and liasing closely together. The watchdog establishes rules and regulations regarding relationships between the partners which prevent rather than enhance co-operation.

Admittedly lawyers have played a role in this, in that many of the members of such bodies are lawyers, but one can hardly blame the lawyers from taking advantage of such job opportunities. The real fault lies with those who set up the administrative structures and put people who have never run anything and do not understand technology in charge of such projects. The solution lies in allowing the industry to get on with the job without excessive external interference and in providing an environment which requires the project managers to introduce, and operate, quality control mechanisms[23]. Ironically, the lawyer can then play a vital supplementary role assisting in the smooth running of projects.

Whilst it is understandable that businessmen only resort to the services of lawyers in emergencies, this is unfortunate, since the earlier lawyers become engaged in commercial dealings the sooner problems can be sorted out or even avoided completely. Indeed, the services of a legal draftsman can do much to minimise ambiguities in a contract, thus reducing the scope for subsequent problems during the course of a construction project. This is not a plea to engage lawyers to draft even more complicated and convoluted construction contracts. There is a very good case for arguing that many of the contracts in current use within the industry are the result of excessive zeal by legal draftsmen. However, much work is currently being done to revise the dispute settlement provisions in construction contracts and to integrate construction management systems and dispute settlement systems[24].

The bad reputation of lawyers owes as much to the legal environment, and the practices and procedures of dispute resolution, as it does to the general characteristics of lawyers themselves. Clients unwittingly exacerbate the perception due to the competitive and unyielding frame of mind that is frequently adopted by them once a dispute resolution process commences. Whilst the lawyer is duty bound to follow the client's instructions, as the purveyor of these instructions to the other party, it is the lawyer who is viewed as the principal obstacle to settlement, not the obdurate client who is hiding behind the lawyer. Of course, the reason the lawyer is used is because, when it comes to firing the bullets, the lawyer knows exactly how to do so to best effect.

Should we pity the poor lawyer and his unjustified reputation ? The answer is probably not, after all there may be many poor clients but not many poor lawyers. The plea "Don't shoot me I'm only the

[22] Daily Mail, 7th April 2001, Ian Jack. Editor Granta Magazine and author of the recently published book, "The Crash that Stopped Britain" which investigates the causes of the Hatfield Rail Crash.

[23] See comments on Latham and Egan below at fn 25/26 below

[24] See comments in respect of Dispute Review Boards at pp29/30 below

messenger boy !" will receive short shrift in most quarters. Is there anything that can be done to alter the public perception of lawyers and if so why bother ? The answer to the first question is "Yes, much can be done" and the answer to the second question is "because the demonising of lawyers acts as an unwelcome barrier to harmonious business relations."

The purpose of this paper is to examine recent global developments in dispute resolution practice which directly address the problems of negative perception attached to the legal profession with a view first, to encouraging a more interactive and co-operative approach by businessmen in the dispute avoidance and dispute resolution process and secondly, to encourage lawyers to actively engage themselves in the opening and development stages of commercial legal services rather than concentrate on the endgame. By so doing, lawyers can do much to alter the current negative image of their profession and industry can benefit from more efficient ways of settling disputes, quickly, with minimal disruption to business and commercial relationships whilst making considerable savings on legal expenses by avoiding protracted litigation.

Businessmen and lawyers : Towards a new relationship.

Ironically, whilst lawyers, particularly in the West, have been forced to diversify into financial services management and provision, commercial legal services have until recently been left to the in house legal teams in large commercial organisations. Even here, the role of the in house lawyer is largely to ensure that contracts best reflect the interests of their employers, to introduce information gathering techniques to ensure that if problems arise their employer will have the upper hand in any subsequent litigation and finally to steer that litigation through the courts.

A new attitude towards commercial co-operation is sweeping through some industries in the UK, particularly in the construction industry following the Latham[25] and Egan[26] Reports which, coupled with the Woolf[27] reforms, have completely altered the complexion of project management and dispute resolution and the role of lawyers. The construction industry in particular needed a new vision to cope with the problems inherent in managing projects which involve a large number of service providers such as architects, surveyors, main and sub contractors and environmental advisors. New project management systems, introduced following these reports and the enactment of the Housing Grants, Construction and Consolidation Act 1996, are considered to have produced considerable efficiency benefits for the industry.

It was inevitable that these reforms would have implications for general commercial practice. The construction industry is not the only type of commercial undertaking that involves co-operation between multiple project partners. Thus the same benefits can be enjoyed by the industry in respect of procurement contracts. Not only that, it is becoming clear that even where there are only two parties involved in a project, co-operation is more efficient and effective. The parties have a common interest in the successful completion of projects. They should not view each other as protagonists and have more to lose from the adoption of self-protection measures than they have from sharing control of the project. All of this is fine. Indeed, it reflects much of the mantra of good business practice in the current business environment, but what has it got to do with lawyers and what has it got to do with dispute resolution ? The answer lies in the nature of disputes and how they can be handled.

The Nature of Commercial Disputes.[28]

First, let us dispel a common misconception that "all disputes are bad and must be avoided at all costs." Admittedly there are individuals that thrive on quarrelling and bickering, who will engineer a dispute for no apparent reason at all. There is no justification for such conduct and it is to be deplored. That apart, the reasons and causes of disputes are legion. There is not the time available here and this is not the place, to attempt to list or categorise the many ways in which disputes might arise. Nonetheless, it is as well to distinguish between pre-contract negotiations which are not disputes at all since no legal rights or interests are at stake and post-contractual negotiation tactics aimed at forcing the other party to alter the terms and

25 The Latham Report. Constructing The Team. Sir Michael Latham. 1994.

26 The Egan Report. Rethinking Construction. Sir John Egan for the DoE. 1998

27 The Civil Procedure Rules 1999 introduced by Irvine LC following the recommendations of The Woolf Report, Access to Justice.

28 See also The Development of a New Legal Framework for the Construction Industry in the PRC. C.H.Spurin 1999. Paper to the Chinese Ministry of Construction.

conditions of the contract, which clearly amount to disputes. Whether the reason for such negotiations is simply to gain an advantage, which some might deem to be unethical rather than astute business practice or, because situations have changed in such a way that the original agreement is no longer workable, the dispute cannot and should not, be categorised as being bad. It is regrettable perhaps, but no more than that. Addressing the issue is beneficial to at least one of the parties if not both.

Whilst a badly managed dispute can have disastrous consequences, disagreements handled properly can be very beneficial, since, it is better to identify problems at the earliest possible stage and to engage in a healthy dialogue about how to solve them. That much is self-evident. The problem however, is that someone will have to bear the cost of implementing the solution. All too often, because the task of allocating costs provides a potential sticking point which could bring a project to a halt, parties may be tempted to avoid addressing identified problems or even from seeking out potential problems in the first place, hoping they will go away. Problems rarely go away on their own and have a nasty habit of resurfacing at a later stage, by which time they are far harder to deal with, particularly if there has been an absence of dialogue, trust or co-operation between the parties.

One of the unfortunate side effects of the optimism that drives business forward is that, by focusing on the potential gains, businessmen often fail to address problem solving when entering into business relations. At best the traditional contract might have included an arbitration clause. What is really needed is to establish a quality assurance mechanism to provide advance warning of potential problems. The project management team system provides such a mechanism. A mere paperwork evaluation system alone without regular site meetings is not enough. Face to face meetings are far better than dialogues conducted at a distance by phone or mail. Problems have to be directly addressed at conference meetings. The parties have to find an immediate solution, avoiding the danger of the problem being pushed to one side or shuffled from one person to another within the corporate bureaucracy. Despite the added cost of such systems the evidence indicates that the substantial efficiency benefits that result from operating project management systems justifies the cost, time and effort involved in setting them up.

Should lawyers become an integral part of such management systems ? Quality assurance itself relies on the critical and evaluative skills of systems managers. The solutions to many of the problems identified by the mechanism will involve minor alterations to current processes. The adage "A stitch in time saves nine" comes to mind. The costs involved at that stage may well be minimal. Adjustments to processes, which have no significant impact on the structure of the contract, can be carried out without involving lawyers at all.

Major problems, the solutions to which involve significant new commitments by one or more of the parties, alter the dynamic somewhat. At subsequent meetings to resolve the problem, the parties will have to discuss matters that affect and may well prejudice their interests. The very first thing that a person who has been arrested will do is to ask for a lawyer. This is deemed desirable since a skilled lawyer is able to see where a particular line of questioning is going and can advise the client on what to say or not to say, ensuring that nothing that occurs unnecessarily prejudices the client's interests. Similarly, a commercial legal advisor can play a valuable role in discussions involving the recasting of contractual obligations to reflect a new situation which has developed during the course and conduct of a project. After all, since a lawyer probably helped draft the original agreement, his presence at any negotiations to amend the agreement is logical. However, few businesses can afford to have a lawyer continually at hand, particularly where the project is modest. The mobile phone means that it is far easier these days to consult with one's lawyer before agreeing to significant alterations to a contract. Even so, the availability of one's lawyer cannot be assured. He may well be in court or otherwise engaged. One solution is to set up a Dispute Review Board, to provide impartial advice and to guide all the parties through the re-negotiation process, acting as a conduit for information and as an ice breaker if and when contentious issues arise that could otherwise lead to a break down in negotiations. Often, a fail safe mechanism is incorporated, whereby in the event of a failure to broker a solution, the Board is transformed into an adjudication or arbitral body empowered to make a finding and impose a solution in the form of a decision or award. Usually the Board must convene within 24 to 48 hours of receiving notice of a dispute.

Negotiating the settlement of disputes.

It is unrealistic to expect all commercial affairs to be carried through without incident. If anything, it is remarkable, given the complexity of modern commerce, the number of operations involved, the interaction and cooperation of so many individuals and the use of sophisticated technologies, that un-resolvable problems do not arise more often. This is due, above all, to the willingness of all concerned to get on with business, negotiate solutions to problems and a universal desire to avoid recourse, whenever possible, to third party dispute resolution mechanisms.

Clearly the arts and skills of bargaining and negotiation are a central facet of any successful commercial enterprise. When problems arise during the course of a project it is not unusual for the same skills to be employed to resolve the difficulties. The nature of the problem often dictates the appropriate solution. This however, is not possible where the personnel on a construction site confronted with the problem are not trained in team management and cooperative problem solving negotiation skills. The introduction of management teams and the retraining of construction practitioners to fulfil this new role has done much to reduce conflicts and claims in the United Kingdom but the revolution is far from complete, particularly when it comes to addressing the financial implications of solving on site problems.

Businessmen are not normally slow to accept responsibility for problems that arise in areas of operations wholly under their control. Indeed, such problems are part and parcel of the risk that business undertakes for gain and profit. Thus, if a machine breaks down or personnel mismanage a project the businessman carries the burden of rectifying the problem. One of the hall-marks of a successful business is the ability to learn from past mistakes and to develop strategies to ensure that like problems do not occur again.

The respective rights and duties of contracting parties are usually comprehensively set out in modern contacts. The parties often have the benefit of the experience of standard form contracts such as INCO [29] in the field of transportation and PAM 1998 [30] and FIDIC [31] in the construction industry. Little, in terms of the mundane and ordinary is left to chance. The biggest hurdle for contract drafters lies in providing for specifics. However, even where ambiguous specifications or instructions lead to mishaps, it is normally possible to broker an agreement to share the cost of rectifying the problem. Project partners tend to have too much at stake to allow bickering, over which of the two of them was to blame for minor misunderstandings, to bring a project to a halt particularly if the cost for each of them is less than anticipated profits.

A well drafted contract will usually contain provisions for the allocation of risk for external events, beyond the control of the parties, which might occur during the course of the project. Where events occur of a similar nature to those provided for in the contract, though not specifically covered by the terms, it is often possible for broker an agreement to extend the term to cover that event.

Even if a construction project involves the use of a project management team this alone may not be sufficient to prevent a dispute arising or provide a mechanism to settle the dispute. The team is charged with the job of identifying potential problems and designing strategies to avoid them. Frequently individual members of the team are required to negotiate together in good faith to resolve obstacles to the progress of the project. However, if the negotiations fail, the parties to the dispute find themselves back at square one. The dispute has to proceed to some form of dispute resolution mechanism. The significant change to previous practice is that increasingly contracts provide a dispute resolution mechanism involving independent members of the same management team, which takes over to settle any persistent disputes. The question that arises therefore is whether such integrated dispute settlement processes are to be preferred to totally independent third party settlement processes. There are a variety of dispute settlement processes available today including mediation, adjudication, arbitration and the courts. Therefore a second question needs to be addressed regarding which of these processes is best suited to the construction industry.

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[29] INCO Terms 1990 & 2000 : International Chamber of Commerce.

[30] The Malaysian Standard Form of Building Contract (The PAM 1998 form) replacing the Pertubuhan Akitek Malaysia and Institution of Surveyors of Malaysia PAM/ISM 1969 form.

[31] FIDIC Contracts produced by the International Federation of Consulting Engineers.

Third party dispute settlement processes.

Inevitably, as discussed above, from time to time, problems arise which, for one reason or another, a solution cannot be agreed upon. Since closure of a dispute is a commercial necessity, however reluctantly, because the disputants cannot agree amongst themselves, outsiders have to be brought in to bring it about. The traditional options available to the disputants involved arbitration (especially if provided for in the original contract) or (in the absence of agreement to the contrary) recourse to the courts. Other variants on third party settlement include expert determination and adjudication.

Business is adverse to third party settlement for a number of reasons. There is an inevitable loss of control by the disputants over the dispute resolution process once a third party takes over. Such processes are expensive, time consuming and result in much delay. Closure is assured but at a price. The usual outcome is that the winner takes all [32] and in addition the loser pays the costs of the settlement process.

Whilst this is a well-understood and accepted consequence of third party determination it is a blunt and somewhat unsophisticated concept. The stakes are therefore very high. Arbitration and court proceedings are fiercely contested. Legal experts exploit every possible advantage to gain victory. The outcome often depends on very legalistic interpretations of terms in contracts and obscure points of law. Experts are called upon to commend or condemn courses of conduct. Hindsight may indeed be a wonderful tool for future planning as one learns from past mistakes but provides a very arbitrary way of measuring things done in the past, often under pressure, and without an awareness of potential problems. Intentions are attached to actions where they never existed in the mind of the doer and harsh blame is allocated.

It is hardly surprising that many losers leave the tribunal or court with a bitter sense that "justice" has not been served well. Of course there are times when a loser graciously accepts defeat, especially where the ultimate loss is borne by an underwriter, but all too often the process makes it impossible for the disputing parties to put the affair behind them and rebuild their commercial relationship.

Even where a party wins, unrecoverable legal expenses, cash flow problems and the cost of lost business opportunities can quickly wipe out any gains. Indeed, the cost of litigation often outweighs the potential benefits to such an extent that many litigants simply abandon claims. The more risky the case, in the view of the claimant's lawyer, the more likely it is that the claim will be dropped or the parties will broker an out of court settlement. [33] The devices of Payment into Court, and Calderbank Offers in arbitration increase the risks involved in litigation since even if the claimant wins costs may be awarded to the other side if the award is less than the sum paid into court or provided for in the sealed offer. A claimant (particularly small contractors) subject to cash flow problems will often accept a poor offer of settlement rather than pursue a well founded claim to the bitter end.[34] Furthermore, it might be added, with some degree of hesitation, that judicial corruption or un-predictability in some jurisdictions (mentioning no names for obvious reasons and without any offense intended to anyone present today), makes litigation even less attractive in some countries.

Mediating settlement agreements.

If recourse to law is so unsatisfactory is there not another way of dealing with disputes ? Mediation offers a half way house between party negotiated settlements, out of court settlements and third party imposed solutions. Out of court settlements favour the party most able to bear potential legal costs of losing a case in court. The parties avoid the costs of actually going to court but still have to pay for the cost of getting close to the court house door which may well be considerable. The hard nosed negotiator is likely to get the better part of the deal. The process can be likened to "playing chicken" with the boldest emerging victorious. Settlements tend to be either very low or excessively generous and do not closely reflect the respective rights and interests of the parties. Mediation normally takes place some distance from the court house door and tends to result in far more balanced settlements. Since the parties broker the final settlement or at the least play an active and present role in the settlement process the influence of the lawyer on the settlement figure is less marked. Contingency fees

[32] The doctrine of Contributory Negligence, where applicable, provides an exception to this.

[33] It would appear that 97% of all civil court actions in the UK are settled out of court.

[34] The payment provisions introduced by The Housing Grants, Construction and Regeneration and Act 1996 have gone someway towards alleviating this problem in the U.K.

can also have a significant impact on final settlement figure.

The parties retain control over the mediation settlement process and the terms of the settlement. The mediator merely facilitates settlement. If this the case, what can the mediator offer that the parties could not provide themselves ? The answer lies in the reason why a third party was deemed to be necessary in the first place. At some stage during negotiations between the parties, some event will have occurred which lead to an impasse, an issue upon which the parties took diametrically opposed viewpoints, which led to a break down in communications and probably triggered off a succession of associated problems such as delay, additional costs and deterioration of product. One role of the mediator is to break the deadlock, by providing a new channel for communications between the protagonists, which enables them to broker a mutually acceptable solution, thereby ending the dispute and doing away with the expensive and tiresome need to arbitrate or litigate.

So, mediation is wonderful, the cure for all commercial disputes. For some the ending " ..... *and they all lived happily ever after*." might spring to mind. Is this no more than an utopian vision, a fairytale divorced from reality ? The answer is an emphatic "NO". Mediation provides an effective middle way which can and does produce viable solutions to many, but admittedly not all, commercial disputes provided both parties to the dispute are able and willing to wholeheartedly participate in the process.

What mediation cannot achieve.

It is important to recognize the limitations of the mediation process and in particular what it cannot achieve. Mediation is not usually a suitable mechanism for dealing with a mere refusal to carry out a contractual duty or pay compensation under the terms of a contract for an evident breach of contract since the party in breach is unlikely to cooperate in a voluntary mediation process[35]. Only a court or tribunal is likely to be able to secure compliance and in reality nothing is contested, so in one sense it is not a dispute in the first place. However, where the failure is due to an inability to pay mediation can offer a means of brokering a structured repayment scheme, which, whilst not the favored option of a creditor may be the only practicable way of recovering losses if immediate payment would force the debtor into insolvency, particularly if the debtor lacks sufficient funds to clear all his outstanding debts to the claimant creditor and to other creditors of equal or greater priority.

How and why does mediation work ?

The fact that commercial mediation works in appropriate situations cannot be disputed. Furthermore, since hard headed businessmen are increasingly resorting to mediation, it is evident that the terms of the settlements that result from mediation are increasingly viewed as being of long term mutual benefit to both parties. A system that produced one-sided bargains would soon lose its attraction and would be unsustainable. The question therefore is not "does it work ?" but is rather "how and why does it work ?"

Types of Mediator and Mediator Strategies and Tactics.

Despite the long tradition of mediated dispute settlement, dating back thousands of years, the precise role the mediator is hotly disputed and unsurprisingly is poorly understood. Mediation means different things to different peoples. There is a lack of universal esteem for the skills of mediators. For instance, a direct translation of the word mediator into Arabic results in the equivalent of a "meddler" or an interfering busy body. It is unfortunate that such a negative connotation might attach to such a very valuable tool for the settlement of commercial disputes. Since the term mediator is in such common global use it would be no small task to try and introduce a new name to replace it. It is hoped that by outlining how commercial mediation actually works, the reader will come to understand that the commercial mediator should not be viewed as a tiresome and unproductive meddler but rather as a positive boon to the dispute settlement process.

There are many and various codes of practice for mediators which contain lists of "Do's and Don'ts" reflecting the diverse aims and objectives of mediation systems providers and regulators involved in a wide variety of different areas of human activity. Unfortunately, when it comes to selecting a mediation service provider many of these

[35] Court Ordered mediation which is available in certain jurisdictions such as the US and Canada may ensure attendance but cannot ensure cooperation, though there may be a cost penalty for a failure to cooperate which can be imposed by a judge at a subsequent trial. See "Mediation Methods for Party Representatives", Chapter 1, NMA 1998.

codes contain extremely similar provisions, which do not necessarily explain how the mediator will function under a particular system There are several distinct schools of thought as to how mediations should be conducted and as to what amounts to the correct basis for the settlement of disputes [36] but the rules and codes of practice provide little or no illumination. Certain distinct features can be identified and these can provide some indicators as to the nature of the mediation service provided.

a) **Representation**. Some rules insist that the parties must have legal representation whilst others expressly ban legal representation. The later are unlikely to pay serious attention to legal rights and duties and will concentrate on interests and personal issues.
b) **Training requirements and accreditation for listed mediators.** Rigorous training and high accreditation levels for listing indicate that crude interest based settlements are unlikely.
c) **Extent of Service Provision.** Some mediation bodies merely appoint or recommend mediators but play no further role in service provision, which means that there is no quality control mechanism. It is unlikely that such bodies will have a mechanism for suspending or de-listing poor mediators.
d) **Client Evaluation forms and Quality Control Mechanisms**. The existence of consumer evaluation systems indicate that the provider operates quality control mechanisms since feed back from clients is an essential part of quality control.
e) **Lay and Expert Mediators.** Some mediation service providers regard the mediator as an expert negotiator who can deal with any type of dispute whatever its nature. Others guarantee that the mediator will be a specialist in the field within which the dispute arises. The general mediator will probably concentrate on interests rather than rights and duties since without an in depth knowledge of professional practice and the relevant law, the mediator will be ill equipped to deal with legal rights and duties.

For some mediators a settlement is the overriding objective. How it is achieved is of no import. Any tactic or strategy, irrespective of ideology, is acceptable if it provides a mechanism for attaining a settlement. Success is the only criteria. The end justifies the means and validates the process. Codes of ethical practice go some way towards protecting the parties from an over zealous mediator but are ineffective against peer pressure mediation tactics. Mediators with a powerful presence, typified by many retired judges who practically run the mediation as an extension of the court house, formulating "judicial" based outcomes often have very high settlement rates but long term satisfaction with the outcomes is not assured. It has the advantage of virtually taking the decision out of the hands of the parties and is perhaps, to be commended to those who do not like to take responsibility for decisions themselves.

By contrast, the so called "Principled Negotiator"[37] concentrates on drawing out the parties common interests. This often involves identifying ways in which the parties can forge new and better commercial transactions which take precedence over the original minor disagreement or whereby some element of profit is factored into the new agreement which compensates for earlier losses. Alternatively, different reasons may be drawn out as to why it is the interest of each of the parties to reach a settlement.

Taken to extremes there is an assumption by some mediators, who are perhaps better described as conciliators by virtue of the methods they adopt for the conduct of the dispute settlement process, that the overriding common interest of both parties is to settle the dispute. The mediator cajoles each of the parties in turn to make concessions, thereby narrowing the gap between them until a settlement becomes possible. A variety of reasons why expectations should be re-evaluated are provided, but the foremost reason is the need to settle the dispute. Movement by one party is portrayed as a token of good faith providing the impetus for the other party to make a like gesture. The mediator is likely to advise the parties that whatever the other party has offered is worth accepting since the dispute will thereby be brought to an end. The beneficiary will be the party who successfully makes the least movement necessary to achieve a settlement. Regarding commercial dispute settlement this is tantamount to haggling over a settlement price and little more. The higher the

[36] For a wide ranging evaluation of the various schools of thought see Dispute Resolution, Negotiation, Mediation and Other Processes. Goldberg, Sander & Rogers, Aspen Press 3rd Ed 1999.

[37] See "Getting to Yes." Roger Fisher & William Ury, Arrow Business Books. Getting Past No, W.Ury. Random House.

regard or status of the mediator in the eyes of the parties the greater the likelihood of reaching a settlement. The judge mediator adopts yet another strategy. This type of mediator formulates a solution to the problem and then uses the force of his authority or office to persuade the parties to adopt the proposal.

Whilst each of these techniques has a valuable role to play in dispute settlement it is submitted that, with the exception of certain elements of the "Principled Negotiation" strategy, they are not generally suitable for the settlement of commercial disputes.

It is submitted that the preferred method of mediation is where the mediator brain storms potential solutions with the parties and invites the parties to consider the advantages and disadvantages of taking different courses of action. A hall-mark of such mediators is that they never advise the parties as to their legal position or as to the merits of an offer. This form of mediation strips away unrealistic expectations, exposing the protagonists to a series of bottom lines, so that the parties are confronted with the expected outcomes of a variety of courses of action, be they negative or even very positive especially where they involve new and beneficial cooperative projects. The mediator then helps the protagonists to identify solutions which avoid the most extreme outcomes, highlighting what might be lost as well as what can be gained.

This form of mediation enables the parties to broker a settlement agreement based on an evaluation of the risks involved in proceeding to court or arbitration, which takes account not only of the likely cost of litigation but also of the chances of winning or losing. An evaluation of the strengths and weaknesses of a claim, the reliability of witnesses and a lowering of expectations in respect of damages claimed form a solid basis for brokering a fair and balanced settlement. Such a process is sometimes referred to as Rights Based Mediation as opposed to the Interests Based Mediation which is outlined above.

Whichever method of mediation is used, one benefit that cannot be over emphasized is that a successful settlement will enable the parties to put the dispute behind them and get on with business in a fraction of the time that would be required to go to arbitration or to court.

Distinguishing Mediation from other negotiation processes.

Mediation is sometimes used in respect of any person who acts as a third party facilitator for dispute settlement but this does little to distinguish mediation from conciliation and other settlement processes which do not make it clear that the dispute resolution practitioner is in fact acting in some sort of quasi-judicial function. Indeed the type of mediator described above who exerts considerable pressure on the parties to settle gets close to playing an adjudicative role. Conciliation has a valuable role to play in dispute settlement but courts the risk of being impugned for duress or undue influence if the conciliator over plays his or her hand. The distinction between mediation and conciliation is important since the public perception of how such mediations operate is such as to lead the public to believe that mediation has no valuable role to play in commercial dispute resolution.

Public international "mediation" typifies this problem as demonstrated by the role played by international mediators at Camp David [38] attempting to settle the Palestinian issue. "Mediation" was the principle vehicle for settling disputes over the division of Yugoslavia which concluded in the Dayton Agreement. Several "mediators" have also been involved in attempting to resolve the Northern Ireland Issue. Despite being called mediators it is notable that none of those involved was a professional mediator. Rather they were prominent politicians, often operating their own agenda and with interests in the outcome who like imperious conciliators or "God Fathers" used their position and reputation to force the parties to reach a settlement, often offering inducements to settle in the form of financial aid packages. In each instance the "mediation" process continued over a prolonged period of time. Clearly this provides little inspiration for commercial mediation and is not a suitable model for use in commercial practice.

A construction "mediator" outlines the case history of a settlement agreement that he brokered in respect of a dispute between a design and build contractor and a client regarding the construction of a University building project. As the building project progressed the client had continually revised the requirements for the use of the completed building. The building grew like "Topsy" over a

[38] President Carter and President Clinton have been active as mediators in the Middle East Situation.

prolonged period of time. The project was completed late. The contractor submitted revised invoices to cover additional expense, delay and lost profit. The client claimed the project was not delivered on time and sought to impose a penalty for late completion. The mediation failed and both parties were reconciled to litigation.

The mediator refused to throw in the towel and with the consent and approval of the parties embarked on an investigation of the matter. He then produced a report to each of the parties in turn outlining the strengths and weaknesses of their cases. The parties returned to the mediation table and a settlement was brokered which took into account the costs of delay that arose out of changing specifications but also factored in a number of negligent actions of the contractor.

The exercise was no doubt useful, successful and valued by the clients but whether or not such a process can be called mediation is doubtful. In effect the mediator became an independent construction consultant appointed to investigate and report on the events. In normal circumstances the mediator has no power to compel the parties to reveal information to the mediator. Even less has the mediator the right to reveal information disclosed to him to the other party without express permission.

If a mediation is unsuccessful then perhaps one way of breaking a stale mate is for the parties to call in a mutually appointed expert to deliver a report. The meditation process could then reconvene after the report has been delivered and evaluated by the parties. It is most unlikely in normal circumstances that a mediator would be empowered to adopt such an investigative role.

Conduct of the commercial mediation process.

Whilst no two mediations can ever be alike there are some common characteristics of the mediation process and common stages through which the process passes. These are outlined below, with an indication of variations that occur where different models of mediation are adopted.

Getting to the mediation table : Much depends on the systems and services provided by the mediation service provider. If the service provider merely lists or nominates the mediator then assuming nomination takes a few days at most it will then be up to the parties to arrange a mediation time and venue suitable to the parties. The mediator will, in the absence of any system for the exchange of information by the service provider, make arrangements with the parties for the exchange of any information that they are willing to disclose, establishing the nature of the dispute, any common ground between the parties, for the submission of claims and counter claims and for arranging for witnesses if any to attend the session.

Service providers that provide mediation facilities such as mediation venues and regulate communications between the parties will normally provide a guaranteed minimum time, subject to extensions at the behest of the parties, for the convening of the mediation session. Some internet providers guarantee a 48 hour service but commonly about one month is the target period for holding the mediation. Cooperation between the parties is essential if everyone is to be given the opportunity to prepare thoroughly for the mediation. However, there is no power to compel the exchange of information. Consequently the parties may enter the mediation knowing a great deal about the other party's view point or alternatively next to nothing at all. Likewise, the mediator may have a complete picture of the dispute or know virtually nothing.

The opening session : This is invariably a joint session with everyone in attendance. The mediator will introduce him or herself to the parties and invite the parties and their representatives to introduce themselves. The parties will be invited to briefly say how they view the dispute and what they hope to achieve from the mediation, hopefully stating what they are prepared to pay or settle for. The mediator will establish ground rules for the conduct of the mediation and explain how the mediation will be run.

The middle game : During this period the mediator will explore various avenues for settling the dispute. The joint session may continue all the way through with the parties addressing each directly with the mediator acting as a referee or chairman inviting the parties to speak in turn. The mediator may take on an inquisitorial role asking the parties questions in turn and providing the other party an opportunity to respond.

It is difficult to get the parties to consider new options in front of each other and a mediator has to maintain a very powerful presence in order to maintain control in extended joint sessions. Joint sessions tend to be very tense and there is no natural break to allow the parties to relax. There is no time

to reflect on one's position and on what is on offer or what is at stake. This provides an incentive to settle quickly but places those of a less strong constitution at a distinct disadvantage.

Alternatively, and this is the most common model of mediation, the mediator will then move to private sessions, meeting each of the parties in turn in separate rooms. At these private sessions the mediator will seek to get a better understanding of the position of the parties, their respective wants and needs, explore avenues for settling the dispute and provide a reality check for the parties. With the consent of the parties the mediator will act as a conduit for the exchange of information, offers and counter offers.

The precise role of the mediator depends on the type of mediation that takes place and it is during the middle stage, that the difference between interests based mediation and rights based mediation is most apparent. The middle game is when the real work of the mediation is carried out. The middle game may last for the greater part of a day or may last for many days or even weeks.

Closure : Once a position has been reached where a settlement is achievable or where a stale mate has been reached the mediator will bring the parties together in a joint session either to finalize the settlement agreement or to attempt to break the deadlock with a direct face to face confrontation. If the deadlock is broken often a settlement rapidly follows. Sometimes it is necessary to recommence the private sessions and return to closure later. If the deadlock cannot be breached then the parties will agree to terminate the mediation or alternatively make arrangements to return at a later date after certain issues have been resolved or additional information has been produced or the authority of someone higher up in their organization has been secured, which will enable the mediation to continue.

How much should a mediation cost ?

There are University Public Service providers that charge a mere $25 a day for mediations. The writer is also aware of a mediation involving a $500m dispute where the mediator billed the losing party $3m for the mediation. There is therefore no answer to this question. There are a number of ways pricing mediation services.

i) There are organizations that provide no more than a listing service and charge a fixed price for providing a list of mediators for the parties to select from. Alternatively the organization may select, appoint or nominate the mediator. The parties are then left to negotiate the price of the mediation with the mediator. A variant on this is that the listed mediators may agree to provide a mediation at a pre-arranged price.

ii) The cost of the mediation may or may not include the cost of the mediation venue. If the mediation is held at the offices of one of the parties this is not an issue. If it is held elsewhere then whether or not the price is inclusive of the venue affects the real cost of the mediation and must therefore be taken into account in assessing whether or not the service offers value for money.

iii) The price of a mediation service is likely to reflect what is provided within the package but it is not necessarily true to say that one gets what one pays for. Subsidized mediation services offered by community organizations and Universities can offer extremely good value for money. Some organizations offer fixed price mediation services, irrespective of the time required to mediate the dispute.

iv) Some organizations offer a range of services, the cost of which reflect the amount of money at stake in the dispute and the nature of the disputes covered by different types of service provision.

v) In house private mediation schemes for business and Dispute Review Schemes and Boards will have a fixed service charge supplemented by a modest charge for individual mediations or days of specific service provision. Construction DRB's are often priced as a fraction of the gross project price for example 0.3 or 0.5% over the duration of the project for administration plus travel costs of Board Members and a price per day per individual for attendance at site meetings. The percentage is paid up front followed by occasional charges.

vi) The most common system for one off mediation services is a fixed rate for full and half days of mediation with a provision for extensions of time. Commercial rates, shared between the parties tend to reflect the going rate of lawyers at the point of delivery of the service. The average charge in the US is approximately $2,000 a day per party. In the UK parties should expect to pay between £800 - £1,000 a day for a standard construction mediation.

An allied question is, "Who Pays for the Mediation?" The norm is for the cost to be borne equally by the parties, paid in advance. The

settlement agreement can in appropriate circumstances reimburse the "winning" party so that the value of the settlement is not diminished by the cost of the mediation. However, where a mediation system is built into supply of goods and services contracts to all clients it is often paid for entirely by the supplier as a mark of good faith and is used as a selling point for the supplier since it demonstrates confidence in the quality of the goods and services. Similarly, many employment mediation services are paid for entirely by the employer.

How long should it take to mediate a dispute ?

Community mediations often target half an hour to an hour per mediation and the community mediation will try to cover as many as eight to twelve minor disputes a day. By contrast many public international mediations are open ended and run for months or even years. Many supply of goods and services mediations aim for an hour to three hours at most and are increasingly being dealt with using internet conferencing systems. Commercial mediation models suitable for the construction industry tend to take one of two forms. Some providers will allocate a number of days with provision for extensions as required whilst others will target a single day for the mediation or a half day for smaller disputes. The difference between the two probably reflects the type of mediation on offer regarding strategies and tactics for achieving a settlement. Interest based mediations take longer than rights and duties based mediations. It can take a lot of time and effort to bring the parties around to a conciliatory position in interest based mediation. By contrast, once the parties have been given the opportunity to evaluate their respective rights and duties and the risks attendant on going forward to litigation, a position will rapidly be reached where they will either draw up terms for a settlement or the mediation will fail.

Rights based mediations establish a short time limit for decision making on the basis that the time limit helps the parties to concentrate their minds on the issues at stake. Most progress is made towards settlement in the final two hours of the mediation. Parties will not make up their minds until they have to. If the parties are given 8 hours to settle they will most likely work within that limit. If they are given 5 days then the mediation will take at least 5 days. Ironically, experience indicates that the longer the mediation progresses after the middle game has commenced the harder it becomes to negotiate a settlement as the parties' positions become entrenched. Even when a rights based mediation fails, frequently the party who has held out for an unreasonable settlement will ring back the next day, having slept on the matter and mulled it over, and request a follow on session. A settlement is often brokered within an hour or so of recommencing the mediation. It is rare for a rights based mediation to require more than one and a half days of mediation. The amount at stake and the complexity of the dispute have little impact on this. It is common for disputes involving many millions of dollars to be settled within these time scales.

Dispute Review Boards, mediation, adjudication and arbitration.

The construction dispute settlement process commences with the identification of potential construction problems and or legal issues by members of the Review Board during site visits. If the partners are able to negotiate a solution to the problems so identified and make arrangements to allocate the costs of implementing the solution then no dispute arises and the matter ends there.

A distinct advantage of the construction team / dispute review board system is that the systems governing the process ensure that any dissatisfaction with the progress of the project is aired and everyone is aware of situation. This is very significant in the UK, because with the advent of statutory adjudication there is a danger that the first time a party to a dispute may be aware of the existence of the dispute is when, following a submission of a dispute to adjudication, the adjudicator writes to that other party informing them that an adjudication process has been initiated and inviting / requiring them to comply with orders for the submission of defense, counter claims and disclosure. The ambush phenomena whereby the claimant has had a long period of time within which to prepare himself for the adjudication and gather evidence and technical reports places the defendant at a distinct disadvantage.

If the team cannot solve the problem then the full board or perhaps the Chairman of the Board alone will transform into either a mediator or mediation panel, or into an adjudication board, or into an arbitral tribunal. If the dispute settlement process commences with a mediation and the mediation fails the dispute may then proceed to either adjudication or arbitration or even to arbitration via

adjudication. The adjudication panel or arbitration tribunal may be made up of members of the Review Board or the dispute may be referred to a separate and distinct body.

One school of though considers that the fact that the mediator has an intimate knowledge of the details of the dispute enables the mediator qua adjudicator or arbitrator to quickly reach a decision and is beneficial. An opposing school of though considers that the fact that the parties have disclosed confidential information as to their positions during the mediation process means that the mediator cannot be an objective judge and is hence disbarred from adjudicating over the matter. Whilst the writer does not concur with this view, it is a valid criticism and it is up to individuals to decide whether or not they are prepared to trust the mediator to fulfill the second role. It is submitted that the Board will already have intimate knowledge of the background to the dispute and the position of the parties in-any-case so whether or not a mediation stage is introduced between the consultancy stage and the adjudication stage is neither here nor there. Nonetheless, one solution is to allow the mediator to become an adjudicator but to provide a safety net in the form of independent arbitration in the event that the parties are not satisfied with the adjudicator's decision.

In the light of the decision in **Carter Ltd v Edmund Nuttal Ltd** 2000, it appears that mediation is not a prerequisite to adjudication, so that the Dispute Review Board may be required to move directly to adjudication at the behest of one of the parties in circumstances where the Housing Grants Act 1996 applies. This would also cause problems for an arbitration DRB since a party could bypass the contract and initiate outside adjudication. This reinforces the value of the mediation / adjudication model of DRB in the UK.

The type of mediation that is conducted by the Review Board is critical to the question whether or not it is possible to have a follow on process or not. Some review boards conduct interest based only mediation and do not have a follow on procedure. Since the interests based mediation does not seek to establish the respective rights and liabilities of the parties, merely what is in the interests of the parties, the mediator is not able to adopt an adjudicatory role. Furthermore, Carter v Nuttal could displace this type of mediation DRB entirely at the option of one of the parties to a dispute. This would be regrettable since Dispute Review Boards are cost effective, can convene at very short notice and armed with prior knowledge of the project can settle disputes quickly and harmoniously.

PROLOGUE

Alternative Dispute Resolution is a young industry, which is still evolving and developing. It is hardly surprising therefore that those of us who engage in teaching aspects of ADR practice find from time to time that the tables have been turned and that they are transformed from teacher to pupil. By keeping an open mind, receptive to new ideas, our perceptions about the processes are constantly refined and enriched. The presentation of this paper in Kuching was such an event. The paper was presented in the morning. During the afternoon session Tony Bingham presented a paper on The Role of Adjudication in the settlement of construction disputes. There then followed a question and answer session during which the following questions were posed to the panel by a delegate, who introduced himself as the local head of Public Works:-

> *" Why do we need mediation and adjudication ? We have been getting on perfectly well in the construction industry without them. What is the point of confusing everybody by introducing additional layers of dispute settlement when arbitration and the courts together provide perfectly good mechanisms for dealing industry problems?"*

The response of the panel was first to ask the delegate and the floor whether or not the industry was actually doing 'perfectly well.' Our interrogator, a gentleman with many years of practical experience in the industry, and a lawyer to boot, emphatically responded in the affirmative. However, the rest of the audience comprising surveyors, architects and engineers, all working directly or indirectly at some time or another for the Public Works Department disagreed strongly. Whilst the Construction Industry Employer in Kuching was happy with the status quo the employees and subcontractors were far from contented and were eager to learn more about what ADR has to offer the industry and about other changes that have taken place within the industry in the United Kingdom.

The difference of views is not difficult to understand. The same schism was evident in the United Kingdom from the 1970'ies onwards and led

to the revolution that has taken place there. Provisions such as 'pay when paid' provided a protective buffer for the main contractor who consequently enjoyed a satisfactory relationship with the developer. The major discontentment within the industry was with the satellite industry providers who had little bargaining power and frequently found themselves, the minor players in the construction game, shouldering the burdens of cash flow and financial risks. In the absence of direct contractual relations between themselves and the employer, if the employer did not pay the main contractor they received nothing at all. The main contractor however suffered less harm having received some, if not all, stage payments.

In the United Kingdom these satellite industry providers welcomed the introduction of the Housing Grants Construction and Regeneration Act 1996 which provided mechanisms for prompt and early payment and openness in the accounting process in respect of deductions and delayed payment.[39] Any mechanism be it adjudication or mediation that could help to reduce the delay and expense involved in the settlement of claims was eagerly seized upon. This explains why construction practitioners, the very same people who by enlarge had little enthusiasm for legal aspects of training during their formative years at University now wish to learn as much as possible about the new dispute settlement processes and why there is a feeling today that deep within every quantity surveyor there is a latent lawyer bursting to break out of the shackles of construction practice.

The background to the modern ADR movement in the construction industry in the United Kingdom is well known and understood and was the reason for the presentation in Kuching, to share the UK experience with overseas colleagues in the industry so that they might work towards reaping similar benefits. Whilst acknowledging that there has been a revolution within the management structure of the UK construction industry, the adjudication of construction disputes and the mediation of construction disputes are presented as parallel developments that occurred at the same time. For this writer the seminar crystallized the nexus between adjudication / mediation and project management. Put simply, instead of viewing ADR as a way of settling disputes rather it should be seen as a way of managing disputes. Disputes being ordinary and usual within the course of a project. The management of disputes is part and parcel of the task of managing the project.

The change in emphasis introduced by the concept of managing rather than settling disputes is significant in a number of ways. Thus

- Management is a task carried out by the industry itself whilst other people, namely lawyers, settle disputes. The industry surrenders control of the process to lawyers.
- The management of a dispute implies that the problem in dispute is containable whilst settlement of a dispute implies that it is too late for containment.
- Management implies a continuation of relationships, whilst inherent in settlement is the notion that the relationship has already been disrupted. At the very least, some damage limitation work will be required in an effort to rebuild the relationship.

The link between mediation and project management is clearly evident following the introduction of Dispute Review Boards as an integral part of the project management team. The role played by adjudication is less obvious and lies partly in the perhaps unexpected but welcome way that adjudication has complemented the management revolution within the industry. Whilst the hallmark of the 1980'ies was the centralization of control the 1990'ies has been the era of devolution, placing control in the hands of those engaged at a local level in the implementation of policy.

This devolution process can be seen in respect of :

- Political control, exemplified by the introduction of the Scottish Parliament, the Northern Ireland Assembly and the Welsh Assembly
- Judicial control and responsibility for the management of cases, as demonstrated by the revisions to the Civil Procedure Rules in 1998
- Arbitral control and responsibility for the management of tribunals, introduced though the Arbitration Act 1996.

The Latham Report sought to introduce the concept of managing the team thereby devolving power from the main players, namely the developer and the main contractor to an inclusive team where the satellite providers play an equally important management role. However, having a place upon the 'Board' is of little avail if there is inequality of

[39] S109-113

bargaining power. The Housing Grants Act removes the ability of the developer and main contractor to withhold monies and through adjudication enables the satellite providers to gain a quick resolution of disputes. This has resulted in the industry seeking to negotiate and manage disputes. The satellite providers needed a device to bring the principal players to the negotiating table. Adjudication is such a device.

Our interrogator conceded that perhaps adjudication had something valuable to offer the industry, but persistent to the end posed a new question **"Why do we need mediation and adjudication ? Surely one new layer of dispute resolution is enough ?"** Whilst mediation has been widely promoted in the United Kingdom since 1990 it has had little impact on the construction industry until recent times. The problem as ever was 'Why should the payer rush to negotiate a settlement when it was in his best interests to delay payment for as long as possible ?' Since payment can no longer be delayed the payer has an interest in negotiating the best terms possible. Mediation is a consensual process and requires the consent of all the parties to work but also, in the specific context of the industry, cannot be made a pre-requisite to adjudication. Thus if the satellite players mediate the threat of imminent adjudication if best terms cannot be achieved increases their bargaining power significantly. The answer to the question is that "*Mediation allows all the players to exercise a meaningful management role in the settlement of disputes without passing control to other's outside the industry*."

A new phenomena that is now becoming evident is that frequently the parties are prepared to mediate the implementation of an adjudicator's decision. Why is this so when the winning party is entitled to immediate enforcement ? The answer lies in the scope of the adjudication and mediation dispute resolution processes. Adjudication operates best as a means of settling single issues. Whilst there may be more than one facet to an adjudication submission the process was never designed to settle all the disputes that arise during the course of a project at one time, traditionally at the end of the project. The aim was to nip problems in the bud and prevent small niggling problems from developing into major divisive issues. Likewise, whilst it is possible to have a multi-party adjudication these are likely to be the exception rather than the rule. By contrast, mediation is well suited to the simultaneous negotiated settlement of a wide range of issues and to multi-party dispute settlement. The satellite provider armed with an adjudicator's decision in his favour can enter the mediation process with enhanced bargaining power and thus broker settlements on a wider range of issues including prospective problem areas which have not yet matured into full blown disputes.

The complementary nature of mediation and adjudication, as remarked earlier in the concluding section of Part III of this paper, is evident in the Dispute Review Board process, where it was proposed that adjudication is the ideal follow on process to the failed mediation process. Why is this so ? Why not arbitrate directly or even litigate ? The obvious answer is that adjudication will produce rapid results, which is particularly significant where the claimant has cash flow problems. However, there is a deeper symbiosis between the two processes.

Mediation is clearly a contractual dispute settlement device and is most definitely not a legal process. Less obviously, so also is adjudication. The fact that it is contractual is masked by its mandatory quality in the United Kingdom, yet closer scrutiny of the Act reveals that the provisions of the Act must be expressly provided for in the contract, failing which the provisions of 'The Scheme' will be implied by statute as terms of the contract.[40] Furthermore, since the decision of an adjudicator is deemed[41] to be binding until the dispute is finally determined by legal proceedings, it would appear that the proceedings are not legal in nature. The adjudicator exercises contractual authority to determine the dispute. At no point is the adjudicator constrained in the manner by which he is to arrive at that decision. Indeed, with the exception of bad faith[42] the adjudicator cannot be held accountable for acts or omissions during the decision making process. We now know that the process is subject to judicial review and is thus of a quasi-judicial nature, but no more.

All this augurs well for the introduction of express terms in a contract providing for adjudication in spheres of operation where adjudication is not mandated by the Act. Since adjudication is a contract term based concept there is no reason whatsoever why the courts cannot apply the full

[40] s108(3) & (5)
[41] s108(3)
[42] s108(4)

range of cases that have settled issues regarding adjudication under the Act to voluntary contractual adjudication. This has implications both in the United Kingdom and for those in the industry overseas.

In the United Kingdom the Act specifically excludes from its mandatory scope the residential occupier.[43] This was perhaps because it was felt that the coercive provisions of the Act would make it far more difficult to steer through Parliament without opposition. However, if extended to non-commercial consumers the Act would also have been contrary to The European Consumer Directive 1994 which provides that consumers have an unimpeded right to litigate consumer disputes with commercial suppliers of goods and services. Nonetheless, there is nothing to prevent the incorporation of an adjudication term in a contract provided it is made clear that adjudication is optional for the consumer. This would provide the consumer with a fast track method of settling disputes with building contractors and since the consumer who takes action must take not only the benefit but also the burden implicit in the process, on such occasions the builder would have a means of ensuring rapid payment for work satisfactorily done. The cost of adjudication could be covered by insurance at a marginal additional cost to the overall project. Whilst the new fast track procedure under the Civil Procedure Rules 1998, which replace the Small Claims County Court system are available for small domestic building works, the prices of properties in the United Kingdom can rapidly take domestic construction work into the jurisdiction of the High Court, with all that that implies in terms of cost and time.

Finally, and in conclusion, Tony Bingham remarked, perspicaciously, that he has never known of a strife-ridden site, which resulted in quality work. Craftsmen will not produce their best work and take pride in what they are doing if they are bitter and disaffected. Mediation and adjudication have done much in the United Kingdom to take disputes out of the settlement process and replace it with the concept of reciprocal and mutual dispute management. It has furthermore gone some ways towards facilitating the involvement of the satellite providers in the overall management of the process, whereby these essential players in the construction game can achieve a sense of ownership and pride in the carrying out of construction projects. Mediation and adjudication have much to commend themselves to the dispute resolution process of the global construction industry. Furthermore, there is no reason whatsoever why theses processes cannot provide the same benefits to other industries.

By C.Haselgrove-Spurin.*

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MANAGING FOR BETTER BUILDING

One of the most exciting innovations in UK Commerce and Government is known as '**Best Value**'. This abstract term is explained in "The Local Government Act 1999, Part 1":

> "To secure continuous improvement in the way (local authority) functions are exercised having regard to economy, efficiency and effectiveness."

Best Value is seen on two levels . . . as a process and as an outcome. It is an end, and a means to an end. Put another way it is a *framework* in order to create a process for organisations of all types to improve their services on the basis of both cost and quality, and to continuously improve their activities in line with priorities set by the organisation. The *outcome* of Best Value means that performance, and the expectations of users, customers, and 'stakeholders' are now deemed to be as important as price. Indeed Her Majesty's Government has not only encouraged this concept generally but has gone so far as to impose Best Value as a duty on local authorities by Act of Parliament.

> "Councils need to break free from old fashioned practices and attitudes . . . our modernising agenda is seeking nothing less than a radical refocusing of Council's traditional role." *[Modern Local Government: In touch with the People 1998]*

The role of Government at national and local levels in the UK is now committed to being a *"best practice client"*. This endeavour in respect of construction industry activity began 6 years ago. A report commissioned jointly by the Government and industry ["Constructing the Team" by Sir Michael Latham. (HMSO1994)], recommended that

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43 s106

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Government Departments and the wider public sector

> *"should deliberately set out to use their spending power not only to obtain value for money for a particular project, but also to assist the productivity and competitiveness of the construction industry, and thereby obtain better value for money generally in the longer term."*

The Government at the same time showed its commitment to this principle in the White Paper "Competitiveness – Helping Business to Win" (HMSO May 1994). It encouraged continuous improvements in productivity as the driving force behind Government action as a client and the formulation of best practice should compliment and contribute to this.

'Constructing the Team', now known as The Latham Report, had a significant effect on UK construction. It not only detected the moment for innovation but echoed Government and private sector enthusiasm for seeking solutions to every day problems. It examined (inter alia):

- The "endless refining" of standard form building contract documents and the impact of Adversarial problems.
- The phasing out of "bespoke" documents and outlawing of unfair clauses.
- The development of "quality registers" for consultants, contractors, sub-contractors.
- Clearer definitions for Project Managers.
- Advice for Partnering arrangements.
- Evaluation of tenders on quality as well as price.
- A Code of Practice for the selection of Subcontractors with fair tendering procedures and teamwork on site.
- Productivity savings and cost reductions.
- A new approach to Dispute Management (called Adjudication).
- Mandatory trust funds for payment to limit the impact of insolvency.
- 'Build' insurance for defects.
- A Development Agency to drive productivity improvements and encourage teamwork.

Sir Michael Latham had spent many years by now as a Member of Parliament. He made plain that reports of this type should not end there. He recommended implementation by Statute. He had seen in his parliamentary experience too many reports simply left on one side; this time he wanted action. He got it. Her Majesty's Government detected the will of the industry in two particular areas. Cash flow in construction is vital; secondly the management of disputes was in need of reform. A Bill was introduced in Parliament in 1995. It became law on 1 May 1998. It is known as **"The Construction Act"**; its correct title is "The Housing Grants Construction & Regeneration Act 1996."
The relevant parts are confined to S104 to S117. (Available on www.tonybingham.co.uk/links) In my respectful view the Act is one of the most significant pieces of legislation in construction history. I go further; it introduces a dispute management process, which dramatically improves upon litigation performance and save huge resources in public money. The UK Courts are relieved of mass expenditure. The new system of Adjudication is cost effective and recommended world-wide. This machinery coupled with the new Payment Provisions has improved UK construction beyond all expectations . . . even the lawyers are delighted, though surprised at its success.

I will tell you more about the detail in a moment. Let me first bring you forward 3 years from 1 May 1998. In other words come right up to today. In the 3 years of the 'Construction Act' we in the UK have had experience of over 3000 adjudications. Of that number 55 decisions of Adjudicators have been examined by the High Court. About 10 of the 55 have struck down or set aside the adjudication. I have told you that because we speak not from anticipation but from experience. If I may go further, in the 3 years as a practising Barrister, my own personal experience has allowed me to represent parties as Claimant or Respondent in adjudication, to be the Adjudicator on numerous occasions, to seek enforcement of the Adjudicator's Decision and to resist enforcement in the High Court, to be legal advisor to Adjudicators, to decide complaints about Adjudicators, to train, examine and interview potential Adjudicators. Finally I have reported 52 of the 55 decisions of the High Court. And now I admit two things, I am still not wholly convinced I know precisely what Adjudication is, secondly, whatever it is the industry is very satisfied.

WHAT IS IT?

It is easier to say what it is not. It is not Litigation, nor Arbitration, nor Expert Determination, nor Mediation, nor (and this might surprise you) is it a "Legal System". I think it can be explained as:

> *"A new layer of dispute management designed for and applicable to the UK Commercial Construction industry. It neither displaces nor replaces Litigation or Arbitration or Negotiation. Instead, it is an option available at the unilateral choice of either party to a construction contract to call for an independent impartial outsider (the*

Adjudicator) who will in 28-days fairly decide on and pronounce upon the rights of the parties according to their contract. That decision shall be obliged; it is binding until the decision is finally decided in the traditional places."

EMPHASIS

- This does not replace the existing dispute resolution system.
- It is a new layer.
- It is an option, which can be ignored; it is not a pre-condition to arbitration/litigation, nor does it prevent parties mediating or reaching a conclusion of their own.
- It does not require both parties to agree. It is triggered by one party as a statutory right. It cannot be deleted from the contract.
- The contract shall contain Adjudication machinery, which complies with the Act. (8 point compliant).
- A default system called "The Scheme" (www.tonybingham.co.uk/links) applies if the contract is not compliant.
- The procedure merely has to be fair.
- The period of 28-days can be extended by agreement.
- The decision is binding (temporary finality).
- The decision is enforceable in the Courts if disobeyed.

BASIC POSITION

An Adjudicator can be called for and has "Threshold Jurisdiction" for:

(1) A Dispute, and
(2) A Construction Contract, and
(3) The Dispute is under the Construction Contract.

TYPICAL ISSUES

- Has a Variation arisen?
- Has a Variation arisen and if so what is its value?
- What is the value of a Variation?
- Was the Contract varied?
- Is a particular item a term of the Contract?
- Was a term breached?
- What is the loss arising out of a breach?
- Of competing causes of loss, which one caused the loss?
- Is the Contract late?
- Is an extension of time applicable?
- Is the extension payable/non payable?
- Is LAD payable?
- Is the Work defective?
- Is a Contra payable?
- Is insurance payable?
- Have notices been given?
- Are notices applicable?
- What is the meaning of a particular term in the Contract?
- What is the meaning of a particular word in the Contract?
- Was the Contract properly determined?
- When did the Contract reach practical completion?
- When is the "Due" Date?
- When is the "Final Date for Payment"?
- What is the value of Work properly done?
- Is the Contractor proceeding regularly and diligently?
- Is this item a Provisional sum?
- When was possession?
- What is the programme?
- Is the programme a term of the Contract?
- Has SMM been complied with?
- Are these ground conditions unforeseeable?
- Is this task temporary Works?

WHO IS THE ADJUDICATOR?

The first vital ingredient is that the Adjudicator is a person who has considerable experience of the Construction industry. Second, but just as important, the Adjudicator must know (at least) the principles of the law of contract and evidence and law of Tortious Negligence. Vital is to remember that the work of the Adjudicator is to Apply the Contract. At the heart of Adjudication is:

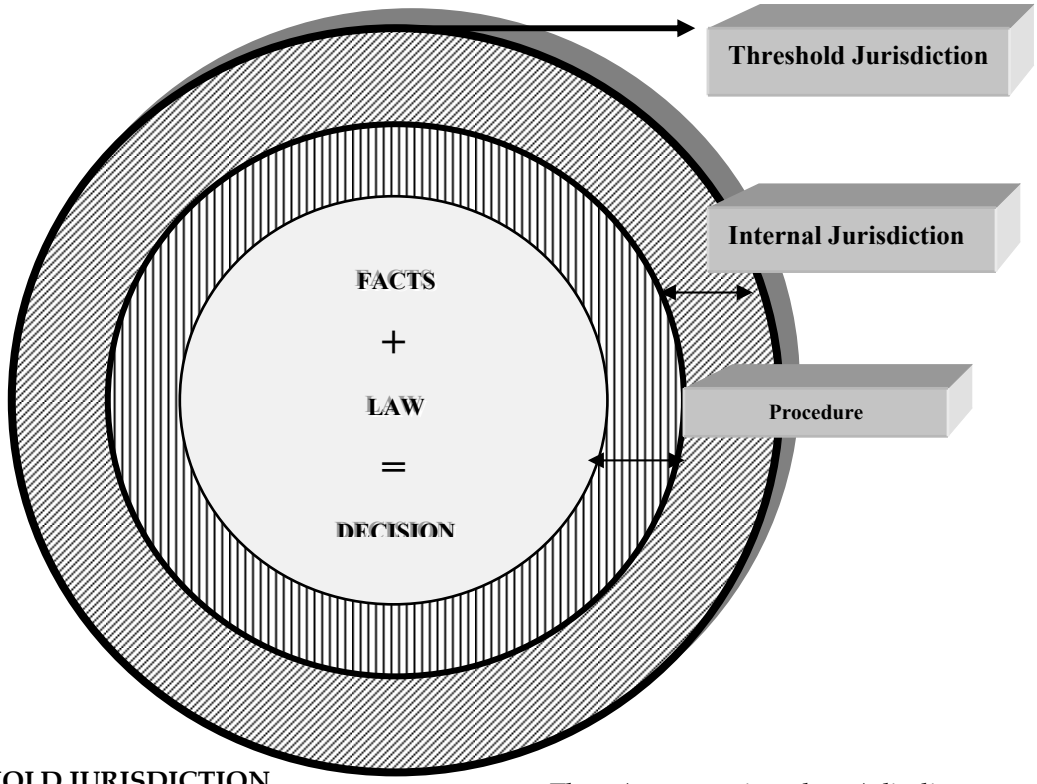
DECIDED FACT + DECIDED LAW
=
DECISION AS TO RIGHTS.

For very large construction projects I have no doubt that the most effective management of disputes is acquired from the pre-selection of a Dispute Resolution Board. These are now in world-wide use. Dispute Resolution Boards containing usually 5 or 6 persons of varying disciplines (engineer/ surveyor/ architect/ constructor/ lawyer/ engineer specialist) visit the project to a pre-arranged cycle to "cast an eye on developments". Then, if a dispute arises, one or more of the Dispute Resolution Board decides the matter using the 28-day machinery of (say) the Construction Act or any variant so agreed. For smaller contracts on Adjudicator Nominating Body appoints the Adjudicator from a panel or list of qualified people. In the UK last year for example, the Royal Institute of Chartered Surveyors made 1009 appointments from their panel of about 100 Adjudicators.

Crucially the appointee will have no conflict of interest, no actual or apparent bias, will be objective, detached and impartial.

In the UK there are several volunteer Adjudicator Nominating Body's (CIOB, RICS, RIBA, ICE, Academy of Construction Adjudicators (now changed to The Association of Independent Construction Adjudicators – AICA), The Bar, The Solicitors). Some are mentioned in Standard Form Contracts as the appointing body.

MODEL



THRESHOLD JURISDICTION

I mention this briefly for emphasis. The machinery is only mandatory (if triggered at all) for Commercial Construction Works. The UK deliberately omitted consumer disputes. Construction Works includes however not only those between Employer/ Main Contractor/ Subcontractor but also Professional Consultants disputes. Quarrels about fees are in scope.

SPECIFIC JURISDICTION

The party who calls for the Adjudicator is entitled to and should define exactly what question and what remedy is to be examined. Indeed we have learned that the 28-day programme is best suited to discrete items of difference. It is incorrect to bring numerous complex disputes to one 28-day process.

PROCEDURE

It is investigative. It is an inquiry by the Adjudicator. We have less emphasis on the traditional adversarial procedure. The Adjudicator may "*take the initiative in establishing the facts and the law*."

Having received the Referral, and some form of Response:

- The Adjudicator must be watchful that the Response does not include an unconnected dispute . . . it will be outwith Jurisdiction.
- Begin the process of INVESTIGATION of the dispute.

The Act permits the Adjudicator to take the initiative in investigating the Facts and the Law. He can be as pro-active as he wishes.

- Sometimes he will hold a hearing
- Sometimes he will call for further information.
- Sometimes he will call for a site visit.
- Sometimes he will call for Legal Advice.
- Sometimes he will call for Technical Advice.

Be warned. Notwithstanding the investigative powers of the Adjudicator, it is still up to the parties to "put" their case. The Adjudicator is not there to figure things out *for* the parties. He investigates the parties story that's all.

EXTENSION OF TIME

The Adjudicator can agree a further 14 days by agreement with the Referring Party.

Longer time needs Adjudicator *and* both parties agreement.

THE DECISION OR AWARD

The Adjudicator, in my view, should be asked to give reasons with his Award. It will focus his mind.

Some Adjudicators are helped by stating a list of issues to be decided. Remember there will be SUBSTANTIVE ISSUES (the ultimate Issue) of which there may be 1, or 2, or 3, or more. The pathway to the ultimate issue is strewn with minor issues too. List them. It helps.

The Decision is Binding.

Ask the Adjudicator to deliver it in 'DRAFT' first (to check him for errors).

Indicate that the Decision on monies should be of whatever sums are excluding VAT . . . the parties will deal with VAT on top of the Award as applicable.

The Award will say when monies should flow, unless it is a mere "declaratory" Award, *e.g.* Extension of Time.

THE JOB IS TO:

(1) Apply decided FACT to Decided LAW/Rules of the Contract.
(2) FACTS are decided on EVIDENCE.
(3) LAW is the Law of Contract, *i.e.* the Rules in the bargain.

ENFORCEMENT

The Award says Parliament is to be obeyed. The UK Courts do just that. Summary Judgment will be given notwithstanding obvious errors of Fact or Law. Only bias or absent Jurisdiction sets a decision aside.

Thereafter, standard litigation/arbitration will decide the same dispute without reference to the Adjudicators decision. It is not an appeal.

THE SECOND LIMB

The "Construction Act" explains not only (New) Adjudication but has the second limb of (New) Payment Provisions. They are the Cinderella features of the legislation. Adjudication is an exciting concept, which is mandatory to be in the Contract but only triggered on demand. But the Payment Provisions are wholly mandatory. They must be engaged and must be used on a day to day basis to control cash flow.

The principle is that the payer will use a system of "Notices" for money movements, namely the "Green Notice", "Amber Notice" and "Red Notice"

THE GREEN NOTICE

This piece of paper must be sent within 5 days of the Interim Valuation date and before the actual due date for the cheque. It will say:

(1) What is payable and how calculated;
(2) The date of payment of the forthcoming cheque.

THE AMBER NOTICE

The condition precedent to "withholding" money from amounts otherwise due is the Amber Notice.
To be effective and therefore entitled to withholding, the notice must say:

(1) The reason or reasons for withholding, and
(2) The amounts applicable to each reason.

Served late or incorrectly set out means that the money is not to be withhold.

THE RED NOTICE

If money is wrongly withheld, the payee is now entitled to postpone his Works. He merely served the 7-day Red Notice.

These new provisions must be expressed in the Contract. If not, the default mechanism of **"The Scheme"** is an implied term. The Scheme contains all the payment machinery for monthly payments and the 3 notices.

CONCLUSION

I said at the outset that the UK Government and Commerce was looking for "Best Value". We do not see litigation or any other form of long-winded dispute resolution procedures as "Best Value" any longer. The public resource cost in running our Courts is excessive. On the other hand we see disputes in commerce and construction in particular as an ordinary and natural consequence of a dynamic which are fast moving and always, for each project, a different adventure. Building tasks change by the day because clients want to and are invited to change their minds. Hardly is it a surprise when doubts creep in about time and cost consequences. We invented Adjudication to quickly stifle disputes, decide quickly and prevent disputes descending into conflict. Conflict creates bad value. Best of all is the innovation of the visiting Disputes Resolution Board. Its influence on large projects is without doubt and most remarkable calming effect. So much so that the numbers of disputes are remarkably low.

I am confident that Best Value comes from good management. The management of disputes is but an aspect among many. I commend Adjudication and Dispute Resolution Boards to you here.

Tony Bingham[44]

[44] 3 Paper Buildings, Temple, London, EC4Y 7EU, England, April 2001

CULTURAL CONFLICT IN CONSTRUCTION ?

S.D.Summerhayes BSc, MSc, CEng, MICE

Sir John Egan[1] said of the UK Construction Industry….

'' The under-achievement of construction is graphically demonstrated by the City's view of the industry as a poor investment. The City regards construction as a business that is unpredictable, competitive only on price and not quality, with too few barriers to entry for poor performers. With few exceptions, investors cannot identify brands among companies to which they can attach future value. As a result there are few loyal, strategic long-term shareholders in quoted construction companies.''

Egan essentially put a commercial/business angle on problems that had been voiced by Banwell[2] in 1964 and Latham[3] in 1994. All of whom had identified construction as unable to deliver projects :-

"ON TIME: ON COST and ON QUALITY."

In the context of the above, it is also worth noting the comments from two construction disasters, separated by over one hundred years of apparent technical and procedural development.

Rothery's report into the 1879 **Tay Bridge disaster** (75 deaths) concluded that …

''…this bridge was badly designed, badly constructed and badly maintained, and that its downfall was due to inherent defects in the structure , which must sooner or later have brought it down. Sir Thomas Baulch is, in our opinion, mainly to blame. For the faults in design…he was entirely responsible. For the faults in construction …he was principally responsible. For the faults in maintenance… he was principally if not entirely responsible.''

The Health and Safety Executive's report into the **1994 Heathrow Express collapse** blamed …'***foreseeable organisational failures''*** for what it described as one of the worst civil engineering disasters in the UK in the last 25 years. It said that .. '***a cultural mindset***' focused on apparent economies and the need for production rather than particular risks. The root cause was identified as a catalogue of design and management errors, poor workmanship and quality control. Investigators found that the accident exhibited '***all the hallmarks of an organisational accident'***.

Together, the above provide a damning indictment on the way in which the construction industry has failed to manage its resources and deliver its remit.

But what remit?

Is it to provide client satisfaction by completion to budget, specification and time or is it to maximise profit margins at the expense of all else. Is the continuum

COST or QUALITY?

Are criticisms justified and are the problems truly institutionalised and therefore representative of cultural difficulties or is the process of construction management one that the industry to date has not yet fully mastered?

But let us consider some of the issues.

Sir John Egan[1] in the foreword to '*THE REPORT OF THE CONSTRUCTION TASK FORCE entitled ,'RETHINKING CONSTRUCTION'*..noted that…

'We have learnt that continuous sustained improvement is achievable if we focus all our efforts on delivering the value that our customers need, and if we are prepared to challenge the waste and poor quality arising from our existing structures and working practices.'

He was also moved in …..

'…issuing a challenge to the construction industry to commit itself to change, so that, working together, we can create a modern industry, ready to face the new millennium.'

The problems identified in the executive summary of that report noted the following key areas of concern

Under-achievement:-

- Low profitability
- Too little investment in capital, research and development and training
- Dissatisfied clients

and provided the following focus:-

Key drivers of change:-

- Committed leadership
- A focus on customer
- Integrated processes and teams
- A quality driven agenda
- Commitment to people

Targets:-

- 10% reduction in construction cost/year
- 10% reduction in construction time/year
- 20% reduction in defects/year
- 20% reduction in accidents/year.

It identified the need for modernisation and was the motivation for the current Movement for Innovation (M4I) initiatives.

These initiatives were recommended by the Construction Task Force, the name given to those individuals and organisations who are committed to act to improve the performance of the construction industry to the benefit of clients and to the benefit of those employed within the industry.

It is intended to be a dynamic, inspirational, non-institutionalised body of people who truly believe in the need for radical improvement within the construction industry.

The cynic, however, might be forgiven for noting that with one exception all the members of the Construction Task Force are representatives of major clients.

It is interesting to note that with the advent of partnering, some enlightened contractors have also become more selective about the clients with whom they enter into contract, preferring to develop longer term relationships based on mutual respect and repeat business.

Key Performance Indicators, as identified in the **M4I** programme are essential allowing the industry to benchmark itself against its own pre-determined standards. But if the culture is to evolve by incorporating all issues what about KPIs in respect of

- Tender appraisal criteria.
- Client/Professional advisor response time
- Valuation payment time
- Design alterations after commencement
- Number of variations issued
- Invocation of Alternative Dispute Resolution

In addition to the M4I initiative, the CONSTRUCTION BEST PRACTICE PROGRAMME is jointly supported by Government and works alongside the M4I programme in disseminating the innovations and lessons from the Demonstration Projects to a wider construction audience. Understandably it can be seen to promote client's interests with the following…..

Aims:

- Improve competitiveness
- Raise client satisfaction
- Transform outmoded Management practices

Business culture

Benefits:-

- Enhanced company profile
- Improved productivity
- Business expansion opportunities
- Increased client satisfaction
- Repeat business opportunities
- Reduced staff turnaround

- Team motivation
- Reduced accidents
- Reduced disputes

Themes for Business Improvement:-

- Benchmarking
- Briefing the team
- Choice of procurement
- Culture and people
- Health and safety
- Information technology
- Integrating design and construction
- Lean construction
- Partnering
- Risk management
- Pre-assembly
- Supply chain management
- Sustainable construction
- Value management

Whole life costing The recent ' *Modernising Construction* ', report presented to Government by Sir John Bourne , head of the National Audit Office further noted that…..

> ***'With Government plans to increase infrastructure spending to £19 billion over the next three years, the need for widespread implementation of good practice now has a greater degree of urgency.***
>
> ***This report highlights the urgent need for change in the procurement and management of new construction, refurbishment and repair and maintenance. The problems of the construction industry have been well described in the many reports on the industry, the solutions to many of these problems have been identified- there is no excuse for not getting it right.'***

Whereas in the past the concept of Government as a best practice operator was itself a conflict of terms, perhaps there is now a suitable climate to embrace that change.

However, unless in delivering client satisfaction, the client himself focuses on added value and not the bottom line of minimum cost, this discussion as a prelude to essential change will be a continuing debate thirty years from now.

In considering any cultural change influencing construction it would be inappropriate not to provide a perspective that embraces health and safety management.

In project management terms there has been for some time a cultural move to integrate health and safety management into a cohesive facet of all projects. There is now a regulatory framework of health and safety legislation serving construction based on a '*deemed to satisfy'* approach unlike earlier prescriptive forms of legislation.

The underlying philosophies serve not only health and safety but also project management itself based on aspects of

- Proactivity
- Co-ordination
- Communication
- Teamwork

managed through a visible audit trail of accountability. It is still apparent that much debate continues on responsibilities, effectiveness and outcomes. Despite its intent, fatalities are increasing, occupational diseases remain an issue, profitability is undermined and control is not exercised.

Whilst legislation itself cannot provide the paradigm shift required for cultural re-alignment the industry notes that…

- Fines are increasing
- Imprisonment is a possibility
- Manslaughter charges may possibly be brought
- The pattern and profile of death increases
- Long-term occupational health problems continue
- Civil legislation gathers pace.

In looking at the problems I would not wish to end on a negative note before moving on and it is worth considering another statement from the ' *Rethinking Construction'* Report..

' UK construction at its best is excellent. We applaud the engineering ingenuity and design flair that are renowned both here and overseas. The industry is eminently flexible. Its labour force is willing, adaptable and able to work in the harshest conditions. Its capability to deliver the most difficult and innovative projects matches that of any other construction industry in the world.'

Whilst the above examples draw on the UK construction industry experience they nonetheless represent an opportunity to benchmark wider issues on the global scene.

Developing economies have particular and often similar problems in respect of :-

- Productivity levels
- Procurement transparency
- Imported labour
- Quality control
- Material costs
- Sub-contracting dependence
- Low foreign investment
- Lack of risk management culture
- Environmental issues
- Population trends
- Decline of public client
- Competitiveness
- Construction management pedigree
- Suppressed profile of construction
- Market position

All these strike at the heart of project management and provide challenges at government, company and individual level.

It was not the intention of this paper to portray the UK Construction Industry as the benchmark standard for others to follow for I believe we have much to learn from each other. Indeed, I am not the spokesperson for that industry but have experience , which has allowed me a personal insight and which hopefully can be shared for mutual benefit.

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