



**DISPUTE RESOLUTION IN THE CONSTRUCTION INDUSTRY:
AN OVERVIEW**

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Introduction

This paper provides an introduction to the dispute resolution techniques that are frequently encountered in the construction industry. The focus is the UK domestic market, but international dispute adjudication boards are also considered. Arbitration has been the traditional method for the resolution of construction disputes for many years, until the introduction of a range of ADR techniques, adjudication and the introduction of pre-action protocols in litigation.

The three core processes of dispute resolution are considered before introducing the range of frequently encountered techniques. Each of the main dispute resolution techniques is then considered in turn. The purpose is not to delve into the detail of each technique, but to provide an overview and draw out the main distinctions between the processes, whilst setting out the key characteristics of the techniques.

The spectrum of dispute resolution techniques

The “conventional” model of dispute resolution is one of an adjudicative process, most frequently fulfilled by the courts. According to Schapiro the ideal court, or more properly the prototype of the court, involves⁽¹⁾:

(1) an independent judge applying (2) pre-existing legal norms after (3) adversarial proceedings in order to achieve (4) a dichotomous decision in which one of the parties was assigned the legal right and the other found wrong.

He goes on to say that an examination of the courts across a range of societies reveals that the prototype “fits almost none of them”. Nonetheless, this does provide a suitable starting point for what one might call the conventional model of dispute resolution. This is clearly at the formal binding end of the spectrum. At the other end of the scale, problem

⁽¹⁾ Schapiro, M. (1981), *Courts: A Comparative and Political Analysis*, Chicago and London, The University of Chicago Press.

solving between the parties represents the informal, non-binding approach, the successful outcome of which is an agreement to “settle”.

In its most basic form direct negotiation provides a simple party-based problem-solving technique. A further dimension is added when either party introduces advisers. Nonetheless, the essential feature of this process is that control of the outcome remains with the parties. Litigation and arbitration require the parties to submit their dispute to another who will impose a legally binding decision.

Negotiation is a “process of working out an agreement by direct communication. It is voluntary and non-binding.” The process may be bilateral (between two parties) or it could be multilateral (many parties). Each party may utilise any form of external expertise it considers necessary, and this is often described as “supported negotiating”.

Mediation is a “private, informal process in which parties are assisted by one or more neutral third parties in their efforts towards settlement”. The new and distinguishing feature here is the addition of a neutral third party who aids the parties in dispute towards settlement. A further important factor is that the mediator does not decide the outcome; settlement lies ultimately with the parties. A distinction is often made between styles of mediation that are “facilitative” and those that are “evaluative”. During a facilitative mediation, the mediator is trying to reopen communication between the parties and explore the options for settlement. The mediator does not openly express his or her opinions on the issues. If, on the other hand, the mediator is called upon to state his or her opinion on any particular issue then he/she is clearly making an evaluation of that issue.

Mediation or conciliation refers to a process in which an independent third party reopens or facilitates communications between the parties and so aids the settlement process. The process can be facilitative in that the third party merely tries to aid the settlement process, or evaluative in that the third party comments on the subject matter or makes recommendations as to the outcome. In the UK, the facilitative style of third-party intervention is most frequently referred to as mediation, and conciliation is reserved for the evaluative process. ACAS is most widely associated with this evaluative style of conciliation in labour disputes, and more recently the ICE in connection with conciliation in civil engineering disputes. On the other hand, CEDR promotes a style that is more focused towards the facilitative end of the spectrum and refers to this as mediation. The position is not necessarily the same internationally. Mediation refers to a more interventionist evaluative approach in some parts of the world.

Table 1: Facilitative and evaluative processes

Mediation or Conciliation	
<i>Facilitative</i>	<i>Evaluative</i>
The mediator/conciliator aids the negotiation process, but does not make recommendations	The mediator/conciliator makes a recommendation as to the outcome

In practice a mediation which starts off in a purely facilitative way may become evaluative in order to try and reach a settlement. This may occur intentionally, at the request of the parties, or with forethought on the part of the mediator, or unintentionally by the words or actions of the mediator. The boundary is clear in theory, but not necessarily in practice. Nonetheless, at a basic level a distinction can be made between "settlement" processes and "decision" - imposing processes. Control of the outcome, or the power to settle rests with the parties during negotiation, mediation and conciliation. By contrast, "adjudicative" or "umpiring" processes, such as litigation, arbitration and adjudication, rely on the judge, arbitrator or adjudicator having the power to impose a decision.

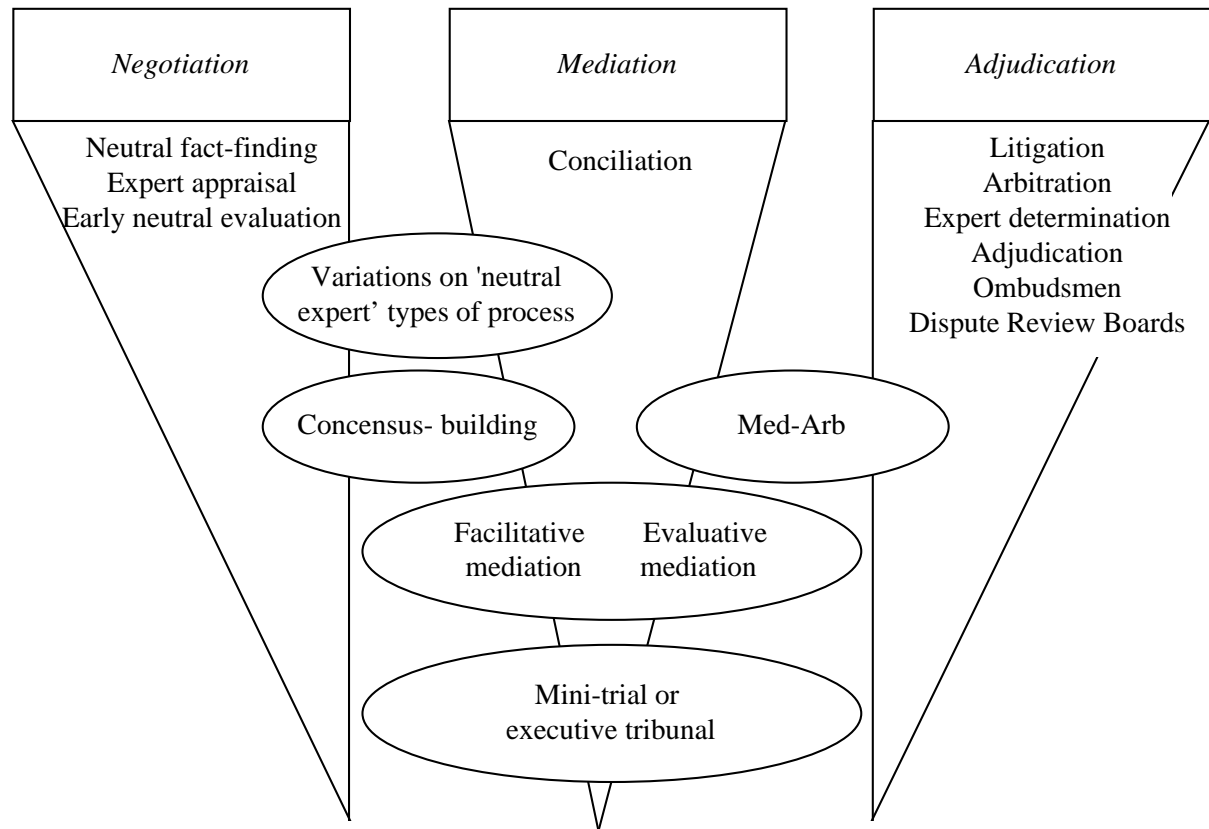
Table 2: Settlements and decisions

Control of the outcome rests with the parties	Decisions are imposed
Negotiation	Litigation
Mediation	Arbitration
Conciliation	Adjudication
	Expert determination

What we have then are three core techniques that may be employed in the resolution of disputes. First, negotiation, which refers to the problem-solving efforts of the parties. Second, third-party intervention, which does not lead to a binding decision being imposed on the parties. Finally, the adjudicative process, the ultimate outcome of which is an

imposed binding decision. Such an approach has been adopted by Green and Mackie (1995), who refer to the “three pillars” of dispute resolution.⁽²⁾ The discrete techniques may be introduced under one of the three pillars, depending upon the main characteristics of the particular technique (see diagram below).

Figure 1: The dispute resolution landscape



Source: Mackie, K. Miles, D. and Marsh, W. (1995), *Commercial Dispute Resolution: An ADR Practice Guide*, p. 50. The chart was derived from a chart by Professor Green of Boston University (1993).

Arguably, all dispute resolution techniques are built upon three basic principal methods: negotiation, mediation/conciliation, and some form of adjudicative umpiring process.

Disputes pyramid

Only very few disputes result in litigation or arbitration. Many disputes are resolved or settled through a wide range of alternative processes. Research by Sarat (1985) demonstrated that an even greater number of claims and grievances emerge but are not pursued.⁽³⁾ He suggests that the stages of a dispute's manifestation and escalation could be

⁽²⁾ Mackie, K. Miles, D. & Marsh, W. (1995), *Commercial Dispute Resolution*, London., Butterworths

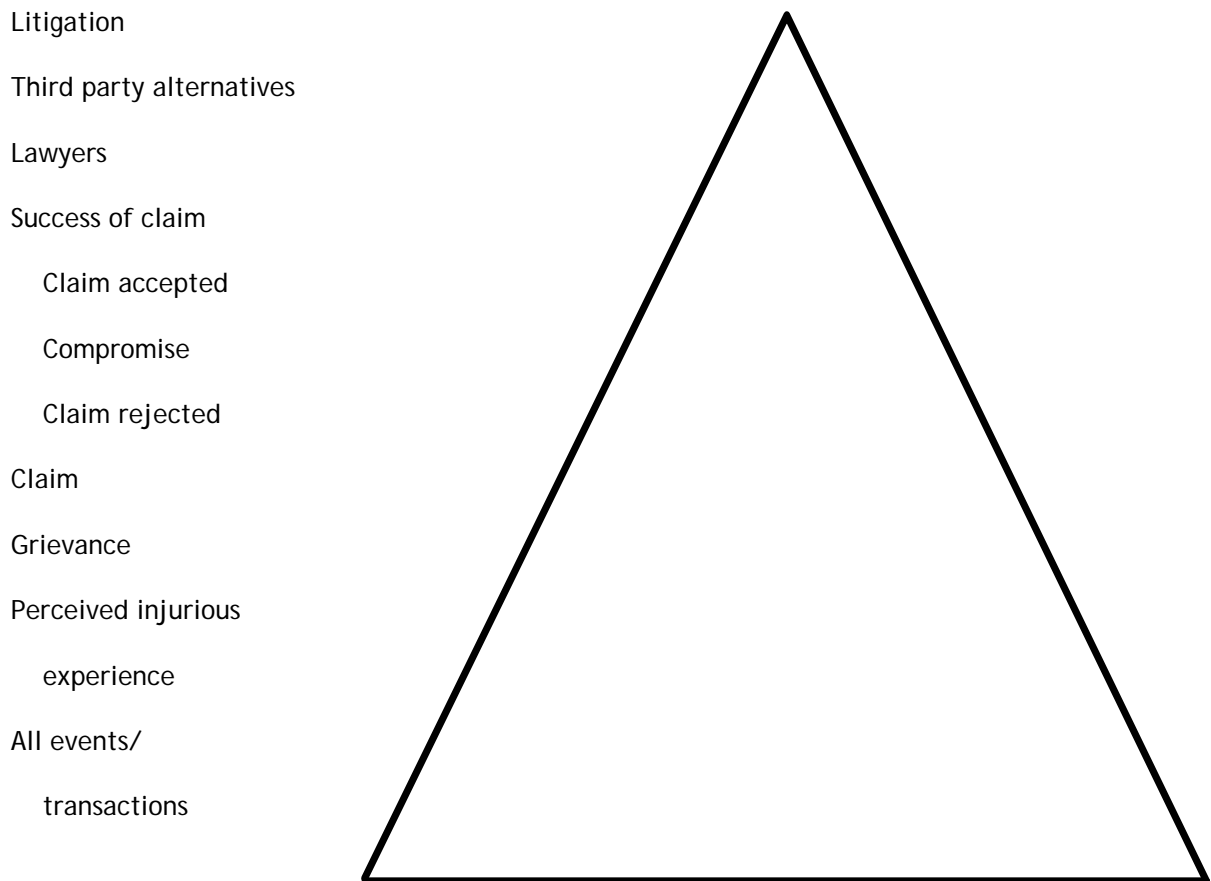
⁽³⁾ Sarat, A. (1985), "The Litigation Explosion, Access to Justice, and Court Reform; Examining the Critical Issues, 37" *Reutgers Law Review* 299, at p. 332.

represented visually as a pyramid. This "disputes pyramid" represents the stages in the disputing process.

Gallanter makes reference to the disputes pyramid, stating that the lower layers relate to the construction of disputes, whilst the upper layers relate to lawyers and the courts.⁽⁴⁾ He considers that the official system of the courts and lawyers may be visualised as the upper layers of a massive legal iceberg. Data may be collected on the occurrences of litigation which is in the public domain. He goes on to consider that there are three main categories of alternative to litigation:

1. **Unofficial systems.** This includes all forms of private settlement process.
2. **Inaction or lumping it.** This means that the complaint or claim is not pursued.
3. **Exit.** This refers to a withdrawal from a situation or relationship by moving, resigning, severing relationships or finding new partners.

Figure 2: The disputes pyramid



Source: Sarat, A. (1985), "The Litigation Explosion, Access to Justice, and Court Reform: Examining the Critical Issues 37" *Reutgers Law Review* 299, at p. 332.

⁽⁴⁾ Gallanter, M. (1983), "Reading the landscape of disputes; what we know and what we don't know (and think we know) about our allegedly contentious and litigious society" *UCLA Law Review* 31, p. 4.

The use of exiting from a relationship will essentially depend upon the availability of alternative opportunities or partners. Unofficial systems comprise a continuum of situations where parties settle amongst themselves by reference to the official rules and sanctions provided by the institutional facilities.⁽⁵⁾

Alternative dispute resolution (ADR)

The term ADR has attracted a great deal of attention in legal and quasi-legal fields since the mid-1980s. However, the 1990s appear to have witnessed an enormous growth in the "ADR debate" with an ever increasing sphere of academics, lawyers and consultants entering the arena. Although the concept of dispute resolution techniques which are an alternative to the court system is not new, the more recent advent of the acronym is essentially taken to describe the use of a third party mediator who assists the parties to arrive at a voluntary, consensual, negotiated settlement. Whilst the origins of mediation may be ancient and Eastern, the recent more formalised technique has principally developed in the USA.⁽⁶⁾

In the UK, mediation was initially taken seriously in the resolution of family disputes.⁽⁷⁾ But, has mediation, or other alternative methods, attracted equal attention in construction? Not only is the construction industry important nationally and internationally, but it is also, arguably, the largest industry in the UK; attracting an equally large volume of diverse disputes, across a wide range of values.

The literature available indicates that ADR is a widely discussed discipline within the jurisprudence of construction disputes. Many writers provide an anecdotal review of the subject matter. Few writers venture beyond the normative to consider the reality of ADR, and many assume that this term relates only to mediation. In fact, many writers reveal their attitude towards the subject by suggesting that ADR may be taken to mean any of the following:

- Alternative dispute resolution;
- Appropriate dispute resolution;
- Amicable dispute resolution;
- Another dammed rip-off;
- Another disappointing result;
- Another drink required.

⁽⁵⁾ Galanter, M. (1974) "Why the 'Haves' Come Out Ahead: Speculation on the Limits of Legal Change", *Law and Society*, Fall, 95-160.

⁽⁶⁾ Pheng, L. S. (1996), "The Influence of Chinese Philosophies on Mediation and Conciliation in the Far East", *Arbitration*, February, p.16-20.

⁽⁷⁾ Roberts, S. (1996), "ADR and Lawyer Negotiations" in Odams, A.M. and Higgins, J., *Commercial Dispute Resolution*, Construction Law Press, London, pp. 229-241.

Nonetheless, some empirical research does exist. The Turner Kenneth Brown Report found that executives responsible for company legal services believed that ADR offered far more advantages than disadvantages, with 75% of the respondents considering ADR developments as a positive step and only 6% considering it negative.⁽⁸⁾ Watts and Scrivener provide a comparative analysis of construction arbitration in Australia and the UK.⁽⁹⁾ In the US, research by Stipanowich (1996) has documented the rise of mediation, which was first taken seriously by the US construction industry.⁽¹⁰⁾ Apparently the Army Corp of Engineers pioneered the process in order to reduce the high costs of litigation. Stipanowich's recent survey indicates that 76% of the respondents had been involved in mediation during the 12 months preceding the completion of the questionnaire.

In the UK, Fenn and Gould completed a project based on Stipanowich's US survey.⁽¹¹⁾ Surprisingly few mediations appear to have taken place in comparison to the size of the industry. Whilst 70% of the respondents could recount the benefits of ADR, less than 30% had actually been involved in an ADR process. In fact none of the respondents had been involved in more than five mediations in the preceding 12-month period. More recently Brooker and Lavers report on their work in the specific area of ADR in construction disputes, and accuse contractors of avoiding mediation.⁽¹²⁾

The results of the largest survey of dispute resolution in the construction industry carried out just before the introduction of adjudication is set out in Gould, N., Capper, P. *et al.*⁽¹³⁾

Benefits of ADR

Maintains a business relationship

The proponents of ADR argue that processes such as mediation can maintain existing business relationships as the parties are aided towards a settlement.

Speed

The average mediation lasts 1-2 days. The proponents of ADR frequently compare this to a trial lasting years. It is, however, important to remember that the parties may not be in a position to forge a settlement early on in the dispute process and it may in fact take many months or even years before they are in a position to mediate effectively.

Lower cost

Clearly a short mediation is a cheaper event than a trial or arbitration. Some argue that lawyers are unnecessary in the process (and therefore a further cost saving is made) while others consider lawyers a valuable addition.

⁽⁸⁾ Turner Kenneth Brown (1993), *Alternatives to Litigation in the UK*, Turner Kenneth Brown Library, London.

⁽⁹⁾ Watts, V. and Scrivener, J. (1994), *Building Disputes Settled by Litigation. Comparison of Australia and the UK.*

⁽¹⁰⁾ Stipanowich, T. J. (1996), "Beyond Arbitration: Innovation and Evolution in the United States Construction Industry" 31 *Wake Forest Law Review* 65.

⁽¹¹⁾ Fenn, P. and Gould N. (1994), "Dispute Resolution in the UK Construction Industry" DART Conference Lexington, Kentucky, USA, 16-19 October.

⁽¹²⁾ Lavers, A. and Brooker, P. (1997), *Contractors' Negative Attitudes are Hindering the Development of ADR*, paper delivered to Arbrix Club, King's College London.

⁽¹³⁾ Gould, N., Capper, P., Dixon, G. and Cohen, M., (1999), "Dispute resolution in the construction industry," Thomas Telford, London.

Confidentiality

The proceedings of a mediation are confidential. Contrastingly, litigation is in the public domain and arbitration may become public if there is an appeal. Confidentiality is an advantage as some clients wish to keep their disputes from the public domain.

Flexibility

Arbitration and litigation are based upon the rights and obligations of the parties to the dispute. On the other hand a mediated settlement focuses on the parties' interests and needs. The mediator encourages the parties to search for a commercial solution which meets with both parties' needs.

Greater satisfaction

Many proponents of ADR argue that the ADR process and the outcomes are more satisfying for the parties than a trial or arbitration. Apparently the reaching of a settlement by consensus is viewed as producing high levels of satisfaction for the parties. Research has suggested that high levels of satisfaction are not attained. However, a mediated outcome is still more satisfactory than other forms of imposed decisions such as litigation, arbitration or adjudication.

Perceived disadvantages of ADR

I will disclose my hand

Parties are frequently concerned that they may disclose some important aspect of their argument which will then aid the other side in the event that the mediation is not successful and the matter proceeds to trial. Mackie *et al* suggests that this belief is more perceived than real and notes three points.⁽¹⁴⁾ First, if a party has a strong case then disclosure of the strengths is likely to assist in settlement. Second, if the party has a weak case then there is perhaps little advantage in "prolonging the agony". Third, if as in the majority of instances the case is not particularly strong or weak then surely it is best to consider ADR.

There is pressure to settle

Some of those individuals who have experienced mediation suggest that as the process goes on the pressure to settle builds. This is no doubt borne out by the fact that many mediations are over during the course of one day and that frequently the parties and the mediator will work late into the evening in order to forge a settlement.

I will give the impression of weakness or liability

Some have argued that to suggest ADR or mediation demonstrates a weakness in the case. While this may have been true at the start of the 1990s, it is arguably less of a disadvantage today.

⁽¹⁴⁾ See footnote 2

Mediation and conciliation

To mediate means to act as a peacemaker between disputants. It is essentially an informal process in which the parties are assisted by one or more neutral third parties in their efforts towards settlement. Mediators do not judge or arbitrate the dispute. They advise and consult impartially with the parties to assist in bringing about a mutually agreeable solution to the problem. A mediator does not impose a decision on the parties in dispute, but assist them to reach their own settlement.

The origins of mediation and conciliation can be traced to China some 3,000 years ago. More specifically, China has used these techniques as a primary dispute resolution process whilst other parts of the world have resorted to some form of adjudicative process. State courts have been used as a mechanism to support socialist ideals and, as such, have performed a controlling function with regard to activities considered as criminal.⁽¹⁵⁾ On the other hand, activities relating to commerce fall outside of socialist ideals, as do non-criminal matters relating to private individuals. The resolution of these disputes by informal processes was encouraged in order to maintain "harmony" in the community.

More recently, and probably during the past 10 to 15 years, there has been a growing international awareness of the benefits of mediation as a dispute resolution technique. In the US, research by Stipanowich has documented the rise of mediation, which was first taken seriously by the US construction industry.⁽¹⁶⁾ Apparently the Army Corps of Engineers pioneered the process in order to reduce the high costs of litigation.

In the UK, this recent move towards mediation under the banner of ADR first developed in the area of family disputes. The commercial sector began to take an interest in the late 1980s and CEDR was formed in 1990 in order to promote ADR in the general commercial setting, primarily through mediation. Specifically in relation to the construction industry, the ICE established a conciliation procedure in 1988. More recently, the courts have piloted a court-based mediation scheme.⁽¹⁷⁾

Adjudication

The term adjudication can be misleading. In its general sense it refers to the process by which the judge decides the case before him/her or the manner in which a referee should decide issues before him or her. More specifically, adjudication may be defined as a process where a neutral third party gives a decision, which is binding on the parties in dispute unless or until revised in arbitration or litigation. This narrow interpretation may refer to the commercial use of an adjudicator to decide issues between parties to a contract. The use of an adjudicator is found in a variety of standard forms of contract used in the construction industry.⁽¹⁸⁾

Until recently, adjudication in the construction industry has displayed certain characteristics. First, the adjudicator is a neutral individual who is not involved in the day-

⁽¹⁵⁾ Palmer, M. J. E. (1991) 'Mediation in the People's Republic of China: some general observations' in Mackie, K. J. (ed.) *A handbook of dispute resolution*, Routledge, London. p221-230

⁽¹⁶⁾ Stipanowich, T. J. (1994), *What's Hot and What's Not*, DART conference proceedings, Kentucky, October.

⁽¹⁷⁾ Butter, N. (1997), "Mediation and the Courts: first official pilot mediation", *The Expert*, September, p. 17

⁽¹⁸⁾ McGaw, M. (1992), "Adjudicators, Experts and Keeping out of Court", *Legal Obligations in Construction*, Constructional Press pp. 605 - 664.

to-day running of the contract. He or she is neither an arbitrator, nor a state-appointed judge. Second, the adjudicator enjoys his or her powers by virtue of the agreement between the parties. In other words, the parties have agreed by contract that the decision of the adjudicator shall decide the matter for them. Third, the adjudicator's decision is binding on the parties, and therefore, unlike mediation, the process does not require the co-operation of both parties. Fourth, adjudicators decisions are usually expressed as being binding until the end of the contract when either party may seek a review of the decision, most commonly by arbitration. Finally, adjudication is not arbitration and is therefore not subject to the Arbitration Act 1996.

It follows, therefore, that an adjudicator's powers are limited to those which are contained in the contract. For example, the DOM/1 (a widely used standard form of sub-contract) made use of an adjudication provision in relation to payment and set-off. However, the position changed on 1 May 1998 with the introduction of statutory adjudication under the Housing Grants, Construction and Regeneration Act 1996.

Statutory adjudication

The introduction of statutory adjudication under section 108 of the Housing Grants Construction and Regeneration Act 1996 was one of the key recommendations in the Latham Report (1994). Latham recommended that a system of adjudication should be introduced within all of the standard forms of contract, unless some comparable arrangement already existed for mediation or conciliation. He further recommended that the system of adjudication should be "underpinned by legislation", capable of considering a wide range of issues and that the decision of the adjudicator should be implemented immediately.

Housing Grants, Construction and Regeneration Act 1996

The Housing Grants Construction and Regeneration Act received royal assent on 24 July 1994. However, those parts relating to construction (Part II of the Act) were not brought into force until the Scheme for Construction Contracts had been affirmed by Parliament. The Scheme and that part of the Act relating to construction commenced on 1 May 1998. At the same time an exclusion order reduced the scope of adjudication in relation to certain statutory provisions, contracts relating to private finance initiative finance agreements, and development agreements.

The Act sets out a framework for a system of adjudication. All construction contracts must meet this minimum criterion. Should a contract fail to meet these minimum requirements then the Scheme for Construction Contracts will apply. A consultation document was issued by the then Department of the Environment in November 1996. This document indicated the likely content of such a scheme. However, this document received widespread attention and criticism.⁽¹⁹⁾

Statutory adjudication - the process

Under Part II of the Housing Grants, Construction and Regeneration Act 1996 a party to a construction contract is unilaterally given the right to refer a dispute arising under the

⁽¹⁹⁾ Enderson, G. (1996), *Disputes, Draft Provokes Fury in Construction*, 28 March, p. 2.

contract to adjudication. The Act only applies to "construction contracts" which fall within the detailed definition of section 104 for example; "architectural design, surveying work or to provide advice on building, engineering, interior or exterior decoration or the laying out of landscape in relation to construction operations" are included within the scope of the Act, whilst contracts of employment are expressly excluded.

In addition, a construction contract is defined so as to include an agreement to carry out "construction operations". Construction operations are further defined in section 105 to include a wide variety of general construction-related work together with a list of exceptions. A notable exception is a construction contract with a residential occupier.

Section 108 sets out the minimum requirements for an adjudication procedure. These may be summarised as follows:

1. **Notice:** A party to a construction contract must have the right to give a notice "at any time" of his/her intention to refer a particular dispute to the adjudicator.
2. **Appointment:** A method of securing the appointment of an adjudicator and furnishing him/her with details of the dispute within 7 days of the notice is mandatory.
3. **Timescale:** The adjudicator is then required to reach a decision within 28 days of this referral. It will not be possible to agree in advance of any dispute that additional time may be taken for the adjudication.
4. **Extending the timescale:** The adjudicator may extend the period of 28 days by a further 14 days if the party referring the dispute consents. A longer period can only be agreed with the consent of *all* the parties. Such agreement can only be reached after the dispute has been referred
5. **Act impartially:** The adjudicator is required to act impartially.
6. **Act inquisitorially:** The Act requires that the adjudicator "takes the initiative in ascertaining facts and the law". This gives the adjudicator power to investigate the issue in whatever manner he or she deems appropriate given the short timescale available.
7. **Binding nature:** The decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration or by agreement. Phillip Capper suggests that "the 'until' formulation gives an unfortunate interim air to the decision almost inviting the view that it ought to be reopened at a later stage".⁽²⁰⁾ The Act does, however, go on to say that the parties may agree to accept the decision of the adjudicator as finally determining the dispute.
8. **Immunity:** The adjudicator cannot be held liable for anything done or omitted in the discharge of his/her function as an adjudicator unless acting in bad faith. This protection is extended to any employee or agent of the adjudicator.

⁽²⁰⁾ Capper, P. (1997) Adjudicator, Dispute Resolution 97, *CIC Conference on Arbitration, Adjudication and Expert Determination in Construction*, London Hilton, 15 January.

The Scheme for Construction Contracts⁽²¹⁾

If the construction contract does not comply with the above eight requirements then the Scheme will be implied into the contract. Alternatively, if the construction contract does comply with the above provisions then the parties may include further more detailed provisions and perhaps a procedure for enforcement. Essentially then the parties can achieve compliance with the Act in one of four ways:

1. the parties could adopt the Scheme;
2. adopt one of the standard forms of contract which sets out a series of adjudication rules;
3. adopt one of the alternative sets of rules, for example, the Institution of Civil Engineers Adjudication Procedure, the Construction Industry Council Model Adjudication Procedure or the Centre for Dispute Resolution Rules for Adjudication, the Institution of Chemical Engineers Adjudication Rules, the Technology Court Solicitor's Association Rules; or
4. draw up their own set of bespoke rules.

Section 114(1) provides that the Secretary of State for England and Wales and the Lord Advocate for Scotland "shall by regulation make a Scheme ('the Scheme for Construction Contracts') containing provisions about the matters referred to" in the Act. The Scheme for England and Wales was introduced by a statutory instrument which commenced on 1 May 1998 (Statutory Instrument 1998 number 649). In its consultation paper, the Department of the Environment (as it was) stated that:

The Scheme may be used to remedy deficiencies in contractual adjudication agreements...and also to provide payment terms.

The Scheme detailed in the statutory instrument is divided into two parts; the first dealing with adjudication, and the second with payment. If a construction contract does not contain adjudication provisions, which satisfy the eight key requirements of the Act then the Scheme applies in its entirety. The aim of the Scheme is to provide a series of workable arrangements which detail the mechanics of adjudication in the event that either no provision is made in the contract or an inadequate provision is included in the contract.

The Scheme is therefore an attempt to provide a workable adjudication procedure which supplements the skeletal regime in the Act. For example the Scheme states that the written notice must briefly set out the nature and description of the dispute, the parties involved, details of where and when the dispute arose, the remedy sought and the names and addresses of the parties to the contract. Further, the Scheme contemplates that there may be more than two parties to the contract and requires the notice of referral to be given to "every other party". In addition, an attempt is made at joinder of related disputes and different contracts and the adjudication at the same time of more than one dispute, but only with the consent of all parties.

⁽²¹⁾ The Scheme for Construction Contracts (England and Wales) Regulations 1998 (SI No. 649)

Alternative standard form rules

A range of alternative standard form adjudication procedures have developed from different corners of the industry. The Construction Industry Council (CIC) launched the first edition of the Model Adjudication Procedure.⁽²²⁾ The CIC is an umbrella body which seeks to represent both the supply and demand side of the construction industry. At the same time the Official Referee's Solicitors Association produced an adjudication procedure.⁽²³⁾ More interestingly, the Centre for Dispute Resolution (CEDR) was quick to establish an adjudication procedure.⁽²⁴⁾ At the time 99% of CEDR's work was in the field of mediation, and one might speculate that the development of CEDR's rules related to market sector protection rather than market opportunities, as their rules remind parties that mediation can be used at any time.

From a legal perspective it is helpful to consider the construction industry as comprising the building sector and the civil engineering sector. Standard forms for building work have traditionally been dominated by the Joint Contracts Tribunal (JCT), while the Institution of Civil Engineers' standard forms have dominated the civil engineering side of the industry. These two bodies have adopted slightly different approaches to the Act. JCT's Amendment 18 was clearly a large-scale amendment to the JCT form, and one which included its own adjudication procedures. A large proportion of Amendment 18 has been incorporated in the 1998 versions of the JCT Standard Form Contracts. On the other hand, the ICE choose to produce a stand-alone adjudication procedure that is then referred to in the standard forms. In addition, the ICE have attempted to maintain conciliation within the framework of their multi-tiered dispute resolution clause, whilst leaving the engineer's decision as the primary tier.

Arbitration

Arbitration is a process, subject to statutory controls, whereby formal disputes are determined by a private tribunal of the parties' choosing. According to Stephenson, Lord Justice Sir Robert Raymond provided a definition some 250 years ago which is still considered valid today:⁽²⁵⁾

An arbitrator is a private extraordinary judge between party and party, chosen by their mutual consent to determine controversies between them, and arbitrators are so called because they have an arbitrary power; for if they observe the submission and keep within due bounds, their sentences are definite from which there lies no appeal.

Providing arbitrators stay within the law, there is generally no appeal from the arbitrator's award, and the award may be enforced by the courts if necessary.

Arbitration is essentially a process which is available as an alternative to litigation. The parties must agree to submit their dispute to arbitration and a distinction is often drawn between existing and future disputes. The distinction is of historical importance because

⁽²²⁾ The Construction Industry Council Model Adjudication Procedure First Edition is the TeCSA Adjudication Rules, 2002, version 2.0

⁽²³⁾ TeCSA Adjudication Rules 2002 version 2.0

⁽²⁴⁾ CEDR (1998) Rules for Adjudication, including guidance notes

⁽²⁵⁾ Stephenson, D. A. (1998), *Arbitration Practice in Construction Disputes*, 4th Edition, Spons, London.

some jurisdictions, notably France, would not until comparatively recently recognise agreements to refer future disputes to arbitration.

The advantages of arbitration are well rehearsed and include: flexibility, economy, expedition, privacy, freedom of choice of arbitrator, and finality. On the other hand, the disadvantages of arbitration appear to have been on the increase. In comparison to litigation, where the judge and court facilities are provided at public expense, the parties to an arbitration will ultimately have to bear the costs of the arbitrator and the facilities. Where, as is often the case in construction, more than two parties are involved in a dispute there is relatively little statutory power to consolidate the actions in one arbitration. Some forms of contract such as the JCT and the FCEC form of sub-contract provide for consolidation in limited circumstances.

The Arbitration Act 1996

The Mustill Committee in its 1989 report recommended the development of a new arbitration act. The committee recommended against the adoption of the UNCITRAL Model Law on international and commercial arbitration ("The Model Law") despite the fact that this has been adopted in a great many countries around the world. The Mustill Committee considered that the existing English arbitration law was sufficiently well developed that the practical disadvantages of enacting a model law would outweigh any advantages. However, the committee considered that the existing law was unsatisfactory for a variety of reasons. Firstly, most of the law on arbitration is to be found in case law and is often only accessible to specialist lawyers. Secondly, the existing statute law was dispersed in a variety of Acts. Finally, the disjointed and illogical arrangement of the existing statutes, together with the complex terminology, is incomprehensible to the layman.

The initiative for a new Act moved gradually forward, first, in a drafting bid under the Marriot Working Group, and then under the umbrella of the Department of Trade and Industry. A draft bill was published in February 1994. According to Ambrose and Maxwell (1997), "the bill was subject to much criticism and around 2,500 comments were received during the 5 month consultation period".⁽²⁶⁾ In November 1994, Lord Justice Saville became the Chairman of the Departmental Advisory Committee (DAC).⁽²⁷⁾ The new draft was published in a consultative paper in 1995. (A final report and supplemental report were published in 1997.) The bill was debated in the House of Lords and then passed on to the House of Commons before being committed to the Special Public Bill Committee procedure. The Act received royal assent on 17 June 1996.

The aim of the Arbitration Act

Five main objectives underlie the Act:

1. To ensure that arbitration is fair, cost-effective and rapid.
2. To promote party autonomy, in other words to respect the parties, choice.

⁽²⁶⁾ Ambrose, C. and Maxwell, K. (1997) *London Maritime Arbitration*, LLP, London, p. 9.

⁽²⁷⁾ The Right Hon Lord Justice Saville (1997) Departmental Advisory Committee on arbitration law, report on the arbitration bill (Feb 1996) & supplementary report on the Arbitration Act 1996 (Jan 1997)

3. To ensure that the courts' supportive powers are available at the appropriate times.
4. To ensure that the language used is user friendly and clearly accessible.
5. To follow the model law wherever possible.

The first of these objectives is included in section one of the Act:

The provisions of this part are founded on the following principles, and shall be construed accordingly -

- (a) The objective of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;
- (b) The Parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;
- (c) In matters governed by this part of the Act the court should not intervene except as provided by this part.

The process of arbitration

The process of arbitration can be considered under four main headings:

- the agreement to arbitrate
- the arbitrator
- the procedure
- the award and enforcement.

The agreement to arbitrate

Parties can agree to arbitrate once a dispute has arisen, or more commonly they may agree to refer future disputes to arbitration should the need arise. Section 6(1) of the Arbitration Act recognises this distinction and defines an "arbitration agreement" as "an agreement to submit to arbitration present or future disputes". The definition does not restrict arbitration to merely contractual disputes, and could include a range of matters such as tortious claims. There are limits to the kinds of dispute which may be "arbitrable", for example criminal matters cannot be settled privately by arbitration.

Section 6(2) of the Act states that a reference to an agreement that does contain an arbitration clause constitutes a valid agreement to arbitrate. This resolves a frequently encountered problem in the construction industry. The case of *Aughton Limited v M.F. Kent Services Limited*⁽²⁸⁾ found that merely referring to a standard form contract which contained an arbitration clause did not amount to an agreement to arbitrate. The parties needed to include a written agreement to arbitrate in their primary agreement. Section 6(2) apparently solves this problem.

⁽²⁸⁾ [1991] 57 BLR 1

An arbitration agreement must be in writing, but this is interpreted widely and includes any method of recording the agreement such as electronically or on tape. The agreement to arbitrate need not be complicated. In fact, the words “English Law - arbitration, if any, London according ICC rules”, has been held to constitute a valid arbitration agreement which provided for arbitration in London under the ICC rules in accordance with English Law.⁽²⁹⁾ In practice, a detailed arbitration agreement is recommended in order to avoid arguments over the validity of the agreement, provide a method of appointing an arbitrator and establish the arbitrator’s powers.

The JCT 1998 Editions of the Standard Form of Contract provides an arbitration agreement which the parties may choose to adopt. Article 5 of the contract contains the agreement to arbitrate, whilst clause 41 deals with issues such as the appointment of the arbitrator, the joinder of additional parties, the reviewing of certificates and instructions, the nature of the award, ability to appeal and also confirms that English Law is applicable. It states what to do if the arbitrator dies or ceases to act and provides that the arbitration is to be conducted in accordance with the JCT arbitration rules. These rules provide a detailed structure for the arbitration process.

The arbitrator

A variety of methods exist for the appointment of arbitrators. An arbitrator or arbitrators may be appointed by agreement of the parties. Alternatively, the parties may have agreed that an institution will appoint an arbitrator on their behalf. Alternatively, the Court may appoint an arbitrator. The most frequently used method in construction contracts is to provide a timescale within which the parties can agree the name or the sole arbitrator, failing which either party may request that the president of a professional institution select and appoint an arbitrator.

Section 33 of the Arbitration Act requires that the tribunal should:

- (a) Act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and
- (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.

The arbitrator’s dilemma is to progress the arbitration and issue an award which deals with the matters in dispute whilst acting fairly and impartially between the parties. At the same time the arbitrator must not exceed his or her powers but must observe the agreed procedures whilst dealing with all of the issues raised.⁽³⁰⁾

Section 29 states that an arbitrator is not liable for anything done or omitted in the discharge of his function as an arbitrator unless the act or omission is in bad faith. This

⁽²⁹⁾ *Arab African Energy Corporation Limited v Olieprodukten Nederland B.V.* [1983] 2 Lloyd’s Rep 419

⁽³⁰⁾ Section 68

immunity does not apply if the arbitrator resigns. However, the court has a power to grant the arbitrator relief from liability if the court considers that it was reasonable for the arbitrator to resign.⁽³¹⁾

The arbitrator obtains his or her powers from the agreement between the parties, the applicable rules and the Arbitration Act 1996. The Act provides the arbitrator with wide-ranging powers, all of which are subject to the agreement of the parties.

The procedure

Arbitration commences when one party sends the other a notice stating that a dispute has arisen between them and refers it to arbitration. If an arbitrator has not been named in the contract, then that party will also send a “notice to concur” in the appointment of an arbitrator. If the parties are unable to agree on an arbitrator then it is common for the professional institutions to appoint one, although this can only be done if the parties have agreed that this mechanism is appropriate. Most commonly, a procedure for default appointment is included within their contract.

Arbitration rules may adopt one or more of the following three possibilities:

- procedure without a hearing (documents only);
- full procedure with a hearing; and
- short procedure with a hearing.

The procedure without a hearing anticipates that the arbitrator will make an award based on documentary evidence only. The parties support their statements with a list of relevant documents together with a copy of any documents upon which they rely. The short procedure may be appropriate for disputes which are simple in nature. The timescales are short, allowing only 28 days for the entire process. This procedure is not frequently used. However, when it is used it is not uncommon for the parties to agree to extend the timescale. Finally, the full procedure with a hearing provides that the parties will serve their statements of case and that the arbitrator will conduct a full oral hearing. Often the parties will be legally represented, expert witnesses are appointed and evidence is given under oath.

The award and enforcement

The arbitrator’s award is final and binding on the parties unless they agree to the contrary.⁽³²⁾ Section 66 of the Act provides that the award may, with leave of the court, be enforced as if it were a judgment of the court. The ability for a party to challenge the award is extremely limited. On issuing the award the arbitrator becomes *functus officio*. This means that the arbitrator’s duty and powers are at an end and save for minor corrections the arbitrator is relieved of his task.

Frequently, the arbitrator may make more than one award, each award dealing with different issues. These “partial awards” or “interim awards” could relate to a part of the

⁽³¹⁾ Section 25

⁽³²⁾ Section 58

claim or an issue that affects the whole of the claim.⁽³³⁾ An interim award is not provisional in nature but is final and binding with respect to the issues with which it deals. The benefit of interim awards is that a major issue can be dealt with by the arbitrator as a preliminary point which dispenses with the need to spend time and money on related issues. The resolution of an important issue early in the proceedings may lead the parties to settle the whole of the dispute.

Should the parties settle the dispute, then the arbitrator may issue a consent award which records the parties' agreement. Such an award is capable of enforcement in the courts. Unless the parties have agreed otherwise then the arbitrator has the power to award a wide range of remedies:

- order payment of money;
- make a declaration of the rights between the parties;
- order a party to do or refrain from doing something;
- order specific performance; and/or
- order the rectification, setting aside or cancellation of a deed or document.

In addition, section 49 of the Act provides that the arbitrator can unless otherwise agreed by the parties award simple or compound interests. This is an interesting provision as in most instances the court can only award simple interests. Rarely does the court have the power to award compound interest.

Litigation in the Technology and Construction Court

Part 60 of the CPR deals with Technology and Construction Court claims. The Technology and Construction Court means any court in which TTC claims are dealt with in accordance with Part 60. A claim may be brought in accordance with Part 60 as a TTC claim if:

- (a) it involves issues or questions which are technically complex; or
- (b) a trial by a TCC judge is desirable.

The practice direction gives examples of claims which may be appropriate, and these include:⁽³⁴⁾

- (a) building or other construction disputes including claims for the enforcement of the decisions of adjudicators under the Housing Grants, Construction and Regeneration Act 1996;
- (b) engineering disputes;
- (c) claims by and against engineers, architects, surveyors, accountants and other specialist advisers relating to the services they provide;

⁽³³⁾ Section 47

⁽³⁴⁾ 2.1 of the TCC practice direction

- (d) claims by and against Local Authorities relating to their statutory duties concerning the development of land or the construction of buildings;
- (e) claims relating to the design, supply legislation of computers, computer software and related network systems;
- (f) claims relating to the quality of goods sold or hired, and work or, materials supplied by services rendered;
- (g) claims between landlord and tenant for breach of repairing covenant;
- (h) claims between neighbours, owners and occupiers of land in trespass, nuisance etc;
- (i) claims relating to the environment (for example, pollution cases);
- (j) claims arising out of fires;
- (k) claims involving taking of accounts where these are complicated; and
- (l) changes to decisions of arbitrators in construction and engineering disputes including applications for permission to appeal.

The above are set out in the practice of direction by way of example. A TCC claim forms a part of the specialist list, and is dealt with by a TCC judge. A TCC claim must be issued in the High Court in London, a District Registry of the High Court, or a County Court specified in the practice of directions. All claims are treated as allocated to the multi-track and so Part 26 does not apply.

An appropriate TCC claim that has not been commenced in the TCC, can be transferred by application to a TCC judge.

One of the key characteristics of the TCC is the management of the case by the judge. A TCC judge is assigned to the case at the commencement of the proceedings. The Court fixes a date for a Case Management Conference at the outset. The Practice Directions states that a Case Management Conference will be fixed within 14 days at the earliest of:

- (i) the filing of an acknowledgement of servicing;
- (ii) the filing of their defence; or
- (iii) the date of an order transferring the claim to a TCC.

Before 1998 the TCC was known as the Official Referee's Court. The post of an Official Referee began by virtue of section 83 of the Judicature Act 1973. The original role of an Official Referee was simply limited to investigation and report on matters of fact which had been referred to the Official Referee. The role of the Official Referees developed, until 1998 when their importance was recognised by the Lord Chancellor. From 9 October 1998 the Official Referee's Court became known as the TCC, and the Official Referees as TCC judges which were from then on to be addressed as "Your Honour".

The judge in charge of the Technology and Construction Court is the Honourable Mr Justice Forbes. He has produced a very useful guide to the TCC dated 19 December 2001.⁽³⁵⁾ The guide produces an overview of the work of the TCC and an introduction to the key stages in the TCC litigation processes.

Some features of construction litigation

The contract may say that the architect or engineer is to certify as a condition precedent some right, or if a certificate is given then it is final, binding and conclusive. This is the case unless it can be set aside, so the question that often arises in construction disputes is the status of an architect's or engineer's certificate. The problem was compounded by the case of *North Regional Health Authority v Derek Crouch*.⁽³⁶⁾ The Court of Appeal compared the powers of the court and of arbitrators under the JCT 1963 Standard Form of Building Contract. The term in that contract gave the arbitrator power to "open up, review and revise any certificate, opinion, decision...as if no certificate, opinion, or decision had been given". The question was whether, if a dispute was to be determined in court, the court had the same power as an arbitrator.

In the case of *Crouch* the Court of Appeal held that the court did not. For some time it was argued that the best forum for construction disputes was that of arbitration because of this additional power that the arbitrator enjoyed. However, the court could declare a certificate inoperative if the architect did not have the power to issue it.

However, *Crouch* was overruled by the House of Lords in the case of *Beaufort Developments (NI) Limited v Gilbert Ash (NI) Limited*.⁽³⁷⁾ The interesting question is whether this issue has only been overruled in respect of the JCT contracts, or whether indeed it has a wider scope such that any court has the same powers as an arbitrator.

If a contract contains an arbitration clause, then a dispute arising under that contract must be referred to arbitration. Section 9 of the Arbitration Act 1996 states that the Court *shall* stay a matter in litigation if there is an arbitration clause unless that clause is "null and void, inoperative or incapable of being performed".

Disputes are often of a technical nature, and so expert evidence is frequently encountered in construction litigation. There are often many matters forming the subject of the dispute, and so a form of pleadings known as "Scott Schedules" is common. Scott Schedules are basically tabulated schedules where each of the individual matters are dealt with in a single row. The column headings provide the opportunity to give each item a serial number, identify it by reference, set out the nature of the breach complained of, together with comments and an amount of money in respect of that item. Further blank columns are then provided giving the other party an opportunity to comment and also the provision of a final column for the judge to make a decision and decide the amount due.

Given the interaction of many issues in construction disputes the costs are often high even if the amount in dispute is low. Cross-claims are also common. For example, a claim for

⁽³⁵⁾ The Hon. Mr Justice Forbes (2002), *The Technology and Construction Court Guide*

⁽³⁶⁾ [1984] QB 644 CA

⁽³⁷⁾ [1999] 1 AC 266 HL

additional money may be met by a defects claim. Such costs claims often raise difficult issues of the fact and more, thus contributing to the high costs of construction litigation.

Finally, many parties are involved in construction projects, and so it is not unusual for the litigation to involve many parties.

Pre-action Protocol for Construction and Engineering Disputes

The Pre-action Protocol for Construction and Engineering Disputes states that it applies to all construction engineering disputes, including professional negligence claims against architects, engineers and quantity surveyors.⁽³⁸⁾ A claimant is however not required to comply with the Protocol if the proceedings are for the enforcement of an adjudicator's decision, including a claim for interim relief, will be subject to the claim for summary judgment under Part 24 of the CPR, or relate to the same issues that have been the subject of an adjudication or some other form of ADR.

The objectives for the Protocol are to encourage the early exchange of information about the proposed claim so as to enable the parties to review their respective positions and hopefully avoid litigation by agreeing to settle the matter before commencing proceedings. If proceedings cannot be avoided then the Protocol is to assist in the efficient management of the proceedings once litigation has commenced.

The court is concerned with "substantive compliance", and may award cost sanctions against a party for non-compliance. In the case of *Paul Thomas Construction Limited v (1) Damian Hyland (2) Jackie Power* it was held that the appropriate sanction is in order that the Claimant pay the costs of the action on an indemnity basis.⁽³⁹⁾ In that case, the Claimant had been unreasonable in that the action had been commenced even though the Defendant was taking steps to appoint a surveyor to review the claims. Further, the Claimant completely ignored the Pre-action Protocol.

The Pre-action Protocol requires the Claimant (or his solicitor) to send to each of the proposed Defendants a copy of the claim letter. A clear summary of the facts should be provided, together with the basis upon which each of the claims is made. If contractual terms or statutory provisions are relied upon, then they should be clearly set out. The nature of the relief claimed should also be set out together with a breakdown showing how the damages have been quantified. If experts have been appointed, then the identity of those experts should be revealed.

Within 14 calendar days of receipt of the Pre-action Protocol claim letter, the Defendant should acknowledge the letter. If the Defendant does not acknowledge the letter in 14 days, then the Claimant can commence proceedings. If the Defendant intends to object to any or all of the claim then the Defendant must within 28 days from receipt of the Pre-action Protocol claim letter respond by setting out the objections and the grounds upon which the Defendant relies. The Claimant need not set out all of its objections, but if it fails to do so the court might take that matter into account when considering the question of costs if issues are raised as subsequent litigation.

⁽³⁸⁾ The Pre-action Protocol for Construction and Engineering Disputes (August 2000)

⁽³⁹⁾ [2002] CILL 1748

If the Defendant does not issue its letter within the period of 28 days, then the Claimant is entitled to commence proceedings. If the Defendant issues its response, it may of course include a counterclaim. Equivalent time periods are provided for the Claimant to respond.

Once exchange of correspondence has been concluded the parties should hold a Pre-action Protocol meeting. The aim of that meeting is for the parties to:

1. Identify the root cause of each disagreement in respect of each issue;
2. Consider how these issues might have been resolved without recourse to litigation;
and
3. If litigation is unavoidable consider what steps should be taken to ensure that the overriding objective on Part 1.1 CPR is achieved.

The parties should also attempt to agree the extent of expert evidence, whether the joint expert could be appointed, and the extent of disclosure.

A Pre-action Protocol meeting is discloseable to the court, but only to the extent that the meeting took place, where the meeting took place and who attended. If a party refused to attend then the grounds for such refusal are also discloseable as are the reasons why a meeting did not take place or why any agreement could not be concluded between the parties. Anything else said at a Pre-action Protocol meeting is said on a without prejudice basis.

Hybrid and multi-stage techniques

This section considers "hybrid" variations to the core processes, together with a range of "multi-stage" procedures. A variety of dispute resolution and conflict avoidance mechanisms are explored. Approaches such as the DRA and DRB seek to deal with conflict early on and avoid the formation of full-blown disputes. Multi-stage procedures are also considered.

Med-Arb

Med-Arb is essentially a hybrid ADR two-stage process. In the first stage the parties attempt to settle their dispute amicably in the forum of mediation. If settlement cannot be found then the parties move to the second stage arbitration. The essential characteristic of this technique is that the mediator in the first stage becomes the arbitrator for the final and binding stage. The commitment by the parties to use this process may arise either through the contract in the form of a multi-stage dispute resolution clause or alternatively the parties may agree to bind themselves to Med-Arb once a dispute has arisen.

The apparent advantages of Med-Arb are that it combines the benefits and possibility of a mediated settlement with the finality of arbitration. As Newman *et al* points out:⁽⁴⁰⁾

Med-Arb recognises that arbitration may not resolve all the issues between the parties but limits the arbitration solely to the intractable disputes, thereby bringing a cost and time saving to the parties.

⁽⁴⁰⁾ Newman, P. (1999), *ADR in the construction industry*

Some commentators have expressed their concerns over such a procedure. Is it not the case that Med-Arb compromises the intermediary's capacity to act, initially as a facilitative mediator and then in an adjudicative capacity, without restricting the flow of information? The fundamental objection to such an approach is that the parties will not wish to reveal confidential information during private sessions with the mediator which may then taint the mediator/arbitrator's view of their dispute during the arbitration.

Dispute Resolution Adviser (DRA)

The basic concept of a Dispute Resolution Adviser involves the use of a neutral third person who advises the parties to a disagreement or dispute and suggests possible settlement options. This concept is clearly similar to that of the Early Settlement Adviser. According to Wall the idea stemmed from Clifford Evans who, in 1986, suggested the use of an "independent intervener".⁽⁴¹⁾ The independent intervener would be paid for equally by the employer and contractor to settle disputes as they emerged, rather than wait until the end of the contract. The decision would be binding until the end of the project when either party could commence arbitration proceedings. Unlike the independent intervener the DRA does not make interim binding decisions, but advises on the means by which settlement could be achieved. The power to settle ultimately rests with the parties.

There are a variety of benefits with such an approach. First, disagreements at site level can be addressed before a full-blown dispute develops. Not only does this avoid the breakdown in working relationships which could then affect the rest of the project's duration, but it also allows the issues to be dealt with whilst they are fresh in the parties' minds. Further, neither the parties nor the adviser are limited to a "legal" outcome in the sense that the settlement could encompass wider solutions mutually beneficial to the parties and the project. The disadvantage is that the parties may be unable to agree or may reject the DRA's advice. Because they are not bound by the adviser's suggestions the dispute may continue to develop.

The logical conclusion was developed by a working party of the Chartered Institute of Arbitrators, and labelled the Dispute Adviser. Severn presents the working party's two-stage solution, which classifies disputes as being either "minor disputes" or "major disputes", and makes use of a Dispute Adviser.⁽⁴²⁾ Severn 1989 Minor disputes are those initial disagreements which may be dealt with by the Dispute Adviser, or some other expert who the parties and the Adviser call in.

If a settlement is not reached or the problem continues then the minor dispute becomes a major dispute. Major disputes may be conciliated, mediated or the Dispute Adviser may make a recommendation. In this context conciliation refers to a purely facilitative process whilst mediation may lead to a written reasoned opinion, binding until overturned by arbitration. The Dispute Adviser may make a recommendation about a likely settlement which the parties could accept or reject, or alternatively help the parties to select either conciliation or mediation in order to progress the resolution of the dispute. In any event

⁽⁴¹⁾ Wall, C. (1992), "The Dispute Resolution Adviser in the Construction Industry", in Fenn, P. and Gameson, R. (Eds), *Construction Conflict Management and Resolution*, E & FN Spon, London, p. 328.

⁽⁴²⁾ Severn, K. (1989), *New Concepts in the Resolution of Disputes in International Construction Contracts*

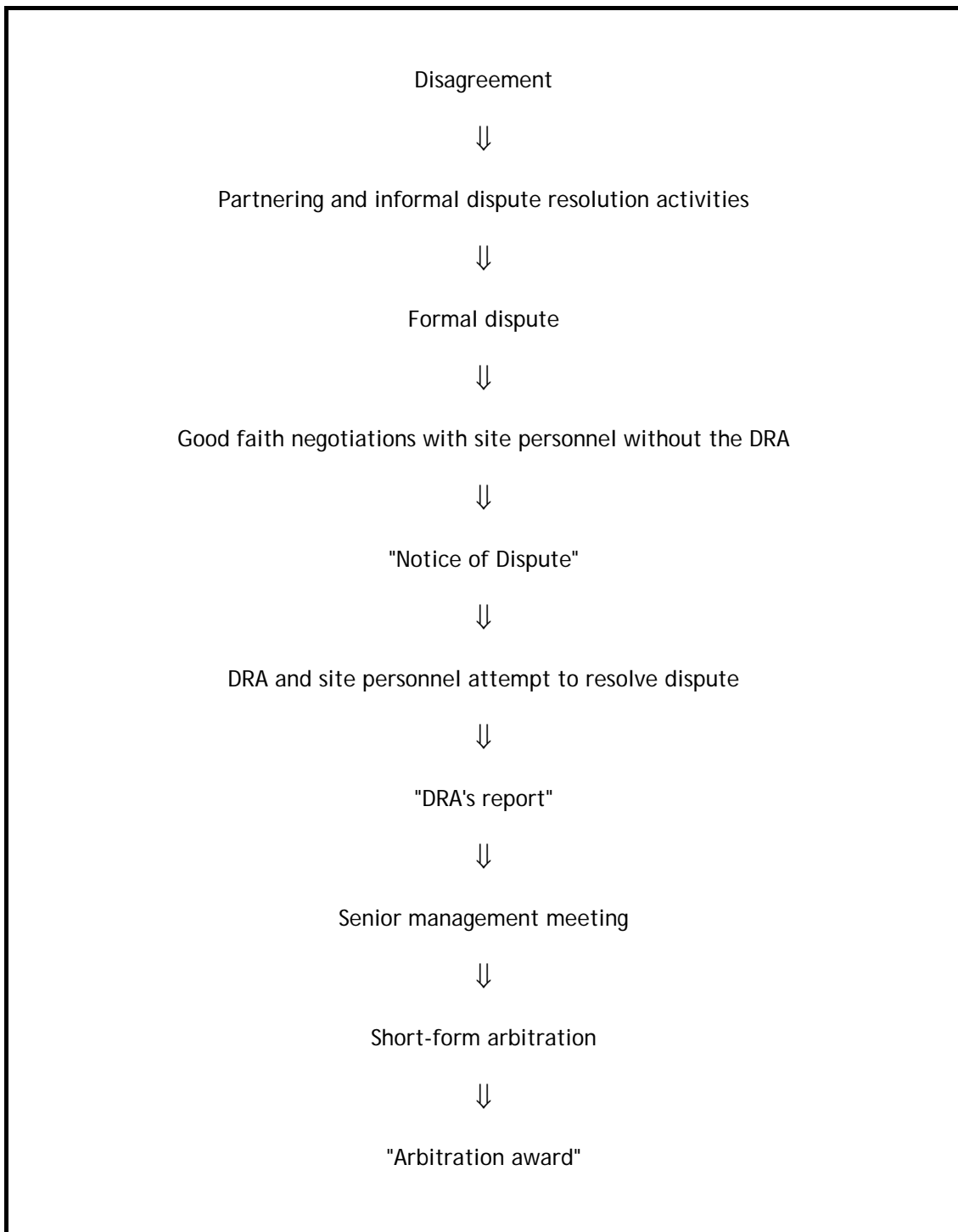
major disputes lead to a binding recommendation, rather than allowing a reticent party the opportunity of delaying payment until post-completion arbitration.

Wall presents the most widely recognised use of a Dispute Resolution Adviser in practice in the form of a complete process - the DRA System. His model was first developed for use by the Hong Kong Government's Architectural Services Department in the refurbishment of the Queen Mary Hospital in Hong Kong. It is a hybrid system which builds on existing concepts. He states that the:

DRA system draws upon the independent intervener concept as modified by the Dispute Adviser but provides a far more flexible approach. It embodies the dispute prevention attributes of the Dispute Review Board and Project Arbitration, it uses partnering techniques to re-orient the parties' thinking and encourages negotiation by using a tiered dispute resolution process. It is based on giving the parties maximum control through the use of mediation techniques but also includes prompt short-form arbitration which encourages voluntary settlement and, if necessary, provides a final and binding resolution to the dispute.

The complete process has several distinct stages. First, at the commencement of the project the DRA undertakes partnering-style activities in order to build a rapport with the parties whilst at the same time encouraging the parties to work as a team. Second, the DRA will then visit site on a regular basis in order to maintain a level of familiarity with the project and its participants. This also provides the opportunity for the DRA to assist in the settlement of any disagreements which may have arisen since the last visit.

Figure 2: Outline of the DRA system, adapted from C. Wall.



The third distinct stage of the DRA's work relates to formal disputes. The contract provides a time limit of 28 days within which any decisions or certificates issued under the contract may be challenged. If a decision or certificate is not challenged then it becomes final and binding. In the event of a challenge, the parties have 28 days within which to try and resolve the matter by direct negotiations. If unsuccessful the aggrieved party is required to issue a formal notice of dispute within the 28-day period, otherwise the right to challenge

is lost. It is most likely that the DRA will have tried to facilitate the early settlement of such disputes, but in the event that a Notice of Dispute is issued then the DRA and the site representatives have 14 days to attempt to resolve the dispute.

During this period the DRA may try almost anything to resolve the dispute, from mediation to calling in an expert in the particular area if the problem proves to be beyond his/her expertise. The important point is that any evaluation is carried out by another neutral third party and not the DRA. By maintaining a purely facilitative role the DRA does not jeopardise the impartial and neutral position which he/she has developed with the parties. Time limits may be extended under certain circumstances and the process comes to an end in the event of a successful settlement or resolution. The parties could agree on a settlement or they may agree to be bound by an expert's opinion.

The fourth stage relates to disputes which have not been settled at site level. The DRA produces a report which outlines the nature of the disputes and each party's viewpoint; this may contain a non-binding recommendation or evaluation of the dispute. The site representatives are given an opportunity to check the accuracy of the report and comment. This provides an important chance for the individual disputants to review their position before the report is passed to senior management. Senior management should be able to obtain a clear picture of the nature of the dispute and bring a non-emotional perspective to the problem. The DRA may continue to facilitate the resolution of the dispute at senior management level.

At the fifth stage, if the matter remains unresolved 14 days after the DRA's report, then a short-form arbitration may be employed. This should take place within 28 days from termination of the senior management's efforts. An arbitrator is selected by the parties or if they cannot agree, then the DRA will select an arbitrator. The contract provides the rules for the short-form arbitration which include the following key elements:

- one issue or a limited number of issues, conducted in one day per issue;
- each party is given the opportunity to present;
- each party to have an equal amount of time;
- the arbitrator has 7 days to make a written award which is final and binding; and
- disputes over time or money are resolved using final offer arbitration where the arbitrator must select one or the other figure.

According to Wall, the Queen Mary Hospital project has raised "numerous problems yet there have been no disputes".⁽⁴³⁾ The Architectural Services Department has used the DRA on other large projects and apparently now ensures that the system is used on all building projects with a value in excess of HK\$ 200 million.

⁽⁴³⁾ Wall, C. (1994), *The Dispute Resolution Adviser*, DART Conference 16-19 October, Lexington, Kentucky p. 10.

Dispute Review Boards (DRB)

The concept of the Dispute Review Board appears to have developed in the USA. It is essentially a process where an independent board of three people evaluates disputes as they arise during the project and make settlement recommendations to the parties. The board is constituted at the commencement of the project, much like a panel of three arbitrators. Each party selects one board member. The parties may then agree on the third or, if they fail to do so, the two board members will select the third. The board periodically visits the site and receives project information to ensure familiarity with the project and the parties. The board meets regularly to discuss problems or disputes, hears presentations from the parties and suggests solutions.

It seems that the main benefit of the DRB is that its mere existence helps to prevent disputes. The parties themselves become familiar with the board's view on particular issues which then aids the negotiation and settlement process which the parties undertake before presenting their dispute to the board. The main disadvantage is the cost of such a system. The non-binding nature also implies a risk that disputes may not settle, and may therefore fester and disrupt the project. The board evaluates the disputes, and there is a danger that one party may perceive that the board is bias if a series of evaluations run contrary to that party's expectations.

Dispute Adjudication Board (DAB)

In 1999 FIDIC produced a new suite of Standard Forms (the red, yellow and silver books).⁽⁴⁴⁾ These new forms introduced a contractual Dispute Adjudication Board procedure. In effect, part of the function of the engineer had been removed, thus giving the Dispute Adjudication Board the power to deal with disputes arising during the course of the works. The engineer is, of course, still required under these new forms to determine matters such as extension of time, valuation of variations and so on. However, the engineer is recognised now to be acting solely for the employer, unlike the previous FIDIC Conditions where he was required to act impartially.

Clause 20 of the 1999 FIDIC Conditions sets out the procedure, and requires the party to appoint a Dispute Adjudication Board within 28 days of the commencement date of the contract. It will normally comprise three parties, so each party nominates one member for the approval of the other. The parties then consult with their nominated members before then agreeing a third member to act as Chairman.

Interestingly, a tripartite agreement is to be entered into by the employer, contractor and the members of the Dispute Adjudication Board.⁽⁴⁵⁾ Essentially, the fees are to be met jointly by the employer and contractor, the members of the DAB are to be impartial and independent, and they must be available for site visits. A default provision provides that the DAB should visit at intervals of not less than 140 days.

Either party may refer a dispute to the DAB. Once referred, the DAB has 84 days to give a decision. The DAB will need to establish a timetable for receiving submissions, reviewing the documents, visiting the site as necessary and conducting the hearing in order to issue

⁽⁴⁴⁾ FIDIC (1999), red, yellow and silver books

⁽⁴⁵⁾ See Appendices to the FIDIC 1999 Forms

its decision. The 84-day period is a relatively short period of time given that the contract is mostly used on large international projects.

The decision of the DAB is binding, and the parties are required to give the decision effect immediately. If either party is not satisfied, then that party has 28 days within which to issue a "Notice of Dissatisfaction". This does not relieve the dissatisfied party of the obligation of complying with the decision in the meantime. The issuing of a Notice means that the DAB decision is not final and binding. The DAB decision will become final and binding if a Notice is not issued.

If a Notice is issued, an attempt should be made to reach an amicable settlement. If this fails, then the final dispute resolution procedure is arbitration.

The impact of ADR on litigation

There have been several highly significant decisions regarding costs orders against successful litigants on the basis that those litigants failed to seriously consider mediation. The first of these was *Susan Dunnett v Railtrack Plc* in the Court of Appeal.⁽⁴⁶⁾ Susan Dunnett's three horses had been killed when the gate to her paddock, which had been replaced by Railtrack, had been left open, allowing the horses onto the line. The gate was not padlocked, nor was there any mechanism for automatically closing the gate, despite the fact that Susan Dunnett had warned Railtrack that people left the gate open. There was an appeal and cross-appeal from the first instance decision, and in granting permission to appeal the Lord Justice stated that mediation or a similar process would be highly desirable in this particular case because of its inherent flexibility.

Regardless of the court's suggestion Railtrack refused to engage in mediation. Railtrack effectively won the appeal, but the Court of Appeal found that as Railtrack had refused to mediate then a costs order should not be made against the unsuccessful claimant. One of the Court of Appeal judges said that a skilled mediation could achieve results far beyond the courts, and a party who dismissed the opportunity for mediation without proper thought would suffer uncomfortable consequences.

The Court of Appeal was in effect following the view of Lord Woolf in *Frank Cowl v Plymouth City Council*.⁽⁴⁷⁾ In that case Lord Woolf emphasised the need for parties in dispute with public bodies to consider ADR. Lord Woolf said that "today sufficient should be known about ADR to make the failure to adopt it, in particular where public money is involved, indefensible". In *Dunnett v Railtrack* Lord Justice Brooke stated that:

When asked by the Court why his clients were not willing to contemplate alternative dispute resolution, said that this would necessarily involve the payment of money, which his clients were not willing to contemplate, over and above what they had already offered. This appeared to be a misunderstanding of the purpose of alternative dispute resolution. Skilled mediators are now able to achieve results satisfactory to both parties in many cases which are quite beyond the powers of lawyers and the courts alike...

⁽⁴⁶⁾ 22 February 2002

⁽⁴⁷⁾ *The Times*, 8 January 2002

Given that the CPR requires the parties to consider ADR, then that obligation is extended into the Pre-action Protocols, there is now clear obligation on the parties to seriously consider some form of mediation or other ADR process. It seems that that obligation will, if ignored, lead to cost consequences, even if the party concerned is successful. However, there may be some circumstances when a failure to mediate is justified.

The case of *Hurst v Leeming*⁽⁴⁸⁾ gives some guidance as to when a refusal to mediate might be justified. The case concerned the dismissal of an action against a barrister, Leeming. The Claimant argued that despite the dismissal of the action he should still receive his costs as Leeming had refused to mediate. Leeming raised five reasons as to why he had refused to mediate:

1. The legal costs already incurred were high;
2. The seriousness of the allegation, as it related to professional negligence;
3. The total lack of substance of the claimant's claims;
4. The lack of any prospects of successful mediation; and
5. The obsessive character and attitude of Hurst, and his history of litigation.

Lightman J in the Chancery Division considered each of these grounds and decided that the first three were insufficient. Therefore, the matter of legal costs already incurred, the seriousness of the allegation and the fact that there is no substance to the claim does not give valid reason for refusing to mediate. However, lack of any prospects of a successful mediation, given the obsessive character and attitude of the Claimant and his repeated history of litigation, which demonstrated that it was highly unlikely that the Claimant would make any serious attempts to settle during a mediation, was sufficient. Therefore, Leeming was not deprived of his full entitlement to costs.

The Court of Appeal has also recently held that there are circumstances within which it is reasonable to refuse to mediate. In the case of *Alan Valentine v (1) Kevin Allen (2) Simon John Nash (3) Alison Nash*⁽⁴⁹⁾ the Respondents had put before the Court considerable correspondence which made it clear that real efforts to settle the dispute had been made, and that the offers were reasonable and generous.

The Respondents had also tried to arrange a "round the table" meeting. Those offers were refused by Valentine who sought the payment of a large sum of money in settlement. The Court of Appeal therefore distinguished this case from the case of *Dunnett v Railtrack Plc* even though the Respondents had refused Valentine's offer of mediation. The Court of Appeal held that their refusal to mediate was reasonable, and so Valentine would pay the Respondent's costs in resisting the appeal.

In *Halsey v Milton Keynes General NHS Trust and Steel v (1) Joy (2) Halliday* {2004} EWCA Civ 576 the Court of Appeal considered the important question of when a judge should impose cost sanctions on an unsuccessful litigant on the grounds that he refused to take part in mediation. The judgment concerned two appeals, and also reviewed submissions

⁽⁴⁸⁾ 9 May 2002

⁽⁴⁹⁾ 29 July 2003

from four interveners, namely; the Law Society, the Civil Mediation Council, the ADR Group and CEDR.

In the first case Mr Halsey died while in hospital. Negligence was alleged by his widow but she was unsuccessful at trial and so the NHS claimed its costs. Following *Dunnett* the Claimant argued that the NHS should not receive its costs as the Claimant had written to the NHS suggesting mediation. The Trust refused on the basis that it believed that it had a good defence and should not be forced to make financial offers to settle in mediation and so wanted to avoid the costs of mediation. The Claimant argued that this was an unreasonable refusal to mediate. The trial judge did not agree with the Claimant, and so made the usual costs order thus awarding the Trust its costs.

In the second case of *Steel v (1) Joy and (2) Halliday* the Claimant was injured in two road accidents. The first in 1996 and the second in 1999. The Defendants admitted liability and the only issue was whether the second Defendant had caused further damage to the Claimant. The second Defendant refused an offer of mediation on the basis that the dispute concerned a question of law. The second Defendant was successful and asked for its costs. The trial judge awarded costs to the second Defendant, thus following the usual costs rule.

Lord Justice Dyson made it clear that it was no longer necessary to make extensive references to the Civil Procedure Rules or Court Guides in order to demonstrate the importance of ADR. He did, however, draw a distinction between the court's encouragement of parties to agree to mediate, and the court ordering the parties to mediate. Whilst he supported the court's encouragement, even in the strongest terms, he considered it quite wrong for the court to order the parties to mediate. Forcing a "truly unwilling" party to mediate was not only unacceptable, but was also an obstruction to a party's rights to access to the court and a breach of Article 6 of the European Convention on Human Rights.

This aspect of the case is particularly interesting (although orbiter) given that the 35th Amendment to the CPR introduced, from 1 April 2004, a mandatory mediation scheme for the Central London County Court. Will this scheme and the Amendment be challenged for directly conflicting with the ECHR?

The second aspect is the court's "encouragement" to mediate. In *Dunnet v Railtrack* the Lord Justice recommended mediation twice. The Court of Appeal held that the successful party's refusal to mediate was unreasonable, leading to cost sanctions. The Model Directions for clinical negligence cases require the parties to consider mediation and if refusing to mediate to then file reasons in court, which will be considered after judgment in respect of the award of costs.

Nonetheless the court's encouragement to the parties to undertake some form of ADR may be robust, and cost sanctions may follow. CPR Part 44.3(2) provides that the general rule is that an unsuccessful party will pay the costs of a successful party, but "the court may make a different order" (CPR Part 44.3(2)(b)). If a court is to deprive a successful party of some or all of their costs because of a refusal to agree to ADR then "such an order is an exception to the general rule that the costs should follow the event". The key question was whether a party had acted unreasonably in refusing ADR. At paragraph 16 of the

judgment the question of whether a party had acted unreasonably in refusing ADR included a consideration of:

- (a) The nature of the dispute;
- (b) The merits of the case;
- (c) The extent to which other settlement methods have been attempted;
- (d) Whether the costs of the ADR would be disproportionately high;
- (e) Whether any delay in setting up and attending the ADR would have been prejudicial; and
- (f) Whether the ADR had a reasonable prospect of success.

He then considered each of these in turn. In respect of the first, the nature of the dispute, he acknowledged that there were some cases where ADR was not appropriate. This included the determination of issues of law or construction, allegations of fraud, or disreputable conduct, resolving a point of law that arises from time to time and injunctive or other relief.

In respect of the merits of the case, a party's belief as to the strength of its case was also to be taken into account. Otherwise invitations to mediate could simply be used as tactical ploys, and those with strong cases will be forced to mediate and thus incur additional costs despite the strength of their case. He therefore qualified Lightman J's test in *Hurst v Leeming* by the inclusion of the word "unreasonably", thus, "the fact that a party *unreasonably* believes that he has a watertight case again is no justification for refusing to mediate". Conversely, a *reasonable* belief that one has a watertight case may well justify refusing to mediate.

Attempts at other settlement methods should also be considered. This will be relevant because it may demonstrate that one party is making an effort to settle or that the other has an unrealistic view in respect of the merits of its case.

The cost of mediation in respect of the amount of the claim by comparison to the cost of litigation is another factor. The costs of the mediation may only be minimal, perhaps the costs of one day in court, but it may be possible to resolve a dispute quite simply by a single day in court.

Delay is also a factor to take into account. Suggesting mediation late in the day may not be acceptable if it will delay the trial. This fifth consideration is analogous to an issue raised in the adjudication case of *Gibson v Imperial Homes*, where HHJ Toulmin QC considered that adjudication may not be appropriate where "final dispute resolution" methods were "immediately available" (Unreported, 18 June 2002).

Whether the mediation had a reasonable prospect of success was a "critical factor". It was crucial in *Hurst v Leeming* and rightly so in the Court of Appeal's view. Lightman J in *Hurst v Leeming*, considered that the question should be asked objectively. So, a position of intransigence might lead to an adverse costs order. However, the Court of Appeal went further. They recognised that a successful party cannot rely on its own unreasonableness. The Court of Appeal therefore adopted a wider test, focusing not just objectively on the

dispute but also on the parties' "willingness to compromise and the reasonableness of their attitudes" (para. 26). In this regard Lord Justice Dyson said that the burden should not be on the refusing party to satisfy the court that the mediation had no reasonable prospect of success, but instead the burden should be placed on the "unsuccessful party to show that there was a reasonable prospect that mediation would have been successful". It is, therefore, for the loser in litigation to prove that there was a reasonable prospect for successfully concluding a mediation in order to upset the general costs rule that he should pay all or some of the other side's costs.

The Court of Appeal has therefore established six useful guidelines that help to establish whether a party has acted unreasonably in refusing to mediate, such that an exception to the general costs rule should apply.

The Court of Appeal also recognised that there is a "scale" of encouragement that the courts might adopt in respect of a particular case. This may range from statements in the Civil Procedure Rules, or the appropriate Court Guide or Pre-action Protocol, to a suggestion by the judge in the variety of different forms. A party that refuses to consider whether its case is suitable for ADR is "always at risk of an adverse finding at the cost stage of the litigation". This is particularly the case where the court has made an order requiring parties to consider ADR. On the other hand, a pledge by public bodies, such as the government departments and agencies pledge, and the National Health Services Litigation Authorities pledge, should not be given great weight. It was merely an undertaking that ADR would be considered; it was not an undertaking that ADR would be adopted in every case.

On 23 March 2001 the Lord Chancellor's Department issued a formal written pledge that it and all of its departments would attempt ADR before resorting to litigation. The pledge stated:

Government departments and agencies make these commitments on the resolution of disputes involving them. Alternative dispute resolution will be considered and used in all suitable cases wherever the other party accepts it.

The pledge states that all government departments and their agencies will seek to use ADR wherever possible in order to avoid litigation. This pledge was recently considered in the *Royal Bank of Canada v Secretary of State for Defence* (14 May 2003, High Court, Chancery Division, Lewison J).

The Claimant was a landlord seeking to determine whether or not notices served by the tenant to terminate a lease were valid. At trial, the tenant's first notice was held to validly terminate the lease, except in respect of an area known as the store room. The tenant therefore argued that it had effectively won and was entitled to its costs.

The landlord had expressed on a variety of occasions a willingness to mediate the claim, but the tenant had refused. A large part of the dispute related to the factual question as to whether vacant possession was required under the lease, and the tenant had effectively lost the factual argument. Further, the Lord Chancellor's Department on 23 March 2001 issued a formal pledge that all government departments should settle cases using alternative dispute resolution wherever possible. The issue, therefore, was whether the tenant Secretary of State for Defence was entitled to its costs for winning the issue in

respect of the notice when it had lost the factual position, and refused to mediate in the light of the Lord Chancellor's press notice.

The judge held that the key factor in the issue of costs was the landlord's willingness to mediate which was refused by the tenant. The formal pledge given by the Lord Chancellor's Department was to be taken seriously and the tenant should have abided by that pledge. As the tenant had not abided by the pledge it was not entitled to recover its costs from the landlord. In conclusion, no order was made as to costs. This decision must be wrong given the *Halsey* decision.

In the further case of *Shirayama Shokusan Company Limited & Others v Danovo Limited* (5 December 2003, Chancery Division), Mr Justice Blackburn ordered the parties to mediate, even though one of the parties clearly did not want to mediate. This case must in the light of *Halsey* be considered to go beyond that which the Court of Appeal considers appropriate.

In respect of the two cases before the Court of Appeal in *Halsey*, the Court considered that the letters written in one (*Halsey*) were "somewhat tactical" and were devised in order to build pressure for the other side to settle the matter because of an adverse cost order simply because of the risk of refusing to mediate. The second case (*Steel*) raised a question of law concerning causation. The Court of Appeal held that the defendant had not acted unreasonably in saying that he wanted to have the question resolved once and for all by the court. Further, the issue was disposed of by the recorder in about 2 hours, and so the costs were not significantly high when compared to the costs of a mediation.

There is one final point arising from this case. Mr Justice Dyson LJ stated:

All members of the legal profession who conduct litigation should now routinely consider with their clients whether their disputes are suitable for ADR.

This is arguably a clear message to the legal profession, undoubtedly including claims consultants when advising clients in respect of disputes, that a failure to properly advise their clients as to whether a particular dispute is suitable for ADR by the application of the considerations in *Halsey* may amount to negligence.

Conclusion

In summary then, adjudication has arguably had an impact upon arbitration and litigation. The use of adjudication has become more widespread in the industry, and there has been an increasing use of adjudication in often substantial post-practical completion final account claims. Recent research suggests that few claims progress beyond adjudication, perhaps supporting a decrease in the use of arbitration and litigation. Nonetheless, the number of claims served in the Technology Court during the past 12 months has risen.

One of the reasons for the increase in claims served may be due to the pre-action phase in litigation. It used to be possible to serve a writ (now replaced by a "claim form") and then investigate the detail of the claim during the initial phases of the litigation process. Under the CPR the Pre-action Protocols demand a detailed claim letter together with identification of supporting documents. There is then a period of time for a response and then a pre-action meeting before commencing proceedings. This procedure delays the

issuing of a claim form, and also provides a timeframe for consideration of the case and attempts at settlement.

Finally, the recent cases of *Dunnett v. Railtrack* and *Hurst v Leeming* further demonstrate the emphasis of the CPR and the courts in moving parties away from an exclusively adversarial approach to the resolution of dispute and towards negotiation and ADR. However, the Court of Appeal in *Halsey* has recently revised the test to be applied when considering whether a party has unreasonably refused to mediate, and so should suffer adverse cost consequences. These are: (1) the nature of the dispute, (2) the merits of the case, (3) the extent to which other attempts were made to settle the matter, (4) whether the costs of the mediation would be very high, (5) whether an attempt at mediation would be prejudicial, and (6) whether the mediation had a reasonable prospect of success.

Reasons for unreasonably refusing to mediate include: costs already incurred, type of issues in dispute, the claim being misconceived (*Hurst v Leeming*). Reasons for unreasonably refusing to mediate include: the nature of the other party is such that settlement is extremely unlikely (*Hurst v Leeming*), generous offers have been made, offers to negotiate are being made instead of mediation (*Corenso v Burnden*), the refusing party rightly believes that it will win (*Halsey*), there is a genuine need to resolve a point of law, the costs of a mediation would be disproportionate (*Steel*).

Coupled with the Pre-action Protocols, more cases are being argued between the parties' lawyers in the pre-action phases before service of a claim form. The threat of failing to properly consider the case arises in the form of cost sanctions, and thus one should seriously consider ADR.

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