



## Recent trends in dispute resolution

by Nicholas Gould, Partner

### Overview

Arbitration was the traditional default method of dispute resolution. This has changed. The development of ADR, the rejuvenation of the Civil Procedure Rules, the developments in the Technology and Construction Court (TCC), and especially the introduction of adjudication, as well as hybrid multistage dispute resolution procedures has changed the landscape of construction dispute resolution.

This paper considers those recent trends in dispute resolution. It deals with the range of dispute resolution techniques that are available in the construction industry. This is considered in 3 main parts. First, a general overview of the spectrum of dispute resolution techniques and consideration of the ADR movement. Second, an examination of the individual techniques, including:

- Negotiation
- Mediation and conciliation
- Adjudication
- Arbitration
- Litigation

Finally, a consideration of the hybrid processes, such as med-arb and other contractual dispute escalation approaches, and project based dispute resolution such as project mediation and dispute boards.

### 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<sup>1</sup> the ideal court, or more properly the prototype of the court involves

“(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, two way problem 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

1. Shapiro, M. (1981) *Courts: A comparative and political analysis*, University of Chicago Press, Chicago

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 multi-lateral (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 disputants 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 which are ‘facilitative’ and those that are ‘evaluative’. During a facilitative mediation, the mediator is trying to re-open 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 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 re-opens 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**

<b>Mediation or Conciliation</b>	
<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

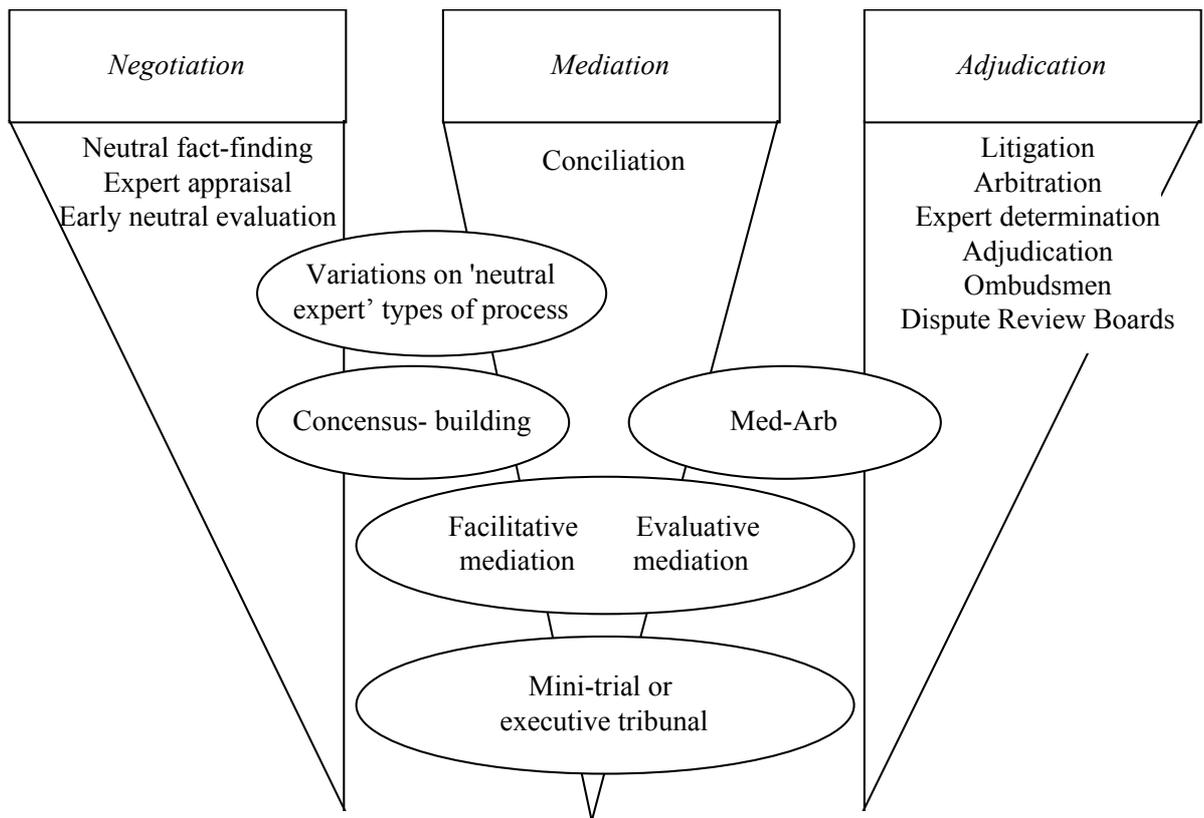
In practice a mediation that starts off in a purely facilitative way may become evaluative in order to try and reach a settlement. This may occur intentionally, at the request of the parties or with forethought on the part of the mediator, or unintentionally by the words or actions of the mediator. The 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 rest 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, which may be employed in the resolution of disputes. Firstly, 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<sup>2</sup>, who refer to the “three pillars” of dispute resolution. 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**, Butterworths, London, p. 50. The chart was derived from a chart by Professor Green of Boston University (1993).

2. Mackie, K., Miles, D., and Marsh, W. (1995) *Commercial Dispute Resolution: An ADR Practice Guide*, Butterworth, London

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

Essentially, categorisation can be by way of any number of core characteristics. An alternative approach to the one considered above could quite simply involve listing those techniques that lead to a binding outcome, and those which are non-binding. Further categorisation could be by way of those techniques which relate to dispute avoidance or the management of conflict, and those which relate to the resolution of disputes. Such an approach expands the range of techniques that need to be considered to include the broader view of "dispute response".

## Alternative Dispute Resolution - the subjective debate

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.<sup>3</sup> In the UK, mediation was initially taken seriously in the resolution of family disputes.<sup>4</sup> 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.

Nonetheless, some empirical research does exist. The Turner Kenneth Brown Report (1993) 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. Watts and Scrivener<sup>5</sup> provide a comparative analysis of construction arbitration in Australia and the UK. In the US, research by Stipanowich<sup>6</sup> has documented the rise of mediation, which was first taken seriously by the US construction industry. Apparently the US 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.

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

4. Roberts S (1996) ADR and lawyer negotiations. *Commercial Dispute Resolution*

5. Watts V and Scrivener J (1994) Building Disputes Settled By Litigations. Comparison of Australian and UK stats. *Australian Institute of Building Papers*

6. Stipanowich T J (1996) Beyond Arbitration: innovation and evolution in the United States Construction Industry, WFLR

In the UK, Fenn and Gould<sup>7</sup> completed a project based on Stipanowich's US survey. 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 5 mediations in the preceding 12 month period. More recently Brooker and Lavers<sup>8</sup> report on their work in the specific area of ADR in construction disputes, and accuse contractors of avoiding mediation.

## 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.

### 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 is 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 that 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.

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7. Fenn P, Gould N (1994) Disputes resolution in the UK construction industry, DART Conference Proceedings, Lexington, Kentucky, USA, 16th-19th Oct

8. Brooker P. and Lavers A. (1997), Perceptions of alternative dispute resolution as constraints upon its use in the UK construction industry, *Construction Management Economics*.

## Perceived disadvantages of ADR

### I will disclose my hand

Parties are frequently concerned that they may disclose some important aspect of their argument that will then aid the other side in the event that the mediation is not successful and the matter proceeds to trial. Mackie et al<sup>9</sup> suggests that this belief is more perceived than real and notes three points. 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 1990's it is arguably less of a disadvantage today.

## Court annexed ADR

The concept of court annexed ADR and the ability for litigating parties to attempt mediation at court was initially developed in the USA. In May 1996 the Central London County Court launched a pilot court annexed ADR scheme on the initiative of Judge Butter QC. The scheme applied to dispute in the £3,000 to £10,000 range. The court wrote to both parties early on in the proceedings and offered them the option to mediate at the Central London County Court in an attempt to resolve their dispute amicably and economically. The mediations took place between 4.30 pm and 7.30 pm and was therefore outside of the usual court hours. Parties were, therefore, given 3 hours in order to attempt to reach a mediated settlement. But is 3 hours adequate? One lawyer mediator who has participated in the pilot scheme commented:

“Well, the answer is that I've never failed to come to a conclusion within three hours. At 2 1/2 hours you've got nowhere but somehow the guillotine hanging is a great aid in resolving the thing if people want to. The thing is, most of this is based upon peoples' misconceptions anyway. The vast majority, I would say close on 90%, of all mediations last for half a day or less. Now three hours or half a day, there's not very much in it. One thing I have mixed feelings about is that when you go in you know you have got three hours full stop. That's it. That's what I have reservations about, but the amount of time is adequate. I never actually had it go beyond. In all bar one of my mediations, the court has succeeded and that was nothing to do with time, it was due to dishonesty on the part of the parties. I've been at almost half past six without having a

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9. Mackie K. (1995) *Commercial Dispute Resolution: An ADR Practice Guide*, Butterworth, London

settlement. Its very useful to remind them that in ten minutes' time they book their place to go upstairs [to the court] to have the matter dealt with. That helps focus the mind."

Each side paid £25 towards the mediator's expenses. Professor Genn observed a large proportion of the mediations that were carried out and reported that there had only been a 4 to 5% take up rate.<sup>10</sup> She reported that of those few cases which did come to mediation the settlement rate was high. Nonetheless, she reported that most settlements were reached in the last 10 minutes of the 3 hour session and that in general both parties were confused as to the nature of the process frequently believing that any final suggestion put forward by the mediator was in some way binding upon them. Interestingly she pointed out that a good deal of these disputes were small building related disputes between owners and trades people and architects.

The Central London County Court scheme is not the first in its kind and was preceded by a pilot mediation scheme launched in June 1994 by the Bristol Law Society. Apparently at the end of the first year of operation only 24 cases had been referred to the scheme with only 2 reaching the mediation scheme<sup>11</sup>. Further, a similar scheme commenced operation in 1996 in the Patents County Court in London.

Verkaik<sup>12</sup> has reported on research by Professor Hazel Genn of University College London in relation to the Central London County Court Mediation pilot scheme. The research concludes that legally represented litigants are less likely to accept the offer of Court mediation or indeed to reach a mediated settlement. Out of the 4,500 litigants invited by the London County Court to mediate, only 160 (3.5%) took up the offer. In 84% of the rejected cases both parties were legally represented. This compares to 67% where neither party was legally represented. Further, the report suggests that lawyers have a negative influence on the success of mediation. 76% of those case mediated, where no lawyers are involved, settled. This compares to a settlement rate of 55% where both parties had solicitors advising them. The largest survey of construction dispute resolution was carried out for the DETR (as it was) in the late nineties.<sup>13</sup>

## Overview of the main techniques

### Negotiation

According to the Concise Oxford Dictionary,<sup>14</sup> "to negotiate" means to "confer with others in order to reach a compromise or agreement." Negotiation is merely the name given to that process. Goldberg et al described negotiation as "communication for the purpose of persuasion; the pre-eminent mode of dispute resolution."<sup>15</sup> Nonetheless negotiation should not be considered as merely a dispute resolution process. Negotiation in its broadest form may be considered as the process by which individuals communicate in order to arrange their business affairs and private lives by establishing agreement and reconciling areas of disagreement.

Interest in negotiation as an art or science appears to have developed in the 1970s. Research in this area is still very much in its infancy. Most theoretical work in the area of negotiation appears to focus on negotiation strategy or tactics rather than the process itself. It is therefore possible to examine negotiation from two perspectives. First, the processual shape of negotiations and, second, the strategy of negotiation.

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10. Genn, H. (1997)

11. Miles, D. (1996)

12. Verkaik, (1998)

13. For the published report see Gould N et al (1999) *Dispute Resolution in the Construction Industry*, Thomas Telford, London

14. Concise Oxford Dictionary (1995)

15. Goldberg S. B. (1992) *Dispute Resolution: Negotiation and Mediation and Other Processes*, 2nd edn. Little Brown, Boston

## The Process of Negotiation

Negotiation clearly involves some form of communication leading to joint decisions. Do these negotiations always maintain a processual shape with identifiable features regardless of the individuals involved or the conditions under which the negotiation takes place? Gulliver maintains that negotiation is essentially a developmental process with eight distinct but often overlapping phases.<sup>16</sup>

- Phase 1: The Search for an Arena
- Phase 2: Agenda and Definition
- Phase 3: Exploring the Field (emphasis on differences)
- Phase 4: Narrowing the differences
- Phase 5: Preliminaries to final bargain
- Phase 6: Final bargain
- Phase 7: Ritualising the outcome
- Phase 8: Execution of outcome

Gulliver goes on to argue that negotiation is developmental because the early stages involve a predominance of antagonism whilst the later stages involve a predominance of co-ordination. Roberts on the other hand argues that negotiation is about communication and information exchange which leads to joint-decision making.<sup>17</sup> As the parties begin to explore their differences, the information exchange that occurs leads to a greater understanding of the situation. This may eventually lead to a convergence of goals and an agreement, or alternatively the abandonment of the negotiation process. In other words negotiation may lead to a valid outcome that does not in fact result in agreement. For example, the unilateral decision to end a negotiation in favour of a more formal dispute resolution technique.

There are two important aspects to Gulliver's processual model. First, bargaining becomes part of the process. Many writers on the subject consider that negotiation is simply a process of bargaining. Gulliver's model on the other hand considers that successful bargaining cannot take place until an agenda has been agreed and the differences explored. On the other hand, it could also be argued that bargaining must occur at each phase. For example, in order to reach agreement over the venue. The second aspect of Gulliver's model relates to the phases themselves. The model identifies the central or strategic actions within a negotiation. Negotiation may break down if the parties are unable to agree a venue or an agenda. The margin between each phase therefore represents the high pressure points during the negotiation.

To reduce negotiation merely to a process of bargaining limits our understanding of the negotiation process. The inability to agree upon the venue may lead the parties to abandon the process completely or to seek redress through some formal dispute resolution process. Alternatively, the process of information exchange may reveal that a dispute does not in fact exist. The parties begin at odds, perceiving themselves to be in a dispute.

## Negotiation Strategies

The literature reveals two main approaches to negotiation. First is the "competitive", "distributional" or "positional" approach. Positional negotiators will make an initial offer

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16. Gulliver, P H. (1979) *Dispute and Negotiations: A cross Cultural Perspective*, Academic Press, London

17. Roberts, S. (1994) *Re-exploring the pathways to decision-making*. Law in Context

that is considerably less than they are ultimately willing to pay. They will raise their offers gradually and seek whatever tactical advantages are available. A large body of literature exists on the subject which essentially explores how to win as much as possible during negotiations. Meltsner and Schrag consider a variety of techniques that a lawyer may employ during negotiation.<sup>18</sup> These tactics may be considered under three headings.

Firstly proprietary tactics. These involve a range of simple positional tactics. For example, insisting that meetings be held in your own office or some other setting where you feel more comfortable than your adversary. Attempting to ascertain the number of persons the other side will bring to the meeting in order to ensure that you balance or slightly outnumber the other side. In the event that the other side requests a negotiation meeting, then demanding some sort of pre-condition which if the other side accepts may improve the chances of a favourable outcome. These simple tactics provide an opportunity to weigh up the negotiating clout of the adversary as well as an opportunity to put the other party at a psychological disadvantage.

Secondly, initial tactics. These tactics are used in order to attempt to extract the first offer from the other side. For example, the use of silence in the hope that the other side will tender an offer in order to keep negotiations under way. A first high demand provides the negotiator with the ability to manoeuvre and reduce subsequent demands. Furthermore, unreasonable and outrageous demands appear to become more justifiable after extended discussions. Another initial tactic involves placing your major demand first on the agenda. Many competitive negotiators believe that there is a "honeymoon" period at the outset of all negotiations during which negotiators make compromises more freely.

Finally, a range of general tactics. This may simply include raising some of your demands during the course of negotiation in the hope that this will put pressure on the other side to complete the negotiations quickly before the position stiffens yet further. Another approach involves the use of two negotiators who play differing or even opposing roles. One takes a very hard line offering almost no compromise whilst the other appears to desire compromise. Opposing parties who are unaware of such tactics frequently grasp at marginal concessions because they perceive them substantial in relation to the position of the hard liner.

An alternative approach to negotiation is that of, "principled", "interest-based", "co-operative", "problem solving" or "win/win" negotiation. According to Fisher and Ury, there are five basic elements to this approach.<sup>19</sup>

1. Separate the People from the Problem In other words, the negotiators should focus and attack the problem rather than each other.
2. Focus on Interests not Positions The negotiators should focus on the reasons for their demand. Focusing on interest in this way may uncover the existence of mutual interests which may pave the way for an agreement. For example the ability to maintain a long term relationship between the parties.
3. Invent Options for Mutual Gain A competitive negotiator will seek to obtain as much as possible during the course of the negotiations. The principled approach recognises that there may be bargained outcomes that will

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18. Meltsner and Schrag. (1973) *Negotiating Tactics for Legal Service Lawyers, Clearing House Review*, 32

19. Fisher, R. and Ury, W. (1991) *Getting to Yes: Negotiating an Agreement Without Giving In*, 2nd edition. Century Business, London

advance the interest of both negotiators. The infamous example is that of two children arguing over an orange. After some competitive and frustrating negotiation where each seeks to demand the orange for his or her own use the mother intervenes and asks each child in turn why they want the orange. One wants the orange for its juice whilst the other wants to grate the rind in order to flavour a cake. This simple example is a stark reminder of how a clear exploration of the parties interests provides the opportunity to maximise the mutual gains.

4. Insist on Using Objective Criterion To reduce the risk of inefficient bargaining or failure to reach agreement on price, Fisher and Ury suggest that the parties focus on some objective criterion to govern the outcome. For example looking up the book value of a second hand car.
5. Know your Best Alternative to a Negotiated Agreement (BATNA) This final element involves a serious consideration of the alternatives to reaching a negotiated agreement with the other party. This may involve exploring the cost of an alternative supplier, or addressing the costs associated with court action against the probability of succeeding.

White<sup>20</sup> suggests that Fisher and Ury's approach is frequently naive and occasionally self-righteous. His principal criticism is that the book overlooks the ultimate hard bargaining which he considers must occur in every negotiation. White does not accept that a negotiator can turn all negotiations in to some form of problem solving exercise. One might conclude that a competitive negotiator would win over a principled negotiator. Ury argues that this is not the case. He argues that it is possible to break through the other side's resistance and engage him or her in problem solving negotiation. This "break-through negotiation" involves five steps.

The first step requires one to avoid acting in the normal way. Rather than attacking the other side Ury invites us to suspend our reaction and assume the position of an objective on-looker. The second step involves listening and acknowledging the other side's point of view agreeing wherever possible. He refers to this other stage as stepping to their side. The third and trickiest stage involves directing the other's attention to the problem of meeting each side's interests. He suggests that we ask simple questions such as "why is that what you want" or "what would you do if you were in my shoes?".

The fourth step involves building on their ideas in order to make it easy and convenient for them to agree. The final stage - "bringing them to their senses, not their knees" - involves making it hard for them to say no. This does not involve using threats or force, but rather focuses on educating the other side about the costs of not agreeing. You are effectively demonstrating your BATNA.

### Mediation and conciliation

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

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20. White, J. (1894) The pros and cons of getting to "yes", *Journal of Legal Education*.

criminal.<sup>21</sup> 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 were 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.<sup>22</sup> 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.<sup>23</sup>

### What is 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. Some definitions in circulation include :

"Mediation is negotiation carried out with the assistance of a third party. The mediator, in contrast to the arbitrator or judge, has no power to impose an outcome on disputing parties."<sup>24</sup>

"Mediation is a facilitative process in which disputing parties engage the assistance of a neutral third party who acts as a mediator in their dispute."<sup>25</sup>

"Where two or more people or companies are unable to resolve a particular problem they invite a neutral person to help them arrive at a solution. The neutral person, or Mediator, will work hard with each side and help them to understand better their own and the other person's position, and explore alternative solutions"<sup>26</sup>

"Mediation consists of the effort of an individual, or several individuals, to assist the parties in reaching the settlement of a controversy or claim by direct negotiations between or among themselves. The mediator participates impartially in the negotiations, advising and consulting the various parties involved."<sup>27</sup>

There are two common threads. Firstly, the form of the third party intervention. The primary role of the third party is to facilitate other people's decision making. The process builds on negotiation, and the mediator fundamentally sustains and reviews the situation with the parties. Secondly, the third party should be independent of the parties in dispute. The essence of mediation that the mediator is impartial. The trust which

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21. Palmer, M. J. E. (1991) ADR; *Mediation in China*, lecture given at the London School of Economics, February.

22. Stipanowich, T. (1994) What's hot and what's not. *DART conference proceedings*, Lexington, Kentucky, USA

23. Butler, N. (1997)

24. Goldberg, S. B. et al, (1992). p103

25. Brown, H. and Marriott, A. (1992) *ADR Principles and Practice*, Sweet and Maxwell, London. p108

26. British Academy of Experts (1992)

27. American Arbitration Association, (1992)

develops during the process allows the mediator to perform “a bridging role” between the parties.

Confusingly, the term ‘conciliation’ is often used interchangeably with mediation. In the UK conciliation is usually taken to mean a more interventionist or evaluative style of mediation. However, there is no internationally agreed norm. The conciliation of labour disputes by ACAS is generally considered to be more evaluative, as is ICE conciliation. If the parties fail to settle under the ICE procedure, the conciliator will make a recommendation. However, the terms mediation and conciliation are often used interchangeably.

In practice, a mediation or conciliation may tend to be more towards one end of the scale than the other. It is perhaps more useful to make a distinction between facilitative and evaluative techniques. The process can be facilitative in that third party intermediary merely tries to aid communications between the parties. CEDR advocate a facilitative approach to mediation. At the other end of the scale is an evaluative approach where the third party comments on the subject matter and makes recommendations as to the outcome.

In summary, the main elements of mediation and conciliation are:

- That it is voluntary in the sense that the parties participate of their own free will.
- A neutral third party assists the parties towards a settlement.
- The process is non-binding unless an agreement is reached.
- The process is private, confidential and conducted without prejudice to any legal proceedings.

### Benefits of mediation

Many consider that mediation and conciliation offer a range of benefits when compared to the traditional formal adjudicative processes such as litigation and arbitration. These benefits include:

- Reductions in the time taken to resolve disputes
- Reductions in the costs of resolving disputes
- Providing a more satisfactory outcome to the dispute
- Minimizing further disputes
- Opening channels of communication
- Preserving or enhancing relationships
- Savings in time and money
- Empowering the parties

### The mediation process

There are, in general terms, three main phases to mediation:

- 1 Pre-mediation – agreeing to mediate and preparation.
- 2 The mediation – direct and indirect mediation.
- 3 Post-mediation – complying with the outcome.

This basic framework may be further developed. Goldberg et al suggests a 5-stage process<sup>28</sup>, whilst Brown and Marriott divide mediation into ten stages<sup>29</sup>.

Basic framework	The practice of mediation (Goldberg, et al p. 106)	The stages of mediation (Brown and Marriott, p. 121)
Pre-mediation	A: Pre-mediation - getting to the table	1: The initial inquiry - engaging the parties
		2: The contract to mediate
		3: Preliminary communications and preparations
The mediation	B: The opening of mediations	4: Meeting the parties
		5: The parties' presentations
		6: Information gathering
		7: Facilitating negotiations
		8: Impasse strategies
Post mediation	E: Agreement	9: Terminating mediation and recording agreements
		10: Post-termination phase

#### *Pre-mediation*

The preparation phase of mediation develops from the initial inquiry, which may involve an explanation of the process, and an attempt to persuade reluctant parties to participate. A contract to mediate is frequently used in order to agree the terms and the ground rules for the mediation. This will include items such as costs, confidentiality, the without prejudice nature of the mediation, authority to settle and timetable. In some instances, the parties may provide and exchange written summaries of the dispute, and occasionally furnish copies of supporting documents. During this process, the mediator will be identified, and will become a party to the mediation contract.

From the mediator's perspective, the pre-mediation objective is merely to get the parties to the mediation. The strategy of the parties is less clear. Are they preparing their best case, do they consider innovative ways to settle, do they really calculate their BATNAS?

#### *The mediation*

Most commercial mediations are conducted over the course of one day, although some may extend over several days, weeks, or even months. Mediations are usually conducted on neutral territory, rather than the offices of one of the parties. This is an attempt to avoid the power imbalances which may occur as a result of one of the parties operating within familiar territory. The mediator's role involves managing the process, and so will receive and seat the parties, before carrying out the necessary introductions. During this first joint meeting, the mediator will establish the ground rules and invite the parties to make an opening statement.

The mediation process is flexible, and once the parties have made their opening statements, the mediator may decide to discuss some issues in the joint meeting or a

28. Goldberg

29. Brown, H. and Marriott, A. (1992) *ADR Principles and Practice*, Sweet and Maxwell, London.

“caucus”. A caucus is a private meeting between the mediator and one of the parties. The mediator will caucus with the parties in turn, in order to explore in confidence the issues in the dispute and the options for settlement. In a caucus, the mediator is mediating “indirectly” with the parties, and this exploration phase of mediation serves to:

- Build a relationship between the parties and the mediator.
- Clarify the main issues.
- Identify the parties’ interests or needs.
- Allow the parties to vent their emotions.
- Attempt to uncover hidden agendas.
- Identify potential settlement options.

While the mediator is caucusing with one party, it may be possible for the other party to work on a specific task set by the mediator. The mediator may also utilise further joint meetings in order to narrow the issues, allow experts to meet, or broker the final settlement. The aim of mediation is to develop a commercially acceptable, workable agreement which can be written into a binding settlement contract.

#### *Post mediation*

Post mediation will either involve execution of the settlement agreement, or a continuation towards the trial or arbitration hearing. The mediator may still be involved as a settlement supervisor, or perhaps further mediations. It has been suggested that just because the parties do not settle, does not mean that the mediation was not successful. The parties may have a greater understanding of their dispute, which may lead to future efficiencies in the resolution of the dispute, or the parties may settle soon after the mediation.

#### The mediator’s role

The mediator is the manager of the process. S/he should take control of the process, and aid the parties to settlement. CEDR state that the mediator fulfils several important roles during the mediation and should:<sup>30</sup>

- Manage the process firmly but sensitively.
- Facilitate the parties towards settlement by overcoming deadlock.
- Gather information in order to identify common goals.
- Be a reality tester, helping the parties to take a realistic view of the dispute.
- Act as a problem solver, thinking creatively in order to help the parties construct an outcome that best meets their needs.
- Soak up the parties feelings and frustrations, re-channelling the parties’ energy into positive approaches to the issues.
- Act as a scribe who assists in the writing of the agreement.
- Be a settlement supervisor, checking that the settlement agreement has worked and being available to help with further problems that may occur.
- Prompt the parties towards settlement and keep the momentum towards settlement.

It is vital that the mediator gains the trust and confidence of the parties so that a full and frank discussion can be encouraged. A full exploration of the problems will help to generate settlement options.

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30. CEDR,(1997) Mediator Training Handbook, Centre for Dispute Resolution

Mediators may employ a variety of strategies to achieve a settlement. The literature suggests that there are five main activities which mediators should employ:

- Investigation- questioning to (1) obtain information and (2) to point out the holes in a particular party's point of view;
- Empathy;
- Persuasion;
- Invention - creating solutions; and
- Distraction - to avoid parties from assuming a set position.

The mediator should question and investigate not just the issues in dispute, but the underlying conflict. Apparently mediators have little chance of "steering" the parties to a settlement without understanding the hidden objectives of the parties. Mediators should avoid sympathy with either party. Nonetheless, a degree of empathy is required in order to build trust with the parties. Persuasion is required in order to drive the mediation forward, as is a degree of inventiveness and the ability to provide distraction. In this context, distractions refers to the ability to take the parties onto another related subject in order to explore settlement possibilities from another angle. This techniques may be used to avoid the polarisation of positions which is frequently adopted by many during conflict.

#### Liability of Mediators

Clause 12 of CEDR's standard form of Mediation Agreement states the following:

"Neither CEDR nor any Mediator appointed by CEDR shall be liable to the Parties or either of them for any act or omission whatsoever in connection with the services to be provided by them."

It is arguable that the Mediator, if acting purely in a facilitative capacity, should never find him or herself in circumstances which may give rise to any liability. Nonetheless it is clearly sensible to include an immunity clause. The clause is an attempt at a complete exclusion of liability and may be contrast to Section 29 of The Arbitration Act 1996 which relates to the immunity of Arbitrators. In that clause Arbitrators are immune unless the act or omission is shown to have been in "bad faith".

Many mediation agreements around the world include similar immunity clauses. Apparently a similar clause has been tested in Australia where the Mediators inadvertently gave incorrect legal advice. There is another incidence where the Mediator may lay him or herself open to a claim. This would be where s/he obtains some confidential information during a caucus which s/he then negligently reveals to the other party.

#### The qualities of a mediator

A good deal of the literature focuses on the function, role and skills of mediators. A mediator is qualified not by the virtue of his or her expertise in a particular area, but rather by the individual's ability to aid the parties to a settlement. In this respect the mediator must manage the mediation process, gather information from the parties before evaluating and testing that information in order to facilitate the exchange of

information which should hopefully then lead to a settlement. These processes can be described as the role or function of the mediator.

However, the skills or attributes required of a mediator in order to carry through a successful mediation are somewhat more subjective. Many of the skills are interpersonal skills of the individual, in particular his or her ability to communicate effectively. An effective mediator needs to be seen to maintain a carefully balanced neutral role. In some respects a mediator who has no specialist knowledge about the technical issues of a dispute will have the benefit of coming to the mediation without preconceived ideas arising from his or her own background. This contrasts to the skills expected of an arbitrator who is usually chosen for his or her particular area of expertise.

The skills of a mediator are based upon the ability to communicate rather than a firm grounding in a technical area. For example, the ability to carefully encourage a party to see the weaknesses of its own case without providing one's own evaluation of the situation requires care and skill.

#### Informal mediation processes

Many of the survey respondents who reported mediation experiences were more specifically referring to a process of "informal" mediation. The technique essentially refers to a wide ranging and flexible process which develops over time, and focuses on a key third party neutral. This neutral is approached because of his or her position by one of the disputant. The individual representing one of the parties approach the particular neutral because a situation of mutual trust and respect already exists as a result of a prior course of dealing.

Often, the previous course of dealing will be over an extended period of many years, possibly with the neutral in a senior commercial position. He or she is usually approached at a certain stage in the dispute. First, the parties are entrenched and unable to find common ground. Second, at least one of the parties recognises the importance of reaching a commercially sensible solution to the dispute. Finally, the approaching agent recognises that the neutral is in a position such that s/he has the ability to "talk" to the other side with a degree of trust and respect.

#### How frequently is mediation used in practice?

An evidenced-based survey commenced on 1 June 2006. This funded project is being conducted by King's College, London.<sup>31</sup> The research is being conducted not only with the support of the Technology and Construction Court, but also with their assistance. The aim of the research is to:

- 1 Reveal in what circumstances mediation is a real alternative to litigation, in other words a value-added alternative that settles the dispute;
- 2 Assist the court to determine whether, and at what stage, it should encourage mediation in future cases; and
- 3 Identify which mediation techniques are particularly successful.

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31. King's College, London gratefully acknowledges the Society of Construction Law, the Technology and Construction Solicitor's Association, Her Majesty's Judges of the Technology and Construction Court and Fenwick Elliott LLP for research funding, ongoing support and guidance. The research is being undertaken on a daily basis by Aaron Hudson-Tyreman. Thanks must also go to Carolyn Bowstead, the TCC Court Manager, for her ongoing assistance.

Survey forms are issued to all of the participants of litigation in the TCC, which has concluded after 1 June 2006. The survey is, therefore, almost at its halfway point. This article is merely a summary of the interim report based upon the data collected in the first quarter of the survey period.<sup>32</sup>

The representatives of each party that has settled, resolved or received a judgment from the TCC after 1 June 2006 has or will receive a survey form. Form 1 applies where a case has settled. Form 2 applies where a judgment has been given. Both surveys enquire whether mediation was used, the form that it took and at what stage in the litigation process the mediation occurred. Specific details about the dispute resolution process are then collected.

#### *Interim Results*

During the first six months, a response rate of 25.5% was recorded. An initial analysis of the responses shows that 32% of those disputes that settled were as a result of a mediation. This is more than had been anticipated. Of the remaining 68%, 61% settled by conventional negotiation while 7% settled as a result of some other process.

The nature of the cases dealt with is also interesting. A noticeable proportion of the cases related to defects (28%), design issues (15%) and professional negligence (15%). A survey dealing with similar categories of disputes arising from the Technology and Construction Court some ten years ago revealed that the majority of the issues leading to litigation in the TCC, were those relating to payment, variations, delay and site conditions.<sup>33</sup>

During the past ten years there has been a reduction in the number of cases commencing in the TCC. Some of this in part relates to the introduction of the pre-action protocols, also in part to the increase in mediation, but undoubtedly, due also to the increase in adjudication. Perhaps it is the case that time- and money-related issues, often prevalent in construction disputes, are now being dealt with by way of adjudication, and during the pre-action protocol process, while defects, design and negligence are remaining within the court's domain. This might be because those issues are frequently not only more complex, but often multi-party and therefore not easily suited to adjudication.

Respondents were asked to identify at what stage litigation settled or was discontinued. This is particularly interesting as many will often have an anecdotal view as to the time at which disputes settle. Anecdotally, many believe that most settlements are reached on the court steps. Clearly, this is not the case. There are a variety of "pinch points" in the litigation process. According to the respondents, those pinch points are:

- During exchange of pleadings (33%);
- During or as a result of disclosure (14%);
- As a result of a payment into court (10%); and
- Shortly before trial (24%).

Of the settlements reached, 81% were reached at one of the above stages. The remaining 19% occurred somewhere between the issuing of the claim form and the issuing of the judgment.

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32. For more information an Interim Report can be downloaded from [www.fenwickelliott.co.uk](http://www.fenwickelliott.co.uk)

33. Gould, N. and Cohen, M. (1998) "ADR: Appropriate Dispute Resolution in the UK Construction Industry" *Civil Justice Quarterly*, volume 17, April, Sweett & Maxwell.

Of the mediations undertaken, 81% were as a result of the parties' own initiative, just 5% as an indication of the court, and 14% as a result of an order of the court. Barristers (48%) and construction professionals (38%) were the most frequently encountered mediators, with solicitors only represented by 14%. No other professionals were represented. No judges had been appointed as a part of the court settlement process according to the respondents. This analysis is only based on the first quarter of the survey period, so the final results may of course reveal a different picture.

Many of the respondents believed that costs had been saved as a result of mediation. In effect, the financial amounts saved represented the point in the litigation at which the dispute is settled. Some suggested that the cost savings were between £200,000 and £300,000. No doubt, those reflected the disputes that settled early during the pleadings stage, whilst those who suggested that the savings were £25,000 or less perhaps represented those disputes that settled shortly before trial.

Mediation is clearly being used successfully in construction disputes. A limited number of mediators are being used repeatedly by those parties that have commenced or are responding to litigation in the Technology & Construction Court. The mediations that are being undertaken are on the parties' own initiative. However, mediations are not occurring at one particular point in the litigation process, but at several distinct points, namely: pleadings, disclosure, payment in and shortly before trial.

These results are only a snapshot, based upon an analysis of the first quarter of the research period. The research continues and will conclude in the summer of 2008. A more detailed report will be available towards the end of 2008.

### 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<sup>34</sup>.

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 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.

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34. McGaw, M, (1992) "Adjudicators, experts and keeping out of court" *Legal Obligations in Construction; Revised Conference Proceedings*, Construction Law Press, p 605

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 has recently changed 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 24th July 1996. 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.<sup>35</sup>

### 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 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 notable exceptions. A further notable exception is a construction contract with a residential occupier. The provisions only apply where the construction contract is in writing, however this is given a wide interpretation and it would seem very little is needed to fulfil this requirement.

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35. Enderson G. (1996)

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

**1. Notices:** A party to a construction contract must have the right to give a notice at any time of his intention to refer a particular dispute to the adjudicator.

**2. Appointment:** A method of securing the appointment of an adjudicator and furnishing him with details of the dispute within seven days of the notice is mandatory.

**3. Time scales:** 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. There are only two exceptions to this rule. First the adjudicator may extend the period of 28 days by a further 14 days if the party refereeing the dispute consents. Second, a longer period can be agreed by consent of all the parties. Such agreement can only be reached after the dispute has been referred

**4. Act impartially:** The adjudicator is required to act impartially.

**5. 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 time scale available.

**6. 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 (1997) 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” 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.

**7. Immunity:** The adjudicator cannot be held liable for anything done or omitted in the discharge of his function as an adjudicator unless acting in bad faith. This protection is extended to any employee or agent of the adjudicator.

In addition to this basic procedural framework the Act further requires that any construction contract complies with the provisions of the scheme for construction contracts.

### The Scheme for Construction Contracts

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 a standard forms 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;

- 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.<sup>36</sup> 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.

#### 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. 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. More interestingly, the Centre for Dispute Resolution (CEDR) was quick to establish an adjudication procedure. 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

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36. Statutory Instrument 1998 number 649

of the industry. These two bodies have adopted slightly different approaches to the Act. The most recent JCT Amendment 18 is clearly a large scale amendment to the JCT form, and one which includes its own adjudication procedures. On the other hand, the ICE have chosen to produce a stand alone adjudication procedure which 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.

### Preliminary Points

A party contemplating reference of a dispute to adjudication must consider a number of preliminary points before proceeding. These include:-

- 1 Is there a dispute?
- 2 Does the dispute arise under a construction contract within the meaning of Section 104?
- 3 Is the contract in writing within the meaning of Section 107?
- 4 What are the identities of the correct parties to the contract?

A party finding itself in the position of responding in a reference to adjudication where there is no legal right so to refer must also pay attention to these issues in order to give itself the best possible chance of stopping the process from taking its full course.

1. Is there a dispute?

Under the HGCRA, there is no entitlement to adjudicate unless a "dispute" has arisen under the contract. A party may therefore challenge a purported reference to adjudication on the ground that there is no dispute. Similarly, enforcement of a purported decision may be defended on the grounds that, without a dispute, the adjudicator had no jurisdiction to make a decision that is binding on the parties.

The question of when a dispute crystallises has been examined in a large number of cases but there has unfortunately been some inconsistency in judicial analysis as to when the point of crystallisation occurs.

Judgments on the question of what constitutes a dispute for the purposes of statutory adjudication can mostly be assigned into one or other of two categories. The first category, the "narrow definition", is based on the proposition that for a dispute to arise, not only must a claim be made but also the recipient of the claim should have been given reasonable opportunity to consider, and respond to, it. The second category, the "wide definition", consists of the cases in which the court in question has applied the proposition that there is a dispute once a claim is made, unless and until the defendant admits that the claimant is entitled to what has been claimed.

More recently, there has been “the flexible approach”<sup>38</sup>, when Mr Justice Jackson stated:-

“1. The word “dispute” which occurs in many arbitration clauses and also in Section 108 of the Housing Grants Act should be given its normal meaning. It does not have some special or unusual meaning conferred upon it by lawyers.

...

3. The mere fact that one party (whom I shall call “the Claimant”) notifies the other party (whom I shall call “the Respondent”) of a claim does not automatically and immediately give rise to a dispute. It is clear, both as a matter of language and from judicial decisions, that a dispute does not arise unless and until it emerges that the claim is not admitted.

4. The circumstances from which it may emerge that a claim is not admitted are Protean. For example, there may be an express rejection of the claim. There may be discussions between the parties from which objectively it is to be inferred that the claim is not admitted. The Respondent may prevaricate, thus giving rise to the inference that he does not admit the claim. The Respondent may simply remain silent for a period of time, thus giving rise to the same inference.

5. The period of time for which a Respondent may remain silent before a dispute is to be inferred depends heavily upon the facts of the case and the contractual structure. Where the gist of the claim is well known and it is obviously controversial, a very short period of silence may suffice to give rise to this inference. Where the claim is notified to some agent of the Respondent who has a legal duty to consider the claim independently and then give a considered response, a longer period of time may be required before it can be inferred that mere silence gives rise to a dispute.

6. If the Claimant imposes upon the Respondent a deadline for responding to the claim, that deadline does not have the automatic effect of curtailing what would otherwise be a reasonable time for responding. On the other hand, a stated deadline and the reasons for its imposition may be relevant factors when the court comes to consider what is a reasonable time for responding.

7. If the claim as presented by the Claimant is so nebulous and ill defined that the Respondent cannot sensibly respond to it, neither silence by the Respondent nor even an express non-admission is likely to give rise to a dispute for the purposes of arbitration or adjudication.”

The validity of contractual provisions imposing mandatory pre-adjudication procedures, for example stating that the parties are first to attempt to resolve any difference by mediation before being entitled to refer such difference to adjudication, has been considered in a number of cases<sup>38</sup>. Such contractual provisions have been held to be void, as they conflict with the unqualified right under Section 108(1) of the HGCRA to refer a difference or dispute to adjudication “at any time” and thereby attempt to fetter a party’s right to do so.

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37. *AMEC Civil Engineering Ltd -v- The Secretary of State for Transport* [2004] EWHC 2339

38. *RG Carter -v- Edmund Nuttall Ltd* [2002] EWHC 400 (TCC), 21 March 2002, TCC, *John Mowlem & Co Plc -v- Hydra-Tight Ltd* 6 June 2000, *British Waterways Board (Judicial Review)* 5 July 2001

2. Does the dispute arise under a construction contract?

The statutory right to refer a dispute to adjudication only arises “under a construction contract” falling within the definition of Section 104. Where the contract does not fall within this definition, there is therefore no right to statutory adjudication.

However, adjudication is also possible under a contract outside the statutory definition where the parties have as part of that contract agreed to refer disputes under it to adjudication. Sometimes the parties agree to adjudicate after the dispute has arisen in circumstances where otherwise there would be no right to refer to adjudication or obligation to participate in it. This is referred to as “contractual adjudication”, to distinguish it from statutory adjudication under the HGCRA.

As it is “contractual adjudication”, the Scheme cannot be implied to fill in any gaps in the adjudication procedures provided for in the contract<sup>39</sup>.

3. Is the contract in writing?

Section 107(1) of the HGCRA provides that the right to refer a dispute to adjudication applies only where the relevant construction contract is in writing. Sub-sections (2) to (6) contain the rules for determining whether the contract is in writing and were initially regarded as providing a fairly wide definition.

However, in the case of *RJT Consulting Engineers Ltd -v- DM Engineering (Northern Ireland) Ltd*<sup>40</sup>, the Court of Appeal applied a much stricter interpretation.

At first instance, HHJ MacKay had taken what he described as a “purposive” approach and held that it was not necessary to identify all the terms of the contract and, since there was in this case a “comparatively great” amount of written material, that would be sufficient. The material included a fee account, identifying the parties and the place of work, and meeting minutes, which identified the type of work being carried out.

The Court of Appeal disagreed with this approach. They said that invoices, for example, are evidence of the existence of a contract and do not define the contract as such. They held that the whole of the agreement had to be evidenced in writing, saying:-

“Certainty is all the more important when adjudication is envisaged to have to take place under a demanding timetable. The adjudicator has to start with some certainty as to what the terms of the contract are. The written record of the agreement is the foundation from which a dispute may spring but the least the adjudicator has to be certain about is the terms of the agreement which is giving rise to the dispute.”

A record of an agreement must thus be a record of a complete agreement. It should be noted that one of the judges, Auld LJ, differed slightly in his view, considering that it was the terms of the agreement which are material to the issue(s) giving rise to the dispute which were important to be recorded in writing, not that every single term, however trivial, should itself be expressly recorded.

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39. For other distinctions between these two types of adjudication, see the decisions of the Court of Appeal in *Parsons Plastics (Research & Development) Ltd -v- Purac Ltd* [2002] BLR 334 and *Ferson Contractors Ltd -v- Levolux AT Ltd* [2003] EWCA Civ 11

40. [2002] EWCA Civ 270, 8 March 2002

#### 4. Identity of the parties

Care must be exercised to state the correct party names not only in the contract documentation but also in all exchanges during the adjudication process, as otherwise there may well be jurisdictional difficulties.

#### The Adjudication Process

The first step is to serve notice of adjudication, to inform the other party that a dispute has arisen and that it is intended to refer this dispute to adjudication.

The notice should set out in reasonable detail what the dispute is about, and the redress being sought; it establishes the jurisdiction of the adjudicator, who will not be entitled to decide any issue not specifically stated in the notice. If a new issue emerges during the adjudication, this may well amount to a new dispute and could therefore be outside the adjudicator's jurisdiction.

The next step is to appoint the adjudicator. An adjudicator may have been named in the contract; if not, then the referring party has to apply to the adjudicator nominating body (ANB) named in the contract or, if none is named, an appropriate ANB for a nomination to be made.

The adjudicator must be appointed, and the dispute formally referred to him/her, within seven days of the notice of adjudication.

Referral to the adjudicator is achieved through service of the referral notice, which states the referring party's case. It should be supported by copies of, or relevant extracts from, the construction contract and all other documents, for example drawings, programmes, correspondence, meeting minutes, notices and calculations, upon which the referring party intends to rely by way of evidence to prove the events or support the assertions which it is claiming.

If the referral notice includes any documentation which the responding party has not seen before (other than witness statements) then the adjudicator will not have jurisdiction to consider it, as it will not have formed part of the "dispute" being referred to adjudication.

The responding party is entitled to serve a response to the referral notice, setting out its reply to the issues, arguments and facts relied upon by the referring party.

The adjudicator may entitle the referring party to serve a reply to the response; in some larger and more complex adjudications, exchanges of submissions continue even beyond this point, with the service of rejoinders.

The adjudicator may ask the parties questions, and may decide to hold a meeting at which the issues in dispute may be explored in full. He may decide to visit the site, or carry out tests, or obtain his own legal and/or technical expert evidence. In the exercise of all these powers, he must be careful to comply with the rules of natural justice, giving the parties the opportunity to comment on any information from whatever source that he wishes to rely upon in reaching his decision. He must not conduct the proceedings in such a way that will lead an outsider to conclude that that might be a risk of bias.

The adjudicator must make his decision on the matters referred to him. If he cannot do this, then he should resign, thus allowing the parties to refer the dispute to someone else.

There is no format prescribed by the HGCRA, the Scheme or any of the published adjudication procedures with which an adjudicator's decision must comply. He should however make his decision responsive to the remedies sought, stating clearly what the parties are to do, and when it is to be done.

The HGCRA does not require the adjudicator to give reasons for his decision; whether he does so therefore depends on the contract, which may provide that he is to give reasons only if a party requests them. Many adjudicators, however, now take the view that they should give reasons in any event, even if only briefly, in order to inform the parties of their thinking and engender greater acceptability of their decision and, perhaps, promote the final resolution of the dispute in a more efficient manner.

Generally, after making and publishing his decision, the adjudicator has no power to review it to reflect any changes in his views on the merits of the dispute. He may, however, revise his decision in order to correct clerical or other accidental errors<sup>41</sup>. The contract itself may also provide for this to be done.

Unless otherwise agreed by the parties, the adjudicator has no power to award the payment of costs, other than to determine payment of his own fees and expenses, for which the parties are in any event jointly and severally liable.

If the adjudicator's decision is not complied with, then it will be necessary to enforce it. The main methods of enforcing adjudicators' decisions are:-

- 1 Summary judgment/interim payment application in court.
- 2 Mandatory injunction.
- 3 Statutory demand.
- 4 Part 8 proceedings, where the declaration of the court is sought on a question that is unlikely to involve a substantial dispute over fact.

The principal grounds for challenging the decision of an adjudicator include:-

- 1 The adjudicator did not have jurisdiction to make the decision.
- 2 The adjudicator acted in breach of the requirements of natural justice/ impartiality/ fairness.
- 3 The adjudicator acted in breach of the applicable procedural rules, thereby going outside his jurisdiction.
- 4 The payee, by reason of insolvency, will be unable to repay the payment ordered when final determination of the dispute requires such payment.

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41. *Bloor Construction (UK) Ltd -v- Bowmer & Kirkland (London) Ltd* [2000] BLR 314

## Current challenges to adjudicator's decision

For some time, a range of jurisdictional challenges have been considered by the courts. Primarily, they can be considered under two major limbs, namely: those relating to whether an adjudicator had jurisdiction to make the decision, and those relating to cases where the adjudicator had jurisdiction but lost it. The first category considered whether the adjudicator "crossed the threshold" and thus had the power to deal with the dispute and make a decision. The second category captured those occasions where the adjudicator had jurisdiction but lost it by going beyond his powers, breaching natural justice, or more recently failing to make a decision within the time available.

Matters that were initially referred to adjudication soon after its launch mostly related to interim valuations. Larger-value and then final account adjudications became more common several years ago. The problem with these large-value adjudications was, at the time, thought to be that a party could spend many months preparing an adjudication thus ambushing the other side and giving them little opportunity to respond in order to gain a strategic advantage. The reality, of course, was that not only did a respondent struggle to respond but adjudicators struggled equally to deal with large and complex disputes within a very limited timescale.

The current trend has therefore been to divide large disputes into more manageable chunks and refer them sequentially to adjudication. This recent approach to serial adjudication has raised a number of interesting questions in the court, and has also led to a more strategic use of adjudication.

## Serial Adjudications

Serial adjudications raise some interesting and current questions:

- Is there a limit to the number of adjudications that can arise from one project?
- The nature of the dispute referred and jurisdiction
- Time limits: and
- Strategic considerations

### *Is there a limit to the number of adjudications that can arise from one project?*

There is no limit to the number of adjudications that can arise from one project, provided that each adjudication is founded on a new dispute. For example, in *William Verry Limited v The Mayor & Burgesses of the London Borough of Camden*,<sup>42</sup> there had been two adjudications. The first concerned an application for payment in June 2003 and the second concerned specific items of valuation. The relevant enforcement proceedings concerned the third adjudicator's decision confirming the extension of time, calculating the amount due at practical completion, the amount of retention, the amount of liquidated damages and then, identifying a net payment to William Verry, together with interest.

### *The nature of the dispute referred and jurisdiction*

Section 108(1) of the HGCRA gives a party to a construction contract a right to refer a "dispute" to adjudication. It does not refer to "disputes". This issue was considered in *David and Teresa Bothma (In Partnership) t/a DAB Builders v Mayhaven Healthcare Limited*.<sup>43</sup>

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42. [2006] EWHC 761.

43. 16 November 2006, TCC (Bristol).

*In this case*, the contractor was engaged under a JCT Intermediate Form of Contract 1998 Edition to carry out alterations and an enlargement to a nursing home. The contract sum was £488,695.38.

The contractor applied for an extension of time and the contract administrator indicated that he would give an extension of time for two months, confirming then an extension of time of 24 days and later an extension of time of 74 days. The date from which the extension should run was not confirmed and so the confusion about the completion date remained.

Application 9 was made by the contractor in the sum of £444,531.74. The contract administrator was replaced and the new administrator certified the sum of £417,201.

A Notice of Adjudication referred a dispute relating to the date for completion of the contract, the scope of the architect's instructions, the validity of the notice of non-completion and the amount of payment in respect of Application No. 9.

HHJ Havelock–Allan QC held that there were two separate disputes and as a result the adjudicator acted without jurisdiction. The decision was therefore not enforced. This decision was then unsuccessfully appealed to the Court of Appeal.

*In Quietfield v Vascroft*,<sup>44</sup> the Court of Appeal heard an appeal from the judgment of Mr Justice Jackson in relation to successive extension of time adjudications. Quietfield employed Vascroft to carry out renovation, alteration and addition works to a mansion pursuant to an amended JCT 1998 contract. There were delays to the works and they were not completed by the completion date. Vascroft made two specific applications to the architect for extensions of time. The first was in a letter dated 2 September 2004 which requested an extension until 9 June 2005. The letter had an attachment which identified 12 matters as being the causes of delay. The second application was made in a letter to the architect dated 22 April 2005 and it relied on delay caused by work being carried out by others and asked for an extension until 23 September 2005. The architect did not give an extension of time.

In August 2005, Vascroft wrote to Quietfield with a Notice of Adjudication. The dispute referred to adjudication included Vascroft's claims for extension of time on the basis of the matters set out in their two letters. The adjudicator declined Vascroft an extension of time but awarded some money for their financial claims. Quietfield subsequently commenced an adjudication for liquidated and ascertained damages for Vascroft's failure to complete the works on time. The same adjudicator was appointed to determine the dispute. Vascroft resisted the claim, contending that they were entitled to an extension of time for the whole period on the grounds set out in Appendix C to their response. The adjudicator decided that he was not able to have regard to the matters set out in Appendix C because he was bound by the decision given in the first adjudication and considered that Vascroft's defence was seeking to rely for a second time on the same matters as they had unsuccessfully relied on in the first adjudication.

Mr Justice Jackson refused to enforce the adjudicator's decision. The question was whether the matters in Appendix C were put forward in the first adjudication. Clause 25 of the Conditions permitted the contractor to make successive applications for extensions of time on different grounds and successive adjudications concerning extensions of time must be permissible provided that each adjudication arises from a separate dispute.

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44. [2006] EWCA Civ 1737.

Lord Justice May referred to the four principles set out by Mr Justice Jackson regarding successive adjudications about extension of time and damages for delay and agreed with them. The scope of an adjudicator's decision is normally defined from section 108 of the Act and paragraphs 9(2) and 23 of the Scheme. Appendix C did not contain the same claims as was advanced in the two notification letters – it had a fairly sophisticated and new critical path analysis and identified a number of causes of delay which did not feature in the two letters. The adjudicator was wrong not to consider Appendix C and accordingly the appeal should be dismissed.

Lord Justice Dyson also agreed that the appeal should be dismissed. He stated:

“[T]he contractor must present some new material which could reasonably lead the architect to reach a different conclusion from that on which he based his earlier decision or decisions. . . . I can see no reason to construe clause 25 so as to prohibit the contractor from relying on the same Relevant Event as he relied on in support of a previous application for extension of time, giving materially different particulars of the expected effects and/or a different estimate of the extent of the expected delay to the completion of the Works.”

Whether dispute A was substantially the same as dispute B was a question of fact and degree. The written notices that formed the basis of the second claim identified Relevant Events which were substantially more extensive than those which formed the basis of the first claim. The particulars were different too. Although there will be some extensive cases where it is a matter of judgement, this was not a borderline case.

An adjudicator's decision was not enforced in *HG Construction Limited v Ashwell Homes (East Anglia) Limited*.<sup>45</sup> In this case, HG Construction Limited was engaged as contractor by Ashwell Homes (East Anglia) Limited for the development of new housing in Cambridgeshire. The contract was based upon the JCT Standard Form of Building Contract With Contractor's Design (1998 Edition). The contract provided for sectional completion. Disputes arose and there were four adjudications. In this judgment, Mr Justice Ramsey had to consider the enforceability of the third Adjudicator's Decision. Ashwell argued that the third Decision dealt with issues that had already been determined in respect of the first Decision.

In the first Notice of Adjudication Ashwell asked the Adjudicator to determine “the validity and/or enforceability of the provisions within the contract for the deduction of liquidated and ascertained damages”. The Adjudicator decided that, as a matter of the objective construction of the terms of the contract, it was possible to determine the works that were included within each section and therefore the provisions in the contract for the deduction of liquidated and ascertained damages were valid and enforceable.

The third Adjudication then involved a dispute about the proportionate relief in respect of liquidated and ascertained damages as a result of partial possession of the sections. As part of the Decision, the Adjudicator decided that the liquidated and ascertained damages of the contract were “inoperable and therefore void for want of certainty”.

The issue, therefore, was whether a subsequent Adjudicator is bound by the decision of an earlier Adjudicator.

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45. [2007] EWHC 144.

Mr Justice Ramsey considered that the starting point was clause 39A.7.1 of the contract which provided that an adjudicator's decision "shall be binding on the parties until the dispute or difference is finally determined by arbitration or by legal proceedings". He noted that it was possible, as a result of *Quietfield Limited v Vascroft Construction Limited*<sup>46</sup>, to have successive adjudications in respect of extension of time issues, providing that new facts had arisen requiring a reconsideration of the extension of time.

In this case the first Adjudicator had decided that the liquidated and ascertained damages provisions of the contract were enforceable. Therefore a subsequent Adjudicator was bound by that decision and could not decide that the liquidated and ascertained damages provisions were void.

Further, and as a matter of practice:

an Adjudicator should consider (based on an objection raised by one of the parties *or on his own volition*) whether he is being asked to decide a matter on which there is already a binding decision by another Adjudicator. If so he should decline to decide that matter or, if that is the only matter which he is asked to decide, he should resign. [Para. 38(3), *Emphasis added*]

This was not a case where a new factual position had arisen giving rise to a new argument. Decision 3 was, therefore, not enforceable nor binding upon the parties. As a result the summary judgment application for Decision 3 was dismissed.

#### *Time Limits*

Time limits have also been recently identified as a new challenge area. In part, this has been because complex adjudications are difficult to deal with in 28 days, but also as a result of delay in nomination by nominating bodies and the adjudicator trying to deal with further submissions made by the parties.

The time frame to serve a Referral has been clarified in the recent decision of HHJ Coulson QC in *Hart Investments Ltd v Fidler & Anor.*<sup>47</sup> The Referral Notice was not served in accordance with the Scheme, being provided eight days (rather than seven) after the Notice of Intention to Refer. The Judge's initial reaction was to consider that in the overall scheme of things, it was difficult to say that a delay of one day in the provision of the Referral Notice should be accorded great significance. However, one of the main points of adjudication is that speed is given precedence over accuracy. What matters is a quick decision. Therefore there must be a summary timetable with which everyone must comply. Therefore the Referral Notice was irregular and/or invalid and the adjudicator did not have jurisdiction.

The effect of an adjudicator's decision given outside the 28-day time frame has been the subject of a number of recent English decisions. Previously it had been the subject of debate, with different decisions given in the English and Scottish courts. In *Barnes & Elliott Ltd v Taylor Woodrow Holdings*,<sup>48</sup> His Honour Judge LLOYD QC held that a decision reached on day 28, but not communicated until day 29, was a valid decision.

His reasoning was based upon the express terms of the contract with which he was dealing, which do not apply here. Moreover, the Judge stressed that s.108 of the HGCR "only confers authority to make a decision within the 28 day period". However, in *Simons Construction Ltd v Aardevarch Developments Ltd*,<sup>49</sup> it was held that a decision that was

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46. [2006] EWCA Civ 1737.

47. [2007] EWHC 1058.

48. [2003] EWHC 3100.

49. [2003] EWHC 2474.

reached over a week beyond the 28-day period was binding because the adjudication agreement had not been terminated by the time the late decision was provided.

In contrast, the Scottish Inner House of the Court of Session, in *Ritchie Brothers plc v David Phillip Commercials Ltd*,<sup>50</sup> held that the 28-day limit meant what it said. Accordingly, they held that a decision that was not provided until a day after the expiry of the 28 days was a nullity, despite the fact that the delay in the provision of the decision had been just that one day. This decision was referred to favourably in the above case of *Hart*.

However, two recent decisions (*Epping Electrical*;<sup>51</sup> *Aveat Heating*<sup>52</sup>) of His Honour Judge Havery QC have confirmed that adjudication decisions given outside the 28-day time limit are not valid. His Honour considered that it would be undesirable for the HGCRA to be interpreted in different ways in England and Scotland and therefore he ought to follow the decision of *Ritchie Bros*. However, a decision communicated out of time was enforced by His Honour Judge Coulson in *Cubitt Building & Interiors v Fleetglade*<sup>53</sup> as His Honour held that there was a distinction between reaching a decision and communicating a decision. A decision which was not reached within 28 days or any agreed extended date is probably a nullity but a decision which is reached within 28 days or an agreed extended period, but which is not communicated until after the expiry of that period, will be valid, provided that it could be shown that the decision was communicated forthwith. *Cubitt Building & Interiors v Fleetglade* also considered the issue of an adjudicator's lien over their decision.

#### *Strategic Construction Dispute Resolution*

Adjudication has done a great deal for construction dispute resolution. It has certainly made the courts more efficient. This means that a party can now seriously contemplate adjudication or litigation (in the absence of an agreement to arbitrate).

The costs and time of perhaps running three serial adjudications in order to deal with a complex dispute frequently turn out to be similar to that of taking the entire matter to the TCC. It often takes more than 12 months to deal with three serial adjudications, and most matters can be dispensed with by the TCC within that timescale. The pre-action protocol process would need to be followed before the commencement of a claim form, but the likelihood is that the matter will settle before judgment in any event. It is therefore the threat of adjudication that is used to push a reluctant party to deal with the claim within the framework of the pre-action protocol process, and then in the TCC.

Adjudication and litigation can of course be taken in parallel. One can adjudicate "at any time" and so the fact that litigation proceedings are under way does not stop a party commencing an adjudication. There is, however, little reason to increase one's costs by trying to run two procedures in parallel, and much to be commended in respect of complex and high value construction disputes for taking the matter simply to the TCC and seeking one's legal costs.

Nonetheless, adjudication is extremely successful and will continue to be widely used within the construction industry. Not just in the UK. Adjudication has now been introduced into the domestic laws of Australia, New Zealand, Singapore and Malaysia. Other countries are currently in the process of debating and introducing adjudication. Further, the international FIDIC suite of contracts introduced, in 1999, a dispute adjudication board that is now becoming widely used throughout the world. That procedure is an 84-day, rather than a 28-day process in order to deal with the fact that

50. [2005] ScotCS CSIH\_32.  
 51. [2007] EWHC 4.  
 52. [2007] EWHC 131.  
 53. [2006] EWHC 3413.

international projects are often larger and the dispute board will need to travel to the project.

Clearly, adjudication is no longer a new phenomenon in the construction industry but one that is now widely used, in an increasingly tactical manner.

### 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:<sup>54</sup>

"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 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

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54. Stephenson D. A. (1998)

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, the bill was subject to much criticism and around 2,500 comments were received during the 5 month consultation period<sup>55</sup>. In November 1994, Lord Justice Saville became the Chairman of the Departmental Advisory Committee (DAC). The new draft was published in a consultative paper in 1995. A final report and supplemental report was 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 17th 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.
- 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;

In matters governed by this part of the Act the court should not intervene except as provided by this part."

Although it was anticipated that the Act would have heralded a new era in arbitration practice, many of the provisions of the Act remain under-used. In contrast to the CPR, the Act's provisions are not all obligatory; arbitration remains a matter of private contract and therefore susceptible to party, lawyer and arbitrator conservatism. In addition, there is a sharp decline in the number of cases being referred to arbitration, partly due to previous dissatisfaction with pre-1996 arbitration, which has led to arbitration clauses in contracts still being struck through as a matter of course, but principally due to the impact of adjudication.

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55. Ambrose and Maxwell (1997)

At a practical level, the increasing complexity and range of disputes referred to adjudication has led to some problems, particularly where adjudicators have lacked the skill or experience to deal with complex claims, for example extension of time claims which require planning and programming expertise, or money claims which require forensic accounting skills. Unless extended, the statutory 28 day period may simply be too short properly and fairly to deal with the points in issue. Further, the parties' costs in adjudication are almost always irrecoverable, and significant.

Arbitration is therefore now beginning to enjoy something of a comeback, particularly if based on the 100 day scheme, championed by the Society of Construction Arbitrators and launched by them on 1 July 2004. This process is designed to act as a halfway point between adjudication and arbitration and is likely to gain significant momentum in the coming years. Where the parties agree to adopt this procedure, the arbitrator will have an overriding duty to make his award within 100 days of the date on which the statement of case is delivered to him or to the other party (whichever is the later).

#### *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*<sup>56</sup> 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.

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.<sup>57</sup> 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 80' 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.

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56. [1991] 57 BLR 1

57. *Arab African Energy Corporation Limited –v- Olieprodukten Nederland B.V.* [1983] 2 Lloyd's Rep 419

## 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 a 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:

- 1 procedure without a hearing (documents only);
- 2 full procedure with a hearing; and
- 3 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 time scales 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 time scale. 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 SCA 100 day Arbitration Procedure

On 1st July 2004 the Society of Construction Arbitrators issued its 100 Day Arbitration Procedure for use in England, Wales and other jurisdictions. Rule 1 states that the arbitrator has an overriding duty to make his award within 100 days from:

- a) The date on which the statement of defence (or defence to counterclaim, if there is one) is delivered to him or to the other party (whichever is the later); or
- b) If the statement of defence (or defence to counterclaim) has already been delivered; from the date on which the arbitrator gives his direction”

Days are calendar days, but if the procedural day ends on a Saturday, Sunday or Public Holiday at the place of the seat of the arbitration then the period is deemed to end on the following working day.

It is immediately apparent that the 100 days does not start until all of the defences have been served. Arguably, it could take a good deal more than 100 days from the service of the notice to refer a dispute to arbitration to the point where the last defence is served.

The standard adoption clause provides that the 100 day SCA Procedure could be written into the contract, or may be adopted on an ad hoc basis after the dispute has arisen or indeed been referred to arbitration. At the launch on 1st July 2004 of the SCA Procedure Professor John Uff QC made it clear that the SCA Procedure could easily be adopted once a dispute has arisen or after the parties had exchanged their pleadings. It may well be that at that stage the parties are able to agree to deal with the rest of the arbitration in the limited 100 day period.

The arbitrator is, within 7 days of his appointment, or adoption of the procedure, to inform the parties of his directions in order to produce a procedural timetable which must be no longer than 100 days. Outstanding pleadings should be served within 7 days, and further documents that the parties seek to rely upon, witness statements and experts reports 14 days thereafter. Specifically requested disclosure documents should be served within 7 days of their request. A hearing should not exceed 10 working days and should commence not more than 28 days after conclusion of the exchange of documents, witness statements and experts' reports. Final written submissions should be made within 7 days from the end of the hearing, and the arbitrator should make his award within 30 days of the end of the oral hearing.

In order to aid the process, the parties agree at Rule 5 to co-operate and take every opportunity to save time where possible.

Rule 6 provides the arbitrator with certain powers in order to facilitate the issue of an award within the limited timescale. These include the ability to receive submissions and material electronically, to take the initiative in ascertaining the facts and the law, direct the manner in which the time at the hearing will be used, or limit the number of witnesses or experts to be heard orally. Questions to experts can be put in writing, the arbitrator can question the expert or witnesses himself and even require two or more witnesses and/or experts to give their evidence together.

While the parties may agree to extend the 100 day period, the arbitrator has no power to extend the period, save for an application to the Court under Section 50 of the Arbitration Act 1996.

14 days before the award is due the arbitrator is to send to the parties his reasonable estimate of the total fees and expenses incurred up to and including the making of the award. Simultaneous submissions and costs should be made within 14 days of the date of the award, and the arbitrator should then within a further 14 days make his award on costs. The 100 day SCA Arbitration Procedure has only recently been issued, but it will be interesting to see if and how the procedure is adopted.

### The Award and Enforcement

The Arbitrator's award is final and binding on the parties unless they agreed to the contrary (Section 58). Section 66 of the Act provides that the award may, with leave of the court, be enforced as if it were a judgement 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 claim or an issue which affects the whole of the claim (Section 47). 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.

### Variations on arbitration

Arbitration is a judicial process, which often proceeds in a similar manner to court based litigation. However, variants on the traditional process of arbitration exist:

Documents only. The hearings are dispensed with and the arbitrator makes an award based upon the written submissions of the parties. This is sometimes referred to as “desk-top” arbitration.

Amiable Compositeur or Ex aequo et bono. If an arbitrator is to act as an amiable compositeur then the arbitrator may within certain limits disregard the strict legal or contractual requirements in order to arrive at an equitable solution to the dispute. “Equitable” in this sense means “fair”.

Final offer or last offer arbitration. Each disputant submits to the arbitral tribunal its final offer in monetary terms. The tribunal must then select one or the other and make an award on that basis. The tribunal may not modify either parties’ offer. A dilemma is faced by each party. An over exaggerated demand may well lead the tribunal to award in favour of the other party.

### Litigation and the court system

The Courts provide the setting for the traditional mode of dispute resolution; namely, litigation. The Law Courts themselves are often considered the most visible feature of the English legal system, and their main function is the adjudication of disputes.

Nonetheless, the number of disputes determined by the Court is negligible, compared to the number of disputes settled by other means. Furthermore, very few proceedings which are commenced result in a trial and subsequent judgement. In fact, in excess of 90% of the actions commenced in the High Court are disposed of before reaching trial, and only a few percent result in a judgement (Judicial Statistics).

The entire civil procedure was replaced on 26 April 1999 by the civil procedure rules. Originally the White Book governed the procedure in the High Court and the Green Book governed the procedure in the County Court. A review of the existing rules and procedures of the Civil Courts in England and Wales by Lord Woolf led first to the Access to Justice report, which in turn led to the establishment of the Civil Procedure Rules which govern both the County Court and the High Court.

#### The new Civil Procedure Rule "CPR"

Lord Woolf published his Access to Justice report in 1999. He considered that the existing system was too expensive, too slow, too fragmented, too adversarial, too uncertain, and incomprehensible to most litigants. The aim of the review was to:

- improve access to justice and reduce the cost of litigation;
- reduce the complexity of the rules and modernised terminology; and
- remove unnecessary distinctions, practice and procedures.

The CPRs were implemented on 26 April 1996 and apply to all new actions commenced from that date. Further, actions commenced under the old system will be transferred onto the Woolf regime after the first interlocutory application made after the 26 April. The rules are printed in 1 volume which comprises a series of parts. Practice directions will support each rule, intending to clarify and describe the particular rule and how it should be used. In addition, practice forms are included in the rules for use at various stages of the litigation process.

#### *The Overriding Objective*

Part 1 of the CPR establishes the overriding objective upon which all rules must be interpreted. Essentially, the overriding objective is that cases should be dealt with justly and in accordance with 5 basic principles that the court will adopt:

- to ensure that the parties are on an equal footing;
- save expense;
- deal with the case in ways which are proportionate to;
  - 1) the amount of money involved;
  - 2) the importance of the case;
  - 3) the complexity of the issue; and
  - 4) the parties financial position.
- deal with case expeditiously and fairly; and
- allocate an appropriate share of the Court's resources to the case whilst taking into account the needs of other cases.

In addition, the Courts are undertaking a new proactive role in managing the cases in order to ensure that the overriding objective is complied with. The management process of the Courts will include encouraging the parties to use ADR, identify the main

issues at an early stage, make appropriate use of IT, attempt to deal with the case without requiring the parties to attend Court if possible and ensure the matter proceeds as fast as is sensibly possible. More importantly, a party who engages in gamesmanship which the Court considers is other than in accordance with the overriding objective risks incurring severe cost penalties.

The Court's general management powers are set out in part 3 and are wide ranging. Unlike the old rules the Court is now expected to be proactive and may therefore exercise any of its powers on his own initiative. In addition, time limits are to be strictly adhered to. Under the old system parties were not penalised for missing dates established by the Courts. However, under the new rules sanctions apply should a party fail to meet a Court designated time limited. If a party is unable to comply then it must apply to the Court for relief from the sanction before the time limit expires.

### The Technology and Construction Court

The Technology and Construction Court (TCC), like the Official Referees' Courts before it, is the specialist Court of the construction industry, because civil engineering and building disputes form a significant part of its work.

The types of claim which it may be appropriate to bring in the TCC include:-

- 1 Building and other construction disputes, including claims for the enforcement of adjudicators' decisions under the HGCRA;
- 2 Engineering disputes;
- 3 Claims by and against engineers, architects, surveyors, accountants and other specialised advisers relating to the services they provide;
- 4 Claims by and against local authorities relating to their statutory duties concerning the development of land or the construction of buildings;
- 5 Claims relating to the environment, for example, pollution cases, and
- 6 Challenges to decisions of arbitrators in construction and engineering disputes, including applications for permission to appeal, and appeals.

All claims allocated to the TCC are assigned to the multi-track: see CPR Rule 60.6(1). The case will be assigned to a named TCC judge, who will have primary responsibility for the case management of that case, and who, subject to the exigencies of the list, will be the trial judge.

There are full time TCC judges at Birmingham, Liverpool, London and Salford, and part-time TCC judges (in the sense that they take TCC work as and when required) in a number of courts in other parts of the country.

Proceedings cannot usually be instituted in the TCC without first complying with the requirements of the pre-action protocol for construction and engineering disputes (see below).

Where a claim has been allocated to the TCC either on issue or by transfer from another court, the TCC will fix the first case management conference with 14 days of the earliest of the filing by the defendant of an acknowledgment of service, or the filing of a defence, or the date of an order transferring the claim to the TCC.

The TCC will send the parties' representatives a case management directions form; the parties are encouraged to try to agree the directions, which will then be approved by the court, if suitable. The directions will usually include the fixing of the date for the trial of the case or of any other preliminary issue that it orders to be tried. The trial of a preliminary issue or of some other severable part of the case often leads to the disposal of the whole case; efficient case management can favour the making of such orders, particularly in complex litigation of the kind that is tried in the TCC. The court will also investigate the possibility of splitting the trial into separate parts; preparation of quantum issues for trial is often wasteful and inefficient unless and until there has been a decision on liability.

The court will want to know whether the parties wish there to be a stay of proceedings to enable them to try to settle the case by negotiations or by some other form of alternative dispute resolution procedure (ADR). The court is obliged by CPR Part 1.4(1) to further the overriding objective by "active case management". CPR Part 1.4(2)(e) defines this as including "encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure". The court may therefore include in the programme of preparation for trial a short period of stay of the proceedings for ADR to take place.

The facility for a without prejudice, non-binding, early neutral evaluation (ENE) by a TCC judge of a dispute, or of particular issues in it, may be available in appropriate cases. The approval of the judge in charge of the list must be obtained before any ENE is undertaken. If the parties suggest it, and the judge considers that an ENE is likely to assist the parties in the resolution of the dispute, or particular issues in it, he may offer to provide that evaluation himself or to arrange for another judge to do so. If the parties accept, then directions will be given for the ENE. Where an ENE is provided by a judge, that judge will, unless the parties otherwise agree, take no further part in the case.

Another question that will be addressed by the court at the first case management conference is expert evidence. The parties will be expected to apply the provisions of CPR Part 35. Expert evidence must be restricted to that which is reasonably required to resolve the proceedings. The overriding duty of the expert is to help the court on matters within his expertise. The following points should be noted:-

1. In deciding whether to give permission for an expert to give evidence, the court will require to be satisfied that:
  - (a) the issues to which that evidence will go are a proper subject for expert evidence; and
  - (b) expert evidence from the proposed witness is justified, having regard to the overriding objective.

Parties sometimes need permission to adduce expert evidence on issues which are either not the proper subject for expert evidence at all, or where the issues are peripheral to the central questions in the case.

2. The court will exercise rigorous control over the number of experts on whose evidence the parties may rely.
3. Where the court gives permission to the parties to adduce expert evidence, it will usually specify the issues to which their evidence may relate. If an expert's report goes beyond that permission, the offending parts of the report are not likely to be admitted in evidence and costs sanctions are likely to follow.
4. The court will also want to explore with the parties at the first case management conference the possibility of making a direction for the use of single joint experts under CPR Part 35.7. The CPR do not specify the criteria for making such a direction; the court will, however, tend to favour the giving of such a direction in relation to issues which do not rely at the heart of the case and/or which are relatively uncontroversial and/or where the cost of expert evidence is disproportionate to the sum at stake in the case. Where the use of a single joint expert is contemplated, the court will expect the parties to co-operate in developing and agreeing, so far as possible, the terms of reference for the expert. In default of agreement, the court will define the terms of reference. In most cases, the terms of reference will detail what the expert is asked to do, identify any documentary material he is asked to consider and specify any assumptions he is asked to make.

At the first case management conference, the court will also usually deal with the question of witness statements, disclosure of documents, whether to make any order for the carrying out of inspections, a site view and the use of IT – the parties should carefully consider how the burden of preparing documents can be reduced by co-operation and the use of IT and in the TCC the IT protocol produced by the Technology and Construction Solicitors Association is often useful.

Usually, it will not be necessary to hold a further case management conference.

At the pre-trial review, the court will look at whether the previous directions have all been complied with and, if not, why not and, where necessary, will give any further directions that are required to ensure that the case will be ready to start on the day fixed for trial. The court will also give directions for the conduct of the hearing itself, including the preparation of the trial bundles, the service and lodging of opening statements, chronologies, copies of authorities and pre-trial reading lists for the judge, the use of technology, the timetable, etc.

It should be noted that TCC judges are also entitled to act as arbitrator, under Section 93(1) Arbitration Act 1996, which provides that he may “if in all the circumstances he thinks fit, accept appointment as a sole arbitrator or as an umpire by or by virtue of an arbitration agreement”. A TCC judge cannot accept such an appointment unless the Lord Chief Justice “has informed him that, having regard to the state of (TCC) business, he can be made available”: see section 93(3).

Application should be made in the first instance to the judge who is wanted as arbitrator; if he is willing to accept the appointment, he will make the necessary application to the Lord Chief Justice for his approval. The rules governing the arbitration will be decided at the preliminary hearing, when appropriate directions will be given.

### The pre-action protocol for construction and engineering disputes

The protocol applies to all construction and engineering disputes, including professional negligence claims against architects, engineers and quantity surveyors.

A claimant will be required to comply with the protocol unless the proposed proceedings (i) are for the enforcement of an adjudicator's decision under the HGCRA, (ii) include a claim for interim injunctive relief, (iii) will be the subject of a claim for summary judgment, or (iv) relate to the same, or substantially the same, issues as have been the subject of recent adjudication under the HGCRA or some other formal ADR procedure. The objectives of the protocol are:-

1. To encourage the exchange of early and full information about the prospective legal claims;
2. To enable parties to avoid litigation by agreeing a settlement of the claim before commencement of proceedings; and
3. To support the efficient management of proceedings where litigation cannot be avoided.

The general aim of the protocol is to ensure that before court proceedings commence:-

1. The claimant and the defendant have provided sufficient information for each party to know the nature of the other's case;
2. Each party has had an opportunity to consider the other's case and to accept or reject all or any part of the case made against him at the earliest possible stage;
3. There is more pre-action contact between the parties;
4. Better and earlier exchange of information occurs;
5. There is better pre-action investigation by the parties;
6. The parties have met formally on at least one occasion with a view to defining and agreeing the issues between them, and exploring possible ways by which the claim may be resolved;
7. The parties are in a position where they may be able to settle cases early and fairly without recourse to litigation, and
8. Proceedings will be conducted efficiently if litigation does become necessary.

The first step in the protocol is for the claimant, prior to commencing proceedings, to send to each proposed defendant a copy of a letter of claim which sets out:-

1. A clear summary of the facts on which each claim is based;
2. The basis on which each claim is made, identifying the principal contractual terms and statutory provisions relied upon;
3. The nature of the relief claimed: if damages are claimed, a breakdown showing how the damages have been quantified; if a sum is claimed pursuant to a contract, how it has been calculated; if an extension of time is claimed, the period claimed;
4. Where a claim has been made previously and rejected by the defendant, and the claimant is able to identify the reason(s) for such rejection, the claimant's grounds of belief as to why the claim was wrongly rejected; and
5. The names of any experts already instructed by the claimant on whose evidence he intends to rely, identifying the issues to which that evidence will be directed.

Within 14 calendar days of receipt of the letter of claim, the defendant should acknowledge its receipt in writing. If there has been no acknowledgment by or on behalf of the defendant within 14 days, the claimant will be entitled to commence proceedings without further compliance with the protocol.

If the defendant intends to object to all or any part of the claimant's claim on the grounds that:-

1. The court lacks jurisdiction,
2. The matter should be referred to arbitration, or
3. The defendant named in the letter is the wrong defendant,

then that objection should be raised within 28 days after receipt of the letter of claim.

Otherwise, the defendant shall within 28 days from the date of receipt of the letter of claim, or such other period as the parties may reasonably agree (up to a maximum of 4 months), send a letter of response to the claimant, identifying:-

1. The facts set out in the letter of claim which are agreed or not agreed, and if not agreed, the basis of the disagreement;
2. Which claims are accepted and which are rejected, and if rejected, the basis of the rejection;
3. Whether the defendant intends to make a counterclaim, and if so, giving the information which is required to be given in a letter of claim;

4. The names of any experts already instructed on whose evidence it is intended to rely, identifying the issues to which that evidence will be directed.

If no response is received by the claimant within the 28 day period, or such other period as has been agreed, the claimant shall be entitled to institute proceedings without further compliance with the protocol.

The claimant shall provide a response to any counterclaim within the equivalent period allowed to the defendant to respond to the letter of claim.

As soon as possible after exchange of these various letters of claim/response/reply to counterclaim, the parties should normally meet.

This meeting is referred to as the pre-action meeting; its aim is for the parties to agree what are the main issues in the case, to identify the root cause of disagreement in respect of each issue, and to consider (i) whether, and if so how, the issues might be resolved without recourse to litigation, and (ii) if litigation is unavoidable, what steps should be taken to ensure that it is conducted in accordance with the overriding objective of CPR Part 1.1.

The court will normally expect that those attending the pre-action meeting will include a representative of each party who has authority to settle or recommend settlement of the dispute, a legal representative of each party, if one has been instructed, and a representative of a party's insurer, where the involvement of insurers has been disclosed.

If the parties are unable to agree on a means of resolving the dispute other than by litigation, they should try to agree:-

- (i) Whether, if there is any area where expert evidence is likely to be required, a joint expert may be appointed, and if so, who that should be, and (so far as is practicable)
- (ii) the extent of disclosure of documents with a view to saving costs; and
- (iii) the conduct of the litigation with the aim of minimising costs and delay.

Any party who attended a pre-action meeting is permitted to disclose to the court:-

1. That the meeting took place, when and who attended;
2. The identity of any party who refused to attend, and the grounds for such refusal;
3. If the meeting did not take place, why not; and
4. Any agreements concluded between the parties.

Except as set out immediately above, everything said at the pre-action meeting is otherwise to be treated as "without prejudice".

### TCC Statistics

Litigation has also suffered as a result of adjudication, so arbitration is not the only victim. There was a distinct decline in the number of claims issued at the Technology and Construction Court in London, with figures (based on claims issued) showing the following:-

1997	611
1998	538
1999	346
2000	344
2001	354
2002	386
2003	315
2004	341
2005	364
2006	392

Recently, the figures suggest that there has been a return to the TCC. Of the claims issued in 2000, approximately 25% related to enforcement of adjudicators' decisions. This remains much the same in 2006. The reduction in numbers for that 2000 may, however, have been as a result of the introduction of the pre-action protocol for construction and engineering disputes,

### Hybrid and project bases dispute resolution

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. Mini-trial is a hybrid ADR technique. Multi-stage procedures are also considered.

### Agreements to negotiate and the approach of the courts

The starting point is the use of an "amicable" dispute resolution clause. In the international construction arena, the FIDIC form of contract for civil engineering and construction works introduced the concept of amicable settlement as a pre-requisite to arbitration. This clause was introduced in the 1987 Fourth Edition to the FIDIC "Red Book" as follows:

"Where Notice of Intention to Commence Arbitration as to a dispute has been given in accordance with sub-clause 67.1, arbitration of such dispute shall not be commenced unless an attempt has first been made by the parties to settle such dispute amicably. Provided that, unless the parties otherwise agree, arbitration may be commenced on or after the fifty sixth day after the day on which Notice of Intention to Commence Arbitration of such dispute was given, whether or not any attempt at an amicable settlement thereof has been made."<sup>58</sup>

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58. Clause 67.2.

Until recently the enforceability of such agreements to negotiate was in some doubt.

However, since the 1992 House of Lords' decision in *Walford v Miles*<sup>59</sup> it is clear that an agreement to negotiate is not enforceable in law. The case related to the sale of a photographic processing business and the central issue related to the enforceability of a contract to negotiate based on a "lock out" agreement. A lock out agreement is an agreement not to negotiate with any other parties whilst negotiations are continuing with one specific party. In *Walford v Miles* the vendors decided to sell the business and received an offer from a third party. At the same time they entered into negotiations with an alternative purchaser and agreed in principle to sell the business and premises for £2m.

It was further agreed that if the purchaser provided a comfort letter from their bank the vendors would terminate negotiations with any third party. In disregard of this agreement the vendors withdrew from negotiations and in fact sold to a third party. The proposed purchasers brought an action for breach of the lock out agreement on the basis that they had been given an exclusive opportunity to agree terms with the vendors and that this was collateral to the subject to contract negotiations.

The House of Lords held that a lock out agreement could constitute an enforceable agreement. However, an agreement merely to negotiate in good faith for an unspecified period of time was not enforceable. On this basis their agreement was unenforceable. The Court concluded that if such an agreement were enforceable the purchaser would not know when he was entitled to withdraw from the negotiations and it was not possible for the Court to decide whether an "excuse" for terminating negotiations by one party was reasonable.

The approach of the English Courts could be contrasted with the approach of Giles, J in the Australian case of *Hooper Bailie Associated Limited v Natcom Group Pty Limited*.<sup>60</sup> In that case Giles, J made a clear distinction between the enforceability of the agreement to reach some sort of result and the agreement to participate in the process:

"Conciliation or mediation is essentially consensual, and the opponents of enforceability contend that it is futile to seek to enforce something which requires the consent of a party when co-operation and consent cannot be enforced; equally they say that there can be no loss to the other party if for want of co-operation and consent the consensual process would have led to no result... What is enforced is not co-operation or consent, but participation in a process from which co-operation and consent might come."

During the course of the Judgement Giles, J considered several important issues concerning the enforceability of ADR clauses. First Giles, J considered the case of *Allco Steel (Queensland) Pty Limited v Torres Strait Gold Pty Limited*.<sup>61</sup> In that case the Court found that a conciliation clause could not operate as a pre-condition to litigation. Some emphasis was placed on the proposition that an ADR clause is unenforceable because it seeks to oust the jurisdiction of the Court. Second, the Judge accepted that conciliation was futile due to the apparently entrenched and opposing positions of the parties.

Third, the judge considered that an ADR clause was an agreement to negotiate and such an agreement is unenforceable as it lacks the certainty required to create legally binding relations. This reasoning is not only based on the House of Lords' decision in the *Walford* case but also on the New South Wales Court of Appeal decision in *Coal Cliff Collieries Pty Limited v Sijehame Pty Limited*.<sup>62</sup>

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59. [1992] 1 AER 453.

60. Unreported 12 April 1992.

61. Unreported 12 March 1990.

62. (1992) 24 NSW LR 1.

Nonetheless Giles, J in Hooper Bailie made a clear distinction between a contract to negotiate and a contract to conciliate or mediate. He held that provided the mediation or conciliation process had sufficient procedural certainty then it would be enforced. It is important to note that the Judge did not impose an obligation to compromise any of the issues but merely that the parties would conduct the conciliation in good faith. In many respects the House of Lords' decision in the *Channel Tunnel Group Limited v Balfour Beatty Limited*<sup>63</sup> and the Commercial Court Practice Directions suggest that the Court may well support a conciliation or mediation pre-requisite provided that the process is carried out during a defined time scale and the rules of the process are sufficiently clear.

### Facilitated negotiation

According to Berman facilitated negotiation "is the introduction of an independent and objective person into your negotiation sessions to assist and expedite the parties in reaching agreement.<sup>64</sup> The purpose of this neutral is to advance the discussions by ensuring mutual understanding of the parties positions and to extract settlement strategies, not unlike a mediator. However, "mediation" is an altogether different process." Berman maintains that the focus of facilitated negotiation is somewhat different to mediation.

Apparently the goal of the facilitator is centred on aiding communication between the parties whilst the focus of a mediator is to reach settlement. Further, the facilitator does not caucus with the parties separately and "never renders an opinion or judgement." One might conclude that facilitated negotiation is a form of supported negotiation developed under the ADR umbrella, it is something less than mediation.

### 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:

"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."<sup>65</sup>

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/arbitrators' view of their during the arbitration.

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63. (1993) All ER 664 HL.

64. Berman G.S (1996) Facilitated negotiations: an effective ADR technique. CIB proceedings.

65. Newman, P. (1999)

### Mini trial or Executive Tribunal

According to Siedel, the use of Mini Trials to resolve construction disputes is currently a new and developing phenomenon.<sup>66</sup> Apparently, the Mini Trial originated in 1994 when Telly Credit took action against TRW, claiming an infringement on its patent rights. The action proceeded over a period of approximately two and a half years and during this time the parties exchanged around 100,000 documents as part of the discovery process. In a bid to conclude the dispute, the parties agreed to an alternative process in order to resolve their dispute.

The lawyers for each party were given a limited time (4 hours each) in which to present their case to the Senior Executives of each company. The executives had authority to settle the dispute. Following the presentations, a further 2 hour time period was provided in order for the other side to reply and for a counter to the reply. The entire process lasted for two days. This meeting was moderated, or facilitated, by a neutral third party who in this case was a retired judge with patent law expertise. In the event that the parties could not settle he had agreed to provide a non binding opinion. Apparently the executives were able to resolve the dispute in around half an hour of private meetings upon the conclusion of the presentations.

The process which later became known as the mini trial can lead to savings in time and money. In addition, Siedel points out that there are 2 major benefits to this approach. First, high ranking officials from each company are given an opportunity to hear both sides' arguments. Second, the executives are then able to meet and discuss settlement without being constrained by legal remedies which assume that there will be a winner and a loser.

Very few real experiences of executive tribunal have occurred. Those that have relate to major projects. Many in the industry are confused about the process, believing that it relates to site negotiations which had reached the point where company executives become involved. Executive tribunals are managed mediation based processes.

### Expert determination

Expert determination is a process by which the parties to a dispute instruct a third party to decide a particular issue. The third party is selected because of his or her particular expertise in relation to the issues between the parties. According to Kendal

“There is nothing very new about expert determination. It has been a feature of English commercial and legal practice for at least 250 years. What is new about it is that it is being called in to help with the current crisis in commercial dispute resolution. Expert determination is a simple procedure by which valuation and technical issues are referred to a suitably qualified professional to determine “acting as an expert and not as an Arbitrator” ... Unlike alternative dispute resolution (ADR), expert determination guarantees a result which is final and binding.”<sup>67</sup>

Expert determination is essentially a creature of contract. The parties to a contract agree that some third party will decide a technical or valuation issue between the parties. Expert determination has traditionally been used in rent reviews. According to Kendal

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66. Siedel, (1992)

67. Kendal, J. (1996) *Dispute Resolution: Expert Determination*, 2nd edition, Longman, Harlow

approximately half of all commercial leases contain a provision for rent review by a surveyor acting as an expert whilst the other half state that the surveyor is to act as an arbitrator. Nonetheless expert determination is not restricted to mere land valuations.

The technique lends itself to valuation and complex technical issues. In this respect expert determination may be found in a wide variety of circumstances: valuing shares in private companies, certifying profits or losses of a company during sale and purchase, valuing pension rights on transfer, determining market values in long term agreements. Further, the use of expert determination may be used as part of a multi stage dispute resolution procedure. In this instance some technical matter may be referred to an expert leaving the other issues in dispute to arbitration or litigation.

#### A creature of contract

A typical expert determination clause should ensure that specific items are clearly dealt with. First, the issue or issues to be determined should be clearly and precisely expressed. Lack of clarity in relation to the issue to be determined may provide an opportunity to argue subsequently about the jurisdiction of the expert. Second, it is important to state that the expert is to act as an expert and not as an arbitrator. Much of the case law in the area of expert determination focuses on this point. If the third party is acting as an expert, then his or her opinion as to the value or opinion of the correct decision in relation to the issue in dispute is not capable of being challenged. On the other hand, if the third party is acting as an arbitrator, then the formalities of an adjudicative procedure must be adhered to.

Third, a further essential feature of expert determination is that the decision should be final and binding. On the other hand adjudication and decisions of dispute review boards are often expressed as final unless challenged by a subsequent arbitration.

#### Finality

Finality is a common feature of expert determination. Finally, the contractual machinery should provide some mechanism for appointment of an appropriate expert. This would usually provide for appointment by agreement between the parties or in default by some appointing authority stated in the contract. The default procedure will ensure that an expert is appointed regardless of the strategies associated with the other party. In addition, it is beneficial to include express provisions in relation to the expert's qualifications and state how the expert is to be paid. These are usually split equally between the parties with a further provision allowing the expert to decide otherwise.

The leading case in this area is *Jones -v- Sherwood Computer Services Plc.*<sup>68</sup> This case involved a sale and purchase agreement where part of the consideration was to be deferred. The valuation of this deferred consideration depended upon the acquired company's sales figures exceeding a certain level. If the vendor and purchaser's accountants were unable to agree this figure then a third accountant was to determine the figure as expert. The vendor's and purchaser's accountants could not agree on the categories of transactions which should be included as sales.

Coopers & Lybrand were appointed as the expert firm who determined that the sales amounted to £2,527,135. The vendor was not satisfied and wished to challenge the

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68. [1992] 1 WLR 277

reasoning behind the determination. The Court of Appeal stated that the expert had been asked to determine the level of sales and that is exactly what they had done. On the other hand, if the expert departed from their instructions - for example, by valuing shares in the wrong company - then that would be sufficient to upset an expert's decision. *Jones -v- Sherwood* suggests then that an expert would need to make some manifest mistake in relation to its jurisdiction before the Court would intervene.

*Nikko Hotels (UK) Limited -v- NEPC Plc*<sup>69</sup> 2 EG 86 considers the expert's jurisdiction in relation to points of law. If the expert had answered the wrong question, then his decision would be a nullity. On the other hand, if the expert had answered the right question but in the wrong way the decision would still be binding.

More recently the House of Lords considered expert determination in the case of *Mercury Communications Limited v Director General of Telecommunications and Another*.<sup>70</sup> In that case two companies, BT and Mercury were granted licences to run telecommunication systems under Section 7 of the Telecommunications Act 1984. Clause 29 of the Agreement provided for a review of the Terms of the Agreement after five years. If either party was unable to agree to any fundamental changes of the Terms then a reference was to be made to the Director General of Telecommunications for the determination of any particular issue. An issue in relation to pricing was referred to the Director General. Mercury challenged the Director General's decision on the basis that he had misinterpreted the costs to be taken into account when setting the price.

Initially, the Director General applied to strike the action out on the basis that the action was an abuse of process. The Director General argued that as the Agreement was formed under the Telecommunications Act 1984 any determinations of the Director General were in the domain of public law and should therefore be subject to judicial review and not a private action. The House of Lords held that as the dispute related to a contractual matter (albeit by way of a statutory power) then an action in private law was appropriate. In relation to the exercise of that decision making function the House of Lords decided that they ultimately had jurisdiction to interpret the construction of the clause. They went on to say that provided the expert does not depart from his/her instructions then the decision cannot be challenged unless there is some allegation of fraud.

### Dispute Resolution Adviser

The basic concept of a Dispute Resolution Adviser "DRA" 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".<sup>71</sup> 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.

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69. [1991] 2 EG 86.

70. [1996] 1 AER 575.

71. Evans, C. (1992).

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 break-down 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 advisers 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.<sup>72</sup> 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 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:

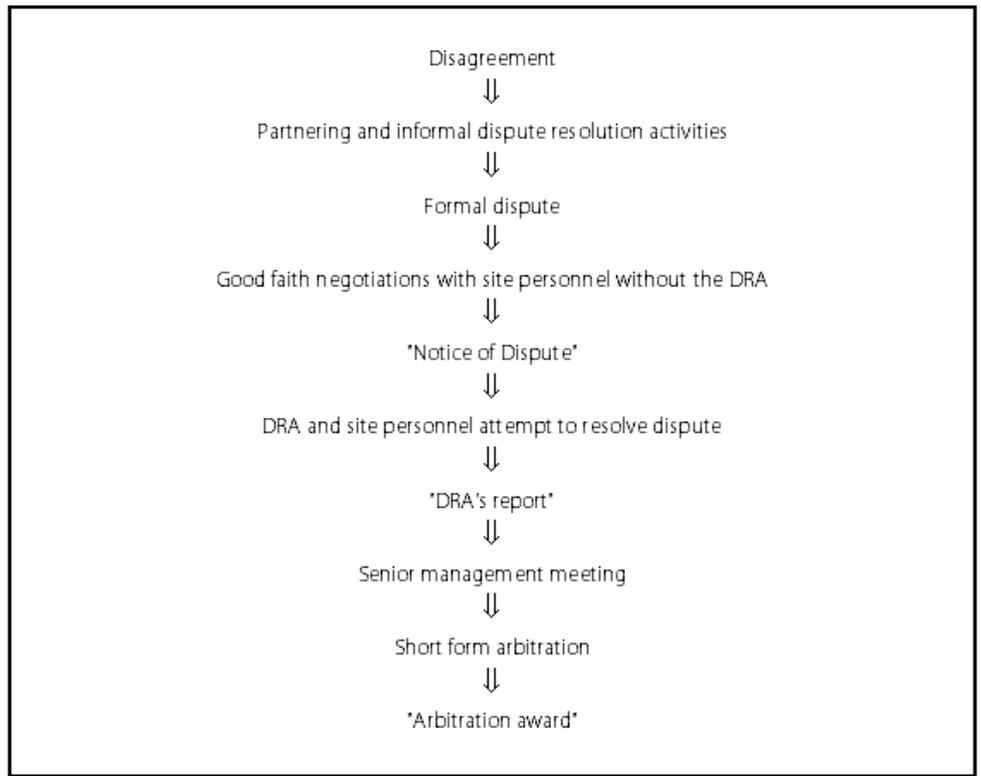
"DRA system draws upon the independent intervener concept as modified by the Dispute Adviser but provides a far more flexible approach. It embodies the dispute prevention attributes of the Dispute Review Board and Project Arbitration, it uses partnering techniques to re-orient the parties' thinking and 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 styled 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.

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72. Severn K. (1989) *New Concepts in the resolution of Disputes in international Construction Contracts*

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



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,<sup>73</sup> the Queen Mary Hospital project has raised "numerous problems yet there have been no disputes". 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.

### Project Mediation

The construction industry benefits from a wide range of dispute resolution techniques. The traditional processes of arbitration and litigation have in part made way for mediation and more recently adjudication under the Housing Grants, Construction and Regeneration Act 1996. Mediation has developed slowly since around the start of the 90's. Hybrid and multi-stage processes such as dispute review boards or dispute escalation clauses have become more widely used on some projects. At the other end of the scale management techniques such as partnering are attempts to avoid disputes arising.

'Contracted Mediation' or 'Project Mediation' attempts to fuse team building, dispute avoidance and dispute resolution in one procedure. A project mediation panel is appointed at the outset of the project. The impartial project mediation panel consists of one lawyer and one commercial expert who are both trained mediators. The panel assists in organising and attends an initial meeting at the start of the project and may conduct one or more workshops at the outset of the project or during the course of the project as necessary.

The panel may also visit the project periodically during the life of the project. In this respect the panel therefore has a working knowledge of the project and more importantly the individuals working on that project. That knowledge allows the panel to resolve differences before they escalate, because the panel provides an immediate forum for the confidential discussion and potential mediation of differences or disputes. Experiences with project mediation in practice are limited. However, project mediation was apparently used on Jersey Airport.

The only publicly reported project where project mediation has been used was Jersey Airport taxiway. The contract sum was approximately £15M, and the project mediation

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73. Wall, C. (1994) The Dispute Review Adviser.

panel cost approximately £15,000. According to the article in Construction Manager a variety of disputes were resolved and the project finished one day ahead of schedule and approximately £800,000 below budget. Much of the project's success has been attributed to the use of the contracted mediation process.

The parties to the construction contract have recognised that there is a risk that they might have disputes during the course of the building work but they have also recognised that a standing mediation panel can help to avoid those disputes during the course of the work. This is because the parties to the construction contract will get to know the individual mediators, and those mediators will not only have an understanding of the project, but will get to know the individuals working on the project. There is, therefore, the potential for the project mediation panel to become involved not just in disputes, but also in the avoidance of disputes before the parties become entrenched and turn to adjudication, arbitration or litigation.

The experience at Jersey raises an important observation and that is the amount of the contract sum by comparison to the cost of the contracted mediation process. Most of the structured ADR procedures such as dispute review boards are only economically viable because they are used on substantial projects. This is because of the costs associated with establishing and running a 3 man dispute review board. A dispute review board is established at the start of the project, and then follows the project by making site visits. Disputes are then referred to that board, which will make recommendations only or binding decisions depending upon the drafting of the contract between the contractor and the employer.

However a project mediation panel is viable for projects with a much lower contract sum. Statistics indicate that around 80% of construction work carried out in this country has a contract sum in £10's or millions rather than £100's of millions. Therefore, project mediation has the potential for use on around 80% of the construction projects carried out in this country.

## Dispute Boards

The use of the term "Dispute Boards" or occasionally "Disputes Boards" (collectively "DBs") is a relatively new term. It is used to describe a dispute resolution procedure which is normally established at the outset of a project and remains in place throughout the project's duration. It may comprise one or three members who become acquainted with the contract, the project and the individuals involved with the project in order to provide informal assistance, provide recommendations about how disputes should be resolved and provide binding decisions. The one person or three person DBs are remunerated throughout the project, most usually by way of a monthly retainer, which is then supplemented with a daily fee for travelling to the site, attending site visits and dealing with issues that arise between the parties by way of reading documents and attending hearings and producing written recommendations or decisions if and as appropriate.

The term has more recently come into use because of the increased globalisation of adjudication during the course of projects, coupled with the increased use of Dispute Review Boards ("DRBs"), which originally developed in the domestic USA major projects market. DRBs were apparently first used in the USA in 1975 on the Eisenhower Tunnel. The use of DRBs has steadily grown in the USA, but they have also been used

internationally. However, DRBs predominantly remain the providence of domestic USA construction projects. As adjudication developed, the World Bank and FIDIC opted for a binding dispute resolution process during the course of projects, and so the Dispute Adjudication Board (“DAB”) was borne from the DRB system; the DRB provides a recommendation that is not binding on the parties.

The important distinction then between DRBs and DABs is that the function of a DRB is to make a recommendation which the parties voluntarily accept (or reject), while the function of a DAB is to issue written decisions that bind the parties and must be implemented immediately during the course of the project. The DRB process is said to assist in developing amicable settlement procedures between the parties, such that the parties can accept or reject the DRB’s recommendation. Genton, adopting the terminology of the International Chamber of Commerce (“ICC”) describes the DAB approach “as a kind of pre-arbitration requiring the immediate implementation of a decision”.<sup>74</sup> He goes on to state that:

“the DRB is a consensual, amicable procedure with non-binding recommendations and the DAB is a kind of pre-arbitration step with binding decisions.”<sup>75</sup>

Building upon this distinction, the ICC has developed three new alternative approaches:

- 1 Dispute Review Board – the DRB issues recommendations in line with the traditional approach of DRBs. An apparently consensual approach is adopted. However, if neither party expresses dissatisfaction with the written recommendation within the stipulated period then the parties agree to comply with the recommendation. The recommendation therefore becomes binding if the parties do not reject it.
- 2 Dispute Adjudication Board - DRB’s decision is to be implemented immediately.
- 3 Combined Dispute Board (“CDB”) – this attempts to mix both processes. The ICC CDB rules require the CDB to issue a recommendation in respect of any dispute, but it may instead issue a binding decision if either the employer or contractor requests and the other party does not object. If there is an objection, the CDB will decide whether to issue a recommendation or a decision.

Genton suggests that the third stage of a CDB would be the referral of a dispute leading to a binding decision, which would need to be implemented immediately. The ICC’s approach is that the DB decides (if either party requests a decision) whether to issue a recommendation or immediately binding decision at the second stage of the process.

According to the ICC the essential difference is that the parties are required to comply with a decision immediately, whereas the parties must comply with a recommendation but only if the employer and contractor express no dissatisfaction within the time limit. The combined procedure seems at first glance to be a somewhat cumbersome approach attempting to build upon the benefits of the DRB and DAB, without following a clear pathway. Nonetheless, it may prove useful for those parties that cannot decide whether they need a DRB or a DAB.

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74. Pierre N. Genton (2003) Dispute Boards.

75. Para. 7-029.

At the other end of the spectrum a DB could be considered as a flexible and informal advisory panel. In other words, before issuing a recommendation, the DB might be asked for general advice on any particular matter. The DB will then look at documents and/or visit the site as appropriate and, most usually, provide an informal oral recommendation which the parties may choose then to adopt. If the parties were not satisfied, the DB would proceed to the issue of a formal, albeit non-binding, written recommendation after following the formal procedure of exchange of documents and a hearing.

As the DB and CDB is a relatively new concept, it is more informative to consider development of DRBs before then considering the development and practice of DABs.

### Dispute Review Board

A DRB usually comprises a panel of three impartial professionals who are employed by the employer and contractor to assist in avoiding disputes and resolving disputes that may arise in respect of a project. The panel should ideally have some specialist knowledge in respect of the type of project. In order to be effective, therefore, the panel needs to be implemented on or around the outset of the project in order that the panel can follow the progress of the project and deal with issues as they arise.

Most frequently, DRB provisions are included within the contract, or may be incorporated later by variation or change order. There will also need to be a tripartite agreement between the DRB members and the employer and contractor dealing with the remuneration of the panel as well as establishing the procedural rules and applicable terms such as confidentiality and the rights and obligation of the DRB members and the employer and contractor.

The key factor that distinguishes DRBs from other dispute resolution processes is that a DRB follows the progress of the project and makes recommendations about disagreements or disputes. While the DRB procedure is formal and will involve exchange of written positions, evidence and a hearing the written recommendation of the DRB is non-binding. The parties are, therefore, not obliged to comply with the recommendation. A fundamental point then about DRBs is that the panel must have the respect of the employer and the contractor and must reach reasoned recommendations that the parties can understand and respect in order that the parties will comply with the recommendation.

DRBs initially developed in the USA. According to the Dispute Review Board Foundation ("DRBF") the first documented use of an informal DRB process was on the Boundary Dam and Underground Powerhouse project north of Spokane, Washington during the 1960s. Problems occurred during the course of the project, and the contractor and employer agreed to appoint two professionals each to a four member "Joint Consulting Board", in order that that Board could provide non-binding suggestions.

The DRBF reported that as a result the recommendations of the Joint Consulting Board were followed, and these included several administrative procedural changes and the settlement of a variety of claims and also an improvement in relationships between the parties. The project was also completed without litigation.

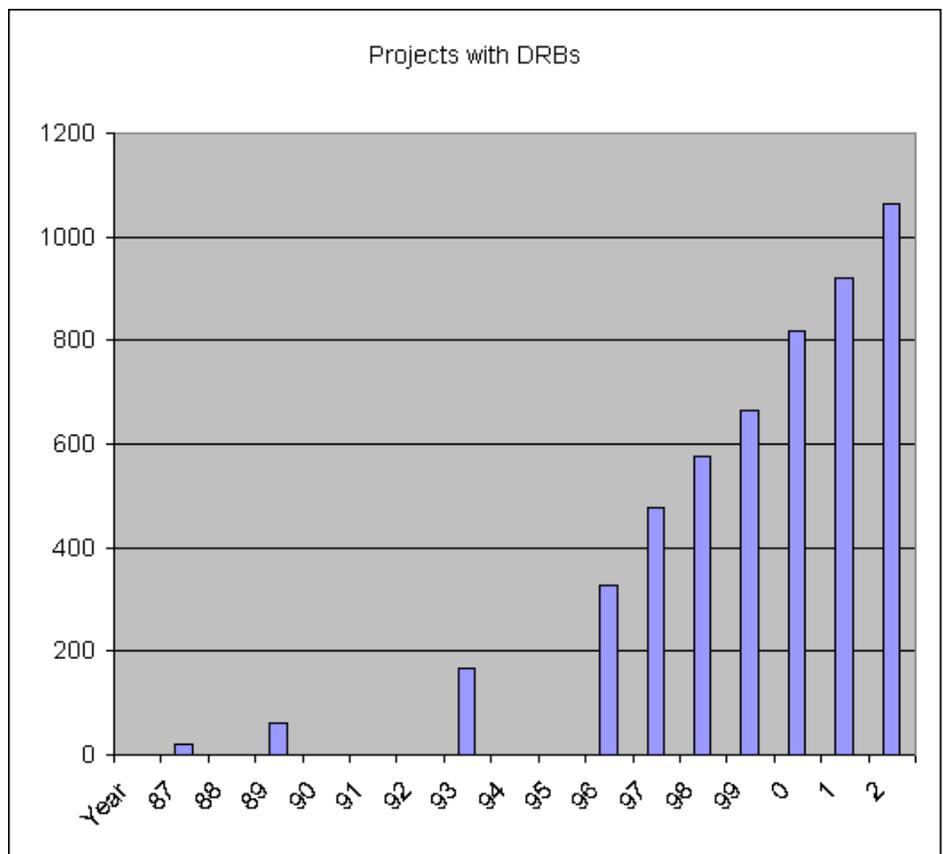
Subsequently the US National Committee and Tunnelling Technology, Standing Subcommittee No. 4 conducted a study and made recommendations for improving contractual methods in the United States.<sup>76</sup> Further studies were carried out, and the first official use of a DRB was made by the Colorado Department of Highways on the second bore tunnel of the Eisenhower Tunnel Project. This was as a result of the financial disaster encountered in respect of the first tunnel between 1968 and 1974.

The DRB was required to make non-binding recommendations about disputes that arose during the project. The Board was constituted at the commencement of the project and followed the duration of the project. The project was extremely successful. And as a result the use of DRBs began to spread for large civil engineering projects in the USA.

The DRBF has catalogued 1062 projects representing more than US\$77.7 billion worth of project work. The December 2003 schedule shows that there were 340 contracts comprising DRBs in 2003. Of those projects 1,261 recommendations were given by the DRBs and only 28 matters went beyond the DRB process. In other words, only 2.2% of those disputes referred to the DRB progressed to arbitration or litigation. A more positive way of looking at this is that DRBs have a success rate of more than 97.8%. The DRBF has reported a considerable rise in the number of projects using DRBs:

Dispute Resolution Board Foundation, December 2003

The DRBF has produced the following statistics, updated to December 2003:



76. 1972.

Contracts Complete and Under Construction  
(DRBF Schedule, December 2003)

	Projects with DRBs	Contract Value	Disputes Settled
Year	Each	US\$ Billion	Each
1988	19	1.4	16
1989			
1991	63	3.2	78
1992			
1994	166	9.7	211
1995			
1996			
1997	326	22.1	424
1998	477	28.8	596
1999	576	32.6	758
2000	666	35.4	869
2001	818	41.0	1021
2002	922	46.2	1108
2003	1062	50.3	1261

DRBs are now widely used on a range of civil engineering projects in the USA. Their use is no longer limited to the mega projects, and 3 man, or indeed 1 man DRBs are being used on smaller projects.

#### Dispute Adjudication Boards

The DAB has developed in parallel with DRBs. The key developments might be considered as follows:

- 1970: A contractual adjudication process was introduced into the domestic sub-contractor standard forms in the UK in order to primarily resolve set-off issues between the contractor and main contractor.
- 1994: Latham issues his final report reviewing procurement and contractual arrangements in the construction industry.
- 1995: FIDIC introduced a DAB in its Orange Book.
- 1996: FIDIC introduced as an option the DAB in the Red Book.
- 1996: Part II of the Housing Grants, Construction and Regeneration 1996 included adjudication provisions in Section 108.
- 1998: Part II of the Housing Grants, Construction and Regeneration 1996 is introduced on 1 May, together with the exclusion order (SI 1998 No. 648) and the Scheme for Construction Contracts, England and Wales (SI 1998 No. 649).
- 1999: FIDIC adopted a DAB/Dispute Review Expert ("DRE") procedure in favour of the additional approach of relying upon the engineer acting as the quasi arbitrator as well as an

agent of the employer or owner. The DAB procedure became mandatory rather than an option. The three major model forms including DABs/DREs were:

- Red Book: Conditions for Construction (a standing DAB comprising three members or one member).
  - Yellow Book: Plant & Design Build (ad hoc DAB).
  - Silver Book: Engineer Procure and Construct (Turnkey) again incorporating an ad hoc DAB.
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- 2000: The World Bank introduced a new edition of Procurement of Works which made the “Recommendations” of the DRB or a DRE mandatory unless or until superseded by an arbitrator’s award.
  - 2002: ICC Task Force prepared draft rules for Dispute Boards (“DBs”).
  - 2004: The World Bank, together with other development banks, and FIDIC started from May working towards a harmonised set of conditions for DAB.
  - 2004: (July): ICE published a DB procedure. Designed to be compliant with the HGCRA.

The introduction in the 1970s of the limited contractual adjudication procedure is perhaps now of limited historical interest. In the UK, the HGCRA was clearly a major turning point. However, it can certainly no longer be considered merely a domestic UK turning point; it also represents a major international turning point in the area of construction dispute resolution. On the international arena, FIDIC led the way by the introduction of DABs in its 1999 suite of contracts. The FIDIC Conditions of Contract typically comprise:

- Clauses 20.2-20.8 the Dispute Adjudication Board;
- Appendix - General Conditions of Dispute Adjudication Agreement;
- Annex 1 - Procedural Rules; and
- Dispute Adjudication Agreement (three person DAB or one person DAB).

#### *FIDIC DAB (Clause 20)*

Clause 20 of the FIDIC form deals with claims, disputes and arbitration. Emphasis is placed upon the contractor to make its claims during the course of the works and for disputes to be resolved during the course of the works. Clause 20.1 requires a contractor seeking an extension of time or any additional payment to give notice to the engineer “as soon as practicable, and not later than 28 days after the event or circumstance giving rise to the claim”.

Some have suggested that the contractor will lose its right to bring a claim for time and/or money if the claim is not brought within the timescale.<sup>77</sup> Under UK law this seems unlikely given that timescales in construction contracts are generally directory rather than mandatory<sup>78</sup>, and also because Clause 20.1 does not go on to clearly state that the contractor will lose its right in the event of a failure to notify within a strict timescale.<sup>79</sup> Nonetheless, a contractor would be well advised to notify in writing any requests for extensions of time or money claims during the course of the works and within a period of 28 days from the event or circumstances giving rise to the claim.

The benefit then of the DAB is that it should be constituted at the commencement of the contract, so that the members of it will visit the site regularly and be familiar not just with the project but with the individual personalities involved in the project. They should, therefore, be in the position to issue binding decisions within the period of 84 days from the written notification of a dispute pursuant to Clause 20.4.

The DAB is appointed in accordance with Clause 20.2. It could comprise individuals that have been named in the contract. However, if the members of the DAB have not been identified in the contract then the parties are to jointly appoint a DAB "by the date 28 days after the Commencement Date". The DAB may comprise either one or three suitably qualified individuals. The appendix to the FIDIC contract should identify whether the DAB is to comprise one or three people. The appendix does not provide a default number, but Clause 20.2 states that the parties are to agree if the appendix do not deal with the matter. If the parties cannot agree, then the appointing body named in the appendix will decide if the panel is to comprise 1 or 3 members.<sup>80</sup> The default appointing authority is the President of FIDIC or a person appointed by the President of FIDIC. The appointing authority is obliged to consult with both parties before making its final and conclusive determination.

On most major projects a DAB will comprise three persons. If that is the case, then each party is to nominate one member for approval by the other. The parties are then to mutually agree upon a third member who is to become the chairman. In practice, parties may propose a member for approval, or more commonly propose three potential members allowing the other party to select one. Once two members have been selected, it is then more common for those members to identify and agree upon (with the agreement of the parties) a third member. That third person might become the chairman, although, once again with the agreement of all concerned, one of the initially proposed members could be the chairman.

The terms of remuneration for each of the individual members of the DAB must be agreed between the parties. This is because each party will be responsible for paying 50% of the remuneration in respect of each member of the DAB.

Clause 20.2 states that a member can only be terminated by mutual agreement of both parties. The employer or contractor acting alone cannot terminate the DAB or a single member of the DAB once the DAB has been constituted. Once constituted the principle obligation of the DAB is to make binding decisions. However, the parties may jointly agree to refer a matter to the DAB simply for an advisory opinion.

If the parties do agree to terminate the appointment of an individual member of the DAB, then they should replace that person by agreement or if the parties cannot agree by nomination of the appointing entity. The parties might also need to replace a member if the member declines to act, resigns, becomes disabled or dies.

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77. Seppala, Christopher (2003) "Claims of the Contractor" a paper given at; The Resolution of Disputes under International Construction Contracts, ICC, Paris, 6-7 February.

78. *Temloc v Errill Properties* (1987) 22 BLR 30, CA

79. *Bremer Handelsgesellschaft mbH v Vanden Avenue-Izegem PVBA* (1978) 2 Lloyd's Rep 109, HL.

80. Clause 20.3.

By virtue of Clause 20.3 the parties have agreed that the appointing entity named in appendix (the FIDIC President or his nominee by default) may appoint members to the DAB if the parties fail to agree within 28 days after the Commencement Date, or fail to agree the identity of a third member, or fail to agree on a replacement member within 42 days after the date on which the sole member declined or became unable to act.

Clause 20.4 deals with referring a dispute to the DAB. The first paragraph of clause 20.4 states:

“If a dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to any certificate, determination, instruction, opinion or valuation of the Engineer, the dispute shall be referred in writing to the DAB for its decision, with copies to the other Party and the Engineer. Such reference shall state that it is given under this sub-clause.”

The parties are therefore obliged contractually to refer any dispute whatsoever that arises in connection with or out of the contract including the opening up and reviewing of notices and certificates. If the DAB comprises 3 members then the DAB is deemed to have received the notice of dispute when it is received by the Chairman alone. This means that the parties can simply direct all of their correspondence to the Chairman, but with copies to the other members, as well as providing a copy to the other party and engineer.<sup>81</sup>

Both the Employer and the Contractor are obliged to provide additional information and further access to the site and its facilities as the DAB may require in order for the DAB to make its decision.

The contractor, notwithstanding that a dispute has been referred to the DAB, is to continue to proceed with the works in accordance with the contract (unless abandoned, repudiated or terminated). Both parties are contractually obliged to properly comply with every decision of the DAB. DAB decisions are therefore immediately mandatory, unless or until revised by an arbitral award, litigation or settlement.

The DAB is obliged to provide its written decision within 84 days after receipt of the reference. The DAB must provide a reasoned award which must be issued pursuant to clause 20.4 of the contract.

The FIDIC contract, at clause 20.4, expressly states that the DAB is not acting in an arbitral capacity. The purpose of this express reference is to make it clear that the written decision of the DAB is not to be treated as an arbitrator's award, and so cannot be said to be immediately finally conclusive. Neither will the DAB's decision enjoy the status of an arbitrator's award in respect of enforcement. It will, however, be enforceable under the contract and depending upon the local law it may be possible to enforce payment required by a DAB's decision in the local court without recourse to the merits of the decision or a stay of litigation because of the existence of the arbitration clause.

If either party is dissatisfied with the decision of the DAB then either party may give notice of its dissatisfaction to the other party. However, this must be done within 28 days after receipt of the DAB's decision. If the DAB does not render its decision within 84 days of receipt of the reference then either party may simply serve a notice of dissatisfaction.

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81. Clause 20.4 and Procedural Rule 4.

A notice of dissatisfaction must set out the dispute and reasons for the dissatisfaction. Matters that are the subject of a notice of dissatisfaction which are not resolved amicably in accordance with clause 20.5 may then be referred to international arbitration pursuant to clause 20.6.

The crucial point about the notice of dissatisfaction is that the decision of the DAB becomes final and binding upon both parties unless a written notice of dissatisfaction is served within 28 days of receipt of the DAB's decision. If either party is not satisfied with the DAB's decision then it is crucial for that party to serve a written notice of dissatisfaction. In the absence of such a notice the parties have clearly agreed by contract that they will accept the DAB's decision as being final and binding upon them.

In light of the House of Lords decision in *Beaufort Developments v Gilbert Ash (NI) Limited* it is highly likely that a court will find that the parties are bound by such a clause and that a failure to serve a notice of dissatisfaction would result in either party's inability to raise a dispute in connection with the same subject matter of any DAB decision that has become final and conclusive.<sup>82</sup>

Clause 20.5 requires the parties to attempt to settle their dispute amicably before commencing arbitration. There is a 56 day cooling off period after the issue of the notice of dissatisfaction. Either party may not commence arbitration (unless the other party agrees) until after the 56th day after the date on which the notice of dissatisfaction was "given".

The final method of dispute resolution is international arbitration pursuant to clause 20.6. The applicable rules are the ICC rules, and disputes are referred to a panel of 3 arbitrators.

#### *FIDIC General Conditions of Dispute Adjudication Agreement*

The appendix to the FIDIC form provides a tripartite General Conditions of Dispute Adjudication Agreement. It is tripartite in the sense that it is entered into between the Employer, Contractor and the sole member or 3 members of the DAB. The Agreement takes effect on the latest of:

- The Commencement Date defined in the Contract;
- When all parties have signed the tripartite Dispute Adjudication Agreement; or
- Or when all parties have entered into a dispute adjudication agreement.

The distinction between the last two bullet points refers to the Dispute Adjudication Agreement appended to the FIDIC form, or alternatively provides for the parties to enter into an effective dispute adjudication agreement even if it is not in the form attached to the FIDIC contract.

The engagement of a member from the DAB is a personal appointment. If a member wishes to resign then a member must give at least 70 days notice. Members warrant that he or she is and shall remain impartial and independent of the Employer, Contractor and Engineer. A member is required to promptly disclose anything which might impact upon their impartiality or independence.<sup>83</sup>

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82. [1999] 1 AC 266 HL; [1998] 2 WLR 860; 1998 2 AER 778; 83 BLR 1; (1998) CILL 1386

83. Clause 3, Warranty.

The general obligations of a member of the DAB are quite extensive. Clause 4 requires that a member shall:

- Have no financial interest or otherwise in the Employer, the Contractor or the Engineer;
- Not previously have been employed as a Consultant by the Employer, Contractor or Engineer (unless disclosed);
- Have disclosed in writing any professional or personal relationships;
- Not during the duration of the DAB be employed by the Employer, Contractor or Engineer;
- Comply with the Procedural Rules (see below);
- Not give advice to either party;
- Not whilst acting as a DAB member entertain any discussions with either party about potential employment with them;
- Ensure availability for a site visit and hearings;
- Become conversant with the Contract and the progress of the Works;
- Keep all details of the Contract and the DAB's activities and hearings private and confidential; and
- Be available to give advice and opinions if and when required by the Employer and Contractor.

By contrast, and pursuant to clause 5, the Employer and Contractor are obliged not to request a member to breach any of the obligations set out above. Neither is the Employer or the Contractor able to appoint a member as arbitrator under the Contract or call a member as a witness to give evidence concerning any dispute arising under the Contract. Further, the Employer and Contractor grant immunity upon the member of the DAB for any claims for anything done or omitted to be done in the purported discharge of the members functions unless those acts or omissions have been carried out by the member in bad faith. An indemnity is provided, joint and severally, by the Employer and Contractor in that regard.

Clause 6 deals with payment. There are two main elements to payment. The first is the retainer fee, which is paid on a monthly basis in consideration for the member being available for site visits and hearings, becoming conversant with the project and providing general services.

The second aspect of the fee comprises a daily fee for payment travelling to and from the site (a maximum of 2 days travelling in each direction) as well as for each day spent working on site, the hearings, preparing decisions and reading submissions. Reasonable expenses together with taxes properly levied are then to be paid in addition. The retainer fee is paid from the last day of the month in which the DAB becomes effective until the last day of the month in which the taking over certificate is issued for the

whole of the works. After that date, the retainer fee is reduced by 50% until the DAB is terminated or a member resigns.

It is therefore highly likely that each of the 3 members of the DAB will receive a different retainer fee and claim a different hourly rate. Each member submits their invoices for the monthly retainer and airfares quarterly in advance. Invoices for daily fees and other expenses are then submitted at the conclusion of a site visit or hearing. The contractor is to pay each of the members' invoices in full within 56 calendar days from receipt.

From a practicable perspective it is often sensible for the two "wing" members of the DAB to submit their invoices to the Chairman who then submits those invoices together with his or her invoice in one go to the Contractor. This means that the Chairman can remain the single point of contact for any issues arising in respect of the DAB's charges and that the final date for payment for all of the members will be on the same date, thus allowing the Chairman to take up the issue of late payment for the DAB if necessary.

If the Contractor does not pay then the Employer is obliged to pay the amount due. If a member has not received payment within 70 days from receipt of invoice by the contractor then that member may:

- Suspend his or her services until the payment is received; and/or
- Resign.

The Employer or Contractor may acting jointly terminate the DAB by giving 42 days notice.<sup>84</sup> If the member fails to comply with the Dispute Adjudication Agreement, or the Employer or Contractor fail to comply with it then those affected may terminate the tripartite Agreement. If a member breaches the Agreement then he or she will not be entitled to any further fees. Any disputes arising under the tripartite Agreement are to be dealt with by ICC arbitration comprising a single arbitrator.<sup>84</sup>

#### *FIDIC Procedural Rules*

The annex to the General Conditions of the Dispute Adjudication Agreement sets out procedural rules for the DAB. The DAB is to visit the site "at intervals of not more than 140 days" and should visit the site during critical construction events. Consecutive visits should not be less than 70 days.<sup>86</sup> The timing and the agenda for each site visit should be agreed between the DAB and the parties.<sup>87</sup>

In practice the DAB sets out the agenda, and the Chairman puts it to the parties and unless an objection is received from either of the parties the Board then proceeds upon that basis. At the conclusion of the site visit, the DAB is to prepare a report setting out its activities during the site visit and identifying those individuals who attended the site visit.<sup>88</sup>

Annex clause 4, requires the parties to furnish the DAB with a complete copy of the Contract, Progress Reports, Variation Certificates and other documents which are "pertinent to the performance of the Contract" or communications between the DAB Employer and/or Contractor shall be copied to the other party, and all the members of the DAB.

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84. Clause 7, Termination

85. Clause 9, Disputes

86. Annex, Procedural Rule 1

87. Annex, Procedural Rule 2

88. Annex, Procedural Rule 3

Annex clause 7 states that the DAB has the power to act inquisitorially. Further, the DAB is to establish the procedure before deciding a dispute and may refuse admission to the hearings and proceed in the absence of any party who has received notice of the hearing.

The DAB may also decide upon its own jurisdiction, conduct any hearings as it thinks fit, take the initiative and ascertain the facts, make use of its own specialist knowledge, decide upon the payment of interest if any, provide provisional or interim relief, open up, review and revised any certificate, decision, determination, instruction, opinion or valuation of the Engineer.<sup>89</sup>

Once a hearing has been concluded the DAB shall meet in private in order to discuss and prepare its decision.<sup>90</sup> Decisions should be reached unanimously, but if this “proves impossible”, then a decision may be made by the majority. In practice, a single decision is usually issued by the DAB: a majority decision and a further section where the minority member sets out his or her written report. If a member fails to attend the hearing then the other two members may proceed to a unanimous decision unless the Employer and Contractor agree otherwise or the absent member is the Chairman and he instructs the other members not to proceed. The Contractor and Employer could of course ask the other two members to proceed and make a unanimous decision.<sup>91</sup>

#### *FIDIC Dispute Adjudication Agreement*

The appendices to the FIDIC Form of Contract contain two Dispute Adjudication Agreements. The first is for use on a one person DAB, and the second for use on three person DAB. The Dispute Adjudication Agreements are for all intents and purposes the same for a one or three person DAB, except that where a three person DAB applies then those three persons are to act jointly as the DAB.

The terms of the General Conditions of Dispute Adjudication Agreement are incorporated by reference on clause 4 of the Dispute Adjudication Agreements. The retainer fee and daily fee of each member is set out in the both Dispute Adjudication Agreements. The Employer and Contractor bind themselves jointly and severally to pay the DAB member in accordance with the General Conditions of the Dispute Adjudication Agreement. Details of the specific FIDIC contract between the Employer and Contractor also need to be recorded, as it is from this document that the Employer and Contractor agree to be bound by the DAB and it is also from that document that the DAB obtains its jurisdiction in respect of the project.

### **The Move Towards Legislation For International Adjudication**

The legislation that has been introduced in the UK, and other jurisdictions introducing adjudication has merely dealt with the domestic position. However, it has been radically suggested that adjudication legislation could be provided by a two part statute.<sup>92</sup> The first part of the Bill would deal with the domestic territorial position, whilst the second part could provide for adjudication in respect of a construction contract anywhere in the world. This follows the concept of international arbitration. Most arbitration acts provide for domestic arbitration in the country of origin, whilst also supporting, recognising and enforcing international arbitration. In other words, the international adjudication section of the Bill would provide an adjudication procedure together with the ability of a local court to support the process in terms of nominating adjudicators by default, or identifying or nominating a body by default and enforcing decisions. Parties, anywhere in the world could choose the adjudication procedure of another jurisdiction.

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89. Annex, Procedural Rule 8

90. Annex, Procedural Rule 9(a)

91. Clause 9(c)

92. Robert Fenwick Elliott.

An International Adjudication Bill might include the following aspects:

1. Be drafted on a “minimum interference, maximum enforceability” basis;
2. Adopt the New York Convention for the purposes of enforcement;
3. Provide for the local courts to identify an adjudicator or nominate an adjudicator nominating body in the appropriate part of the world. This could be done by a judge on a documents only (email) basis;
4. Provide a limited ability for challenges. There would always be the ability to challenge on the basis of no jurisdiction, but how restricted should challenges be based upon grounds of natural justice?
5. A decision would be binding, unless or until subsequent arbitration, litigation or settlement; and
6. Detailed procedural rules would need to be included.

The advantages of such an approach would mean that international projects could make use of adjudication procedures in a country supported by a competent court system, which is not always the case in some developing countries where considerable construction projects are being carried out. Further, the parties could choose an adjudication system that appears to be more effective than others, or adopt a system whose procedurals appear to suit their project or their needs to a greater extent than their domestic adjudication process, if any.

## Conclusion

There are in deed now a wide range of dispute resolution techniques that are available in the construction industry. It is clear that the TCC is now able to rapidly deal with cases that come before it. Adjudication has substantially reduced the workload in the court, with the benefit that the court is available to deal with adjudication enforcement and also to deal with its primary workload in an efficient and rapid manner. In the past, it would have taken at least three years from the service of a writ to the issuing of a judgment for a relatively substantial construction case. Now, even complex construction cases can be dealt with within a year.

It is no longer the judge or the court’s ability to deal with matters that are the delaying factor. It is simply a case of whether the parties can keep up with the judge. There is therefore much to commend the adjudication process in terms of its contribution to judicial efficiency and it seems likely that statutory-backed adjudication procedures will be seen in many other common law jurisdictions. It may even be the case that the process of rapid binding dispute resolution is introduced into other commercial areas in order to reduce the burden on the court.

### Nicholas Gould

Partner, Fenwick Elliott LLP

+44 (0)20 7421 1986

+44 (0)20 7421 1987

ngould@fenwickelliott.com