

Introduction to the Basics

Dispute Resolution Guide: *A Brief Introduction to Dispute Resolution in the Construction Industry.*

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Overview

Arbitration was the traditional default method of dispute resolution. This has changed. The development of Alternative Dispute Resolution (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 have 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 three main parts. First, a general overview of the spectrum of dispute resolution techniques and consideration of the ADR movement. Second, an examination of adjudication and arbitration, focusing on the applicable legislation and procedure.

Thirdly this is followed by consideration of the TCC and the current approach to key aspects including:

- 1 Case management;
- 2 Experts;
- 3 E-disclosure; and
- 4 Cost management.

Finally, a brief consideration of international arbitration and dispute boards.

The Three Pillars of Dispute Resolution

There are three core techniques that may be employed in the resolution of disputes, which according to Green and Mackie¹ are the “three pillars of dispute resolution”. These are:

- 1 Negotiation;
- 2 Mediation (or third party intervention); and
- 3 Adjudication/ Arbitration/ Litigation.

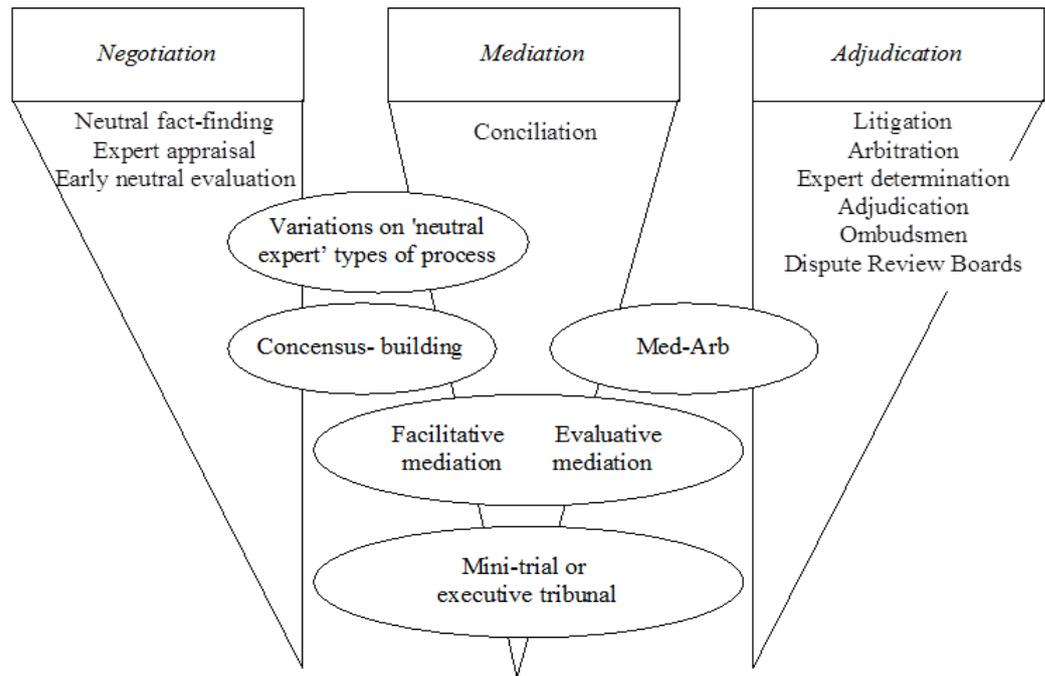


Fig. 1- The dispute resolution landscape²

The Techniques Defined

Negotiation

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

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, unlike the other pillars which require third party intervention.

Mediation

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 distinguishing feature here is the addition of an independent and neutral third party who aids the parties in dispute towards settlement. A further important factor is that the mediator does not decide the outcome; settlement lies ultimately with the parties.

A distinction is often made between styles of mediation that are “facilitative” and those that are “evaluative”. During a facilitative mediation, the mediator is trying to reopen communication between the parties and explore the options for settlement. The mediator does not openly express his or her opinions on the issues. If, on the other hand, the mediator is called upon to state his or her opinion on any particular issue then he/she is clearly making an evaluation of that issue. During an evaluative mediation, 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, rests with the parties during negotiation, mediation and conciliation. By contrast, “adjudicative” or “umpiring” processes, such as litigation, arbitration and adjudication, rely on the Judge, arbitrator or adjudicator having the power to impose a decision.

Adjudication/ Arbitration/ Litigation

This is the third and final pillar of dispute resolution. Whilst discussed in more detail in the rest of the paper, the ultimate distinction between this pillar and the previous two is that the ultimate outcome of a dispute is an imposed binding decision.

Adjudication

Adjudication is a 28-day, short-form dispute resolution procedure that aims to resolve the disputes without the need to undertake long and costly court procedures and therefore assist cash flow. It has often been nick-named the “pay first, argue later” mechanism for resolving construction disputes.

In its general sense, it refers to the process by which the Judge decides the case before him/her. More specifically, adjudication may be defined as a process where a neutral third party gives a decision that is binding on the parties in dispute unless or until revised by 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.³

Law

This section proposes to deal with the following aspects:

- 1 Adjudication under the Housing Grants, Construction and Regeneration Act 1996;
- 2 Adjudication under the Scheme for Construction Contracts (England and Wales) Regulations 2011.

Statutory adjudication

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

Housing Grants, Construction and Regeneration Act 1996

The Housing Grants, Construction and Regeneration Act received Royal Assent on 24 July 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 agreements, and development agreements.

The HGCRA 1996 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.⁴

Statutory adjudication – the process under the HGCRA 1996

Under Part II of the HGCRA 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*"⁵ 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.

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

1 **Notices:** Under Paragraph 1 of Part 1 of the Scheme, written notice may be given at any time, notifying the intention to refer the dispute to adjudication. The notice of adjudication is paramount. It is the document that clearly sets out the adjudicator's decision and the scope and limit of the claim being referred to in adjudication.

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”*.⁶ 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 – Procedure

If the construction contract does not comply with the above eight requirements then the Scheme will be implied into the contract.⁷ Alternatively, if the construction contract does comply with the above provisions then the parties may include more detailed provisions and perhaps a procedure for enforcement. 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.

Essentially then the parties can achieve compliance with the Act in one of four ways:

1. The parties could adopt the Scheme;
2. Adopt 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, or the Technology Court Solicitor’s Association Rules;
4. Draw up their own set of bespoke rules.

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.

Notice of intention to refer

Just like the process under HGCRA 1996, either party to the contract may give written notice of its intention to refer the dispute to adjudication at any time.⁸ The referring party should provide notice of adjudication to every other party to the Contract and under paragraph 1(3) of Schedule of the Scheme for Construction Contracts 1998 (“the Scheme”) include:

1. The nature and a brief description of the dispute and the parties involved;
2. Details of where and when the dispute arose;
3. The nature and redress which is sought; and
4. The names and addresses of the parties to the contract, including (where appropriate) the addresses which the parties have specified for the giving of notices.

Appointing the adjudicator

The Scheme details the procedure for appointing an adjudicator under paragraph 2-6.

The responding party has the opportunity to object to the adjudicator’s appointment but this will not necessarily invalidate the adjudicator’s appointment or any decision which he reaches.⁹

Referral notice

The referring party is required to refer the dispute in question in writing to the adjudicator *no later than seven days* from the date of adjudication.¹⁰ Under paragraph 7(2) of the Scheme, the referral notice should be accompanied with copies (or relevant extracts) of the contract and other documents that the referring party intends to rely upon.

It is the duty of the referring party under paragraph 7(2) of the Scheme to send the adjudicator the relevant notice and documents, but also send a copy to all parties involved in the adjudication.

Adjudicator’s powers

The adjudicator’s powers under the Scheme are much like s.108 HGCRA 1996. To summarise they are:

1. The duty to act impartially and fairly (paragraph 12(a));
2. Take the initiative (paragraph 13);
3. Consider the relevant information (paragraph 17).

Adjudicator's decision

Under paragraph 19 of the Scheme, the time limit for when an adjudicator should reach the decision (with potential extensions) is set out. Paragraph 19(3) does, however, highlight that the adjudicator should deliver his decision to the parties as soon as possible after reaching it.¹¹

The adjudicator shall decide the matters in dispute and paragraph 20 of the Scheme lists factors that may be taken into consideration.

Also, under paragraph 22, the adjudicator will only give reasons for his decision if he is requested by one of the parties to do so.

Compliance and support

The parties shall comply with the decision immediately unless directed by the adjudicator otherwise.¹² Paragraph 23 of the Scheme states that the adjudicator's decision is binding on the parties and therefore compliance is necessary until the dispute is determined through legal proceedings, arbitration or by agreement between the parties.

Fees

The adjudicator's reasonable fees and expenses are to be paid and the parties shall be jointly and severally liable for any sum which remains outstanding following the making of any determination on how the payment shall be apportioned¹³.

Jurisdiction

Ensuring that an adjudicator has the jurisdiction to decide the dispute referred to him is of the utmost importance to the adjudication process. Without jurisdiction, an adjudicator's decision will be null and void and, ultimately, will not be enforced by the courts. In contrast, if an adjudicator has jurisdiction then, as the TCC and Court of Appeal have repeatedly made plain, errors of law, fact or procedure will not, without more, justify a failure to comply with it.¹⁴

The Adjudicator must have (and maintain) jurisdiction to decide the dispute referred to him. A reminder of the general principles occurred in the case of *Carillion Construction Ltd v Devonport Royal Dockyard*.¹⁵ This case arose from a project involving the fit-out of a submarine dockyard. The dispute here arose after completion. It was one of those big disputes, which some Judges have suggested are not really suitable for adjudication. Carillion sought over £10million and the adjudicator was provided with over 29 lever arch files of material. As a consequence, the dispute could not be resolved within 28 days and the adjudicator asked for and received two extensions. He therefore had 10 weeks to come to a decision. Carillion were awarded over £10million. Devonport declined to pay.

Mr Justice Jackson in his judgment reviewed the recent case law and set out four basic principles which he said applied to any attempt to enforce an adjudicator's decision:

1. The adjudication procedure does not involve the final determination of anybody's rights (unless all the parties so wish);
2. The Court of Appeal has repeatedly emphasised that adjudicators' decisions must be enforced, even if they result from errors of procedure, fact or law;
3. Where an adjudicator has acted in excess of his jurisdiction or in serious breach of the rules of natural justice, the court will not enforce his decision;
4. Judges must be astute to examine technical defences with a degree of scepticism consonant with the policy of the 1996 Act. Errors of law, fact or procedure by an adjudicator must be examined critically before the Court accepts that such errors constitute excess of jurisdiction or serious breaches of the rules of natural justice.

These principles were later approved by the Court of Appeal.¹⁶

Objecting to an adjudicator's jurisdiction

If a party wishes to object to an adjudicator's jurisdiction, it should object to the adjudicator's jurisdiction as soon as possible.

Court support and enforcement

It should be noted that under s.108(3) HGRA 1996, until the dispute is litigated, arbitrated or settled, the adjudicator's decision is only temporarily binding.

Despite this being the case, neither the HGCRA 1996 nor the *Scheme for Construction Contracts* provides a clear mechanism for enforcing an adjudicator's decision. Section 9 of the TCC Guide, however, does provide such a procedure, with section 9.1.1 noting:

"The TCC is ordinarily the court in which the enforcement of an adjudicator's decision and any other business connected with the adjudication is undertaken."

The TCC Procedure for enforcing an adjudicator's decision has been led by the TCC Judges rather than Parliament. Section 9.2 of the TCC Guide sets out the procedure for enforcing an adjudicator's decision, whilst section 9.3 deals with the enforcement hearing itself.

As noted in the case law above, the court will enforce adjudication decisions without enquiring as to their correctness.

General approach

The general principle within the TCC remains that adjudicators' decisions will be upheld unless the adjudicator has no jurisdiction or there was a serious breach of natural justice. The strict approach to enforcement stems from the early case of *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999]¹⁷ which was the first enforcement case to come before the

TCC challenging the validity of an adjudicator's decision based on procedural error. This was followed by *Bouygues (UK) Ltd v Dahl-Jensen UK Ltd* [2000]¹⁸ which held that despite the clear error made by the adjudicator, the decision had to be enforced. This was confirmed by the CA who held that whilst the question was answered in the wrong way, the right question was answered so it did not affect jurisdiction or prevent summary enforcement of the decision.

The case of *Able Construction (UK) Limited v Forest Property Developments Limited* [2009]¹⁹ serves as a useful reminder that the courts are wholly unsympathetic to parties who appear to be trying to avoid their obligations. In this case, the TCC enforced an adjudicator's decision after Forest Property failed to comply with a settlement agreement made following the adjudicator's decision. The TCC also awarded Able Construction indemnity costs because Forest Property had no defence to claim and because Able Construction had incurred extensive costs in recovering sums that Forest Property had previously agreed to pay. This case, therefore, acts as a clear reminder to parties who have no real defence to a claim and who are delaying payment of monies due.

However, there may be a basis of challenging an adjudicator's decision on the basis of:

1. The adjudicator had no jurisdiction to make the decision;
2. There was a serious breach of the rules of natural justice.

Developments concerning challenges to adjudicators' decisions have largely been in the area relating to alleged breaches of natural justice. Natural justice requires that every party has the right to a fair hearing and has the right to be heard by an impartial tribunal.

In the recent case of *Wycombe Demolition Ltd v Topevent Ltd* [2015],²⁰ Wycombe sought to have the adjudicator's decision enforced. Topevent argued that the adjudicator's decision was void as it breached the laws of natural justice and also alleged reference to multiple disputes.

The fact that the adjudicator had not visited the site was deemed not to be a breach of natural justice. The allegation that the adjudication had failed to decide the valuation dispute on the basis of the parties' respective submissions was also rejected. The Judge in the case noted:

*"An adjudicator has to do his best with the material with which he was provided. He has considerable latitude to reach his own conclusions based on that material, and he is certainly not bound to accept either one or other of the figures advanced by the parties."*²¹

Likewise, in *Science and Technology Facilities Council v MW High Tech Projects UK Ltd* [2015]²² Fraser J held that whilst a general reservation of rights by the defendant was enough to maintain jurisdictional challenges, the defendant's points were dismissed on the basis that the adjudicator's decision had been given 11 months before. Fraser J noted that the "widespread and varied" attempts to raise jurisdictional objection were not what adjudication was created for.

Arbitration

This section is intended to provide a brief summary on:

- 1 Applicable legislation.
- 2 Practice and procedure:
 - 2.1 The agreement to arbitrate;
 - 2.2 The arbitrator;
 - 2.3 The procedure; and
 - 2.4 The award and any problems enforcing the award.

Overview

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:²³

"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 a private form of dispute resolution that is agreed by the parties in the contract. An arbitrator, or panel of arbitrators, is appointed by the parties to make a binding decision from which there are very limited grounds of challenge.

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 with litigation, where the Judge and court facilities are provided at public expense, the parties to arbitration will ultimately have to bear the costs of the arbitrator and the facilities. Another disadvantage is that an arbitrator has no power to award interim measures and this therefore could result in the depletion of resources before the dispute is settled.

Background and applicable legislation

The Mustill Committee in its 1989 report²⁴ 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. First, most of the law on arbitration is to be found in case law and is often only accessible to specialist lawyers. Secondly, the existing statute law was dispersed in a variety of Acts. Finally, the disjointed and illogical arrangement of the existing statutes, together with the complex terminology, is incomprehensible to the layman.

The initiative for a new Act moved gradually forward, first in a drafting bid under the Marriot Working Group, and then under the umbrella of the Department of Trade and Industry. A draft bill was published in February 1994. According to Ambrose and Maxwell, “the bill was subject to much criticism and around 2,500 comments were received during the 5 month consultation period”.²⁵ 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 were published in 1997. The bill was debated in the House of Lords and then passed on to the House of Commons before being committed to the Special Public Bill Committee procedure. The Act received royal assent on 17 June 1996. The Arbitration Act 1996 (“Arbitration Act”) is now the principal English statute.

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 1 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.”²⁶

Although it was anticipated that the Act would herald a new era in arbitration practice, many of the provisions of the Act remain underused. In contrast to the Civil Procedure Rules (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.

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 to deal properly and fairly with the points in issue. Further, the parties' costs in adjudication are almost always irrecoverable, and significant.

Practice and procedure

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

1. Agreement to arbitrate
2. The arbitrator
3. The procedure
4. The award and enforcement

The agreement to arbitrate

An arbitration agreement is "an agreement to submit to arbitration present or future disputes (whether they are contractual or not)".²⁷ It is therefore a contractual undertaking by two or more parties to resolve disputes by the process of arbitration, but that does not restrict arbitration to merely contractual disputes and could include a range of matters such as tortious claims.

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

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

The arbitrator

The arbitrator's task is to determine disputes referred to him, either alone if he is appointed as the sole member of an arbitral tribunal or jointly with other members of a tribunal. His decision should be based on evidence and submissions and in accordance with the law chosen by the parties.³⁰

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

The general duty of the tribunal is set out in s.33 of the Arbitration Act:

“(1) The tribunal shall –

(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and

(b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.”

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

The procedure

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

*“Unless otherwise agreed by the parties, an award made by the tribunal pursuant to an arbitration agreement is final and binding both on the parties and on any persons.”*³¹ This means that the arbitration award is immediately enforceable, subject to any right of challenge that is invoked.³²

Section 66 of the Arbitration Act contains summary procedures for the enforcement of domestic awards. 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 tasks.

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

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

1. Order payment of money;
2. Make a declaration of the rights between the parties;
3. Order a party to do or refrain from doing something;
4. Order specific performance; and/or
5. Order the rectification, setting aside or cancellation of a deed or document.

In addition, s. 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.

Technology and Construction Court

The types of claim which it may be appropriate to bring in the Technology and Construction Court (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 multitrack: 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 within 14 days of the earliest of the filing by the defendant of an acknowledgement 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 Technology and Construction Court is part of the Queen's Bench Division of the High Court. It is a specialist court, which deals with technology and construction disputes, and other disputes that involve questions or issues that are technically complex.

Proceedings in the TCC are governed by:

1. The Civil Procedure Rules (CPR) and supplementary Practice Directions (PD);
2. CPR 60 (Technology and Construction Court claims) and its associated PD deal specifically with the practice and procedure; and
3. TCC Guide, second edition, third revision.

CPR Rules provide that a TCC claim is a claim which involves technically complex issues or questions (or for which trial by a TCC Judge is desirable) and has been issued in or transferred into the TCC specialist list.

There is a compulsory pre-action protocol, the purpose of which is: to encourage the frank and early exchange of information about the prospective claim and any defence to it; to enable parties to avoid litigation by agreeing a settlement of the claim before the commencement of proceedings; and to support the efficient management of proceedings where litigation cannot be avoided.

The TCC PD identifies the types of claim which it may be appropriate to bring as TCC claims, such as building or other construction disputes, including claims for the enforcement of the decisions of adjudicators under the Housing Grants, Construction and Regeneration Act 1996; engineering disputes; claims by and against engineers, architects, surveyors, accountants and other specialised advisers relating to the services they provide and so on.

Pre-action protocol

The Pre-Action Protocol for Construction and Engineering Disputes applies to all disputes in that category, 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.

Paragraph 1.4 relates to compliance and states that:

"The court will look at the effect of non-compliance on the other party when deciding whether to impose sanctions."

The Pre-Action Protocol for Construction and Engineering Disputes provides for a pre-action meeting but also recommends that the parties should consider whether some form of ADR is more suitable than litigation.³⁴ This accords with the Court of Appeal's recognition in *Burchell*

v Bullard that mediation should act as a track to a just result running parallel with that of the court system.³⁵

In light of the *Halsey*³⁶ judgment the protocol expressly recognises that the parties cannot be forced to mediate or enter into any form of alternative dispute resolution. However, when considering this recommendation the parties will be aware of the very real cost consequences that could result from a failure to consider mediation and generally act in accordance with the applicable pre-action protocol.

In the recent case of *Frontier Agriculture Ltd v Wilkinson and others*,³⁷ Mr Justice Stuart-Smith in the TCC re-emphasised the importance of the requirement in the Pre-Action Protocol for Construction and Engineering Disputes for the parties to meet prior to the issue of proceedings.

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 acknowledgement 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 four 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:

1. 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)
2. The extent of disclosure of documents with a view to saving costs; and
3. 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*".

Key aspects

There are a number of notable key aspects to TCC proceedings. The most notable ones are case management, the use and control of experts, e-disclosure and costs management. Each of these is considered briefly below.

Case management

Traditionally, a Judge has been assigned to a new case, which means that that Judge will then deal with issues arising in relation to the case including the hearing and issuing of the judgment. This has not necessarily always been the case with the court system. Different Judges might hear applications made along the way before the final hearing. However, for the purpose of consistency TCC Judges have tendered to deal with all the issues. This means that the Judge becomes familiar with the parties and the case, but there is less opportunity for a party to seek some strategic advantage by raising applications before different Judges on the way to the final hearing.

Case management by the same Judge has been an important aspect of TCC proceedings. As a result of more recent court proceedings it is now becoming a more familiar process in the court system generally.

Experts – Civil Procedure Rules Part 35

The involvement of experts and the use of expert evidence is one of the most significant features of a TCC claim. Each party may instruct more than one expert, even for relatively small disputes.

The parties often appoint experts at an early stage, before proceedings are issued and, sometimes, before the pre-action phase. The TCC recognises the tension between the parties' need to instruct and rely on expert opinion in the pre-action stage and the court's need to reduce the cost of expert evidence. Parties should be aware of this tension and avoid incurring costs on experts on uncontroversial matters or in low value cases before the Case Management Conference (section 13.3.1, TCC Guide). The cost of expert evidence can be significant and the use of single joint experts is limited.

Expert evidence

Expert evidence is dealt with by section 13 of the TCC Guide. It is described as evidence about matters of a technical or scientific nature and generally includes the opinions of the expert. The quality and reliability of expert evidence will depend upon (i) the experience and the technical or scientific qualifications of the expert and (ii) the accuracy of the factual material that is used by the expert for his assessment. Expert evidence is dealt with in detail in CPR Part 35 ("Experts and Assessors") and in the PD supplementing Part 35.

The provisions in CPR Part 35 are concerned with the terms upon which the court may receive expert evidence. These provisions are principally applicable to independently instructed expert witnesses. CPR 35.2(1) states that a reference to an "expert" in CPR 35 is a reference to a person who has been instructed to give or prepare expert evidence for the purpose of proceedings. The expert witness's primary duty is to help the court, and this duty overrides any duty that the expert may have to those who are instructing or paying him (CPR 35.3).

It is also worth noting that the Practice Direction on Pre-Action Conduct and Protocols (Pre-Action PD) came into force on 6 April 2015 and replaced the Practice Direction on Pre-Action Conduct (PDPAC). The Pre-Action PD does not contain an equivalent to Annex C, which provided guidance on instructing experts and which did not apply to claims proceeding in the TCC (section 13.7.1, TCC Guide). The Pre-Action PD reminds parties that permission is required before expert evidence may be relied upon (CPR 35.4(1)) and that the court may limit the fees that are recoverable for an expert (paragraph 7, Pre-Action PD).

The TCC Guide, at section 13.8.2(d), also acknowledges that “hot-tubbing” (or “concurrent evidence”) of experts may be an option for the court to consider when deciding to deal with expert evidence. This style of examination simply means that the expert witnesses are examined and then cross-examined together. This method of examination can have significant results in construction-related disputes and reflects Jackson LJ’s recommendation at chapter 38 of his report.³⁸

The recent case of *Van Oord UK Limited and SICIM Roadbridge Limited v Allseas UK Limited* [2015]³⁹ highlights the danger of using an expert who has failed to follow proper process and procedure when writing the expert report. In that case Coulson J provided 12 reasons as to why the expert was “entirely worthless” and these can be seen as guidance as to what the court expects from an expert. These were:

1. The expert is required to check the documents and come to their own conclusion – not take it on face value;
2. Consider all of the witness statements produced by both parties;
3. Be prepared to value claims on an alternative basis;
4. Use actual costs where possible rather than relying on made-up or calculated rates;
5. Consider the points raised by an opposing expert and address them;
6. Ensure that they can stand by all aspects of their reports having verified the documents and evidence relied upon;
7. Draft the reports clearly – do not mislead or deliberately make unclear;
8. Review all documents that are referred to and provided with reports;
9. Ensure that the expert’s view is his own and he has not been influenced;
10. Be clear as to the documents and analysis which have been provided by people other than the expert and make clear the extent to which these have subsequently been relied upon;
11. Challenge what they are told until they are happy that what they have been told is correct;
12. Consider alternative methods of calculations and other approaches which may not necessarily have been pleaded.

E-Disclosure

The TCC adopted the e-disclosure pack published by the Technology and Construction Court Solicitors’ Association (TeCSA), Technology and Construction Bar Association (TECBAR) and the Society of Computers and the Law (SCL) on 1 January 2014.

The e-disclosure protocol was designed to underpin the operation of Practice Direction (PD) 31B, CPR 31.5(3) requirement of a disclosure report and the electronic documents questionnaire.

Updates to e-disclosure

Recently, the High Court expressly approved the use of predictive coding (also known as technology assisted review or computer assisted review) for a large disclosure exercise in the case of *Pyrrho Investments Limited & Anor v MWB Property Limited and Others*[2016].⁴⁰

Predictive coding is software that helps identify relevant documents through a combination of computer and manual document review. The software applies various algorithms to the human reviewer's decision when coding documents and applies this to the remaining documents within the database. It will take a couple of batch reviews in order for the software to be as effective as it can. Whilst traditionally civil litigation's approach has been fairly cautious, the landmark ruling in *Pyrrho* could see this method being adopted across all courts.

Master Matthews permitted the coding on the basis of the large volume of documents within the disclosure exercise, noting that other jurisdictions such as those in the US and Ireland have used such coding when appropriate. He noted that there is nothing in the CPR or Practice Directions to prohibit its use and CPR PD 3B specifically stated "*other automated searches*".

It should be noted that this case was not held in the TCC and cannot be seen as a precedent for what is to follow; at best it is persuasive. Whether predictive coding is appropriate for complex construction disputes which invariably involve numerous technical issues that may develop over time and can be interrelated is not clear. However, the TCC e-disclosure protocol does acknowledge that predictive coding could become part of the disclosure process.

Cost management

Section 6.3 of the TCC Guide focuses specifically on cost management. The TCC Judge takes a proactive role in the management of cases, with the TCC giving directions at the outset and then during proceedings in order to serve the overriding objective of dealing with cases justly and proportionately.

The main intention behind the Jackson reforms was not only to improve the efficiency of the court system but also reduce the cost of bringing legal action. One of the outcomes was the introduction of costs budgets which requires both parties to set out the time and cost (incurred and potentially incurred) at an early stage in the proceedings. The TCC ran a cost management pilot scheme from October 2011 to March 2013 and has remained at the forefront of the issue on costs.

Denton v TH White Ltd[2014]⁴¹ held that there would be cost consequences against parties who took advantage of minor procedural errors made by the other party to the case. This emphasised that in light of the Jackson reforms, the need to reduce costs should be at the front of everyone's mind when undertaking litigation.

The recent TCC case of *GSK Project Management Ltd (in liquidation) v QPR Holdings Ltd* [2015]⁴² illustrates some of the difficulties parties may face when seeking approval of their costs budget. The Judge observed that cost budgeting reviews can and should be carried out quickly. The Judge held that Coulson LJ's approach in *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Limited*[2015]⁴³ should be used as a guide rather than a straitjacket, with the following points considered:

1. The proportionality of the cost budget;
2. The reasonableness of the cost budget;
3. A summary of options; and
4. Conclusions on the available options.

Likewise, in the case of *Gotch & Gotch v Enelco Limited* [2015],⁴⁴ Justice Edwards-Stuart noted that in light of the Jackson Reforms, even more emphasis should be placed upon the overriding objective of dealing with the case at a proportionate cost. He was critical of those parties who waste court time as he noted:

*"It is therefore time to say, in the clearest terms, that parties and their solicitors can no longer conduct litigation in a manner which does not keep the proportionality of the costs incurred at the forefront of their minds at all times."*⁴⁵

Therefore, it is imperative that when undertaking any type of litigation, both parties are vigilant as to the mounting cost and only take those actions necessary to progress the case.

It should be noted that in light of the 83rd CPR update, changes have been introduced to the cost budget in advance of the Case Management Conference (CMC). Cost budgets must now be filed 21 days and not 7 days in advance of the CMC and parties must then file an "agreed budget discussion report" (setting out what is agreed and any reasons for disagreement) 7 days before the CMC. The idea behind this is to increase the opportunity for agreement and it requires the parties to cooperate and compromise regarding their budgets.

Aspects of construction litigation

Certificates

Most standard forms state that an arbitrator has the ability to "open up, review and revise" decisions or certificates. *North Regional Health Authority v Derek Crouch* [1984] QB 644 concerned an appeal from an arbitrator's award. The Court of Appeal compared the powers of the court and of arbitrators under the JCT 1963 Standard Form of Building Contract. The term in that contract gave the arbitrator power to "open up, review and revise any certificate, opinion, decision ... as if no certificate, opinion, or decision had been given". The question was whether, if a dispute was to be determined in court, the court had the same power as the arbitrator.

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

The point was then reversed by the House of Lords in *Beaufort Developments (NI) Limited v Gilbert Ash (NI) Limited* [1999] 1 AC 266. The interesting question is whether this issue has only been overruled in respect of JCT Contracts, or whether indeed it has a wider scope such that any court has the same power as an arbitrator.

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

Scott Schedules

Disputes are often of a technical nature and so expert evidence is frequently encountered in construction litigation. There are often many matters forming the subject of the dispute and a Scott Schedule is a type of pleading that can be used to summarise the parties' views on each aspect of the dispute. They are basically tabulated schedules where each of the individual matters are dealt with in a single row. The column headings provide the opportunity to give each item a serial number, identify it by reference, set out the nature of the breach complained of, together with any comments and an amount of money in respect of that item. Further blank columns are then provided giving the other party an opportunity to comment and also the provision of a final column for the Judge to make a decision and the amount due.

Section 5.6.2 of the TCC Guide provides that a Scott Schedule should be used if it will "genuinely" save time and money but it should not be ordered or agreed if it will waste time and thus raise costs.

There is no prescribed form for a Scott Schedule but according to the TCC, the format should be specified when ordered by the court/agreed by the parties and be as user-friendly as possible. Quite often, this schedule will take a landscape format.

It is also important to note that after the entries on the Scott Schedule, it should be supported by a statement of truth from each party as prescribed under section 5.6.1 of the TCC Guide.

The case of *Imperial Chemical Industries Plc v Bovis Construction Limited & Ors*⁴⁶ considered global claims, but also the content of a Scott Schedule. Judge James Fox-Andrews QC reviewed the Scott Schedule and came to the conclusion that it did not even begin to properly particularise the linkage between the alleged claim and any particular delay. His Honour held that it was inadequately pleaded and struck out the Scott Schedule.

It should be noted that although the Scott Schedule was struck out, the claim itself was not struck out and so the claimant could have continued his claim by formulating a properly particularised Scott Schedule. However, it seemed unlikely that the claimant would be able to produce a Scott Schedule in the terms required by the Judge and so this must have effectively brought an end to the claim.

Cross-claims

Given the interaction of many issues in construction disputes, costs are often high even if the dispute amount is low. Cross-claims are also common. For example, a claim for additional money can be met with a claim for defects. Such costs claims often raise difficult issues of fact and more, thus contributing to the high cost of construction litigation.

Multi-party

Not all contracts are executed between two parties and it therefore follows that not all disputes will be between two parties. There may be multiple parties ("multi-party") or there may be two parties but multiple contracts ("multi-contract").

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 Dispute Resolution Appointment (DRA) and Dispute Resolution Board (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 prerequisite 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.”⁴⁷

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*⁴⁸ 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*.⁴⁹ 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*.⁵⁰ In that case the court found that a conciliation clause could not operate as a precondition 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*.⁵¹

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 required that the parties conduct the conciliation in good faith. In many respects the House of Lords' decision in the *Channel Tunnel Group Limited v Balfour Beatty Limited*⁵² and the Commercial Court Practice Directions suggest that the court may well support a conciliation or mediation prerequisite 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 obsessions to assist and expedite the parties in reaching agreement."*⁵³ *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.”⁵⁴

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 suggest that the court may well support a conciliation or mediation prerequisite provided that the process is carried out during a defined time scale and the rules of the process are sufficiently clear.

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Mini trial or executive tribunal

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 (four 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 two-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 two 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."⁵⁸

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, 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 multistage 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*.⁵⁹ 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 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 had 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 2 EG 86⁶⁰ 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*.⁶¹ 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 Colin Wall the idea stemmed from Clifford Evans who, in 1986, suggested the use of an "independent intervener".⁶² The independent intervener would be paid for equally by the employer and contractor to settle disputes as they emerged, rather than waiting until the end of the contract. The decision would be binding until the end of the project when either party could commence arbitration proceedings. Unlike the independent intervener the DRA does not make interim binding decisions, but advises on the means by which settlement could be achieved. The power to settle ultimately rests with the parties.

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

The logical conclusion was developed by a working party of the Chartered Institute of Arbitrators, and labelled the Dispute Adviser. Severn presents the working party's two-stage solution, which classifies disputes as being either "*minor disputes*" or "*major disputes*", and makes use of a Dispute Adviser.⁶³ 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.

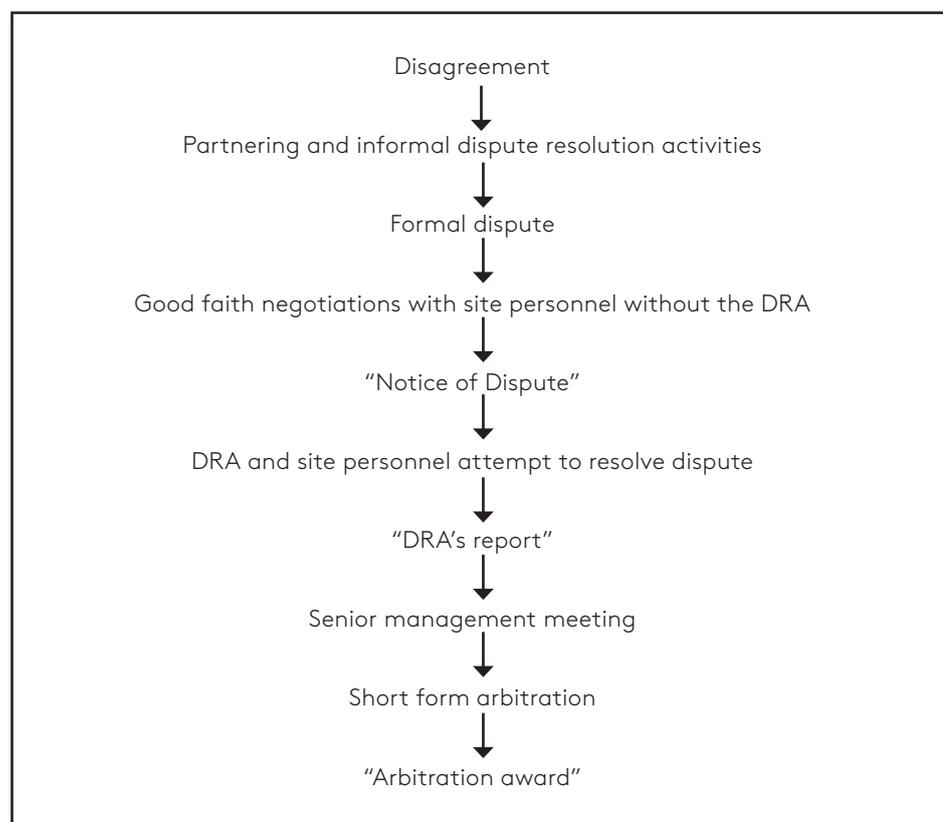
If a settlement is not reached or the problem continues then the minor dispute becomes a major dispute. Major disputes may be conciliated, mediated or the Dispute Adviser may make a recommendation. In this context conciliation refers to a purely facilitative process, whilst mediation may lead to a written 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.”⁶⁴

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.

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:

1. One issue or a limited number of issues, conducted in one day per issue;
2. Each party is given the opportunity to present;
3. Each party to have an equal amount of time;
4. The arbitrator has seven days to make a written award which is final and binding; and
5. Disputes over time or money are resolved using final offer arbitration where the arbitrator must select one or the other figure.

According to Wall,⁶⁶ 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 90s. Hybrid and multistage 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.

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 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 three-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 the UK has a contract sum in tens of millions rather than hundreds of millions. Therefore, project mediation has the potential for use on around 80% of the construction projects carried out in the UK.

Dispute Boards

A “Dispute Board”, or occasionally “Disputes Boards” (collectively “DBs”), 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 members of DBs need to be relevantly experienced in the type of project under construction and have a thorough understanding of contractual issues.

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.

There are three main types of DBs:

1. Dispute Review Board (DRB)
2. Dispute Adjudication Board (DAB)
3. Combined Dispute Board (CBD).

Dispute Review Board

The DRB issues recommendations in line with the traditional approach of DRBs. These are opinions based on the information provided within the dispute and are non-binding. The DRB process is there to assist parties in amicable settlement rather than enforce a decision.

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.

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 at 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 the establishment of 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.⁶⁷ 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 1,062 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%.

Dispute Adjudication Board

The DAB is different from DRBs because the decision issued by the DAB is binding between the parties. Chern notes that the integral word is "*adjudication*" that suggesting that an adjudicator reviews the information and issues a decision.⁶⁸

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.⁶⁹ 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.

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 then choose 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 are relatively new concepts, it is more informative to consider development of DRBs before then considering the development and practice of DABs.

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 subcontractor 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 Act 1996 included adjudication provisions in section 108.
- 1998: Part II of the Housing Grants, Construction and Regeneration Act 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.

- 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 the DAB.
- 2004: (July): ICE published a DB procedure. Designed to be compliant with the HGCRA.
- 2014: (August): CI Arb publishes dispute board rules.

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:

1. Clauses 20.2-20.8 the Dispute Adjudication Board;
2. Appendix – General Conditions of Dispute Adjudication Agreement;
3. Annex 1 – Procedural Rules; and
4. 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.⁷⁰ Under UK law this seems unlikely given that timescales in construction contracts are generally directory rather than mandatory,⁷¹ 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.⁷² 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 who 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 does 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 one or three members.⁷³ The default appointing authority is the President of the FIDIC or a person appointed by the President of the 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 the appointment of 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 principal 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.

By virtue of clause 20.3 the parties have agreed that the appointing entity named in the 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 three 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.⁷⁴

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 that 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. A notice of dissatisfaction must set out the dispute and reasons for the dissatisfaction. Matters that are the subject of a notice of dissatisfaction and 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.⁷⁵

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 three 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 three members of the DAB. The Agreement takes effect on the latest of:

1. The Commencement Date defined in the Contract;
2. When all parties have signed the tripartite Dispute Adjudication Agreement; or
3. 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.

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

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

11. 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 member's functions unless those acts or omissions have been carried out by the member in bad faith. An indemnity is provided, jointly 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 travelling to and from the site (a maximum of two 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 three 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:

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

The Employer or Contractor may acting jointly terminate the DAB by giving 42 days' notice.⁷⁷ If the member fails to comply with the Dispute Adjudication Agreement, or the Employer or Contractor fails 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.⁷⁸

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 apart.⁷⁹ The timing and the agenda for each site visit should be agreed between the DAB and the parties.⁸⁰

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.⁸¹

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.

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 revise any certificate, decision, determination, instruction, opinion or valuation of the Engineer.⁸²

Once a hearing has been concluded the DAB shall meet in private in order to discuss and prepare its decision.⁸³ 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.⁸⁴

FIDIC Dispute Adjudication Agreements

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 in clause 4 of the Dispute Adjudication Agreements. The retainer fee and daily fee of each member is set out in 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 this 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.⁸⁵ 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.

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 based upon grounds of natural justice be?
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.

International Arbitration

This section will cover the following:

1. Brief introduction to international arbitration
2. Brief summaries of running arbitration within the various institutions
3. ICC
4. DIFC/LCIA
5. DIAC.

Overview

International arbitration is appropriate for international projects. In other words, the arbitration in some way transcends national boundaries. The project will no doubt be in one particular country, however the “players” may be based in other countries. For example, a project in Indonesia might be carried out by designers from Europe, a contractor from Japan and with finance from Japan and the USA. In that situation the parties might agree to have the seat or the place where they hold their arbitration in Singapore. It might be considered by the parties a neutral place to hold their arbitration. There is a distinction between a purely domestic arbitration between parties based and operating within one jurisdiction, and international arbitration which is more suited to projects involving parties from various jurisdictions.

There are a number of international organisations specialising in the drafting of international arbitration rules, and also appointing arbitrators as well as managing to varying levels the administration of the arbitration. The arbitral tribunal will have jurisdiction over the arbitration, but the institutional arbitration might help with administrative support. Some of the key institutions are considered below.

Institutions

ICC

The International Court of Arbitration is supervised by the International Chamber of Commerce (ICC) Court and administered by the court’s secretariat. Established in 1919, the ICC is considered to be the leading international arbitral institution through its extensive experience in handling a large volume of cases and the significance of disputes heard. With experience covering some 180 countries, it provides an ideal platform for international arbitration. Keeping up to date with developments, new ICC Rules of Arbitration came into force on 1 January 2012.

The court does not intervene in the merits of the case and the arbitrators make independent decisions.⁸⁶ Although the base of the International Court of Arbitration is Paris, with offices in Hong Kong, Singapore and New York, parties are free to choose the seat of arbitration. When there is no agreed seat of arbitration by the parties, the court will choose the seat by considering the neutrality of the court, convenience and enforceability of the arbitral award.

The court provides much valuable administrative support for the parties in dispute, with great flexibility for the parties to agree on a particular procedure within the framework of the

ICC Rules. The court provides detailed guidance at the start of the arbitration when it can adjudicate on the validity of the arbitration agreement and confirm the appointment of the arbitral tribunal.

When parties agree to appoint a three-member tribunal, each party puts forward an arbitrator and the ICC Court will appoint the president of the tribunal. The court's appointment is made following a proposal by the relevant national committee. When the dispute refers to an agreement governed by English law, the English national committee would be consulted. Members of the national committee will also depend on the terms of the contract, the parties involved and the nature of the dispute. Further, the procedure for a three-member tribunal is open for parties to agree otherwise.

When assessing the administrative fees and costs of the arbitrator or arbitrators, the amount depends on the amount in dispute as well as the complexity of the matter being referred. However, the ICC provides detailed guidance on the costs of the arbitration by providing an easily accessible Arbitration Cost Calculator on its website.⁸⁷

Under Article 30 of the ICC Rules, the tribunal is required to provide its award six months from the date of the last signature by the tribunal or by the parties of the "*Terms of Reference*". Subsequent to the arbitration tribunal's award, the court can review and approve a draft award made by the tribunal. Although the court does not correct any alleged errors of fact or law, it ensures that there are no errors of form. It provides consistency regarding the awards made by the arbitrators where minimum standards are met. Thus, parties to the dispute can be assured of the quality of their arbitrator.

Recently, there has been an increasing demand by parties in dispute for urgent interim measures from arbitral proceedings. The ICC accommodates such demand where the emergency arbitrator has the power to grant such measures even before the formation of the arbitral tribunal. It is an important development as it takes a great amount of time to constitute an arbitral tribunal and receive any relief when a party may have immediate concerns that requires urgent relief. Further, the timeline can also be delayed by an uncooperative party who is determined to delay the proceedings to the detriment of the other party. Emergency arbitrator procedure protects such vulnerability by granting relief in the interim before or while a main claim is being adjudicated.

Prior to the introduction of emergency arbitrator procedure, parties had to seek emergency relief from local courts whilst the tribunal was being set up. However, ICC did provide a further option for the parties to apply for a pre-arbitral referee.⁸⁸ Parties could also wait until the formation of the tribunal and then apply for an interim award.

In 2012, the ICC introduced new provisions for an emergency arbitrator under its Arbitration Rules.⁸⁹ In the first year, two applications were made.⁹⁰ Only one of the applications was admissible as the other was not admissible pursuant to Article 29(6) of the ICC Rules of Arbitration. The successful application involved parties from the United Kingdom and its emergency arbitrator was appointed within one day. During 2013 and 2014, the ICC received six applications each year.

As indicated by the number of cases being referred to the emergency procedure, application for the emergency arbitration is limited despite the demands for an emergency arbitration prior to its introduction from the legal profession. Due to the limited number of cases, there are no specific ways to determine the exact reasons for the low number of applications. However, the cost of the ICC Emergency Arbitrator Proceedings is US\$ 40,000,⁹¹ which is considerably higher than other procedures such as Stockholm Chamber of Commerce (SCC) or London Court of International Arbitration (LCIA). SCC's application and arbitrator fee amounts to €15,000 as outlined in the 2010 SCC Arbitration Rules.⁹² LCIA's costs consist of £20,000 for the emergency arbitrator's fee and an application fee of £8,000. In addition to

the costs issue, the lack of sanctions and limited enforceability are clear drawbacks for the ICC emergency arbitrator procedure.⁹³

On 24 June 2015, the ICC held an Emergency and Preliminary Measures conference to discuss the emergency measures and preliminary measures in arbitral proceedings. The ICC Young Arbitrators Forum (YAF) conducted a number of events earlier in 2015 to aid the understanding of its emergency arbitration proceedings. One was conducted in Lagos sponsored by Emedith Solicitors and Rosberg Legal Practitioners & Arbitrators, to discuss the developments since the introduction of the emergency arbitration proceedings.⁹⁴ In Tunis, LABIB Cabinet d'avocats sponsored an event to discuss the practical aspects relating to requesting interim measures before and during arbitration.⁹⁵ Another event was held in Cologne and sponsored by Oppenhoff & Partner and Borris, Hennecke and Kneisel. The event discussed success stories and challenges to the new emergency arbitration procedure.⁹⁶ In Lisbon, the ICC Young Arbitrators Forum (YAF), ICDR Young & International and APA Sub 40 organised a joint conference for the understanding of emergency arbitration.⁹⁷ Such events outline the increasing interest shown by the legal profession for emergency arbitration proceedings. Further, as shown by the Lisbon event, the extent of emergency arbitration is compared and developed alongside other rules.

ICC Rules state that the emergency arbitrator may only make orders which limit the arbitrator's powers. ICDR, SIAC, SCC and LCIA empower the emergency arbitrator to make an award or an order. An example of the limited enforceability of the ICC Rules is outlined in Article 29(5), which states that the Emergency Arbitrator Rules will only apply to parties that are signatories to the arbitration agreement or their successors. The emergency arbitrator's orders are not binding on the arbitral tribunal, and the tribunal may modify, terminate or annul the order or any modification thereto made by the emergency arbitrator.⁹⁸

In addition, in comparison with SIAC's eight to ten days to provide a decision, the ICC emergency arbitrator's target decision timeframe is fifteen days. It is a long time for a decision when compared with an emergency arbitrator's decision under the SCC which has a target of five days.⁹⁹ However, it is not the longest time for decisions, as the emergency arbitrator's decision under ICDR is 21 days on average.¹⁰⁰

DIFC/LCIA

Dubai in the United Arab Emirates established the Dubai International Financial Centre (DIFC) which is a financial Free Zone with independent commercial laws and courts. Established in 2004, DIFC is a financial centre between Asia and Europe. DIFC courts administer a common law judicial system within the DIFC financial free zone in Dubai. In November 2006, the United Arab Emirates ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. DIFC administers its own arbitration law based on the UNCITRAL Model Law.¹⁰¹ To tailor such rules, DIFC and LCIA (London Court of International Arbitration) launched a new arbitration centre named DIFC-LCIA Arbitration Centre in 2008. The centre has its own DIFC-LCIA Arbitral Rules (DIFC-LCIA Rules) administered by the London Court of International Arbitration.

The new centre attracted a great deal of interest as it showcased the efforts to establish Dubai as one of the ideal locations for international arbitration. It utilises its geographic attributes in the Middle East as well as the increasing confidence in the region to attract further global businesses. Inaugurating the DIFC-LCIA Arbitration Centre, His Highness Sheikh Maktoum Bin Mohammed Bin Rashid Al Maktoum, Deputy Ruler of Dubai, promoted the introduction by saying:

"The establishment of the DIFC-LCIA Arbitration Centre is part of a strategy to position Dubai as an international arbitration jurisdiction. This is a landmark step for Dubai, reaffirming its status as one of the world's leading business hubs and creating an efficient working environment for local and international companies to prosper."

Being one of the fastest growing centres, it offers a valuable option for parties to conduct arbitration and enhances the economic development of the region. In October 2011, with the introduction of Law No. 16, the DIFC Courts' jurisdiction has been expanded. The Law enables parties with no connection to the DIFC to elect, by consent, to use the DIFC Courts as a dispute resolution forum.

Recent developments show that the DIFC Courts have taken a number of proactive steps to increase the enforceability of DIFC Court judgments in jurisdictions within the Middle East. In particular, new laws enable the seamless enforcement of DIFC Court judgments in "onshore" Dubai and in the other Emirates within the UAE.¹⁰² Further, the court started to link with other international courts via a Memoranda of Understanding and Guidance to foster judicial cooperation regarding the mutual recognition and enforcement of judgments. In particular, in May 2010, it has entered into a Memorandum of Understanding with Jordan.

Further, the Riyadh Arab Agreement for Judicial Cooperation, the Convention of the Arab League on the Enforcement of Judgments and Arbitration Awards, the Gulf Cooperation Council Protocol, and bilateral treaties with other jurisdictions have greatly enhanced the mutual recognition and enforcement of DIFC Court judgments.

The significance of the DIFC Court is that it is trying to implement a system whereby court judgments are to be changed into arbitral awards by the DIFC-LCIA, which would render them enforceable under the New York Convention. On 30 July 2014, the Dubai International Financial Centre Courts opened a one-month consultation period when the local law fraternity provided feedback on the *Draft Practice Direction on Referral of DIFC Court judgments to DIFC-LCIA Arbitration Centre*.¹⁰³

After lengthy public consultation, parties which are subject to the DIFC Court's jurisdiction can also choose to refer their final judgments for enforcement through the DIFC-LCIA Arbitration Centre.¹⁰⁴ This development is the first in the world to convert a judgment into an arbitral award and offers parties the chance to pursue the advantages of litigation as well as arbitration. The winning party can enjoy the local court's enforceability in other jurisdictions utilising the New York Convention. With over 150 signatory nations around the world, a valid arbitral award will be easier to enforce in most jurisdictions.

Conversion Proceedings would be available in respect of any judgment of the DIFC Courts regarding payment of money as long as they meet the Referral Criteria. The Referral Criteria are:

1. The judgment has taken effect in accordance with [DIFC] Rule 36.30;
2. The judgment is not in respect of an employment contract or consumer contract which is subject to Article 12(2) of the Arbitration Law 2008 precluding arbitration in respect of such contracts;
3. The judgment is not subject to any appeal, and the time permitted for a party to the judgment to apply for permission to appeal has expired;
4. There is a Judgment Payment Dispute; and
5. The judgment creditor and judgment debtor have agreed in writing that any Judgment Payment Dispute between them may be referred to arbitration pursuant to this Practice Direction.

It is important to note that the Conversion Proceedings are an opt-in mechanism. As such, the parties must either agree in their underlying contract or by way of a submission agreement after the disputed event. Within the contract or submission agreement, they agree to the mechanism of the Conversion Proceedings.

With the above development, creditors utilising the DIFC Court have a further avenue for enforcement, both locally within the UAE and internationally. It will certainly enhance the UAE's development as one of the world's leading dispute resolution venues. Such an innovative idea is another example of the growing list of efforts made by Dubai to create a business friendly environment. However, the opt-in nature of the new rule will limit the utilisation of the conversion as the defending party may not want the court's ruling to be internationally enforceable. Further, drafting appropriate dispute resolution frameworks into underlying contracts may also prove to be challenging.

If the parties to the dispute utilised an arbitral tribunal for their dispute, the DIFC Arbitration Law does not impose a six-month requirement for the arbitrator to issue its award. DIFC-LCIA Rules do not outline guidance as to how the arbitration is conducted under those Rules but under UAE law, if the arbitration must render an award within six months from the date of the first hearing.

To accommodate recent developments concerning an interim remedy, DIFC Arbitration Law and the DIFC-LCIA Rules provide orders for security for costs.¹⁰⁵ With the increased popularity of emergency arbitration, the DIFC-LCIA Arbitration Rules provide for expedited proceedings to the exclusion of the emergency arbitrator.¹⁰⁶ Article 9 of the Rules outlines that the following:

"Article 9 Expedited Formation

9.1 *In exceptional urgency, on or after the commencement of the arbitration, any party may apply to the LCIA Court for the expedited formation of the Arbitral Tribunal, including the appointment of any replacement arbitrator under Articles 10 and 11 of these Rules.*

9.2 *Such an application shall be made in writing to the LCIA Court, copied to all other parties to the arbitration; and it shall set out the specific grounds for exceptional urgency in the formation of the Arbitral Tribunal.*

9.3 *The LCIA Court may, in its complete discretion, abridge or curtail any time-limit under these Rules for the formation of the Arbitral Tribunal, including service of the Response and of any matters or documents adjudged to be missing from the Request. The LCIA Court shall not be entitled to abridge or curtail any other time-limit."*

Applying the above Article, parties to a DIFC-LCIA dispute may be able to utilise the LCIA form of emergency arbitration procedure under the new LCIA Arbitration Rules that came into force in October 2014.¹⁰⁷ Under the LCIA Arbitration Rules, Article 9B paragraph 9.4, any party can apply to the LCIA Court for an appointment of a temporary sole arbitrator to be an emergency arbitrator before the formation or expedited formation of the tribunal.

It is interesting to outline that the LCIA Emergency Arbitrator Provision is an additional right for the parties alongside the parties' right to apply to court for interim measures.¹⁰⁸ Further, LCIA retained the option of applying for the expedited formation of the arbitral tribunal by the parties involved if the case is of "exceptional urgency".¹⁰⁹ The tribunal formed on an expedited basis will have the same powers and obligations as the arbitral tribunal issuing orders or awards. The expedited tribunal may have additional powers as the urgency may provide the tribunal with the power to modify time limits outlined in the Rules.¹¹⁰

With the development of DIFC-LCIA, Dubai is increasingly becoming an important arbitration centre. It is further aided by Dubai International Arbitration Centre (DIAC) developments.

DIAC

DIAC was first launched as the Centre for Commercial Conciliation and Arbitration in 1994. DIAC is an autonomous, permanent, non-profit institution that is located at the Dubai Chamber of Commerce and Industry (DCCI). Similar to DIFC-LCIA, DIAC provides a valuable option for parties to conduct arbitration in the region.

The majority of arbitrations in the UAE are conducted under the DIAC Rules where the 2007 DIAC Arbitration Rules apply. The new DIAC Rules replace the 1994 rules, which were originally designed for domestic arbitration. Thus, the updated rules allow parties to choose any seat they require and do not limit parties to Dubai. This facilitates the Centre's growth in the region as a centre for arbitration.

The DIAC Rules outline that the parties may agree how many arbitrators there should be.¹¹¹ Interestingly, it states that the number of arbitrators can be more than one as long as it is an uneven number. When the parties fail to agree on the number of arbitrators, the arbitral tribunal will consist of one member unless the centre determines that, in view of all the circumstances of the dispute, a tribunal composed of three members is appropriate.

Similar to other arbitral rules, Article 9 of the Rules outlines that an arbitrator must be impartial and independent. Article 10 requires the sole arbitrator or chairman of the tribunal to be of different nationality from one of the parties unless the other party agrees.

The DIAC Rules are similar to other arbitration proceedings where the parties exchange their respective pleadings with respective arguments, relevant documentary evidence and a statement of the relief sought.¹¹² All materials relating to the proceedings, such as documents produced for the dispute, are confidential.

Article 31 of the DIAC Rules allows the tribunal to order interim measures, including injunctions and measures for the conservation of goods involved in the disputes.

The time limit for the arbitration tribunal to provide its award is six months from the date the tribunal receives the file from the DIAC. However, the tribunal can extend the period by six months on its own motion and the Executive Committee of the DIAC may extend it further.¹¹³ Thus, there is no strict time limit for the tribunal to provide the award.

Conclusion

There are indeed 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
September 2017

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77. Clause 7, Termination.
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79. Annex, Procedural Rule 1.
80. Annex, Procedural Rule 2.
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82. Annex, Procedural Rule 8.
83. Annex, Procedural Rule 9(a).
84. Clause 9(c).
85. Robert Fenwick Elliott.
86. The ICC Court's function is to follow the progress of each case and review the awards in order to facilitate their enforcement in national courts.
87. See <http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/cost-and-payment/cost-calculator/>
88. International Chamber of Commerce (ICC), Rules for a Pre-arbitral Referee Procedure, <http://www.iccwbo.org/products-and-services/arbitration-and-adr/pre-arbitral-referee/rules-for-a-pre-arbitral-referee-procedure/>
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107. The LCIA Arbitration Rules, in particular Article 9B, are available at www.lcia.org
108. See LCIA Arbitration Rules (2014), Article 25 – Interim and Conservatory Measures.
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