A Critical Analysis of the Means Commonly Adopted to Avoid Disputes in the Construction Industry*

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Unfortunately proliferation of construction contract forms continues. In fairness, the universal consensus by all sectors of the construction community is impractical — and indeed probably impossible.

Nonetheless, it is both instructive and constructive to try to draw together the contracts' various approaches to dispute avoidance. In the following learned and comprehensive article, Douglas Jones, does exactly that.

Introduction

Purpose

This article is intended to provide a critical analysis of the means commonly adopted to avoid disputes in the construction industry. A simple formula appears obvious: adequate pricing and good management. It is proposed to limit the discussion in this article to less commercially relevant means than the obvious. In doing so it is assumed that issues pregnant with contention are on foot which are to be dealt with so as to avoid their giving birth to fully fledged disputation.

It is of course artificial to attempt to draw a clear distinction between dispute *avoidance* and dispute *resolution*; many of the techniques involved are the same. The focus of this article, however, is on those techniques available to avoid the progression of a construction dispute to binding resolution by arbitration or litigation. Both administrative procedures and non-binding alternative dispute resolution (ADR) techniques are therefore relevant.

Context

At the present time, the construction industry is experiencing a reaction against the traditional, formal, binding methods of dispute resolution. Wherever one turns, one hears those chant-like words, "litigation is costly and inefficient" and "arbitration has become too much like litigation". It is therefore not surprising that the ADR bandwagon has become crowded. As John Tyrril has written, "the advantages of mediation and its positive results have been well explained and promoted with zeal approaching the religious."[1]

Nor is this reaction limited to the construction industry, or even the commercial community generally. Professor Tay has discerned a widespread "romantic yearning for fireside equity". This, she says, is the "desire for informal 'human' resolution of conflict ... by ad hoc, flexible justice ... enabling the parties to live together, rather than sharpening the point at issue and then deciding it without fear or favour."[2] Consequently, as well as seeing ADR vigorously promoted to commercial parties, we

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[1] J Tyrril, "Practical Commercial Mediation Issues", paper presented to IIR Conference, *Making Construction Projects Work*, 12-13 March 1996, p 1.

[2] A E-S Tay, "Law, the Citizen and the State", in Brown et al, *Law and Society*, p 9.

have also seen its introduction into the resolution of family law and other disputes.

We must be careful that this reaction against traditional dispute resolution does not become an overreaction. It is easy to forget while buried beneath a thousand boxes of documents that the judicial process is the product of centuries of development based on experience as to how justice might best be done between disputing parties. Each aspect of the judicial process developed for a reason. There is no doubt that many judicial procedures, despite existing for good reasons, invite abuse by litigants bent on exacting tactical advantages. It is, however, suggested that any approach to reform of the deficiencies of construction litigation and arbitration in the 1990s be undertaken with cool heads, with the lessons of history firmly implanted in them.

Issues

Broadly speaking, there are four groups who influence the ways in which construction disputes are avoided and resolved. These are, first those who negotiate and draft the contracts, secondly, the parties to contracts and those who advise them, thirdly, the dispute resolution practitioners (that is, arbitrators, mediators etc) who often have considerable discretion to determine the procedures they will follow, and finally, the courts, in which is reposed the final authority to interpret contractual provisions for dispute resolution. Accordingly, the aim of this article is to provide some suggestions in answer to the following questions:

- What *provisions* should construction contracts contain to assist in the efficient resolution of contentious issues?
- What approaches should *the parties* to construction contracts take to dispute avoidance and resolution?
- What considerations should *dispute resolution practitioners* take into account in deciding between alternative ways of resolving disputes?
- What approaches should the *courts* take to dispute resolution in construction contracts — how should they ascertain the parties' intentions and to what extent should public policy and/or paternalism override these intentions?

The article discusses three broad topics in the area of dispute avoidance:

- early warning provisions;
- administrative dispute resolution; and
- non-binding dispute techniques.

For each of these, a set of criteria with which to analyse the various options is presented first, followed by a discussion of each of the options.

The principles discussed are illustrated by reference to provisions contained in some modern standard form construction contracts.

Finally some thoughts are offered regarding the courts' approach to the interpretation of dispute provisions in construction contracts.

Early warning

It is in the interests of both parties to a contract quickly to identify events or claims which have the potential to cause disputation. In the context of an owner/contractor relationship, the sooner the owner is made aware of the possibility of a claim for additional payment or the need to resolve an issue of quality or performance, the greater its ability to adjust finance, budgets or designs to address the particular issue. It is also in the contractor's interest to recognise the need to make claims early, have them quantified and paid, and get on with its performance of the contract. Despite this, contractors often delay making claims until late in a project and, as a consequence, these claims may take the owner and its advisers by surprise, producing a reaction of resentment and hostility. Although it must be recognised that the generation of some initial resentment upon the making of a claim is difficult to avoid, such sentiments are far better dealt with if raised at a time when both parties have a range of commercial options available to them (as they often will during the currency of a project), and when the facts are not forgotten or confused.

For this reason it is suggested that early warning provisions, which require a party asserting a claim to do so within a set time-frame after the occurrence of the events giving rise to the claim, are a positive step towards minimising the costs of disputation and enhancing the effectiveness of any dispute resolution mechanisms subsequently undertaken. It is true that such provisions increase the resources required for administration of the contract from the point of view of both parties. However, the cost of

these resources pales into significance against the costs involved in the resolution of an intractable dispute.

To attain the dual objectives of minimising the costs of disputation and effective resolution of disputes, it is suggested that the early warning provision should possess the following characteristics:

- The provision should work both ways. Claims by owners in respect of delays, quality of workmanship and the like should be required to be made within a time-frame similar to that within which contractors are required to make claims for extensions of time, variations or costs arising from directions.[3]
- They should carry a sanction for non-compliance. The most usual sanction is the loss of the right to pursue the claim.
- It is also important that the quantification of the claim as well as its existence is notified at the earliest opportunity.

Such provisions require that a balance be struck with the commercial requirements of the party in the dominant bargaining position (usually the owner). Owners should resist the temptation to impose too draconian a time limit, or a completely one-sided provision. In this respect, the mature judgment of experienced lawyers and consultants needs to be available to owners in order to make an informed judgment.

Properly enforced and administered, contractual provisions requiring early warning of the existence and quantification of claims facilitate their dentification and resolution much earlier than would otherwise be the case.

Administrative Dispute Resolution

Administrative dispute resolution is that which takes place during the course of the construction process, and which is accomplished by the people responsible for project delivery rather than outsiders to the process. Ideally, methods of administrative dispute resolution should be fast and cheap so as not to disturb the ongoing progress of construction. Administrative dispute resolution is variously known as "on the run" dispute resolution, "real time" dispute resolution, and "issue resolution". The last of these terms deliberately avoids use of the word "dispute" for psychological reasons. It has entered our language on the coat-tails of partnering, and has been used by the New South Wales Department of Public Works and Services in its new C21 Contract.[4]

It is proposed to commence with an analysis of developments in the area of administrative dispute resolution.

The available methods of administrative dispute resolution vary in a number of respects:

- **Binding/non-binding**: Probably the most obvious advantage of having a binding outcome is that responsibility is shifted from the parties themselves. They do not have to admit that they were wrong. As a result there may well be less emotional energy wasted by party personnel during the construction process if a binding administrative dispute measure is used. The advantage of a non-binding mechanism is that the parties themselves retain control of the process, albeit with the preservation of whatever power imbalances may already exist within the relationship.

  It is suggested that a binding determination in respect of a disputed issue is desirable as soon as possible after it arises during the construction process. All parties need to be certain about where they stand in relation to each other in order to proceed with the construction process. Contractors in particular need cashflow. An early binding result to a dispute can promote all of these.
- **Final/subject to appeal**: This issue is separate from whether or not the procedure is binding, although it only arises in the case of binding dispute mechanisms. The prospect of a final determination will provide a strong imperative for the parties to make early attempts to resolve their differences voluntarily. On the other hand the provision for appeal to more formal dispute processes engenders a more relaxed attitude to

[3] In this context it should be noted that the operation of set-off provisions will reduce the need for owners to notify and pursue a claim as such; if the set-off provisions are generous then the owner will normally be able to withhold money and let the contractor pursue the claim. For early warning provisions to operate equitably they must be coupled with reasonable set-off provisions.

[4] See cll 82-84.

the introduction of such provisions as at the time of contract neither party can predict the importance of issues likely to be subject to such determination or the likelihood of the perversity of any decision. In order to encourage certainty, it is necessary for any appeal process to be initiated within a short time after the decision, and/or for the decision to be binding in the absence of such an appeal, and until overturned on appeal.

- **Thoroughness**: A dispute mechanism, whether binding or not, should ideally "get it right the first time". To do so, of course, requires delving into the disputed issues to a depth which is not always desirable during the construction process because it diverts resources away from the project. Such processes must necessarily be less rigorous than those adopted in fully-fledged disputation. An important touchstone is the level of comfort of those in the administration process, rather than that of their lawyers or claims consultants, with their capacity to present their points of view and to answer the opposing contentions.
- **Technical/legal**: Unless one has the luxury of a legally qualified engineer or a lawyer closely familiar with the construction process, the choice has to be made as to whether the dispute resolver should be technically or legally trained. As the process is intended to be administrative, technical knowledge is obviously more desirable than legal expertise.
- **Adversarial/inquisitorial**: In serious disputes, most parties prefer to be given the opportunity to present their points of view. An inquisitorial approach may save time in the short run, but if it increases the likelihood of dissatisfaction with the result then it may actually prolong the process. A useful compromise is for each party to be given the opportunity to present its point of view, and to answer that of the other party, but to empower the dispute resolver to adopt an inquisitorial approach thereafter.
- **Who represents the disputing parties?** The parties involved in construction disputes are often sizeable corporations. As a result there arises the question who should represent each party in dispute resolution proceedings (the issue here is not whether the parties should be legally represented). If the procedure is of a binding adjudicative nature, it is helpful for the parties to be represented by on-site personnel who are familiar with the issues. If, on the other hand, the procedure is non-binding, it is better for the parties to be represented by senior personnel with the authority (both actual and as perceived by other personnel) to make concessions on behalf of the corporation. If the parties do not have the resources to be able to devote senior personnel to the dispute resolution process, then serious thought should be given to making it a binding one.
- **Should lawyers be involved?** Of all the questions which must be answered by parties setting up an administrative dispute resolution regime, this is one of the most at risk of receiving an answer coloured by the current reaction against the traditional legal approach to things. The knee-jerk reaction to this question may well be a "no", due to the perception that lawyers add to the adversarial nature and to the complexity of the proceedings. In fact, quite the opposite is (or at least ought to be) true. Lawyers can identify relevant issues and separate them from irrelevant ones. They can also remain aloof from the emotions generated by disputes and thus diffuse conflicts. In any event the parties will make their own arrangements regarding advice and the risk of lawyers infecting the process can be minimised by reducing the amount of time devoted to hearings and encouraging an inquisitorial approach by the dispute resolver.
- **Who employs the dispute resolver?** Most dispute resolvers are employed by either the project owner, or the owner and contractor jointly. A joint appointment is of course crucial. Joint payment is also desirable as it is likely to reduce suspicion of any lack of independence, and to engender joint ownership in the process. The issue of the independence of the dispute resolver has generated a lot of thought and innovation in recent years, as a result of which it occupies a considerable proportion of the discussion below.

Clearly there is no one optimal mechanism; the appropriate one for each project depends on the individual circumstances. However, normally a

combination of the above varieties is required: some disputes will be technical; others will be legal. Some disputes will be capable of disposal by final and binding means at the administrative level; others are too complex for that.

One of the challenges in designing a disputes procedure is to provide for the different types of disputes generated by the project to be directed into the appropriate resolution channels. It is currently fashionable to provide both for an expedited form of dispute resolution and a more thorough form in the same contract. When this model is adopted careful thought needs to be given to the means by which the alternative mechanisms are activated. It is not often appropriate for the simple, but crude, criterion of the face value of the issue to be used for this purpose.

It is now proposed to discuss a number of mechanisms which can form part of an administrative dispute resolution regime.

Traditional determination of claims by superintendent

Under traditional construction contracts, the contractually appointed contract administrator, variously called Architect, Engineer and Superintendent ("superintendent"), is the first port of call for the determination of claims.

The superintendent is required to fulfil dual roles under the contract:

- an agency function, whereby the superintendent acts as agent of the owner, for example, when approving a construction program submitted by the contractor; and
- the role of an independent certifier, whereby the superintendent is required to act fairly and in the interests of both parties to the contract, and is not entitled to act in accordance with the directions of the owner;[5] for example, when valuing a variation or granting an extension of time.

Separation of these dual functions is usually a matter of construction of the contract, although the JCC standard form contracts specifically set out which functions are which.[6] Other standard forms which provide for a traditional superintendent include the FIDIC Orange Book (discussed below), FIDIC 4, AS 4000 (discussed below) and its predecessor AS 2124, as well as NPWC 3.

The first line resolution of claims notified by contractors will normally be the responsibility of the superintendent, as part of his or her (independent) certifying function. The superintendent's decision is typically binding but subject to appeal. The process is not thorough enough to warrant that it be final. The superintendent is invariably technically trained (normally as an architect or engineer), and can inform itself as it thinks fit. Lawyers are not involved at this level.

Superintendents are usually either employees of the owner or of a consultant engaged and paid for by the owner. Whatever may be the integrity of the particular person fulfilling that role, it is inevitable that the contractor will perceive that the superintendent is not truly independent. The traditional regime, whereby the superintendent is vested with dual roles, has worked for many years because of the integrity and professionalism of individuals who, despite having commercial interests to the contrary, have maintained a sufficient degree of independence to preserve the system. Nevertheless, the commercial necessity that "justice must not only be done but must be seen to be done" remains in many cases unsatisfied in relation to the independent certification role of the superintendent in conventional construction contracts.

It is for this reason that, in many instances, the first-level dispute resolution mechanisms commonly provided for in construction contracts are not working. Contractors labour under the (mis)apprehension that a determination by the superintendent is made in the interests of the owner rather than as an exercise in balancing the respective rights of the parties.

There are two things which can be done at the contract formation stage to facilitate the effective disposal of such issues. They are:

- Provision for the appointment of a truly independent superintendent sometimes known as an "independent certifier"; or
- The provision of a first level of appeal from a determination of the superintendent to an independent adjudicator or disputes review board

[5] *Perini Corporation v Commonwealth* [1969] 2 NSWR 530.

[6] JCC subcll 5.01 and 5.02.

before the activation of more formal dispute resolution mechanisms under the contract.

Truly independent certifier

As with the traditional superintendent, decisions of a truly independent certifier are binding, but not final. The thoroughness of the procedure is largely up to the parties but would typically be comparable to that of a traditional superintendent. The certifier is technically trained and can usually inform itself as it thinks fit. The fundamental difference from the traditional superintendent is in who employs the dispute resolver.

This option involves the "splitting" of the dual functions of the conventional superintendent, and giving them to different people. At the time of entering into the contract a person acceptable to both the owner and the contractor is appointed and is vested with responsibility for the independent certification functions under the contract. The independent certifier must be, and must be seen to be, answerable to both parties, and would ideally be remunerated by both parties. The agency functions of the conventional superintendent should be performed by or on behalf of the owner by the owner's own consultant or representative. Such a scheme requires a substantial redrafting of the traditional contractual arrangements insofar as it involves, at least, a division of the superintendent's agency and certifying roles and the allocation of these roles to different individuals.

Such a scheme may not immediately commend itself to owners who traditionally have had "their" person performing both agency and certifying roles under the contract. The traditional situation gives the owner a real commercial edge and is less costly. Whether owners will regard the minimisation of disputes following the appointment of an independent certifier as cost effective is an open question. However, when making such an assessment, owners should consider not just the immediate advantages which they might be forgoing, but the possibility that a contract structured in this way might attract lower tender prices.

An example of an attempted use of the truly independent certifier concept is to be found in the NSW Department of Public Works and Services' new C21 Contract, discussed below.[7]

Appeal from decisions of superintendent to independent adjudicator

If the independent expert adjudication mechanism is adopted, responsibility for both agency and certification functions is left with the superintendent, but there is an intermediate level of appeal from decisions of the superintendent to an independent expert agreed between both parties at the time of entering into the contract.

In this model, *all* the functions of the superintendent (including traditional certification matters such as valuation of progress claims and variations) are often characterised as agency functions. This is a recognition of the commercial reality of the nature, role and terms of appointment of employees and consultants who carry out superintendence roles.

It is suggested that, ideally, the expert adjudicator's decision should be binding but subject to appeal, except that if a notice of appeal is not issued within a time limit the decision becomes final as well as binding. Since the decision might end up binding the parties permanently, it may be appropriate to provide for a slightly more thorough procedure than would be adopted by a traditional superintendent, although it would normally still be an inquisitorial one. It is suggested that the adjudicator should act as an expert, not as an arbitrator, and have the power to:

- open up and review or revise any direction of the superintendent;
- proceed to resolution of the dispute in a manner to be agreed, without being bound by the rules of evidence and without legal representation; and
- engage and consult the persons that the adjudicator thinks necessary.

Independent expert adjudication is of course available not only as a means of resolving disputes about decisions of the superintendent but also as a step in the resolution of other general contractual disputes. However, it is possible to limit the nature of the disputes to be referred to the independent adjudicator to those which are traditional certifying matters, such as extensions of time and valuations

[7] See s 5.1, infra.

of variations, and to exclude more complex matters such as claims in breach of contract. The essential role of the independent adjudicator would in such circumstances be to review and decide upon all matters which the superintendent is given a discretion to review and decide upon under the contract.

In this way, the independent expert adjudication mechanism acts as a means of overcoming the perceived lack of independence of the traditional superintendent.

Both the PC1 Contract (discussed below), and the Department of Defence standard forms of contract for the construction of Defence facilities, provide for use of the independent expert adjudication mechanism. The PC1 Administrative Dispute Procedure diagram, appended to this article, illustrates the mechanism.

Disputes review boards

The concept of the dispute review board (or DRB) has recently generated a considerable amount of literature; however, this has not yet translated into widespread implementation of the concept. Notwithstanding the hype, the absolute numbers of projects involving DRB's is still quite small. For example, it has been estimated that, worldwide, by 1994, "67 DRB projects had been completed, 93 DRB projects were in process and 193 DRB projects were in the planning stages".[8]

Having said that, there is no doubt that the concept is growing rapidly off this low base. Two particularly high profile projects, namely the Eurotunnel and the Hong Kong Airport, have employed DRB's, and furthermore the new FIDIC Orange Book involves a "Dispute Adjudication Board", which is substantially the same as that which is normally referred to as a DRB. The World Bank has also thrown its weight behind the concept.

The use of DRB's in Australia to date has not been significant.

A DRB is a panel of experts, existing from the outset of a construction project, which meets together at regular intervals throughout the course of the project so as to develop a familiarity with it, and which hears and resolves disputes as they arise on site. The defining characteristics of a DRB are:

- that it meets and remains up-to-date with project progress regardless of the existence of any actual disputes; and
- that it employs a quick and cheap procedure designed to facilitate the early disposal of disputes with minimum diversion of resources away from the ongoing construction process.

Apart from these essential common elements, it is suggested, the mechanics of individual DRB's can vary almost endlessly.

A key consideration is whether or not the DRB's decisions should be binding. Broadly speaking there are three options here:

- The DRB's decisions are entirely non-binding, and merely advisory. In this event they are usually "with prejudice", in the sense that the decision is admissible in formal dispute processes.
- The DRB's decisions can be binding on an interim basis, subject to being reviewed or even replaced by an arbitral tribunal or court. Often such review would only be available where the party wishing to pursue the dispute complies with some requirement to notify the other party of this intention within a certain time limit.
- The DRB's decisions are final and binding and not subject to review.

It is suggested that the second of these approaches is the most desirable. It provides certainty, enabling the parties to order their affairs in a predictable framework. It ends (or at least postpones) wrangling over the financial relations of the parties, enabling them to direct their energies to the construction process itself. It is also likely to produce a more equitable result in that the owner is not able simply to withhold all disputed amounts thus holding the contractor to ransom. Even the proponents of the first approach may be found, on a closer reading, to be advocating the second.[9]

On the other hand, persuasive arguments can be made in favour of the first approach. It has been suggested that "not placing the burden of a binding

[8] N Kaplan and P H J Chapman, "Dispute Review Boards", paper presented at the Chartered Institute of Arbitrators Conference, *The Commercial Way to Justice*, Boston, 26-28 September 1996, p 3.

[9] See eg T P Devitt and P W Berning, "Disputes Review Boards", paper presented at the *World Conference on Construction Risk*, p 10.

decision may encourage it to render bolder, more incisive decisions".[10] Furthermore, making the DRB's decision non-binding avoids the resentment that may be generated by a win-lose situation. In any event, experience has shown that such decisions tend to be observed by the parties, due to the respect they have for the DRB process, and the strong risk of an adverse costs order where arbitration or litigation is unsuccessfully pursued in the face of three respectable expert opinions.[11]

Agreements to the effect that the DRB's decision is final and binding are very rare.

Because a DRB is a tribunal of three, and because it often hears submissions, it is reasonable to suppose that it is more thorough than most other administrative dispute mechanisms. This is helpful because it increases the likelihood that that DRB will get it right the first time, thus avoiding an expensive post-completion arbitration. On the other hand the cost of retaining a DRB is more significant than that of most other dispute mechanisms, especially where the project is not a large one. According to one US source, DRB costs have ranged from 0.04% to 0.51% of total contract costs.[12] One approach for a small project is to have a DRB of one person, who would then act similarly to the independent expert adjudicator.

Another important issue to consider is whether it should be staffed by technical or legal personnel. Setting up a tribunal of three permits the luxury of having at least on of each. Although most of the issues dealt with by the DRB will be technical, the presence of a lawyer on the board adds to the credibility of its decisions when they come to be considered in court, either as admissible evidence (in the event that the DRB's decision was not binding), or in a challenge to the decision (in the event that the contract purported to make it final and binding).

The parties also must consider the extent to which the DRB process should be judicial in nature. Decisions have to be made as to:

- Discovery rights — although extensive discovery has the potential to generate delays, it must be realised that "without discovery, the contractor enjoys a considerable informational advantage over the owner".[13]
- Cross-examination — like discovery, this is an expensive and time-consuming process, but without it, there is a risk that unreliable evidence will be relied on by the DRB.
- Role of lawyers — commonly, lawyers are excluded from the task of making presentations to the DRB due to a perception that they may hinder the process.[14] However, lawyers are trained to identify relevant issues and to organise them into cogent arguments. They are also more likely to remain dispassionate about matters which may generate a lot of emotion on the part of those directly involved in the dispute.

Examples of other issues which arise in setting up a DRB process could be multiplied. All judicial procedures are open to the criticism that they provide scope for a reluctant party to hinder the process; prescriptive procedural rules may be difficult to give effect to if short time limits are placed on the steps to be taken in the DRB process.[15] The point is, however, that all judicial procedures exist for a reason, and disadvantages result from excluding them. In the end the parties need to weigh up the costs and benefits of each procedure and decide whether they want it. Another approach is for the parties to bestow on the DRB a wide discretion as to the procedure to be used, and for the DRB to decide during the dispute resolution process what is needed to generate a fair result. But this may render the cost of the DRB unpredictable. It must be borne in mind that the DRB is designed to operate during the course of the construction process.

Experience has shown that if reasonable decisions are made as to how to structure the process, capricious results are rare.

Like the independent certifier and the expert adjudicator, the DRB mechanism overcomes the

[10] Ibid, p 12.

[11] Kaplan and Chapman, op cit n 8, p 4.

[12] American Society of Civil Engineers, *Avoiding and Resolving Disputes During Construction*, Technical Committee on Contracting Practices of the Underground Technology Research Council (1991), p 10.

[13] Devitt and Berning, op cit n 9, p17.

[14] Devitt and Berning, op cit n 9, p15.

[15] P Capper, "Making Arbitration and Dispute Review Boards Work Together Effectively", paper presented to the International Dispute Resolution Conference, Hong Kong, 20 November 1996.

problem of the independence of the dispute resolver. The DRB must be jointly appointed.

Partnering

Project partnering incorporates commonsense project management techniques, including the early identification and resolution of differences of opinion. Although a full discussion of the partnering process is beyond the scope of this article, the mechanisms adopted by the parties to the process for the resolution of "issues" (as they are typically referred to), provides a sound framework for the development of effective administrative dispute provisions for incorporation into conventional works contracts.

The partnering process is usually not enshrined in contractual documents, but instead arises from a commitment by the parties to co-operate, in a spirit of goodwill and fair dealing, in the successful completion of the project. The parties enshrine their mutually agreed objectives in a partnering charter which, although not a legally binding instrument, signifies their commitment to the success of the project. Free and open communication between the parties is facilitated by regular face to face meetings and the establishment of mechanisms designed for the timely resolution of issues as they arise.

The partnering "issue resolution" framework is designed to determine claims and resolve other problems at the lowest possible level of management and at the earliest possible opportunity. If an issue arises at site level, on-site team members are empowered to endeavour to resolve it.

If resolution is not achieved within a set time-frame (usually a stipulated number of days), it is automatically elevated to the next level of management. Automatic elevation of issues precludes a party from refusing to determine a claim or address a problem, and provides an effective and timely notification mechanism for successive levels of management. Stand-offs are thus prevented, and the parties are provided with the best opportunity for the adoption of a commercially viable solution before a problem has the chance to impact on the project.

Contractual provision can be made for issue elevation as a dispute avoidance technique whether or not the project is to be partnered. But if a project is to be partnered, and the issue elevation concept is to be employed, it is essential that the contractual provisions for dispute resolution are harmonised with this. It is not good enough for the partnering charter to envisage issue resolution within a partnering framework while the contract says something completely different. This is because, in a partnering situation, claims or other issues, dealt with informally without regard to the contract until things go wrong, can lead to assertions of waiver, estoppel and misleading or deceptive conduct. For instance, when issues are addressed in face to face discussion at site-level, representations may be made, or a party may conduct itself in a manner inconsistent with the terms of the contract (for example, not giving notices when the contract requires them). This may lead to assertions that a party, by its conduct, has waived contractual rights, or created an estoppel, preventing them being relied upon.

Careful thought must therefore be given to the contractual provisions for administrative dispute resolution to be used in conjunction with partnering. It is better for the commitment to quick and efficient notification and resolution of disputes to be a legal one rather than a mere "moral" one.

Dispute resolution adviser[16]

The dispute resolution adviser (or DRA) concept had its genesis in the contract for the refurbishment of the Queen Mary Hospital in Hong Kong. Although to date it has apparently not been utilised outside Hong Kong, it is worthy of consideration by construction industry participants and dispute resolution practitioners alike. It is a hybrid technique, drawing from DRB's and project arbitration as practised in the USA, as well as a number of models which have been suggested in UK writings.

> "The DRA system design starts with maximum party control of the dispute resolution process and then introduces a series of dispute resolution

[16] This discussion draws heavily from C J Wall, "The Dispute Resolution Adviser System" (unpublished paper, 1995), which in turn is based on C J Wall, "The Dispute Resolution Adviser in Construction Industry", in P Fenn and R Gameson (eds), *Construction Conflict: Management and Resolution* (1992), pp 328-339.

steps, each step becoming more interventionist with final resolution by short-form arbitration."[17]

A DRA, like a DRB is appointed at the outset of a construction project and visits the site regularly in order to remain up-to-date with developments on site. Upon appointment, the DRA holds a series of familiarisation meetings, with the aim of developing the relationships between the personnel on site as well as building their support for the DRA system. "These meetings are akin to informal partnering sessions."[18] The regular site visits are used as an opportunity for the DRA to facilitate the settlement of any disagreements that have arisen.

Any disputes unable to be settled by informal means become the subject of a formal notice of dispute. If the party wishing to raise the dispute does not issue such a notice within 28 days of the decision, certificate etc which precipitated the dispute, then that decision, certificate etc becomes binding. The process then follows a number of steps:

- direct negotiations between site level personnel;
- facilitated negotiations between site level personnel, in which the particular technique used (for example, mediation, expert appraisal, mini-trial etc) is at the discretion of the DRA;
- referral of the dispute to senior personnel, along with a report of the dispute produced by the DRA; and
- short form arbitration.

The DRA system is calculated to bring about the resolution of disputes as early as possible in the dispute process, and with minimum third party involvement. The DRA's role becomes more interventionist throughout the course of the process. Even if the dispute does become the subject of a formal binding decision, the DRA system should have mobilised a lot of contemporaneous information about the dispute, thus making final resolution less expensive.

The DRA was originally conceived in a highly consultative process in which owner and prequalified tenderer personnel, along with project consultants, were heavily involved. As a result, the personnel involved in the seminal DRA project felt as though they owned the process, which of course contributed to its success. Proponents of the DRA concept therefore emphasise that it is essential for the dispute resolution model to be tailored to the individual project. Without the pre-contract consultative process, it might not work nearly so well.

Non-binding dispute resolution techniques

Naturally it is the principal aim of non-binding dispute resolution to bring the disputants to a settlement. There may be any number of barriers to the successful negotiation of a construction dispute. Examples include:

- Feelings of hostility between the parties resulting in an inability to communicate.
- A failure by one or both parties to appreciate the strengths of the other side's case, resulting in an overly sanguine perception of one's chances of success in a binding forum.[19]
- A tendency to procrastinate, due to the absence of any imperative to make tough decisions.
- A feeling that the process of preparing for litigation has gone beyond the point of no return; so much money and emotional energy has been expended preparing for the final showdown that the parties do not want to settle.
- A reluctance to make concessions given the need to justify such decisions to superiors.
- The failure of emotions generated by the dispute to be given the opportunity to be aired.

Of key importance is to realise that not all of the barriers to settlement are rational ones relating to the parties' appreciation of the merits of the dispute. The aim in selecting, structuring and conducting a non-binding process is to ascertain what these barriers are and then to employ strategies to overcome them.

[17] Ibid, p 10.
[18] Ibid, p 12.

[19] In this context, Golann and Aaron cite some interesting statistics from the USA. When the parties to mediations assess their chances of success, the forecast probabilities of both sides frequently total 150% or more. In an experiment at Harvard Law School, "students were given identical files describing an auto accident, then asked to evaluate the plaintiff's chances of winning in court. Those assigned the role of lawyer for the accident victim assessed her chances of prevailing at a mean of 65%. By contrast, students who were given the same case file but told that they represented the defendant insurance company gave the plaintiff only a 48% chance": (1997) 52 *Dispute Resolution Journal* 26 at 28.

The various non-binding methods can be analysed and compared according to their effectiveness in breaking down these barriers to settlement. Unfortunately the empirical evidence on construction ADR is scant, to say the least, which means that the analysis must occur at the theoretical and anecdotal levels.

A criticism of non-binding ADR generally is that parties may use it merely as an intelligence gathering exercise rather than as a genuine means of resolving disputes. ADR can also be a source of delay to a strong case, or the case of an owner or contractor who is facing insolvency.[20]

Discussed below are a number of the non-binding mechanisms commonly used to resolve construction disputes. They are analysed in terms of their respective abilities to break down the various barriers to settlement which may exist. This analysis is intended to elucidate the pros and cons of each of the methods, as well as indicating when one will be more appropriate than another.

Negotiation

Naturally, no third party intervention is required here. Negotiation is the original method of dispute resolution.

Direct negotiation may not be particularly useful for breaking down the barrier of outright hostility between the parties. It presupposes that the parties are on speaking terms.

It also presupposes that the negotiators have some understanding of the issues in the case. The negotiation process itself is unlikely to be of assistance if the negotiators do not have an appreciation of the strengths and weaknesses of their respective positions. On the other hand it may be highly appropriate in circumstances where the arbitration or litigation process has mobilised a lot of information about the dispute. Many aspects of the judicial and arbitral processes have the side effects of breaking down the barriers to settlement (specifically, for example, the exchange of points of claim and defence, and the discovery procedure, tend to promote an appreciation on the part of each party of the strengths of the other side's case). It is precisely for this reason that settlement frequently occurs after a great many steps have been taken along the path of a binding dispute resolution process.

Considering that in negotiation the parties have nothing but their own commercial motivations to settle, often a crucial factor in the success or otherwise of negotiation is the wider context in which it occurs. Some negotiations occur as part of a lengthy contractual dispute resolution procedure (for example, if the negotiation fails, you go to a non-binding expert appraisal and then senior executive negotiation and so on). Soft fallbacks such as these may encourage the parties to postpone hard decisions.[21] Negotiation is more likely to generate a settlement in circumstances where failure to settle has serious consequences. Thus the commercial imperative for both parties to settle in a negotiation is greater when the prospect of a costly arbitration or trial is imminent. A cash-strapped contractor of course has a motivation to settle not shared by the owner. In such circumstances negotiation might generate a result unrelated to the merits of the dispute.

If the barrier to settlement is that the parties feel the arbitration or litigation process has gone beyond the point of no return then again negotiation may not be the most appropriate non-binding method. Some type of third party neutral may be required to diffuse these emotions.

Where the personnel charged with the responsibility to resolve the dispute on behalf of their respective employers are reluctant to make concessions, the obvious solution is for negotiations to take place at a higher level of management. Some dispute resolution procedures are based on the concept of "issue elevation", in which disputed issues are elevated through the ranks of management until they are resolved.[22] Not only do senior personnel have greater authority (both in fact and as perceived by other personnel) to make concessions, but they also have a greater ability to remain aloof from the dispute. A concomitant problem is that they are likely to be less familiar with the issues and rely unquestioningly upon their subordinate's advice.

[20] J Smart, "Choosing the appropriate dispute resolution procedure" (1989) 5 BCL 169.

[21] Tyrril, op cit n 1.

[22] See eg, the procedure provided for in the C21 contract, discussed infra. See "Partnering", p 39.

So far as contract provisions are concerned, it is desirable that disputing parties be encouraged to help themselves to resolve contentious issues. A means to this end is the requirement that senior executives who have no personal involvement in the day to day project activities meet to resolve intractable issues prior to the commencement of formal dispute processes.

Mediation, conciliation, facilitation

Each of these terms refers to a negotiation process assisted by a third party neutral. The distinctions between the three are not important. What is important is to appreciate the possibility of different levels and types of involvement by the third party neutral. For convenience, the term "mediation" is used throughout the article in reference to these three methods collectively.

Where there is hostility between the parties, the involvement of a third party neutral is calculated to diffuse it. If necessary, the neutral can engage in "shuttle diplomacy" (a phrase brought into favour by the negotiation techniques of former US Secretary of State Henry Kissinger) enabling the parties to communicate indirectly. Most mediations involve the parties meeting with the mediator both individually and together.

If the personnel representing the parties in the mediation do not understand the issues in the dispute, a third party neutral can help to identify them. This is a significant advantage over direct negotiation. If requested, the neutral can also provide "reality checks", that is, indicating what principles of law might apply and what the outcome might be in the event that a particular issue were decided in a binding forum. Experienced mediators are, however, often reluctant to express strong personal opinions due to the risk of being seen as biased.

It has been argued that:

> "The great advantages of mediation and conciliation must receive immediate attention when a dispute arises. Most cases settle and the aim is to achieve this at the earliest practicable stage, to save time and money."[23]

But the mediation process itself benefits to some extent from the information generated by the preparatory work for arbitration or litigation. If it is very early in the piece and the parties do not yet appreciate each other's cases, a technique such as a mini-trial may be more appropriate than mediation to begin with.

Like direct negotiation (although to a lesser extent), mediation depends for its effectiveness on the existence of motivations to settle which are extrinsic to the process itself. If the fallback from a failed mediation is a soft one, then the mediation is more likely to fail than if the consequences of failing to settle were dire.

As with any non-binding technique, the consequences of failing to settle may be more dire for one party than for the other, and mediation does little to counteract the resultant power imbalances. For example, the party in whose favour the settlement is made is often pressured to make some concession even though its case may be superior in every way. Another example is where a party threatens arbitration or litigation of a weak claim, thus intimidating the defendant, and then offers to settle it once the defendant has faced up to the reality of the claim.[24] Depending on the respective bargaining power and positioning skills of the parties, this may generate an unfair result. But this happens all the time through the aggressive pursuit and then settlement of claims. The mediator should not be regarded as responsible for unfair results.

If the feeling is that the process has gone beyond the point of no return, a third party neutral can counteract this.

Once the mediation process is under way, what role should the mediator take? The most common approach is for the mediator to facilitate negotiation by directing the parties' attentions to the relevant issues and suggesting innovative solutions. However, sometimes the parties may request the mediator to take a more proactive approach. For example:

- inquisitorially conducted mediation — parties sometimes request that the mediator attempt to get to the bottom of the matter by asking probing questions.

[23] Smart, op cit n 20 at 174.

[24] Tyrril, op cit n 1.

- non-binding advisory opinion of the merits of the dispute (a la expert appraiser),
- even a binding award (whether it be by way of arbitration or expert determination)

The most experienced of mediators are reluctant to agree to a change in their job descriptions midway through the mediation. If the parties think that the comments they make during the course of a mediation may eventually be used against them in the rendering of an opinion (binding or not), they may be less open from the outset, thus rendering the process less effective.

Non-binding expert appraisal

Non-binding expert appraisal is where the third party neutral is commissioned to provide an appraisal of the merits of the dispute, and a suggested outcome. In terms of its final product, this procedure is similar to a binding expert determination or an arbitration, except that the expert's opinion is not binding. Instead it is merely advisory.

If the parties are unable to communicate with each other, this process may be highly appropriate for the simple reason that it requires little communication between disputants. Each party must of course be prepared to settle; it will not work if they are so hostile that they will only submit to a binding award. The process depends on the respect the parties have for the expert. Thus they may not stand to be informed by each other that they are wrong or unreasonable, but will stand to be told this by the expert.

Non-binding expert appraisal is also useful to overcome the difficulty that the parties do not appreciate the strengths and weaknesses of each other's cases. A written appraisal, with reasons, by a highly respected construction dispute resolution practitioner is one of the harshest forms of "reality checks" available. Psychologically, it is important that the expert's opinion is regarded as a *prediction* of the result that a binding procedure would generate in the circumstances, not advice as to the way in which the expert would *personally* decide the case. The expert's personal views are not necessarily what matters to the parties, and are not likely to motivate them to settle. What is, however, likely to motivate them is an answer to the question: how am I likely to fare if it really does go down to the wire?

Where settlement is being hindered due to procrastination, it is normally the wider context in which the non-binding procedure occurs that is the problem. The parties' motivations to settle are often extrinsic to the ADR procedure itself. However, if the extrinsic motivations are weak, non-binding expert appraisal is likely to be useful because it provides such a harsh reality check. It forces the parties to assess whether or not they wish to go to the expense of proceeding to a binding resolution.

The benefits of a non-binding expert appraisal should be considered as early as possible once it is realised that disputation is likely. The idea is to give the parties an appreciation of the risks involved in proceeding to a binding resolution. It is better for this to occur when they have spent a minimum of money on the court or arbitral processes. In designing the appraisal procedure itself, there is a balance to be struck between making it so thorough that its cost is comparable to a binding procedure anyway and abbreviating it so much that its outcome is likely to bear little correlation to that of a long form binding procedure.

Another advantage of this procedure comes to the fore where the individual responsible for settling the dispute on behalf of one of the parties is answerable to some superior or liable to loss of face with colleagues if concessions are made. If an expert has advised that it would be prudent to make concessions, then it is easier for such an individual to make them without loss of face.

This method is not always useful in providing for the parties' emotions surrounding the dispute to be aired, especially if an inquisitorial procedure is adopted. However, a non-binding expert appraisal must be followed up by negotiation, either direct or facilitated, and this process may provide the forum necessary for the airing of such emotions.

There is of course endless mixing and matching to be done with this and other methods of dispute resolution. One increasingly common hybrid procedure is where a mediator dons the hat of an expert appraiser, and offers an opinion as to how the case would be decided in a binding forum.[25] Obviously the extent to which the mediator does

[25] Golann and Aaron, op cit n 19.

this may vary from dropping a couple of subtle hints that certain points being raised in the mediation are weak to dropping a bombshell by offering a detailed, written appraisal of the entire dispute. Mediators must take care not to step outside the boundaries of what the disputants have requested. By providing unsolicited reality checks, a mediator may contribute to a (misconceived) perception that he or she is biased.

Mini-trial, senior executive appraisal

The object of each of these methods is to inform the senior executives, who will eventually enter into facilitated negotiations with a view to settling the dispute, of the issues in the dispute. They seek to capture the twin advantages of having negotiating personnel who are aloof from the dispute but who nevertheless understand it.

The mini-trial procedure as practised in the United States involves a "trial", in which site level personnel (and possibly lawyers) make submissions to a tribunal as to the matters they see as crucial to the dispute. The tribunal is typically composed of a senior executive from each side and a third party neutral umpire. After the submissions, the executives enter into a facilitated negotiation procedure with a view to reaching a settlement based on the issues elucidated in the trial.

If the parties are hostile to one another then the process carries with it some risk. Being in nature a "trial" it is important that it be strictly and authoritatively controlled by the umpire to prevent it from being degraded into a slanging match. The presence of lawyers, able to identify relevant issues and diffuse emotions, is helpful in this respect.

Senior executive appraisal is a method which is similar to mini-trial, but which is not adversarial, being "pervaded throughout by a consensus oriented approach".[26] Rather than being structured as a trial, this method begins with the exchange of short position papers and even shorter responses. At an "appraisal conference", a senior executive from each disputing party meets with a consultant, who chairs proceedings, and each side makes a brief oral presentation elucidating the issues raised in the position papers and especially any points raised by either of the executives or the consultant. As with mini-trial, this conference is followed by a negotiation process mediated by the consultant who chaired the conference.

As mentioned above, the object of these procedures is to provide for informed negotiation by senior executives. They are meant to provide a cheaper way of getting the executives informed than the preparatory procedures associated with arbitration and litigation. They should therefore be attempted early in the piece.

Like most other non-binding techniques, mini-trial and senior executive appraisal rely on some extrinsic motivation for settlement. They do not provide as harsh a form of reality check as does non-binding expert appraisal, and therefore will be less likely to motivate tough decisions in the absence of commercial pressure to do so.

ADR clauses

Should the parties commit in advance to attempt facilitated negotiations in the event that a dispute arises, or should they wait to see how they feel when the dispute does in fact arise?

A number of well respected practitioners counsel against the use of compulsory ADR clauses.

Smart J suggests that ADR clauses should not be included, for:

> "when the dispute arises the parties themselves will usually know whether there is any point in negotiating. While financial and executive self-interest is the usual catalyst for negotiation and settlement the use of a third party to manage the dispute often helps keep the settlement discussions on the boil."[27]

John Tyrril has written:

> "An unwilling party, participating in a mediation by presence only for the sake of form or procedure to comply with a contractually pre-agreed and required mediation, or court directed mediation, is unlikely to be conducive to a mediation worth the time and effort. Coerced

[26] L Street, "Senior Executive Appraisal: An Additional Resolution Procedure" [1989] *Australian Corporate Lawyer* (September), pp 7-8.

[27] Smart, op cit n 20 at 170.

mediations are often productive of failed mediations."[28]

There is of course a contrary view, namely that, if the parties are stuck with an agreed ADR procedure and are unable to proceed with binding dispute resolution until it has finished, they are likely to attempt to make a fist of it. On this view, it is the initial decision to enter into ADR which is the hardest, and if the parties are forced into that decision the ADR may well succeed. It is suggested that whether or not this statement holds true is very much dependent on specific circumstances. In particular, if a party (usually the owner) stands only to lose money when the judgment or arbitral award is made, it will not mind sitting out the ADR procedure without attempting to make constructive use of it.

This is an example of where the dearth of empirical evidence on construction dispute resolution in Australia hinders informed debate.

A clause to the effect that, in the event of a dispute arising, which cannot be resolved by bilateral negotiation, the parties are required to consider whether they can agree upon an ADR process is a useful aid to encouraging ADR by breaking down the initial barrier (even though such a clause is of no legal effect). Such a provision recognises that no two disputes are the same and that ADR should be tailored to meet the requirements of the particular issue.

Putting it all together

It is now proposed to consider how the issues discussed above are dealt with in some modern standard form contracts used locally and internationally. The contracts considered are:

- C21, the new form of construction contract being trialed by the NSW Department of Public Works and Services;
- FIDIC Orange Book the standard form of contract for international design and construct projects, issued in 1995 by Federation Internationale des Ingenieurs-Conseils;
- AS 4000, the standard form of contract issued in August 1997 by Standards Australia to replace the AS 2124 form of contract; and
- PC 1, a new standard form of contract for traditional and design and construct projects to be launched shortly by the Property Council of Australia.

Diagrammatic representations of each of the models for dispute resolution adopted in these contracts are attached as appendices to the article.

C21

Early warning

C21 provides that if the contractor is making a claim it must do so within 14 days of the date on which the contractor should reasonably have become aware of it. Unfortunately the sanction for non-compliance is merely a disentitlement to interest in respect of the claim for the period before the claim is made. A similar provision applies to the raising of an "Issue", which may be either an unresolved claim or some other type of dispute.

The imperative for early warning of contentious issues is not as strong under this contract as it might have been.

Administrative dispute resolution

The tasks which would traditionally have been carried out by the Superintendent (for example, under NPWC 3) are split between two individuals, the Principal's Representative and the Valuer. The split is, however, not along the lines suggested above. The Principal's Representative retains most of the traditional certification functions under the contract, including for example the granting of extensions of time, and the Valuer's functions are limited to those associated with variations about which the parties cannot agree.

The thinking behind this approach is that the Valuer is only necessary where the parties are unlikely to be able to agree; the parties should be required to sort the issues out for themselves where possible. The result is that a number of traditional certification tasks are carried out by the Principal's Representative, who is under no obligation to take the Contractor's interests into account in doing so.

The C21 procedure contains four steps each involving a separate non-binding dispute resolution method. The diagrams appended to the paper illustrate this procedure. If the initial assessment of the claim by the Principal does not result in

[28] Tyrril, op cit n 1.

agreement, then the Executives confer and seek to resolve it. Failing that, the Senior Executives confer, and failing that, the parties must use best endeavours to agree on an ADR procedure. Only on the parties' failure to agree on such a procedure, or their failure to agree to a settlement after engaging in it, is either party permitted to refer the dispute to arbitration.

Conspicuously lacking from the C21 procedure is any mechanism designed to provide a binding interim ruling on the rights of the parties. The status quo is maintained until all of the non-binding steps have been taken.

The Principal seems to have a great incentive to delay resolution as this will normally mean delaying payment to the contractor. It is able to do this for 119 days before it is forced to arbitration, which then may take so long to generate a result that the 119 days will be a drop in the ocean. At no point does the Principal come up against a situation where it is facing the prospect of a (possibly unfavourable) binding result unless it settles voluntarily.

This disadvantage is ameliorated by the implementation of the "issue elevation" concept in the C21 procedure. If an issue fails to be resolved at one level of management, it proceeds to the next. There is thus a motivation for the personnel at each level of management to resolve issues in order to avoid the embarrassment of having to bother their superiors with them. Nevertheless the success of this concept is very much dependent on the attitude taken by the parties. Senior management personnel are unlikely to be interested in dealing with trivial issues in any event. The question must therefore be asked whether the contract should have provided for even the possibility of senior management having to attempt to resolve trivial issues.

FIDIC Orange Book

Early warning

Prior to the event referred to in the diagram as "dispute arises", the contractor must comply with some early warning provisions, failing which it loses the right to pursue its claim.[29] The contractor must notify the Employer as soon as possible and in any event within 28 days of the start of any event giving rise to a claim. It must keep such contemporary records as may be necessary to substantiate the claim, and must subsequently provide detailed particulars of the amount and basis of the claim. If the events giving rise to the claim persist, the contractor must keep the Employer informed thereof.

Administrative dispute resolution

Although the party administering the contract is known as the Employer's Representative, it is expressly obliged to carry out its certification fractions "fairly, reasonably and in accordance with the Contract".[30] The Employer's Representative therefore has a traditional split certification and agency role under the contract.

The inclusion of a DRB (known in this case as a Dispute Adjudication Board or DAB) in this contract is a boon for the DRB concept. The diagram illustrates the way in which the DAB is incorporated into the overall procedure.

The contract importantly provides that the DAB must be appointed within 28 days of the contract coming into legal effect, and that the DAB members must at all times remain independent of the parties. The Employer and Contractor each provide a half of the DAB members' remuneration.[31]

Although it is simpler than the rather convoluted C21 procedure, it has the potential to take even longer: 140 days until arbitration must be commenced. However, FIDIC's procedure is crucially different from that of C21 in that it provides for an interim binding ruling. The parties are obliged to give effect to the DRB's decision unless and until it is revised, either in an amicable settlement (for which the contract subsequently provides) or by an arbitral award.[32]

This guarantee of some cashflow even where there are disputed issues will be of great comfort to contractors and will no doubt result in more competitive tenders.

[29] FIDIC Conditions of Contract for Design-Build and Turnkey (the Orange Book) (1st ed, 1995), cl 20.1.

[30] Ibid, cl 3.5.

[31] Ibid, cl 20.3.

[32] Ibid, cl 20.3.

Mature dispute ADR

If either party is dissatisfied with the DRB's decision it must notify the other party of this within 28 days, whereupon the parties must attempt an amicable settlement. The context in which these attempts occur is highly conducive to a successful and equitable outcome, for two reasons.

First, the imminence of a costly and time consuming arbitration at the time the negotiations are entered into will provide a commercial imperative for settlement.

Second, the fact that the DRB's decision binds in the interim means that the negotiations will take place on a far more equitable basis than they would under C21, for example. If it has been successful before the DRB, the contractor enters into the negotiations for amicable settlement with improved liquidity and will thus be less likely to agree to a settlement which does not do justice to the merits of its claim.

AS 4000

Early warning

The claims procedure begins with an early warning provision, but the sanction for failure to comply is not barring of the claim but merely a liability to damages, which would be very difficult to prove. The contract thus leaves open the possibility that the claim might fester.

Administrative dispute resolutions

The first line resolution of claims is carried out by the superintendent, who has the traditional independent certification and agency role, which raises the perceived conflict of interest problem referred to above, and as under C21, there is no provision for an interim binding decision.

Mature dispute ADR

The conference between parties empowered to resolve the dispute just prior to arbitration is likely to be the most effective measure in the procedure due to the imminence of a binding result should settlement fail to occur. Of course it would be quite open to the parties to confer in the absence of such a provision from the contract, but its presence is of psychological value in that the suggestion of a conference is less likely to be interpreted as a sign of weakness.

PC1

As with C21, the contract administrator has no independent certifying role under the contract and acts at all times as agent of the owner.

The dispute procedure provided for in the PC1 Contract embodies a number of the principles discussed in this paper. In particular, it is based on the philosophy that:

- early warning of contentious issues is the key to their efficient resolution;
- a binding interim decision on disputed issues will facilitate the ongoing progress of the project;
- the independent adjudication mechanism is an appropriate way to counteract the perceived conflict of interest in the traditional superintendent mechanism; and
- contractually agreed ADR procedures should be kept to a minimum to avoid delay.

Early Warning Provisions

The PC1 contract provides that the contractor, in order to make any claim for additional payment, must provide the owner with notices, within a time limit, and with adequate particulars as to the nature of the claim. Otherwise, the contractor is not entitled to maintain its claim.

Administrative dispute resolution

The contract provides for a binding expert determination of disputed issues if they fail to be resolved within 14 days of arising. However, not all disputed issues are directed into this channel. The parties specify in advance which issues they wish to go to expert determination and which they wish to proceed straight to mature dispute resolution. Typically, the parties would specify that disputes associated with the certification functions of the contract administrator, such as extensions of time and the valuation of variations, would be directed to expert determination. A more complex dispute, especially if it involved legal issues, such as the possible frustration of the contract, would normally proceed straight to mature dispute resolution.

The expert's decision is binding on the parties during the interim period as they pursue further dispute options. This promotes certainty for both

parties and means that further negotiations will be carried out on an equitable basis since the contractor's cashflow is not in jeopardy.

Being an administrative process, the expert determination is quick and relatively inexpensive. The expert may inform itself in any manner it thinks fit, which means that it may act as an inquisitor if it wishes, although it may invite submissions from the parties on particularly contentious points. Its decision must be handed down within 28 days.

Mature dispute resolution

Rather than providing in advance for a facilitated negotiation procedure, the PC1 Contract simply envisages that senior executives of the disputing parties should meet, within the brief period of three weeks, either to settle the dispute or agree on some longer form of ADR. In this way, the method of ADR chosen can be tailored to the characteristics of the individual dispute which has arisen.

Party autonomy, public policy and paternalism

In giving effect to dispute resolution provisions in construction contracts, the courts firstly consider the intentions of the parties, as evidenced by their contract, as to how their disputes ought to be resolved. The concepts of public policy and paternalism, anathema to commercial lawyers, place some limits on the competence of the parties to decide for themselves how their dispute will be resolved. The great dilemma for the courts in enforcing a contractually agreed *procedure* is that it may not always generate a result which is desirable in *substance*. This produces the understandable desire in the courts to intervene in order to do justice between the parties.

In a construction contract negotiated by two or more commercially aware parties, it is extremely difficult to separate the abstract notion of justice from the more concrete notion that the intentions of the parties should be adhered to. Thus a particular contractually agreed process for dispute resolution may have generated a result which seems on its face to be unjust. But, just as construction contracts allocate all kinds of construction risks to various parties, who include risk premiums in their prices as a result, the risk that the agreed dispute resolution process generates an unjust result is one which must be assumed to have been addressed by the parties, and the appropriateness of the competing methods of dispute resolution must be assumed to have been considered by way of a cost-benefit analysis.

The fundamental value to be upheld by courts in the enforcement of dispute resolution agreements must be party autonomy: "those who make agreements for the resolution of disputes must show good reasons for departing from them."[33]

The question what principles should be applied in ascertaining the intentions of the parties, however, is another question altogether. It is, of course, one of the abiding questions in contract law and a detailed treatment of it is certainly beyond the scope of this paper. Nevertheless it is worth mentioning some areas in which there appears to be some confusion on the part of commentators (as well as judges on occasion) as to how the parties' intentions should be ascertained.

It is commonly said that commercial parties usually just want to get the dispute over with and then get on with business. In other words they are satisfied with pragmatic solutions, seeing "justice" as an expensive luxury. This conventional wisdom is then used as the basis for arguments that courts should take a "practical" approach to the construction of dispute resolution provisions in contracts.

Consider, for example, the statement:

> "Construction community disputants want expeditious and reasonably conclusive resolution. If they wanted the safeguards of two or three appeals, they would take their disputes into the courts initially."[34]

In the absence of empirical evidence, there is no basis for making this assertion. The mere fact that the parties to a construction contract have chosen to provide for arbitration as a means of resolving their disputes is no reason to suggest that they want the arbitration to be utterly final.

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[33] *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334 at 353 per Lord Mustill.

[34] R K F Davis, "The Quest for Speed and Finality in Arbitration Proceedings—Does the Uniform Commercial Arbitration Act Go Far Enough?" (1989) 5 BCL 290. The quote is from the abstract, p 290.

On the contrary, if they have been properly advised by their lawyers, they will understand that, at least under Australia's uniform commercial arbitration legislation, the award will be subject to a certain limited amount of scrutiny by the courts. They will therefore have entered the arbitration agreement based on that expectation, and will expect it to be fulfilled. This may even provide some comfort to the parties.

Of course industry participants want fast and efficient dispute resolution. But they also want to win. And they certainly do not want to lose cases which they should have won because of the brevity of the dispute resolution process.

For this reason the attitude of the Courts to the new techniques of dispute "avoidance" will be of considerable relevance as parties who see commercial advantage in escaping from the agreed process enshrined in the contract, attempt to ignore them. In particular, the enforceability of ADR and expert determination clauses will certainly attract the attention of the Courts on a regular basis. It is proposed to briefly consider both these issues.

ADR Enforceability

Where a contract provides for compulsory ADR in the event of a dispute arising, it is not unusual for one party to desire its enforcement while the other party wishes to proceed straight to a binding dispute mechanism. It is in these circumstances that the enforceability of the ADR clause will be put to the test.

The only real remedy[35] available for breach of a mediation clause is a stay of any arbitration or litigation proceedings commenced in breach of it. In *Hooper Bailie Associated Ltd v Natcon Group*,[36] Giles J granted such a remedy.

The key issue in the case was whether or not the mediation agreement was sufficiently *certain* to be enforceable by a court. Where a mediation agreement is construed as being an "agreement to agree", it stands little chance of being enforced, for it is well established that an agreement to agree is not known to the law. However, when a mediation agreement is recognised as an agreement to participate in a particular process,[37] it is possible to find in the clause the requisite certainty for it to be enforced. In particular, the agreement must contemplate possible failure of mediation proceedings, and provide for a definite conclusion to them even without a resolution.

An agreement providing for mediation proceedings of indefinite duration would not be enforced.

It was on this basis that *Hooper Bailie* was decided in favour of the party attempting to enforce the mediation agreement. But in the subsequent case of *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd*,[38] "the agreement of the parties fell down for lack of certainty in the *process* which they should follow in their mediation" (emphasis added). Thus there is no guarantee that every mediation agreement will be held to contain the requisite certainty to be enforced in a court.

It should be noted that it was crucial to the availability of a stay of arbitration proceedings that the mediation agreement in *Hooper Bailie* was expressed in *Scott v Avery* form. In other words, the fulfilment of the mediation clause was expressed to be a condition precedent to the progress of the dispute into formal arbitration and litigation stage. It was only on this basis that Giles J found in the *Commercial Arbitration Act*[39] the power to stay arbitration proceedings pending the completion of mediation proceedings. It is also notable that Giles J did not consider the existence of this power to be settled law, noting the reservations expressed by Rogers CJ CommD as to the correctness of one of the authorities on which Giles J relied.[40]

On the basis of these authorities, it seems clear, at least in New South Wales, that a mediation clause in *Scott v Avery* form, which outlines with sufficient clarity the process to be followed in the mediation proceedings, will be enforceable by means of a stay

[35] Specific performance of an ADR agreement will not normally be ordered as such an order would require constant supervision. Again, it should be borne in mind that breach of a contractual term sounds in damages, but the damage suffered due to breach of a mediation clause may be very difficult to prove. See section 3.1.4, supra.

[36] (1992) 28 NSWLR 194. See R S Angyal, "The Enforceability of Agreements to Mediate" (1994-1995) 12 Aust Bar Rev 1 for a comprehensive case report.

[37] As Giles J recognised in *Hooper Bailie*, at 206.

[38] Unreported, NSW Supreme Court, Giles J, 28 March 1995.

[39] Section 47.

[40] *Hooper Bailie*, at 211.

of any arbitration or litigation proceedings commenced in breach of it.

Binding expert determination

Enforceability of expert determination agreements

The processes discussed in sections 3.3 and 3.4 of this article involve the possibility of an independent expert, or DRB making a decision which will be binding upon the parties to the contract in the absence of an appeal, and until changed by the appeal process. The issue of whether such process can be effectively binding is a complex one which is not the subject of this article.[41]

A contractual provision purporting to render an expert determination final and binding on the parties will generally be given effect by the courts. This is, however, always subject to the possibility that the agreement will be held void on public policy grounds as an ouster of the court's jurisdiction.

The rule that the jurisdiction of the courts as to questions of law cannot be ousted by contract[42] has had a turbulent history, especially in recent times. While it has never been overruled, it has been eroded by a number of decisions which, while being difficult to reconcile with the rule, do not deal with the authorities which supported it. As Windeyer J observed in *Felton v Mulligan*[43] "the grandiloquent phrases of the eighteenth century condemning ousting of the jurisdiction of courts cannot be accepted in this second half of the twentieth century as pronouncements of a universal rule".

The rule has always been said to be based on public policy. There was a perception that the public had an interest in the ultimate oversight of all affairs by the King's Courts, such that no section of society (for example, the construction industry) could form "a law unto themselves". The question to be asked now is whether the public can still be said to have an interest in such a position.

The rule is arguably ripe for reconsideration. In *PMT Partners Pty Ltd v Australian National Parks and Wildlife Service*,[44] the High Court of Australia held that:

> "It may be accepted that contracts will only be construed as limiting the rights of the parties to pursue their remedies in the Courts if it clearly appears that that is what was agreed. However, when it is provided, as it is in cl 45, that [a]ll disputes or differences... shall be decided' in accordance with specified procedures, the starting point must be that the parties are to be taken to have provided exclusively and exhaustively as to the procedures to be followed, unless something makes it plain that that is not the case."[45]

In *Fletcher Construction Australia Ltd v MPN Group Pty Ltd*,[46] Rolfe J considered an expert determination clause of the kind which now commonly appears in construction contracts. It provided that in the event of a dispute arising between the parties, a third party should resolve the dispute, acting as expert not arbitrator, and that his or her decision should be final and binding upon the parties.

One party sought to breach this agreement and the other sought to prevent it from doing so. Rolfe J held that the parties should be held to their agreement for dispute resolution. in doing so his Honour rejected three submissions:

- that the agreement was void on public policy grounds for attempting to oust the jurisdiction of the courts;
- that the agreement was void for uncertainty; and
- that the disputes in question did not fall within the terms of the clause.

For present purposes, the first of these submissions are relevant.

Rolfe J noted that, despite the wording of the clause, to the effect that the expert's decision was final and binding, the expert's decision "remains amenable to attack, although of a limited nature, before a Court on the basis, for example, that the

[41] See D S Jones, "Expert Determination in Construction Contracts", paper presented to International Dispute Resolution Conference, *Will Arbitration Survive the Alternatives?*, Hong Kong, 1996.

[42] Originally set down in *Thomson v Charnock* (1799) 8 Term Rep 139.

[43] (1971) 124 CLR 367 at 385.

[44] (1995) 184 CLR 301.

[45] Ibid at 311 per Brennan CJ, Gaudron and McHugh JJ.

[46] Unreported, Supreme Court of NSW, Rolfe J, 14 July 1997.

expert has not asked conformably with the agreement or that the decision is vitiated by a factor, such as fraud" (at p 11). This being the case, his Honour reasoned, the expert determination clause did not oust the courts' jurisdiction but merely "limited the matter for consideration by the Court to the question whether the agreed decider has acted conformably with the agreement of the parties and not in such a way as to vitiate his or her decision" (at p 15).

The courts are becoming far more permissive towards all forms of alternative dispute resolution, both binding and non-binding. *Fletcher Construction* continues this trend.

Facilitation of the process

Although the courts may be happy to enforce expert determination agreements, their capacity to facilitate the expert determination process is severely restricted by the absence of a statutory power to do so. This is in stark contrast to the capacity of the courts to facilitate the arbitral process under the Commercial Arbitration Acts and the *International Arbitration Act* 1974 (Cth).

A good illustration of some of the problems which can arise is the case of *Triarno Pty Ltd v Triden Contractors Ltd.*[47] In that case, a construction project deed obliged the contractor to provide a bank guarantee to the owner. Any claims by the owner were to be paid out of the bank guarantee. In the event of disputed claims, the owner was not entitled "to any amount of his claim in dispute until it received a determination from an independent expert agreed upon by the parties or failing agreement, appointed by the chairperson of the Institute of Arbitrators Australia, New South Wales Chapter, whose decision shall be final and binding".

Unfortunately, however, as Cole J (as he then was) observed:

> "The deed made no express provision for payment of the independent expert, for the procedures to be followed by the independent expert in reaching his determination, or for any rights or obligations upon Triarno [the owner] or Triden [the contractor] in relation to such expert determination."

Cole J refused to make a declaration as to the rules and procedures for the conduct of the expert determination and he also refused to order the contractor to submit to and co-operate with the expert determination. He said:

> "If the parties have not by their deed agreed the procedures to be followed upon an expert determination, that is not a void the Court can fill. There is no reason to imply a term that the Court will determine procedures. It is a matter for either agreement between the parties, or determination by the independent experts as to the procedures to be followed."

In *Fletcher Constructions*, the submission that the expert determination agreement was void for uncertainty was based on the absence from the agreement of any machinery provisions as to how the expert procedure would run, for example "the rules of evidence to apply; the right of the parties to be legally represented; whether the parties could be compelled to furnish information or documents and if so how ..." (at 19-20) and numerous other issues. Rolfe J held, on the authority of the decision of Cole J in *Triarno Pty Ltd v Triden Contractors Ltd*[48] that the absence of agreement as to these issues simply meant that responsibility to decide on them fell at the feet of the expert.

With respect to Rolfe J, it is arguable that Cole J's decision was not intended to establish the proposition which Rolfe J relied on. *Triarno*, as mentioned above, was an application for a declaration as to the rules and procedures for the conduct of the expert determination. The certainty of the contract was not in issue. Cole J's statement that the procedure was at the discretion of the expert was therefore obiter.

The moral of the story is that the parties to an expert determination agreement must clearly specify the procedures they wish to follow. Otherwise, there may be capricious results.

[47] Unreported, Supreme Court of NSW, Cole J, 22 July 1992.

[48] (1992) BCL 305.

Attacking an expert determination

There are three grounds on which it is possible to attack an expert determination. These are:

- fraud;
- error of fact; and
- error of law.

The overriding consideration, however, is that the expert determination must be made in accordance with the terms of the contract. Thus, it is quite possible for the parties to agree to be bound by a determination which is procured either fraudulently,[49] or on the basis of a factual error.

In summary, then, the courts' attitude to expert determination clauses exhibits a higher degree of respect for party autonomy.

Conclusion

The means available to avoid disputes in the construction industry are varied and increasingly the subject of adoption in standard form contracts in use in Australia.

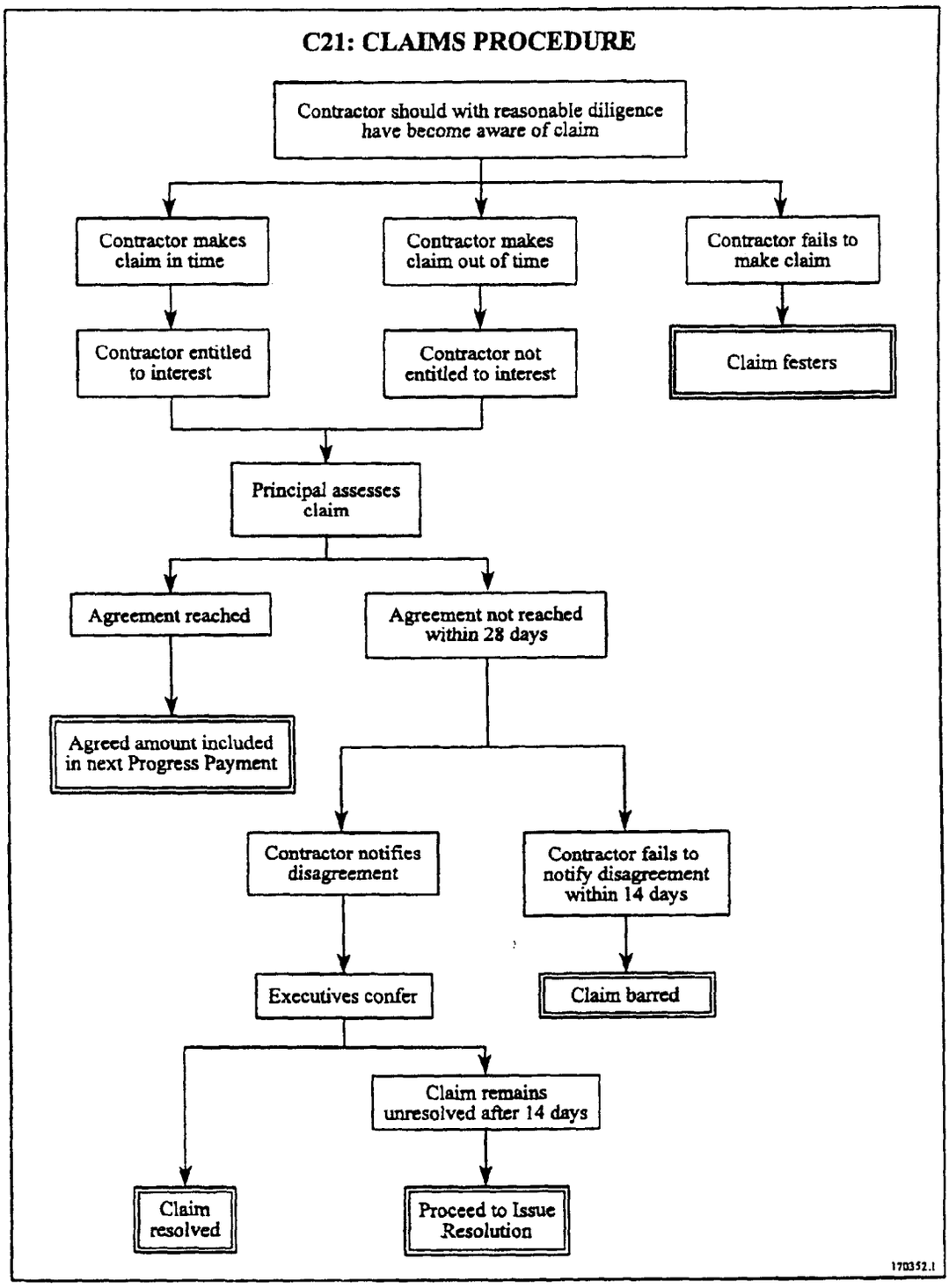
Many are too recently introduced for there to be sufficient history to enable them to be empirically evaluated. Nevertheless, the reasoning behind them suggests that there are good prospects of them making a positive contribution to more effective resolution of commercial conflict in the construction industry.

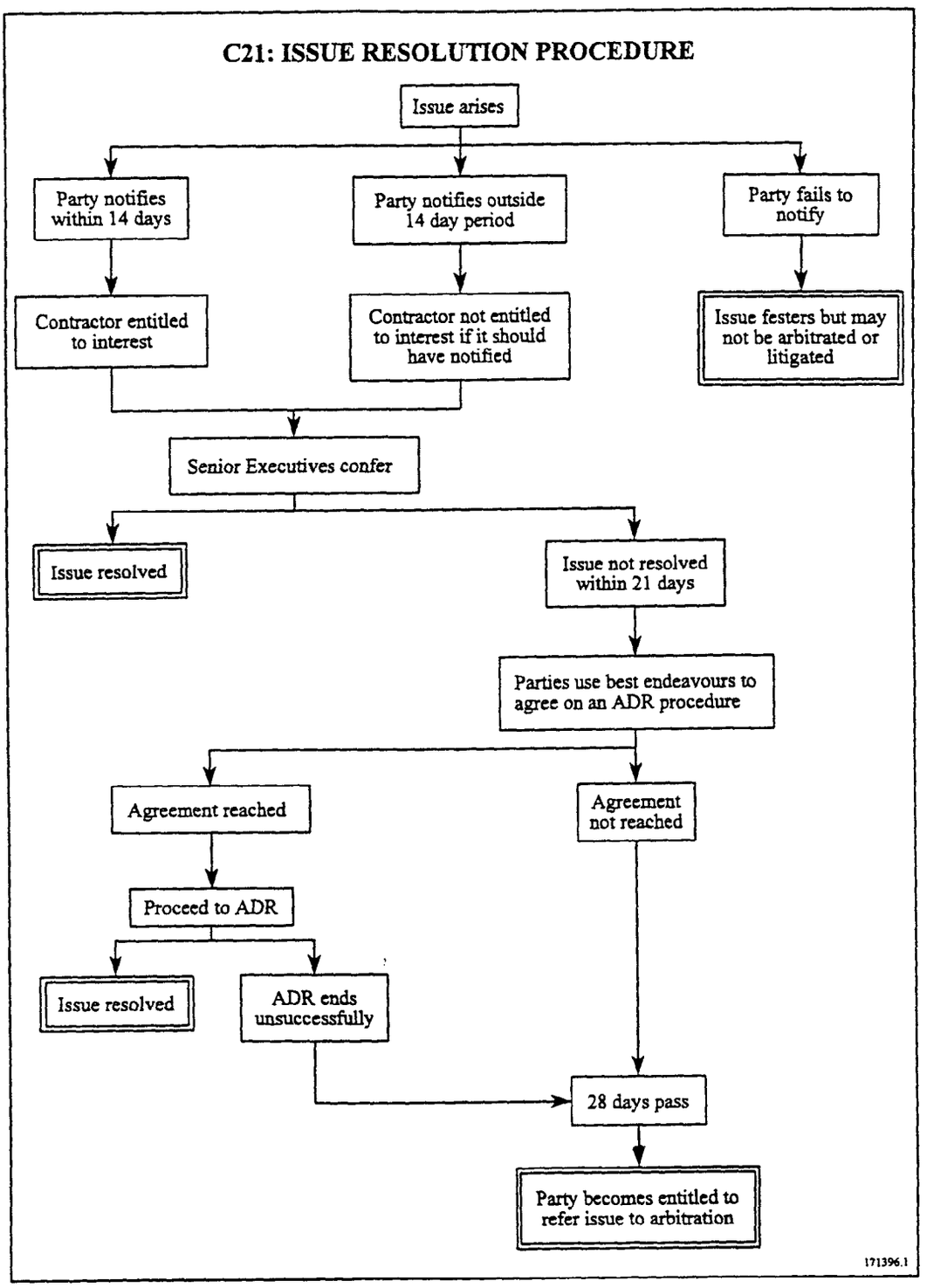
An issue for industry advisors is their contribution to increased efficiency in issue resolution. This will only be possible if they have a detailed knowledge of the techniques available and how they can be introduced at the various stages of the construction process to add value.

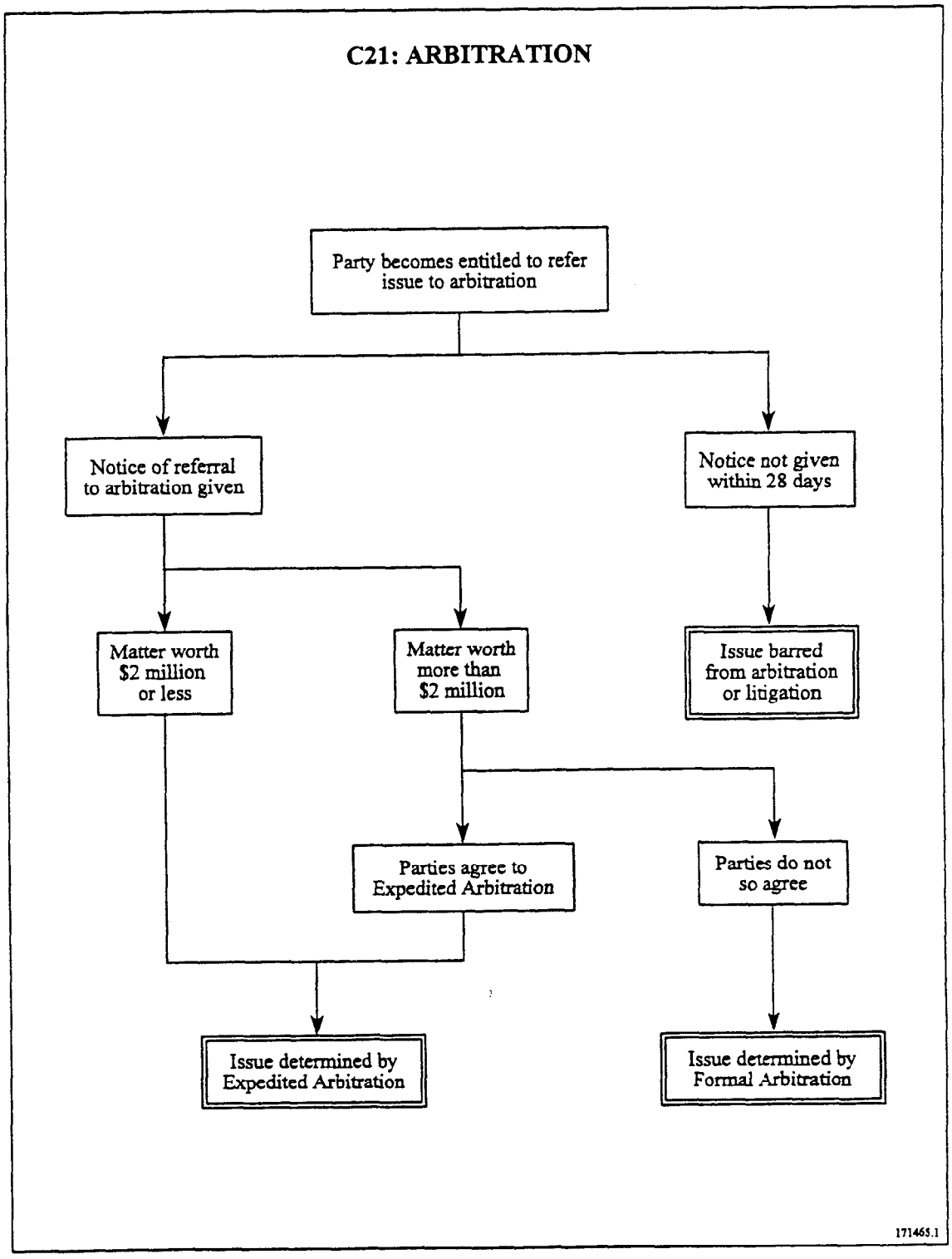
It is trite, but useful, to observe that without appropriate contract provisions an expert disputes practitioner will lack the necessary tools to effectively deal with conflict arising during the construction process. On the other hand, misuse of the contract tools will lead to them being of little ultimate value to the parties.

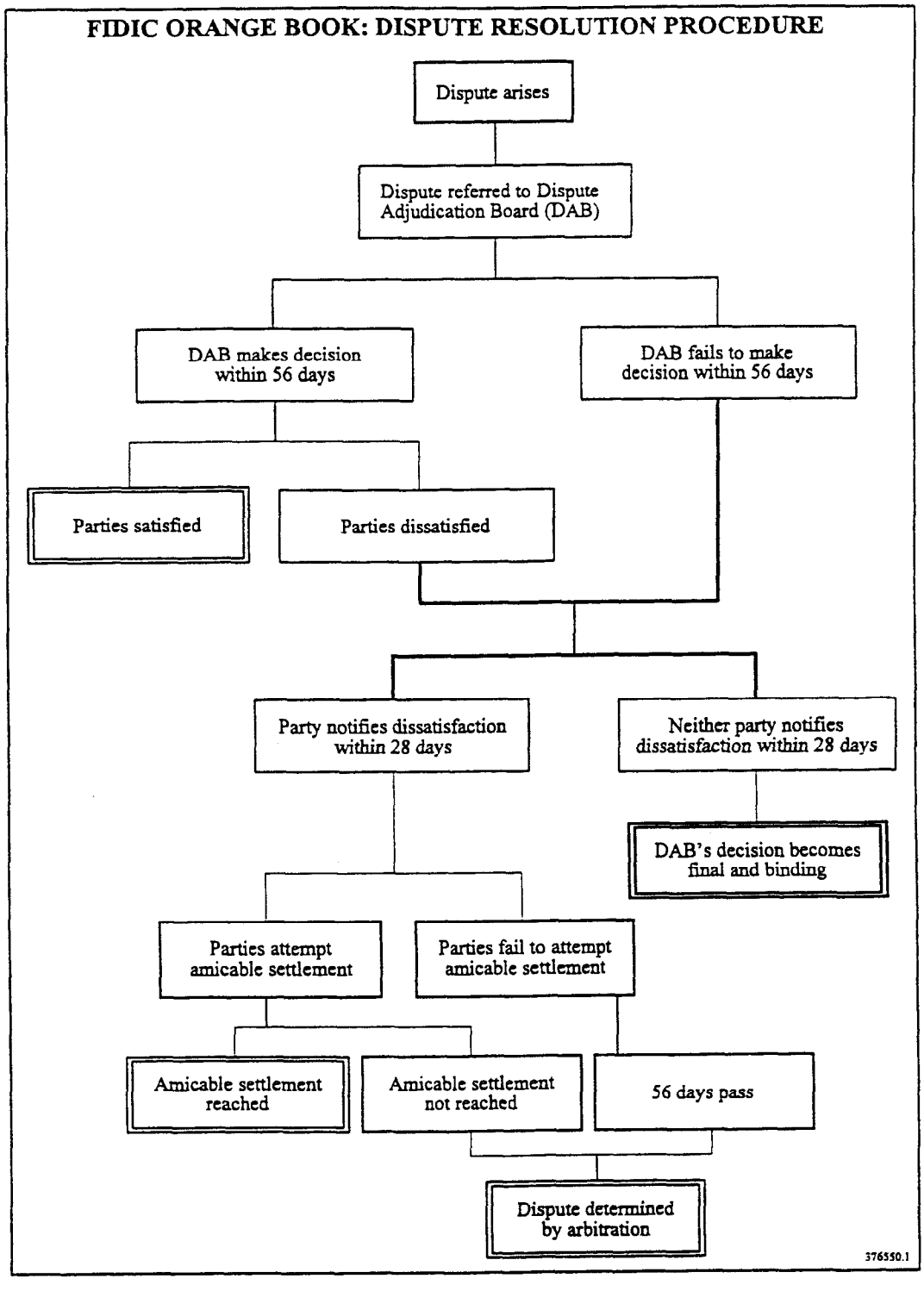
[49] *Tullis v Jacson* [1892] 3 Ch 441.

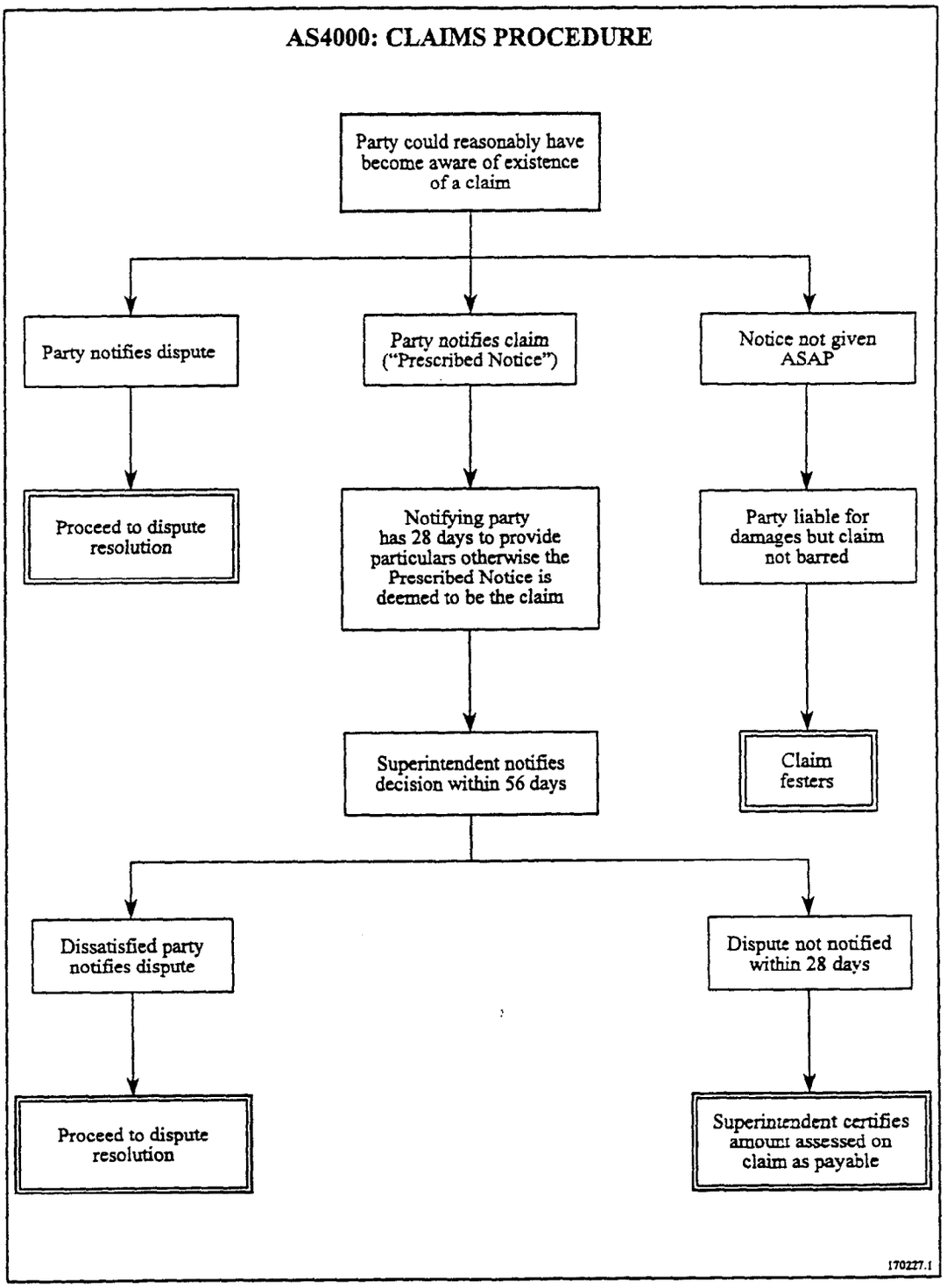
Appendix: Some standard form disputes procedures

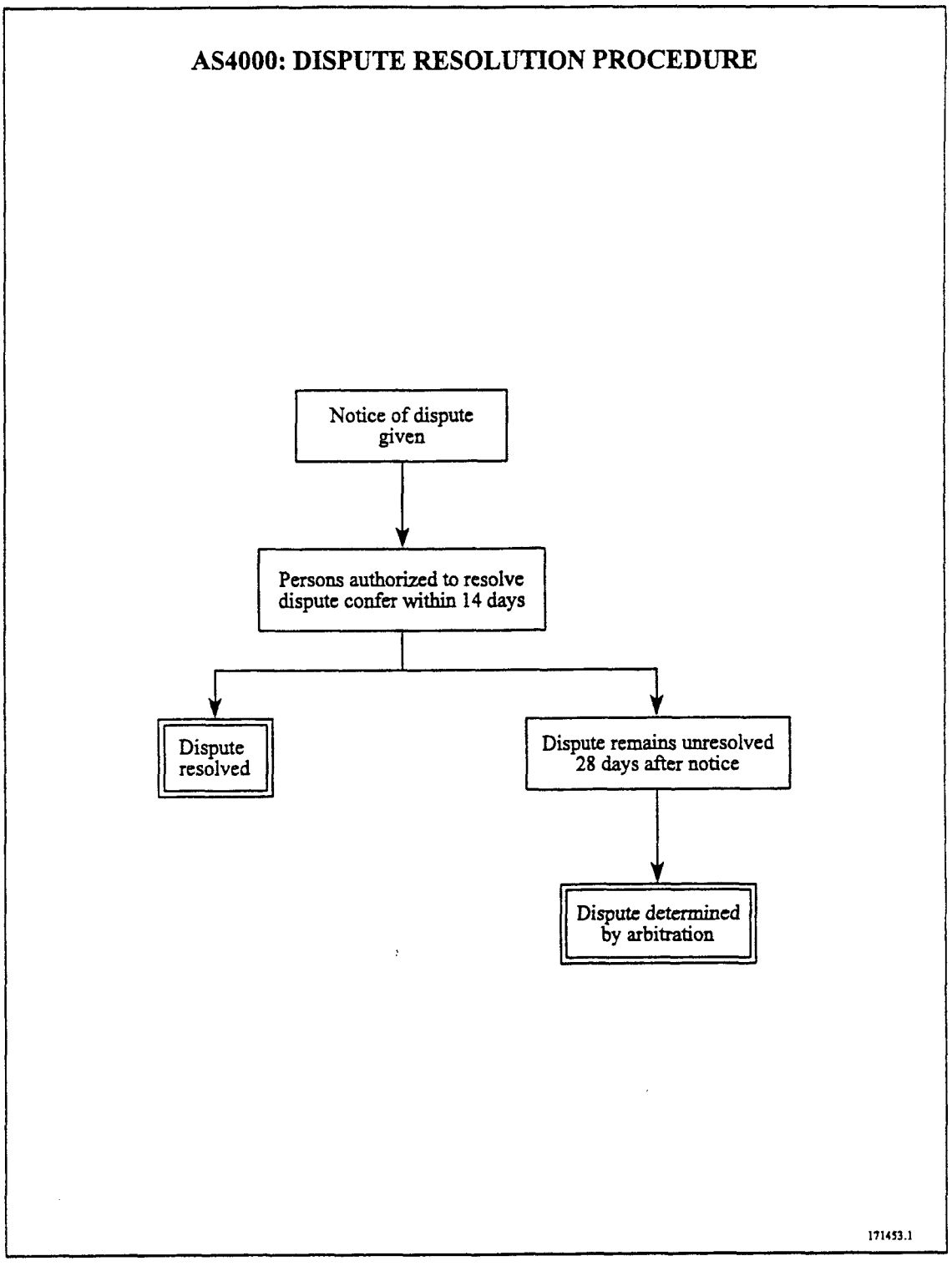


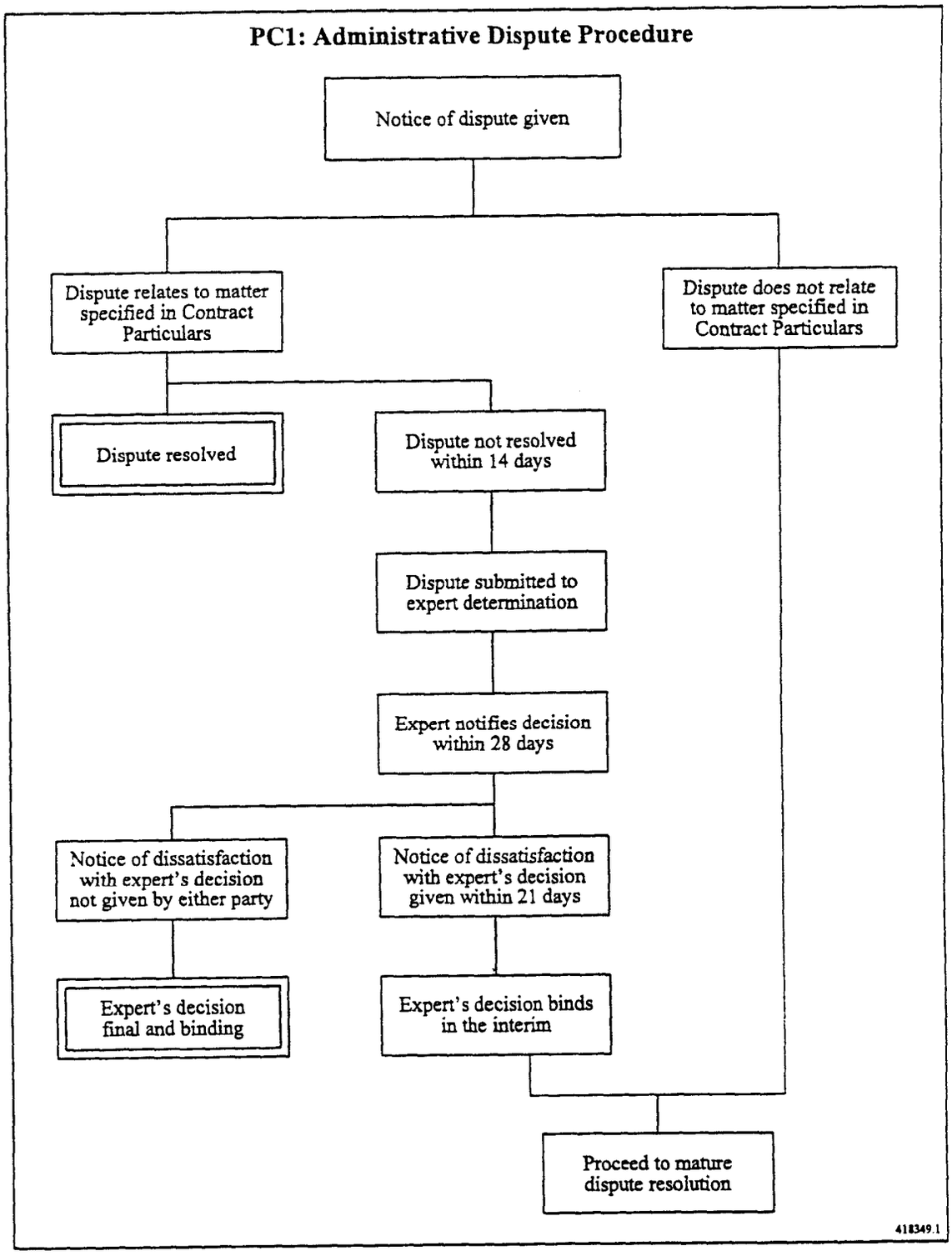

C21: ISSUE RESOLUTION PROCEDURE
Issue arises
Party notifies within 14 days
Party notifies outside 14 day period
Party fails to notify
Contractor entitled to interest
Contractor not entitled to interest if it should have notified
Issue festers but may not be arbitrated or litigated
Senior Executives confer
Issue resolved
Issue not resolved within 21 days
Parties use best endeavours to agree on an ADR procedure
Agreement reached
Agreement not reached
Proceed to ADR
Issue resolved
ADR ends unsuccessfully
28 days pass
Party becomes entitled to refer issue to arbitration
171396.1

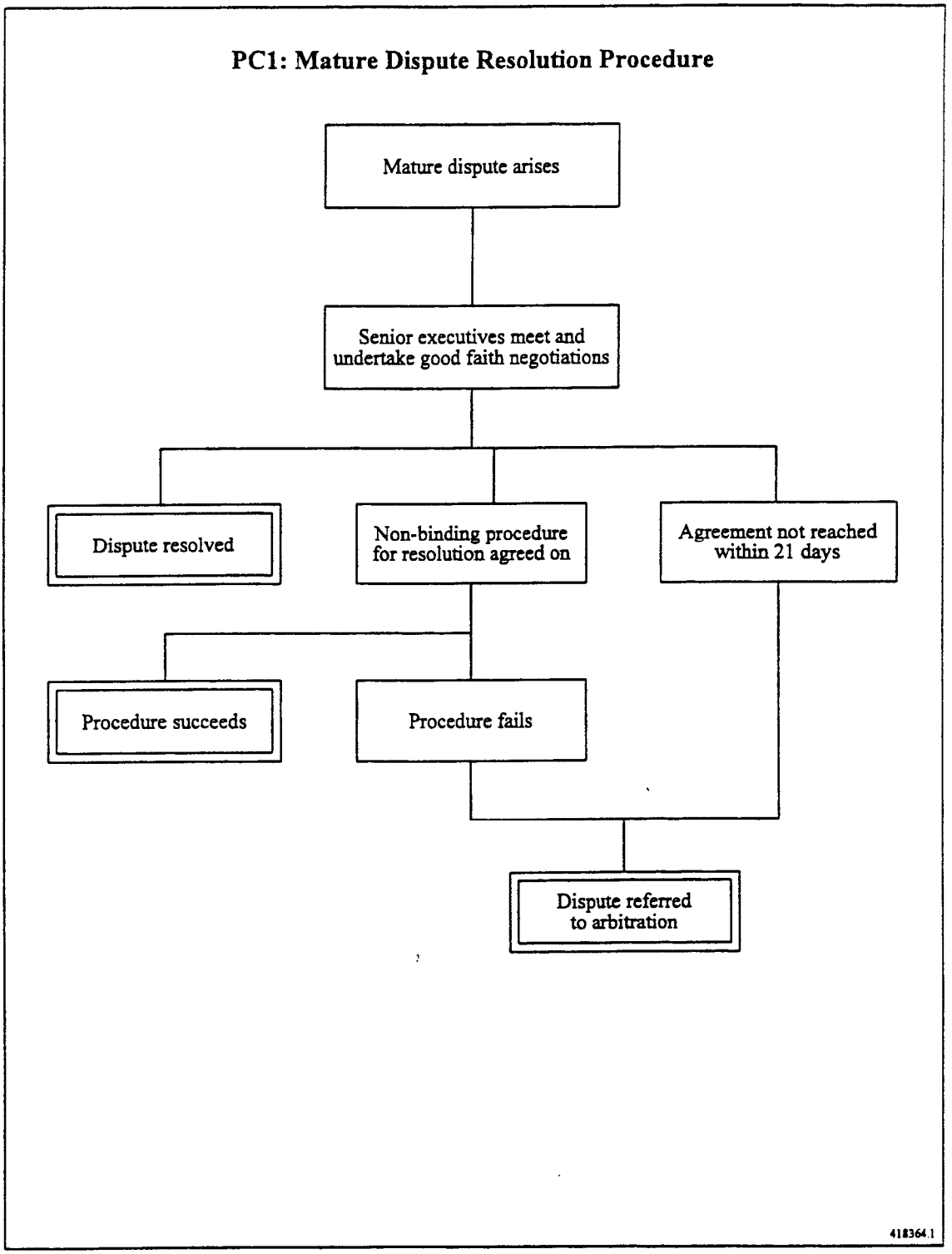

C21: ARBITRATION
Party becomes entitled to refer issue to arbitration
Notice of referral to arbitration given
Notice not given within 28 days
Matter worth $2 million or less
Matter worth more than $2 million
Issue barred from arbitration or litigation
Parties agree to Expedited Arbitration
Parties do not so agree
Issue determined by Expedited Arbitration
Issue determined by Formal Arbitration
171465.1


FIDIC ORANGE BOOK: DISPUTE RESOLUTION PROCEDURE
Dispute arises
Dispute referred to Dispute Adjudication Board (DAB)
DAB makes decision within 56 days
DAB fails to make decision within 56 days
Parties satisfied
Parties dissatisfied
Party notifies dissatisfaction within 28 days
Neither party notifies dissatisfaction within 28 days
DAB's decision becomes final and binding
Parties attempt amicable settlement
Parties fail to attempt amicable settlement
Amicable settlement reached
Amicable settlement not reached
56 days pass
Dispute determined by arbitration
376550.1


AS4000: CLAIMS PROCEDURE
Party could reasonably have become aware of existence of a claim
Party notifies dispute
Party notifies claim ("Prescribed Notice")
Notice not given ASAP
Proceed to dispute resolution
Notifying party has 28 days to provide particulars otherwise the Prescribed Notice is deemed to be the claim
Party liable for damages but claim not barred
Superintendent notifies decision within 56 days
Claim festers
Dissatisfied party notifies dispute
Dispute not notified within 28 days
Proceed to dispute resolution
Superintendent certifies amount assessed on claim as payable
170227.1


AS4000: DISPUTE RESOLUTION PROCEDURE
Notice of dispute given
Persons authorized to resolve dispute confer within 14 days
Dispute resolved
Dispute remains unresolved 28 days after notice
Dispute determined by arbitration
171453.1


PC1: Administrative Dispute Procedure
Notice of dispute given
Dispute relates to matter specified in Contract Particulars
Dispute does not relate to matter specified in Contract Particulars
Dispute resolved
Dispute not resolved within 14 days
Dispute submitted to expert determination
Expert notifies decision within 28 days
Notice of dissatisfaction with expert's decision not given by either party
Notice of dissatisfaction with expert's decision given within 21 days
Expert's decision final and binding
Expert's decision binds in the interim
Proceed to mature dispute resolution
418349.1


PC1: Mature Dispute Resolution Procedure
Mature dispute arises
Senior executives meet and undertake good faith negotiations
Dispute resolved
Non-binding procedure for resolution agreed on
Agreement not reached within 21 days
Procedure succeeds
Procedure fails
Dispute referred to arbitration
418364.1