"The costs of [preparatory work] became abortive to the extent that the personnel in charge of the project is no longer in a position to achieve productive work, but cannot be dismissed or directed to other projects in view of the expectation that the works may actually continue at any time.

The period of the Advance Payment delay was ultimately of such length that most of the personnel and other time related costs became abortive.

In view of these considerations we find that a percentage of 20% of the allowable costs for home office overheads, staff salaries, medical insurance, staff expenses, postage and DHL, air fares, sundry expenses, hotel accounts, visa fees, site electricity and telephone/telex was not abortive and 20% thereof should be deducted as the value of productive work."

With respect to the issue of foreseeability (2. above), the tribunal then stated as follows:

"We are satisfied that the Claimant was throughout largely dependent upon the prompt effectuation of Contract payment obligations by the Defendant to enable the work to be funded and proceeded in accordance with the programme. We find that it was from the outset reasonably foreseeable, and in truth foreseen, by the Defendant that any failure on its part to make payments when legally due was quite likely to result in delay to the work, and in increased outlays by the Claimant arising from the consequent need to devote resources to their task over a lengthier duration and with impaired economic efficiency. There is no doubt that this is what, to an appreciable extent, occurred."

However, the tribunal then noted that it was for the claimant to establish with reasonable particularity the nature and extent of the losses it claimed to have suffered, and the tribunal then went on to consider the evidence which the claimant had produced on this issue.

WHETHER THE FIDIC AND ENAA FORMS CONSTITUTE TRADE USAGES?

Case 8873 [1997] dealt with the issue of whether the principles contained in the FIDIC or ENAA (Engineering Advancement Association of Japan) forms of construction contract had become so widely accepted as to constitute veritable trade usages which might apply in the construction industry even to a case where the parties had not expressly agreed to adopt them. Unsurprisingly, the tribunal concluded that the principles in these forms of contract did not satisfy the requirements to become trade usages as:

1. the solutions provided by these forms of contract were not found to have been applied in practice with a sufficient degree of uniformity; and
2. the party invoking this theory could not prove that the principles embodied in these forms were applied in the construction industry in the absence of an express agreement of the parties.

THE DISPUTE RESOLUTION PROCESS IN ASIA[1]

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1. INTRODUCTION

Purpose

This article is intended to provide an overview of a range of dispute resolution options for the Construction Industry in Asia. In doing so, it is intended to consider a number of options designed to avoid contentious issues giving birth to fully fledged disputation.

There is also a discussion of options for dealing with issues which have *reached* the stage of full fledged dispute.

Many of the options discussed need specific contract provisions in the original contract between the parties in order to be effective. The requirements of such provisions are also discussed in some detail.

1.2 Context

At present, 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."[2]

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."[3] Consequently, as well as seeing ADR vigorously promoted to commercial parties, it has also been introduced into the resolution of family law and other disputes.

Care must be taken 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

[1] The author gratefully acknowledges the assistance he received in the preparation of this paper from Stephen White, Legal Assistant, Clayton Utz.

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

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

centuries of development, based on experience as to how justice might best be done between disputing parties. Each aspect of the judicial process has 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 should be undertaken with cool heads, with the lessons of history firmly implanted in them.

1.3 Construction disputes—the nature of the beast

Construction contracts pose a number of problems that are not as frequently confronted in other commercial contracts. As a result, the scope for disputes to arise is somewhat larger than is generally confronted in commercial contracting. One major source of dispute is the complexity of scope of the contract and the subject-matter of the contract, especially when the various documents forming the contract are prepared by different parties.

Another major problem is the failure to administer the contract properly, resulting in breach and, inevitability, disputes. Such failures are likely to take place because traditionally construction contracts require[4]:

"• much interpretation of the contract conditions, specifications and drawings before a contractor can proceed to carry out his obligations;
• co-operation amongst the various design consultants to ensure that there is proper interfacing between different works;
• co-ordination amongst the contractor and all sub-contractors including the various tradesmen to facilitate a smooth flow of work according to the work sequence;
• communication between the design team and the building team necessitated by the dynamics of the contract where numerous additions and omissions of work are not uncommon; and
• compliance with numerous procedural requirements under the contract."

The contract administrator, in a traditional construction contract has "true power" in his or her hands. They make determinations and give directions on the scope of works, and thus, variations; defects rectification and completion; delay, extension of time and liquidated damages; and payment pursuant to measurement and valuation. With such decisions, there is a high probability that one party will be disappointed, and accordingly, such decisions and directions are a prime source of disputation.

Disputes may arise from[5]:

"• the inadequacies of the contract document because of poor contract drafting;
• the failure of the parties to comply with their obligations;
• the improper exercise by the parties of the rights under the contract; and

[4] P Chan, "Resolving Construction Disputes in Singapore—Litigation, Arbitration and ADR", [1998] ICLR 259, p 260.
[5] *Ibid.*, p 261.

• the disagreement with the architect's decision made under the contract or his failure to make them."

While it is not difficult to understand that construction contracts involve many risks which increase the possibility of differences between the parties, it is more difficult to determine how to avoid or minimise such differences; and when such differences lead to dispute, how to deal effectively with the dispute in a way which minimises its impact on the project.

1.4 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, i.e., 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 options are available for the hearing of an *arbitration* within Asia?
- 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 four broad topics in the area of dispute avoidance:

- early warning provisions;
- administrative dispute resolution;
- non-binding mature dispute resolution techniques; and
- binding mature dispute resolution 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 two modern standard form construction contracts.

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

2. EARLY WARNING

While clear, unambiguous and complete contract documentation will go a long way towards avoiding disputes, it is unlikely that every possible factor or scenario will be envisaged. It is therefore critical that there are "arrangements for continuous, full and frank dialogue which can deal with problems as they arise".[6]

It is in the interests of both parties to a contract to identify quickly 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 in 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.[7]

[6] R H Turner, "Avoidance and Resolution of Construction Disputes", [1994] ICLR 384.

[7] 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 simply 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.

- 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 decision.

A somewhat more open-ended approach is demonstrated in the World Bank's Standard Bidding Documents—Procurement of Works—Smaller Contract, which explicitly requires the contractor to give an early warning of any events which might adversely affect quality, increase cost or cause delay.[8] Failure to provide such a warning impacts on any right to an extension of time and compensation. This encourages early notification of potential problems which, if left, could later form the basis for a claim. This provision is in addition to the usual requirements of notification of a claim.

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

3. 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, and has entered our language on the coat-tails of partnering.

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

[8] Clayton Utz, "World Bank Standard Bidding Documents for the Procurement of Smaller Works Contracts" (1996) 44 *Australian Construction Law Newsletter* 22.

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 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 sizable 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.

3.1 Traditional determination of claims by contract administrator

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

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

- an agency function, whereby the contract administrator acts as agent of the owner, for example, when approving a construction programme submitted by the contractor; and
- the role of an independent certifier, whereby the contract administrator 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[9]; 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 Australian JCC standard form contracts specifically set out which functions are which.[10] Other standard forms which provide for a traditional contract administrator include the FIDIC Orange Book (discussed below[11]), FIDIC Red Book PC1 (discussed below[12]), AS4000 and its predecessor AS2124.[13]

The first line resolution of claims notified by contractors will normally be the responsibility of the contract administrator, as part of his or her (independent) certifying function. The contract administrator's decision is typically binding but subject to appeal. The process is not thorough enough

[9] *Perini Corporation* v. *Commonwealth of Australia* [1969] 2 NSWR 530.
[10] JCC subcl 5.01 and 5.02.
[11] See section 7.1, *infra*.
[12] A new standard form of contract for traditional design and construct projects issued by the Property Council of Australia; see section 7.2, *infra*.
[13] Standard form contracts released by Standards Australia.

to warrant that it be final. The contract administrator is invariably technically trained (normally as an architect or engineer), and can inform him or herself as he or she thinks fit. Lawyers are not involved at this level.

Contract administrators 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 contract administrator is not truly independent. The traditional regime, whereby the contract administrator 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 contract administrator 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 contract administrator 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 contract administrator sometimes known as an "independent certifier"; or
- the provision of a first level of appeal from a determination of the contract administrator to an independent adjudicator or disputes review board before the activation of more formal dispute resolution mechanisms under the contract.

3.2 Truly independent certifier

As with the traditional administrator, 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 contract administrator. The certifier is technically trained and can usually inform itself as it thinks fit. The fundamental difference from the traditional contract administrator is in who employs the dispute resolver.

This option involves the "splitting" of the dual functions of the conventional contract administrator, 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 contract administrator 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 contract administrator'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 foregoing, 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 New South Wales Department of Public Works and Services' new C21 Contract, in Australia.

3.3 Appeal from decisions of contract administrator to independent adjudicator

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

In this model, *all* the functions of the contract administrator (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 contract administration 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 contract administrator, 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 contract administrator;
- 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 contract administrator 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 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 contract administrator 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 contract administrator.

Both the PC1 Contract, discussed below,[14] and the World Bank's Procurement of Works—Smaller Contracts, standard form of contract for the construction of projects valued under US$10 million, provide for use of the independent expert adjudication mechanism. The PC1 Administrative Dispute Procedure diagram, appended to this article, illustrates the mechanism.

Adjudication is also important in light of recent developments in the United Kingdom, which provide an example of one path which dispute resolution in the construction industry could take. Following the release of the Latham Report—"Constructing the Team"—in 1994, which included recommendations for dispute minimisation in the construction industry, the disputes clauses of the NEC engineering and construction contract have been completely revised, and the Housing Grants, Construction and Regeneration Act 1996 (UK) (HGCRA) has been enacted.

Following Latham's recommendation that disputes in the construction industry be resolved by a neutral adjudicator,[15] both of these changes increase the role of adjudication in the resolution of construction disputes.

Under the HGCRA a statutory right to refer a dispute arising under the contract, to adjudication, is created. As a result, a number of provisions relating to the adjudicator must be included in a construction contract, for if they are not, the Scheme for Construction Contracts will impose a set of default provisions. The NEC provides for the appointment of an adjudicator at the outset of a project, an approach which is also taken in the World Bank's Standard Bidding Documents—Procurement of Works—Smaller Contracts.

3.4 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

[14] See section 7.2, *infra*.

[15] M Latham "Constructing the Team" (1994) HMSO, London, ¶ 9.4–9.7, 9.14.

widespread implementation of the concept. Notwithstanding the hype, the absolute numbers of projects involving DRBs 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".[16]

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 DRBs, and furthermore the new FIDIC Orange Book as well as the 1996 Supplement to the FIDIC Red Book involve 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.[17]

The use of DRBs in Asia, to date, has not been significant.

A DRB is a panel of natural experts, existing from the outset of a construction project, which meet together at regular intervals, including site visits, 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:

- it meets and remains up to date with project progress regardless of the existence of any actual disputes; and
- 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 DRBs 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.[18]
- The DRB's decisions can be binding on an interim basis, subject to being reviewed or even replaced by amicable agreement or 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.[19]
- 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

[16] 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.

[17] Standard Bidding Documents—Procurement of Works (1995).

[18] For example: World Bank's Standard Bidding Documents—Procurement of Works (1995).

[19] For example: FIDIC (1995) Supplement to its Conditions of Contract for Works of Civil Engineering Construction, 4th edn, 1987 (the Red Book).

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.[20]

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 decision may encourage it to render bolder, more incisive decisions."[21] 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.[22]

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 the 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 U.S. source, DRB costs have ranged from 0.04% to 0.51% of total contract costs.[23]

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 one 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

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

[21] *Ibid.*, at p 12.

[22] Note 16, *supra*, at p 4.

[23] 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.

generate delays, it must be realised that "without discovery, the contractor enjoys a considerable informational advantage over the owner."[24]

- *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.[25] 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.[26] 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 problem of the independence of the dispute resolver. The DRB must be jointly appointed.

3.5 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.

[24] Note 20, *supra*, p 17.
[25] *Ibid.*, p 15.
[26] P Capper, "Making Arbitration and Dispute Review Boards Work Together Effectively", paper presented to the International Dispute Resolution Conference, Hotel Furama Kempinski, Hong Kong, 20 November 1996.

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 (e.g. 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.

3.6 Dispute Resolution Adviser[27]

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 DRBs and project arbitration as practised in the United States, as well as a number of models which have been suggested in U.K. writings.

> "The DRA system design starts with maximum party control of the dispute resolution process and then introduces a series of dispute resolution steps, each step becoming more interventionist with final resolution by short-form arbitration."[28]

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."[29] 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 (e.g. 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.

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

[28] C J Wall, "The Dispute Resolution Adviser System", unpublished paper (1995), p 10.

[29] *Ibid.*, p 12.

The DRA was originally conceived in a highly consultative process in which owner and pre-qualified 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.

4. NON-BINDING MATURE 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[30];
- 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 being given the opportunity to be aired.

Of key importance is to realise that not all 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.

The various non-binding methods can be analysed and compared according to their effectiveness in breaking down these barriers to

[30] In this context, Golann and Aaron cite some interesting statistics from the United States. 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(2) *Dispute Resolution Journal* at 28.

settlement. Unfortunately, the empirical evidence on construction ADR is scant to say the least, which means that the analysis must occur at 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 disutes. ADR can also be a source of delay to a strong case, or the case of an owner or contractor who is facing insolvency.[31]

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.

4.1 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 (e.g. if the negotiation fails one goes to a non-binding expert appraisal and then senior executive negotiation and so on). Soft fall-backs such as these may encourage the parties to postpone hard decisions.[32] 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

[31] J Smart, "Choosing the appropriate dispute resolution procedure" (1989) 5 BCL 169.
[32] Note 2, *supra*.

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.[33] 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.

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.

4.2 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 U.S. 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", i.e. 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,

[33] See, e.g., the procedure provided by the Dispute Resolution Adviser concept, discussed at section 3.6, *supra*. See section 3.5, Partnering, *supra*.

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."[34]

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 fall-back 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.[35] 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 underway, 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;
- non-binding advisory opinion of the merits of the dispute (à la expert appraiser); or even,
- a binding award (whether it be by way of arbitration or expert determination).

[34] Note 31, *supra*, at 174.
[35] Note 2, *supra*.

The most experienced of mediators is reluctant to agree to a change in job description 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.

4.3 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 check" 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.[36] Obviously the extent to which the mediator does 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.

4.4 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

[36] See generally D Golann and M Aaron, "Using Evaluation in Mediations" (1997) 52(2) *Dispute Resolution Journal* 26.

into a slanging match. The presence of lawers, 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".[37] 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 eludicating 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.

4.5 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."[38]

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 conductive to a mediation worth the time and effort. Coerced mediations are often productive of failed mediations."[39]

There is of course a contrary view, namely that, if the parties are stuck with

[37] L Street, "Senior Executive Appraisal: An Additional Dispute Resolution Procedure" [1989] *Australian Corporate Lawyer* (September) pp 7–8.
[38] Note 31, *supra*, at p 170.
[39] Note 2, *supra*.

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 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.

5. BINDING MATURE DISPUTE RESOLUTION TECHNIQUES

When all that has passed before has failed, and the differences feeding the dispute remain, it is necessary to have some form of final and binding dispute resolution procedure, to end the matter once and for all. Notwithstanding utmost good will and management, some disputes will not be amenable to resolution by agreement. Where large sums of money, governing probity requirements or the interests of third parties (such as insurers) are involved, commercial resolution may not be immediately attainable. In such cases, the parties require a process for binding, sometimes involuntary, dispute resolution.

Arbitration and litigation are complex processes requiring the allocation of significant resources, necessitating careful project management, and can easily become ends in themselves. Once commenced, the energy of the parties and of their advisers tend to be devoted to the process itself, rather than to the broad commercial picture of which the process is but a part.

The parties must keep in mind that a binding, involuntary, dispute resolution mechanism is merely a further step in the commercial process. The detailed preparation required provides the opportunity for issues to be crystallised, and for the relative strengths and weaknesses of the parties' contentions to be assessed. Bearing in mind that the process can be expensive, and sometimes will cost more than the amount in dispute, the commercial process can derive incremental value by continual use of the information which is generated by arbitration or litigation.

There can be many opportunities during formal dispute resolution for the settlement of the dispute. Whether they are created, and used effectively, will depend upon the parties themselves controlling the process, and the lawyers recognising that their duty to their clients is to achieve cost effective resolution of the dispute.

5.1 Arbitration

Inclusion of an arbitration clause will constrain the parties from recourse to the courts, where they would be able to go without restraint, but for the arbitration agreement. In this sense, the arbitration clause restricts the options of the parties and this needs to be clearly recognised by employers and contractors alike. Arbitration is not without its drawbacks and the decision to include an arbitration clause in the contract should be an informed commercial choice, with due consideration given to the nature of the project, the nationality of the assets of last resort, the place(s) where resort may be had to the courts, and the process of arbitration being considered for adoption.

Arbitration has been described as the private enterprise counterpart of the court system, deriving its existence and force from the agreement between two or more parties to submit their dispute to the final and binding determination of a third party agreed upon between them or appointed pursuant to their agreement by some other party.

Agreements to arbitrate are of two different types:

- *specific* arbitration agreements, in which the parties decide to refer an existing dispute to arbitration; and
- *general* arbitration agreements, whereby the parties to a contract provide that in the event of disagreement, some or all of the disputes arising between them will be referred to arbitration.

The arbitration agreement limits the arbitration proceedings in the following respects:

- it determines *when* the arbitral proceedings will take place;
- it defines *what* it is that can be arbitrated (and hence the jurisdiction of the arbitrator); and
- it sets the *legal and procedural framework* within which a dispute will be arbitrated.

5.1.1 Jurisdiction

The courts have interpreted general agreements to arbitrate liberally to enable a wide variety of disputes occurring in respect of the contract containing such a general agreement to arbitrate, to be the subject of arbitration proceedings. Thus, arbitration clauses, in providing that:

"All disputes or differences arising out of the contract or concerning the performance or

non-performance by either party of his obligations under the contract, whether raised before or after the execution of the works under the contract shall be decided as follows—",

as well as those arbitration clauses in substantially similar terms, have been held to cover disputes in respect of the following:

- claims in tort which are closely connected with the contract;
- the effect and consequences of an acceptance of repudiation of the agreement;
- frustration of the contract;
- contracts of compromise of the matters sought to be arbitrated;
- release, estoppel, waiver or set-off;
- internal rectification of contract;
- claims for civil remedies under any relevant legislation prohibiting misleading and deceptive conduct;
- claims that the contract is void *ab initio.*

The foregoing demonstrates the eagerness of the courts to give to an arbitration clause the widest operation its wording permits. But it should not be assumed that each and every arbitration clause, regardless of its wording, will give to an arbitrator jurisdiction to decide upon all of these types of dispute.

5.1.2 Joinder

Because of the consensual nature of arbitration, it is not possible to involve parties in the process who are not parties to the arbitration agreement. This means that third parties, such as subcontractors, cannot without consent be part of an arbitration between a head contractor and an employer. Although this may streamline the process, it poses a considerable procedural difficulty where it is necessary for the arbitrator to dispose of a dispute involving parties other than the parties to the arbitration agreement.

5.1.3 Procedure

The arbitration agreement can, and should, expressly deal with the procedural law which will apply to the arbitral proceedings and the procedure to be used for the arbitration. This can be quite important as the procedural law governing the arbitration process varies between states within countries and certainly from country to country. The choice of law will make quite a difference to the way in which an arbitration can be conducted.

The procedural rules of a particular arbitral agency are commonly adopted in general agreements to arbitrate and provide a framework within which the arbitration is to be conducted.[40] This is less common with domestic agreements to arbitrate but is essential for international agreements.

[40] See section 5.3, *infra.*

A detailed knowledge of the procedural rules available, and their advantages and disadvantages from the point of view of the parties, is vital in order to agree sensibly upon an arbitration procedure tailored to achieve effective dispute resolution.

5.1.4 Stay of proceedings

An unwilling party to an arbitration may commence court proceedings in an attempt to supplant an arbitration. If this occurs, the only real remedy available to the party attempting to enforce the arbitration agreement is to apply for a stay of the court proceedings. Local legislation may give specific powers to the courts to stay court proceedings commenced in respect of disputes which fall within the scope of an arbitration agreement.[41]

5.1.5 Party autonomy, arbitrability and international arbitration

The advantages of international arbitration over enforcement of rights through litigation are well known. International arbitration enables parties to transcend geographical and cultural boundaries[42] by enabling them to set their own rules for determining disputes between them. In particular, parties can choose:

- the adjudicator;
- the place of the arbitration;
- the law of the arbitration; and
- the law pursuant to which the dispute is to be determined.

It is the freedom of parties to make these choices which is "the juristic foundation of international commercial arbitration".[43]

Thus the starting-point for an examination of arbitrability is the principle of freedom of contract—a party should be permitted to bargain with any right it possesses. When a party enters into an arbitration agreement, that party offers as consideration the undertaking that his or her right in respect of the wrong committed will be considered fully vindicated once the arbitral award is discharged.[44] This is why arbitration has been described as a "social" as opposed to a state jurisdiction.[45]

[41] For example, in Australia, the uniform Commercial Arbitration Acts.

[42] J Jakubowski, "Reflections on the Philosophy of International Commercial Arbitration and Conciliation" in J C Schultz and A J Van den Berg (Eds) *The Art of Arbitration* (1982) at 175.

[43] Sir M J Mustill, "A New Arbitration Act for the United Kingdom? The Response of the Departmental Advisory Committee to the UNCITRAL Model Law", 6(1) *Arbitration International* 3 at 31.

[44] It should be recognised that not all arbitrations deal with rights. However, the arbitrability question is unlikely to arise in the case of "interests arbitrations" since in such cases the arbitrator is not usurping the courts' jurisdiction.

[45] J Jakubowski, note 42, *supra,* at 178.

5.1.5.1 The New York Convention and the UNCITRAL Model Law

Despite the emphasis in the New York Convention on party autonomy, there are still some important restrictions on the power of parties to choose how and where their disputes are to be determined. One of those restrictions is "arbitrability". Generally, if a dispute is not considered to be "arbitrable" it will not be referred to arbitration, if an award is made about a matter which is not considered to be arbitrable it will be liable to be set aside in the country where the award was made or may not be enforceable in the place where recognition and enforcement of the award are sought.

Article II(1) of the New York Convention governs the "front end" arbitrability question. It provides that each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject-matter capable of settlement by arbitration.

Article V(1) of the New York Convention sets out five grounds for refusing recognition and enforcement of awards. Article V(2) provides two additional grounds namely that: (a) the subject-matter of the difference is not capable of settlement by arbitration under the law of the country of enforcement; and (b) the recognition and enforcement of the award would be contrary to the public policy of that country.

These provisions are reflected in the UNCITRAL Model Law. Although not expressly referred to at the "front end" stage, Article I(5) preserves state laws by virtue of which certain disputes may not be submitted to arbitration.

Article 34(2) of the UNCITRAL Model Law sets out the same grounds as those contained in Article V of the New York Convention, as grounds for setting aside an award at the place of making the award. Article 34(2)(b)(i) specifies non-arbitrability. Similarly, Article 36(1) repeats the grounds contained in Article V of the New York Convention as grounds for refusing recognition and enforcement of awards. Article 36(1)(b)(i) specifies non-arbitrability.

5.1.5.2 When is the Issue Likely to Arise? Arbitrability can arise at any of the following stages[46]:

1. where a party seeks a stay of court proceedings alleged to have been instituted in contravention of an arbitration agreement;
2. where a party seeks compulsory referral to arbitration;
3. where the jurisdiction of the arbitral tribunal is challenged, i.e. a party may seek an injunction preventing a dispute from being arbitrated;
4. where an application is made to set aside an award; and
5. at the recognition/enforcement stage, where the arbitrability of the dispute will be determined by the courts of the place of enforcement.

[46] M Jacobs, *International Commercial Arbitration in Australia Law and Practice*, ¶ 8.290.

5.1.5.3 Arbitrability The term "arbitrability" is used in different contexts with different meanings. For example it can refer to whether or not a person alleged to be bound did agree to be bound and whether a particular dispute falls within the wording of the arbitration clause (sometimes referred to as subjective arbitrability), and whether a dispute is inherently arbitrable as a matter of public policy (sometimes referred to as objective arbitrability).

This article is primarily concerned with objective arbitrability.

At first blush the meaning of objective arbitrability is simple—the ability of something to be arbitrated.

In the absence of a universally accepted international trade law and an international court with appropriate jurisdiction, questions or arbitrability of international disputes and the enforceability of international arbitration awards are necessarily determined by the domestic laws of one or more countries. Courts have been described as "an executive partner to provide greater effectiveness to the arbitral process". However this partnership is not always harmonious and is perhaps better described as competitive.[47]

> "The phenomenon of non-domestic arbitration in competition with the federal judicial machinery poses, in its starkest form, the contest between rights which could be traced to the personalities of the contractors alone, and rights whose source is explicable only in terms of the contractors' existence within a polity."[48]

Redfern and Hunter consider the concept of arbitrability:

> "The concept of arbitrability, properly so called, relates to public policy limitations upon arbitration as a method of settling disputes. Each State may decide in accordance with its own economic and social policy, which matters may be settled by arbitration and which may not. In international cases, arbitrability involves balancing of competing policy considerations. The legislators and courts in each country must balance the importance of reserving matters of public interest (such as human rights or criminal law issues) to the courts against the public interest in the encouragement of arbitration in commercial matters."[49]

Thus although the word "arbitrability" conveys a sense of absoluteness, due to its necessary relationship with public policy, considerable difficulty is encountered in defining the limits of arbitrability.

5.1.5.4 Arbitrability and public policy It is generally accepted that arbitrability, and the other specific grounds referred to in Article V(1) of the New York Convention, are aspects of the concept of public policy. Thus Bockstiegel[50] notes that the separation of arbitrability in Article V(2)(a) from the general public policy ground in Article V(2)(b) may be superfluous, but concludes that the specific reference to arbitrability *requires* Contracting States to consider the question of arbitrability.

[47] M Kerr, "Arbitration and the Courts: the UNCITRAL Model Law" (1985) 34 *International Comparative Law Quarterly* 1 at 2.

[48] E M Morgan, "Contract Theory and the Sources of Rights: An Approach to the Arbitrability Question" (1987) 60 *Southern California Law Review* 1059 at 1059–1060.

[49] A Redfern and M Hunter, "Law and Practice of International Commercial Arbitration", 2nd edn (1986) at 137.

[50] K-H Bockstiegel, *Public Policy and Arbitrability*, ICCA Congress Series No 3, 177 at 183.

Public policy by its very nature is not static nor is it precise. Public policy depends upon the judgement of the respective community at a particular time. What is considered to be part of public policy in one nation state may not be seen as a fundamental standard in another standard nation state with differing economic, political, religious, social and legal systems. One need only consider the differences between Sharian law, common law and civil law countries to understand the potential differences in the meaning of public policy. For this reason public policy has been described as, "a very unruly horse and when once you get astride it you never know where it will carry you".[51]

Courts traditionally have jealously guarded to themselves matters of important public significance such as rights relating to personal and family status, criminal law, bankruptcy, industrial, intellectual and commercial property rights affecting matters of public interest; and rights protected by reason of the special situation of the party such as alimony, rights of the tenant and the employee, rights of the agent or the consumer. It is argued that arbitration of such disputes has the potential to undermine both the legal, social and political fabric of society.

Various justifications have been provided by courts for reserving such disputes to themselves including:

1. some matters should only be dealt with by local courts which permit appropriate appeals as safeguards;
2. the lack of opportunity to conduct a wide ranging review of arbitrable awards and confidentiality;
3. the settlement of the dispute affects interests other than those of the parties, or implicates values other than those that concern the parties[52];
4. where the legal principle at issue has aims other than promoting justice between the parties[53];
5. accountability—decision-makers whose decisions may not be published;
6. the coercive powers of the state should not be vested in an arbitrator; and
7. protection of third party interests not represented at the arbitration.

Where there is a breach of public policy, it has been argued there is no "genuine consent" between the parties.[54] This analysis has the advantage of avoiding criticism of intrusion into the principle of autonomy.

[51] *Richardson* v. *Mellish* (1824) 2 Bing 228 at 252. Thanks for this quotation to Duncan Miller from his article "Public Policy in International Commercial Arbitrations in Australia", 28 ACLN 5.

[52] W W Park, "National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration" (1989) 63 *Tulane Law Review* 647 at 650.

[53] S E Sterk, "Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defence" (1981) 2 *Cardozo Law Review* 481 at 486.

[54] J Stempel, "A Better Approach to Arbitrability" (1991) 65 *Tulane Law Review* 1377 at 1426. See also the comments in relation to developing nations, section 5.9, *infra*.

5.1.5.5 International public policy Critics of the potential width of the public policy exception see it as providing an opportunity for national courts to use it as a cloak to substitute their preferences for those of the parties.[55]

However, in international arbitrations many countries have, by express reference[56] or through their courts,[57] interpreted public policy not to refer to internal national public policy standards. In *Parsons & Whittemore Overseas Co v. Société Generale de L'industrie du Papier*,[58] the Second Circuit of Appeals found that Article V(2)(b) should be construed narrowly:

> "Enforcement of foreign arbitral awards may be denied on these [public policy] bases only where enforcement would violate the forum's state's most basic notions of morality and justice."[59]

Thus, matters considered to violate public policy in domestic relations would not necessarily be held to violate public policy in international relations.[60] However this has not yet been universally accepted.[61]

As will be seen in section 5 of this article, many of the "justifications" for reserving disputes concerning certain subject-matter have now been discredited in favour of liberalising the subject-matter which is considered to be arbitrable.

In addition, a number of countries have enacted specific legislation to enable the arbitration of disputes concerning subject-matter previously held to be inarbitrable. An example is the U.S. patent legislation.[62] Where specific legislation is enacted to permit arbitration of a dispute, the question of non-arbitrability will not arise for that jurisdiction.

5.1.6 What law should be applied to determine arbitrability?

According to which body of law should arbitrability be determined?[63] The answer to this question could be different depending on the stage of dispute determination at which the question is raised.

On the controversial issue of whether a municipal judge must apply foreign mandatory rules of law, Blessing persuasively argues that the limit of arbitrability is set "only by the limits imposed on the basis of public policy in

[55] *Ibid.* at 1395.

[56] Art 15.02(5) of the new French Arbitration Law of 1981.

[57] *Trésor Public Galakis* JCP (1966) 14 798 (France) 945. Ct 2449; *Fritz Scherk* v. *Alberto Culver Co* 417 US 506 (1974) (USA); and *Mitsubishi Motor Corp* v. *Soler Chrysler-Plymouth, Inc.* 473 US 614 (1985) (USA).

[58] 508 F.2d 969 (2d Cir 1974).

[59] *Ibid.* at 974.

[60] A J Van den Berg, *The New York Arbitration Convention of 1958; Towards a Uniform Judicial Interpretation*, Kluwer Law and Taxation Publishers, Deventer, Netherlands, 1981, pp 360–363.

[61] This interpretation of "public policy" was referred to in the Australian Case of *Resort Condominiums International Inc.* v. *Bolwell* (1993) 118 ALR 655 at 676 but neither accepted nor rejected. It was noted that no Australian case had accepted the interpretation.

[62] 35 USC § 294.

[63] In an example given in his article "Arbitrability of Intellectual Property Disputes" (1996) 12(2) *International Arbitrator* 191 at 192, Dr Blessing suggests that the answer could be one of eight different possible systems of law.

international affairs", such that there has been some violation of a state's fundamental legal notions.[64]

5.1.6.1 At the stage of enforcement of an agreement to arbitrate The question may first have to be addressed at the stage that a party seeks assistance from a court for the enforcement of an arbitration agreement. No guidance is given by the New York Convention as to the law to be applied in determining the answer to this question.

A J van den Berg[65] argues that the question of arbitrability must be determined by the law of the forum state, because a court derives its competence from its own national law governing the agreement. Whether the competence has lawfully been excluded in favour of arbitration is thus a matter for the law of the forum.

To the contrary, Jacobs[66] argues in favour of the proper law of the arbitration agreement. This, it is said, gives effect to considerations of party autonomy and the legitimate expectations of business persons.

Notwithstanding Jacobs' views, it seems with respect unlikely that the law of the forum can be regarded as irrelevant to the issue.

5.1.6.2 At the time of challenge to the award at the place of making the award What law should the arbitrator apply to the question of arbitrability of a dispute when making the award?

If the arbitration is conducted under the UNCITRAL Model Law then an award will be liable to be set aside if the dispute concerns subject-matter not capable of settlement by arbitration under the law of the place where the award is to be made (Article 34(2)(b)(i)).

5.1.6.3 At the time when recognition and enforcement is sought Recognition and enforcement of an award may be refused if a court in the country where enforcement is sought finds that the dispute, the subject of the award, is not capable of settlement by arbitration under the law of that country (Article V(2) of the New York Convention,[67] also reflected in Article 36(1)(b)(i) of the UNCITRAL Model Law).[68]

5.1.6.4 First Option v. *Kaplan* Dicta in the recent case of *First Option of Chicago* v. *Kaplan*,[69] would seem potentially to impact on the way in which the question of arbitrability should be approached. The Supreme Court in this case held[70]:

[64] *Ibid.*, at 205.
[65] Van den Berg, note 60, *supra*, at 152–153.
[66] Jacobs, note 46, *supra*, ¶ 8.340.
[67] Support is also found in judgments of Italian Courts: V Vigoriti, "International Arbitration in Italy" (1990) 1 *American Review of International Arbitration* 77 at 82.
[68] See also the Second Look Doctrine discussed in section 5.10, *infra*.
[69] 115 S Ct 1920 (1995).
[70] *Ibid.* at 1923.

> "If the parties agreed to submit arbitrability to arbitration then the court's standard for reviewing the arbitrator's decision about the matter should not differ from the standard courts apply when they review any other matter that the parties have agreed to arbitrate... That is to say, the court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain circumstances."

These dicta suggest that in some situations, what the court called "the arbitrability question itself" may be submitted to arbitration, in which case the courts must "give considerable leeway" to arbitrator's decisions on the limits of their own jurisdiction.

However, it has been suggested (correctly in the author's view) that the reference to "arbitrability" in these dicta should be restricted to "subjective" arbitrability.[71]

5.1.7 Arbitral proceedings

Arbitrators are bound to act judicially and to decide according to law. The requirements in relation to procedural fairness are subject to the agreement of the parties as to procedure.

The usual position is that the arbitrator determines the question at issue according to law. However, often the relevant arbitration legislation will permit the parties to agree in writing to allow the arbitrator to determine the question as *amiable compositeur* or *ex aequo et bono*. Although an *amiable compositeur* is not required to decide the question "according to law" it is suggested that the arbitrator cannot disregard the law but rather is only freed from its strictness in application and its technicalities.

The rules of procedural fairness require arbitrators to observe three general principles:

1. each party must be given full opportunity to present its own case to the tribunal;
2. each party must be made aware of its opponent's case, and must be given a full opportunity to test and rebut it; and
3. each party must have the same opportunity to put forward its own case, and to test that of its opponent.

In the absence of agreement, the requirements with regard to procedural fairness impose a limit on what can be done by arbitrators to foreshorten proceedings in terms of their ability to make their own enquiries and rely on the expert opinion of persons not called as witnesses by the parties.

Generally, under the relevant arbitration legislation, the arbitrator will be required to contemporaneously furnish reasons for the award unless the parties agree to the contrary. With regard to findings of fact, it is desirable for a finding to be made in respect of matters of fact which are relevant and have been the subject of the argument.

[71] For a comprehensive analysis of the decision see W W Park, "The Arbitrability Dicta In *First Options* v. *Kaplan*: What sort of Kompetenz-Kompetenz Has Crossed the Atlantic?" (1996) 12(2) *Arbitration International* 137.

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5.1.8 Simplified arbitration

Arbitration has a somewhat undeserved reputation for being incapable of delivering speedy and cheap dispute resolution. This is no doubt due to the temptation in arbitration to mimic traditional court procedure. In many instances the arbitrator's fear of criticism by a court has resulted in arbitration procedures being more cumbersome than the foreshortened procedures available in the commercial courts.

As a consequence of the essentially consensual nature of arbitration, arbitral proceedings can be as simple and quick as the parties agree. If a dispute reaches arbitration the parties, and particularly their advisers, should look carefully at ways of simplifying the process. In the past there has been too little advantage taken of the opportunity to agree upon a simplified procedure at the commencement of an arbitration. This is due to the following factors:

- it is perceived to be to the commercial advantage of one party to lengthen, delay and increase the expense of the process; and
- lawyers have not been prepared to advise their clients confidently of the advantages (and risks) of simplified arbitration procedures.

One of the reasons why lawyers hesitate to press their clients to consider simplified forms of arbitration is the fear of leaving stones unturned in the path to victory. Procedural steps designed to maximise a party's chances of success but which are in many instances productive of delay and expense include the giving of oral evidence in chief, particulars and discovery. Full scale discovery and detailed pleadings with lengthy requests for particulars are designed to do away with "trial by ambush" and enable the parties to prepare fully to meet the cases presented at the hearing. They do, however, provide an effective means of delay and oppression to parties seeking the final determination of a dispute, and except in so far as they may shorten the length of the hearing, they tend to increase costs greatly.

Ways of modifying or eliminating the procedural steps mentioned above, and others involved in the formal dispute resolution process, should be part of an active consideration by lawyers and their clients at the commencement of the arbitration. Methods of simplifying the arbitral proceedings include:

- "papers only" arbitration where the arbitrator decides issues of contract construction or technical interpretation on written submissions from both parties without the need for any pleadings or (sometimes) any hearing;
- limitations on discovery of documents, a process which can bury both parties in mountains of paper, of which only some has any relevance to the issues;
- "look sniff" arbitrations where the issue is quality of work and the arbitrator looks at the work in question and makes a binding determination within days of the dispute arising;

- simplified pleadings and statements of the matters at issue;
- presentation of evidence in writing rather than orally with (sometimes) a limited time for cross-examination;
- written rather than oral submissions; and
- exchanges of expert reports prior to hearing with or without a requirement for the experts from the opposing sides to confer and isolate for decision in an appropriate way only those issues on which they cannot agree.

The arbitration process can be as streamlined as the parties wish. This is one of the major advantages of arbitration. Unfortunately, the opportunities of simplifying and expediting arbitrations are not sufficiently recognised nor implemented.

5.2 Institutional versus other arbitration

While a number of good reasons for simplifying the procedures of an arbitration have just been listed, this should not be seen as supporting the rejection of the rules of the various institutions available for the conducting of arbitrations. Such rules provide both a procedural and substantive framework within which the parties must work. A level of certainty about what is expected of the parties is provided by such rules. Institutionalised arbitration, not just using the rules, also provides certainty as to how the arbitration will proceed, how it will be administered, and even allows for the vetoing of a decision in some circumstances.

Thus, the parties, when agreeing to allow disputes to be subject to arbitration, whether through a specific arbitration agreement or a general arbitration agreement, must consider the pros and cons of institutional, as against other forms of arbitration. However, it must be remembered that as non-institutional forms of arbitration allow the parties to agree upon the rules by which the tribunal will conduct the arbitration, the various institutional rules may be used, and possibly moulded, without actually referring the dispute to any particular institution. Thus, the discussion which follows, of the various rules available in Asia, is relevant to either form of arbitration.

Some of the advantages of institutionalised arbitration include:

- certainty provided by the use of tried and tested arbitration clauses, avoiding the danger of a clause which fails to allow the formation of a tribunal, but locks the courts out of any hearing of the dispute, leaving the parties without a forum[72];
- the provision of "established and time tested rules and procedures" for the conduct of the arbitration allowing for certainty[73];

[72] J Thiefry, "The Finality of Awards in International Arbitrations", (1985) 2 *Journal of International Arbitration* 27, p 40.

[73] M F Hoellering, "Alternative Dispute Resolution and International Trade", *Arbitration and the Law; AAA General Counsel's Annual Report*, (1986), p 114.

- the provision of arbitrators from a screened pool of candidates[74];
- the ability to arrange for ancillary items such as translators, hearing rooms and the scheduling of procedures[75];
- the fact that most institutions can also offer other forms of alternative dispute resolution[76];
- the provision of administrative assistance, allowing the tribunal to concentrate on the matters at hand; and
- the weight accorded to awards of such institutions assisting the recovery of such awards.[77]

In contrast, some of the advantages of other forms of arbitration include:

- the overall administrative fees may be minimised[78];
- the most convenient location for the hearing can be chosen;
- the rules for the arbitration can be tailored to suit the specific circumstances of the dispute (if already existing)[79]; and
- by tailoring the rules, time and cost can be minimised, or the procedure designed to encourage the continuance of a working relationship.[80]

Weighing up the advantages of both options; the parties must make a decision on which approach is most likely to assist the resolution of the dispute, or if no dispute has yet arisen, the best option to run with in a general arbitration agreement.

5.3 Regional arbitration options

Once it has been decided that arbitration will form part of the dispute resolution process, it is necessary to determine how the arbitration will be carried out. This task is made somewhat easier by the availability of the standard rules of various organisations for the conduct of arbitration.

A consideration of all the available rules would be an arduous task. As such, it is proposed to look at a number of the rules emanating from, or applied by, international arbitration institutions within Asia. The rules chosen are those of the Australian Centre for International Commercial Arbitration[81] (ACICA), the London Court of International Arbitration[82] (LCIA), the Hong

[74] *Ibid.*
[75] *Ibid.*
[76] *Ibid.*
[77] J G Wetter, "The Present Status of the International Court of Arbitration of the ICC: An Appraisal" (1990), 1 *American Review of International Arbitration* 91, p 106.
[78] H L Arkin, "International Ad Hoc Arbitration: A Practical Alternative", (1987) 53 *Arbitration* 260, p 261.
[79] *Ibid.*, p 262.
[80] R J Graving, "The International Commercial Arbitration Institutions, How Good a Job Are They Doing?", (1989) 4 *American University Journal of International Law and Policy* 368.
[81] UNCITRAL Arbitration Rules, 1976.
[82] London Court of International Arbitration Rules, 1998.

Kong International Arbitration Centre[83] (HKIAC), the Singapore International Arbitration Centre (SIAC)[84] and the Kuala Lumpur Regional Centre for Arbitration[85] (KLRCA).

Both the ACICA and HKIAC recommend the use of the UNCITRAL Arbitration Rules, subject to the appointing and administering body being the ACICA or HKIAC, respectively. However, the rules applied by these institutions share many similarities with the KLRCA Rules which adopt the UNCITRAL Rules, subject to a number of modifications. The SIAC Rules are also based largely on both the UNCITRAL Arbitration Rules and the Rules for Arbitration of the LCIA, which are themselves similar to the UNCITRAL Arbitration Rules. Thus, it will become apparent that there are many points in common between the various rules. However, the differences that do exist are of practical importance, and must therefore be considered.

As the relative advantages and disadvantages of the various arbitration rules available are of critical importance in determining which rules should be specified in an arbitration agreement, it is proposed to compare the rules of the various institutions previously mentioned, so as to allow for a sensible decision on which rules to commit to. The comparison will be undertaken in relation to a number of stages and issues in the arbitral process, those being[86]:

- initiation of the arbitral process;
- arbitral proceedings;
- the award; and
- costs.

References to the UNCITRAL Rules shall be relevant for consideration of the ACICA Rules, HKIAC Rules and, unless specific mention is made of the KLRCA Rules, the KLRCA Rules.

5.3.1 Initiation of the arbitral process

All of the rules, bar the LCIA[87] and SIAC,[88] expressly require an agreement, in writing, stating that the dispute will be settled by arbitration in accordance with their respective rules.[89]

5.3.1.1 Notice To commence an arbitration under any of the rules, written notification must be given by the claimant to the respondent, expressing their wish to commence arbitration, and providing various details relating to

[83] UNCITRAL Arbitration Rules, 1976.
[84] Arbitration Rules of the Singapore International Arbitration Centre, 1997.
[85] Rules for Arbitration of the Kuala Lumpur Regional Centre for Arbitration.
[86] Attorney-General's Legal Practice (1997), *International Commercial Dispute Resolution Handbook*, Office of Legal Information and Publishing, Attorney-General's Department, Canberra, at p 35.
[87] "Where any agreement, submission or reference provides in whatsoever manner for arbitration under the rules of the LCIA", the parties shall be taken to have agreed in writing.
[88] If "any agreement, submission or reference" provides for arbitration under the SIAC Rules, the parties will be taken to have agreed that the arbitration shall be conducted in accordance with the SIAC Rules.
[89] UNCITRAL Rules, Art 1; KLRCA Rules, r 1.

the parties, the arbitration and the dispute.[90] However, under the SIAC and KLRCA Rules, such notification must also be filed with the registrar of the SIAC or the director of the KLRCA, as relevant[91]; while the LCIA Rules require a written request to be filed with the registrar of the LCIA Court.[92] Further, under the SIAC and KLRCA Rules, if the parties have agreed to allow a party other than the SIAC or KLRCA to authorise arbitrators, this must be filed with the registrar of the SIAC or director of the KLRCA, whichever is relevant.[93]

Of particular interest is the fact that under the LCIA and SIAC Rules, the arbitration commencement date will be deemed to be the date of receipt by the registrar of the notification of arbitration.[94] Thus, service of a request for arbitration, while a condition precedent, is not enough to commence arbitration and, therefore, prompt delivery of the notice to the registrar is advisable. In contrast, under the UNCITRAL Rules, the arbitral proceedings are deemed to commence on the date on which notice of arbitration is received by the recipient.[95]

Other distinct requirements include:

- the UNCITRAL Rules also require the notification to include a proposal as to the number of arbitrators (i.e. one of three).[96]
- the LCIA Rules require inclusion of the fee prescribed in the Schedule of Costs.[97]

5.3.1.2 Number of arbitrators While all the rules allow the parties to agree to the number of arbitrators (i.e. one or three); under UNCITRAL, if the parties fail to do so within 15 days of receipt of notice of arbitration by the respondent, three arbitrators will be appointed.[98]

In contrast, under the LCIA Rules, if the parties fail to agree in writing to have more than one arbitrator, then a sole arbitrator will be appointed unless "in view of all the circumstances of the case a three-member tribunal is appropriate".[99] Under the SIAC Rules, a sole arbitrator will be appointed unless the parties have agreed otherwise.[100]

5.3.1.3 Appointment of tribunal If there is to be only one arbitrator, all of the rules, bar the LCIA Rules, allow the parties to agree on who will act as arbitrator.[101] In contrast, under the LCIA Rules, the LCIA Court will appoint

[90] UNCITRAL Rules, Art 3; LCIA Rules, Art 1; SIAC Rules, r 3.
[91] SIAC Rules, rr 2.4 and 3.4; KLRCA Rules, r 2.
[92] LCIA Rules, Art 1.1.
[93] SIAC Rules, rr 3.5, KLRCA Rules, r 2(3).
[94] LCIA Rules, Art 1.2; SIAC Rules, r 3.3.
[95] UNCITRAL Rules, Art 3(2).
[96] UNCITRAL Rules, Art 3(3)(g).
[97] LCIA Rules, Art 1.1(f).
[98] UNCITRAL Rules, Art 5.
[99] LCIA Rules, Art 5.4.
[100] SIAC Rules, r 6.
[101] UNCITRAL Rules, Art 6, SIAC Rules, r 7.

the arbitrator or arbitrators.[102] However, the difference is not as great as first appears, as Articles 1.1(e) and 2.3 contemplate party nomination of an arbitrator, while Article 5.5 states that "the LCIA Court will appoint arbitrators with due regard for any particular method of criteria of selection agreed in writing by the parties". Further, the LCIA Rules do allow an agreed appointing party to appoint an arbitrator, subject to the LCIA Court's satisfaction with that arbitrator.[103]

Under all the rules, bar those of the LCIA, if the parties fail to agree within a specified time,[104] then an agreed authorising authority may appoint the arbitrator. If no other authority is specified, or the authority refuses to act, the authorising authority will be the ACICA,[105] HKIAC,[106] KLRCA[107] or SIAC,[108] depending on which institution is conducting the arbitration. Under the UNCITRAL and KLRCA Rules, a list procedure is followed, unless such an approach is considered inappropriate or the parties agree that such an approach should not be used.[109] In comparison to the LCIA approach, which requires appointment within 30 days of the request,[110] the list method would appear to add a delay in the instigation of proceedings.

Where the dispute is to be settled by three arbitrators, under all of the rules except those of the LCIA, each party has the opportunity to appoint one arbitrator.[111] If they fail to do so, the other party may request the appointing authority to nominate the second arbitrator, with the same procedures being followed as for a sole arbitrator.[112] Once two arbitrators have been appointed, they must select and agree upon a presiding arbitrator. If they fail to do so, the appointing authority will appoint the arbitrator.

In comparison, under the LCIA Rules, the parties will only be allowed to nominate an arbitrator if they have so agreed in writing.[113] Further, the LCIA Court will always appoint the chairman (equivalent of presiding arbitrator).[114] Due to the various time frames allowed in the case of a tribunal consisting of three arbitrators, the scope for delay under all the rules bar those of the LCIA, is considerable.

If the dispute is having a serious effect on progress of the project, or on the financial viability of one of the parties, such delay could be a major cause of concern. Such concerns have, apparently, been recognised in the LCIA Rules, which allow for the expedited formation of the arbitral tribunal,

[102] LCIA Rules, Art 5.
[103] LCIA Rules, Arts 7.1 and 5.3.
[104] UNCITRAL Rules, Art 6(2)—30 days; SIAC Rules, r 7.2—21 days.
[105] UNCITRAL Rules, Art 6(2), as varied by arbitration agreement.
[106] *Ibid.*
[107] UNCITRAL Rules, Art 6; as modified by KLRCA, r 3(1).
[108] SIAC Rules, r 7.2.
[109] UNCITRAL Rules, Art 6(3); KLRCA Rules, r 3(2).
[110] LCIA Rules, Art 5.4.
[111] UNCITRAL Rules, Art 7(1); SIAC Rules, r 8.1.
[112] UNCITRAL Rules, Art 7; SIAC Rules, r 8.
[113] LCIA Rules, Art 7.2.
[114] LCIA Rules, Art 5.6.

following a request from one of the parties.[115] While this process is not automatic, it does provide the court with a discretion, in light of all the circumstances, to speed up the whole formation process.[116]

Finally, the LCIA and SIAC Rules also allow for multi-party appointment of arbitrators, which could be very useful in construction disputes, considering the large number of parties possibly involved.[117]

5.3.1.4 Independence and impartiality of arbitrators All the rules include mechanism to ensure the independence and impartiality of the arbitrators,[118] though none more so than the LCIA Rules, which require each arbitrator to provide the registrar with a written resume, fee rates, and to sign a declaration in relation to his or her impartiality and independence.[119] However, even without such a procedure, the UNCITRAL and SIAC Rules both allow for the removal or rejection of arbitrators where a lack of impartiality or independence is of concern.

5.3.1.5 Challenge of arbitrators All the rules have some mechanism for challenging the appointment of a particular arbitrator. Under the SIAC Rules, notice of the challenge must be sent within 14 days of appointment, if there are reasons which give rise to justifiable doubts regarding impartiality or dependence[120]; whilst under the UNCITRAL and LCIA Rules, such a challenge must be launched within 15 days.[121]

If, following a challenge, the other party disagrees and the arbitrator does not wish to withdraw him or herself; under the UNCITRAL Rules, if there was an appointing authority, whether they appointed the arbitrator or not, that authority will decide the outcome of the challenge.[122] While similarly, under the SIAC Rules, such a decision will only be made by an appointing authority if that authority made the initial appointment; otherwise, the Chairman of the SIAC will decide.[123] In contrast, under the LCIA Rules, the LCIA Court will always decide on the challenge.[124]

Under both the UNCITRAL and SIAC Rules, any substitute arbitrator shall be chosen pursuant to the original procedures, except if this would require the designation of an appointing authority. In such a case, the authority that decided the challenge shall appoint the substitute arbitrator.[125] In contrast, the LCIA Court retains a discretion as to whether to follow the original appointing procedures.[126]

[115] LCIA Rules, Art 9.
[116] LCIA Rules, Art 7.3.
[117] LCIA Rules, Art 8, SIAC Rules, r 9.
[118] UNCITRAL, Arts 9–12, SIAC, rr 11–14.
[119] LCIA Rules, Art 5.3.
[120] SIAC Rules, r 13.
[121] UNCITRAL Rules, Arts 9–11; LCIA Rules, Arts 10.3–10.4.
[122] UNCITRAL Rules, Art 12(1).
[123] SIAC Rules, r 14.1.
[124] LCIA Rules, Art 10.4.
[125] UNCITRAL Rules, Art 12(2); SIAC Rules, r 14.2.
[126] LCIA Rules, Art 11.

5.3.1.6 Replacement Both the UNCITRAL and SIAC Rules apply the same procedures for the appointment of a replacement arbitrator, following the death or resignation of an arbitrator, as were undertaken for the initial appointment.[127] In addition to these bases for replacement, the LCIA Court may revoke the appointment of any arbitrator, without a challenge having been lodged, if the arbitrator deliberately violates the agreement, does not act fairly and impartially or with reasonable diligence and as above,[128] in contrast to both the UNCITRAL and SIAC Rules, the LCIA Court retains a complete discretion as to whether to follow the original appointing procedure, following the removal of an arbitrator.[129]

Further, under the UNCITRAL and SIAC Rules, if the arbitrator fails to act or it is impossible for the arbitrator to perform his or her functions, then the procedure in respect of a challenge and replacement shall be applied.[130] Thus the flexibility available to the LCIA Court is not available under the UNCITRAL or SIAC Rules.

5.3.2 Proceedings

While the general provisions of all the rules attempt to ensure the requirements of natural justice are satisfied, only the LCIA and SIAC Rules expressly encourage the parties to agree upon the procedures for the conduct of the arbitration.[131] Although, under the LCIA Rules, any such agreed procedures must comply with the tribunal's general duties in relation to a fair, impartial, efficient and final resolution,[132] in contrast, the UNCITRAL Rules specify that the tribunal "may conduct the arbitration in such manner as it considers appropriate", without reference to the agreement between the parties.[133] The LCIA and SIAC Rules both allow the tribunal a very wide discretion. In the case of the SIAC Rules, in the absence of agreement as to procedural rules,[134] and in the case of the LCIA, unless the parties have otherwise agreed,[135] which is more difficult to exclude than the SIAC requirements.

5.3.2.1 Place All of the rules allow the parties to agree on the place where the arbitration will be held.[136] However, under the SIAC Rules, the tribunal may override this decision if it believes another place is more appropriate.[137] In contrast, under the UNCITRAL Rules, the tribunal will only make such a

[127] UNCITRAL Rules, Art 13; SIAC Rules, r 15.
[128] LCIA Rules, Arts 10.1–10.2.
[129] LCIA Rules, Art 11.
[130] UNCITRAL Rules, Arts 13(2) and 9–12; SIAC Rules, rr 15.2 and 12–15.1.
[131] LCIA Rules, Art 14, SIAC Rules, r 27.
[132] LCIA Rules, Art 14.1.
[133] UNCITRAL Rules, Art 15(1).
[134] SIAC Rules, r 17.2.
[135] LCIA Rules, Art 14.2.
[136] UNCITRAL Rules, Art 16(1); SIAC Rules, r 19.1; LCIA Rules; Art 16.1.
[137] SIAC Rules, r 19.1.

decision when the parties have failed to agree on a location.[138] Under the LCIA Rules, if a location is not specified, the arbitration shall be held in London, unless the LCIA Court determines there is a more appropriate location, under the circumstances.[139]

5.3.2.2 Language As with location, all the rules allow the parties to agree to the language or languages of the arbitration.[140] If they have failed to so agree, under the UNCITRAL and SIAC Rules, the tribunal shall determine which language or languages are to be used in the proceedings.[141] In contrast, the LCIA Rules provide that where a failure to agree has occurred, the language of the arbitration agreement shall be the language of the arbitration[142] and if the arbitration agreement is agreed in more than one language the tribunal will, unless specified otherwise, decide which of those languages will be the language of the arbitration.[143] Further, the defaulting party can never complain if the proceedings are in English.[144]

The language of the arbitration will be of great practical importance, for all written statements and any oral hearings will be required to be in the specified language, and documents will have to be translated.[145] Thus, it is important to ensure that a convenient language is specified in any arbitration agreement or arbitration clause.

5.3.2.3 Applicable law The SIAC Rules do not state how the applicable law is to be determined, while making reference to "the applicable law of the arbitration"[146] and "such law as may be applicable".[147] In contrast, both the UNCITRAL and LCIA Rules explicitly allow for the parties to agree as to the applicable law.[148] If the parties have failed to do so, under the UNCITRAL Rules, the law of the arbitration will be determined by the tribunal applying the applicable conflict of laws rules.[149] However, the tribunal may determine the matter as *amiable compositeur* or *ex aequo at bono* if it is authorised by the parties to do so and the applicable law allows such arbitration.[150]

In contrast, the LCIA Rules state that if the parties have failed to agree on the applicable law, or the law of the location of the arbitration does not allow such an agreement, then the law of the seat of the arbitration shall apply.

[138] UNCITRAL Rules, Art 16(1).
[139] LCIA Rules, Art 16.1.
[140] UNCITRAL Rules, Art 17(1); SIAC Rules, r 20.1; LCIA Rules, Art 17.1.
[141] UNCITRAL Rules, Art 17(1); SIAC Rules, r 20.1.
[142] LCIA Rules, Art 17.1.
[143] LCIA Rules, Arts 17.2–17.3.
[144] LCIA Rules, Arts 17.2–17.3.
[145] UNCITRAL Rules, Art 17; SIAC Rules, r 20; LCIA Rules, Art 17.4.
[146] SIAC Rules, r 1.1.
[147] SIAC Rules, r 17.2.
[148] UNCITRAL Rules, Art 33(1); LCIA Rules, Art 16.1.
[149] UNCITRAL Rules, Art 33(1).
[150] UNCITRAL Rules, Art 33(2).

However, the position in relation to determination as *amiable compositeur* or *ex aequo at bono* is much the same as under UNCITRAL.[151]

5.3.2.4 Representation All of the rules allow the parties complete freedom in choosing who will represent them in the arbitration, provided proof of authority has been submitted.[152] While both the LCIA and SIAC Rules expressly state that parties may be represented by legal practitioners, the UNCITRAL provision is broad enough to allow such representation.

5.3.2.5 Hearing While all the rules allow for the holding of hearings on the request of either party,[153] both the LCIA and SIAC Rules allow the parties to agree to a documents-only arbitration.[154]

All of the rules allow for the hearing of witnesses,[155] although both the LCIA and SIAC Rules explicitly provide the tribunal with a discretion to refuse or limit the appearance of such witnesses,[156] as well as allowing questioning of witnesses by the other party.[157] Under the UNCITRAL Rules details about witnesses must be communicated to the tribunal at least 15 days prior to the hearing,[158] while the SIAC and LCIA Rules allow for greater flexibility.[159]

5.3.2.6 Documentation All the rules have a number of requirements in relation to arbitration documentation. These are in relation to type and content of documentation, and time limits for filing.

Under the UNCITRAL Rules, the statement of claim and statement of defence must be communicated to the other party and each arbitrator, within the time period determined by the tribunal.[160]

Similarly, under the LCIA and SIAC Rules the tribunal may determine time periods for such submissions[161]; however the LCIA Rules place the further limitation that the parties must not have agreed otherwise.[162] In both cases, if the tribunal fails to specify such periods of time, both Rules set out a 30-day limitation period following receipt of each requirement.[163]

Further, under all the rules, except the LCIA Rules, the tribunal will decide if, and what, further documents will be required.[164] The LCIA Rules do

[151] LCIA Rules, Art 22.3.
[152] UNCITRAL Rules, Art 4; SIAC Rules, r 21; LCIA Rules, Art 18.
[153] UNCITRAL Rules, Art 15(2); LCIA Rules, Art 19, SIAC Rules, r 22.
[154] LCIA Rules, Art 19, SIAC Rules, r 22.1.
[155] UNCITRAL Rules, Art 25; LCIA Rules, Art 20; SIAC Rules, r 23.
[156] LCIA Rules, Art 20.2; SIAC Rules, r 23.2.
[157] LCIA Rules, Arts 20.4 and 20.6; SIAC Rules, rr 23.3 and 23.5.
[158] UNCITRAL Rules, Art 25(2).
[159] LCIA Rules, Arts 20.1 and 20.2; SIAC Rules, rr 23.1 and 23.2.
[160] UNCITRAL Rules, Arts 18 and 19.
[161] LCIA Rules, Art 15.1; SIAC Rules, r 18.1.
[162] LCIA Rules, Art 15.1.
[163] LCIA Rules, Art 15; SIAC Rules, r 18.
[164] UNCITRAL Rules, Art 22; SIAC Rules, r 18.4.

contain a similar power, although the tribunal must give the parties a reasonable opportunity to state their views.[165]

5.3.2.7 Evidence Under all of the specified arbitration rules, the tribunal may determine whether or not evidence is material, regardless of whether it is strictly admissible or not.[166] Thus, under none of the specified rules are the parties hamstrung by the rules of evidence which can create problems when litigating.

5.3.2.8 Experts All of the specified arbitration rules provide that the tribunal may appoint one or more experts, whether or not they are requested to do so by either party.[167] Similarly, under all the specified rules, the parties can be forced to provide any relevant documents and information to the expert, but will have the opportunity to present expert witnesses and to question the tribunal's expert.[168]

5.3.2.9 Security Both the LCIA and SIAC Rules allow the tribunal to order any respondent to a claim or counterclaim, to provide security for all or any part of any amount in dispute.[169] This provision could be of great importance when the party against whom one is claiming is of questionable future viability, for it is clearly understood by all, that winning a claim can be a very hollow victory if the respondent enters into liquidation.

Additionally, both the LCIA and SIAC Rules allow the tribunal to order any party to provide security for the legal and other costs of any other party. This provision can help to alleviate the risk of vexations claims, or stonewalling tactics aimed at delaying the proceedings.[170]

In contrast, the UNCITRAL Rules only make provision for the ordering of security for the cost of interim measures of protection.[171]

5.3.2.10 Truncated arbitration While more a matter of procedure, the LCIA Rules also provide an interesting mechanism to overcome the refusal of one arbitrator to proceed on a three member tribunal. In such a case, the two other arbitrators may continue with the arbitration; thus avoiding having to recommence proceedings due to one person's recalcitrant behaviour.[172] In contrast, the UNCITRAL and SIAC Rules allow the arbitration to continue, only after the recalcitrant arbitrator is replaced.[173] It can be seen that there are distinct advantages to the LCIA approach, as a potential delay to proceedings can be avoided.

[165] LCIA Rules, Art 22.
[166] UNCITRAL Rules, Art 25(6); LCIA Rules, Art 22.1(k); SIAC Rules, r 26.3.
[167] UNCITRAL Rules, Arts 15 and 27; SIAC Rules, r 24; LCIA Rules, Art 21.
[168] UNCITRAL Rules, Art 27; SIAC Rules, r 24; LCIA Rules, Art 21.
[169] LCIA Rules, Art 25.1; SIAC Rules, r 27.4.
[170] LCIA Rules, Art 25.3; SIAC Rules, r 27.3.
[171] UNCITRAL Rules, Art 26.
[172] LCIA Rules, Art 12.
[173] UNCITRAL Rules, Article 13(2); SIAC Rules, r 15.2.

The closest provision of any of the other specified arbitration rules is contained in the SIAC Rules, which allow other arbitrators to proceed if one arbitrator is refusing to comply with any mandatory provision of any applicable law relating to the making of awards.[174]

5.3.3 Arbitral awards

5.3.3.1 Interim awards Under all of the specified arbitration rules, the tribunal may make interim or partial awards.[175]

5.3.3.2 Time limit In trying to solve a dispute as quickly as possible, this requirement can provide the key. However, only the KLRCA Rules and SIAC Rules include specific time limits within which an award will be rendered. For the KLRCA the time limit is six months from the initiation of the arbitration, thus expediting the whole process,[176] while the SIAC requires an award within 45 days of the end of the hearing.[177] There are a number of advantages to the very strict time requirements of the KLRCA, as such an approach prevents the hearing becoming bogged down, forcing the parties and tribunal to move things along expeditiously. However, while the LCIA Rules do not include a specific time limit, the various powers available to the tribunal to expedite matters, can have a similar effect.[178]

5.3.3.3 Majority decision Under the UNCITRAL Rules, where there is more than one arbitrator, any award or decision must be made by a majority of the arbitrators.[179] However, on questions of procedure, the presiding arbitrator may decide on his or her own, subject to revision by the tribunal.[180]

In contrast, under the LCIA and SIAC Rules, if a majority decision cannot be reached on any matter, whether procedural or substantive, the chairman[181] or presiding arbitrator,[182] as relevant, will decide the issue.

5.3.3.4 Correction of award All of the specified arbitration rules allow the tribunal to correct an award, either of its own volition or in response to a request by one of the parties, within 30 days of receipt or communication of the award.[183] Similarly, all the rules allow for the making of additional awards, if a matter that should have been, has not been determined in the award.[184] Thus typographical, computational or clerical errors can easily be overcome.

[174] SIAC Rules, r 28.2.
[175] UNCITRAL Rules, Art 32(1); LCIA Rules, Art 22.1(j); SIAC Rules, r 25(j).
[176] KLRCA Rules, r 6.
[177] SIAC Rules, r 28.1.
[178] LCIA Rules, Art 22.1.
[179] UNCITRAL Rules, Art 31(1).
[180] UNCITRAL Rules, Art 31(2).
[181] LCIA Rules, Art 26.3.
[182] SIAC Rules, r 28.3.
[183] UNCITRAL Rules, Art 36; LCIA Rules, Art 27; SIAC Rules, r 29.
[184] UNCITRAL Rules, Art 37; LCIA Rules, Art 27; SIAC Rules, r 29.

5.3.3.5 Form Under all of the specified arbitration rules, the award must be in writing, dated, signed and, unless otherwise agreed, state reasons for the decision.[185]

5.3.3.6 Confidentiality Importantly, under all the specified rules, the award can only be made public with the consent of both the parties.[186] This provision can provide a distinct advantage over litigation.

5.3.3.7 Interest Both the LCIA and SIAC Rules specifically allow the tribunal to award simple or compound interest on any sum granted.[187] The express allowance of compound, as well as simple, interest could be of great importance in a construction dispute considering the, often very large, amounts under dispute and the length of the project. The other specified rules are silent on the exercise of the arbitral discretion for the awarding of interest, with no international consensus on whether such interest can in fact be granted.

5.3.3.8 Finality While all of the specified rules state that awards are final and binding,[188] this is subject to the relevant laws of the site of the arbitration. Generally, matters of jurisdiction of the tribunal are justiciable[189]; however, if the arbitration is undertaken with the KLRCA, the award cannot be challenged.[190] This is because of section 34 of the Malaysian Arbitration Act, which is a unique provision. Appeal to the High Court from international arbitration decisions is excluded,[191] rather than merely limited, as in other countries.

5.3.4 Costs

This will often be the determining factor when deciding whether to undertake institutionalised arbitration in contrast to other forms of arbitration.

All of the specified arbitration rules allow the relevant institution to demand payment of deposits prior to commencement of, and during, the arbitration,[192] and all the specified rules, bar the LCIA Rules, require such deposits to be equal. In contrast, the LCIA Rules allow the court to determine payment by the parties of such deposit, in such proportions as it thinks appropriate.[193]

[185] UNCITRAL Rules, Art 32; LCIA Rules, Art 26; SIAC Rules, r 28.
[186] UNCITRAL Rules, Art 32(5); LCIA Rules, Art 30; SIAC Rules, r 34.6.
[187] LCIA Rules, Art 26.5; SIAC Rules, r 28.5.
[188] UNCITRAL Rules, Art 32(2); LCIA Rules, Art 26.8; SIAC Rules, r 28.8.
[189] See section 5.1.5.1, *supra*.
[190] *Klockner Industries-Anlagen GmbH* v. *Kien Tat Sdn Bhd* [1990] 3 MLJ 183; *Soilchem Sdn Bhd* v. *Standard Elektrik Lorenz AG* [1993] 3 MLJ 68.
[191] *Ibid.*
[192] UNCITRAL Rules, Art 41; LCIA Rules, Art 24; SIAC Rules, r 27; KLRCA Rules, r 8.
[193] LCIA Rules, Art 24.1.

Under all the specified arbitration rules, the tribunal, in its award, will determine what payments are due for the services provided by the institution and the tribunal, and the proportion in which the parties shall pay the institution and/or tribunal.[194]

All of the institutions provide schedules of costs which can help in a comparison of the various institutions, with costs for hearing rooms, arbitrators, administrative costs, appointment costs, etc. provided. Costs for arbitrators vary from institution to institution, with some institutions basing the cost on the quantum of the dispute,[195] while others base such costs on an hourly rate.[196]

5.4 Expert determination

Sometimes, parties to a contract may wish to submit their dispute to a binding determination by a private third party, who is not an arbitrator. The reason for taking such a course may be either:

- that the parties wish to exclude the operation of the relevant arbitration legislation, especially if, as is generally the case, recourse to the courts is allowed to a dissatisfied party; and/or
- to exclude the requirement of procedural fairness.

5.4.1 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 on 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.[197]

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.[198]

The rule that the jurisdiction of the courts as to questions of law cannot be ousted by contract[199] 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*[200] "the grandiloquent phrases of the eighteenth century

[194] UNCITRAL Rules, Art 38; LCIA Rules, Art 28; SIAC Rules, r 30; KLRCA Rules, r 7.
[195] E.g. KLRCA.
[196] E.g. LCIA.
[197] See D S Jones, "Expert Determination in Construction Contracts", paper presented to International Dispute Resolution Conference, *Will Arbitration Survive the Alternatives?*, Hong Kong, 1996.
[198] E.g. *Baulderstone Hornibrook Engineering Pty Ltd* v. *Kayah Holdings Pty Ltd*, unreported, Supreme Court of Western Australia, Heenan J, 2 December, 1997.
[199] Originally set down in *Thompson* v. *Charnock* (1799) 8 Term Rep 139.
[200] (1971) 124 CLR 367 at 385.

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 (e.g. 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*,[201] 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 CL45, 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."[202]

In *Fletcher Construction Australia Ltd* v. *MPN Group Pty Ltd*,[203] 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 on the parties.

One party sought to breach this agreement and the other sought to prevent if 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 is 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 expert has not asked conformably with the agreement or that the decision is vitiated by a factor, such as fraud".[204] 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

[201] (1995) 184 CLR 301.
[202] At 311 *per* Brennan CJ, Gaudron and McHugh JJ.
[203] Unreported, Supreme Court of NSW, Rolfe J, 14 July 1997.
[204] *Ibid.*, p 11.

agreement of the parties and not in such a way as to vitiate his or her decision".[205]

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

5.4.2 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 relevant Asian Arbitration Acts.

A good illustration of some of the problems which can arise is the case of *Triarno Pty Ltd* v. *Triden Contractors Ltd*.[206] 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 and Mediators 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 Construction*, 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, e.g. "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

[205] *Ibid.*, p 15.
[206] (1992) 10 BCL 305.

issues. Rolfe J held, on the authority of the decision of Cole J in *Triarno Pty Ltd* v. *Triden Contractors Ltd*[207] 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 for which Rolfe J relied on it. *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.

5.4.3 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,[208] or on the basis of a factual error.

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

For reasons which will become apparent, parties do not normally take this course where significant questions of quantum or law are in dispute.

5.5 Litigation

Litigation is the compulsory form of dispute resolution designed by society to ensure that the disputes of its citizens are resolved in a civilised manner. Subject to the existence of an agreement to submit disputes to either arbitration or expert determination, the parties to construction disputes must resort to court in order to enforce their legal remedies.

International enforcement of judgments presents its own problems. For example, Australia is not a party to any multilateral conventions dealing with the international enforcement of judgments, such as the Brussels and Lugano Conventions, whose operation is restricted to Europe and the United Kingdom. In Australia, the Foreign Judgments Act (Cth) 1991 provides for

[207] (1992) 10 BCL 305.
[208] *Tullis* v. *Jacson* [1892] 3 Ch 441.

the registration and enforcement of foreign judgments of the courts specified in the Schedule to the Foreign Judgments Regulations (Cth) 1992. Only judgments for monetary sums will be enforced in the designated courts of the countries specified in the Schedule.

If a party wishes to enforce the judgment of an Australian court in a country other than those listed in the Schedule, or enforce a judgment requiring a party to do or refrain from doing some act other than the payment of money, he or she will be forced to sue on the original cause of action in the country in which enforcement is sought.

For this reason, arbitration is regarded as a more attractive option for the resolution of international disputes, due to the operation of the New York Convention, which is a multilateral convention for the reciprocal enforcement of arbitral awards.

6. CONTRACTUAL PROVISIONS FOR THE RESOLUTION OF MATURE DISPUTES

For the purposes of discussion, a model for an effective contractual provision for the resolution of mature disputes is identified below:

1. If a party is dissatisfied with the outcome of any of the administrative dispute resolution mechanisms discussed above, or if a dispute arises which is not amenable to administrative dispute resolution, the dissatisfied party is required to furnish a notice of appeal or dispute to the other party.
2. The parties must then enter into *bona fide* negotiations with a view to resolution of the dispute within a set time frame of service of the notice of appeal or dispute. The participants in the negotiation process will have been specified in the contract prior to signing and will have the authority to bind the respective parties to any agreement reached. Negotiating parties should be employed at an executive level, removed from the day to day operations of the project.
3. If the parties are unable to resolve the dispute by negotiation, they are required to agree, within a set time-frame, to a non-binding facilitated negotiation procedure to be undertaken in furtherance of their endeavour to reach agreement. Such procedure may take the form of mediation, facilitation, conciliation, independent expert determination or mini-trial. It is important that the procedure is left to be agreed between the parties and not imposed in the contract. To do otherwise is to run the risk of imposing an inappropriate form of dispute resolution, which may well have the effect of delaying the ultimate determination of the matter in contention. Insistence upon a particular, or indeed upon any, assisted negotiation strategy, without regard to the nature of the dispute, will be likely to frustrate the dispute resolution process rather than facilitate it.

4. If the parties fail to reach agreement on an appropriate procedure within the time-frame designated in the contract, or if the agreed procedure is unsuccessful, the dispute proceeds to arbitration.
5. Any assisted negotiation process should be voluntary, with either party being able at any time to elect to terminate it and proceed to arbitration. If the provisions of this model are interpreted to be conditions precedent to arbitration they would provide a mechanism whereby a party seeking to delay the ultimate determination of a dispute could use the procedure to effect this objective.

A regime along the lines of this model, which impose a realistic requirement upon the parties to negotiate solutions to a dispute, and if deadlocked, to address ways of breaking that deadlock, increase the likelihood of an early resolution of the dispute. It gives the parties every chance of resolving the dispute before resort is made to more formal (and more expensive) dispute resolution methods. Even where a dispute does in fact proceed to arbitration or litigation, the process detailed above may help to streamline the proceedings by refining the issues to be resolved.

7. PUTTING IT ALL TOGETHER

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

1. *FIDIC "Orange Book"*—the standard form of contract for international design and construct projects, issued in 1995 by Federation Internationale des Ingenieurs-Conseils; and
2. *PC1 and its accompanying subcontract PSC1*—a new package of standard forms of contract for traditional and design and construction projects issued by the Property Council of Australia.

Diagrammatic representations of each of the models for dispute resolution adopted in these two contracts are attached as appendices to the article (see pages 417–419).

7.1 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.[209] The contractor must notify the employer as soon as possible and in any event within 28 days of the start of any event

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

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."[210] 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.[211]

Although it is simpler than the rather convoluted procedures which exist in some standard forms, for example the C21 procedure,[212] 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.[213]

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.

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. Secondly, the fact that the DRB's decision binds in the interim

[210] *Ibid.*, cl 3.5.
[211] *Ibid.*, cl 20.3.
[212] C21 is a standard form contract which was released by the New South Wales Department of Public Works and Services, in Australia.
[213] FIDIC Orange Book, note 209, *supra*, cl 20.3.

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.

7.2 PC1

In the PC1 Contract, 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 article. 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.

8. PARTY AUTONOMY, PUBLIC POLICY AND PATERNALISM

In giving effect to dispute resolution provisions in construction contracts, the courts first consider the intentions of the parties as evidenced by their contracts, 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 the 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".[214]

The question, however, of what principles should be applied in

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

ascertaining the intentions of the parties, 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 article. 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."[215]

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. 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 briefly to consider both these issues.

8.1 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

[215] 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.

these circumstances that the enforceability of the ADR clause will be put to the test.

The only real remedy[216] 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*,[217] 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,[218] 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*,[219] "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*[220] form. In other words, the fulfilment of the mediation clause was expressed to be a condition precedent to the progress of the dispute into the formal arbitration and litigation stage. It was only on this basis that Giles J found in the Commercial Arbitration Act[221] (the relevant Australian legislation) 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.[222]

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

[216] 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 4.2, *supra*.

[217] (1992) 28 NSWLR 194. See R S Angyal "The Enforceability of Agreements to Mediate" (1994–95) 12 *Aust Bar Rev* 1 for a comprehensive case report.

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

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

[220] (1855) 5 HLC 809.

[221] Commercial Arbitration Act (Cth), s 47.

[222] *Hooper Bailie*, *supra*, at 211.

sufficient clarity the process to be followed in the mediation proceedings, will be enforceable by means of a stay of any arbitration or litigation proceedings commenced in breach of it.

9. CONCLUSION

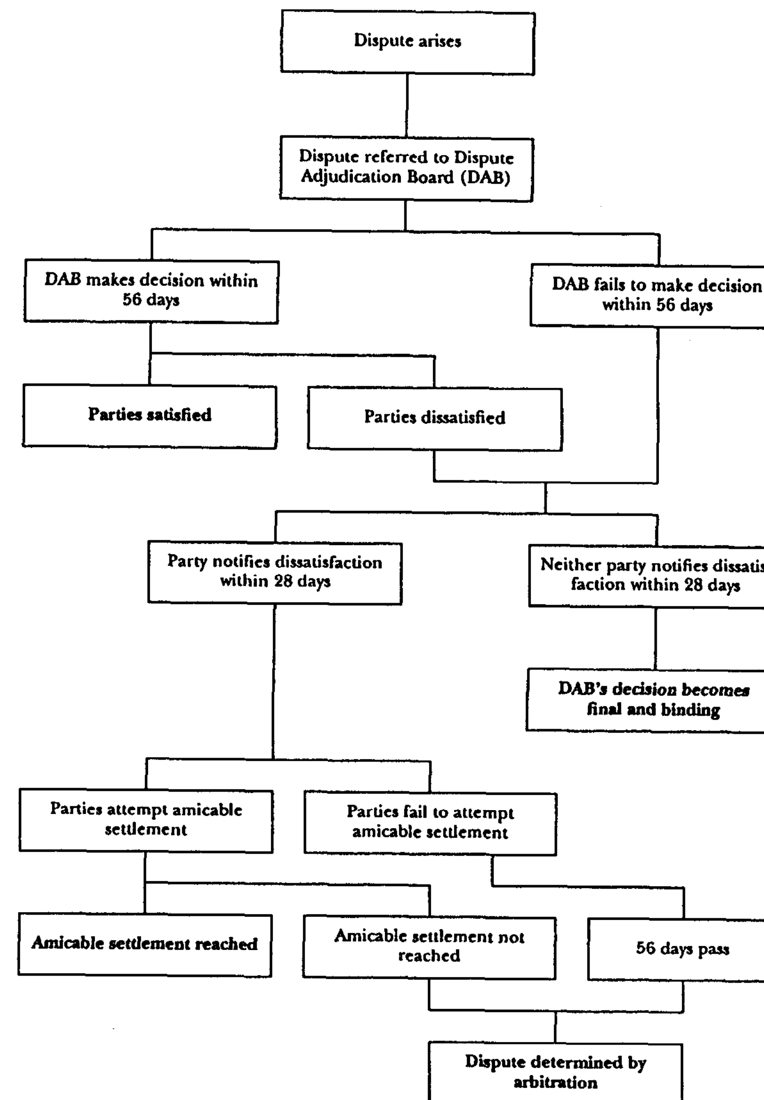
The means available to avoid disputes in the construction industry are varied and increasingly the subject of adoption in the ever-increasing number of standard form contracts in use in Asia. Many are too recently introduced for there to be sufficient history to enable them to be empirically evaluated. Nevertheless, the reasoning behind them suggests that there are good prospects for them to make a positive contribution to more effective resolution of commercial conflict in the construction industry.

An issue for industry advisers 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.

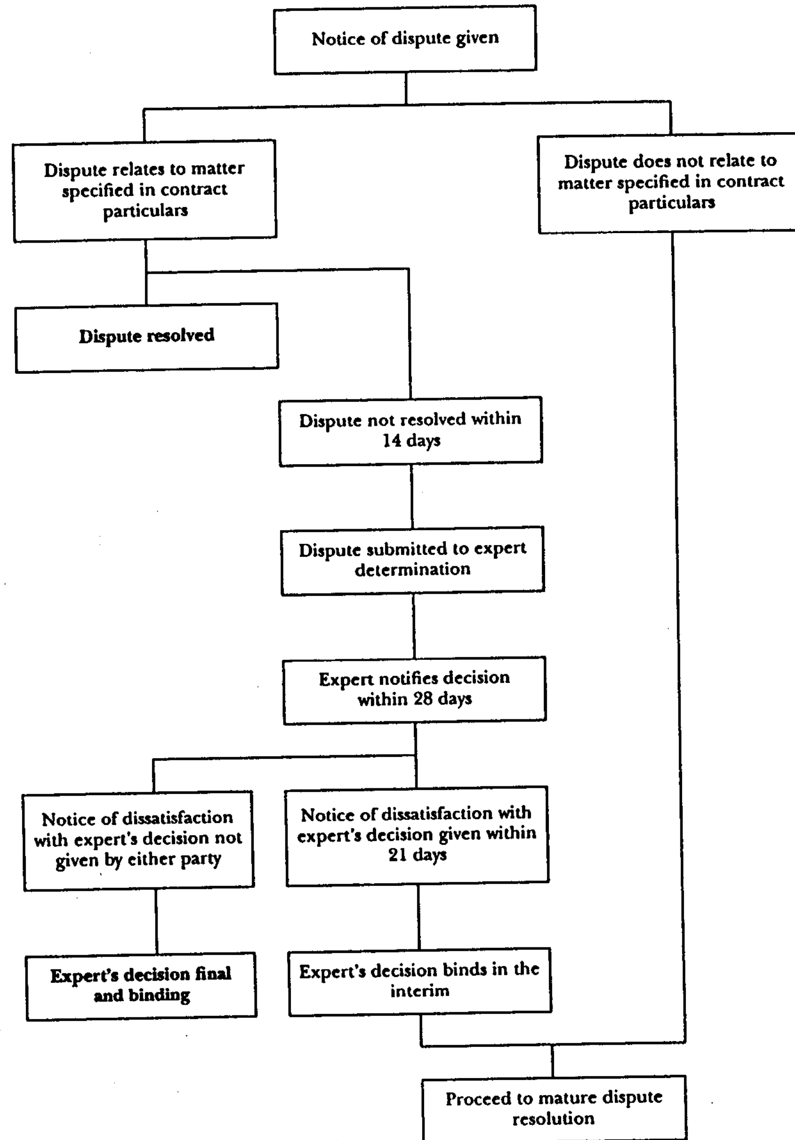
It is trite, but useful, to observe that without appropriate contract provisions an expert disputes practitioner will lack the necessary tools to deal effectively with conflict arising during the construction process. On the other hand, misuse of the contract tools will lead to them being of little ultimate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

APPENDIX—SOME STANDARD FORM DISPUTES PROCEDURES

FIDIC ORANGE BOOK: DISPUTE RESOLUTION PROCEDURE



PC1: Administrative Dispute Procedure



PC1: Mature Dispute Resolution Procedure