

PART I

AN INTRODUCTION TO ADR

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ALTERNATIVE DISPUTE RESOLUTION

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A. Introduction

The phrase alternative dispute resolution or ADR encompasses a range of procedures other than litigation which are designed to resolve conflicts. ADR processes include negotiation, mediation, conciliation, expert determination, adjudication, and arbitration.¹ In the last few decades the use of ADR has become more prevalent within both international and domestic commercial contracts. The reason for this is that the costs of litigation have become

¹ There is no universally accepted definition of ADR. Some definitions of ADR exclude all processes whereby a binding decision is given by a third party. The Academy of Experts published a glossary on *The Language of ADR* (1992) in which they defined ADR as a process of resolving an issue 'susceptible to normal legal process by agreement rather than by imposing a binding decision'. Brown and Marriott, *ADR Principles and Practice* (1999) at 12 suggest that inter party negotiation without lawyers is not an ADR process.

prohibitive and the parties to a dispute and their advisers are now considering alternative methods to resolve disputes which are cheaper, quicker and will not lead to a break down in the working relationships of the parties.

- 1.02** A detailed examination of each of the processes is beyond the scope of this book. However, a summary of the various types of ADR processes is provided and a short commentary is given to the new International Chamber of Commerce (ICC) ADR Rules and the United Nations Commission on International Trade Law (UNCITRAL) Conciliation Rules. In addition to the ADR processes described there may be other ADR processes which are specific to particular countries. Such processes would include Ombudsmen Schemes, utility regulators or statutory tribunals. These forms of domestic ADR are not addressed.
- 1.03** ADR techniques fall into two discrete types. Those which seek to persuade the parties to settle and those that provide a decision. Where a decision is given then that decision may be binding on the parties, it may have an interim binding effect or may simply be a recommendation that the parties can accept or ignore. Recently a number of hybrid forms of ADR have emerged. For instance there has been a growth in med-arb; a process which incorporates both mediation and arbitration.

The need for a conflict or dispute

- 1.04** The essence of ADR is to resolve conflicts, differences or disputes that exist between the parties. ADR processes seek to resolve these differences in two ways. Where the ADR process provides the parties with a decision then the process is about establishing rights and obligations. Where the process is facilitative then its purpose is about the acknowledgement and appreciation of differences.² The aim for the parties must be to establish the correct process in order to resolve the dispute.
- 1.05** A dispute has been described as a lack of compromise between the parties.³ There must be some issue or matter upon which the parties are unable to agree. However, it is also possible to resolve, through an ADR procedure, issues which have yet to attain the status of an actual dispute. For example, the parties

² T Crum, *The Magic of Conflict* (1989).

³ D Foskett, *The Law and Practice of Compromise* (1996) 5. The word 'dispute' has also been considered in numerous arbitration cases, for example, *Halki Shipping Corp v Sopex Oils Ltd* [1998] 1 WLR 726, [1998] 2 All ER 23, [1998] 1 Lloyd's Rep 465, CA; and in many adjudication cases: *Beck Peppiatt v Norwest Holst Construction* [2003] EWHC 822 (TCC), 20 March 2003; *London and Amsterdam Properties Ltd v Waterman Partnership Ltd* [2003] All ER (D) 391; and *RSL(SW) Ltd v Stansell Ltd* [2003] EWHC 1390; cf *Nuttall v RG Carter* [2002] BLR 312.

may agree to appoint an expert to decide an issue, such as the valuation of shares.

Palm tree justice

There is a perception that many forms of ADR produce what has often been termed as a 'win/win' result. A common view is that a decision of an ADR tribunal will inevitably be a compromise neither favouring one party nor the other. However, this perception is unsupported by empirical evidence. Where awards or decisions are made with reasons then a tribunal which has fudged the issues will be exposed. In such cases both parties come away feeling aggrieved with the ADR process and the tribunal will rarely be appointed again by either of the parties. In ADR techniques which facilitate a settlement then it is the parties that reach a compromise and not the tribunal. **1.06**

Some benefits and problems with ADR techniques

Court proceedings often provide a 'Rolls Royce' dispute resolution procedure. The parties are given ample time to prepare their case. They may be entitled to disclosure of the documents in the other party's possession. The evidence will be set out in witness statements and expert reports. The parties will have time to consider the evidence and respond. The parties may also issue interrogatories and seek further particulars of the allegations made. However, it is often the case that a vast amount of the time spent on litigation is wasted and the majority of the results are derived from a small proportion of the work undertaken. Disclosure of documents may take up a disproportionate amount of time and costs. Formal and lengthy pleadings may not always be appropriate. Litigation adopts a procedure which intends 'to leave no stone unturned'. ADR procedures often focus on simply requiring the parties to do a small amount of work to obtain the maximum results. **1.07**

ADR techniques are therefore often significantly cheaper than full-blown litigation. However, this will depend upon the ADR technique which is adopted. International commercial arbitrations can often be more expensive than litigation. There is a creeping tendency to carry out complex international commercial arbitrations as if they were litigation.⁴ Both parties often appoint distinguished lawyers and eminent and expensive arbitrators. A further criticism of ADR, and arbitration in particular, is that because strict rules of evidence do not apply irrelevant and inflammatory material may be presented in the ADR and arbitration proceedings. This requires time and money to be spent on issues that **1.08**

⁴ G Phillips, 'Is Creeping Legalism Infecting Arbitration?' *Dispute Resolution Journal*, Feb/April 2003.

are unnecessary.⁵ However, ultimately the choice of an ADR technique is one for the parties to make. The parties have control over the conduct of the dispute resolution process and may agree procedures which seek to save time and cost.

B. Mediation

- 1.09** Mediation is a process whereby a neutral third party, the mediator, facilitates negotiations between the parties in order to assist them to reach a settlement. The aim behind the mediation process is that it should be quick, inexpensive and confidential. The parties are not simply limited to looking at their own legal entitlements; they are encouraged to think outside of the problem. For instance, where parties may work together on future projects some concessions can be made regarding the present dispute and discounts can be agreed for future projects. This is useful where the relationship between the parties has not broken down irretrievably.
- 1.10** Mediation is the new buzz word in commerce in Western Europe and the use of mediation has been welcomed and endorsed by industry generally. Its success lies, in no small part, because the process allows the parties to continue to work together after the mediation hearing has been concluded. The aim of mediation is to get away from the 'win/lose' mindset. What is required is to facilitate a dialogue with all the other parties involved in the dispute to ensure that the dispute does not escalate.
- 1.11** In response to the growth of mediation as a favoured ADR technique the European Commission published a Green Paper on developing commercial mediation within the EU in October 1999. The Green Paper was introduced because of work undertaken by CEDR⁶ and four other mediation bodies from France, the Netherlands, Italy, and Brussels. Research was undertaken by these bodies regarding the current state of mediation and other non-litigious dispute resolution procedures in the fifteen member states and they produced recommendations for future development. UNCITRAL has also recently produced a draft Model Law relating to mediation/conciliation.⁷

Mediation procedures

- 1.12** The mediation procedure will generally be flexible with the mediator determining how the process will be conducted. It will be usual for the parties to set out a

⁵ J Holloway, *Why Arbitration Agreements are no Panacea for Employers*, www.womenof.com/articles/le_6_16_03.asp.

⁶ Centre for Effective Dispute Resolution.

⁷ The Model Law is discussed at paras 1.17–1.21.

summary of their respective cases and any documents on which they wish to rely. Privileged documents can be shown to the mediator and these will be kept confidential if a party so requests. After the parties have met and set out their respective cases to the mediator it is usual for the parties to move to separate rooms. The mediator moves between the parties discussing the issues with each of the parties. This is often referred to as caucuses or breakout sessions. In this way the mediator can discover where the main issues of contention lie and discuss these with the parties privately. Once this process has concluded the mediator will then discuss alternatives to overcome the issues. It is hoped at the end of the process that the parties will reach a settlement.

Mediation as a condition precedent to arbitration

It is now becoming common to find that major international commercial contracts require the parties to attempt mediation before they become entitled to commence any other dispute resolution process. An agreement obliging the parties to attempt mediation prior to arbitration will usually be upheld and a party which commences an arbitration in breach of this agreement risks finding that the arbitral tribunal will have no jurisdiction to deal with the dispute. The High Court in England has held that the parties to a contract are bound by a mediation clause.⁸ In *Cable & Wireless plc v IBM United Kingdom Ltd* a dispute arose and court proceedings were commenced. Cable and Wireless made an application to stay the court proceedings pending a referral to ADR in accordance with the ADR clause in the contract. IBM claimed that the ADR clause lacked certainty and was nothing more than an agreement to negotiate and was therefore unenforceable. The court granted the application and rejected this argument. The Court held that in deciding whether such clauses were enforceable, an important consideration would be whether or not the obligation to mediate was expressed in unqualified and mandatory terms. Similarly, in *Poiré v Tripier*⁹ the French Cour de cassation has held that a conciliation clause, which had been agreed to by the parties, prevented any legal proceedings being commenced prior to the completion of the conciliatory process. 1.13

The London Court of International Arbitration (LCIA) mediation procedure¹⁰

The LCIA Mediation Procedure came into force on 1 October 1999. It provides for mediation where the parties to a present or future dispute have agreed to resolve the dispute by this method. The LCIA Mediation Procedure consists of 1.14

⁸ *Cable and Wireless plc v IBM United Kingdom Ltd* [2002] EWHC 2059. Cf *Halifax Financial Services Ltd v Intuitive Systems Ltd* [1999] 1 All ER (Comm) 303.

⁹ Rev Arb (2003) 403.

¹⁰ The full text of the Rules can be found at the LCIA website at www.lcia-arbitration.com.

eleven Articles and proposes recommended clauses to be incorporated into contracts. The mediation procedure is commenced when a party to a dispute sends to the Registrar of the LCIA a Request for Mediation. The Request must state briefly the nature of the dispute and the value of the claim. The Request must also include details of the parties and a copy of the agreement to refer the dispute to the LCIA Mediation Procedure. As with the ICC ADR Rules there is a process whereby a party can write to the LCIA, even if there is no agreement to refer the dispute to the LCIA Mediation Procedure, and subsequently seek agreement to have the matter dealt with by that procedure.

1.15 The parties to the dispute can agree how they will set out their respective cases. In default of agreement Article 4 of the LCIA Mediation Procedure sets out the information which the parties must provide. Article 5.1 permits the mediator to conduct the case as it sees fit, having regard to the circumstances of the case and the wishes of the parties. Article 5.2 to 5.6 prescribes certain rules for the procedure.

5.2 The mediator may communicate with the parties orally or in writing, together, or individually, and may convene a meeting or meetings at a venue to be determined by the mediator after consultations with the parties.

5.3 Nothing which is communicated to the mediator in private during the course of the mediation shall be repeated to the other party or parties, without the express consent of the party making the communication.

5.4 Each party shall notify the other party and the mediator of the number and identity of those persons who will attend any meeting convened by the mediator.

5.5 Each party shall identify a representative of that party who is authorised to settle the dispute on behalf of that party, and shall confirm that authority in writing.

5.6 Unless otherwise agreed by the parties, the mediator will decide the language(s) in which the mediation will be conducted.

1.16 Article 6 of the LCIA Mediation Procedure deals with the conclusion of the mediation. The mediation is concluded when a settlement is reached, the parties advise the mediator that settlement cannot be reached, the mediator considers that the dispute cannot be resolved, or when any agreed time limit for the mediation has expired. Pursuant to Article 7 if an agreement can be reached then this is recorded in a settlement agreement. Article 8 deals with the costs of the mediation. Article 9 permits the parties to commence or continue litigation or arbitration while the mediation process is on-going. Article 10 deals with confidentiality and privacy and Article 11 provides an exclusion of liability for the LCIA and the mediator.

Conciliation and the UNCITRAL Model Law on International Commercial Conciliation

There is little, if any, difference between mediation and conciliation. In England 1.17 it was thought that if there was a difference between mediation and conciliation then this difference related to whether the facilitator gave a recommendation if the ADR process was unsuccessful. Where a recommendation was provided then the process was generally referred to as conciliation¹¹ whereas if no recommendation was given the process was generally referred to as mediation.¹²

On 24 June 2002, at its 35th Session in New York, UNCITRAL adopted its 1.18 Model Law on International Commercial Conciliation.¹³ The Model Law applies only to ‘commercial’ disputes. The word ‘commercial’ is intended to have a broad definition.¹⁴ It is also intended to apply to international disputes. The Model Law also provides a definition of what ‘international’ means.¹⁵ The conciliation process is described as: ‘a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person, or persons (“the conciliator”) to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contract or other legal relationship’.

There are limits to the applicability of the Model Law on International Commercial Conciliation. The parties are free to exclude its application. The Model Law also does not apply to cases where a judge or arbitrator, in the course of judicial or arbitral proceedings, attempts to facilitate a settlement.¹⁶ This presupposes that an arbitral tribunal or judge will have the power to stop the arbitral or litigation process and take on the role of facilitator. Under English law it is questionable whether an arbitral tribunal would have this power.¹⁷ 1.19

The Model Law on International Commercial Conciliation sensibly proposes as 1.20 an option a clause for the suspension of limitation periods. This would run from

¹¹ See The Institution of Civil Engineers Conciliation Procedure 1988, rule 2.

¹² ACAS defines conciliation as ‘the act of reconciling or bringing together the parties in a dispute with the aim of moving forward to a settlement acceptable to all sides’. Mediation is defined as ‘acting as an intermediary in talking to both sides—the aim is for the parties to resolve the problem between themselves, but the mediator will make suggestions along the way’. For a further analysis of the differences between conciliation and mediation see *Flight Training International v International Fire Training Equipment Ltd* [2004] EWHC 721 (Comm) at paras 38–43.

¹³ <http://www.uncitral.org/>.

¹⁴ The word ‘commercial’ is defined within a footnote in terms identical to that found within the UNCITRAL Model Law of Arbitration—see paras 2.44–2.47.

¹⁵ Article 1(4)(6).

¹⁶ Article 1(9)(a).

¹⁷ *Glencot Development and Design Co Ltd v Ben Barrett & Son (Contractors) Ltd* [2001] BLR 207.

the date of commencement of the conciliation to the date of its termination. The conciliation is commenced on the date when the parties agree to engage in conciliation proceedings. The proceedings are terminated when there is (a) a settlement; or (b) a declaration by the conciliator that conciliation is no longer justified; or (c) a declaration by the parties to the conciliation or from one party to another and the conciliator that the conciliation is terminated.¹⁸

- 1.21** The conduct of the conciliation is placed firmly in the hands of the parties. However, in the event that the parties are unable to agree on the procedure for the conciliation then the conciliator determines the procedure. The conciliator is required to treat the parties fairly. The Model Law on International Commercial Conciliation sets out rules relating to confidentiality as between the parties in the conciliation¹⁹ and confidentiality generally.²⁰ The Model Law also expressly prohibits disclosure of information obtained in the conciliation in subsequent legal or arbitral proceedings.²¹ Furthermore, the Model Law prohibits the conciliator acting as arbitrator in subsequent proceedings or in a related dispute unless both parties agree.²²

C. Adjudication

- 1.22** Contractual adjudication is a fast-track process and has been described as a species of arbitration.²³ However it is not arbitration and is not covered by the Arbitration Acts.²⁴ Contractual adjudication provisions are common within international construction and engineering contracts. They allow for the appointment of a third party to resolve disputes quickly, cheaply, and effectively so that issues in contention may be resolved and the project can proceed uninterrupted. Adjudication has been defined as requiring a party 'to make a formal judgement on a disputed matter'.²⁵ HM Treasury has

¹⁸ Article 11.

¹⁹ Article 8.

²⁰ Article 9.

²¹ Article 10.

²² Article 12.

²³ In *Costain Ltd v Strathclyde Builders Ltd* (Outer House OH, Court of Session (CS)), Lord Drummond Young stated that he considered an adjudicator as a 'type of arbiter', and that adjudication was in this respect a 'species of arbitration'.

²⁴ However, see *Cape Durasteel Ltd v Rosser & Russell Building Services* (1999) 46 Con LR 75 in which the court held that in certain circumstances an adjudication clause could be caught by the Arbitration Acts. In this case the decision of the adjudicator was intended to be final and binding and the court held that the ADR process chosen by the parties amounted to an agreement to arbitrate.

²⁵ *The Concise Oxford English Dictionary*.

also defined adjudication within its Guidance Notes on Dispute Resolution.²⁶

Adjudication as a species of arbitration

There are many similarities between adjudication and arbitration. They both involve the referral of a dispute to a neutral third party for a decision. However, the two processes are distinct. First, an adjudication will be concluded within a short time span—usually between twenty-eight and fifty-six days. Second, the decision of an adjudicator will have only interim binding effect. In *A Cameron Ltd v John Mowlem & Co*²⁷ a decision of an adjudicator was received and the successful party sought to enforce the decision as if it were an arbitrator's award. At first instance, Judge Esyr Lewis held that a decision of an adjudicator under a Joint Contracts Tribunal (JCT) contract is not enforceable as an arbitration award. His reasoning being that: 'The Adjudicator . . . does not perform an arbitral function and does not make any final award definitive of the parties' rights.' The decision was upheld on appeal. The English Court of Appeal found that the contract contained an arbitration provision in addition to the adjudication provision. They stated that: 'An Adjudicator's decision is "binding . . . until" determination by an Arbitrator. The decision has an ephemeral and subordinate character which in our view makes it impossible for the decision to be described as an award on an arbitration agreement. The structure of the sub-contract is against that conclusion. We would dismiss this appeal.'

The Court of Appeal in *A Cameron Ltd v John Mowlem & Co* then proceeded to state that they might have reached a different conclusion if the decision of the adjudicator was intended to be final and binding. In *Cape Durasteel Ltd v Rosser & Russell Building Services*²⁸ the decision of the adjudicator was intended to be final and binding. Adjudication did not at that time have an established meaning in construction contracts and there was no reason why that process could not amount to an arbitration.²⁹

²⁶ The definition by HM Treasury states: '**Adjudication**: as its name implies, this involves the appointment of an adjudicator, who will deliver a view on the case, having heard oral and/or written submissions. Most commonly, the adjudicator is appointed as a "valuer" or "expert". This procedure falls outside the scope of an "arbitration" and is therefore free from the formalities attached to the latter . . . Unless the contract provides otherwise, awards are binding on the parties to an adjudication without rights of appeal. Often the contract will provide for the award to bind the parties during the performance of the contract, with rights of appeal thereafter.'

²⁷ 52 BLR 24 (12 December 1990), CA. This was the first case where the adjudication provisions of the JCT forms of contract were considered.

²⁸ (1996) 46 Con LR 75.

²⁹ See also *Drake & Scull Engineering Ltd v McLaughlin & Harvey plc* (1992) 60 BLR 102 at 109–10 where the court held that the adjudication procedure formed part of the arbitration procedure.

Statutory adjudication in England and Wales

- 1.25** The Housing Grants, Construction and Regeneration Act 1996 has introduced into English law a statutory right to adjudicate in construction related disputes.³⁰ A party to a construction contract may refer any dispute relating to that construction contract to adjudication at any time.³¹ In the event that the parties have not agreed an adjudication process which complies with the Housing Grants, Construction and Regeneration Act 1996 then the default procedures of the Scheme for Construction Contracts (England and Wales) Regulations 1998 will apply.
- 1.26** The decision of an adjudicator will have interim binding effect. This means that a court will enforce the decision unless and until it is overturned by litigation, arbitration or by the agreement of the parties. The English courts have continually shown themselves willing to enforce adjudicator's decisions even where there is a patent error on the face of the decision. In *Macob Civil Engineering Ltd v Morrison Construction Ltd*³² the rationale for this was explained:
- The intention of Parliament in enacting the Act was plain. It was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional basis, and requiring the decisions of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement. . . .
- Parliament has not abolished arbitration and litigation of construction disputes. It has merely introduced an intervening provisional stage in the dispute resolution process. Crucially, it has made it clear that decisions of adjudicators are binding and are to be complied with until the dispute is finally resolved.³³
- 1.27** The English courts have therefore taken a pro-enforcement stance to adjudication and there are only two sets of circumstances that may arise in which a court will refuse to enforce an adjudicator's award. The first is where there is an excess of jurisdiction by the adjudicator. This may occur where the adjudicator answers a question which has not been referred to adjudication or where there is no dispute.³⁴ The second is where there is a breach of natural justice.

Natural justice and adjudication

- 1.28** Adjudication may be used for all construction related disputes. It does not matter how complex the dispute is; the process was designed so that 'one size fits all'. However, adjudication was also intended by Parliament to be a fair process. In

³⁰ See the Housing Grants, Construction and Regeneration Act 1996, Pt II.

³¹ Housing Grants, Construction and Regeneration Act 1996, s 108.

³² [1999] BLR 93, 97.

³³ See also the case of *Bouygues UK Ltd v Dahl-Jensen UK Ltd*, The Times, 17 August 2000 where the Court of Appeal affirmed this principle.

³⁴ *Nikko Hotels (UK) Ltd v MEPC plc* [1991] 28 EG 86.

London and Amsterdam Properties Ltd v Waterman Partnership Ltd,³⁵ Judge Wilcox stated that if an adjudication was conducted unfairly then the courts would not aid in the enforcement of the adjudicator's decision. In this regard fairness is synonymous with 'natural justice' and 'equality of arms'. If justice cannot be done within the twenty-eight-day time period prescribed under the Housing Grants, Construction and Regeneration Act 1996 then the parties would have to agree to extend the time period for the conduct of the adjudication in order to achieve a fair resolution of the dispute.³⁶

The facts of *London and Amsterdam v Waterman Partnership* were that Waterman Partnership, an engineering company, was employed by London and Amsterdam on a project to develop a shopping centre. London and Amsterdam claimed that it had suffered loss as a result of Waterman Partnership's failure to release substantial elements of steelwork design information by set dates. London and Amsterdam claimed that this caused critical delays and, as a result, it had made significant payments to the steelwork contractor and the following trades. Waterman Partnership denied liability. London and Amsterdam commenced an adjudication and served over 1,000 pages of documentary evidence that Waterman Partnership had never seen. It was, as Judge Wilcox noted, a classic case of an ambush. Waterman Partnership argued that there was no dispute, as it had not been given sufficient time to consider the claims made, and that it was unable to respond effectively within the time frame to this new evidence. In the adjudication the adjudicator awarded in favour of London and Amsterdam who then sought to enforce that decision. **1.29**

Judge Wilcox concluded that there was a dispute. In this regard his honour applied the test for a dispute in *Halki Shipping*³⁷ and distinguished *Nuttall v Carter*,³⁸ which had interpreted the meaning of the word 'dispute' narrowly. However, he acknowledged the force of Judge Seymour's comments in *Nuttall v Carter* that ambushes in adjudication were unfair. Judge Wilcox concluded that, even though there was a dispute, the court could refuse to enforce an adjudicator's decision where it was made in breach of natural justice.³⁹ Judge Wilcox stated that 'the courts would be slow to dilute requirements of natural justice where the referring party seeks to enforce the award'. However, Judge Wilcox did not want this ground of challenge to open the floodgates and therefore **1.30**

³⁵ [2003] All ER (D) 391 (TCC).

³⁶ See also *AWG Construction Ltd v Rockingham Motor Speedway Ltd* [2004] All ER (D) 68 (TCC).

³⁷ [1998] 1 WLR 726, [1998] 2 All ER 23, [1998] 1 Lloyd's Rep 465.

³⁸ [2002] BLR 312.

³⁹ Judge Wilcox referred to and approved his previous decision of *Try Constructions Ltd v Eton Town House Group Ltd* [2003] BLR 286; and Judge Lloyd's decision of *Glencot Development and Design Co Ltd v Ben Barrett & Son Contractors Ltd* [2001] 80 Con LR 31.

warned that breaches of natural justice, as a ground of challenge against the enforcement of an adjudicator's decision, would only succeed if the challenging party could show that there was a live triable issue as opposed to a fanciful prospect of success. Judge Wilcox further warned that parties should not search around for breaches of natural justice and acknowledged that a mere ambush, however unattractive, did not necessarily amount to procedural unfairness.

1.31 The importance of natural justice in adjudication The application of rules of the natural justice in adjudication has been considered in a number of cases dealing with the enforcement of adjudicators' decisions. In *Balfour Beatty v London Borough of Lambeth*⁴⁰ Judge Lloyd referred to the case of *Discairn Project Services Ltd v Opecprime Ltd (No 1)*⁴¹ and concurred with the views of Judge Bowsher where he stated that the Scheme for Construction Contracts:

... makes regard for the rules of natural justice more rather than less important. Because there is no appeal on fact or law from the adjudicator's decision, it is all the more important that the manner in which he reaches his decision should be beyond reproach. At the same time, one has to recognise that the adjudicator is working under pressure of time and circumstance which makes it extremely difficult to comply with the rules of natural justice in the manner of a court or an arbitrator. Repugnant as it may be to one's approach to judicial decision-making, I think that the system created by the [Housing Grants, Construction and Regeneration Act 1996] can only be made to work in practice if some breaches of the rules of natural justice which have no demonstrable consequence are disregarded.

1.32 In contrast Judge Seymour in *RSL(SW) Ltd v Stansell Ltd*⁴² was more forceful in his views that natural justice should be maintained. He stated that there were risks within the adjudication process but that those risks could be minimized by 'maintaining a firm grasp on the principles of natural justice and applying them without fear or favour'. Similarly, the Outer House of the Court of Session in Scotland has stated that everything in an adjudication is 'subserving to natural justice'.⁴³

1.33 The burden and standard of proof necessary to show a breach of natural justice The fact that a party claims a breach of natural justice does not mean that an adjudicator's decision will not be enforced. The party claiming the breach of natural justice has the burden of proving its case. The breach of natural justice must be substantial and relevant.⁴⁴ A breach of natural justice which is peripheral or irrelevant will not amount to a valid ground for refusing

⁴⁰ [2002] BLR 288, 301.

⁴¹ [2000] BLR 402, 405.

⁴² [2003] EWHC 1390 at para 33.

⁴³ *Costain Ltd v Strathclyde Builders Ltd* OH, CS, 19 December 2003, Opinion of Lord Drummond Young.

⁴⁴ *Costain Ltd v Strathclyde Builders Ltd*, OH, CS, 19 December 2003, Opinion of Lord Drummond Young.

to enforce an adjudicator's decision.⁴⁵ Where a breach of natural justice has been shown to have occurred the burden of proof appears to shift to the other party to show that it was peripheral or irrelevant. In *Interbulk Ltd v Aiden Shipping Co Ltd (The 'Vimeira')*,⁴⁶ Ackner LJ stated that: 'Where there is a breach of natural justice as a general proposition it is not for the courts to speculate what would have been the result if the principles of fairness had been applied.'

Dispute Adjudication Boards, Review Boards, and Resolution Advisers

A Dispute Adjudication Board is a term which is familiar to users of the International Federation of Consulting Engineers (FIDIC) forms of contract. The Dispute Adjudication Board is a panel which is constituted at the start of the project or when the first dispute arises and deals with any dispute arising in the project. The Dispute Adjudication Board gives a decision which has interim binding effect. A Dispute Review Board provides a similar function, however, it will usually only make a recommendation. Less used and less commented on is the Dispute Resolution Adviser. While a Dispute Adjudication Board will adjudicate upon the dispute a Dispute Review Board or Dispute Resolution Adviser may adopt other ADR techniques to resolve the issues. In this regard Dispute Review Boards and Dispute Resolution Advisers cannot be classified as adjudication techniques *per se* although they can and sometimes do adopt this ADR process. 1.34

Dispute Resolution Adviser

The purpose of appointing a Dispute Resolution Adviser is to prevent expensive after-the-event disputes arising. A Dispute Resolution Adviser was first used on the Queen Mary Hospital Project in Hong Kong.⁴⁷ The Dispute Resolution Adviser procedure was implemented as part of the partnering agreement between the employer and the contractor. The Dispute Resolution Adviser attended site on a monthly basis and the role was to ascertain problems and future controversies and to implement a strategy which would address and resolve these problems. The Dispute Resolution Adviser process has been referred to as being: 'a hybrid system of dispute avoidance and dispute resolution techniques using alternative dispute resolution but, if necessary, some of the more conventional forms of binding dispute resolution but avoiding the 1.35

⁴⁵ *Balfour Beatty v London Borough of Lambeth* [2002] BLR 288, 302.

⁴⁶ [1984] 2 Lloyd's Rep 66.

⁴⁷ C Tsin, *Dispute Resolution Adviser System in Hong Kong—Design and Development* (1997) 63(2) Arbitration 67.

courts'.⁴⁸ It is, however, usual for the Dispute Resolution Adviser to adopt mediation techniques in order to resolve disputes. If the mediation procedure should be unsuccessful then the Dispute Resolution Adviser would prepare a report to senior executives. The report would detail the issues in dispute, the process of addressing the issues and why the dispute had not been resolved. The report might also contain a recommendation. Senior executives would then consider the issues raised and the recommendation and attempt to resolve the dispute prior to the next step of short-form arbitration.

*Dispute Review Boards*⁴⁹

- 1.36** A Dispute Review Board will usually be constituted at the start of a major construction project by the parties and will become involved with the project at the outset. Dispute Review Boards were first used in the United States in the 1960s.⁵⁰ They have now been used in many different projects throughout the world. The Dispute Review Board will make regular site visits to the project to keep itself acquainted with the progress of the works. It has been stated that the success of Dispute Review Boards has occurred because 'the very presence ("shadow") of the DRB influences the attitudes and behaviour of those involved in the project, which in turn leads to fewer disputes'.⁵¹ Equally, the Dispute Review Board process allows experienced and specialist knowledge to be brought to a dispute at the outset of the dispute and in particular where the courts of the place where the project is being constructed may be inexperienced in complex construction projects.
- 1.37** The costs of the Dispute Review Board are met between the parties. Where a dispute arises then the Dispute Review Board will meet on site and draft a recommendation. The process will be informal. The recommendation will not usually be binding on the parties, although it may be agreed by the parties for it to have interim binding effect or even be fully binding. Where the decision of the Dispute Review Board is simply a recommendation then it will be persuasive. It is usual for a Dispute Review Board to be comprised of three members, although on a number of large projects the Dispute Review Board has been made up of five⁵² or even six members.⁵³

⁴⁸ C Wall, *The Dispute Resolution Adviser System* (paper presented at CIB World Building Congress, Gavle, Sweden, June 1998).

⁴⁹ A detailed commentary on Dispute Review Boards (DRBs) is given by Richard Shadbolt, *Resolution of Construction Disputes by Dispute Review Boards* [1999] ICLR 101.

⁵⁰ A Joint Consulting Board was appointed on the Boundary Dam in Washington.

⁵¹ Paul Gerber, *Dispute Avoidance Procedures ('DAPs')—The Changing Face of Construction Dispute Management* [2001] ICLR 122, 125.

⁵² *Channel Tunnel Group v Balfour Beatty Ltd* [1993] 1 All ER 664.

⁵³ The DRB on the Hong Kong airport project was made up of a six-member panel.

The Dispute Review Board Foundation The success of Dispute Review Boards led to the creation of the Dispute Review Board Foundation in July 1996. It is a non-profit-making organization dedicated to the furtherance of the Dispute Review Board concept. The Dispute Review Board Foundation has published a manual which is directed toward owners, construction managers, architects, engineers, contractors, lawyers, and others working with Dispute Review Boards. The manual provides advice on the benefits, pitfalls, procedures, and the appointment of the Dispute Review Board. Figures provided by the Dispute Review Board Foundation for the year 2000, illustrate that 97 per cent of construction disputes, where Dispute Review Boards were involved; were settled without proceeding to litigation or arbitration. These disputes involved 757 projects with a total project value of \$39.5 billion. While the use of a Dispute Review Board on large projects may be cost-effective it is questionable whether on smaller projects the same benefits can be obtained. In each case the parties will need to consider whether a three-person panel is suitable for the type and size of the project. A one-person Dispute Review Board is, however, an option for small-to medium-size projects that may find the cost of supporting a three-person Dispute Review Board panel prohibitive. **1.38**

Dispute Adjudication Boards

A Dispute Adjudication Board is a different animal to a Dispute Review Board. Dispute Adjudication Boards are common in international civil engineering projects and were introduced into the FIDIC forms of contract in the 1990s. Dispute Adjudication Boards now appear in the new rainbow of FIDIC forms of contract. The Dispute Adjudication Board procedure provides that a party has to give notice of its intention to refer a dispute to the Dispute Adjudication Board. Within twenty-eight days of the notice the parties must jointly appoint a Dispute Adjudication Board (if one is not already appointed). If agreement cannot be reached as to the appointment of the Dispute Adjudication Board then the contract provides a default procedure for appointment. The Dispute Adjudication Board has eighty-four days in which to reach its decision, which must be reasoned and is binding on the parties. If a party is dissatisfied with the decision then it must give notice of dissatisfaction within twenty-eight days after receiving the decision. The FIDIC forms of contract thereafter provide for a period where the parties should attempt amicable settlement. In the event that the parties are unable to settle the dispute amicably then the parties can initiate arbitration. The reference to the Dispute Adjudication Board within the FIDIC forms of contract is therefore a condition precedent to the commencement of an arbitration. **1.39**

D. Expert Determination⁵⁴

- 1.40** The use of an expert or valuer to determine or assess an issue is a process which has been a feature of commercial and legal practice for centuries. However, as a result of the ever increasing costs associated with arbitration and litigation it is a process which is being called upon more and more often. The use of expert determination is common in resolving valuation disputes such as rent reviews, accountancy, and intellectual property disputes. The process is usually extremely quick and cheap. The expert will conduct its own investigations into the facts and does not need to wait for the parties to provide it with evidence. The expert's decision is often final and binding on the parties and there is no right of appeal.⁵⁵ A challenge to the decision will only be permitted in limited circumstances. Enforcement of the expert's decision is by an action for breach of contract.
- 1.41** An expert determination agreement will often include a clause requiring the expert to act 'as an expert and not as an arbitrator'. The expert's determination is not therefore an arbitrator's award nor comparable to a court's judgment. It cannot be enforced under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1959 or the Brussels Convention on the Jurisdiction and Enforcement of Judgments in Civil and Commercial Matter 1968 (Brussels Convention). In the event that a party fails to comply with the expert's determination then fresh proceedings must be commenced to enforce the decision. A party can generally obtain summary judgment on the determination and thereafter enforcement can take place of the court's judgment.
- 1.42** Challenges to an expert's determination can be made on limited grounds. It has long been accepted that a party can challenge an expert's determination where it is alleged that the determination has been induced because of fraud or bias. Similarly, a challenge can be made where the determination deals with issues falling outside of the expert's jurisdiction.⁵⁶ In England, applications have been made to the court to overturn an expert's determination in cases where the expert has made a mistake.⁵⁷ However, the English courts have shown themselves unwilling to interfere in a contractual mechanism to determine a dispute

⁵⁴ For a detailed analysis of expert determination see John Kendall, *Expert Determination* (2001).

⁵⁵ In this regard a distinction is made between the process of expert determination and expert appraisal. An expert appraisal occurs where the expert makes a recommendation which has no binding effect, which is analogous to the ADR process of early neutral evaluation or a DRB.

⁵⁶ *Jones v Sherwood Computer Services plc* [1992] 1 WLR 277.

⁵⁷ *Belchier v Reynolds* (1754) 3 Keny 87.

by expert determination and which has been agreed by the parties. In *Nikko Hotels (UK) Ltd v MEPC plc*⁵⁸ the court decided the basis on which an expert's determination would be void. The court stated that if the expert had answered the wrong questions then the determination would be invalid. If it had answered the right question in the wrong way, the determination would be binding. The same test is used in determining whether an adjudicator has exceeded his jurisdiction in making his decision.⁵⁹

A final determination of the issues

The Supreme Court of Western Australia has recently had to consider what types of disputes were amenable to expert determination. In *Baulderstone Hornibrook Engineering Pty Ltd v Kayah Holdings Pty Ltd*⁶⁰ the court held that not all matters could be referred to expert determination. The court stated that expert determination was a suitable ADR process to resolve issues of fact on which the expert was suitably qualified. In *Baulderstone Hornibrook Engineering* the expert had been asked not only to decide issues of fact but also questions of damages, which was beyond the scope of his expertise. The court concluded that matters relating to breaches of contract, damages, and breaches of statutory duty could only be determined by the courts or by arbitration.⁶¹ **1.43**

The approach in *Baulderstone Hornibrook* of considering expert determination by reference to the subject matter of the dispute was reviewed by the Supreme Court of New South Wales in *Fletcher Construction (Australia) Ltd v MTN Group Pty Ltd*.⁶² The court held that the issue that the court had to consider was whether the expert had acted within the scope of the dispute resolution clause. The court disagreed that an expert could not resolve matters of breaches of contract or damages if this fell within its terms of reference. There is therefore no consensus as to the matters which can be referred to expert determination in Australia. Similarly, in England there is no authority on this issue. **1.44**

Expert determination and arbitration compared

An examination of the wording of the dispute resolution clause has to be **1.45**

⁵⁸ *Nikko Hotels (UK) Ltd v MEPC plc* [1991] 28 EG 86.

⁵⁹ *Bouygues UK Ltd v Dahl-Jensen UK Ltd* [2001] 1 All ER (Comm) 1041; and *C&B Scene Concept Design Ltd v Isobars Ltd* [2002] EWCA Civ 46.

⁶⁰ (1997) 14 BCL 227.

⁶¹ See also the English case of *Cott UK Ltd v FE Barber* [1997] 3 All ER 540 where the court refused to stay litigation even though the litigation was in breach of a clause requiring an expert determination.

⁶² Rolfe J, Supreme Court of NSW 55028, 14 July 1997 and see also *Public Authorities Board v Southern International Developments Corp Pty Ltd* [1990] ICLR 443, Supreme Court of New South Wales, 19 October 1997.

undertaken in each case to decide whether the dispute resolution process is arbitration, a valuation or expert determination. In each case the courts will look at the substance of the clause rather than its heading. In *David Wilson Homes v Survey Services Ltd (in liquidation)*⁶³ proceedings were brought against Survey Services Ltd and their insurers. The insurers applied to have the proceedings stayed under section 9 of the Arbitration Act 1996. The clause in the contract on which the insurers relied stated: 'This contract is governed by the laws of England and any dispute or difference arising hereunder between the Assured and the Insurer shall be referred to Queen's Counsel of the English Bar . . .' The Court of Appeal held that this clause was an arbitration clause and that there was no need to mention arbitrator or arbitration. The courts stated that as the parties had wanted a binding decision they must have intended that they resolve their dispute by arbitration. The Court of Appeal stated:⁶⁴

The necessary attributes of an arbitration agreement are set out in the second edition of Mustill and Boyd, *Commercial Arbitration* (2nd edn, 1989) p 41. But, for the present purposes, the important thing is that there should be an agreement to refer disputes to a person other than the court who is to resolve the dispute in a manner binding on the parties to the agreement. That is what this clause in my opinion does, and it is therefore an arbitration agreement within the meaning of s 6 of the 1996 Act.

A process requiring a judicial enquiry

- 1.46** In a leading case on the distinction between valuers and arbitrators the Court of Appeal considered that it was the judicial nature of arbitration which distinguished it from mere valuation. The Court of Appeal referred to obiter dicta from Esher MR:⁶⁵

The question here is, whether the umpire was merely a valuer substituted for the valuers originally appointed by the parties in a certain event, or arbitrator. If it appears from the terms of the agreement by which a matter is submitted to a person's decision, that the intention of the parties was that he should hold an inquiry in the nature of a judicial inquiry, and hear the respective cases of the parties, and decide upon the evidence laid before him, then the case is one of an arbitration. The intention in such cases is that there shall be a judicial inquiry worked out in a judicial manner. On the other hand, there are cases in which a person is appointed to ascertain some matter for the purpose of preventing

⁶³ [2001] 1 All ER (Comm) 449, CA. However, see *Flight Training International v International Fire Training Equipment Ltd* [2004] EWHC 721 (Comm) and *Kenon Engineering Ltd v Nippon Kokan Kabushiki Kaisha* [2003] 754 HKCU 1, in which *David Wilson Homes* was distinguished. In these cases the courts held that the process that the parties had chosen was mediation and not arbitration.

⁶⁴ [2001] 1 All ER (Comm) 449, 451.

⁶⁵ *Re Carus-Wilson v Green* (1886) 118 QBD 7.

differences from arising, not of settling them when they have arisen, and where the case is not one of arbitration but of a mere valuation.⁶⁶

The courts, in order to determine whether a dispute resolution process is an arbitration or expert determination, will therefore look at the process in which the ‘adjudicator’ makes its decision. If the process involves a judicial enquiry then it will be arbitration. If no judicial enquiry is required then it will be an expert determination. It is immaterial what the parties call the process. As Lord Templeman once stated: ‘The manufacture of a five-pronged implement for manual digging results in a fork, even if the manufacturer . . . insists that he intended to make and did make a spade.’⁶⁷ Problems with the categorization of expert determination and arbitration clauses sometimes occur in commercial leases in the context of rent review arrangements where provisions in leases sometimes provide for arbitration and sometimes for expert determination. In *Langham House Developments Ltd v Brompton Securities Ltd*,⁶⁸ the court stated:

Where a third party is to determine the rent under the provisions of a rent review clause, the third party may act either as an expert or an arbitrator: normally the clause will make it clear in what capacity the third party is to act; if it does not, it will be a matter of construction as to which was intended and the mere description of a third party as ‘expert’ or ‘arbitrator’ in the lease will not necessarily be conclusive.

The distinction between arbitration and expert determination has recently also been considered by the Victorian Civil and Administrative Tribunal in *Age Old Builders Party Ltd v Swintons Pty Ltd*.⁶⁹ In this case the tribunal had to consider whether an expert determination clause within a contract was in fact an arbitration agreement. The tribunal held that the name given to the agreement was irrelevant and that the substance of the agreement had to be considered. If the agreement required that there be a judicial enquiry including the right of both parties to be heard then this was more likely to be an arbitration agreement than an expert determination clause. Further, the tribunal held that where the agreement required the dispute to be determined in accordance with the law then once again the agreement was more likely to be an arbitration agreement. The tribunal stated that even if the word ‘arbitrator’ is not used it does not follow that what has been agreed is not arbitration. The tribunal held that it was

⁶⁶ The court reached a similar decision in *Cape Durasteel Ltd v Rosser & Russell Building Services Ltd* (1995) 46 LR 75 where Judge Lloyd stated: ‘I do not consider that it could have been seriously argued that in a contract of this kind a provision whereby any dispute is to be referred to the adjudication of a person agreed by the parties or appointed by the President of a professional institution is not an arbitration agreement.’

⁶⁷ *Street v Mountford* [1985] 2 WLR 877.

⁶⁸ (1980) 265 EG 719.

⁶⁹ <http://www.vcat.vic.gov.au>.

‘unpersuaded that the parties, by the words they choose to use, can deem their relationship to be something it is not’.

- 1.49** The distinction between arbitration and expert determination is important. First, as mentioned above, there are different rules relating to the enforcement of arbitrators’ awards compared to expert determinations. Second, there are different rules relating to the challenges which can be made to an expert determination compared to an arbitration. Third, arbitrators will generally be immune from suit unless bad faith is shown. An expert may be sued for negligence unless this type of liability has expressly been excluded within its appointment.

The ICC Rules for Expertise

- 1.50** The ICC issued a set of Rules for Expertise which came into force on 1 January 2003.⁷⁰ The Rules of Expertise are administered by the International Centre of Expertise, which is a service centre of the ICC. The rules provide a comprehensive agreement under which an expert is appointed and under which he or she will seek to resolve the dispute of the parties. Once the expert has been appointed consultation with the parties is required and its ‘mission’ should be set out in a written document. The mission statement sets out the names and details of the parties and the expert. It also sets out the issues which are to be addressed and the procedure to be followed by the expert. Once the mission statement has been prepared the expert then provides the parties with a timetable for the conduct of the expert determination. The obligation on the expert is stated as being: ‘to make findings in a written expert’s report within the limits set by the expert’s mission after giving the parties the opportunity to be heard and/or to make written submissions’. Unless the parties otherwise agree the expert report is not binding. The Rules of Expertise are therefore a hybrid of certain aspects of expert determination and certain aspects of neutral evaluation.

E. Neutral Evaluation and Mini-trials

Neutral evaluation

- 1.51** Neutral evaluation is a process whereby a neutral professional (an ‘evaluator’), considers the issues in dispute and gives a non-binding assessment of the merits of the respective parties’ cases. There is no set procedure for neutral evaluation. However, it is common to find that the first step in the neutral evaluation process involves the parties’ appointing an evaluator who has expertise in the area of law or issue in the dispute. After detailed information and case summar-

⁷⁰ These rules replace the old ICC Rules of Expertise which were in force from 1 January 1993.

ies are exchanged the evaluator convenes a neutral evaluation session. At this session, each side briefly presents the factual and legal basis of its position. The evaluator may ask questions of the parties and help them identify the main issues in dispute and also areas of agreement. The evaluator may also assist the parties in exploring options for settlement. If settlement does not occur, the evaluator then offers his or her opinion as to the settlement value of the case, including the likelihood of liability and the likely range of damages. With the benefit of this assessment, the parties are again encouraged to discuss settlement, with or without the evaluator's assistance. They may also explore ways of narrowing the issues in dispute, exchanging information about the case or otherwise preparing efficiently for arbitration or trial.

Mini-trials⁷¹

The procedure for a mini-trial is similar to a litigation hearing. Mini-trials were first used in the United States in the mid 1970s to resolve complex and acrimonious patent disputes.⁷² The parties may appoint a neutral(s) to act as the tribunal to hear the dispute. Alternatively, the tribunal can be comprised of two senior executives, one from each party, and a neutral chairman. The tribunal is a creature of the agreement of the parties and it is the parties' agreement which determines what can and cannot be done by the tribunal. The parties will usually present to the tribunal a précis of their respective cases, which will include submissions and the presentation of evidence. The tribunal can issue written rulings on matters of disclosure, hold joint discussions to resolve questions of procedure, answer legal or technical questions raised by the parties, and question witnesses and counsel to clarify a party's case.⁷³ The tribunal can act inquisitorially and can comment on the evidence and submissions. If the tribunal is made up of neutrals then it will give a non-binding recommendation. Where the tribunal comprises senior executives then it may be used as a platform to commence settlement negotiations. **1.52**

Mini-trials are frequently effective because the recommendation given by the tribunal often reflects the likely outcome if the matter went on to trial. Equally, the process helps to narrow the issues of controversy and encourage settlement discussions. Where settlement discussions are commenced then the tribunal can **1.53**

⁷¹ Mini-trials can take two forms. First, they can be a discrete type of ADR process. Second, mini-trials can be used as a settlement technique introduced to expedite the resolution of a dispute within the civil litigation system. Mini-trials within the civil litigation system are not considered in this chapter. For an analysis and review on how mini-trials works within the litigation process see Alberta Law Reform Institute's Discussion Paper No 1 of August 1993, *Civil Litigation: The Judicial Mini-Trial*.

⁷² E Green, *Growth of the mini-trial* (Fall 1982) 9 *Litigation* 12.

⁷³ M Hoellering, *The mini-trial* (December 1982) 37 *Arbitration* 48 et seq; and Page and Lees, *Roles of participants in the mini-trial* 18 *Public Contract Law Journal* 54 et seq.

act as a facilitator or mediator between the parties. In this regard the tribunal has a persuasive power rather than the judicial power of a judge or arbitrator. Mini-trials allow for a full examination of complex problems without the delays and costs associated with complex litigation.

F. Med-Arb and Other Forms of Hybrid Arbitration

- 1.54** It has been suggested that it is one of the characteristic strengths of English arbitration that it permits great flexibility to the arbitration process.⁷⁴ The arbitration procedure may be tailored to meet the needs of the particular case. Therefore it is possible to have documents-only arbitrations or short-time-span arbitrations. In recent years, however, arbitration in its traditional form has developed a number of hybrid ADR processes. These processes differ significantly from traditional arbitration procedures and it has been questioned whether they are in fact arbitration proceedings or whether they constitute a separate ADR process.

Med-arb

- 1.55** Med-arb is a process which is a hybrid between both mediation and arbitration. As a result there are no fixed rules on how the process should be conducted. It is therefore possible for the parties to agree to mediate first, then arbitrate. It is also possible to mediate during the course of the arbitration or mediate after the arbitration hearings have been concluded but before an award has been issued. It is possible to mediate discrete items in order to narrow the issues in dispute in the arbitration.⁷⁵ Alternatively, the parties could arbitrate discrete issues and then seek to mediate the remainder of the dispute.

The strength and weaknesses of med-arb

- 1.56** It is the lack of structure of the med-arb process which is its strength and at the same time its weakness. It is its strength because the parties and mediator/arbitrator can adopt procedures which are best suited to resolve the dispute. Its Achilles' heel⁷⁶ is that in some common law jurisdictions the knowledge which

⁷⁴ Brown and Marriott, *ADR Principles and Practice* (1999) at 12.

⁷⁵ See further D Elliott, 'Med/Arb: Fraught with Danger or Ripe with Opportunity?' (1996) 62 *Arbitration* 175.

⁷⁶ See Haih Oghigian, *On Arbitrators Acting as Mediators* (2002) 68 *Arbitration*, Vol 1, 42. In *Acorn Farms Ltd v Schnuriger* [2003] 3 NZLR 121 the High Court of New Zealand held that where the parties had agreed a med-arb procedure then the mediator/arbitrator could not receive information in the absence of the other parties and that this therefore prevented the mediator having break out or caucus sessions.

the mediator may acquire prejudices his position in acting as arbitrator. The principle that each party should hear the case of the other side is contravened where the arbitrator is advised of confidential information within the mediation process. The issue which then arises, if the mediation process fails and the arbitration resumes, is whether the other side should be advised of the confidential information which the arbitrator possesses.

Acceptance of the med-arb process There are many jurisdictions that do not consider that an issue of natural justice arises where the arbitrator acts as mediator. In some jurisdictions med-arb as an ADR process is actively encouraged. The Alberta Arbitration Act,⁷⁷ for instance, provides: **1.57**

35(1) The members of an arbitral tribunal may, if the parties consent, use mediation, conciliation or similar techniques during the arbitration to encourage settlement of the matters in dispute.

(2) After the members of an arbitral tribunal use a technique referred to in subsection (1), they may resume their roles as arbitrators without disqualification.

Similar provisions are found within the Arbitration Rules of the Stockholm Chamber of Commerce. Equally, in Colombia, judges, at the beginning of the case, act as mediators or conciliators. If no agreement between the parties is reached then the judge continues with the case in his role as judge. Also, the rule applies to arbitral proceedings so that an arbitrator may start the case as mediator and, if no settlement is reached, thereafter revert to the role of arbitrator. **1.58**

Rejection of the med-arb process The use of med-arb is not accepted in all countries. In the English case of *Glencot Development and Design Co Ltd v Ben Barrett & Son (Contractors) Ltd*⁷⁸ the High Court was sceptical about the med-arb process. The case concerned an adjudicator who was asked to facilitate negotiations between the parties. The same principles that applied to the adjudicator taking on the role as mediator would apply equally to an arbitrator. A dispute arose as to the final account due for building works undertaken by Glencot. The parties referred the dispute to adjudication under the Scheme for Construction Contracts pursuant to the Housing Grants, Construction and Regeneration Act 1996. At an initial meeting the parties, having reached a partial settlement, requested the adjudicator to act as mediator. Settlement was not reached in the mediation and the adjudicator advised the parties that the adjudication would proceed. The adjudicator wrote to the parties asking them to inform him immediately if they felt that his position had been **1.59**

⁷⁷ There are identical provisions within of the Nova Scotia Commercial Arbitration Act 1999, s 38 and the Arbitration Act 1992 of Saskatchewan and a similar clause in the Indian Arbitration and Conciliation Act 1996. A number of arbitration rules also permit the arbitrator to use mediation techniques to settle the dispute (eg the AFMA Rules for International Arbitration, cl 16.4).

⁷⁸ [2001] BLR 207.

compromised by his role as mediator. No objection was raised by Barrett at that time. A date was fixed for a further meeting. Barrett subsequently raised an objection. The adjudicator refused to withdraw at that stage and subsequently made a finding that Barrett should pay a sum in excess of £160,000 to Glencot. Glencot then initiated court proceedings and sought summary judgment to recover the sum awarded. Barrett defended the summary application on the basis that the decision was invalid as a result of apparent bias.

- 1.60** The High Court held that summary judgment was not appropriate as Barrett did have an arguable case. The test for apparent bias was an objective one. The court had to determine whether 'the circumstances would lead a fair minded and informed observer to conclude that there was a real possibility or a real danger' of bias.⁷⁹ In assuming the role of mediator the adjudicator had exposed himself to hearing information and forming opinions about individuals which would not have occurred in his role as adjudicator. Barrett therefore had an arguable case that an informed observer could conclude that a potential for bias existed. The court held that Barrett's failure to raise its objection earlier did raise the possibility of an issue of waiver. The court concluded that a summary hearing was not the appropriate forum to explore that issue fully. However, the court ordered Barrett to make an interim payment to Glencot pending the substantive trial.
- 1.61** The court did not rule that a med-arb procedure could never be successful. However, the decision will certainly make arbitrators consider carefully how they will conduct a mediation process. It may be possible for an agreement to be reached that no confidential information will be passed to the mediator during the mediation. Alternatively, the mediation process could take place after the arbitrator has completed the arbitration and has written his award but not published it.
- 1.62 Med-arb and stepped ADR processes** Med-arb is different from a two-tier or stepped ADR process, which requires a form of ADR followed by arbitration. The use of an ADR process followed by arbitration is now common in major international contracts.⁸⁰ In these types of contract the mediator or facilitator does not subsequently become the arbitrator and vice versa. An example of a two-tier process can be seen in the *Channel Tunnel* case.⁸¹ In this case the

⁷⁹ See also *Director General of Fair Trading v Proprietary Association of Great Britain*, The Times, 2 February 2001.

⁸⁰ It is common to find stepped ADR processes in many of the PFI and PPP contracts. In the privatization agreements of some of the major utilities the dispute resolution agreements allowed for at least four levels of ADR process prior to a party being entitled to commence court or arbitration proceedings.

⁸¹ *Channel Tunnel Group v Balfour Beatty Ltd* [1993] 1 All ER 664, 672a-e.

contract required that a dispute would first be referred to a panel of three persons acting as independent experts and not as arbitrators. The parties were required to give effect to any decision of the panel until that decision was revised by arbitration.

Flip-flop arbitration

The United Kingdom's Department of the Environment, Transport and the Regions has produced a glossary of commercial property terms. Flip-flop arbitration is defined as being 'A form of arbitration under which the arbitrator bases his award on the submission he considers most reasonable. It is claimed that this encourages parties to be more reasonable in their submissions and reduces polarisation.' This type of process is also known as pendulum arbitration. **1.63**

The name flip-flop arbitration has its origin in a United States arbitration case which dealt with a baseball player. Both parties set out their respective cases to the arbitrator. On the evidence submitted the arbitrator decides which submission is the correct submission and then makes an award in favour of that party. The arbitrator cannot cherry-pick from a party's case. The award either favours the claimant or respondent. The perceived benefits of this type of arbitration are that it encourages the parties to put forward a realistic case. If a party inflates its claim then it is possible that it will lose everything. A variation to the theme is where the parties submit to the arbitrator in sealed envelopes their offers of settlement of the claims. The arbitrator then decides liability and quantum. The arbitrator then proceeds to open the envelopes and the sum which is nearest to its own assessment is awarded as the sum due. This type of arbitration is also known as 'final offer' arbitration. **1.64**

There are difficulties with pendulum arbitration especially where the arbitration is not a simple money claim. In employment disputes the parties may be asking the arbitrator to address issues such as productivity payments, hours, and restraint of trade issues. The United Kingdom government 'Report of the Inquiry into the Machinery for Determining Firefighters' Conditions of Service' addressed these issues. The Inquiry considered firefighters employment contracts and whether pendulum arbitration should be considered to resolve disputes arising under such contracts. The Inquiry stated: **1.65**

If there is a package of demands, will this be broken down and sent to different arbitrators, to avoid sharing out the decisions? Will the arbitrator be expected to decide that the whole package goes one way or the other? Who will decide exactly what the final positions are? Having an outright winner and an outright loser is not necessarily conducive to good industrial relations. It would not be particularly helpful in an environment encouraging partnership.

However, the use of pendulum arbitrations has been endorsed in employment **1.66**

arbitrations and encourages both employers and employees to start negotiations from a realistic starting point.⁸² In England there is no reported case of an appeal from a pendulum arbitration. As the arbitral tribunal agrees to tie its hands in making the award it is questionable whether an award in a pendulum arbitration could be enforced under the Arbitration Act 1996. The award is determined by the submissions of the parties and not by the arbitrator acting fairly and impartially. Some commentators have therefore suggested that it is an ADR process rather than a type of arbitration process.⁸³

G. The ICC ADR Rules⁸⁴

- 1.67** The ICC ADR Rules came into force on 1 July 2001. The ICC state that the phrase ‘ADR’ as used within the ADR Rules means ‘amicable dispute resolution’ rather than the more usual ‘alternative dispute resolution’. The ADR Rules replace the ICC Rules of Optional Conciliation which were in force from 1 January 1988. The essential characteristics of the ICC ADR Rules are that they should be flexible and controlled by the parties. They are also intended to provide for a rapid and inexpensive dispute resolution process which leads to an amicable solution.
- 1.68** The ICC ADR Rules are to some extent unique and therefore do not fit neatly within any of the above processes. The ADR Rules permit the parties to choose whichever ADR technique they consider appropriate to resolve their dispute, although they exclude litigation or arbitration. Where there is no agreement on the choice of ADR process then mediation will be used. The ADR Rules therefore envisage that the dispute may be resolved via a settlement or a non-binding or a binding recommendation or evaluation.
- 1.69** The ADR Rules are made up of seven Articles and a Schedule, which deals with the costs of the ADR process. There are suggested ADR clauses set out within the Forward to the Rules. These ADR clauses provide for: Optional ADR, Obligation to Consider ADR, Obligation to Submit Dispute to ADR with an Automatic Expiration Mechanism, and Obligation to Submit Dispute to ADR, Followed by ICC Arbitration as Required. The Optional ADR Clause states:

⁸² The use of final offer arbitration is also permitted under the Canadian Transportation Act, which contains several provisions designed to facilitate the resolution of rate and service disputes between carriers and shippers or transit authorities. Final offer arbitration is provided for in Part IV of the Act and provides one means of resolving such impasses through the use of an arbitrator or a panel of three arbitrators.

⁸³ Dr L Mistelis, *ADR in England and Wales*, 27, published at www.ombuds.org.

⁸⁴ The ADR Rules and the Guide to ICC ADR can be found on the ICC website at www.iccwbo.org.

‘The parties may at any time, without prejudice to any other proceedings, seek to settle any dispute arising out of or in connection with the present contract in accordance with the ICC ADR Rules.’

Article 1 of the ADR Rules states that all ‘business’ disputes whether international or not may be referred to ADR proceedings pursuant to these rules. The ADR Rules may be modified by agreement of all parties, subject to the approval of the ICC. The ADR Rules cannot therefore be used to resolve labour disputes or other non-business matters. The rules would also not be applicable to consumer disputes unless the consumer was acting in the course or furtherance of a business. Article 2 sets out the procedure for commencing the ADR process and the particulars which must be provided to the ICC in its written request. Article 2B allows for a party to write to the ICC and request the ADR process even where there is no agreement by the parties to use the ADR Rules. In such circumstances the ICC will write to the other party and request whether that party agrees or declines to participate in the ADR proceedings. No ADR proceedings can be commenced without the agreement of the other party. **1.70**

Article 3 of the ADR Rules deals with the appointment of a Neutral. ‘Neutral’ is the term used by the ICC to describe the person who will seek to facilitate the settlement of the dispute. Article 4 deals with fees and costs. Article 5 of the ADR Rules provides for the conduct of the ADR procedure. The first action which the Neutral takes is to establish with the parties the ADR process to be adopted to resolve the dispute and define the procedure which is to be used. The Guide to the ADR Rules lists a number of different techniques which can be adopted by the parties and the Neutral. However, it is made clear that the list is not intended to be exhaustive. The Guide to the ADR Rules suggests the following: mediation, neutral evaluation, mini-trial, any other settlement technique, or a combination of settlement techniques. In default of agreement between the parties as to the technique to be adopted the ADR Rules state that mediation shall be used. **1.71**

The Neutral is given complete discretion as to the conduct of the ADR process. However, in conducting the process, the Neutral must have regard to the principles of fairness and impartiality and the wishes of the parties. The parties are required to co-operate in good faith with the Neutral. Unless otherwise agreed by the parties, the Neutral’s recommendation or decision will not be binding on the parties. **1.72**

Article 6 of the ADR Rules deals with the termination of the ADR process. Article 7 of the ADR Rules provides for privacy and confidentiality in the ADR process. Any settlement agreement is also private and confidential save in so far as disclosure is necessary to enforce the terms of the agreement. The Neutral is **1.73**

also prohibited under the ADR Rules, unless the parties otherwise agree in writing, from acting in any judicial, arbitration or other similar proceedings relating to the dispute. The ADR Rules finally set out an exclusion of liability provision for both the ICC and the Neutral.

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