

DISPUTE PREVENTION

AND RESOLUTION MATRIX

Dispute Prevention / Resolution Process	Autonomy in Appointment and Process	Formality Of Hearings And Process	Effectiveness Enforceability Of Remedy	Flexibility Of Process	Privacy of Process	Speed of Process From submission to Resolution / Remedy	Cost of Process and Representation	Legal / Self Representation (if allowed)
Self Help (actions must be lawful)	Yes	Informal	Sometimes	Very	Maybe	Yes	Low	n/a
Negotiation / Partnering	Yes	Informal	Sometimes	Very	Yes	Can be + Prevention	Low	Either
Pre-trial Negotiations	Yes ¹	Informal	Sometimes	Very	Yes	Can be	Standard rates	Legal
Conciliation (Binding)	Perhaps ²	Variable ⁹	Yes ¹³	Very	Maybe	Can be	Variable	Either
Conciliation (Non-Binding)	Perhaps ³	Informal	Maybe ¹⁴	Very	Yes	Can be	Variable	Either
Mediation (Binding /Non Binding)	Yes ^{4a}	Informal	Sometimes	Very	Yes	Quick	Variable ³²	Either
DRevB / DArbB / DAdjB	Yes ^{4b}	Informal	Sometimes	Very	Yes	Quick + Prevention	Relative	Either
Courts (Domestic / Supra National)	No	Formal	Yes ¹⁵	No	No	Slow	High	Legal
Tribunals / Disciplinary Boards	No	Semi-formal	Yes	No	No	Reasonable	Variable	Either
Ombudsmen / Regulators	No	Not applicable	Possibly	No	No	Variable	None	None
Adjudication Statutory HGCRA	Yes ⁵	Informal ¹⁰	Yes ¹⁶	Very ²¹	Yes ²⁵	28 days ²⁸	Low ³³	Either ³⁷
Adjudication Voluntary FIDIC	Yes ⁶	Informal ¹¹	Yes ¹⁷	Very ²²	Yes ²⁶	28 days upwards ²⁹	Low ³⁴	Either ³⁸
Expert Determination	Yes/No ⁷	Not applicable	Yes ¹⁸	Yes ²³	Yes	Yes ³⁰	Low ³⁵	None ³⁹
Arbitration (Private not State)	Yes ⁸	Variable ¹²	Yes ¹⁹	Yes ²⁴	Yes ²⁷	Reasonably quick ³¹	Variable ³⁶	Either ⁴⁰
Judicial Review	No	Formal	Yes ²⁰	No	No	Yes	Reasonable	Legal

Notes

- 1 But lawyers take the lead, seeking client’s instructions as needed, hands off process by mail/phone usual.
- 2 Usually a pre-set format with a fixed / pre-determined Conciliator or Board.
- 3 Perhaps, usually pre-set, as in 2 above
- 4 Format in contract – both for appointment and degree of autonomy in process. (a) Court Appointed in USA. (b) compulsory in some US States & World Bank
- 5 For one party to appointment. Joint autonomy only for process subject to minimum statutory requirements
- 6 For appointment – agreed by parties in the contract. Joint autonomy only, for process : Institutional Role.
- 7 Yes for appointment, No for process. Independence variable eg ICE employer appoints
- 8 For appointment – format in contract unless ad hoc. Joint autonomy only, for process : NB Role of Institutions.
- 9 Depends on conciliator – likely to be informal
- 10 Hearing rare – 95% paper only – adjudicator decides what is needed.
- 11 Hearing rare – as in 10 above
- 12 Joint party autonomy over the process. Parties can choose – but invariably less formal than the courts.
- 13 No control over outcome
- 14 Not enforceable. Can be very coercive especially if outcome made public
- 15 No control over outcome, but beware bankruptcy.
- 16 Only temporarily binding. Immediate payment required. Challenge by Judicial Review. No control over outcome.
- 17 As in 16 above
- 18 Judicial Review Quashing, enforcement, prohibition. Appeal or challenge possible.
- 19 Binding award, but subject to both judicial review and to appeal or resistance during enforcement proceedings. Internationally enforceable. No control over outcome
- 20 But a review of process not merits –may send case back for reconsideration – not an automatic win.
- 21 Adjudicator chooses process and acts inquisitorially
- 22 Adjudicator chooses process and acts inquisitorially
- 23 For expert who is in charge of process – parties have no control – depends on nature of inquiry.
- 24 May be agreed in contract : subsequently joint autonomy only, over the process
- 25 Subject to later arbitration/court action for enforceability plus Judicial Review
- 26 Subject to later arbitration/court action for enforceability plus Judicial Review
- 27 But privacy may be jeopardised by enforcement proceedings or by appeal
- 28 Statutory Process with 7 day submission time and right to 14 day extension
- 29 As above – subject to terms of contract – likely to be quick – but FIDIC International 6 months.
- 30 Time scale set in contract
- 31 Fast track arbitration is normally pre-set to very short time schedules
- 32 Not always cheap, some are free / fixed price – commercial mediation best for larger disputes.
- 33 Normally restricted to scope of reference so there may be many adjudications related to a project : Rates range from £125 - £250 per hour.
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- 35 Professional rates
- 36 Considerable party autonomy as to choice of procedure. Can be dearer than the courts if the parties require long hearings etc
- 37 Professional non legal representation common – mostly paperwork only
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- 39 Paper only – but expert may make site visits and act inquisitorially to discover facts
- 40 Professional non legal representation common

□ DISPUTE PREVENTION AND RESOLUTION □

There are three distinct and separate stages or elements to this topic:

- 1 Dispute Prevention.
- 2 Negotiated Settlement / Resolution
- 3 Third Party Determination / Resolution

1 Dispute Prevention. WIN/WIN

“Prevention is Better than Cure”

Disputes are disruptive, wasteful and expensive. The primary aim of all constructors should be to prevent disputes arising or to bring about closure rapidly before minor problem matures into a full blown dispute. There are a number of processes designed to achieve this :-

- **Self help**
- **Give up and concede defeat – not worth the hassle.**
- **Unassisted Negotiation**
- **Expert Determination** – contract administration – problem is the administrator is often the cause of disputes – lack of independence may be a problem.
- **Partnering** – post Latham
- **Contracted Mediation** – Resolex
- **Dispute Resolution Boards** – first stage is identification / prevention
- **Deterrents** – rapid justice prevents frivolous disputes – Adjudication may fulfil this role.

2 Negotiated Settlement / Resolution. WIN/WIN

“Jaw Jaw is Better than War War”

Where the parties have developed fixed views about their respective positions face to face negotiations may cease to be effective. An independent third party negotiation facilitator can help negate personal issues and bring about a return to objectivity, thereby guiding the parties to a realistic settlement of the dispute. Timely and relatively inexpensive, it helps maintain relationships, which is valuable if the parties need to continue to co-operate now and/or in the future.

3 Third Party Determination / Resolution. WIN/LOSE

“Justice Delayed is Justice Denied.”

When the talking ends, the only way to end a dispute is to refer it to a third party determinator who will decide the outcome. This is a judicial role, played by adjudicators, arbitrators and judges. The primary questions here are about how quickly and inexpensively a dispute can be resolved, with the minimum of disruption to on-going projects where applicable.

- **Binding Conciliation** – rare in construction industry.
- **Adjudication** – 2 types Statutory and Voluntary. Informal, relatively quick and inexpensive – but only temporary finality.
- **Arbitration** – cost & speed depend on party autonomy.

□ A BRIEF OVERVIEW OF THE PROCESSES □

- **Dispute Resolution Boards** – 4 types – Advisory recommendation, with or without subsequent admissibility : Mediation Board : Adjudication Board : Arbitration Board.
- **Litigation** – The courts are deemed to be formal, slow and expensive – though post CPR 1998 the courts are more efficient than previously and the case management revolution can eliminate frivolous claims and defences. ADR provides no alternatives to the Courts for Criminal Prosecutions – Breaches of Health and Safety and recourse to Tribunals is necessary for Planning and Environment issues.

Guardians of the Process

The Courts also act as the judicial inspectors of inferior judicial decision makers, providing Judicial Review and Appeals. Both Judicial Review and Appeal are difficult if no reasons are provided.

- **Judicial Review** – the courts review the process to ensure that the requirements of natural justice and due process have been complied with. They ensure the decision maker had jurisdiction, was not biased, considered all the facts and issues and afforded the parties an opportunity to present their case, hear the case against them and effectively challenge the other side.
- **Appeal** – available only in respect of questions of law – not facts which will be finally determined by the original decision maker.
- **Enforcement** – and other support to the private determination processes – such as subpoena of witnesses. Judicial Review of adjudication is often raised at this stage by the defence. Arbitration awards are enforceable world wide under the New York Convention on the Enforcement of Arbitral Awards providing an effective mechanism to chase the money.

Careers

ADR practice is not a career, it is a valuable adjunct to your normal career. It is an **OFFICE** one should be proud to serve in, for the benefit of the industry.

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