ADR NEWS

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For current developments in Arbitration, Adjudication, Dispute Review Boards and Mediation

EDITORIAL :

From the exponentially expanding number of mediation website listings it would appear that month by month the number of private mediation providing organisations grows in the UK. Is this an indication that the mediation business in the UK and globally is growing or is the market simply becoming flooded with erstwhile providers? It is difficult to tell since apart from CEDR there are few statistics available, though those that are seem to indicate that the number of disputes being handled by mediation are relatively small. On the other hand, it is apparent that the courts are now availing themselves of the power under the Civil Procedure Rules 1998 to recommend mediation in appropriate circumstances and to grant stays of action pending mediation. In this issue's leading article, C.Spurin examines the nature of the global mediation market. The paper examines the various mechanisms available for the settlement of commercial disputes outside the courts and considers the principal factors that influence the decision to settle or litigate. The objective is to enable the reader to make considered choices as to the most effective way to resolve commercial disputes that they might become embroiled in and to provide a dispute settlement road map that might be advantageously incorporated into future contract documents to govern their commercial ventures.

Continuing this theme, ADR News explores potential avenues for the development of private dispute settlement in the UK in "ADR Boom or Bust?" and "Compensation Culture Crashes." Self-regulation of the ADR industry comes in for close inspection by yours truly. The implications for ADR of the replacement of the LCD with a Department of Constitutional Affairs are considered by C.Spurin and Nick Turner gives Case Corner a kick-start in this edition with a review of recent case law, including **SHIMIZU EUROPE LIMITED v LBJ FABRICATIONS LIMITED**.

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Editorial Board.

General Editor : G.R.Thomas
Assistant Editor : C.H.Spurin
N.Turner
G.M.Beresford-Hartwell
R.Faulkner

For an insight into how to stop the legislature working by going on holiday, read Richard Faulkner's fascinating account of the Austin, Texas out of State Democratic Picnic Party.

S.Randhawa explains the immigration adjudication process and G.Beresford Hartwell provides an overview of ADR processes. ADR News also features a review of the Construction Umbrella Group User's Guide to Adjudication.

NADR introduces a new facility for its members. Each member will be entitled to receive personalised NADR Business Cards carrying the member's ADR credentials, contact details and membership number. Two versions of the card are available. A deluxe laminated version and standard version. See below for illustrations of front and back of card and application details.

The comments received about the new look Newsletter have been very positive, with readers from as far afield as the US and Hong Kong expressing interest in joining NADR. In particular the new expert witness category of member has provoked a considerable amount of interest from new readers.

The number of new visitors to the NADR website continues to grow week-by-week. So come on everyone. Get those ADR ideas, comments and questions into the editor and help establish Treforest as the all time "Ideas Capital of ADR." Happy poolside reading as the holiday season gets underway. Just leave your mobile behind – unless of course it's to give us a ring with your latest inspiration!

G.R.Thomas : Editor

ADR – BOOM OR BUST?

Given the changes in civil litigation brought about by the Civil Procedure Rules 1998, does ADR have a future in the UK? Assuming that litigation is now quicker and cheaper, with judicial case management eliminating spurious claims and other tactics designed to wear down opponents, court services appear to be a more attractive proposition than ADR, particularly since the courts are in a position to recommend mediation in appropriate circumstances.

As ADR practitioners, NADR members have a vested interest in this issue. Let us not lose sight of the fact that ADR practice, whilst a vocation for some, is above all about occupying an office which carries with it great responsibilities. We are ethically bound to recognise that the interests of the community are paramount. We exist to provide the best possible dispute settlement services to the community. If the courts now provide the best possible service where does that leave the ADR industry?

More now than ever, it is essential for ADR to provide added value, that something distinctive and valuable that the courts cannot provide. The private nature of ADR and benefits of peer assessment, whilst important factors may not in themselves be enough to persuade parties to hold faith with ADR. User friendliness, informality, cost effectiveness and speed, whilst much trumpeted benefits of ADR, are often more wishful thinking than reality. If the ADR industry is to survive this can no longer be the case.

First the introduction of the Model Law internationally, followed by the Arbitration Act 1996 reforms in the UK has provided a solid base for the arbitration industry to build upon. The arbitrator is now afforded considerable scope to regulate the process and is indeed under a duty to adopt cost effective procedures.

There is an urgent need for all arbitrators and ADR service providers to fully embrace these opportunities to meet the challenge from the newly reformed litigation process. The courts provide a Rolls-Royce civil justice process, which falls down in two respects. The sheer cost of litigation means that justice is not available to all. Legal Aid provision is severely restricted and contingency fee representation is highly selective, leaving large numbers of potential claimants and indeed defendants on the outside. Justice delayed is often tantamount to justice denied. Whilst the CPR 1998 has speeded up the litigation process it remains a relatively slow process. There is therefore a need to develop timely, low cost and fixed price arbitration services to meet the needs of these excluded categories. Construction adjudication has shown us the way towards achieving both of these objectives, but much more needs to be done to extend the benefits to all categories of dispute.

First there is a need to develop improved ADR service provision but secondly, there is a need to educate both users and their representatives about the existence of these new alternatives to litigation. In the absence of a major organisation dedicated to this task, it falls to us as practitioners, not just to promote ourselves but also the new ADR products at every opportunity. Only by so doing can we meet and prevail over the challenge from a reformed and more vital litigation process. CHSpurin

DEMOCRATIC LEGISLATORS "HOLIDAY" HALTS ADR BILLS

Two separate non-controversial ADR bills creating statutory Dispute Resolution Boards and Adjudication died in House Committee after being delayed by the maelstrom of Congressional Redistricting politics in the biannual Texas Legislature.

The two bills, drafted by NADR members Robert Gammage and Richard Faulkner with advice from UK Adjudicators Tony Bingham and Corbett Spurin, would have statutorily sanctioned both DRBs and Adjudication, established the qualifications for service, mandated Board and Adjudicator neutrality, established the uses of DRB recommendations and provided for enforcement of Adjudication decisions. They would also have required all Texas government agencies to consider the use of DRBs and Adjudication for every government construction projects. Alas, in order to prevent Republican redistricting measures passing the House of Representatives, the Democratic members of the legislature went absent without leave on an extended out of state picnic until the time for considering new legislation expired.

Deprived of sufficient members in the House to constitute a quorum, the legislative program for the session ground to a halt. The regretful upshot is, that whilst not a target of this highly successful tactic, the bills to add Adjudication and DRBs to existing Texas ADR statutes have been put on hold for two years. However, all may not be lost. The Governor of Texas has issued a call for a special legislative session beginning June 30. It may be possible that some of the legislation may yet be salvaged from the wreckage. Only time will tell. So watch this space! R.Faulkner

COMPENSATION CULTURE CRASHES by CHSpurin

Amidst a wave of euphoria the UK embraced contingency fee justice, a wonderful new legal product that reached the parts that other forms of justice could not reach. Previously, justice at a price was available to those that could afford and to those entitled to assistance from the ever-shrinking Legal Aid pot. Now anyone with a valid claim could pursue it – no one was left out. Then came the call-centre phenomena. Aggressive TV marketing campaigns encouraged the public to pursue their rights to compensation, free of charge. US style ambulance chasing arrived with a vengeance in the UK.

Local authorities and business paid the price as claims flooded in. The cost of insurance cover went through the roof. Then doubts about the benefits to claimants were expressed. Whilst the contingency percentage is capped at a low level, the hidden costs of pursuing the claim deprived many successful litigants of a large proportion of their awards. Now it appears the entire edifice is tumbling down.

First there was the demise of Claims Direct in 2002. In June 2003 the mighty Aventis and its subsidiary The Accident Group (TAG) ceased trading. Whilst the claims on its books will still be pursued by the solicitor firms already engaged, working directly with the clients rather than through TAG, it appears that the bottom has fallen out of the claim chasing market at last. What impact, if any at all will this have on ADR?

The initial successes of the movement were significant. Many claimants who might previously have gone directly to solicitors were attracted by the promise of free representation, without realising that this was available from many high street solicitor's firms in any case. Perhaps therefore the inability of law firms to adapt to the legislation quickly enough contributed to the success.

Submitting a claim over the phone gave the impression that claimants could get access to justice without having to face the daunting task of going to a solicitor. Informality and user-friendliness appeared to be on offer. Perhaps however one of the most significant factors has been the way tortuous liability has been extended by the courts as one after the other many of the litigation flood-gates has been lowered in recent years, with no doubt a little help from the Human Rights Act 1998. The Claims Centres initially capitalised upon this, benefiting many claimants. Defendants, rather than risk losing in court were prepared to make a settlement offer. However, the sheer cost of manning these centres required a massive case-load to make them viable. Ultimately the centres pursued too many weak cases in an attempt to maintain the case-load and the movement imploded.

There are lessons to be learnt from this for ADR. Firstly, there is a continuing need for access to justice which no longer being fulfilled by these call centres. Whilst the passing of the excesses of the movement is to be applauded, they did nonetheless fill an important gap in the claims market. Secondly, a new way of filling that gap is needed. There is a role here for ADR .

Mediation and arbitration are not limited to contract disputes. Both processes lend themselves equally well to the settlement of tort claims. The problem is that tort disputes rely overwhelmingly on ad-hoc submissions, which require the consent of both parties. Court recommended mediation under the CPR 1998 can help but its value at present is limited. What is needed is a mechanism to encourage the use of ADR in tort claims.

It is possible that ADR service providers can work with the insurance industry to create such a mechanism. Firstly, the insurance industry often picks up the tab at the end of the day when compensation is awarded. Secondly, increasingly many members of the public have insurance accident cover so the claimant is in fact an insurance company, claiming in subrogation. Thirdly, legal insurance is increasingly popular today, so that the cost of litigation is covered by the insurance industry. Litigation costs are a major problem for the insurance industry and ADR by providing cost effective, timely dispute settlement processes has a lot to offer the industry.

The ADR industry alone cannot fill the gap left by the demise of the legal call centres, but by working with the insurance industry the needs of society can be met. The insurance industry and ADR have successfully worked in partnership in the US for over ten years now providing a model of what can be achieved, relying essentially on mediation. The P&I clubs have also started to make use of mediation.

However, as yet little has been done to develop arbitral and adjudicative services in this area. The CIArb has successfully pioneered timely fast track arbitration for travel/holiday and sport disputes. However, these schemes rely on prior contractual relationships. Ensuring a role for arbitration and adjudication in the settlement of tort claims will not be so straightforward but it is a worthwhile and achievable goal. The key to success is to build bridges between ADR service providers and the insurance industry, educating carriers about the nature of the services we have to offer and their benefits for the settlement of tort claims.

NADR MISSION STATEMENT

"To enable those engaged globally in domestic and international commerce to achieve the optimum climate of good relations, by facilitating the settlement of differences between trading partners through the establishment of and provision of an internationally homogenous, wide and comprehensive range of dispute resolution services, grounded on the highest ethical standards which guarantee impartiality and fairness, by synthesizing the best practices in Alternative Dispute Resolution from around the world, and which are tailored to the specific purposes of the various aspects of industry and commerce, whilst bridging the cultural and jurisdictional barriers which traditionally separate and divide them, at a price compatible with commercial needs and within a prompt and appropriate time frame."

NADR INTERNATIONAL OBJECTIVES

1. To spread the Concepts and Practice of ADR, to a cross-section of industry, professionals (both legal and non-legal), educational institutions and the public in general in order to ensure that the various forms of ADR enter the main stream of commercial practice and become the primary mechanism for commercial dispute resolution.
2. To assist and advise governments on the introduction of legislation to better facilitate the adoption of ADR mechanisms by commerce.
3. To forge a new spirit of co-operation and confidence between the providers of Dispute Resolution Services and commerce.
4. To train (in association with the NMA) a new generation of ADR personnel from a diverse range of commercial and legal backgrounds and to inculcate within them the highest standards of ethics, knowledge and expertise.
5. To create and provide a wide range of cost effective Alternative Dispute Resolution services ranging from adjudication, arbitration and conciliatory project review boards through to mediation, to commerce and to the consumer.
6. To recruit ADR specialists old and new from the global community to participate in the provision of the above stated Alternative Dispute Resolution services and to make their services available to commerce though the promulgation of lists and by providing appointing services as appropriate.
7. The maintenance of a strictly enforced barrier between the provision of ADR services and legal advice guaranteeing a total absence of conflicts of interest. ***(NADR does NOT and WILL NOT provide legal advice to parties.)***
8. To co-operate with and work alongside governments and the longstanding bastions of dispute resolution to achieve the above stated objectives.

SELF-REGULATION AND ADR

By G.R.Thomas

The recent demise of The Accident Group (TAG) following closely on that of Claims Direct has brought sharply into focus the litigation industry in the United Kingdom. There has been a great deal of unease about the tactics employed by litigation firms in the pursuit of claims with calls for there to be great regulation of the process and claims that self-regulation no longer meets the criteria of a modern society based litigation culture. This may well be true, but why is this important to ADR practitioners?

Very little if any business of Claims Direct or TAG found its way to ADR practitioners, so why should their demise be of concern to those who practice in the ADR industry?

The importance of their demise is that they have brought into public focus, the problems associated with professional self-regulation. ADR practitioners are for the most part professionals who have followed recognised paths of study and have developed professional competence through their studies and experience. There is however, a rider to this and that there is no legal necessity for an ADR practitioner to have trained through a professional training body or to have followed an approved academic route nor to be a member of a professional ADR body.

It is an accepted fact that most practitioners have followed an approved route and are members of a professional body, but not all are. There is, however, no universal standard of training or the need for continuous professional development in pursuit of excellence in one's chosen career. Why is this important following the demise of TAG and Claims Direct?

The answer is very simple, ADR is part of the litigation industry and by association is brought into disrepute because of the "fall-out" from the failure of the "no win- no fee" organisations. There have been calls for greater regulation of the whole litigation industry following TAG's failure. This includes all ADR practitioners.

We are now into the stage of "How can the public and the public purse be best protected?" The usual answer is the one that has again been trotted out and that is we need greater regulation and not self-regulation. This is of particular importance to the ADR industry in that at present there is not even self-regulation.

There are recognised ADR bodies and service providers with their codes of conduct and ethics, most notably the Chartered Institute of Arbitrators, as well as others. There is however, a problem with ADR in that unlike the court system "word of mouth" plays an important part in the selection process of a third party neutral, whether acting in a quasi judicial manner or as a mediator. People are chosen because they have gained reputations for fairness and integrity; that is, the parties trust them. This being the case why should these people be subjected to outside regulation? To state in reply that it is to protect clients and the parties makes little sense. If in any ADR process there is evidence that there has been "wrong doing" then the aggrieved party can take legal steps to correct that anomalous position.

Would this be improved by external regulation? How could it be improved? The only available censure would be removal of registration. Would this be important? To new practitioners of ADR undoubtedly yes, but to older established, respected personal, there is a question mark. ADR procedures are basically private dispute resolution processes where it is possible that the parties' can chose a person whom they respect to arbitrate or adjudicate on their dispute if they wish to have a "judicial" decision or then can use a mediator to facilitate settlement of a dispute. These are all processes that can be carried out "in secret", so what use would external regulation be if the parties wanted a particular individual whether he was registered or not?

There is a grave danger that "the baby will be thrown out with the bath water" in the rush to present a "respectable face" to litigation following the demise of TAG and Claims Direct. It is a case of "something must be done and seen to be done". The excesses of the likes of TAG and Claims Direct have impinged on those who are involved in the dispute resolution industry, but there are fundamental differences between respected ADR practitioners networking and developing contacts and as important engendering trust and respect amongst potential users of the services provided, dealing with disputes in a private, professional manner and salesmen touting for business on every street corner in every town and city in the land.

If there is a need for external regulation why are those who make greatest use of the ADR processes not at the forefront of the call for greater regulation of these self same processes? In the UK, construction disputes are settled for the most part by adjudication and given the size of the industry and the scope for disputes there is no call for greater regulation of the industry. Proof, if any is required that it works.

Those who call for greater and better regulation to prevent the excesses of the likes of Claims Direct and TAG and abuse of the litigation process fail to consider that the litigation industry is a very diverse body with numerous organisations involved without accounting for specific individuals. Would all these be "lumped together"? Would different standards be applied to adjudicators compared with barristers? Would legally qualified expert witnesses have different standards of probity compared to construction engineers? One the one off expert witness have to undergo an approved course of training? There are innumerable possibilities when the call for universal external regulation is made.

There are professional bodies responsible for most if not all aspects of the litigation process, from the Bar Council to expert witness bodies, to organisations like NADR and CEDR. These are responsible organisations that take their duties seriously. People become members of these bodies because of the professional status that they gain from membership. Users of such services appreciate this. The key factors in the selection of ADR practitioners are experience, qualifications and membership of recognised bodies. Would external regulation alter this position? The answer would appear to be no!

A final thought: "Why is the litigation industry in a mess?" There is a simple answer. In the rush to deregulate the litigation process, the powers that be removed many of the restrictions that applied to the legal professions. Prior to deregulation, the likes of TAG and Claims Direct could not have existed and touted for business in the way that they have. Therefore, to now claim that the answer is more regulation brings the cycle full circle. If ADR practitioners act professionally and ethically at all times in their dealings with parties then what could greater regulation achieve than that which they already give parties who employ them. Let us prove to a sceptical public that we do not need external regulation to ensure that professional standards are met. We are professionals and we must act as professionals and that no external influence could improve the service we already provide to those who take advantage of our services. The answer is in all our hands, let us all make strenuous efforts to ensure that we gain and retain the confidence of the public and clearly demonstrate that there is no need for external regulation.

Awkward Disputant Relents

By Corbett Haselgrove-Spurin

- Is mediation all about persuading the parties to a dispute to be reasonable?
- If so, what is so unreasonable about falling out with someone? and
- What is so unreasonable about refusing to compromise?
- What, if anything, can mediation offer faced with a refusenik?

PRE-RAMBLE

"If mediation is the civilised way for reasonable folk to settle disputes, why have the English failed to enthusiastically embrace it?"

The decision to go to law to settle a dispute is a major step, not to be taken lightly. Litigation is an expensive business. It involves entering into the arcane world of the lawyer, a daunting journey of ritual and formality, guaranteed to sever all social ties between the erstwhile protagonists and for all these reasons best avoided at all costs. The journey is taken, however reluctantly, by those who having adopted (wholly reasonably from their individual perspectives) diametrically opposed and irreconcilable views, about the extent to which one or other of them should bear legal/financial responsibility for the consequences of an event or course of conduct. The task of fairly allocating responsibility between the parties is handed over to an impartial referee, for justice to be done.

At the end of the trial a victor will emerge. One party's view will be vindicated and he will have proved his point. The other's views will be shown however understandably or reasonably held to have been misconceived. A high price will have been paid, financially and emotionally for this enlightenment, but it is the time honoured and proper way of resolving such matters. The vanquished will have to abide by the outcome, irrespective of whether or not he acknowledges any wrongdoing. None of that will make any difference, since whatever else the matter will have been resolved and brought to an end.

Much is likely to have gone before. A problem having reared its ugly head, the claimant will have approached his adversary pointing out what concerned him. Only after failing to receive a response, or what he considered to be a satisfactory reaction, will the claimant have turned to his lawyers for assistance. The lawyer in turn will have taken steps to ensure that a dispute had indeed crystallized and will afford the other party one further opportunity to make amends. Only then will a timetable be put in place for the final show-down when battle will be joined in the judicial arena.

Between filing of writ and donning of gloves, a warm up bout between sparing lawyers, (under the watchful eye of the CPR 1998 case managing judge, bare-knuckle fighting and Queensbury Rules being displaced) will set the scene for what is to come. Whilst absent the knock-out blow, this is no mere shadow boxing show; with a sharp left to the payment into court and a solar-plexis crushing counter offer, delivered under the shadow of costs following the event, the lawyers play to the client gallery with such intimidating force that only the bravest of the brave do not succumb to a tempting pre-trial settlement. The commitment of both parties to the reasonableness of their respective cases is tested to the full.

By the time the dour portals of the court room are breached by the valiant few that brave the pre-trial rituals, the protagonists will have completely reinforced their views and self beliefs in the righteousness of their stands. To flinch in the line of fire and concede defeat would be outrageous cowardice: to waiver now and compromise a major loss of face: to the victor the spoils, to the loser the honour of going down fighting. Such was the way of our adversarial civil trial process, befitting of all true-blooded Anglo-Saxon.

A new day dawns. The moon waxes dim on the long since faded Empire where the sun once never set. The brave new world of the shining new European liberal elite rises high over the mid-day sky, heralding in an era of consensus and reasonableness, banishing mediaeval trials of strength and country-side like sports, to the unhallowed halls of history, the psychological scars and humiliation of defeat in battle an unacceptable price, too high to pay for the sophisticates of our modern age.

And so there was mediation, the all-conquering dispute settlement process of the age of reasonableness and consent. No more lawyers and bewigged judges - robes and ermine cast to the closet, our learned friends embraced honest livings at last and so we all lived happily ever after, guided to the light of fair and reasonable settlements by facilitators who helped us to become more pragmatic in outlook and to identify and value "significant" wider mutual interests.

INTRODUCTION

Born in the Southern States of the US, the ADR / Mediation Movement[1] came of age in the late 1980's and set out to conquer the world in the early 1990's. The global commercial and legal community has been exposed to ADR for over twelve years. The global pioneers of ADR have done a superb job of expounding the benefits and virtues of ADR to government, relevant sectors of the commercial community and to legal practitioners. Despite all this, the take up of mediation outside the US has been poor.

Certainly mediation is settling commercial disputes, but not in anywhere near the numbers required to be able to assert that the process is making a significant contribution. The proclaimed benefits of mediation are not in doubt. Where the process works well the benefits are plain to see. It has the ability to provide party autonomy and control over the shaping of a settlement. It can indeed result in the desired "WIN/WIN" outcome avoiding the inevitable adverse consequences of "WIN/LOSE" awards that flow from third party settlement processes. It is a private, informal, non-legalistic process and maximises the potential for the preservation of on-going relationships between the disputing parties. It can be cost effective and timely.

If the aims and philosophies of ADR are indeed well founded, why has the movement up to date failed to make the progress that it should have made, given its significant advantages over traditional third party dispute settlement processes?

DOES MEDIATION NEED MORE TIME TO BECOME ESTABLISHED GLOBALLY?

It is commonly thought that because mediation involves such a major change in mind set for both disputants and the legal community, that it will take time to become established. Certainly in the early days no one expected instant results and the early pioneers accepted that any career investment in mediation training and provision was essentially a long-term project.

How much time however is needed for the process to become established?

There is now a widespread general knowledge of the existence of and the benefits of Mediation, not only in the legal profession but also beyond in commerce and industry. Innumerable seminars, workshops and demonstrations have been held for industry and the legal profession. In addition many University graduates have been exposed to the benefits of the mediation process. After twelve years of such exposure mediation might be expected to have made a major break through, particularly in the UK where it has attracted a large number of adherents.

During the same period of time, the Dispute Review Board (DRB) process has acquired critical mass, making a significant contribution to the settlement of construction disputes, viewed in terms of capital investment programs subject to the DRB process globally. The DRB process is entirely voluntary and has not benefited in any way from statutory intervention as it has made its progress onto the world stage. Why has the DRB process made more progress outside the US than mediation? The DRB experience indicates that it is not necessarily due to a lack of time for the process to mature, or because there has been an absence of positive statutory or judicial intervention. If this is indeed the case it would appear that the answer to mediation's lack of penetration of the market must lie elsewhere.

In the UK in an even smaller time frame, construction adjudication has been established as the primary method of settling disputes in the industry. Clearly the statutory support for adjudication has had much to do with this, but the 1998 Civil Procedures Rules have also lent considerable support to mediation in the UK. Increasingly mediation is being advised by judges, as part of the new case management process. Does mediation need even more legislative support, along the US lines of court ordered mediation? If so, where does this leave the international community, which is less likely to benefit from supportive legislation?

Let us not detract from the successes of the mediation process. At a social level, pioneer community mediation programs appear to be producing interesting results. Family mediation has an important role to play. The insurance industry is making progress in developing mediation processes for the settlement of multi-party disputes where both claimant and defendant are insured with separate carriers who have an interest in the outcome. The focus here is rather on the basic commercial/contractual civil dispute.

[1] In this paper, ADR is used as a synonym for Mediation, rather than as a cipher for all forms of private dispute resolution outside the courts. It differentiates between 3rd party dispute settlement processes such as arbitration, litigation and mediator assisted negotiation processes.

IS MEDIATION AN UNWANTED ALTERNATIVE?

Mediation provides an alternative to third party settlement processes such as adjudication, arbitration, expert determination and litigation. The parties agree the terms of a settlement rather than have a settlement decision imposed upon them by a third party. Given mediation's relatively poor performance globally, is it an unwanted alternative? If this is the case, why is it not wanted?

1) Is it that US Mediators are superior, that is to say, that there is something about the way mediation is practiced globally that makes it unattractive to commerce and industry?
2) Is it that the US culture is uniquely suited to mediation, that is to say, that there is something distinct about the American psyche, which renders them more open to the benefits of mediation than foreigners?
3) Or, are the benefits of mediation peculiar to the US judicial system, that is to say, that an essential jurisprudential factor which makes mediation viable in the US is lacking on the global scene, depriving it of effectiveness?

Let us be clear about what is being evaluated. An essential role of the legal advisor is to weed out unmeritorious claims. Many meritorious claims will be rapidly settled by the other side upon receipt of the "solicitor's letter" warning of legal action if satisfaction is not forthcoming. Failing that, the mere issue of a writ is not an assured prelude to trial. Pre-trial settlement is the norm for commercial disputes. Only a small percentage of disputes proceed to trial. What impact, if any, does mediation have in such circumstances? Are some of the successes accredited to mediation false attributions, since settlement would in the past have been achieved by direct negotiations between the lawyers? If this is the case it is arguable that mediation has simply increased the cost of settlement. Such increase could be justified however if it can be shown that the mediation produces better and fairer settlements.

For present purposes, any analysis of the contribution of mediation to dispute settlement has to focus on the extent to which mediation reduces the percentage of disputes going to final judicial/arbitral determination rather than on the role of mediation as a variant on traditional pre-trial settlement. None-the-less, some of the following observations about why disputes do or do not settle will apply equally to pre-trial negotiation settlements and to mediated settlements.

1 Superior US Mediation Practice

The question here is not whether US mediators are superior as individuals, but rather as to whether US mediation methodology is superior to the techniques applied outside the US. Is there a right way to mediate, and if so what is it?

The styles and modus operandi of mediators are legion, but for present purposes let us consider three broad general categories, namely the "*Interests Based Mediator*", the "*Evaluative Mediator*" and the "*Pseudo-judicial Mediator*". The principal form of mediation currently used in the UK is interests based. It is submitted that whilst this form of mediation has an essential and valuable role to play in community and social mediation, particularly if there is nothing concrete to litigate effectively making it "the only game in town", it is not the most appropriate vehicle for commercial mediation. It is further submitted that the inappropriate use of this form of mediation has done much to inhibit the use of mediation in the UK for the settlement of commercial disputes.

The Interests Based Mediator invites the parties to look beyond the immediate disputed issues to consider other reasons for settling the dispute that could produce long-term benefits. In particular, the detrimental impact of the dispute on continuing relationships often plays a central role. By healing rifts in their relationship the parties are then able to participate in mutually beneficial projects, which rapidly offset any short-term sacrifices necessary to achieve a settlement. In the context of a family break up, the need to cooperate with ex-partners in post separation child-care arrangements is compelling. Whilst counselling may heal rifts in relationships, the objective of family mediation is not to repair what is lost but rather to act as a communications vehicle for the redistribution of shared assets and the sharing of ongoing mutual obligations. It is often the case that the original cause of social feuding is petty and insignificant. The feud is fuelled and deepens because of the antagonistic behaviour of the parties. Social rifts between people who share a close space, be it family or neighbourhood can be highly detrimental to the well being of their local society. Mediation facilitated inter-parte communication can break the demonising cycle and promote toleration.

The model only works on the premise that such wider and more valuable benefits exist and are desirable. If one or other of the parties is implacably opposed to a future relationship or does not value the preservation of the relationship

or any other asserted wider interest, then the method becomes unviable. It is impossible to list all the forms of wider interest that can impact upon a dispute. Much depends upon the facts of each individual case. Such wider interest includes for instance the need by the parties for privacy and the maintenance of commercial/trade secrets that could be prejudiced by a public trial.

Primary importance is accorded to the need to reach a settlement. Settlement becomes the holy-grail. Frequently the parties are made to feel that they have in some way failed and have acted in an unreasonable manner if a settlement is not reached. Avoiding the formality of a trial and the stress and disruption inherent in the lengthy litigation process all figure large in the persuasive tool kit of the interests based mediator. It is in the interests of both parties to reach closure at the earliest possible stage so that they can get back to normality and concentrate on running their lives and business without having to factor in the unpredictable consequences of the trial.

For the stout hearted none of this may be sufficient to justify making unwarranted concessions to the undeserving, simply to make the matter go away. I am mindful of a meeting I had with a senior partner of a local practice who had days previously travelled up to London for his first and self-avowedly last mediation. It had he asserted been a waste of his time and his client's money. Thirty minutes into the mediation it had become apparent that the central purpose of the mediation was to brow-beat the parties into a settlement based on splitting the difference. His client would have none of it. They promptly terminated the mediation. My mission to espouse the benefits of mediation fell on deaf ears. Having set himself firmly against the mediation process, no amount of assurance that not all mediations are like that would ever persuade him to take a chance on the process again in the future.

The Evaluative Mediator concentrates on the potential judicial outcomes and invites the parties to consider the risks inherent in proceeding to trial. The process is at its least effective when social issues and relationships alone lie at the heart of a dispute, since there is little tangible to evaluate and the matter may well not be justiciable in the first place. It is at its most effective where commercial issues are involved and the consequence of a failure to mediate will be litigation. Indeed, it is towards this type of dispute that this article is directed. Mediation cannot in the strictest of senses aspire to delivering up justice, since the outcome is a settlement agreement, not a handed down judgement. The aim is to facilitate a fair settlement, but what is meant by the word "fair"? The mere agreement of the parties to a settlement cannot be a measure of fairness. It merely demonstrates an absence of coercion. Fair must be measured by other means.

At the outset of a mediation the parties will inevitably be polls apart in expectations. The task of the mediator is to narrow that gap until a point is reached where the expectations of the parties are brought into close proximity. The Evaluative Toolkit involves evaluating or "guesstimating" the likely outcome of a trial. Both parties are invited to consider the highest and lowest potential awards that might arise out of litigation and the likelihood of achieving them. The strength of both parties legal argumentation, the reliability of witnesses and the difficulty of discharging the burden of proof all play a part in the equation. A little generosity can be squeezed out of both parties on the basis that a settlement now will avoid further legal costs. Thereafter negotiations commence in earnest with "do-able" concessions being made by both sides to broker a settlement on terms that the parties can live with. In the final analysis the parties have to chose whether or not to settle for the guaranteed "bird in the hand" or whether to gamble, go for broke and litigate in the hope of securing the "two in the bush."

The Pseudo-judicial Mediator takes the initiative in proposing and imposing a solution (or at the very least uses his status and prestige etc) on the parties. This model owes much to the conciliation process or alternatively to expert determination and whilst it no doubt suits the type of disputants who essentially want to be told what to do, relieving them of the onerous burden of making a decision, one wonders whether or not the parties should rather make an overt choice to submit the dispute to adjudication, arbitration or expert determination in the first place.

I am reminded of the mediator who over a period of months took it upon himself to act as an investigator for both parties in dispute over a design and build contract. Under his advice and guidance a settlement was eventually concluded. For an adjudicator or arbitrator this would have amounted to improper conduct. He developed the legal and evidential case for both parties, filling in the gaps on their behalves. The role was less mediator and more independent consultant, minus the power of expert determination.

What the process highlights is the value of an independent third party recommendation, which enables the parties to sell the outcome to interested parties and stakeholders. A litigant may have a problem justifying the terms of a pre-trial settlement to superiors, shareholders and in the case of a public office holder, the electorate. The mediator can provide a shield to hide behind and the recommendation of the pseudo-judicial mediator provides the most secure of shields.

All three forms of mediation are practiced both in the US and beyond and have supporters and detractors. It is possible to point to both the successes and failures of each method. The global mediation community has engaged in a destructive debate about which method is correct. Thus, at a recent ADR Forum, the writer was informed by an esteemed colleague that he "had no truck with these evaluative mediators." It is submitted that it is a mistake to demonise a particular approach to mediation. In appropriate circumstances, all three forms of mediation are perfectly valid methodologies. The point is, that each method lends itself to particular types of dispute. The successful application by a family or community mediator of interests based methods does not prove that interests based mediation is the best form of mediation. It merely shows that it is the most appropriate model for that form of dispute. If that is the only form of dispute that the mediator handles then that is the only form of mediation he or she needs to become skilled at.

However, if a mediator operates a multi-disciplinary practice, there is a need to be skilled in all three variants and to apply the appropriate methodology to the dispute at hand. Some mediators successfully do this, but it is submitted that dogma and a commitment to a particular brand of mediation has inhibited the growth of mediation on the global scene, resulting in dissatisfaction with the process by dissatisfied parties to mediations who have been subjected to an inappropriate methodology for the conduct of their dispute. Using all three methods during a single process enriches the process, increasing the number of persuasive tools available to the mediator and thus increasing the potential to reach a successful conclusion to the dispute. Wider interests are relevant to the evaluative process, since they provide additional benefits to be put into the equation, though they might well be insufficient in themselves. Combined with a realistic but perhaps rather tight compensation package, they could be sufficient to tip the balance towards settlement.

A recent "successful" community mediation that has been brought to my attention illustrates quite dramatically the dangers of settling for the sake of closure. Members of a community that had allegedly suffered from health threatening pollution commenced legal action to recover compensation for ailments attributed to the pollution. Rather than mount over a hundred individual tort actions before the court, mediation offered a useful mechanism for dealing with this class action. Some individuals had apparently suffered a great deal whilst others had only suffered minor inconvenience. The larger group was thus split into a number of distinct groups, each of which chose a representative to attend the mediation. At the mediation these representatives were persuaded by the mediator to select one of them to act as negotiator for the whole and to grant the representative authority to that spokesperson to settle for the whole. It was further agreed that to simplify proceedings the settlement sum would be divided equally between all the claimants, irrespective of the extent to which they had suffered from the pollution. The representative, whilst an outspoken and forceful character, came from a group that had suffered minor inconvenience. Contrary to the advice of the group's solicitor, when the going got tough during the negotiations, the representative spokesperson made major concessions. The global settlement sum was heralded as a significant victory. Those that had suffered minor harm received a fair to generous settlement but disturbingly, the rest received grossly insufficient compensation to enable them to cope with the consequences of the pollution.

The result is a community where mediation is now considered to be a dirty word. The polluter got off lightly and had much to celebrate. It is submitted that the mediator's persuasive toolkit was somewhat lightly packed and that a more studied approach would have produced a genuine WIN/WIN situation for all concerned. It should finally be noted that since the settlement included a finality clause and a confidentiality clause, there is no way back for the disgruntled claimants.

There are some highly impressive mediators in the global community that have the ability and flexibility to call on each of the above mentioned techniques as and when required. The relatively small uptake of commercial mediation has inhibited the creation of a broad panel of experienced mediators on the global scene. In the US mediation is a major industry, which has consequently produced a large number of highly

skilled practitioners. The chicken and egg question is whether global commercial mediation can take off thereby stimulating the growth of a sufficiently large cohort of high calibre mediators, or whether the mediators need to be in place first to promote confidence and growth in the market.

2 Is US culture uniquely suited to Mediation?

In order to answer this question it is necessary first to determine what it might be about mediation that could be so uniquely accommodated by US culture. Mediation attempts to get the parties to step back and by separating the personalities from the issues, adopt an objective view, thereby facilitating a reasonable, pragmatic settlement of the dispute. If the Americans are more open to persuasion by mediators, is it because the great mixing bowl had produced folk who are more reasonable and pragmatic than the rest of us?

Reasonableness : Assuming the ordinary fellow on the Clapham Omnibus was indeed an Englishman and not a visiting American, the assertion that the English unlike our cross-Atlantic cousins, lack phlegm and are neither reasonable nor pragmatic, runs contrary to the stereotype. The assertion also seems to imply that whilst it is the time honoured way of settling disputes, third party dispute settlement is now the preserve of unreasonable disputants, all other disputes having been reasonably settled by negotiation. Is it in fact fair to categorise one or other of the litigants as acting unreasonably?

It is submitted that whilst we can all point to parties who have acted in a clearly unreasonable and unrealistic manner, the majority of disputants are not unreasonable, even though a court may ultimately rule against them. However, the reason a dispute has arisen in the first place is because the two parties become attached to their viewpoint. From their own perspective it is reasonable for them to hold that opinion. As time passes they are likely to become more and more attached to that opinion and less prepared to view the situation from the other party's point of view.

The vital moment that needs to be seized in order to end a dispute before it really gets a head of steam occurs very early on. Once legal advisors have been appointed by the parties the time will have passed and since mediation tends to come on the scene at an even later stage, it is likely to be far to late to prevent a hardening of attitudes. The case for ensuring that, where mediation is viewed as a viable method of resolving disputes, that it is mandated at the earliest possible stage by a contract provision is compelling. In the US the prevalence of mediation clauses is widespread. By comparison, the device is rarely used in the UK. Whilst the legal profession is very aware of mediation, the process has, with a few exceptions, hardly penetrated the consciousness of global commerce and industry.

Where a dispute has developed and had been referred to a legal advisor, if the opinion of a client is very misplaced, it is likely that their legal advisor will quickly point out to them that they have a problem. Otherwise, far from being patently unreasonable, the reasonableness of the party's view is reinforced by the support of the legal advisor. The barriers to settlement have by this time been firmly established and to dismantle them will require some form of catalyst.

Most commercial disputes are about who must shoulder the financial burden for the consequences of an unforeseen event, asserted wrongful act or omission. From a business stand point, dispute attrition makes business sense and is in that sense perfectly reasonably even though it may be viewed as socially unreasonable behaviour, which is altogether another matter. It may be unfair on the deserving claimant to duck one's financial responsibilities. Although an abrogation of social responsibility, there are strong commercial benefits to be gained from playing the system to one's advantage. If a cash strapped claimant cannot afford to take the matter to trial there is little incentive for the defendant to mediate a settlement.

Pragmatism **:** Americans are renowned for their hard nosed, non-sentimental approach to business. Does this have an impact upon their susceptibility to persuasion by mediators? Whilst the absence of sentimentality in business is probably a universal phenomenon, the extent to which commerce in the US takes into account the interests of shareholders and stakeholders may result in corporate defendants in particular being more circumspect about litigation risks that could impact upon stock values and dividends.

The US is considered to be a highly litigious. The reason for this is that the consumer plaintiff plays for very high and often achievable stakes. The judicial system favours the consumer against the corporate defendant. By contrast, there is little to indicate that US corporations are litigious. In reality the Corporate Boardroom is likely to be the exact opposite and litigation adverse. This is where the human factor, if permitted, can impact upon the decision to litigate or settle. In the larger

organisation therefore, the decision may well depend upon the level within the corporate hierarchy that the decision is taken. Two distinct factors are at play here. Firstly, what degree of influence does the central character in the dispute exercise and secondly, is the decision made on a strategic corporate basis or is down to an individual to call the shots?

Who is financially responsible will depend upon a decision of facts and law. Independent advice is available from legal advisors. Advice about best industry practice and information about the facts surrounding the dispute are often provided by a character involved in the incident such as the site manager. Since that individual's professional standing is at stake, he is likely to be defensive and construct a self-supporting factual case. Whilst it might not stand up in court, the legal advisors will have difficulty testing it thoroughly. On the factual basis as presented to them the lawyers will provide a favourable prognosis for litigation. When it comes to negotiations, the very same character, as the person with best local knowledge and understanding of the issues, is often assigned to accompany the legal representative. The result is a disaster for the negotiation. Self denial takes centre stage as the manager strives to maintain face. Whilst most commercial negotiations avoid emotional factors, this is one instance when they play a central role. Ideally an independent internal inquiry should be conducted to get an objective take on the facts of the matter but this rarely occurs, particularly since senior management in many organisations automatically provides mutual support and solidarity to its own kind. The legal team will of course ask searching questions of its clients but too often they cannot penetrate the factual barrier constructed by the manager until it is too late.

Business is about competition and taking calculated risks. The choice to negotiate or litigate is likewise a calculated risk that panders to the competitive spirit. However, when deciding whether or not to litigate the businessman is playing outside his field of expertise. If the gambler instinct takes hold, there is the danger that the player will resort to bluff and brinksmanship in the litigation poker game, where the cards are drawn from circumstance, the lawyers act as banker and witnesses play the role of joker. Like a casino the odds are unfavourable and as with Russian Roulette the consequences of failure extreme, but once the game is afoot, drawn like a moth to a candle the game of "chicken" must be followed through. However, the pot is not provided by the player. It comes from the shareholders and other stakeholders, such as the employees and support industries that may potentially be ruined by an adverse ruling. It is remarkable how often clients only hear the positive messages from their legal advisors and turn a deaf ear to warnings with the result that many suits are pursued against the best advice of counsel, bolstered by false optimism and unrealistic expectations.

For some litigants the trial becomes a pursuit for "justice" which cannot fail to reward the unrighteous. The possibility of being proved wrong does not even enter the litigant's mind. The trial becomes a test of self-faith in the infallibility of the litigant, though strangely enough, the loser often appears to have the ability to subsequently quietly forget about that fact once judgement is made. Negotiated settlement is simply not an option for such a person. A Board of Directors is less likely to fall into this category. There is a case for depersonalising matters by ensuring that all decisions to litigate are taken at a board level.

Conclusion : By whatever means the parties get to mediation, once there the incentive to settle depends to a great extent on the personality of the parties. The parties may be open to persuasion, or settlement adverse, because their principal objective is attrition, because they are gamblers or because they have total faith in themselves and seek justice. Since settlement requires two parties who are open to persuasion, the chances of getting the parties to mediation and through to closure are limited as demonstrated in the following chart. Assuming the four categories apply equally to both claimants and defendants, there is only a 1 in 16 chance of getting the appropriate combination of parties who are amenable to settlement as demonstrated in the following chart.

Claimant		Defendant
Open to persuasion		Justice
Attrition		Gambler
Gambler		Attrition
Justice		Open to persuasion

The model assumes that the four categories exist in equal measure, which is not likely to be the case. If the percentage of disputants falling into the un-persuadable category rises, the scope for using mediation successfully decreases.

In the construction industry, particularly with respect to disputes between contractor and sub-contractor, attrition is quite common. The

contractor uses the sub-contractor's need both to continue trading with him and on the characteristic cash flow problems of sub-contractors, frequently brought about by the disputed failure of the contractor to pay promptly, to wear the subcontractor down. [2]

3 Are the benefits of mediation peculiar to the US Judicial System?

The principal distinctions between the US and most other jurisdictions is firstly that the many US States have court ordered mediation and secondly that the quantum of damages is set by the jury, rather than by the judge. What impact do these factors have on US mediation success rates?

Court Ordered Mediation : The Southern US States, recognising the potential for mediation to reduce the burden on the courts, were the first to introduce Court Ordered Mediation. The effect is to stay court proceedings until the parties have attempted a mediated settlement. If no settlement is achieved the case can be listed for trial. Whilst this has done much to bolster the US mediation industry, the legislation was introduced after voluntary mediation, both contractual and ad-hoc, had already become firmly established. It merely built upon and maximised the successes of the process. Voluntary mediation has been less successful in establishing its presence outside the US. The UK has sought, under the Civil Procedure Rules 1998, to augment the process by way of judicial recommendation, as part of the case management process. Whilst it is still early days, the courts are increasingly making use of this new power. It is submitted that there is little difference between a court order and a court recommendation. It takes a brave and arguably foolish counsel to risk upsetting the judge by declining to take up the recommendation. Both processes have little impact on the defendant, beyond the risk of a cost penalty following judgement. The primary target is the claimant, who may not be able to proceed to court and judgement until mediation has been attempted, or the period of the stay of action has passed.

Civil Jury trials and quantum : This is the one factor which is quite distinct from other jurisdictions and which impacts strongly on the way defendants conduct mediation and provides the greatest incentive to claimants to litigate. In the UK quantum is dealt with by the judge. Whilst it is down to the claimant to establish breach, causation and loss, The Judicial Studies Review Board provides clear and predictable guidelines for the quantification of loss in a wide variety of circumstances. The jury in the US has a far wider degree of discretion. Coupled with this, the US jury is often able to award punitive damages and frequently these far exceed the proven losses. Jury awards involving private citizens claiming against corporations generally bear little relationship to the actual losses sustained by the claimant. The award represents a "Glittering Prize" and a way for the individual to reap great rewards denied the ordinary citizen through toil and endeavour. It is hardly surprising that in such suits the corporation would prefer to negotiate a settlement. The risk of trial is extreme. This situation may not be sustained for very much longer however, for there is a significant movement in the US to limit the power of juries to award punitive damages.[3] It is quite possible that a level playing field for mediation is close by and this extraordinary advantage for mediation in the US may soon come to an end.

Conclusion **:** Whilst court ordered mediation coupled with a duty placed on the judiciary to use it to cut down trial listings is a recipe for guaranteeing increased participation in mediation, there is a danger that mediation could be ordered for the wrong reasons, i.e. limiting the judicial docket rather than by selecting cases where a settlement is potentially achievable. The result is merely to increase the ultimate costs of settlement unnecessarily and to even put access to justice out of financial reach of deserving parties. Used judiciously, the current CPR 1998 model could prove to be more than adequate. The jury trial incentive no doubt did much to promote mediation in the US and to enable it to become firmly established. It will be interesting to see how well mediation fares in the US if this potent abuse of justice is removed. Now that mediation is entrenched as a significant part of the US dispute settlement machinery, this writer anticipates that the process will continue to thrive, though volume may be adversely affected. Globally, if mediation is to succeed, it will have to do so on its merits and not off the back of this artificial incentive, since thankfully it is unlikely that the discredited

[2] Similarly, the poor financial situation of sub-contractors is regularly used to resist otherwise enforceable adjudication decisions, providing proof positive that a settlement would never be on the cards.

[3] See the BMW Case and now the State Farm Mutual Automobile Case 2003 where the Supreme Court overruled excessive punitive damage awards made by juries in Alabama and Utah respectively. Despite resistance from the plaintiff bar, reform is proposed on a regular basis to remove or restrict punitive damages.

jury awards process will ever be emulated outside the US. Since the mediation industry in the US grew apace with the development of the mediation profession the same pattern could be recycled globally. Mediation developed in the US through trial and error and gradually models of best practice have started to emerge. Provided these examples of best practice are universal, global mediation should be in position to benefit from the US experience, though there is much to be said in a domestic context, for learning by one's own mistakes, as opposed to the mistakes of others.

However, Mediation is not a defined process or an exact science. It has many variations so it is difficult for the clients to know exactly what it is they are buying into. There are a number of questions about best mediation practice that have yet to be finally resolved.

Mediate-able disputes : The problem that arises here is not about the types of dispute that cannot be mediated because they fall within the sole preserve of the judiciary. Rather the problem is about which lawfully settle-able disputes are in fact amenable to mediation. Both parties have to be prepared to mediate and willing to give ground. Mere doubts about the value of mediation by one of the parties can often be overcome by a skilful mediator during the course of the mediation. However, there is little that a mediator can do about a party who attends simply to see what, if anything at all, can be gained out of the process or to give an appearance of playing the game, but with absolutely no intention of conceding anything at all. The objective is essentially attrition, to wear the other party down and to encourage withdrawal. The party will either win or the mediation will fail. The interests based mediator, by placing great significance on the importance of reaching a settlement, becomes the unwitting ally of such a obstructive party, since the only opportunity for movement arises from encouraging the other party to make further concessions. By contrast the evaluative mediator is more likely to declare the mediation frustrated and terminate it.

Joint and private sessions. Some mediators favour only using joint sessions whilst others use a mixture of joint and private sessions or caucuses. The advantage of private sessions is that they afford an opportunity for the mediator to freely explore the strengths and weaknesses of both parties assertions, alternative grounds for settlement and the possible terms of a settlement without prejudicing the interests of either party. The disadvantage is that the mediator has to take great care to avoid any indication that he is acting as a mere delivery man or worse, as a spokesperson of the other-side. Why bother with a go-between when the parties could deliver the message directly themselves? Any sense of partisanship destroys trust in the mediator. Private sessions are an essential vehicle for dialogue in situations where the parties who cannot bring themselves to communicate directly with each other. However, frequently the only way to break an impasse is to bring the parties together. A party who may well debate ad infinitum with a mediator cannot, when faced with a directly delivered ultimatum, prolong a discussion with the other-side. A joint session can often speed up the negotiation end-game considerably, once a settlement is in sight.

Client representation. There is little consensus on whether or not lawyers and or party representatives should be encouraged to take part in mediation or not. For some legal representation is considered to be absolutely essential, whilst others consider that the presence of lawyers at the mediation represents a barrier to settlement. Mediation consultants are now a common alternative to legal representation in countries where legal representations at mediation has not been made the sole preserve of the legal profession, thereby denying non-legally qualified consultants a right of audience in the process.

Legally qualified mediators. Again, as above, there are jurisdictions where only lawyers are permitted to act as arbitrators and or mediators. Despite the proclaimed ADR benefit of peer assistance and judgement, there is a school of thought that considers that the services of a lawyer are essential to ensure that justice and the interests of the parties are not prejudiced by lay participation.

Mediator expertise. Should the mediator be qualified and if so what level of qualification is required and in what should the mediator be qualified, mediation practice, the relevant area specialism under consideration or both? Mediation training courses range from a couple of hours theoretical introduction to extended courses with varying degrees of hands on practice sessions, assessed workshops, examinations and pupilage. Competence examinations provide perhaps the best measure of quality assurance, given that how much training is required depends a great deal on the prior abilities of the erstwhile

mediator. Professional communicators such as lawyers and professional advisers are likely to need less training since their persuasive skills are already highly developed.

One school of thought maintains that the mediator is a highly skilled inter-personnel guru who can handle any dispute whatever the subject matter. From the interests based perspective this may well be so, but the same cannot be said of the evaluative mediator who needs to have a firm grasp both of the law and the industry context of the dispute. Equally, the pseudo-judicial mediator who coerces the parties into an unsound settlement may well expose himself to liability for duress and undue influence from a dissatisfied client. In 1998 a mediator who guided parties to a $30,000 settlement was sued by the "successful" claimant, when subsequent claimants on identical facts were awarded six figure sums against the same defendant.

I once witnessed a mock mediation concerning a shipping dispute where it was evident that the mediator knew nothing of the shipping industry or of maritime law. Eventually a settlement was achieved, simply because everyone wanted to be seen to be playing the game. No charterer would ever have agreed to the terms. In reality the mediation would have failed. Anyone using that demonstration as a role model for mediation practice would quickly bring the process into disrepute, however well meaning or otherwise professionally qualified they might be,

Length of mediation sessions. There appears to be a miss-understanding of what goes on in the mediation process and what is required to enable it to work. The process is not a quick instant fix which can be achieved in an hour or so. The process is relatively quick but cannot be successfully conducted in prescribed quick-silver time. Whilst mediation frequently results in settlements in a mere hour or so, it is a mistake to schedule a very tight two or three hour slot for a mediation. During case management sessions, parties are often encouraged by the presiding judge to attempt a mediated settlement. Neither lawyer is likely to want to provoke the judge by disagreeing with the suggestion that mediation would be in their client's best interest. So, the parties rush off to a rapidly convened two or three hour late afternoon or evening mediation. The mediations invariably fail and the parties meet again in court a short time later. Why has the process failed? It is submitted that the short time scale is a significant factor. A short mediation session rather than a full scale mediation is proposed to keep the costs down and thus to sweeten the pill. The standard short slot mediation is run at a low fixed cost and the professional costs of advisors is kept to a minimum. However, if the process is to work, sufficient time needs to be accorded the process, so that the brain storming that goes on in the private session / caucus can take effect. If the parties, of their own accord, quickly reach a settlement, all well and good, but it is not possible to rush the process.

This also begs the question as to whether or not court advised mediation, which comes some time after the dispute has matured and the parties have become thoroughly attached to their viewpoints is not in fact too late for effective mediation. US Court Ordered Mediation comes very early on in the judicial process, shortly after filing of writ, and most typically within four weeks. Even better is the contractual mediation which can take place at a very early stage before a writ is served. The sooner the mediation the less attached will the parties be to their positions and thus more open to an invitation to reassess their position.

The dispute cycle : There is a well established school of thought that there is a natural cycle to the life span of a dispute. Eventually a dispute will burn itself out by dint of attrition or changing circumstances. However, this has little to do with justice or fairness and the notion that things should be left to run their natural course has nothing to contribute to the dispute settlement process. On the other-hand, in human relations there is an appropriate time and place for dealing with matters and in social disputes inter-partes communication may well be impossible whilst emotions are too raw. Whether or not time heals wounds, some space between the hurt and negotiations can be valuable. The danger is that too much time can have the opposite effect in that the parties attitudes can harden. The parties become so attached to their viewpoint that settlement becomes impossible and litigation/arbitration then provides the only possible way of achieving closure. The latter poses more of a problem than the former in commercial disputes, since emotion is unlikely to be a significant factor in commercial disputes. Therefore, for such disputes the sooner the mediation is convened the better thereby increasing the likelihood of settlement. Besides, there is no delicacy about the timing of a court or arbitral hearing, which is a purely administrative matter.

Dispute cycle mediators concentrate on shortening the cycle. The mediation enables the parties to address matters earlier than they would otherwise have done. The mediator allows the parties to thrash out the various aspects of the dispute at length, relying on attrition to wear down resistance. There is some merit in this approach, particularly where the parties have to carry third parties along with them and lacking authority to settle at the outset, have to take the various offers back to their wider constituency before returning to the table for further negotiations and hopefully towards final settlement. This is perhaps the only way to settle disputes where neither party is willing or compelled to submit to litigation, as epitomised by the mediated international peace agreements, industrial disputes and community disputes about planning and the environment with a strong political, as opposed to legal element to them. They are not however speedy affairs. They are likely to be expensive and very time consuming for all concerned.

It is submitted that a cost effective timely commercial mediation process should incorporate relatively tight time-frames for the mediation session, preferably one day, albeit a potentially long day may be needed, and that both parties should have full authority to settle from the outset. It is remarkable how deadlines can concentrate the mind. This accounts for the remarkable number of litigation suits that settle at the court house door, though it also conveniently ensures that the lawyers have been gainfully retained for a significant period of time. Set too early a deadline can cause a mediation to fail, but if scheduled to follow on closely behind a full evaluation and exploration of the risks and issues, as opposed to a prolonged debate between the parties about fault and liability which is most appropriately dealt with by a court and a judge who can deliver a decision, a deadline can be very effective. Once the parties have had their alternative to “a day in court” and got things off their chest, a window of opportunity arises to broker closure. If the opportunity is not seized upon then the negotiation enters a long haul stage and the whole value of mediation is lost. To continue with the mediation after that will at best be very expensive and at worst futile.

This is significant because it is commonly thought that mediation is a relatively inexpensive process. It is submitted that this is not necessarily the case. Certainly fixed price mediation schemes, particularly those subsidised by the local community and Universities are very good value for money for the parties. Great strides have been made with the development of electronic ADR. A number of organisations now provide electronic forms for the rapid submission of disputes and for inter-partes communications. Coupled with a rapid settlement process the development is welcomed, since otherwise the adage “justice delayed is justice denied” comes to mind. E-mediation in particular facilitates long distance mediation at minimal cost. However, because the process lacks the immediacy of face to face negotiations, there is a danger that the sessions can be spread out over an extended period of time. It is vital to preserve the momentum of the mediation process and set a tight schedule that prevents the dispute entering into the long haul syndrome, since otherwise, the initial savings on expenditure can be lost as the mediator/s fees mount up, hour by hour and day by day.

The time frame for successful mediation differs little from case to case, with a day generally proving sufficient for even complex commercial disputes. The cost of a mediation, if factored on a time rather than a value basis, is likely to vary little. Mediation therefore offers best value for the settlement of complex, multi-issue high value disputes. Contrary therefore to the common view that mediation is relatively inexpensive, it does not offer best value for lower and mid-range value commercial disputes. Whilst it may be justifiable to speculate a grand or so on mediation to head off a six figure law suit, fixed price arbitration or adjudication offers better value for a mere £20,000 dispute and an assured outcome.

The Role of the Court as Mediator : A disconcerting US inspired concept doing the international circuit at present is case management mediation by the trial judge. This proffers the benefits of mediation and the CPR 1998 case management reforms in a tempting single package. Only time will tell how well this variant on mediation works but it augurs badly for the private mediation market. Already there are those that have expressed disapproval of mediation/third party determination processes where the mediator becomes a judge in the event of a failure to broker a settlement. The dangers inherent in pre-trial mediation where the judge and the other party become aware during the joint mediation stage (caucuses are in the circumstances strictly taboo) which would not be disclosed during a trial, are highlighted in **Glencot v Barrett.**[4]

[4] **Glencot Dev & Design Co. Ltd v Ben Barrett & Son (Contractors) Ltd** [2001]BLR 207. TCC

It would appear however, that the judge does not actually attempt a full-blown mediation. Rather, having had the benefit of perusing all the pre-trial submissions, the judge provides the parties with an indication of where he thinks the case is going, and invites the parties to negotiate on that basis. There is some logic in this approach, since the parties are provided with a very realistic reality check. It takes a large amount of the guesswork out of the evaluative process. The downside is that in order to do so the judge may give an appearance of having prejudged the case even before the trial has taken place. This is quite distinct from the Interim Arbitral Award, which is a full mini-trial of a single issue such as jurisdiction or security for costs and from the practice of construction adjudicators to request more information about an aspect of the dispute from both parties, whilst confirming that other issues have already been settled, since in both instances there is no issue of pre-judgement. From this writer's perspective the jury is still out on this novel mediation model. It will be instructive to find out how those jurisdictions currently trailing the process get on with it.

CONCLUSIONS

This article has considered a wide range of mediation practices. Each of the variations has something to commend it, particularly if applied in appropriate circumstances. The problem is firstly that many mediation practitioners prefer certain variations to the exclusion of others, rather than utilizing the most appropriate technique in any given situation and secondly that with the exception of the repeat player returning to a known quantity, it may be impossible for the parties to know what form of mediation awaits them when they commit to mediation in a contract and/or ultimately submit to the process.

IS ARBITRATION PREFERABLE?

Given that the majority of disputants who resist all opportunities to broker a negotiated settlement at an early stage are likely to be "settlement adverse", third party determination has a defining role to play in private dispute settlement. The problem for mediation is that whilst it is most effective when mandated by contract, contracting parties may prefer, wisely perhaps, to choose an alternative form of third party settlement such as arbitration or adjudication to ensure that closure will be achieved. Whilst understandable, is it necessary to completely eschew mediation? It is submitted that mediation/3rd party settlement has much to commend it.

Despite all the advantages of mediation, a further incentive is often needed to secure a settlement. Whilst a court judgement may be needed to make financially secure debtors pay up[5], the mere existence of an enforcement mechanism can act as the necessary incentive for both litigation and arbitration. But, this alone is not enough, since if scope for attrition remains, there are defendants who will avail themselves of the strategy. The key lies in putting in place a sufficiently timely private process, which prevents the strategy from working. Adjudication and fast tract arbitration could therefore be used as a catalyst for settlement.

Adjudication : The ICE pre-arbitral process is a generic form of adjudication. However, the most common application of adjudication has been in the UK construction industry, both as a voluntary process and subsequently under the Housing Grants Construction and Regeneration Act 1996 (HGCRA). The temporarily final decision of the adjudicator is immediately enforceable and binding. Absent final determination by a court or arbitrator, the decision will produce closure. Adjudication works within a tight timeframe.

Fast Track Arbitration : Whilst governed by relevant arbitration law rather than the HGCRA 1996, fast tract arbitration is otherwise remarkably similar to adjudication, with one exception. A fail-safe mechanism is built into adjudication to guard against off the wall decisions whilst the arbitral award is final. The choice therefore, as to which process to chose depends upon whether or not the parties are prepared to place complete faith in the decision maker in the interests of finality.

Dispute Review Boards : Alternatively, the DRB process and variants on it can be used to minimise the advent of disputes in the first place. The Dispute Review Board process has the ability to identify problems and promote solutions before an actual dispute crystallises. It incorporates a similar combination of persuasion plus enforceability. It is the nature of firstly the persuasion mechanism and secondly the form of enforceability that varies depending upon the exact format selected.

A mediation / third party determination combination is potentially an expensive option that may well not be suitable for small value disputes. Nonetheless, it offers a way of injecting new life into the mediation process at a critical time in its global development.

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[5] Little can be done about the debtor who would rather file for bankruptcy than pay his dues.

LORD CHANCELLOR DEPARTS

Lord Irvine of Lairg will enter the history books as the last fully-fledged holder of the ancient office of Lord Chancellor, having resigned on the 11th June 2003. Lord Falconer of Thoroton was appointed to the new post of Secretary of State for Constitutional Affairs. The newly created Department of Constitutional Affairs takes over the work of the Lord Chancellor's Department, plus the work of the now defunct Welsh and Scottish Offices, with two cabinet ministers acting in future as spokespersons for Scotland and Wales. The offices of Secretary of State for Wales and Scotland are under temporary stewardship, pending abolition.

Consultation is underway to set up a US style Supreme Court to replace the judicial function of the House of Lords. It is unclear what the jurisdiction of this Supreme Court will be. If it is limited to constitutional matters, the Court of Appeal could become the highest civil appellate court, as originally envisaged in 1873 when the Supreme Court of Judicature was established. Following protests about .the abolition of the judicial role of the House of Lords the court was reinstated. Nonetheless, the rationale behind having a two tier appellate system is not apparent. It is not yet clear what will happen to the Law Lords or who will sit in the new Supreme Court but is does seem that the UK is about to embrace a distinct continental style public law / administrative court hierarchy. If the new Supreme Court has a broader public law role, the court could take over appellate jurisdiction from the Court of Appeal for challenges to high court orders pursuant to applications for judicial review under Order 54 Civil Procedure Rules 1998. If that is the case then challenges to the conduct of arbitration and adjudication procedures could find their way to the new court. Does this also pave the way for a written constitution empowering the Supreme Court to overrule unconstitutional legislation and what impact will this have on the Human Rights Act 1998? The remoulding of the Supreme Court of Judicature also conveniently coincides with the changing nature of the European Union and the creation of a European Constitution and affords an opportunity for the government to tailor the judicial system in to the changing structure of the European Court of Justice and a newly emerging European Union justice system, with its own multi jurisdictional police force and prosecution service.

The apparent abolition of the Lord Chancellor's Office seemed to have created a constitutional vacuum. The House of Lords had no leader until Lord Falconer was belatedly appointed Lord Chancellor the following morning. Statute currently provides that the presence of the L.C. is required on the Woolsack in the House of Lords and thus an amending statute will be required to abolish the office. The target date for the abolition of the Office appears to be Summer 2006 A consultative process will now be instituted to determine what will replace the Lord Chancellor’s Office and to design the new Supreme Court. Some form of judicial appointment body is envisaged. Whether this body is also tasked with appointing members to the new Supreme Court is not known. It is not even clear whether members of the court will have to be lawyers. It is quite extra-ordinary that such a major constitutional reform process has commenced without any prior consultation and without any debate in either House. As with the on going reform of the House of Lords, effective if not legal abolition of yet another longstanding constitutional institution has taken place before what is to replace it has even been worked out.

The Lord Chancellor's Office has long since been viewed as an anachronistic breach of the doctrine of the Separation of Powers. The LC held a seat in the cabinet, participated in legislation and headed up the judiciary. Abolishing the Office is being heralded as a major step towards separating the judiciary from politics but will this be the case? Lord Faulkner, a cabinet minister, will not sit as a judge, but the Department of Constitutional Affairs will continue to administer the court system. Plus ca change . . . . ! ! ! To the extent that the judicial process is necessarily constrained by financial resources, it is difficult to imagine that a complete separation between the legal system and politics can ever be achieved. Perhaps that is why the overtly political title Ministry of Justice has been avoided.

How all of this will impact on the future of ADR is difficult to predict. The LCD has actively promoted ADR as a means of reducing the burden on the courts. We will all have to wait, with baited breath, to see whether or not Lord Faulkner progresses matters further in this regard but it would appear unlikely. He has already been tasked with reforming the criminal justice system. One might imagine that he will have more than enough on his hands completing that and finalising the new constitutional arrangements.

The next major ADR initiatives are most likely to come from the European Commission, which is in the process of conducting a review of mediation processes at the present time, with a view to introducing a regulatory mechanism. The preliminary papers have already excluded third party determination from its remit so the implications for expert determination, adjudication and arbitration are minimal. However, since judicial mediation is quite common in mainland Europe, significant changes may yet be on their way, which could well impact upon the UK. CHSpurin

CONSTRUCTION CASE CORNER

SHIMIZU EUROPE LIMITED v LBJ FABRICATIONS LIMITED

LBJ had referred a dispute to adjudication in January 2003, in respect of an interim valuation previously submitted to Shimizu in December 2002,. The adjudicator issued a decision in February, deciding that Shimizu should pay LBJ the amount of £47,718.39 plus VAT *"without set-off"*.

It was a condition precedent of the sub-contract agreement that, prior to payment becoming due *"[LBJ] shall have delivered to [Shimizu] a VAT invoice or authenticated VAT receipt in respect of the relevant interim payment…"* LBJ had not complied with this condition. LBJ had not issued a VAT invoice / receipt as Shimizu had not informed them of the payment, if indeed any, that was to be made.

Upon receipt of the adjudicator's decision, LBJ issued a VAT invoice in the amount stipulated as being due by the adjudicator on the 21 February. Shimizu responded with a withholding notice on the 25 February. The withholding notice provided reasonable detail with regards to the reasons for deductions.

Amongst other issues, Shimizu sought declaration from the court that the adjudicator's decision did not prevent them from issuing a withholding notice in respect of the VAT invoice received from LBJ, dated 21 February.

LBJ contended that to concur with Shimizu could have a disastrous effect on the Construction Act. It was suggested that this decision could encourage others to contract on similar terms that stipulate that payment only becomes due upon receipt of a VAT invoice or receipt. If a party is not informed of the sum to be certified they cannot realistically issue a VAT invoice let alone a receipt.

The court held that the condition precedent prevented payment "becoming due", until such time as a VAT invoice or receipt had been submitted to Shimizu. Since no VAT invoice was issued until the 21 February, after the adjudicator's decision, Shimizu, in accordance with the sub-contract, were entitled to issue a withholding notice at anytime up to five days before the final date for payment. The full report should be read in order to appreciate and consider all the discussions.

Commentary

Whilst the decision of the court appears to have interpreted the terms and conditions correctly in a literal sense, the decision could be argued to be inequitable. Shimizu clearly failed to adhere to their contractual obligations in advising LBJ of the payment to be made, thereby preventing LBJ from issuing a VAT document, which in turn would have started the payment clock ticking.

To be fair, in the circumstances Shimizu had advised LBJ with regards to set-off issues prior to the submission of the interim application in December. However that earlier letter could not be held to constitute a valid withholding notice, as it had not been issued in respect of a valuation.

In order to kick-start the payment process in future, in similar circumstances, it might be possible that firms when making interim applications for payment, where no agreement has already been reached between the respective surveyors, could issue a VAT invoice for the full amount. In the event that the full amount is not certified for payment the previous invoice could be superseded or adjusted by a credit. It is quite likely that your accounting staff will have some comments to make in respect of the headache this might cause.

Alternatively, service providers would be well advised not to contract on similar terms, without amendment to provide for the consequences of a failure to provide necessary information in order to raise a VAT invoice.

By Nick Turner

HARVEY SHOPFITTERS LTD V ADI LTD 6 March 2003

Letters of intent : formation of contract : quantum meruit : oral and written terms : estoppel : amendment of claim : damages for breach of contract.

The significance of contract terms is examined by John Uff QC in a situation where the parties conducted business in an informal manner, with neither party following the prescribed contract procedures. The defendant sought to have claims unsupported by relevant notices dismissed. In deciding whether or not to follow the terms of an IFC Contract the court stated that "the issues can be summarised in this way:

(a) the Courts now adopt a practical approach to whether and what agreement should be upheld;
(b) niceties which might on a more traditional approach have been regarded as precluding agreement will not now be so regarded unless essential to the basis of the agreement;
(c) this is the more so where the contract has been fully performed."

The defendant's failure to follow the contract procedures gave rise to an estoppel – so that the court was able to consider claims not originally supported by contract compliant notices.

In other respects the case is an object lesson in how not to present a claim, in that the claimant made repeated applications for amendments, even after adjudication had commenced and subsequently before the court. The court afforded a degree of latitude to the claimant because, due to the informal way in which the contract works were administered, what had in fact taken place only became evident as documents and evidence were subsequently disclosed and examined. The upshot of all this was that some, but not all of the additional claims were allowed by the court.

Comment : Whilst the industry is continually urged to work together in a cooperative spirit, it is clear that as and when relationships break down, both parties will revert to formality. If there is no clear paper record of events, a party is likely to encounter severe difficulties in establishing entitlement. The answer must therefore be: Yes – cooperate by all means, but do not lightly dispense with contract formalities – keep written records of oral agreements as to variations and additional works – get them signed off – and deal with extensions of time promptly.

RSL (SOUTH WEST) LIMITED V STANSELL LIMITED [2003] EWHC 1390

The adjudicator engaged a consultant to provide an expert report. He provided a summary of the initial report to both parties, but did not provide either party with a copy of the initial or the final report. The adjudicator took the report into account in making his decision. H.H. Judge Richard Seymour Q. C. held that this amounted to a fundamental breach of the rules of natural justice, and the right of a party to know the full details of the case against him and to be afforded an opportunity to respond to that case. In consequence the decision was struck down.

As a second line of attack the claimant sought to have the element of the decision based on the report severed from other elements of the decision so that sums ordered to be paid in respect of those other elements be ordered even though the sums arising out of the report based part might not be enforceable. The court held that whilst such a course of action might be sustainable under Scots law, under English law there could be no severance of a single claim or dispute. The entire decision stood or fell on the basis of natural justice.

Comment : Whilst it appears that a reference for multiple disputes could be severable under English Law, since only one dispute can be referred at a time to adjudication, severance under English Law would appear to be limited to arbitration.

Choice of law and conflicts of law could play an important part in future construction disputes on similar issues in the future. Beware the terms of reference in future where one party to a construction contract comes from South of the border and the other from the North. Disputes about conflicts of law have plagued arbitration in the past. They can be time consuming and expensive and it would be a pity if such issues detract from the intention to produce a cheap and timely process of adjudicative dispute resolution process. It becomes clear with the passage of time that adjudication is rapidly becoming a highly technical and complex legal process, contrary to the intentions of its original designers.

C.H.Spurin

In addition to construction case reports, the next edition of Case Corner will feature a review of UK Mediation Cases.

NADR MEMBERSHIP CARDS

From credit cards, identity cards, blood donor cards to business cards we all carry enough stuff around in our wallets to sink a battleship. Why might we want to consider any additions to this already burdensome arsenal?

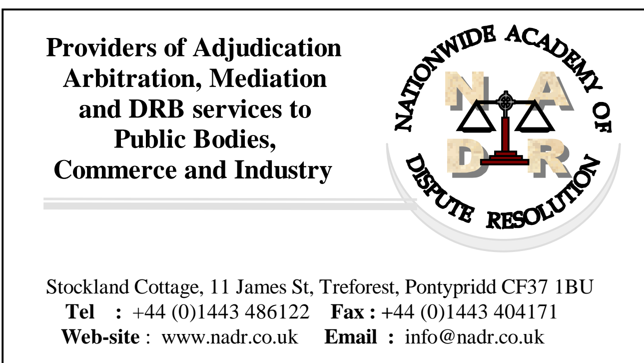
Business cards provide the most practicable way to ensure that new business contacts remember who you are, what you do and how, when the need arises, to contact you.

Membership cards are a convenient way to establish an individual's professional credentials and standing within an organisation.

The new NADR Membership/Business Card is a dual-purpose card that fulfils both functions at the same time.

ADR practice is, for most of us, an adjunct to our main livelihoods. Whilst most members are likely therefore to have a business card identifying their primary role for their main employer, most of these cards will remain silent about their other life as an ADR practitioner. This new facility addresses that issue, enabling members to promote their private ADR activities, advertise/verify their ADR credentials and provide a gateway to ADR services for prospective clients.

One side of the card, which is credit card sized, will be the same for all members, promoting NADR services, so that clients who need ADR services will know who NADR is, what we do, how to approach us and how to gain access to further information.



The benefit for all members is that it may lead to applications for nominations and encourage the business community to access our web site and learn more about ADR and the services that we provide.

In particular it will also provide your potential clients with the necessary information to access your CV on the NADR web-site.

NADR is seeking to portray a bold confident image of the organisation, which informs ADR users quickly and clearly of what we do. We hope you approve of the restyled logo, which will feature on all future NADR publications and correspondence.

The other side of the card will be member specific, carrying your name, qualifications, ADR practice specialisms, telephone contact details and NADR Membership Number.

A.N.Other
BDS, F.CIArb, F.NADR.

Dental Surgeon, Mediator, Arbitrator
Law Society Registered Expert Witness

Tel (H) : 01756 886430 : (M) 08808 326574

Membership Number 20100099

Personal identity card. Each member will be provided with a laminated identity card, to be retained by the member and used for identity purposes and proof of membership. Once you have received your card please check that the details are correct and advise NADR promptly if the information on your card needs to be changed in anyway. We will then amend the card and send you a replacement. The cards are durable and should have a relatively long life but replacement cards will be provided upon request as and when required.

Business card : each member will be provided with 10 sample standard black and white business cards. Additional copies will be available at standard commercial rates.

Please note that your NADR membership number is not the same as your NADR website registration number.

NADR welcomes comments from members about how useful, if at all, they feel this new facility will be for them. Equally, if you have any alternative ideas about how best to promote ADR then please share them with us. NADR is conscious that the only way to ensure the prosperity of our industry is to ensure that those sectors of commerce, industry and the public sector that can benefit from ADR are fully aware of what it has to offer them, how to access ADR services and provides for ADR in its contract documentation. We are always looking for new ways to get the message across to potential clients.

BEST PRACTICE IN CONSTRUCTION ADJUDICATION by CHSpurin

The Construction Umbrella Bodies Adjudication Task Group has now produced two guides to Adjudication. One for Adjudicators published in 2002 and now most recently, a User's Guide to Adjudication. Both guides are available for downloading and printing from the Construction Industry Council web site www.cic.org.uk

The Adjudicator's guide to best practice provides good clear common sense guidance which if followed will ensure that the most glaring pitfalls of conducting an adjudication are avoided.

The User's Guide, whilst not rocket science provides in 25 pages, a useful outline of the process for the industry. It is unlikely to replace the need for specialist advice, but if read by those who most need it in the industry and followed, will ensure that the parties to construction disputes have a clearer idea of what the process is about and how to initiate adjudication proceedings.

Topics covered include:-

- What is adjudication?
- Establishing a right to adjudicate
- Do I need professional help?
- Starting adjudication
- Replying to a notice of adjudication
- What happens next?
- The adjudicator's decision
- The cost and who pays
- What do I do now?
- Where do I go for further information or assistance?
- Text of s108 HGCRA
- List of ANBs.

Whilst old-hat for adjudicators and professional advisors, it is well worth guiding clients and potential parties to adjudication to the guideline, not least of all because less time would then need to be spent covering basics.

My only criticism would be that the Guide advises that there may be no need for professional advice unless the dispute involves complicated technical or legal issues. It is submitted that what is or is not a live legal issue may not be apparent to the lay-person. The advice on carefully compiling a reference or response is spot-on, but how can the uninitiated carefully prepare legal claims and defences without a knowledge and understanding of relevant legal issues, particularly when one realises that often one or other or the parties to a construction dispute has never even bothered to read the original contract properly in the first place? We have all had to deal with clients who are convinced that the law is with them when the reality is quite different.

Self help and "pro se" representation in such instances would be a recipe for disaster. This is not to say that a QC should be retained for every little dispute, but, good quality advice is available at a reasonable price and it is submitted, at a price that is well worth paying.

Whilst construction adjudication started out as a rather rough and ready process, it is rapidly becoming a highly legally refined process. The wording of the notice of intention can be crucial to the jurisdiction of the adjudicator. Ask the wrong question and you may not like the answer, or it may be one, which is of little use to you. It may even open the door to unwanted counterclaims. Being economical with the truth in a submission may cause problems, but lay persons frequently only see their own concerns and could easily fail to understand the importance of putting the whole of a matter to the adjudicator. These are but some of the reasons why advice should be sought by anyone who does not have a good working understanding of construction law, contract interpretation and adjudication practice.

That said, however, well done to the Construction Umbrella Group for a an excellent, jargon free guide which will render widen accessibility to construction adjudication to the smaller construction firms that do not have their own in house legal teams. Lets just hope that they get to know about and actually read the guidelines. That unfortunately, is something which is far from certain.

It is clear that adjudicator's would be well advised to follow the advice of the Umbrella Group on best practice in adjudication. The number of successful challenges against adjudicators for breach of the rules of natural justice, particularly to provide a fair hearing, to consider all sides of the argument, to permit access to all materials and charges against a party and to afford an opportunity to challenge such materials and charges mounts weekly. In **Pring & ST Hill Ltd V C J Hafner T/A Southern Erectors** : [2002] EWHC 1775, TCC 31 July 2002 an adjudicator found against a contractor and in favour of the employer in respect of welding splatter damage to newly installed windows. The contractor sought through adjudication to recover these losses from sub-contractors. The same adjudicator was appointed. Exercising their rights under paragraph 8(2) of the Scheme for Construction Contracts the subcontractors objected to the appointment, fearing prejudice due to the adjudicator's prior knowledge. The adjudicator nonetheless went ahead promising full disclosure, which he could not deliver because of the private nature of the previous adjudication. The adjudicator relied upon his previous award in determining damages. The court refused enforcement.

Alternative Dispute Resolution
A User's Introduction to Some Available Methods

In this note, I propose to set out the principal methods available for the resolution of private disputes, and the resolution of some classes of disputes, which may have a public element.

Necessarily, in a short note, there is no time to give a deeply academic treatment, and many users will wish to refer to more authoritative text, or to seek appropriate legal or other advice.

There are learned arguments about what is meant by Alternative Dispute Resolution, ADR. The logical meaning is simple. Alternative Dispute Resolution, in a legal context, embraces all means of resolution that are available as alternative to proceedings in court.

In general, any persons who have a dispute of any substance have a right to seek to have that dispute heard and determined by an appropriate court. In most countries, the court has an inherent jurisdiction to hear private disputes and it will hear them whether or not the defendant or responding party has agreed to that jurisdiction. That, then, is the essential difference between litigation and all forms of ADR. At one point or another, ADR methods are voluntary and depend upon the consent of the parties in the dispute.

There is one cautionary note to include here - there are countries who have enacted legislation to make one or more methods of ADR obligatory. The United Kingdom, for example, has introduced a right to what is called 'adjudication' for parties to construction contracts. The essential principle remains. The law provides, however, for every construction contract to be deemed to have an agreement to adjudication in it. Other countries have provided for mediation to be ordered by a judge, or to be a necessary step on the way to litigation. However, it is still true to say that consent is the underlying principle, even if the consent itself is not fully free.

Similarly, some States of the United States of America have legislated, and some Courts have provided as a part of Court procedure, for mediation to be required as a condition of proceeding with an action. This also contravenes the principle of consent, and that in turn affects the way in which parties view the process - and may even affect the outcome, for essentially psychological reasons, which we cannot discuss here.

So, as this note is essentially an overview for the possible user, let me first set out the processes that are available and from which a choice can be made. Mine is not an exclusive list and there are variants to almost every approach, so the reader is urged, indeed strongly urged, to seek legal advice before embarking on any of the courses open. The choices I propose to review, as alternatives to litigation are these:

1. **Do Nothing**
2. **Negotiate directly**
3. **Find an Expert**
4. **Find a Mediator**
5. **Find an Adjudicator**
6. **Find an Arbitrator**

Each of these approaches has its merits, and I propose to look at them from a user's point of view.

1 Do Nothing

Disputes can often involve an expense of time and spirit, as well as money, and the outcome is rarely certain. Involvement in a dispute can distract attention from other, more important matters in business and personal life. It is surprising how often people, having found themselves faced with an insult or injury - real or perceived - decide, after careful thought, to let the matter go and to chalk it up to experience. Doing nothing is a very practical option and anyone with a grievance should consider the benefits of inactivity first and foremost. Talking it through with a friend or professional may help to get things into perspective, but be warned that it is often too easy for other people to urge you to action - they will not have the burden of it.

In certain circumstances, and on taking advice, it may be as well to write to the other party saying something like "I propose to do nothing about this, but I reserve my rights" or something of the kind. There is often a great pleasure in taking the moral high ground, especially if you do not lose much by doing so.

2 Negotiate Directly

There is almost never harm in writing or telephoning the other party and saying "Let's talk about this over . . . . . *a game of golf, lunch, dinner, a walk by the sea, any of those things.*" It is sometimes said that to make the first move displays weakness, but that is nonsense - you may be negotiating from strength or weakness, and a willingness to discuss a solution is a sign of moral strength, not weakness. It also puts you in the position of gaining a *tempo*. If you initiate the negotiation, the other party may expect you to

make the first proposal, which puts you in a leading position. No third party is involved. Whether you offer to play host (and that itself gives an advantage) or 'go Dutch' is a matter of judgement. A variant on direct negotiation would be negotiation through friends or through your respective solicitors - but think what would happen if you agreed to negotiate through a mutual friend - you would have created a form of mediation without knowing it.

3 **Find an Expert**

The two of you, parties in dispute, can agree to find an expert who will know about the matters that concern you, and may look into your differences and form his or her expert opinion.

Now, and this is very important, you can use that expert in two very different ways. You can agree merely to obtain that expert opinion, and then use it to guide your own negotiations. Alternatively, you can agree to abide by that decision - to be bound by it.

If you agree to be bound, then you will have contracted to accept the expert's opinion and to act on it. If you then fail to comply with your bargain, it can be enforced by a Court. Moreover, expert determination, as it is called, is generally not open to appeal or correction in the court, except, in the event of egregious misbehaviour by the expert.

Examples where expertise has been used in this way include such questions as the opinion of Counsel as to the proper interpretation of a Contract, the opinion of an engineer as to the probable cause of a failure of a machine, and the opinion of a stockbroker as to the valuation of shares.

Some times the distinction between an expert and an arbitrator or adjudicator may be blurred, and experienced experts will encourage the parties to make their purpose clear. Certain forms of contract, such as those of the IChemE in UK, have provision for an expert to determine all disputed matters or disputed matters of particular kinds. The parties choose how to limit the range of subjects for the expert to resolve.

Specialist institutions, including NADR, will often suggest the names of persons having experience of expert determination. Although the only obvious requirements are competence and, of course, the trust of both parties, there are legal considerations, such as the need for fairness, that favour the use of an expert who has made such determinations before.

4 **Find a Mediator**

Mediation requires only that the two of you in dispute should agree to have someone mediate between you. However, in recent years, a mediation industry has come into existence and is growing, with many organisations (of which NADR is but one) providing training and accreditation and developing sets of more or less formal rules. The principle is simple, the mediator uses his or her skills to enable the parties to negotiate towards an agreement of their own.

There are choices: the mediator may simply chair a discussion between the parties, taking a more or less active role as they, the parties, wish; in a commonly seen variant, sessions chaired by the mediator, the so-called plenary sessions, alternate with private discussions or caucus sessions, in which the mediator sits with one or other party and carries the thoughts of one to the other (sometimes characterised as "shuttle diplomacy"). The mediator also hears things from a party which help with understanding the position, but may not be repeated to the other party. Confidentiality is very important.

There are other choices: The mediation may be intended simply as a means to a deal (so-called "interests" mediation) or it may be to help the parties achieve a fair result (so-called "rights" mediation). The parties may choose to use a mediator solely as a passive messenger, or they may ask the mediator to bring his own knowledge into play. They are more likely to ask for that knowledge where the issues are of fact and the mediation is about rights, or intended to predict what may happen in Court.

It is as well for there to be a clear understanding about which of those choices is preferred by the parties, because different ADR organisations have different approaches. Some favour a deal at any price, some favour a fair outcome. It is sometimes said that an agreed deal must be fair, but that ignores the weight of bargaining power which one or other party has. "A man, convinced against his will, is of the same opinion still."

One advantage claimed for mediation is that it opens the way to lateral thinking, and to the settlement of disputes by the use of creative alternatives for example, leaving things as they are in the disputed contract and entering into some other deal which suits both parties - perhaps on another project. It is sometimes forgotten that, even with arbitration and litigation, two parties may always agree to an alternative deal, limited only, as in mediation, by their ability to imagine.

5 **Find an Adjudicator**

Strictly speaking an Adjudicator is anyone who makes a decision in a more or less judicial manner. However, the contract forms used by the World Bank have provided for a Board of Adjudicators in major contracts, and the UK construction industry, through the Housing Grants, Construction and Regeneration Act 1996, has a statutory right of adjudication implied in every contract (there are exceptions, and there is now jurisprudence as to what is a construction contract for the purpose of the Act).

An Adjudicator has wide ranging powers, but has an obligation to make a decision within 28 days from receiving a claim, commonly called a 'referral' (he or she is a kind of referee). The referring party may agree to extend the time, but the essential purpose of Adjudication is to keep the cash flow going without stopping the construction. As it happens, the Arbitration Act 1996 was intended for the same purpose, but the drafters made a mistake, by making s.39 optional, but that is another matter.

Adjudicators are available from a wide range of appointing bodies (NADR is one, of course). Many are competent construction professionals, but there are lawyers available too. Agreement as to the Adjudicator is very desirable, but not necessary, because the Act deems there to have been an agreement in the contract (whether there was or not), and the Secretary of State has prescribed a default Adjudication Scheme.

Many of the plethora of appointing bodies have their own rules for Adjudication and it would be invidious, in the note, to discuss any one in particular. The essential features of Adjudication are that it has to be done briskly and that the decision of the Adjudicator must be complied with straightaway, even though it is a provisional decision, made subject to the final decision of a Court or Arbitrator. There are dangers about that, one or other party may become insolvent in the interim. The Courts have considered this question when deciding whether or not to enforce Adjudicators decisions.

6 **Find an Arbitrator**

Arbitration is, even now, the principal alternative to litigation. In Arbitration, the parties choose someone to hear their respective cases and make a binding decision. There is legislation in most countries to regulate and supervise the process, but essentially, the principle is the same. Arbitration usually results from an arbitration clause in a contract, or in the standard membership terms of a club, such as a commodity association. The arbitration agreement is in existence before the dispute.

It is perfectly possible, however, to make an agreement to arbitrate after the dispute has arisen. From time to time, parties may compromise an action brought in the Court, by referring it to arbitration.

The Arbitrator (or arbitral tribunal - larger international cases often have three arbitrators - one appointed by each party and the third agreed in some way) will act judicially, and give directions as to what the parties should do. There is great flexibility of procedure, the arbitrator may leave everything to the parties, or may take his or her own initiative in ascertaining the facts or the law.

Arbitration is a serious business, although, in the right hands it can be fair, efficient and quick. However, because it is final and binding (subject to limited scope for appeal), no-one should venture into it with out advice from a lawyer with specialist experience of arbitration.

In England and Wales, an arbitrator can order an interim payment, but only if the parties have agreed (this is the effect of s.39 of the Arbitration Act 1996). So useful is this provision that a number of sets of arbitration rules provide for it (for example CIMAR - the Construction Industry Model Arbitration Rules).

Arbitration is particularly useful in international trade. That is because the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, recognised in almost every trading nation, provides for enforcement of Awards all over the world, while Court judgements do not always work so freely in foreign lands.

Arbitrators can be found in the lists of most of the major technical institutions, and bodies such as the Law Society, the Chartered Institute of Arbitrators or, of course NADR, as well as in arbitral organisations such as the ICC in Paris, the LCIA in London or their equivalents around the world. Most arbitral institutions provide full administrative services also, with clerks or counsel handling the file.

Conclusion

This has been a brief overview of the main ADR processes. Although the processes all stem from the principle of voluntary agreement, there is real variety and each method is worthy of a book of its own.

I have set out to show that variety in outline - anyone who needs to have recourse to some form of dispute resolution should seek the advice of an experienced practitioner as, although the principles may be clear and the processes inherently simple, there are pitfalls.

ADR has come to stay, however. No businessman or professional should ignore the implications, and in England and Wales (and in many other jurisdictions world-wide) no contentious lawyer should even consider going to a Court in the present legal climate without first looking carefully, and being seen to have looked carefully, at the alternatives.

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GETTING THE FEES IN by CHSpurin

With the exception of contingency fees, where the lawyer knowingly undertakes the risk of non-payment in the event of a failure to bring about a result, party representatives are able to take effective measures to ensure that they are remunerated for their labours. The salary of judges is safeguarded by the state and is quite independent of any duty of the parties to pay the costs of the trial. It is normal for the mediator to require payment at the start of proceedings. The odd man out in all of this is the adjudicator / arbitrator. The question of payment of an arbitrator's fees was considered in **Brian Andrews v John Bradshaw** [1999] EWCA and the provisions regarding the payment of an adjudicator's fees were considered in **St Andrews Bay Development Ltd v HBG Management Ltd** P370/03.

Bradshaw, an arbitrator, specified in his terms of appointment that both parties should make an initial £250 down payment on account. The appointment terms contradicted the terms of the construction contract, which stated that the arbitrator would receive three monthly stage payments. One party paid the £250.00, but the other, who was an unwilling party to the arbitration refused to pay. This refusal to pay annoyed Bradshaw, who availed himself of every opportunity to raise the matter of non-payment. This led to a successful application for the arbitrator's appointment to be set aside, partly on the basis of the ill will arising out of this non-payment issue and partly because the arbitrator sought expert legal advice on preliminary issues put forward by the other party whilst refusing to put the complainant's preliminary issues to the legal expert.

By the time the appeal was heard the arbitrator's award, which favoured the complainant, was available for consideration by the appeal court. The award demonstrated that the arbitrator had not in fact been biased against the complainant. For this reason the court quashed the set aside order, thereby reinstating the arbitrator. The court had some sympathy with the arbitrator because the complainant had adopted a very obstructive attitude towards the arbitrator, but otherwise noted that the arbitrator had no right to the initial down-payment and had got himself somewhat confused at times regarding some of the issues under consideration, albeit that he recovered sufficiently to make an unbiased decision. However the court was far from happy about an order of costs made against the complainant despite the fact that he had been on most counts the successful party, and because it was the other party's interim applications that had had the greatest impact on costs thus far. Since this was a judicial review action and not an appeal on merits this aspect of the award remained untouched by the court of appeal, though it was of dubious merit.

The moral of the story is 1) if an arbitrator is to require cash in advance, make sure it is allowed by the terms of the disputed contract from which the arbitrator's jurisdiction derives and 2) if such a requirement is permitted and stipulated, either decline to act if no funds are forthcoming, or alternatively, get on with the job without complaining. Furthermore, it is unwise to take a down payment from one party but not from the other since this creates an appearance of imbalance in the relationships of the parties to the arbitrator. Finally, an arbitrator needs to clearly demonstrate in reasonable terms why he might chose to differ from the standard practice of awarding that costs should follow the event, particularly if the relationship between the party deprived of costs has been somewhat strained since that could give an appearance of bias.

In **St Andrews Bay v HBG** an adjudicator sought, contrary to the terms of the underpinning JCT contract, to withhold issuing the decision pending receipt of fees and expenses, ultimately issuing the decision two days after the due date. Whilst the decision was made within the required time frame, the court held that the statutory regime impliedly required that the decision be issued promptly. However, in the circumstances the court held that these technical irregularities were not so fundamental as to render the decision a nullity. It would appear therefore that whilst an adjudicator might make a decision a day or so in advance and withhold the decision pending payment up to the due date, it is unwise to further delay issue in the event of non-payment. Recovering fees after the event is often fraught with difficulties, particularly if the paying party is impecunious. Adjudicators appear to have less financial security that other ADR practitioners.

THE IMMIGRATION ADJUDICATOR : PART 1

Under the **Immigration Act 1971**, Immigration Adjudicators constitute an independent judicial body. Appointed by the Lord Chancellor, the Chief Immigration Adjudicator (His Honour Judge Henry Hodge OBE) and the Immigration Adjudicators represent the first tier in considering appeals against decisions made by Immigration Officers, Entry Clearance Officers and the Home Secretary. The administrative elements of the process are conducted by the Court Service, an executive agency of the Lord Chancellors Department.

> **The Immigration and Asylum Appeals (Procedure) Rules 2003,** which came into force on the 1st April 2003, state at **s1.2(2)** :
>
> *" The overriding objective of these Rules is to secure the just, timely and effective disposal of appeals and applications"*
>
> The Rules further provide at **s 2.8(i)** that :-
>
> *"every appeal shall be determined at hearing unless the matter lapses, is withdrawn or abandoned or is the subject of an adjournment.*"

The basic procedure in making an appeal comprises of the applicant, in person or via an appointed representative, attending court to present the appeal at the hearing before the Immigration Adjudicator. A Home Office representative will also invariably be in attendance, to contest the appeal or in certain instances to accede to the appeal. The Adjudicator, having heard the appeal in full thereafter makes a written decision to be forwarded to the parties as to uphold or not to uphold the original decision made by the Home Office. An appeal can be made in certain instances in respect of the Adjudicator's determination. Such an appeal is made to the second tier of the Immigration Appellate Authority, i..e. The Immigration Appeal Tribunal within a specified timescale.

At present, 326 part time and 76 full time adjudicators deliberate over matters throughout the UK at permanent centres and at various satellite courts. In order to be appointed as an adjudicator, a competent and working knowledge of domestic law, European and overseas law is a pre-requisite, coupled with a knowledge of contemporary foreign and political matters. A knowledge or experience of dealing with ethnic minority issues is also seen as desirable. Indeed with reference to **s81 of The Nationality, Immigration and Asylum Act 2002** it is unlikely that an individual appointed as an adjudicator would have less than seven years general legal experience as a Solicitor, Advocate or Barrister or other non-legal experience which the Lord Chancellor would deem suitable for appointment.

Section 82 of the aforesaid Act deals with the right of appeal and stipulates that in instances where an "immigration decision" is made in respect of an individual, that individual may appeal to an adjudicator and the section further defines what constitutes an "immigration decision". Section 83 essentially provides that The Adjudicator is obligated to consider asylum appeals where the applications have been rejected by the Secretary of State provided that the applicant can demonstrate that leave to enter or remain for periods exceeding one year have been granted.

The grounds for appeal are defined by s 84 and stipulate that the appeal must be brought on one or more specified grounds which include where the decision made was contrary to the Immigration rules, the Human Rights Act, Race Relations Act (Public Authorities), not in accordance with the law, Refugee Convention or where the individual is an EEA national or member of a family of an EEA national may constitute viable criteria for making such an application.

Following the hearing the Adjudicator's decision must be made in writing and the appellate authority must send a copy of the determination to each party. Where an appeal against the adjudicator's determination is sought, this can be made but only with the permission of the Tribunal with regard to an application made in accordance with the rules and only on a point of law (s 101). It is important to acknowledge that the appeal to the Tribunal must take place within specific deadlines set down in the rules. Where the applicant is in detention under the Immigration Act, an appeal must be made no later than 5 days following the receipt of the adjudicator's determination. In any other instance, where the appellant is in the UK, no later than 10 days after receipt of the adjudicator's determination. Where the appellant is outside the UK, no later than 28 days after receiving the Adjudicator's determination.

The Tribunal may extend the time limits if it is satisfied that by reason of exceptional circumstance it would be unjust not to do so.

It must be acknowledged that the continued furore and castigation of asylum seekers by certain sections of the media has increased the burden and pressure on the processing of Immigration applications. This inevitably has a direct consequence for Immigration Adjudicators in dealing with matters more rapidly and without delay, whilst simultaneously keeping a watchful eye over any applications which constitute an abuse of process and which are merely aimed at prolonging an applicant's stay in the UK, such applications being devoid of merit.

By Surinder Randhawa

Part II of this Article appears in the next edition and will focus on the role of the Immigration Tribunal.

WEBSITE UPDATE

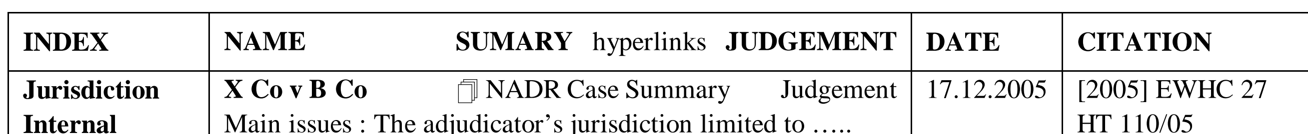
NEW ARTICLES

- **Dispute Resolution in Sharia Law** by Samer Nawaz
- **Examining Lawyers Perspectives on Mediation as an ADR Process** by Surinder Randhawa

NEW FEATURE

Case law Database.

This new research facility, for members only, commences with a comprehensive Construction Law Case Database. Further databases are planned for law reports on arbitration, expert witness practice, international trade and shipping, insurance and mediation. The format of each database is as follows :-



INDEX	NAME **SUMARY** hyperlinks **JUDGEMENT**	DATE	CITATION
Jurisdiction Internal	**X Co v B Co** NADR Case Summary Judgement Main issues : The adjudicator's jurisdiction limited to …..	17.12.2005	[2005] EWHC 27 HT 110/05

The index will be limited to one or two words at most, identifying the primary area covered by a case; the name of the case followed by hyperlinks to summaries provided by NADR and to the full judgement, where available (under each case will be a bullet point of main issues) ; the date of judgement will be in a separate column followed by the citation where available. Users will be able to search the database by index, name and date. Adjudication.co.uk have kindly agreed hyperlinks to the full transcripts of construction adjudication judgements on their website.

The intention is to make a start at each of these other databases and then to add to them gradually as time and resources permit. This is a very large undertaking and readers will appreciate that if we were to wait until each database was complete before launching it, this would involve a long wait, whereas by doing it incrementally members will be able to benefit from work as it progresses. The aim is to commence with 2003 cases, keep them up to date and to gradually back date entries over a period of time.

If you know of any relevant cases that you feel should be included in the database, please advise us about them. Furthermore, ADR NEWS readers are invited to submit summaries of favourite cases for inclusion in the databases. Your authorship will be acknowledged.

Readers are also invited to submit personal reviews and comments on latest publications on ADR that they have read, with recommendations and commendations (if any).

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