NATIONWIDE ACADEMY of DISPUTE RESOLUTION

ADR NEWS

SPECIAL SEMINAR EDITION 25th APRIL 2000

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

CONCEPTS AND PRACTICE OF ADR IN THE DOMESTIC AND INTERNATIONAL ARENA

SHARIFAH MARIAM SYED IBRAHIM[1] - OPENING ADDRESS

I, on behalf of the Nationwide Academy of Dispute Resolution, Malaysia, and our distinguished panel members, extend a heartfelt welcome and our gratitude to Y. B. Dato Dr. Rais Yatim, Minister in the Prime Minister's Department, who has taken time off from his busy schedule to give the key note address for our seminar. NADR is grateful to all the participants who had given us their support in making this seminar possible, and to the distinguished panel members who have graciously agreed to be with us and impart their knowledge to us and to share with us the experience that they have acquired over many years of practice.

The title of the Seminar today is "Concepts and Practice of ADR in the Domestic and International Arena." The purpose of the seminar is provide delegates with an insight into Alternative Dispute Resolution and an awareness of the latest trends in this rapidly developing global movement with particular emphasis on the practice of ADR and its relevance to commerce in South East Asia.

Our mission at NADR is to synthesis the best of practices in Alternative Dispute Resolution from around the world, and to make them available to commerce in South East Asia and to play a part in helping to establish Malaysia at the centre of the development of and the provision of ADR in South East Asia. We are fortunate to have the support of so many people and organisations who share our objectives, and on this note I feel that this would be an appropriate time to introduce to you all our distinguished Minister, Y.B. Dato Dr Rais Yatim who has so generously agreed to address us all today. Your excellency ….

YB DATO' Dr. RAIS YATIM[2] - KEY NOTE

Disputes in society cannot always be avoided. Solutions must be prompt, lest these disputes lead to disruption of social and economic activities. In general, parties go to the courts for the settlement of their disputes. The courts, after hearing the parties, hand down a decision that is binding on the parties to a particular dispute. While the court's jurisdiction as a tribunal for civil litigation should remain and continue in its pivotal role as the final seat of justice, it is time for alternative methods of dispute resolutions to take on greater significance and contribute towards easing the pressure on the courts.

Justice outside the courts is not a new concept. Our social, cultural and religious outlooks have always accommodated and accepted that disputes ought to be resolved expeditiously with minimum publicity usually by the use of a trusted elder acceptable to the disputants. With the introduction of the English legal system based on the Common Law, our own methods of resolving disputes fell into disuse.

As we forge ahead in this millennium, new social and economic orders have begun to materialise domestically and across borders. The mechanics for the resolution of disputes whether through the court system or by alternative methods would have to keep pace with these changes with a view towards minimising disruptions to existing relationships and maintaining good economic ties towards achieving a win/win idealism.

The formalisation of alternative dispute resolution methods and their wide spread application protends well for Malaysia as investor confidence grows and new economic ties are forged domestically and internationally. The key to successful resolution of disputes is closely linked to the confidence the ADR system generates in respect of the speed of the process, cost effectiveness and unscrupulous impartiality.

---

1 *, Director, NADR Sdn Bhd*

2 *, Minister in the Prime Minister's Department*

Providers of ADR services should strive to attain these basic elements if they wish to succeed in their endeavour to promote and popularise their services.

I take this opportunity to congratulate the organisers who have made great efforts in bringing together the distinguished speakers and a broad section of the Malaysian society to look into ADR as a viable adjunct to litigation. The government shall be studying proposals towards legalising appropriate laws to give the right impetus to the wider use of ADR in our country. The revival of ADR in the midst of changes to the social order and the increasing burden on the court system is welcomed. I am confident that the use of ADR would become more acceptable in our society.

Shaifah Mariam Syed Ibrahims……. Thank you Dr Rais Yatim for your kind words. I am sure everyone here today welcomes the support that the Government is giving to the development and establishment of ADR provision in Malaysia.

The Chartered Institute of Arbitrators, as its name suggests, has established and provided a bench mark for international arbitration since its founding in 1915. However, the CIArb recognises that new forms of ADR apart from arbitration are gradually establishing themselves as significant vehicles for dispute resolution in the commercial world. The CIArb set the standards for arbitration on the world wide stage and now seeks to play a similar role in respect of other forms of ADR. The CIArb has been involved for several years in training and listing for adjudication and recently established its first list of mediators. Training and further accreditation are in the pipeline. This sets the background for the support that is given to our seminar today by the CIArb, and whilst Neil Kaplan QC, President of the CIArb cannot be present today, he sends this message to you, the delegates at this seminar ……. :-

NEIL KAPLAN QC – PRESIDENT OF THE CHARTERED INSTITUTE OF ARBITRATORS

"It is interesting to observe that mediation and other non confrontational methods of dispute resolution have been practised with success in Asia for centuries. This prompts me to ask why today we are seeing a resurgence of it in Asia. What was informal and culturally motivated has now become surrounded by rules, panels, accreditation and formalism. To discover why this has happened we need to look back to the parlous state of the world economy after World War ll. It took many years for political and trade barriers to fall but as they slowly did so the volume of trade increased. Today countries and blocs who once could not speak to each other now actively trade. However the concomitant of increased trade is an increase in disputes.

Arbitration became the preferred method especially for international disputes. The New York Convention of 1958, which now applies in over 140 jurisdictions, makes it far easier to enforce an arbitral award than a court judgment. Further the existence, as from 1985, of the United Nations Model Law on Arbitration has given a great boost to legislative improvements in many places. However the success of arbitration both internationally and domestically was seen by some as sowing the seeds of discontent. This was because many lawyers hijacked the arbitral system and turned arbitration into the mirror image of litigation - the very thing that, by agreeing to arbitration, the parties thought they would be avoiding. Too much international arbitration is fought as if it were off-shore litigation. These problems were coupled with a growth of court business generally. In some jurisdictions the court system was swamped by criminal cases or administrative law cases. The result was that commercial cases were put to the back of the list and unacceptable delays occurred.

I am not too sure where the modern method of mediation actually started but I suspect that it was America where in some States the court system just could not cope. Mediation appears to have developed fast and furious in Australia. However I first came across the concept when I was involved in a committee which was making recommendations to The Hong Kong Government for substantial amendments to the Arbitration Ordinance in 1981/2. We were impressed by what we had learned from our colleagues in China. They had a long history of combining conciliation with arbitration and saw no conceptual problems in so doing. We made a first and tentative step with legislation which came into force in 1982. The Hong Kong Arbitration was the first, or one of the first, to refer to conciliation and make some provisions for it.

By 1989 we became bolder and made provision for the arbitrator, with consent of the parties, to act as mediator. Nothing surprising in that, but what was to happen if the mediation failed? How could the arbitration continue if the arbitrator had seen the parties separately and been told matters in confidence. This was the typical common law knee

jerk reaction. However we were again impressed by the experience in China where our friends answered by saying who better to arbitrate than the failed mediator? We went along with this approach but provided that if the arbitration re-commenced the arbitrator had a duty to disclose such confidential matters as he thought necessary for the fair conduct of the resumed arbitration. The point to remember is that this section which still exists is based on the parties continuing consent. I know that this section has been used a few times. No one is forced into using it but some parties might find it useful and thus there is statutory provision preventing any complaints about its use at a later stage. In a later amendment we provided that mediation and conciliation were interchangeable.

At or about the same time building contractors in Hong Kong complained to Government, who was the largest employer, that it took too long to get cases resolved by traditional methods. They wanted Government to agree to use mediation. Government were not averse to the idea but were reluctant to make it compulsory. A voluntary scheme began and it was successful. Government then agreed to make it compulsory. This was at about the time that Government were about to let contracts for the new airport related projects. In these contracts once a dispute arose the aggrieved party was obliged to refer the matter to mediation which step was a condition precedent to subsequent adjudication or arbitration. This system works well. Neither party feels it a sign of weakness to go to mediation because it has been contractually mandated. The statistics indicate that many intractable disputes were resolved during or reasonably shortly after the mediation process.

I return to my original question – why is formal mediation necessary? I believe a number of factors are at play here. The number of disputes has increased given the complexity of modern life. The amount at stake is greater given the globalisation of modern trade. And perhaps most importantly the techniques of mediation have been developed and honed. One must never underestimate the ability of the trained and skilled mediator in bridging the unbridgeable. In the ultimate analysis it was the lack of true mediating skill on behalf of the legal team, whether in-house or external, which led to the creation of a trained band of independent professionals prepared to assist the parties in assisting themselves.

And so mediation is all the rage all over the world. Mediation is not limited to commercial disputes. It is very useful in matrimonial disputes, personal injury disputes and community based disputes. No wonder that many Governments are supporting mediation which, when successful, brings great savings in cost. But no system can be better than those who practice it and thus I welcome this seminar in Kuala Lumpur arranged by the National Mediation Academy of the United Kingdom and supported by the Chartered Institute of Arbitrators. Despite its name the Chartered Institute is committed to promoting mediation and in this regard is setting up a panel and will soon be organising courses.

I wish this seminar well and I am sure it will be both enjoyable and interesting for delegate and teacher alike."

Shaifah Mariam Syed Ibrahims……. We thank Neil Kaplin for his support and acknowledge that ADR can only be as good as those that practice it. This is a relatively new industry. However much we know and however much experience we have there is always something new to learn in this rapidly evolving industry. Practice makes perfect and can only be improved by the assimilation of new methods and techniques tailored to the ever changing needs of global commerce.

Whilst Neil Kaplan astutely identifies that the bed rock of negotiation and mediation was forged by our forefathers here in South East Asia, in recent years it is that cultural melting pot, the USA, which has borrowed our ancient and instinctive social mechanisms for dispute resolution and redesigned them to accommodate the needs of commerce. In this respect, as we seek to re-accommodate these traditional methods of dispute resolution into our modern lives we should not ignore the debt that we owe to the thousands of practitioners in the US who have refined and redefined these techniques. NADR is fortunate to have the support of distinguished ADR practitioners from the US, represented by Judge Richard Faulkner, one of our panel members today and by Doke Bishop who has provided two superb papers to support the seminar.

NADR's main objective is to generate awareness in and to spread, the Concepts and Practice of **ADR**, to a cross-section of industry, professionals (both legal and non-legal) government, educational institutions and the public in general. Justice delayed is justice denied and disputants have now reached the crossroads where they are ready and willing to submit their disputes for resolution to a qualified facilitator outside the

court system for a fair resolution. Mediation as a mode of **ADR** is well established in the USA and is growing in importance in the United Kingdom, People Republic of China and other jurisdictions.

Serious businessmen demand confidence in the system that they turn to for resolution of commercial disputes. Their confidence can only be gained if the **ADR** services are impartial, and effective in terms of both time and cost. As Neil Kaplan pointed out in his key note address to us today, **ADR** services are only as good as the people that provide them. The **NADR** group is in a position to provide quality **ADR** training with well-recognised accreditation for aspiring **ADR** personnel to ensure that commerce gets the quality of service that it demands and deserves.

The rest of this week is taken up by the first inaugural training sessions by **NADR** for mediators and mediation party representatives here in Kuala Lumpur. I am pleased to announce to you today that in August **NADR** will be mounting its second ADR seminar which will concentrate on the Construction Industry and in particular on adjudication and dispute review boards. Concurrently, the second **NADR** training course will take place and I hope that many of you present today will consider participating.

It is all very well and good to acquire the skills of an **ADR** specialist but that is all for nothing without the means to put that expertise into practice for the good of the profession and for the betterment of commerce. **NADR** has had over 20 years of experience in providing **ADR** services around the world and now seeks to establish a firm base here in Malaysia for the provision of **ADR** services to the South Eastern Asian commercial community. Having trained **ADR** specialists, **NADR** will provide the infrastructure which will enable its listed arbitrators, adjudicators, dispute board specialists and mediators to practice in their respective fields in South East Asia.

NADR listing is open to existing qualified **ADR** practitioners. However, the aim is to attract new practioners from all walks of life and commerce into a profession which has a vital role to play in the commercial life of South East Asia in the 21s Century. There is an enormous scope for expansion and development in ADR in the new global commercial community. **NADR** seeks to position itself and Malaysia at the centre of this new exciting industry, providing mediation schemes for business, low cost, speedy, paper-only arbitration schemes for the consumer sales market and adjudication and dispute review panel services to the construction industry. **NADR** seeks to create new business to complement, rather than to encroach on, the market occupied by existing providers of **ADR** services such as the CIArb.

NADR is confident that resolution of disputes by appropriate alternative modes will become common currency and play its rightful role in minimising litigation and maintaining good ties between the disputing parties with neither party feeling that they had totally lost out in the process. I am sure that each and everyone of you is of a like mind, which is why you are hear today, to learn more about and to discuss the evolution of our industry.

That said, allow me now, to introduce you to our distinguished panel members, who will shortly engage in a fascination discourse with you on the evolving concepts and practice of **ADR**.

- Professor Geoffrey Beresford Hartwell, chartered engineer, past chairman and Senior Vice-President of the Chartered Institute of Arbitrators.
- Professor Dr. Shad S. Faruqi, Assistant Vice-Chancellor, Universitii Tecknologi MARA.
- Professor Tony Bingham, Civil Engineer, barrister, construction arbitrator.
- Judge Richard Faulkner, Executive Director of National Association for Dispute Resolution Incorporated of the USA., educator, mediator, arbitrator and attorney at law.
- Dr Susan Hodges, Educator and Maritime Lawyer.
- Corbett Haselgrove-Spurin, Educator and mediator.
- Mark Entwhistle, constructor, barrister, arbitrator, and formerly a Director of James R Knowles.

We hope everyone, delegates and panel members alike, enjoy this seminar and that you will learn a great deal today about the evolving world of **ADR** . We urge you all to join with us in facing up to the professional challenges and opportunities brought about by the development of the global economy. We once again thank all who are present today and wish you well.

And now, if I could invite Professor Geoffrey Beresford Hartwell to provide you with a "Comparative Analysis of the Ethical Dynamic involved in Litigation, Adjudication, Arbitration and Mediation "

"INTRODUCTORY REMARKS : A COMPARATIVE ANALYSIS OF THE ETHICAL DYNAMIC INVOLVED IN LITIGATION, ADJUDICATION, ARBITRATION AND MEDIATION"[3]

My task is to set out the ground, the theoretical ground, so to speak, for the development of the practical discussions which follow.

In his kind message to us, the President of the Chartered Institute of Arbitrators, Neil Kaplan QC, expressed some surprise at the idea of a team from the West coming to the East to talk about mediation and conciliation and the whole principle of negotiated agreement. He is right, of course, and the concept of honourable compromise has long been a part of Eastern Culture. But it has long been part of Western Culture also, although we may have lost sight of it in modern times. The principles of moderation, of balance and of honour can be found in Aristotle, and in the Natural Law traditions of Europe, as they are found in the philosophies of the East. But I would like to approach our subject today from a different point of view. Experts will talk to you about the perceived advantages of what we now call ADR- Alternative Dispute Resolution or, as I would prefer to call it, Independent Dispute Resolution. They will explain why they think it is necessary or desirable, perhaps to relieve the load on the Court system, maybe to enable innovative solutions to be found to an intractable problem, or possibly just to allow those in dispute to feel they have more control of their own affairs.

All those are valid reasons for studying ADR. But I wish to question why we have to think of these processes as alternative at all. Here, in South-East Asia, I would argue that the methods we are going to discuss today are not alternatives, but the natural way to resolve disputes. Litigation, I suggest, is the other option, available if all else fails. Available if we cannot find any-other way to solve our difficulties. An option of last resort. And, if you think about it, it is really rather surprising that litigation is available to us at all. It is quite obvious that the Court exists to enforce the Law and to punish crimes against the state and against society. That is an entirely necessary form of regulation, without which there would be anarchy. The State, any State, has an interest in protecting its people and its institutions.

What is a little less obvious, I suggest, is that the State should have an interest in the relationship between two private people, or in the relationship between two private companies. Indirectly, it does, of course, have such an interest, because the regulation of private relationship is necessary if individuals are not to have recourse to some kind of self-help. It is important that people's private relationships should run smoothly and equally important that commerce should have a firm legal base.

From time immemorial, the elders of the tribe have lent their authority to the proper enforcement of obligations owed by one person to another. The modern State does the same, but it does so by choice. Let me cite two examples from England. There, the Court will not hear cases in which one party seeks party seeks payment of a gambling debt by another. There is nothing illegal about a gambling debt. There is no doubt, in such a case, that the money is owed. The State simply does not choose to become involved. As another example, perhaps oversimplified, for which I apologise, the Court will not hear a case in which one man claims that another has agreed, by word of mouth, to give him a house, or some land. Statute requires that agreements about land are evidenced in writing. If there is nothing in writing, the State does not concern itself. By choice.

That is why I suggest that recourse to the Court may not be the natural way in which disputes between parties should be resolved or determined. I do not say that I believe Mediation, Adjudication, Expertise, Arbitration or any of the private techniques, to be superior to the Court or, indeed, that there is any competition between Private Dispute Resolution and the Courts. I am quite clear in my own mind about that. I argue, quite simply, that disputing parties should be encouraged to take every step available to them to resolve matters between them, privately, or with the help of professionals, and that only when resolution is impossible, or one party refuses to accept the outcome, should there be recourse to litigation, the option of last resort, the ultimate recourse.

[3] By Eur Ing Professor Geoffrey M. Beresford Hartwell

ADR techniques work because people want them to work. They have to do with communication. They have to do with making promises. We have to consider two main kinds of promise, perhaps three. In Negotiation, with or without the help of outsiders to the dispute, and in Mediation and

Conciliation, and in those forms of ADR which involve attempts to find an accommodation between parties, the promise is a promise of best endeavours, a promise to try. In Arbitration, in Determinative Expertise and in Adjudication (if indeed, Adjudication is truly a separate and distinct process and not simply a particular approach to Arbitration), the promise is a promise of compliance, a promise to abide by the outcome of the process.

On the one hand a promise to try; on the other a promise to comply. In both promises, sincerity plays a part. These private processes do not have the sanctions of the Court, so it is expected that those who take part will act in good faith and honour. In my view, that is one of the most important aspects of Private Dispute Resolution; in agreeing to a process of the kind, the parties make an honourable commitment. Rather than invoke the Court, each party denouncing the other, they agree, in honour, to resolve matters justly for themselves, by themselves, perhaps with the aid of a third party or parties of their own choice.

As to the third class of promise, where there has been, say, Negotiation or Mediation leading to an acceptable answer, the parties may decide to make an agreement or, where the process leads to Neutral Advice, they may elect to adopt that advice as their agreement. That is then a promise and becomes a contract between them.

I invite you to bear that in mind as we discuss ways and means of Dispute Resolution in their many forms. It is all too easy, in studying the structure of the process, to forget the foundation upon which it rests.

I said that ADR processes depend upon a promise. Some processes do not stop there. Arbitration, in particular, is known and respected in most jurisdictions as a process having its own legitimacy.

There may be different jurisprudential theories as to whether it may be treated as a purely private process, or whether it should be seen as an extension of the judicial system itself. Now is not the time to explore the topic. What is significant, however, is that most jurisdictions not only recognise the legitimacy of arbitration, but will afford the Award of a tribunal a status corresponding closely to the status of the judgements of their Courts.

A consequence of that is that arbitral proceedings tend to be constrained, in that certain minimal requirements of due process are expected and Awards require to be generally consistent with Law. Perhaps a tribunal will not decide precisely as would the Court, but it will not make an Award which is offensive to the State. If it did, the Award would not be enforced and could be overturned by the Court.

The constraints on other ADR processes are not so narrow. An outcome may not be what might be expected from an analysis of law, but may well be something more innovative, or of wider scope, that is acceptable to the parties. That does not, however, mean that the parties may make an illegal arrangement. They remain subject to the relevant law. It does mean that they can agree, for example, to share the losses on one contract and agree to work together on another, perhaps developing new business between them.

I hope that introduction is helpful. I set out to show that what we call ADR is really the more natural way of resolving disputes and that we should regard litigation as the final option when all else fails. That was to lay the ground for what is to follow.

The task, perhaps one may call it the mission, of ADR Academics, is to make the techniques of ADR better known and to make them available to professionals of all kinds. We work with lawyers, engineers, architects, teachers, doctors, business men and community leaders. Our aim is to make a fair resolution of disputes available to everyone and to enable ordinary people to serve their own industries and communities as Neutrals. That is why we are here and why we are grateful to you for allowing us to come. It may be fanciful to describe ADR as a kind of people's justice, but that is how I see, it. It is also a commonsense way to deal with problems. I hope you will agree with me when you have heard what my distinguished colleagues have to say.

JUSTICE OUTSIDE THE COURTS: ALTERNATIVE DISPUTE RESOLUTION AND LEGAL PLURALISM

By: Prof Dr. Shad Saleem Faruqi : Universiti Teknologi MARA

To many people the luster of the legal process radiates the promise of justice. Many of us have been brought up to believe that an independent judiciary and a fearless Bar can protect our rights, preserve our liberty, secure our property and render to everyone his or her due - both by way of punishment and by way of benefit.

It can hardly be doubted that judges and lawyers play an important role in actualising the ideals of justice under the law. A modern society without courts and a legal profession is unthinkable.

Having said that, it must also be observed that the problems and challenges of justice are so immense that no single institution or cluster of institutions and no single process can by itself banish the darkness of injustice, produce a just ordering of society, ensure a fair distribution of material and legal resources, safeguard the rule of law, promote equality, ensure proportionality in punishment, and protect entitlements and legitimate expectations. The demands of substantive and procedural justice are so monumental and multi-dimensional that no law, no institution and no method is adequate to the task.

It is also being increasingly recognised that in attempts to resolve disputes, litigation is only one choice amongst many viable alternatives. In every society a large number of legal and non-legal, formal and informal, contemporary and customary principles, methods and institutions exist to rectify wrongs and promote remedies.

In all social systems, the formal, enacted, written law of the state co-exists with a large corpus of non-state law. Sociology and historicism recognise that the centre of gravity of the law-making process lies not in Parliament but in society itself.

The tendency in modern legal systems, especially those wedded to the common law tradition, is to aggrandize the judiciary, to place it at the centre of the legal cosmos and to exaggerate its role in, and its capabilities for, actualising the goals of justice and the rule of law. It needs to be stated, at the risk of sounding heretic, that the judicial technique plays only a marginal role in the resolution of disputes in society. When invoked, the judicial process merely supplies band-aid solutions to problems of vast magnitude.

A mature theory of dispute-resolution must encompass all institutions and processes - whether legal or non-legal, formal or informal, contemporary or customary - to further the end of settling disputes by smoothing away discords.

This essay will touch on some such institutions and processes. It will point out that in Malaysian society, in addition to arbitration, mediation and conciliation, there is a wide range of other legal and non-legal alternatives for coping with the conflict stirred by public and private law disputes.

It will also plead for a revival or strengthening of many historical, social, customary and religious means for ordering human relations, resolving disputes, maintaining social harmony and preserving an idea of communitarian justice.

THE DARKER SIDE OF LAW AND LITIGATION

The judicial process was meant to provide an effective and impartial mechanism for redressal of grievances. It was meant to solve some of society's problems. Sadly it has become part of the problem !

From a long litany of complaints against the judicial process the following need to be highlighted.

Procedural justice, substantive injustice.

It is claimed that justice is secreted in the interstices of procedure. It is true that between procedure and substance there is a cycle of interaction. But it is equally evident that in many cases the courts go through the motions of justice to reach results which are legal but hardly equitable. The process, not the result, seems to be the dominant consideration. Technicalities of procedure often thwart substantive issues from being raised. The success of a pleading does not depend on its intrinsic merit but on the brilliance (or otherwise) of the advocacy.

The law of evidence is not about truth but about proof. Exclusion of hearsay evidence ensures that false evidence is not admitted. But it also results in rejection of eminently truthful testimony. The parole evidence rule, the rules of limitation, the mind boggling technicalities of procedure, have very little to do with justice. They also diminish respect for the legal system in the minds of litigants whose substantive case was clearly just but who got knocked out on. mere technicalities.

Structural Issues

Judges are servants of the law, not its masters. They face serious dilemmas when the law at hand is iniquitous or reflects structural injustice. For example, indigenous communities occupying native land without formal titles are often displaced because the formal law does not recognize their rights over the land. Often, children of poverty-stricken families have difficulties proving their citizenship status because their illiterate parents did not register them with the National Registration Department in accordance with legal requirements.

The English philosophy of legal positivism poses problems when a human rights conscious judge is confronted with` unjust laws and institutions. He cannot, like the natural lawyer, lean on the principle *"lex injusta non est lex"* (unjust law is not law) and give preference to transcendental values over posited and enacted rules. At best he can interpret existing materials creatively and read into them some implicit safeguards. But such kind of reformative activity is bound to be sporadic and piecemeal and cannot solve deep-seated structural problems of injustice.

Adversarial System

The polarizing blunt instrument of adversarial litigation supports competitive aggression to the exclusion of reciprocity and empathy. It "expresses a chilling Hobbesian vision of human nature. It accentuates hostility and not trust. Selfishness supplants generosity. Truth is shaded by dissembling." [4]

The adversarial system resolves conflicts in a way that destroys rather than preserves erstwhile relationships. This system is inappropriate for disputes between family members and business associates. Recourse to the highly publicized judicial process for domestic violence cases often results in fracture of family ties. If one party loses his/her means of support as a result, there is very little that society does in the post trial period to help the helpless.

The adversarial framework requires judges to choose one victor and one vanquished in a fair contest between two equal parties. But where the parties are not equipped equally, and the judge does not interfere to ascertain the truth, a miscarriage of justice is most likely. In countries with high rates of unrepresented accused, the adversarial system leads to horrible results. In another area, that of citizen-state disputes, the citizen is hardly on a level playing field with the government and the adversarial system often works to his detriment.

I am tempted to suggest that trials by adversarial contest are a relic of our not so civilized past and must in time go the way of the ancient trial by battle and blood.

I also wonder whether the French system of droit administratif, with its peculiar system of separate and independent administrative tribunals to try disputes between the citizen and the state, provides a better forum and better range of remedies in public law disputes.

High Cost

The high cost of hiring a lawyer dissuades many a citizen from seeking judicial enforcement of his rights. It does not speak well of a legal system if I wish to recover my stolen cow from someone and have to sell my house to recover it! The government's and Malaysian Bar's gallant efforts at providing legal aid help access to the legal system. But legal aid does not solve problems which are structural in nature.

Delays

Besides high costs, the delays inherent in judicial proceedings encourage many citizens to seek non-judicial remedies for enforcement of their rights.

Separation Of Powers

Two sacred doctrines of contemporary legal systems - the doctrine of separation of powers and the rule of stare decisis - have a bearing on the ability of judges to do what justice requires. The doctrine of strict separation by Montesquieu is often used by judges to justify self-restraint. For example, in a recent case, **Mohd Yusof Mohamad v Kercjaan Malaysia** [1999] 5 MLJ 286, the learned judge said: "Any judicial interference, in matters where the executive had exclusive information and upon which it had acted, could be readily construed as judicial encroachment upon the independence of the executive."

There are some well recognised categories of decisions which are so mixed up with executive policy, or politics or non-legal factors that the courts are unwilling to review these decisions by reference to judicial standards. This is the concept

[4] J. Auerbach, Justice *Without Law,* Oxford University Press, 1983, p. viii.

of nonjusticiability. Whenever it is invoked successfully, the ideals of the rule of law are set aside.

Stare Decisis

The doctrine of stare decisis bids judges to respect the principles of the past in the interest of certainty and predictability. But with all due respect, certainty and predictability in the law are good but justice is better. As Lord Atkin said: "when these ghosts of the past stand in the path of justice clanking their medieval chains, the proper course for the judge is to pass through them undeterred." **United Australia Ltd. v Barclays Bank Ltd**. [1941] AC 1 at 29.

Lack Of Initiative

The judicial work, unlike the work of the legislature and the executive, is characterized by lack of initiative. Courts of law do not have a roving mission to discover and correct errors of law or abuse of power by administrative authorities unless a citizen knocks on the door of justice and asks for judicial intervention.

Executive Policy

Judicial control of the administration operates on the circumference of the administration rather than becoming an integral checking force therein because the underlying policy assumptions of executive decisions are generally not the subject of judicial intervention.

Locus Standi

The rule of locus standi provides a procedural hurdle against those seeking judicial intervention for alleged wrongs. Though this rule has been liberalized in many countries like India and the USA, its obstructive potential is considerable. It tends to treat civic minded citizens as busybodies and not as public benefactors.

In sum the legal process can be threatening, inaccessible and exorbitant for the weaker sections of society. Litigation encourages the assertion of legal rights but only for those who have the ability to pay. To some extent the judicial process, despite its pretensions for impartiality, is more likely to sustain domination than to equalise power.

Exclusive reliance on the judicial process for achieving justice in society in neither desirable nor possible.

Other techniques for dispute resolution must be explored.

ALTERNATIVE DISPUTE RESOLUTION (ADR)

ADR refers to the wide range of alternatives for coping with the conflict stirred by disputes between citizen and citizen, citizen and the state and between international parties. According to Auerbach, "litigation is only one choice among many possibilities ranging from avoidance to violence".[5] ADR refers to the many alternative methods of resolving disputes other than through litigation/adjudication in the ordinary courts.

In Malaysia the following techniques of ADR seem to exist:

1. Arbitration under the Arbitration Act 1952; the International Court of Arbitration and the Kuala Lumpur Regional Centre for Arbitration.
2. Negotiation, Mediation and Conciliation.
3. Statutory Tribunals or adjudicatory bodies like the Industrial Court, Public Services Commission, Professional Disciplinary Bodies, Rent Tribunal, Public Services Tribunal, Special Commissioners of Income Tax, Social Security Appellate Board, Commission for Workmen's Compensation, Commodities Trading Tribunal, Appeal Board for Planning Matters, Registrar of Trademarks, Collector under the Land Acquisition Act, Registrar of Societies, Licensing Authorities and Adjudication by Ministers.
4. Commissions of Enquiry.
5. Special bodies have recently been created to handle small claims, consumer complaints and complaints on insurance matters.
6. The proposal for an Accident Compensation Commission and an Independent Police Complaints Authority has been mooted but not yet accepted.
7. In addition to the normal courts, there also exist the following courts with specific jurisdiction:
   - Syariah Courts with civil and criminal jurisdiction.
   - The Penghulu's court (court of the village head-man)
   - Native Courts in Sabah and Sarawak.
   - Juvenile Courts
   - Court-Martial
8. Under the rules of court several procedures exist to enable parties to force their opponents

[5] Jerold S. Auerbach, *Justice Without* Law, Oxford University Press, Oxford, 1983, p. 3.

to compromise or settle the dispute and avoid the trial: [6]

- Payment into Court if defendant admits liability and wishes to avoid costs (0.59 r 5 (b)) Rules of the High Court 1980.
- Offer of Compromise
- Notice by Admission
- Defence of Tender
- "Without prejudice save as to costs offer."

9. Parliamentary devices
   - Question time in Parliament.
   - Debates and Motions.
   - Parliamentary Committees.
   - Constituency work by MPs.

   Parliamentary opportunities to discuss issues of public concern and to highlight the grievances of citizens against the state serve to expose official mismanagement, unfair treatment of citizens and administrative bungling. Parliamentary scrutiny of the government may help to provide remedies against maladministration and reduce the citizen's need to resort to the judicial process.

   Members of Parliament are not only legislators; they are also problem solvers, social workers and spokespersons for their areas. Many MPs use their parliamentary allowance to set up Service Centres to attend to constituents' needs. These Service Centres are highly popular and process hundreds of cases between citizen and citizen and citizen and state.

   One commentator attributes the importance of such non-legal remedies to "legal under-development." This is an ethnocentric view and rests on the presumption that legally conscious people must necessarily be litigation-hungry.

10. The print media especially the Letters to the Editor Column, and the Actionline and Hotline service that some newspapers provide to their readers allows an informal, expeditious and effective grievance-remedial technique to the citizens. In the area of human rights, the international media plays a significant role to highlight abuses.

11. The Public Complaints Bureau which is Malaysia's version of the Scandinavian ombudsman and the British Parliamentary Commissioner of Administration supplies an internal corrective mechanism within the administration.

12. The recently established Human Rights Commission is charged with the responsibility of investigating complaints.

13. Intervention on behalf of a complainant by a non-governmental organization (NGO). Many such consumer, environmental and human rights NGOs exist with varying degrees of effectiveness.

14. The departmental complaint box.

15. The Anti Corruption Agency.

16. The Auditor General.

17. Internal or Departmental inquiries.

18. International pressures.

In a third world setting where legal literacy is low; legal aid is in its infancy; and people are not litigation conscious, extra-legal and informal remedies are much more effective than legal ones in securing redress against maladministration and unconstitutional conduct. One can point to Service Centres run by political parties; exposes of gross injustices by the media; intervention by MPs on behalf of their constituents; parliamentary committees; the Biro Pengaduan Awam; the Human Rights Commission; and actions by determined NGOs that seem to be much more effective in solving citizens' grievances than the processes of the courts. We should get away from the idea that a court is the only place in which to settle disputes. People with claims are like people with pains. They want relief and results and do not care whether it is in a court-room with lawyers and judges or somewhere else.

LEGAL PLURALISM

Legal pluralism can help to supply alternative dispute resolution techniques. In the *Journal of Legal Pluralism and Unofficial Law, No.* 39 of 1997 at page 155, legal pluralism is referred to as `legal polycentricity'. Elsewhere, a state with legal pluralism is described as a multi-law state. According to Gordon R. Woodman,[7] the concept of legal pluralism refers to the following legal arrangements:

[6] Choong Yeow Chow, (1999) 26 JCML 85-117

[7] Gordon R Woodman, Book Review of Hanne Peterson and henrik Zahle (eds.) *Legal Polycentricity: Consequences* of *Pluralism in Law, 1995* in *Journal* of *Legal Pluralism and Unofficial Law,* Number *39, 1997, pp. 155-161.*

(i) "the existence within a particular society of different legal mechanisms applying to identical situations" (Vanderlinden)
(ii) "the situation in which two or more laws interact" (Hooker)
(iii) "that state of affairs, for any social field, in which behaviour pursuant to more than one legal order occurs" (Griffith)
(iv) "the situation, for an individual, in which legal mechanisms arising from different orderings are potentially applicable to that situation" (Vanderlinden)
(v) "a situation in which two or more legal systems coexist in the same social field" (Merry)
(vi) "the condition in which a population observes more than one body of law" (Woodman)
(vii) "different authorities in the different fields of regulation use different sources of law and in different orders" (Weis Bentzon)
(viii) "polycentrism means that law is engendered in many centres - not only within a hierarchical structure - and consequently also as having many forms".

Legal pluralism refers to the situation where a legal system allows a variety or multiplicity of substantive rules, from many sources, on the same point; or where a field of social relations like marriage is governed by more than one set of laws.

So defined, legal pluralism probably exists in every legal system! As Woodman, quoting Griffith, says: "law everywhere is fundamentally pluralist in character".[8] The *Journal of Legal Pluralism and Unofficial Laws* records many instances of legal pluralism in Latin America, Europe, Africa and Asia. For example in the African state of Benin, "inheritance of land is governed in part by customary indigenous law in a form recognised and enforced by the institutions of the state, and in part by the French Civil Code introduced in the period when Benin was the French Colony of Dahomey".[9]

In almost all legal systems, the formal, written law of the state competes with informal, unwritten, non-state laws. Such non-state laws may be known by many names: folk laws, indigenous traditions, *lex--non scripta*, ethnic groups' laws, and traditional laws. In Malaysia, for example, codified Islamic law, uncodified Malay *adat* (custom) and native laws of Sabah and Sarawak coexist with the ordinary legal system. Legal pluralism can also be said to exist because statutes are supplemented by, and often compete and clash with, common law; the common law is supplemented by equity; public law exists side by side with private, contractual law; secular law is supplemented by divine law; and national laws exist alongside international rules dictated by the increasing spread of globalisation. In addition, the ordinary laws of the land are supplemented and superseded by emergency laws enacted under Article 150 of the Constitution. For example, on the issue of corruption, two parallel laws exist - the ordinary Prevention of Corruption Act 1961 and an Emergency Ordinance on the point. The Attorney General has the discretion to pick and choose which law to apply.

Comparison Between Legal Pluralism & ADR

1. ADR is primarily procedural. It is about how a claim must be processed and about how a dispute must be resolved. Legal pluralism, on the other hand, encompasses both substantive and procedural aspects. The existence of legal pluralism means that on a particular point, more than one system of substantive law exists. There are no universal rules about whether the pluralistic laws must be administered by different or the same courts.
2. ADR is primarily about the forum in which a dispute is to be resolved. ADR does not dictate the substantive content of the law to be applied. Thus a contractual matter may be litigated in the ordinary courts or be subjected to arbitration etc. under ADR. In both cases the ordinary law of contract will apply. Legal pluralism, on the other hand, supplies an alternative law to be applied to the situation at hand.
3. In the application of ADR, there is generally no competition between conflicting systems of laws as there invariably is when legal pluralism exists.

Does ADR Create Legal Pluralism?

The issue is exceedingly complex. From a superficial point of view, it appears that ADR is about forums, about where the dispute should be processed. Legal pluralism is about what law is applicable. It follows, therefore that the implementation of ADR is not meant to create legal

8 Ibid, *157*
9 ibid, no. *40, 1998, p. 183*

pluralism but only to supplement the court system of Malaysia.

However there may well be situations in other jurisdictions where the existence of an alternative dispute resolution mechanism indicates the existence of a parallel legal system. For instance if "trial by battle" is allowed as an alternative method of resolving the issue, this will clearly point to the recognition of an alternative system of laws. Perhaps one can conclude that the existence of ADR does not prove the existence of legal pluralism. But the existence of legal pluralism may well permit the operation of ADR.

ADR and Legal Pluralism in Malaysia

Many legal systems including those in India, New Zealand, the United States, and many African and Latin American states have had to grapple with the demand of the minorities for legal pluralism in the matter of personal laws.

In many African states, legal pluralism is allowed because of nationalistic fervor which brought about the end of colonialism and which demanded that African traditions be revived to restore African pride and dignity.

In Malaysia, Muslims are allowed to maintain their religious laws for certain purposes (Articles 74 & 77 and List 11, Item 1 of the Ninth Schedule of the Federal Constitution). Likewise the natives of Sabah and Sarawak are permitted to practice their indigenous traditions in Native Courts (Schedule 9, Item 1 and Article 95B of the Federal Constitution).

The entire sweep of Malaysian history, especially Malay history will testify that the legal process was, up till recently, secondary to alternative means for ordering human relations, resolving disputes, maintaining social harmony and preserving an idea of communitarian justice. Arbitration, mediation and conciliation reflect the values and ideas of Malaysian society far better than the gladiatorial combats of an adversary system of justice. But with colonial conquests the "legalization" of Malaysian society was seen as a sign of civilisational progress. In the days of the British, indigenous legal systems were pushed to the periphery and the triumph of formal justice with its presumed virtues of rationality, consistency, impersonality and predictability was regarded as one of Britain's greatest contribution to Malaya. From an anthropological point of view, however, the "legalization" of the Malay community had its darker side.

Firstly, it led to the adoption of a narrow and artificial concept of law.

In legal systems wedded to the British brand of legal positivism, religion, ethics and morality are excluded from the definition of `law'. So are customs and social practices even though their norms contribute to community life and lend stability and legitimacy to social arrangements. Non-state law is refused the appellation of law because it lacks the instruments which in any system of law provide the minimum requirement for enforcement. "The absence of codes, constables and courts backed with a central authority upon which their legality and legitimacy may be founded "[10] is normally put forward as the justification for confining law to posited norms. However a long line of anthropologists like Gluckman and Fallers have observed that the tribal law of many African communities-has all the attributes of law required by John Austin. [11]

"It is noteworthy that the religious and customary law of the Malays and the customary law of the natives of Sabah and Sarawak seem to meet the requirements of "codes, constables and courts." The laws exist in several juristic expositions. The enforcement machinery is in place. People feel bound by the law and have internalized the non-state norms. Malay custom is not static and is capable of growth and change. Rulings on religious and customary matters are available free of cost from duly constituted authorities. There is a court system with a system of appeal. As to the problem of justice and equity and the subjection of custom to the judicial test of reasonableness, Hamnett points out that "this is usually little more than an ethnocentrism."[12]

Secondly legalisation of community led to litigiousness and encouraged people to inverse the "love thy neighbor" command to an invitation to "sue thy neighbor."

But anthropological evidence from earlier societies shows persistent patterns of rejection of lawyers and courts in favor of alternative means of settling discords. Auerbach informs us that in New England congregations in the USA, among Quakers

---

10 Lakshman Marasinghe, (1998) 25 IMCL 12

11 ibid at pp. 13-14

12 ibid

and Mormons, and in religious utopian communities, Christian doctrine encouraged alternatives to the formal law. The Chinese in San Francisco, the Scandinavians in Minnesota and Chamber of Commerce businessmen resisted the formal processes of the law and instead strove for social harmony, mutual access to conciliation techniques and mutual trust and responsibility.[13] This is in contrast with today's "hyper-lexis" which expresses the values of an individualistic, capitalistic, win-at-all cost culture.

In the whole sweep of Islamic and Malay history, the role of lawyers and courts was subordinated to alternative means of settling discords in society. Family and community involvement in maintaining social harmony was emphasised. Negotiation and compromise were cherished values. It was considered improper to shame an adversary. He should be allowed to "save face". Marital disputes were committed to a *hakanz* (a mediator) to resolve. The procedure of the courts was inquisitorial, not adversary. Complaints against the government and against traders in the market could be investigated by a *Muhtasib* - an Islamic ombudsman administering the system of *Hisba.* Like the French *Conseil d'Etat,* a developed system of *Mazalim courts* existed to oversee mal-administration in the government. Religious authority did not belong to any high priests. It had to be earned by piety and popular acceptance. Religious and community leaders advised on all personal and commercial disputes and tried always to find a middle path after hearing all parties.

The concept of law was holistic and included principles and doctrines contributed by religion and custom. Justice and equity rather than rigid adherence to rules of law were emphasized. The law of crimes included principles of compensation from the law of torts. The law of theft could be suspended if the crime was committed due to force of circumstances during a famine. What is *haram* (forbidden) could become permissible if no other choice was available. An illegitimate child could be deemed legitimate if the biological parents had a genuine belief in the legality of the relationship. Squatters had equitable rights over public land provided they had revived dead land for a lawful purpose (the concept of *ihya al-mawat).*

CONCLUSION

How people dispute is a function of how and whether they relate to each other. Dispute settlement procedures reflect the most basic values of society. They indicate the ideals people cherish and the quality of their relationship with others.

We need to explore and revive the folkways of our culture; to strengthen non-legal, informal, expeditions and inexpensive remedies for solving grievances; to supplement court-processes with the widest range of ADR techniques. We need to restore the sense of community, harmony, trust and reciprocity and to involve village elders, community leaders and mosque and church officials in informal, neighborhood tribunals to smooth away discords and to make justice accessible to all. The tension between legality and justice prevalent today needs to be eradicated.

In Malaysia the institution of the village Penghulu and the District Officer used to play an active role in informal adjudication of disputes and this role needs to be revived. Values historically associated with informal justice should again gain our attention.

But we need to be aware of the seductive appeal of alternative institutions. ADR techniques (like arbitration) should avoid the same vices as in litigation.

A two-track justice system, dispensing "informal justice" to the poor and "justice according to law" to the affluent has its own dangers.

13 J. Auerbach, Justice Without Law?, pp. 3-4

Mediation: What It Can Offer to Malaysia

(Advanced Dispute Resolution for the Global Economy)

by Hon. Richard Faulkner

"Our litigation system is too costly, too painful, too destructive, too inefficient for a truly civilized people."

"The notion that most people want black-robed judges, well dressed lawyers and pine paneled courtrooms as a setting to resolve their disputes is not correct. People with problems, like people with pain, want relief, and they want it as quickly and inexpensively as possible." Warren Burger, Chief Justice, United States Supreme Court

"The wise man learns from his mistakes. The truly wise man learns from the mistakes of others." Ancient Proverb.

I. Introduction

Businesses today are faced with meeting the challenges of a global economy in the Twenty First Century. The competition is no longer just located in Kuala Lumpur, but in Dallas, Kansas City, Moscow, Beijing, Manila, Paris, Munich and London. The old techniques of prior decades no longer suffice for successfully solving the problems foisted upon our clients by the world economy and a plethora of often ambiguous and even contradictory legislation. Our contemporary reality is that well meaning people who have never engaged in any significant business transaction, much less a major international transaction, have regulated and legislated hobbles on businesses in ways unknown to many of your international competitors. Your clients and their businesses must now succeed in the global economy. Today, they and you must be more innovative, more creative and far more imaginative than was previously necessary to successfully negotiate the challenges posed by the international marketplace. It is imperative that such imagination and creativity also extend to navigating our various legal systems.

Our world continues to become more interdependent. Thus the opportunities for misunderstandings, mistakes and misperceptions have grown exponentially. Frequently businesses which have never engaged in significant national or international business have become active in global commerce. Every entity with an Internet web site now reaches the entire world. The Internet in particular has propelled substantial numbers of previously local businesses into the international arena. Consequently, an increasingly large number of relatively unsophisticated people have suddenly been thrust into world commerce. They have little or no cross-cultural awareness. They are not only unaware of the potential benefits of alternative legal cultures and business methods, but are often extremely suspicious of those very same differences. Unless represented by sophisticated international law firms such as Houston's Vincent and Elkins or King and Spaulding or Dallas's Aiken, Gump or Haynes and Boone or London's Hammond Suddards or Freshfields, these businesses frequently stumble into totally unnecessary disputes. That is highly detrimental to the businesses, their business partners, their shareholders and their customers. Worst of all, it is frequently completely unnecessary and preventable.

Disputes are inevitable. Human nature ensures that they will occur. However, disputes need not be destructive. People have different interests, views, perceptions, recollections and understandings. When these differences are harmonized they can generate a synergy beneficial to everyone. If left unattended, they can degenerate into mutual recriminations, disruptions of business relationships and even litigation. The processes of mediation and conciliation are ideally suited to effectively and efficiently convert those disputes from a combat to be won, to a problem to be solved together. Consequently, every attorney and business should ensure that the use of mediation and conciliation constitute an integral part of their strategy for business, professional and global success.

Mediation has now become the dispute resolution method of choice for most sophisticated and knowledgeable businesses and attorneys throughout the United States. Arbitration is now a distant second and hybrid mechanisms such as Dispute Review Boards are increasing in use. Indeed, the assertion is beginning to be advanced that attorneys should have an ethical duty to ensure that we know, understand, employ and properly advise our clients of the many advantages available to them in the techniques and legislation providing for Alternative Dispute Resolution and the jurisprudence now interpreting it. Properly employed, mediation, including contractually mandatory mediation, can become the most effective method available to businesses and litigants for the vindication of their rights in virtually every context. Our clients increasingly know and understand that the courthouse has a number of serious deficiencies. They expect,

indeed, they have the right to be advised of all of the available alternatives to traditional litigation. One law professor of this author's acquaintance recently stated in a public speech that in his view any attorney who does not properly explore the opportunities afforded by mediation for their client is committing legal malpractice.

II. The Deficiencies of Litigation.

Today everyone knows the serious and numerous defects of our various court systems. Those legitimate criticisms are regularly articulated in the halls of many of the world's legislatures, the American Congress, the Texas Legislature, Parliament, the chambers of our Courts, in "exposes" in the news media and frequently even in your own offices. A few of the most notorious and most vexing problems of our legal systems are:

1. **Delay.** Court proceedings are slow, cumbersome and often provide no one with an acceptable outcome. Many disputes frequently require decades of litigation to obtain a truly final decision.
2. **Expense.** Litigation is very expensive. Often both sides in litigation spend tens of thousands of dollars in attorneys' fees, expert witness fees, investigators' charges and court costs. This figure does not include the cost of the disruptions to the business or the internal cost of employees wasting time working on the litigation rather than performing their real profit producing jobs.
3. **Loss of Privacy.** Litigation is public and everyone can watch and learn about your businesses' or client's problem. Does your client really want everyone to know about their personal or business affairs? Do they, or you, really want their affairs permanently recorded in a public record, always on display to every curious person or worse, members of the media? We as lawyers often forget that our clients do not share our enthusiasm for public attention.
4. **No Day in Court.** Litigation is frequently decided by courts on technical reasons of interest and concern only to lawyers and judges. None of the parties ever has a real opportunity to tell their story or to fully present their case. Very few people ever actually get to go into Court and try their lawsuit. No one ever achieves true closure. We lawyers know that virtually all lawsuits are settled. Yet, how many of our clients are truly happy with those results? Most of the world's court dockets are still extremely congested and are becoming almost as slow and technical as the courts satirized by Charles Dickens.
5. **Nonspecialized Decision-Makers.** Courts and juries do not specialize in resolving business disputes. Yet, for more than 3000 years the techniques of mediation and conciliation have been known and used in communities throughout the world.
6. **No Comity of Judgements.** Even when a party obtains a judgment in one country it does not mean that it will be recognized in another country. For a variety of reasons, most constitutional and historical, the United States does not generally recognize and will not enforce the judgments of any other country. On the surface this would seem to be disastrous. However, through careful drafting of contracts this ostensible void has been very efficiently filled by the use of international arbitration under a variety of treaties and conventions. Sophisticated drafting also permits those businesses using adept counsel to avoid that American peculiarity frightening to every sane business person, the civil jury trial.

III. Mediation (and Conciliation) Defined.[14]

Mediation is the least formal and by far the most commonly employed form of alternative dispute resolution. The Texas Alternative Dispute Resolution Act of 1987 defines mediation as follows:

A. Mediation is a forum in which an impartial third person, the mediator, facilitates communication between parties to promote reconciliation, settlement, or understanding among on them.

B. A mediator may not impose his own judgment on the issues for that of the parties.

Mediation provides the parties a voluntary, nonbinding, facilitated negotiation managed and directed by an experienced, trained neutral in a private confidential forum.

IV. The Advantages of Mediation and Conciliation.

Mediation offers numerous advantages to all parties in a dispute. The best known advantages of mediation are those of:

Speed. Litigation in Court, especially American Federal Courts, is frequently slow with the proceedings often lasting from 2 to 5 years. If there is an appeal, that time period can become 5 to 10 years, or even

[14] Note: In the United States the terms and the techniques of mediation and conciliation are now used interchangeably

longer. A mediation is usually completed in a period of months and sophisticated Rules, such as those of the Nationwide Academy for Dispute Resolution or the Center for Public Resources, are designed to try to conclude the case within 90 days whenever possible. Once a dispute is settled, it is over.

Reduced Cost. Everyone saves money in legal expenses and costs by using mediation in place of litigation. A Study by the Institute for Civil Justice found that mediation was approximately 97.4% less expensive than litigation. Most mediations are scheduled within 60 days of the date the dispute is referred to mediation and completed in one or two days. Most mediators are also knowledgeable in the areas in dispute and many are even experts in the field. Consequently, they are able to learn and understand a party's case much faster than a nonspecialist Judge or jury.

Expert Assistance. Many mediators specialize in resolving particular types of disputes. Courts do not. Mediators generally know and understand the law applicable to the cases before them and have both the time and inclination to learn everything beneficial to the case that they are mediating. They are frequently sophisticated expert neutrals and guide their mediations accordingly. Mediators are "Agents of Reality" and can often direct the parties attention to issues that they would rather not deal with, but which may be critical in the context of a particular case. Often a mediator can focus on issues with a freedom and orientation unavailable to a party's executives or attorneys. When appropriate, a mediator may even propose his own suggestions for the settlement of a dispute.

A Full and Fair Hearing. Mediators always listen to the parties' case. Unlike a court, they will not dismiss a claim on technical legal grounds thereby depriving the parties of a hearing. The parties in every mediation will always have an opportunity to present their position and any evidence they believe that the mediator should know. This is true, even if that information is not technically admissible under the Rules of Evidence. A mediator will not prevent your client from telling their story by granting a Motion for Summary Judgment, as is often done in the courts. Your client or business may not "win", but they will always have had a real chance to explain their position and present their case. Many parties feel that the mediation process is "their day in court"!

Client Control. Many clients, particularly businesses are dismayed by the loss of control they experience in litigation. Critical issues are frequently determined on a commercially absurd time schedule formulated without their input and under "Rules" that no sane businessman would ever use to govern his affairs.

Privacy. Mediations are conducted with only the parties and counsel present. There is no public record of the proceedings and even the existence of the mediation is private, unless revealed in an action to enforce the settlement. Thus, there is no publicity of the proceeding and the parties can resolve their differences without interference from the media or others without a legitimate interest in the parties' dispute.

Complete Customized Relief. The parties control the resolution of their case. They are not subjected to the "mass justice" (injustice?) of the legal system. They can incorporate everything necessary to achieve all of the relief they believe that their situation requires. They may even settle their dispute on a basis that no court could ever mandate.

V. Mediation is Beneficial to the Government.

Mediation offers numerous benefits to governments. Prior to the adoption of the 1987 Texas Alternative Dispute Resolution Act, litigated cases frequently required six years or more to reach trial. That situation was unacceptable to the business community, the Bar and the public. The cost of correcting the situation in just Dallas County, Texas alone was projected to require the State of Texas to create and fund two additional Civil District Court's at an estimated cost of 2 million dollars per year. Texas has 465 counties. Soon after the passage of the A.D.R. Act the courts began aggressive implementation of court ordered mediations. Within two years the average age of the oldest cases on the Dallas court docket declined to slightly under four years. By 1992 the average age of the oldest cases actively on the court dockets was reduced to under two years. Today it is possible in many courts in Dallas County to bring a case to trial before a jury within one year from the date it is filed. In courts which aggressively use mandatory mediation, the few cases remaining unsettled after mediation can often now be tried to a jury verdict within six months from the date they were first filed in court!

The effective use of mediation in Dallas County has thus far saved the State of Texas approximately $26,500,000.00. Similar savings have been achieved in Houston, San Antonio and Austin. The widespread use of mediation has also enhanced the general Texas business climate by ensuring that disputes are now efficiently and cost effectively resolved whenever possible. The State of Texas has also achieved a corollary benefit from the fact that many attorneys and businesses now first resort to privately conducted mediation to resolve their disputes. These private mediations are currently settling an estimated 92.4 percent of the cases mediated. Thus, only 7.6 percent of those cases are ultimately filed into the court system and require the expenditure of any public funds. Dallas court ordered mediations currently enjoy a settlement rate of about 84.7 percent. Consequently, even where parties do not wish to voluntarily proceed to mediation almost 85 percent of those cases settle in mediation. The experience of the United States District Courts is similar.

VI. Mediation's Benefits to Businesses and Individuals.

Litigation is expensive. It costs businesses and individuals much more than mere money. Every dispute includes certain transactional costs, disruption to relationships and lost business opportunities. One study in the insurance industry indicated that the average transactional cost savings of mediation, when compared with litigation was in excess of $2,500.00 per case in "small cases" with under $25,000.00 in dispute. In larger cases the savings frequently exceeded $10,000.00 per case. In several death cases this author has personally mediated to settlement, the estimated and budgeted costs allocated for each case exceeded $ 250,000.00. Both cases were settled in one day mediations for a mediation cost of $4,000.00. The estimated mediation cost savings to the Dallas business community in 1996 was projected at $22,750,000.00. Calculated over the 12.25 years of active mediation use in the Dallas area, the business community has saved approximately $ 278,687,500.00 in unnecessary litigation related expenses. The cost savings to the entire Texas business economy are believed to now exceed $1,000,000,000.00. This is significant to any business community. These results can be achieved in Malaysia too!

Damage to relationships. Disputes damage relationships. However, problems and disputes in every relationship are inevitable. Businesses spend fortunes advertising for customers. It costs money to obtain a customer. If a business is lucky, a satisfied customer will tell a friend. A dissatisfied customer will often tell at least ten people. Today, infuriated customers often set up Internet Web Sites and tell the world! Obtaining and keeping customers is critical to every business's success. Disputing with customers is not a recipe for success. It is axiomatic that unless forced to, no one who has had to sue another person ever does business with them again. One study of arbitration in the textile industry found that 17.46% of the companies that engaged in an arbitration with each other still continued to do business together. Preliminary information now indicates that almost 76% of those parties to disputes who resolve them through mediation will at least consider doing business with each other again. Mediation is ideal for repairing relationships.

Business Community and Support. One of the original problems facing organizations wishing to use mediation or other forms of A.D.R. was the fear of "appearing weak" or uncertain of the merits of their own case by suggesting mediation. These issues were straightforwardly addressed by the creation and use of the A.D.R. Pledge sponsored by the Center for Public Resources. Each subscribing company's Chief Executive Officer and General Counsel have signed the Pledge and committed themselves to explore the use of certain A.D.R. techniques with any other signatory to the Pledge before resorting to litigation. Consequently, every signatory has empowered itself to always suggest the use of mediation or arbitration in every dispute by creating a mandatory corporate policy requiring it to do so. To date, 468 members of the Fortune 500 have signed the A.D.R. Pledge.

VII. The Foundation.

1. Education, Qualification and Ethics for Mediators. Malaysia today is a major commercial country and significant participant in international commerce. The most advantageous incorporation into the business community of these "ancient", but newly rediscovered techniques of dispute resolution will require the use of mediators trained to internationally accepted standards. Those mediators must know the underlying research and theoretical basis for successful mediation. They must also employ and consistently demonstrate their adherence to the strong ethical requirements imposed on all third party

neutrals if these techniques are to be successful. Mediation requires the parties to have some faith and trust in the mediator. It is most successful when the parties know that they can completely trust and rely upon their mediators. Consequently, demonstrated competence and consistent adherence to a strong ethical code are essential.

2. Guarantees of Confidentiality. Mediation is designed around the critical concept of privacy and confidentiality. Parties must be assured that nothing they say or discuss during a mediation with either the mediator or any party will be used against them in any later court or arbitration proceeding. A mediator must have the freedom to meet alone with the parties or any of them to generate the types of settlement statistics common in Texas. Confidentiality empowers the parties to freely generate and explore numerous options for possible settlements. It further restores to the parties the use of the ancient, simple, extremely effective, but often ignored settlement mechanism of the apology.
3. Education of Lawyers and Businesses. Mediation must be known and recognized as available, cost effective and beneficial. This will require the education of the legal and business community. Some, very few, lawyers will not appreciate the potential threat to their incomes posed by A.D.R. That was certainly the experience in Texas. However, we are ethically required to place our clients' interests ahead of our own. The ethical lawyers will continue to do so, just as they have always done. If past experience is any guide, once the efficiency and effectiveness of mediation is recognized in the business and legal community, those lawyers leading in its' use will be well recognized for their foresight and amply rewarded for their efforts. Many lawyers in Texas today essentially devote their practice exclusively to Alternative Dispute Resolution.
4. Commitment to the Use of Mediation by Lawyers and Businesses. As mediation is known to be available business will inevitably be drawn to use it. Today in the United States many businesses require their attorneys to regularly analyze every case they are assigned to determine when they can be sent into mediation. Many insurance companies actually impose monthly or quarterly quotas of cases to be sent to mediation by every one of their claims adjusters. Anyone familiar with the insurance industry knows it doesn't do anything without carefully calculating the financial benefit available to it from every course of action. The A.D.R. Pledge is yet another, but still only one example of businesses accepting mediation and attempting to use it whenever possible. Today many trade associations and S(elf) R(egulating) O(rginazation)s mandate the use of mediation and A.D.R. mechanisms for deciding all disputes between their members, as well as their members and the general public. It is now virtually impossible to open a brokerage or bank account in the United States without agreeing the use of mediation and arbitration instead of the courts for the resolution of all disputes with those businesses.
5. Acceptance by the Courts. Mediation is effective. It settles disputes, even the most intractable cases. As the judiciary recognizes and accepts the benefits mediation offers the courts and the parties to litigation, they will discover, or even create, new ways for it to become available. They will eventually discover what the judges of Texas learned a decade ago. Ordering the parties in litigation to mediation with well trained, talented mediators will mean that almost 85% of those litigants will resolve their differences on a basis they can accept. And, as an additional benefit, more docket time will be freed to expedite the trial of those cases truly requiring the devotion of scare judicial time and resources.

VIII. <u>Conclusion.</u>

Mediation has much to offer Malaysia. The eventual availability of a cadre of well trained, expert mediators will help all of the people and businesses of Malaysia resolve their disputes rapidly, efficiently and cost effectively. Every part of the community will benefit by the increased productivity of the economy and the legal system. The natural talent, ability, language skills and cross cultural sensitivity of the Malaysian people will inevitably lead to the further expansion of your economy into international commerce. The presence and ready availability of a pool of trained, experienced English speaking mediators and arbitrators in Malaysia will also grant you a significant competitive advantage in the ever evolving and expanding world of Internet "E Commerce". The multiplicity of benefits of Alternative Dispute Resolution are yours, if you choose to avail yourself of them. We look forward to working with you when you do.

ADJUDICATION IN THE CONSTRUCTION INDUSTRY IN THE UK
A ROLE MODEL FOR MALAYSIA?

By Tony Bingham

1 On the l May 1998 an Act of Parliament came into force in England, Wales and Scotland. It was extended to Northern Ireland on 1 June 1999. It is known as "The Construction Act"'; its proper name is the Housing Grants Construction & Regeneration Act 1996. But do not now expect it to apply to housing only; it applies to nearly all commercial construction operations. I will give you precise scope later.

2 It may sound far too sensational to say this, but I believe the "Construction Act" is the most important piece of legislation in the construction industry ever. I will go further, it's impact and benefits are so enormous and successful that I can see every justification for its introduction in all branches of commerce not just construction. And may I go even further, let me commend this Act to Malaysia.

3 Let me tell you about the Act. It has two main themes:

(1) A brand new dispute management process called 'Adjudication'.

(2) New Payment rules.

BACKGROUND

4 The United Kingdom has conducted occasional reviews of the construction procurement process and contractual arrangements. They go back to 1932, then 1964, then 1972, then 1994. The theme has always been how to provide better value for the customer. Recommendations have frequently been past by but not always. The 1994 report, called "Constructing the Team" by Sir Michael Latham, carried a key recommendation which was the basis of the "Construction Act", It was that we had to seek a more efficient way to deal with ordinary building disputes. The reason is that differences of opinion are inevitable on a fast moving construction project and if not "nipped in the bud" they tend to destroy teamwork by allowing disputes to deteriorate into conflict.

At the same time we lawyers were also searching for methods of improving dispute management methods. Litigation was expensive and slow. Arbitration had become "Litigation in the private sector", Mediation was not attracting much use. Of Litigation it was said by our most senior civil Judge, Lord Woolf (June 1995) "Access to Justice".

"Throughout the common law world there is acute concern over the many problems which exist in the resolution of disputes by the civil courts. The problems are basically the same. They concern the processes leading to the decisions made by the courts, rather than the decisions themselves. The process is too expensive, too slow and too complex. It places many litigants at a considerable disadvantage when compared to their opponents. The result is inadequate access to justice and an inefficient and ineffective system.

And on 24 January 1995 the Lord Chief Justice and the Vice-Chancellor issued a Practice Direction ([1995] 1 WLR 262) setting out new requirements in the preparation and control of cases. In announcing it the Lord Chief Justice said:

"The aim is to try and change the whole culture, the ethos, applying in the field if civil litigation. We have over the years been too ready to allow those who are litigating to dictate the pace at which cases proceed."

Meanwhile the Arbitrators were working on a new Act of Parliament. On 31 January 1997 came into force in England, Wales and Northern Ireland "The Arbitration Act 1996". It is a masterpiece. It frees up Arbitrators to drive the process forward and be effective and economical. But implementation of the Litigation reforms via new Arbitration and via New Litigation (from 26 April 1999) were painfully too late for industry and in particular the Construction Industry. So it sought via Parliament a discreet new system of its own. It is called Adjudication. And I admit to three things; first, I did not think it would get through Parliament, second I did not think industry would truly want it, and third I thought the lawyers would be against it. I was totally wrong. The Act came, the industry has embraced it, is using it, likes it, and the lawyers . . . . yes, the lawyers, have completely welcomed it. In short this is a dramatic success.

5 **HOW DOES ADJUDICATION OPERATE?**

(1) It applies to disputes arising under a construction contract for construction operations.

(2) It is only mandatory if one party to the contract triggers adjudication. Parties can go straight to Litigation/ Arbitration/ Mediation if they wish.

(3) The Adjudicator is (usually) appointed by an independent body.

(4) Appointments are made within hours.

(5) The appointed Adjudicator then has 28 days to deal with the dispute referred. (The parties and Adjudicator can extend time).

(6) The decision is an announcement as to the *rights* of the parties under the contract, i.e. Judicial. (this is not a "commercial decision").

(7) While the decision deals with facts/evidence + law the procedure is entirely different to Arbitration or Litigation. It is more INVESTIGATIVE than ADVERSARIAL. Having said that the Adjudicator can adopt whatever procedure is most expedient and economic and fair.

(8) The Adjudicator's decisions are final and binding, but only until finally decided in Litigation or Arbitration.

(9) The Courts will enforce the Adjudicator's decision irrespective of errors of fact or law. If the Adjudicator has jurisdiction to deal with a dispute then his decision binds until litigated or arbitrated.

(10) The Litigation or Arbitration is not an appeal. It is conducted as though the Adjudication was never carried out.

6 **HOW DOES THE PROCESS BECOME PART OF THE CONTRACT?**

(1) The legislation requires each contract to contain Adjudication
but if the contract fails to so provide then a default mechanism is implied into the contract. It is called "The Scheme".

(2) A copy of the Act and "The Scheme" is enclosed.

Let us take a look at these provisions in detail. (This lecture will now take you through key parts of "The Construction Act" and "The Scheme")

7 **EXPERIENCE**

The provisions applied to contracts which arose after 1 May 1998, so things were slow in 1998. But, in 1999 the pace quickened. By now we have has more than 1000 Adjudications. Of these I know of 26 which have been scrutinised by the courts when a party refused to obey the decision. The courts have followed the spirit and intention of Parliament by enforcing decisions on the simple notion that if the Adjudicator has jurisdiction then his decision binds.

8 **LAWYERS**

Many have been shocked by the idea that the whole investigation takes no more than 28 days! The secret is to abandon the procedural time tables familiar to the grinding detail of Litigation. Secondly the secret is to bring "bite-size" disputes to the Adjudicator. Thirdly, the Adjudicator is frequently a lawyer or if a technical person, then that person will seek legal advice. But the main attraction is that all Adjudicators have been trained in the process and examined and interviewed. Moreover they are bound to continue training. Most of all it has been drummed into technical Adjudicators that they must make decisions about the rights and duties of the parties under the contract according to law. They cannot decide according to their sympathies or decide "commercially". Lawyers are therefore encouraged because we have not had arbitrary decisions. The Adjudicator is behaving like a referee in a football game or umpire in a cricket match. Only the rules of the particular game applied.

But there is more. Lawyers actually want an efficient method of managing disputes. The reason is to coax clients to keep coming back with repeat business. This 28 day process is actually efficient and

there is many a lawyer ideally placed to assimilate quickly large amounts of information about a building dispute, then analyse and present the problem in clear terms to the Adjudicator. In truth the construction lawyer is needed all the more for this high speed process. He is a good communicator and he is able to easily deal with modest size disputes within days of being instructed. And there is more, Those disputes which were or are uneconomical to fight in Litigation (costs being disproportionate to sums in dispute), now have a proper Judicial forum.

9 **THE PAYMENT PROVISION**

This is the Second Part of the Construction Act and is in some ways *more* important than Adjudication. Here are the features:

(1) The Contract will contain "Adequate machinery" for dealing with interim payments. There *will* be interim payments.

(2) Pay when paid is banned.

(3) There is a right to postpone work if not paid on time.

(4) The payer must tell the payee:
- (i) What is to be paid in his forthcoming payment; and
- (ii) How calculated; and
- (iii) Issue a "Green Notice" giving this advance information.

(5) If the payer believes he has a right to withhold money from sums otherwise due:
- (i) The payer must issue an "Amber Notice" advising:
  - (a) amount withheld;
  - (b) reasons;
  - (c) how calculated; and
- (ii) Issue the notice before the cheque is due.

(6) If no correct "Amber Notice" is issued then the right to withhold is lost.

(7) If money is not paid when it ought to be paid then the payee may:

(1) Issue a "Red Notice"; and

(2) Wait 7 days and pull off site.

10 **TYPES OF DISPUTE COMING TO ADJUDICATION**:

(1) Failure to pay on time;

(2) Failure to give Amber/ Green/ Red Notices;

(3) Value of Variations;

(4) Value of Loss and Expense;

(5) Period of Extensions of Time;

(6) Whether a person has repudiated the contract;

(7) Whether the work is correct quality;

(8) Interpretation of contract;

(9) Scope of Contract; and many more.

11 **THE AUSTRALIAN MODEL**

On 26 March 2000, New South Wales brought into force their version of the Construction Act. It is called:

It is not the same as the UK model. I will discuss its features at the conference.

Anthony Bingham
April 2000

THE ISM CODE AND THE LAW OF MARINE INSURANCE

by Dr S Hodges*

INTRODUCTION

The International Management Code for the Safe Operation of Ships and for Pollution Prevention (the ISM Code), incorporated as Chapter IX of the SOLAS Convention 1974, became law on 1 July 1998.[15] Even before its adoption, the industry had expressed its concern about the legal implications of the Code.[16] The consensus of opinion is that it is bound to affect several important areas of shipping law.[17] This paper will, however, examine only one aspects of the law, namely marine insurance where the impact of the Code can clearly be felt.

The Code has essentially from the legal point of view raised, *inter alia*, two main points: First, it has set an international standard for the safe management and operation of ships and, secondly, it has for the purpose of ensuring that this is achieved mandated that a "designated person"[18] as defined by the Code be appointed by "the Company".[19] That both these elements will have a bearing, directly or indirectly, on the rights of a shipowner to claim indemnity from his insurer is clear.

Before proceeding to discuss how the Code can affect a shipowner's claim for indemnity under a marine policy of insurance, and the legal niceties of the relevant law under the Marine Insurance Act 1906,[20] it is necessary to briefly outline the objectives of the ISM Code. As declared in its preamble, its main purpose is "to provide an international standard for the safe management and operation of ships and for pollution prevention." Clause 1.2.2 of the Code spells out the factors to be borne in mind when a company considers its "safety management objectives".[21] Though many of the requirements of the Code are laid down in general principles, in the form of broad guidelines, nonetheless, its basic aim is clear: It is to instill in shipowners a sense of safety consciousness and thereby promote a safety culture in the running of their ships.

INTERNATIONAL STANDARD OF SHIP MANAGEMENT

The brunt of the Code is felt by shipowners in two ways. First, it has, through the device of the "Safety Management System", provided the courts with a yardstick, a minimum standard, which has to be attained for each ship on matters relating to management and operation.[22] It has also established in relation to that particular ship a code of conduct on safe management and operation to be observed by the shipowner. The legal effect of this aspect of the Code is straightforward: it has supplied the courts with not only a measure or standard of safe management to be attained by a particular ship, but also the *modus operandi* of how that end may be achieved. To quote Lord Donaldson, the shipowners have "in effect to create their own regulatory regime and show that they are complying with it."[23] No shipowner should now be left in any doubt as to the bottom line which has to be accomplished on matters relating to the management and operations of his ship(s).

---

* LL.B. LL.M. Ph.D. Lecturer in Law, Department of Maritime Studies and International Transport, University of Wales, College of Cardiff, author of *The Law of Marine Insurance*, Cavendish Publishing Ltd., (1996) and *Cases and Materials on Marine Insurance Law*, Cavendish Publishing Ltd., (1999).

15 Adopted on 4 November 1993 by Resolution A. 74(18) and incorporated into SOLAS 1974 on 19 May 1994. See Resolution A. 988(1() adopted on 23 November 1995. Pursuant to the E.U. Communities Council Regulation No. 30051/95, adopted on 8 December 1995, the ISM Code was already applicable (from 1 July 1996) to roll-on/roll-off passengers operating between ports in the European Union.

16 See e.g. Mandaraka-Sheppard, *The International Safety Management Code in Perspective*, P&I International, June 1996, 107; and McBride, *The ISM CODE; legal aspects and practical difficulties*, Offshore Investment, July/August 1997, 22.

17 E.g. the law of limitation of liability and, as identified by Lord Donaldson, *The ISM Code: the road to discovery?* 1999 L.M.C.L.Q. 526 at 531, the criminal liability of a shipowner company for involuntary manslaughter.

18 The appointment of a "designated person" is provided in cl. 4 of the Code.

19 "Company" is defined in cl. 1.1.2. of the Code.

20 See s. 39(1) and 39(5) Marine Insurance Act 1906.

21 Clause 1.2.2 of the Code states: "Safety management objectives of the Company should *inter alia*:
.1 provide for safe practices in ship operation and a safe working environment;
.2 establish safeguards against all identified risks; and
.3 continuously improve safety management skills of personnel ashore and abroad ships, including preparing for emergencies related both to safety and environmental protection."

22 See art. 1.4 - Functional requirements for a Safety Management System.

23 Lord Donaldson, *op. cit.*, p. 531.

A shipowner who fails to comply with the terms of the Code will be visited with liability should any loss or damage result therefrom: failure to observe any of the provisions of the Code would constitute or support an action in negligence and/or breach of a statutory duty of care.[24] Once liability is established and a loss is incurred by a shipowner, he would naturally wish to seek indemnity from his insurer under the policy of insurance he has subscribed; and when such a claim is made under a *time* policy of insurance, the seaworthiness of the ship and the defence of privity afforded by section 39(5) are very likely to raised by the insurer.

THE "DESIGNATED PERSON(S)"

To implement and maintain the Safety Management System,[25] article 4 of the ISM Code declares that: "To ensure the safe operation of each ship and to provide a link between the company and those on board, every company, as appropriate, should designate a person or persons ashore having direct access to the highest level of management." It is to be noted that the "company" could be either "the Owner of the ship or any other organisation or person such as the Manager, or the Bareboat Charterer".[26] This means that if a shipowner has delegated the responsibility of the management of his ships to a management company, that company may have to employ or nominate a person(s) to act as the "designated person(s)". Should the designated person(s) be found to be wanting in his duties, the shipowner could be made vicariously liable for any loss or damage resulting therefrom.

Consequently, the pertinent question is: Is the act of the "designated person(s)", whether employed by the shipowner or management company, to be deemed that of the shipowner? To answer the question effectively, the role and function of the designated person within either the shipowning or the management company would have to be examined. There are three ways of viewing his position. He could be regarded either as:

(1) a mere servant or employee of a company in which case his act is of no consequence in so far the question of indemnity is concerned; or
(2) a senior member of the company occupying a managerial position; or
(3) a member of the Board of Directors.

The fact that he is described as a person "having direct access to the highest level of management" suggests that he is *not* part of the upper echelon of management; otherwise, there would have been no need for the stipulation. Moreover, his job description does not seem to place him high on the corporate ladder, for his duties include the "monitoring and safety and pollution prevention aspects of the operation of each ship and to ensure that adequate resources and shore based support are applied, as required." He is the link between shore (office) and shipboard personnel. To all intents and purposes, he is the conduit pipe connecting the ship to the company. It is thus suggested that, unless he is also a director of the board or a senior manager of the company (which is highly unlikely), his act is not the act of the shipowner.

INDEMNITY UNDER A TIME POLICY OF MARINE INSURANCE

The connection between the ISM Code and the law of marine insurance may not, at first sight, appear to be obvious. The remit of this paper is to examine the effect the Code has on a *time* policy of insurance with particular reference to the defence of unseaworthiness and privity afforded to an insurer by section 39(5) of the Marine Insurance Act 1906 which states:

> *"In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness."*

In marine insurance, the subject of seaworthiness is relevant in both time and voyage policies of insurance: in a voyage policy, the requirement of seaworthiness takes the form of an implied warranty - section 39(1) implies a warranty of seaworthiness at the commencement of the insured voyage - the breach of which *per se*

---

[24] Indeed, a shipowner who fails to take all reasonable steps to ensure that the ship is operated in a safe manner may be prosecuted under s. 100 M. S. A. 1977 (previously s. 31 M.S.A. 1988); see also *Seaboard Offshore Ltd. v Secretary of State for Transport, The Safe Carrier* [1994] 1 Lloyd's Rep. 589, H.L.

[25] See arts. 1.2.3 and 1.4 of the ISM Code.

[26] See art. 1.1.2 of the ISM Code.

would automatically discharge the insurer from liability as from the date of breach.[27] In a time policy, however, the position is more complex in that, though there is no implied warranty of seaworthiness at any stage of the adventure, "*the assured*" would forfeit his right to indemnity should he be found to be privy to such unseaworthiness to which the loss is attributable.

There are essentially two features in section 39(5) of the Marine Insurance Act 1906, namely "unseaworthiness" and "the assured" which are relevant to the present discussion.

Unseaworthiness

Before an insurer can exonerate himself from liability under section 39(5), it has first to establish that the insured vessel is "unseaworthy" within the legal meaning of the term. Traditionally, the concept of "seaworthiness" has always concerned itself with matters relating primarily to the *physical* condition of the ship.[28] Separately, the competence of master and crew[29] and sufficiency and quality of fuel[30] have also long been recognised as matters invariably impinging upon the seaworthiness of a ship. Aside these accepted and well-known features pertaining to seaworthiness, British courts have always jealously guarded the parameters of the concept, employing in the main two criteria for the measurement of seaworthiness.

The first yardstick was proposed by Parke B. in *Dixon* v. *Sadler*[31] to the effect that to be seaworthy, "she shall be in a fit state as to repairs, equipment, and crew, and in all respects, to encounter the ordinary perils of the voyage insured, at the time of sailing upon it". The gist of this is encapsulated in section 39(4) of the Act which reads simply as: "A ship is deemed to be seaworthy when she is reasonably fit in *all respects* to encounter the ordinary perils of the seas of the adventure insured." Any *physical* defect affecting the ship's ability or capability to combat the ordinary perils of the seas of the adventure insured would undoubtedly render her unseaworthy.

The second benchmark, more general in terms, can be found in the words of Mr Justice Channel in *McFadden* v. *Blue Star Line*.[32] The test is worded as follows: "To be seaworthy, a vessel must have that degree of fitness which an ordinary, careful and prudent owner would require his vessel to have at the commencement of her voyage, having regard to all the probable circumstances of it."

The question which now arises is, would a breach of any of the requirements of the ISM Code render a vessel unseaworthy? Before this question can be answered effectively, it is necessary to comment briefly on the spirit of the Code. Its aspirations are laid down in the opening line of the Preamble and in clause 1.2. Basically, the aim is to provide, *inter alia*, "an international standard for the safe management and operation of ships" and "to ensure safety at sea, prevention of human injury or loss of life, and avoidance of damage … in particular … to property."[33]

To ensure that these objectives are achieved, the Code has devised a system of certification[34] whereby certificates, namely the SMC (Safe Management Certificate) and the DOC (Document of Compliance) will only be issued to a company when it has been proved that a safe system of management has been set up for the ship and that it is in operation on board that ship respectively. Only when a company can demonstrate that its shipboard management operates in accordance with the approved SMS (Ship Management System) which it has devised will an SMC be issued to each ship. That the ISM Code is not concerned with the

---

27 Section 39(1): "In a voyage policy, there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured." The legal effect of a breach of a promissory warranty spelt out in s. 33(3) has now to be read with the decision of the House of Lords in *The Good Luck* [1991] 2 Lloyd's Rep. 191,H.L.

28 This restrictive view probably stems from the phrase "taught, staunch and strong" commonly found in charterparties. See, *e.g.* the comments of Kerr L.J. in *The Derby* [1985] 2 Lloyd's Rep. 325 C.A., and *The Aquacharm* [1982] 1 Lloyd's Rep. 7.

29 See, *e.g. Wedderburn & Others* v. *Bell* (1807) 1 Camp. 1; *The Makedonia* [1962] 1 Lloyd's Rep. 316; *Standard Oil Co. of New York* v. *The Clan Line Steamers Ltd* [1924] A.C. 100; and *The Hongkong Fir* [1961] 2 Lloyd's Rep. 478.

30 See, e.g. *Louis Dreyfus & Co.* v. *Tempus Shipping Co.* [1931] A.C. 726, H.L.; *Fiumana Societa Di Navigazione* v. *Bunge & Co. Ltd* [1930] 2 K.B. 47; *Thin* v. *Richards* [1892] 2 Q.B. 141; *McIver & Co.* v. *Tate Steamers Ltd* [1903] 1 K.B. 362; and *Northumbrian Shipping Co.* v. *Timm & Son Ltd* [1939] A.C. 397.

31 (1839) 5 M. & W. 405 at 414.

32 [1905] 1 K.B. 697 at 706.

33 See cl. 1.2.1.

34 See cl. 13.

physical attributes of a ship but with the formulation and implementation of a safe system of management and operation of ships is clear.

In the present discussion, we are not so much concerned with the documentary aspects of the Code as with the actual failure on the part of the shipowner to *operate* a safe ship. A company which has for whatever reason failed to obtain the necessary documents (DOC and SMC) would commit a breach of the Code and may be penalised by the relevant authority with whatever sanction the law of the flag State may deem fit to impose. The mere failure to obtain the necessary certificates, however, cannot by itself render a ship unseaworthy, for a ship may well be *in fact* safely managed and operated at the time of loss.

On the other hand, it has also to be pointed out that even if the documentary demands of the Code are complied with, in that the ship has been issued with the necessary certificates, certification alone is not in itself proof that the ship is in *actual fact* safely managed and operated. We have been told often enough that the mere fact that a company has been issued with certificates is not conclusive proof of seaworthiness.[35] Seaworthiness is a question of fact and no court would allow any outside force to usurp its power and authority to investigate and determine for itself whether a particular vessel is or is not seaworthy.

Any shipowner would, of course, wish to cling onto the narrow and traditional point of view, that seaworthiness refers only to the *physical* qualities of the ship *vis-a-vis* her capacity to encounter the ordinary perils of the sea. But the word "*in all respects*" appearing in section 39(5) are clearly wide enough to embrace within the realm of seaworthiness (or unseaworthines) a ship which is not safely managed. Moreover, such a ship would also fall foul of the second criterion, for no ordinary, careful and prudent shipowner would send a ship to sea without ensuring that she is not only physically fit but also safely managed - all the more so now that there is an accepted international standard of safe management and operation for ships. Further, an insight of future trend can be found in a recent case, *The Toledo*,[36] where Mr Justice Clarke placed much emphasis on the standard of "the reasonable shipowner". He said: "… the reasonable shipowner would have appreciated the risk and would have set up a proper system for the inspection, ascertainment and repair" of the frames and brackets supporting the shell plating in the holds.[37] The pertinent parts of his judgment read as follows:[38]

> *"It can only have been because of a failure on the part of the defendants and their masters to lay down and implement a proper system of maintenance and repair …. [T]he system on board Toledo and her sister ships for the ascertainment and repair of their internals was defective because it did not ensure that the damage was properly inspected, monitored and repaired …. [I]f the defendants had had and operated a proper system Toledo would not have been in the condition in which she was at St. John and Florenz and William Shakespeare would not have been in the condition in which they were found when surveyed."* [39]

Perhaps the time is now ripe to give another dimension to the notion of seaworthiness. A ship which is not safely managed or operated can be as unsafe and as dangerous as one which is not physically fit to encounter the ordinary perils of the seas. It is thus submitted that if a procedure is unsafe, the ship will be unseaworthy.

---

35 See, *e.g. Studebaker Distributors, Ltd* v. *Charlton Steam Shipping Co. Ltd* (1937) 59 Ll.L.Rep. 22, *The Australia Star* (1940) 67 Ll.L.Rep. 110 and, in particular, *Asbestos Corp. Ltd* v. *Compagnie de Navigation Fraissinet et Cyprien Fabre* 480 F. 2d 669 (2d Cir. 1973). In *The Star Sea* [1995] 1 Lloyd's Rep 65; [1997] 1 Lloyd's Rep 360, CA, the ship was issued with a cargo ship safety certificate covering, *inter alia*, fire safety. Tuckey J. (at p. 664) was clear that "no owner does or should rely on this as a substitute for his own responsibility for the safety of his ship".

36 [1995] 1 Lloyd's Rep. 40. Earlier, in *The Garden City* [1982] 2 Lloyd's Rep. 382 at 389, a case interpreting the term "actual fault or privity" under limitation of liability law in the Merchant Shipping Act 1894, s. 503, Staughton J., citing *The Lady Gwendolen* [1965] 1 Lloyd's Rep. 335 as authority, emphasised that "the top management of every shipowner corporation ought to institute a system for the … detection of faults". A system of checklists, written instructions, and written reports of inspections was suggested.

37 The casualty leading to the loss of the entire cargo was caused by the fracture of the shell plating on the port side of the hold which fracture was caused by the damaged condition of the frames and brackets supporting the internal structure of the hold.

38 [1995] 1 Lloyd's Rep. 40 at 53.

39 It is interesting to note that, as in *The Star Sea* [1997] 1 Lloyd's Rep. 360, CA, two sister ships of *The Toledo* also suffered from similar defects.

A ship which is not safely managed or operated in accordance with the terms of the approved Safety Management System is, it is contended,[40] "not reasonably unfit to encounter the ordinary perils of the seas" and, therefore, unseaworthy.[41] There is no reason why unseaworthiness cannot take the form of a weakness in a system of management or operation[42] which is in breach of the terms of the ISM Code. Thus, it is suggested that the ISM Code may be usefully employed to serve as another criterion for the measurement of the seaworthiness of a ship.

The Assured

Once it has been established that the ship is unseaworthy, the next line of inquiry is to ascertain whose conduct is deemed that of "the assured" for the purpose of stripping the company of its right to indemnity under the policy. It is to be noted that under section 39(5), the insurer is not liable for the loss only if "the assured" is privy to such unseaworthiness to which the loss is attributable.

In the case of an individual shipowner, there is less difficulty in identifying whose conduct should be called for examination. But when the shipowner is a company, the perennial problem - whose act is to be regarded the act of the company - invariably rears its ugly head. The general principles to be applied for the resolution of this issue are generally referred to as the law of attribution.

In *The Star Sea*, Lord Justice Leggatt in a methodical manner enumerated the variables as follows:[43]

(1) *If one had an individual assured who ran his own affairs, the section would not be trying to except unseaworthiness to which that individual was not privy. The fact that an employee (e.g. the master) had knowledge would not for example be to the point.*

(2) *If the assured were one corporation and if that one corporation alone were responsible for putting ships to sea, the search would be to draw the circle round the natural person which fairly reflected the equivalent position to that which would prevail where a natural person was the assured.*

(3) *The position is obviously more complex where one corporation owns the ship and may be "the assured" technically, but where the management and responsibility has been placed in the hands of other corporation, even than the aim of the exercise must be the same.*

Little need be said about the first situation as it does not pose any difficulty. But as regards the second and third, the task at hand is to identify which natural person (or persons) possess, in relation to the unseaworthiness, the relevant state of mind. In other words, in whom, in the ranks of the assured company or management company, must the necessary privity reside.

On the subject of corporate ownership, the case that immediately springs to mind is the recent Privy Council decision in *Meridian Global Funds Management Asia Ltd. v Securities Commission*,[44] where all the various principles of the law of attribution which may be applied were canvassed. Though not an insurance case, the points of law raised are nonetheless relevant to the present subject. But before proceeding to discuss the legal principles, it may be helpful to start by examining the precise nature of the problem relating to corporations. Adopting the words of Lord Hoffman, the issue may be framed thus:[45] "Whose act (or knowledge, or state of mind) was *for this purpose* intended to count as the act etc of the company?" For the present discussion, the phrase "for this purpose" has to mean for the purpose of indemnity in insurance. Lord Hoffman then answered his own question as follows:[46] "One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy." The "rule" here must mean the rule (or statute) which has engendered the problems concerning attribution, namely the Marine Insurance Act 1906 read with the ISM Code.

---

40 See Hodges, *Seaworthiness and safe ship management* [1998] I.J.I.L. 162 where this contention is discussed in depth.

41 See s. 39(4): "A ship is deemed to be seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas or the adventure insured."

42 See *The Toledo* [1995] 1 Lloyd's Rep. 40. In *The Garden City* [1982] 2 Lloyd's Rep. 382 at 389, Staughton J advised that "the top management of every shipowner corporation ought to institute a system for the … detention of faults." It was suggested that a system of checklists, written instructions and written reports of inspections ought to be implemented.

43 [1997] 1 Lloyd's Rep. 360 at 375, C.A.

44 [1995] 3 All ER 918. Henceforth referred to as the "*Meridian* case".

45 *Ibid*. at 924. [Emphasis in original text].

46 *Ibid.*

In this regard, it would appear that the approach taken by the Court of Appeal in the celebrated case of *The Eurysthenes*[47] and *The Star Sea*[48] is in tune with that (the rules of attribution) advocated by Lord Hoffman in the recent decision of the House of Lords in the *Meridian* case. Lord Denning in *The Eurysthenes* remarked:[49] "The knowledge must also be the knowledge of the shipowner personally, or of his *alter ego*, or in the case of a company, of its head men or whoever may be considered their ego."

The position of a shipowning company

The fact that a corporation is an "abstraction" and has "no mind of its own any more than it has a body of its own" renders it much more difficult to apply the substantive laws. A company has to conduct itself through various persons, and the question remains, which person (or persons) is "the directing mind and will of the corporation, the very ego and centre of the personality of the corporation."[50]

The law is, however, settled at least on two points. First, it is clear that neither the employment of a competent master nor the engagement of a reputable firm of ship managers will divest a shipowner of certain aspects of his/its responsibility.[51]

Secondly, in the well-known limitation case of *Lennard Carrying Company Ltd v. Asiatic Petroleum Company Ltd*, Viscount Haldane, the Lord Chancellor, clarified that:[52] "It is not enough that the fault should be the fault of a servant in order to exonerate the shipowner, that the fault must also be one which is not the fault of the owner, or a fault to which the owner is privy…"

Guided by the language and purpose of the section, the House in the *Lennard* case looked for the person whose functions in the company, in relation to the cause of the casualty, were the same as those to be expected of the individual shipowner to whom the language primarily applied. The precise test applied was:[53] "Who in the company was responsible for monitoring the condition of the ship, receiving the reports of the master and ship's agents, authorising repairs etc?" This person is the directing mind and will of the company and, therefore, his act is to be attributed to the company.

The general law seems to be clear that if the directing mind and will of the company, for the particular matter at hand, is not to be found in the board of directors or a member of the board of director, it can be found in the body of a high ranking officer of the company, a person holding a managerial position, but not a mere employee or servant of the company. His position is on the higher rung of the corporate ladder or hierarchy, and the rationale for this is based on the assumption that decisions on important matters are not normally placed in the hands of a clerk or junior member of staff.

Ships managed by a management company

In relation to a ship which is managed by a management company, reference need only be made to *The Charlotte*,[54] the *Lennard* case,[55] *The Marion*[56] and *The Ert Stephanie*,[57] albeit cases on limitation of liability, which have all established that a shipowning company cannot wash its hands of its legal responsibility simply by delegating the task of management to a third party. The question is, are the acts committed by a senior member of a management company to be deemed that of the shipowner? Just as an individual shipowner or a shipowning company can now no longer divest himself/itself of responsibility by the appointment of a

---

47 [1977] 1 Q.B. 49 at 67, C.A.

48 [1997] 1 Lloyd's Rep. 360 at 374, C.A.

49 [1977] 1 Q.B. 49 at 68, C.A.

50 *Ibid.*

51 See e.g. *The Lady Gwendolen* [1965] 1 Lloyd's Rep. 335.

52 [1914-15] All E.R. Rep. 280 at 283, henceforth referred to simply as the '*Lennard* case'.

53 Per Lord Hoffman in the *Meridian* case [1995] 3 All E.R. 918 at 925. P.C.

54 (1921) 9 Ll. L. Rep. 341 In this case, though the petitioners for limitation were the shipowners, nevertheless, the spotlight was focused on the conduct of two partners of the firm engaged to manage the *Charlotte.*

55 [1914-5] All E.R. Rep. 280. In this case, the ship was managed by Lennard & Sons, in which a Mr. J. Lennard, who was the active director of the company was also a director of another company, Lennard's Carrying Co. Ltd., which owned the ship.

56 [1984] 2 Lloyd's Rep. l.

57 [1989] 1 Lloyd's Rep. 349, C.A. *The Ert Stefanie* was managed by Sorek Shipping Ltd., and the personal fault of a Mr. Baker, the operational and technical director of Sorek, deprived the shipowners of its right to limitation. Mustill L.J. (at 352) said: 'Mr Baker was the director in charge of the aspects of the company's business which went wrong. He was personally at fault. It seems to me plain that in such circumstances the owners have no right to limit their liability.'

competent master, the same cannot be achieved with the engagement of a ship management company however reputable.

The succinct judgment of Sheen J. in the court of first instance in *The Marion*,[58] citing *The Charlotte* and the *Lennard* case as authority, vividly makes the point as follows:

> *"When a ship is owned by a limited liability company and managed by another limited liability company the first question which arises is: To which of those companies should one look to see whether the owners are guilty of "actual fault"? It is not disputed, nor can it be disputed in this Court, that the answer to that question is that one looks to the managing company."*

Thus, it seems clear that the *alter* ego of the management company (its directors and senior managers) is the *alter ego* of the shipowning company.[59]

Returning to the case of *The Star Sea* referred to earlier,[60] the Court of Appeal was clear that the Kollakis brothers,[61] both of whom were directors of the company (Kappa), which managed the ship, were the natural persons within the circle. To this list, the Court of Appeal included a Mr Nicholaidis, the technical director of Kappa and, a Mr Faraklas, a director of Charterwell, the company listed as the registered manager of the ship.[62] All four were held to be the "relevant persons" whose privity or knowledge was to be considered that of the assured.[63] As can be seen, the relevant natural persons have all come from high rank, of director and technical director of the company. The decisive consideration stems from the fact that they were all involved, one way or another, in the decision making processes required for the sending of *The Star Sea* to sea.

As was seen, it is the conduct of senior managers of the ship management company which is to come under scrutiny. To all intents and purposes, any fault committed by the director or senior managers of the management company is to be considered the fault of the shipowner. The shipowning company, instead of having its own management and operational division within the company, has effectively in engaging a management company to take care of its affairs adopted the *alter ego* of that company as its own. This makes sense, for if the law were otherwise, all shipowners (individuals and corporations) would simply delegate managerial and operational matters to a third party.

On the above premise, any fault committed by the "designated person", whether employed by the shipowner or their ship management company, is unlikely to be attributed to "the assured". It is contended that his actions cannot affect the right of the shipowner, for his position within a corporate structure is not high enough to constitute its *alter ego*. This, however, does not necessarily mean that a company can never be denied of its right to indemnity should the designated person(s) be in any way at fault.

Though the primary function of the designated person is to relay relevant information from ship to shore (and shore to ship), nevertheless, the ultimate responsibility of ensuring that such relevant information is *in fact* efficiently, properly and regularly transmitted still rests with the company. To absolve itself of fault or privity, the company has to show that it (its *alter ego*) has established a line of communication which is effective and reliable, and that any repeated acts of a failure to communicate are remedied. The company has to be kept informed (and ought to be kept informed) and if there is any slack or breakdown in the system of communication, it could well be held to have, if not actual, constructive knowledge of the fault in the management of the ship.

Once the identity of the relevant person is known, the next stage of the inquiry is to determine whether he is "privy" to such unseaworthiness (the fault in the ship management system) to which the loss is attributable? And on this subject, reference need only be made to the remarks of Lord Denning M.R in ***The Eurysthenes,***

---

58 [1982] 2 Lloyd's Rep. 52 at 54.

59 For the purpose of limitation, Mr Baker was treated as the *alter ego* of the shipowners.

60 *Star Sea* was insured under a time policy. She and her two sisters, *Centaurus* and *Kastoras*, were all beneficially owned by the Kollakis family. All three ships were lost because of defective fire dampers.

61 Who were also the owners of *Star Sea*.

62 Mr Nicholaidis was originally excluded from the list of relevant persons by Tuckey J, the trial Judge.

63 The assured was a one-ship company managed by another company, Kappa. However, another company, Chartererwell, was listed as the registered manager of the ship.

who after conducting a comprehensive historical survey of the origin of this "old-fashioned word'" had no doubt that it refers to both actual and constructive (turning a blind eye) knowledge.

CONCLUSION

The very backbone of the ISM Code is to ensure that matters relating to safe management and operations of ships are monitored, defects and shortcomings rectified, and, more significant, that lessons are learnt. By expanding the concept of seaworthiness, much can be done by the courts to promote safety in the shipping industry. The law in this regard is of course yet to be tried and tested. But bearing in mind that safe management and operations of ships, the very ethos of the Code, is now the order of the day, it is not too difficult to hazard a guess, that in the event of a catastrophe the court will be looking closely not only to the physical condition of the ship but also the manner in which she is managed and operated.

RISK ANALYSIS OF THE IMPACT OF THE CHOICE OF DISPUTE RESOLUTION SYSTEM ON THE OUTCOME OF A MARITIME DISPUTE

By C.Haselgrove-Spurin.

INTRODUCTION

When a civil dispute[64] or difference arises between two parties there are a number of different ways in which the parties can go about trying to settle that dispute or difference. It is possible for parties entering into a contractual relationship to pre-determine the method of settlement that will apply to future disputes and differences by the insertion of a clause into the contract.[65] Unless the parties subsequently otherwise agree that method of settlement will be used by the parties in the event of a dispute or difference. [66]

Even where there is no choice of dispute settlement mechanism in a contract or where a dispute arises between parties not governed by a contractual relationship it is nonetheless open to the parties to agree upon a dispute resolution mechanism.

The choices available to the parties are broadly :

1) To seek to negotiate a settlement between themselves.
2) To seek to settle the difference with the assistance of a mediator
3) To avail themselves of a third party expert determinator
4) To settle the difference through the courts[67]
5) To arbitrate the dispute.
6) Combinations of the above such as med/arb processes.

Negotiation.

Provided the parties are confident that they have a sufficiently good relationship to deal with disputes or differences between themselves then negotiation is clearly the best, simplest, most harmonious, cheapest and speediest way of dealing with any such dispute or difference that might arise. However, suspicion and distrust, often arising out of imbalances in negotiating power between the parties, frequently result in deadlock and delay. If allowed to fester this can cause irreparable damage to the relationship and so there is a need to consider alternative methods of settling disputes and differences where this occurs. Nonetheless, a provision in a contract requiring the parties to conduct their relationships in a spirit of co-operation and to attempt to settle differences though negotiation is desirable, provided an alternative mechanism for dispute resolution is available in the event of a breakdown in the negotiations and provided the provision makes it clear what the appropriate time and circumstance for referral is and the mechanism for referral is clearly stated.[68]

---

64 This paper does not deal with disputes between citizen and state where the interests of the state and its citizens are protected by the courts as typified by criminal trails.

2 See Doke Bishop's paper "A Practical Guide for Drafting International Arbitration Clauses." which provides a thorough review of the various types of ADR clause which can be incorporated into contracts.

66 If one of the parties seeks to over-ride an ADR clause by commencing court action the other party can seek a stay of the court action. If however, the other party also submits to the court action then there is an implied waiver of the right to proceed by way of the alternative dispute resolution.

67 Some jurisdictions e.g. Texas, USA, operate court ordered mediation systems so the element of choice may be restricted by legislation. See later discussion of the effect of non participation in court ordered mediation.

68 See for instance the JAMS/ENDISPUTE clause A1 Duty to negotiation in good faith.

The Civil Courts.

At the time of writing, the standard default mechanism for dispute resolution is the civil courts. Where a contract is silent on dispute resolution system, a dispute arising out of the contract, if it is to be settled, will at the instigation of one of the parties, find its way to a court.[69] The court has the power to settle the dispute, subject only to any appeal to a higher court. A failure by one party to attend will not prevent the court proceeding to binding enforceable judgement. A defendant has nothing to gain and everything to lose by non-participation. Default in respect of a judgement or court order is immediately subject to court enforcement in pain of contempt proceedings at the behest of the other party. The court can resort to the use of bailiffs to enforce payments of debts. What were previously known as "Mareva Injunctions", but have now been re-titled as "Seizure Orders" by the Civil Procedure Rules 1998 in the U.K., can ensure that assets are not removed from the jurisdiction.

The process is adversarial.[70] The battle-ground is shaped by rules of law and the solutions are limited to those available to the legal system within which the court operates. The judge is unlikely to have any practical business experience and deals with the dispute on a purely legal basis only. The parties have little or no control over the process[71] and its outcome, trusting their legal representative to do the best he or she can to represent their interests. The parties involvement in the process is by enlarge made at a distance during consultations with legal representatives. Participation, if it occurs at all, is on the witness stand.

Whether the central issue depends on an interpretation of a legal issue or a determination by the court of a factual situation, the process is somewhat like a lottery. The outcome is likely to be one of "winner takes all" with the loser bearing the costs of the trial. The court has little scope to slice the cake and achieve a compromise solution to the dispute.[72] This is not to say that it would be better for the courts to render a so called "equitable" solution by sharing out the loss between the parties. Justice often requires hard decisions and the enforcement of the rights of a party who has been unjustly deprived of benefits under a contract or has sustained damage to other interests. Equally, simply because a party to an action has suffered loss does not, without more, entitle the claimant to be compensated for that loss. Nonetheless, it is inevitable that one party will depart triumphant and the other will be left feeling that justice and fairness has not been achieved.[73] This is particularly so where one party wins on a legal technicality. This is not conducive to good relations between the parties in the future.

Arbitration.

The traditional alternative to court settlement of disputes is arbitration. The parties give the tribunal the power to settle their dispute. Arbitral awards are enforceable in domestic courts[74] and international awards are supported by The New York Convention on the Enforcement of Arbitral Awards, providing access to the enforcement powers of the courts of most of the international community. Arbitral awards are not free from challenge in the courts. However, where the jurisdiction permits the issuing of unreasoned awards, or the parties agree to the issuing of an unreasoned award the scope for challenge is severely restricted.[75]

---

69 See below for a discussion as to which court might ultimately be seized of the dispute.

70 This is true even of the so called "inquisitorial" civil legal systems. There is a distinction between the way the court conducts its business (adversarial or inquisitorial) and between the way the opposing parties relate to each other which is inevitably adversarial when court or arbitral action is involved. The inquisitorial nature of civil law systems relates merely to the way in which the judge is empowered to cross-question the parties and require paper submissions of evidence, whereas the common law adversarial system involves opposing lawyers presenting evidence to the court and cross questioning the other party before the judge or arbitrator.

71 Once the process has reached the trial stage there is little scope for the parties to withdraw from the process. However, parties frequently broker a settlement pre-trail which often leads to the classic settlement at the courthouse door. Unfortunately, the equality of bargaining power between the parties in such negotiations tends to be poor and negotiation is conducted at a distance by the parties' representatives.

72 Some jurisdiction contain legal rules that enable the court to apportion liability, as with the rules on contributory negligence in tort in England. Where both a claim and counter claim succeed in respect of different elements of a dispute there can likewise be some appearance of a splitting of the cake which can then have a knock on effect for award of costs.

73 See Geoffrey M Beresford-Hatwell's paper "Comparative Analysis of the Ethical Dynamic Involved in Litigation, Adjudication, Arbitration and Mediation."

74 Section 42, 44 & 66 Arbitration Act 1996 amongst others provide powers of the court to support the arbitral process.

75 s52(4) Arbitration Act 1996

To a greater or lesser extent, depending on the jurisdiction governing the dispute and where applicable, the rules of any arbitral organisation chosen by the parties to govern the process[76], the parties are free to agree the range of powers exercisable by the arbitrator. The process as with the courts is adversarial. The battle-ground is shaped by rules of law and the solutions are limited to those available to the legal system within which the tribunal operates.[77] The arbitrator is likely to have practical experience of the industry which enables the arbitrator to better understand the background to the dispute especially when addressing issues of fact.[78]

Again, whilst there are a number of advantages to choosing arbitration, the outcome is nevertheless likely to be a winner takes all situation with the loser bearing the costs of the arbitration. Party participation is much like that in the courts though it is likely to be somewhat less formal. The role of the arbitrator is similar to that of the judge in a court, though the arbitrator's powers are somewhat more limited than those of a judge. So, once more, the outcome of an arbitration is not likely to be conducive to good relations between the parties in the future.

Expert determination and adjudication.

Whilst expert determination and the various forms of adjudication[79] provide a viable way of settling dispute, this paper will not deal with this mechanism in any detail, apart from pointing out that as a fast track form of arbitration it can be cost and time effective but limits the degree of participation that the parties have over the process. The battleground is legal in nature, but the decision will normally revolve around the determination of a fact such as the value of an item, the meaning of the terms of a contract and who is responsible for carrying out contractual duties or whether a certain event has taken place such as the fulfilment of a contractual duty for example the use of specified materials. The expert determinator or adjudicator, is by nature, an expert with experience in the industry and the decision is less likely to be based on the application of esoteric rules of law.

Apart from statutory adjudication schemes where the law gives the adjudicator the power to settle disputes referred to the adjudicator,[80] the power to determine the outcome of the dispute is given to the expert determinator or adjudicator by the parties. The outcome is likely to be a "winner takes all" situation which once again is not necessarily conducive to good relations between the parties in the future. However, since adjudication is frequently used to settle interim disputes that occur during the course of implementing a wider program, it can enable the parties to put an issue to rest and get on with the next task in hand. This is particularly so of adjudication in the construction industry. Frequently however, adjudication is not final and in such cases the decision whilst immediately binding on the parties is subject to subsequent re-evaluation by an arbitrator or the courts.

Mediation.

Mediation is gradually establishing itself as a viable alternative method of settling disputes and differences.[81] Unlike court settlement, arbitration, expert determination and adjudication a third party does not make a decision which settles the dispute.[82] Participation by the parties in the process is central to the way mediation operates. This is both a strength and a weakness of mediation. If one party refuses to participate it is not possible to broker an agreement and the mediator has no power to impose a decision in the absence of participation by one of the parties.

---

76 eg ICC Rules, Model Law, LCIA Rules , GAFTA Rules etc

77 See below regarding choice of substantive and procedural law.

78 This is not necessarily so. There has been a tendency in recent years for arbitrators to be drawn from the ranks of lawyers and judges. However, there is often scope within the appointing system for the parties to seek to ensure that the arbitrator is drawn from their peers within their industry.

79 See Tony Bingham's paper, "Adjudication in the Construction Industry in the UK – A Role Model for Malaysia."

80 As under s108 Housing Grants, Construction and Regeneration Act 1996 in the UK and under a host of Acts providing for Ombusdman Review of consumer disputes.

81 As to whether mediation is a new concept or a tradition Asian concept which is establishing itself or re-establishing itself, see Neil Kaplan's address to this seminar supra.

82 See Judge Richard Faulkner's paper "Mediation – What is it and what has it got to offer Malaysia ?"

By contrast, both judges[83] and arbitrators[84] can continue the court or arbitral hearing in the face of the obdurate refusal of a party to attend the hearing, where it is clear that the refusal to attend has no reasonable justification and is carried out for no other purpose that that of attempting to frustrate the process. It is commonly stated that mediation is a non-binding process which relies on the co-operation of the parties to participate in the process. Whilst true, this is increasingly an oversimplification.[85] In jurisdictions which operate court ordered mediation, a failure to attend and even a failure to actively participate in the process can have a variety of adverse consequences for the absentee or non-participant. Under the CPR Rules in the UK the court can order a stay of action pending participation in a mediation[86], and can even award costs against the successful party if that party had intentionally failed to participate in a mediation.[87] If the process works[88] it produces an agreement, brokered between the parties through the good offices of the mediator, which can be made legally binding and enforceable in the courts. [89] In the event of a refusal by one party to abide by the agreement, subsequent court action to enforce the agreement is inexpensive and relatively quick. There is little point is refusing to fulfil the agreement.

The scope for challenging the validity of the agreement is very limited and restricted to allegations of bias, duress and undue influence on the part of the mediator. Proving such allegations is difficult since it is standard practice that all notes and transcripts in the possession of the mediator are destroyed or returned to the parties at the conclusion of the mediation.[90] The parties agree in advance that the mediator and all other parties present should treat all information disclosed in the process as privileged.[91] Thus none of the information disclosed during the process can be subsequently disclosed in court or used as evidence. Offers of settlement, made but not accepted, cannot later be used in court as a substitute for a payment into court. Nor can such offers be disclosed to the court to try and influence the judge's award of damages or costs. The avenues for appeal from the court and the arbitral process, even though limited in scope, are much more extensive than the process for challenging the validity of mediated agreements.

The mediation commences with the mediator welcoming the parties and then laying out the ground rules for the conduct of the mediation[92] followed by opening statements by both parties or their representatives. Once both parties have set out their stance at the commencement of the mediation, for the benefit of the other party and the mediator, the mediator acts both as a conduit for the flow of information between the parties[93] and, as an agent of reality for each of the parties in turn, providing a sounding board for the

---

83 In civil cases the court operates on the basis that where a defendant fails to rebut the allegations of the plaintiff the defendant conceeds that point, so a failure to attend has immediate and obvious repercussions for the absentees' defence.

84 For example s41(4) Arbitration Act 1996 UK

85 See R.Faulkner, G.Thomas & C.H.Spurin, "Mediation Methods : Representing Your Client at a Mediation" University of Glamorgan Law School Press 1st Ed 1999, pp7-14.

86 s26(4)(2) CPR 1998 : see also Torith v Stewart Duncan Properties [1999] Employment Appeals Tribunal. LTL 19/12/99 Lawtel C8200316 and see also Neil Kaplan's address to this seminar where he makes it clear that in Hong Kong participation in the mediation process, where an agreement contains a mediation clause, is a condition precedent to court proceedings.

87 s44.3. C.P.R. 1998

88 Determining whether or not the mediation process has worked should not however be based entirely on whether or not a settlement of all elements of the dispute has been achieved. Frequently agreement is reached over some elements of the dispute, with the consequence that subsequent litigation is more focussed, and consequently faster and cheaper. Even where no settlement is achieved the process can still deliver benefits in that the differences that separate the parties are much more clearly understood by both parties.

89 The parties can alternatively make a non-binding agreement, that is to say an agreement "binding in honour only".

90 See foot note 28 below. The mediator will make this clear during the introduction to the process when he or she sets the ground rules for the mediation.

91 See for instance the standard form NADR Mediation Agreement which is signed by both parties to the mediation.

92 A contrast can be drawn here between the courts, where the parties have little or no choice in respect of the procedures which govern the conduct of the trail. Arbitration however does provide the parties with an element of choice providing they can reach agreement, at least in the UK by virtue of all of those provisions under the Arbitration Act 1996 which commence with the legend "Unless the parties otherwise agree .,." and with particular reference to s34 Arbitration Act 1996. In the absence of agreement it is the arbitrator who determines the procedures that will govern the process. The parties however have an element of choice at an earlier stage when they choose the arbitral or mediation body that will handle the dispute, with it is hoped, a keen weather eye on the type of procedures favored by that body and prescribed within its rules for the conduct of the process.

93 What follows is perhaps an over simplification of the role of the mediator, but which concentrates on a model which lends itself to commercial dispute settlement. There are many different models of mediation process, which have evolved to facilitate different types of dispute between different types of disputant. Indeed, there is no concensus as to how a mediation should be conducted,

confidential exploration of concepts and ideas which might form the basis of a negotiated settlement. The mediator can act as devil's advocate to each party in turn, suggesting possible advantages and disadvantages for each party of pursuing different ways of dealing with the differences which divide the parties. The mediator can suggest ideas and concepts which each of the parties might wish to consider. The mediator can help the parties to identify hidden benefits and things that each of the parties can offer the other which are not burdensome for them but which the other party would place value on.

The settlement is likely to be based on some form of "compromise" but this does not inevitably mean that either party ends up compromising their interests. The old adage "no gain without pain" does not necessarily ring true for mediated settlements. By contrast with the judicial system which produces a win-lose situation, mediation can result in a win – win situation where each party settles within their band of expectation and perhaps even above (i.e. receives more than expected) or below (i.e. pays out less than expected) the level at which they were prepared to settle. Furthermore, the benefits of facilitating agreements for future co-operation can far outweigh any concessions made regarding the immediate dispute at hand. All of this embraces settlement concepts which the courts, arbitration and adjudication cannot offer the parties. However, this does not mean that the law does not have a role to play in the process. In particular, the agent of reality is founded on the basis of the legal consequences of a failure to broker an agreement, firstly in respect of the cost of pursuing the difference further at law or through arbitration and secondly because the law is likely to establish the basis of the respective rights and duties of the parties.

Assuming the parties reach an agreement which brings the dispute to an end there is a very good prospect that the parties can continue to do business together and that the dispute will not have caused irreparable damage to their business relations. Indeed, an awareness of the each party's expectations and the limits of each party's tolerances can foster a climate of mutual respect which strengthens the relationship. The early mediation of minor disputes and differences can enable parties to work more closely together in the future.[94] With less at stake than would be the case with court action parties can use mediation as a way of interacting between themselves during the course of business. In this respect mediation is an ideal mechanism for dealing with differences between employees and between employer and employee.

Mediation provides an alternative method of dispute resolution. It does not displace judicial and arbitral dispute settlement. Indeed, there are many disputes which do not lend themselves to mediation.[95] Where there is no dispute at all apart from a blatant refusal to pay for contractual benefits received it is unlikely that the defaulting party will co-operate in the mediation process. The defaulting party may not have the resources to pay and bankruptcy proceedings are the only viable way of moving forward. However, even in these types of cases, if the defaulting party is trying to buy time, it may be an appropriate response for the creditor to take a pragmatic view of the situation and to put aside strict legal rights and broker some form of extended credit agreement, especially if there is a possibility that the financial affairs of the debtor will eventually be solved and the parties will be able to resume a profitable business relationship. Finally, mediation keeps the parties business affairs out of the public arena. The court process is open to the public. Whilst arbitration is private and keeps business affairs out of the public domain, any recourse to the courts for assistance or support or for the enforcement of an award can break down the privacy barrier. Businessmen do not want their dirty linen laundered in public. Litigation sends out a message to prospective customers that business relations with the organisation might be far from harmonious.

CHOICE OF JURISDICTION AND CHOICE OF LAW

Introduction.

Whether the parties address the issue of dispute resolution mechanism before or after a dispute arises there are a number of other issues that have to be dealt with at the same time if the dispute is of an international nature, namely, the substantive and procedural law that will govern the respective rights / liabilities and duties of the parties and the conduct of the dispute resolution process respectively. The consequences of,

---

with advocates of a variety of competing methodologies. See Goldberg, Sander and Rogers, "Dispute Resolution. Negotiation, Mediation, and Other Processes" Aspen Law and Business, for an overview of a wide range of these methodologies.

94 The adjudication system introduced by the Housing Grants, Construction and Regeneration Act 1996 is based on the same premise.

95 See NADR guidelines on appropriate cases for mediation.

and implications for, dispute resolution processes, of choice of law and choice of jurisdiction clauses depend on whether the dispute ends up in court, arbitration or mediation.

Choice of Jurisdiction.

This is not the time and place to enter into an in depth analysis of jurisdiction. Suffice to say that matters are considerably simplified if the parties ensure that the procedural law of the court handling the suit covers all jurisdictional aspects of the dispute. In international cases, much time and expense can been incurred by parties to disputes where jurisdictional matters have to be ironed out before the court even gets to consider the issues involved in the dispute.

Arbitration is much more flexible in this respect, but even so, the arbitrator is frequently required to deliver an interim award dealing with jurisdiction matters. A lack of clarity in this respect can result in one of the parties having recourse to the courts to settle jurisdictional issues. The degree of support that a court can and will lend to the arbitration process differs from jurisdiction to jurisdiction and this should be taken into account by parties when drafting jurisdiction clauses in contracts.

The degree of support that the judicial system will lend to the mediation process,[96] in particular regarding stay of court action pending participation in the mediation process, the availability of court ordered mediation and the penalties that the court will impose on non-participants in the mediation process depends very much on the substantive jurisdiction that governs the process. In particular, care needs to be taken to ensure that if recourse to the courts is needed in order to enforce the mediated agreement, that the court seized with jurisdiction will recognise and enforce that agreement. Indeed, the mediated agreement itself can include a Law and Jurisdiction clause.

Choice of Law.

Domestic civil courts are not well suited to the consideration and application of foreign law. The courts of England and Wales for instance treat foreign law as a question of fact that has to be established by the parties. This can complicate matters considerably and therefore it is therefore highly desirable that the parties seek to ensure that the contract provides for the contracts to be governed by the substantive law of the courts that will adjudicate over disputes that arise between the parties. However, in so doing, the parties need to maintain a weather eye on statutory provisions that impose rights and duties on the parties. This is particularly so for international disputes, since there are a number of International Conventions that can, through incorporation into domestic law, govern the conduct of the parties. Thus there are three International Conventions that govern the carriage of goods by sea[97], a range of conventions that govern jurisdiction and enforcement of court and arbitral awards and another range of conventions governing limitation of liability in respect of maritime pollution[98] and damage consequent on the carriage of dangerous cargoes. The point is that different jurisdictions will have incorporated different conventions thus providing the parties with differing standards of conduct and differing rights, liabilities and privileges.

Arbitrators are far more conversant with the concept of applying "foreign" substantive law. Indeed the arbitrator is more able to apply international conventions to disputes and can, with the consent of the parties, even decide a case on an equitable "ex aequo bono" basis. The trick here, from the party's perspective, is to try and ensure that the arbitrator chosen to adjudicate is familiar with the substantive law that governs the dispute.

Since the mediator merely facilitates the parties in reaching an agreement it is not immediately apparent what impact the substantive law has on the mediator's role. However, it should be remembered that the mediator will, when providing the parties with reality checks, make reference to both the substantive law that governs the relations between the parties and also to any procedural law that will have an impact, in particular in respect of costs and enforcement powers, on the parties in the event of a failure to broker an agreement.

---

96 See footnote 22 supra.

97 The Hague, The Hague-Visby and The Hamburg Rules.

98 See Dr Susan Hodges, "The legal implication os the ISM Code : insurance and limitation of liability." [1999] IJIL 39.

Check List to Evaluate the Variable Factors Involved in Settlement of a Dispute through The Courts, Arbitration or Mediation

Factors	Court	Arbitration	Mediation
Time to settlement			
Executive costs of preparing for trial etc			
Legal costs of preparing for trial etc			
Costs of trial & do costs follow event ?			
Finality of dispute			
Implications, if any, for future relations			
Need for witnesses / reliability / availability			
Availability of Discoveries			
Availability of Security			
Enforceability			
Limitation of Liability			
Privacy			
Scope for a negotiated settlement			
Implications of payment into court etc			

Conclusion.

There are advantages and disadvantages to each method of dispute resolution. It is difficult for the parties to predict which system will best suit their needs before the true nature of a dispute is disclosed. Nonetheless a well thought out dispute resolution clause taking into account all the known variables and the likely vicissitudes of the shared business venture the parties are about to undertake is likely as not to prove more than adequate and apposite. If not, as with the post dispute reference, it is not necessarily too late, providing the parties can agree, to amend the terms of reference. Similarly, time and effort expended on a well considered choice of law and jurisdiction clause will be rewarded, preventing subsequent delay, expensive litigation and submission to rules which presage unwelcome consequences.

IMPACT OF CHOICE OF ADR SYSTEM ON A DISPUTE

Comparative analysis of dispute settlement processes

The theoretical differences between taking a claim to law, to arbitration or to mediation are common currency today. Much has been written in the journals about the value of ADR. Still, the legal practitioner in particular tends to remain sceptical and perhaps a little fearful (unjustifiably as it so happens) that the advent of ADR may in fact adversely affect his fee earning capacity. Businessmen may have heard about the existence of ADR but outside the US there is little encouragement to take advantage of it. This is particularly so where the lawyer advising the businessman on choice of dispute resolution system is sceptical about ADR in the first place.

The impact of different choices of dispute resolution system only really hit home to the practitioner when put into practice. This being so, for the benefit particularly of those who have not been involved in ADR processes until now, there follows an analysis of the impact choice of dispute resolution might have on a hypothetical maritime dispute. The dispute is of a common place type. A vessel has been lost at sea along with its cargo. The cargo was insured under an ICC(A) Cargo policy. The assured seeks to recover from the underwriter. The underwriter resists the claim on the grounds that the vessel, with the knowledge of the assured, was unseaworthy. This being contrary to the provisions of the contract of insurance, the underwriter seeks to avoid the policy. From the viewpoint of the assured and the underwriter, which is the best dispute resolution system for settling this dispute ? What are the advantages and disadvantages of choosing one system over another ?

The dispute should not be viewed in isolation. Whilst this will be the only dispute to be settled by the court, arbitrator or through mediation there are a host of other disputes waiting in the wings involving a number of other parties. The underwriter will subsequently seek to recover any monies paid out under the policy by way of subrogation of the assured . The "authorities" will seek to recover damages for pollution and both

the ship owner and the charterer will be embroiled in this action. The ship owner will wish to claim on his own insurance policy. The charterer will seek to recover any liability incurred from the ship owner under the charter party. In conclusion, the present dispute is just one of many hurdles that will have to be jumped before all the matters arising out of the incident are finally put to rest. The outcome of this dispute may well have knock on effects for other disputes the parties are involved in with different parties. This analysis will be followed by a demonstration mock mediation of the dispute.

Bangsar Oil Export (M) SDN BHD v Tight Purse Insurance Co.Ltd.

This is a practical exercise illustrating the impact of choice of ADR system on a dispute. It features a dispute between a charterer / assured and an underwriter, involving alleged unseaworthiness due to a purported breach of the International Management Code for the Safe Operation of Ships and for Pollution Prevention.[99]

Personalities involved.

Mr Alan Azad, MD of Bangsar Oil Export (M) SDN BHD (**BOE**) purchased 120,000 tonnes of oil from Malaysian Petroleum (M) SDN BHD (**MPS**) which he then sold under a delivery contract subject to Bankers Documentary Credit, cash payable in advance, to The Tigger Oil Co, (**TOC**) Sri Lanka.
Mr.A.Azad nominated the Damansara Bank, KL as confirming bank.
The VCL Stella Marina and two sister ships, The VCL Luna Marina and The VCL Sola Marina were beneficially owned by the Zarim family, resident in Kuala Lumpur, Malaysia and London, England.
Each ship was owned by a one ship company registered in England, namely the VCL Stella Marina Co Ltd (**SMC**), the VCL Luna Marina Co Ltd (**LMC**) and the VLC Venus Marina Co Ltd (**VMC**) respectively.
All three vessels were effectively managed by Corona Maritime (UK) Co Ltd (**CMC**), directed by Chancer Zarim and his two sons Zachariah Zarim and Absolom Zarim and by Ally Akba, the technical director.
Malaysian Chartering (M) SDN BHD (**MCS**) was the registered managing organisation directed by Chancer Zarim and Mohd Munassor. **BOE** chartered the VCL Stella Marina for 2 years, under a Time Charterparty, commencing the 3rd January 2000, from **SMC** through the auspices of **MCS**.

Background information.

The VCL Stella Marina was built in 1984 and became part of the Corona fleet in September 1999. All three vessels were of identical design and construction including a full flood carbon dioxide extinguishing system for the engine room, consisting of a rank of C02 cylinders which could be discharged by pulling down a single handle in the bridge house. A series of wires and pulleys linked the handle to the cylinders. In order for the fire suppression system to work effectively it was essential that all doors, windows and ventilation shafts be completely sealed and airtight when the system is triggered off. The vessels were also equipped with an electrically powered main fire pump and an emergency fire pump.

The VCL Stella Marina was arrested by Dutch port officials at Rotterdam during her first voyage in October 1999 and following a survey Captain Chancer Zarim was ordered to effect maintenance and repairs to the main and emergency fire pumps, and to ensure that an effective safety management system (SMS) be adopted on board the vessel.

Captain Chancer Zarim ordered the ship's engineer to carry out a routine inspection and repairs to the vessel and assured the authorities that the task of developing an SMS was well advanced and that all crew would be fully trained and conversant with all aspects of ship safety. The engineer attempted repairs to the fire pumps but failed to get the emergency pump to work. During the course of inspection of the wiring to the main fire pump system blocks of wood were used to jam open a ventilator shaft carrying the wire conduit. The blocks of wood were never removed. Captain Chancer Zarim took a cursory glance at the instructions for operating the full flood carbon dioxide extinguishing system, called the crew together, pointed at the lever and told them "If ever we get a fire, make sure that this lever is pulled down as quickly as possible". The vessel was released from arrest and promptly sailed to Kerteh, Malaysia.

The Charter

The vessel was delivered to **BOE** at Kerteh, Malaysia. A.Azad promptly ordered the vessel to load the cargo of 120,000 tonnes oil with orders to set sail to a Sri Lankan port. A.Azad inspected the ship's log on delivery

[99] The International Safety Management (ISM) Code. See annex 1 below.

and was aware that there had been problems in Amsterdam. Having inquired as to the nature of the problem and what had been done about it he was assured by Captain Chancer Zarim that there was nothing to worry about and that everything had now been sorted out, and that the vessel was ready to load and set sail.

The Insurance

Prior to shipment **BOE** insured the cargo under an Institute Cargo Clauses (A) policy with Tight Purse Insurance (UK) Co Ltd (**TPI**).

The policy was stated to be subject to English Law and either (Delete as appropriate)

a) English Jurisdiction
b) London Arbitration or
c) Mediation under the auspices of NADR (M) SDN BHD,

for shipment from Kerteh to a Sri Lankan port.

The cargo was duly loaded on the 4th January and a clean bill of lading issued to Mr.A.Azad., who promptly tendered a receipt and shipping documents in respect of the cargo to the Damansara Bank and received payment in full.

The Incident.

The vessel set sail on the 4th January. At around 3:20 a.m. a fire broke out in the engine room of the VCL Stella Marina. Captain Chancer Zarim, who had been dozing in a chair whilst on night watch promptly engaged the C02 extinguishing system by pulling a lever in the bridge house which should have engaged the system and extinguished the fire. This operation initially smothered much of the fire but failed to extinguish it completely because a block of wood prevented a ventilation shaft from being closed. The fire re-established itself and having generated extremely high temperatures penetrated the cargo hold and ignited the oil cargo. At 5:25 a.m. Captain Chancer Zarim gave the order to abandon the vessel. Following an enormous explosion the vessel broke in two and sank at 6:05 a.m. with loss of all cargo, but without loss of life. The incident has resulted in severe marine pollution in an area of the sea close to the coast of Malaysia with adverse effects on the tourist and fishing industries. The projected costs of pollution control and cleaning up operations are enormous.

The Claim[100]

BOE claimed on the Institute Cargo Clauses (A) all risks policy for the loss of the cargo by fire, a peril insured against under the policy, freight costs and return of premium.

The Defence.

TPI's loss adjuster conducted investigations into the incident and advised that the claim be rejected on the grounds that the VCL Stella Marina was unseaworthy, with the privity of Mr.A.Azad, MD of **BOE**. Consequently, **TPI** denied liability to **BOE** under the policy.

In particular, **TPI** alleged that

1) By virtue of s40(2) Marine Insurance Act 1906[101] in a voyage policy on goods or other moveables there is an implied warranty that at the commencement of the voyage the ship is not only seaworthy as a ship, but also that she is reasonably fit to carry the goods or other moveables to the destination contemplated by the policy.

2) That by virtue of s33 Marine Insurance Act 1906[102] breach of the warranty entitled the underwriter to avoid the policy.

---

[100] Independently from the current dispute, the incident also gave rise to issues regarding Marine Pollution against the ship owners and charterers. There are also outstanding insurance claims against other insurance companies by ship owners and charterers.

[101] s40 Marine Insurance Act 1906 **No implied warranty that goods are seaworthy**
(1) In a policy on goods or other moveables there is no implied warranty that the goods or moveables are seaworthy.
(2) In a voyage policy on goods or other moveables there is an implied warranty that at the commencement of the voyage the ship is not only seaworthy as a ship, but also that she is reasonably fit to carry the goods or other moveables to the destination contemplated by the policy.

[102] s33 Marine Insurance Act 1906 **Nature of warranty**

3) Clause 5.1[103] of the policy states that in no case shall this insurance cover loss or damage or expense arising from unseaworthiness of vessel or craft, unfitness of vessel ….. for the safe carriage of the subject-matter insured, where the Assured or their servants are privy to such unseaworthiness or unfitness, at the time the subject-matter insured is loaded therein.

4) Clause 5.2[104] of the policy states that the underwriters waive any breach of the implied warranty of unseaworthiness of the ship and fitness of the ship to carry the subject-matter insured to destination, unless the Assured or their servants are privy to such unseaworthiness or unfitness.

5) Following the judgement of the Court of Appeal in The Sea Star it is evident that the Stella Marina was unseaworthy, in that

   a) the Fire Suppression System was ineffective and

   b) by virtue of the fact that the crew were not adequately trained in the operation of said Fire Suppression System and

   c) on account of the failure of owners / operators to institute an effective Safety Management System (SMS)[105] and

   d) on account of the owner/operator's failure to consequently put said SMS into operation, in contravention of s40(2) MIA 1906.

6) Following the judgement of the Court of Appeal in The Sea Star[106] it is evident that the Stella Marina was unseaworthy, in that the Fire Suppression System was ineffective and by virtue of the fact that the crew were not adequately trained in the operation of said Fire Suppression System and on account of the failure of owners / operators to institute an effective Safety Management System (SMS) and on account of the failure to consequently put said SMS into operation, in contravention of Clause 5.1 of the ICC Policy.

7) That the knowledge of such failures by A.Azad, MD of **BOE**, the assured, counteracted the waiver of the breach of the implied warranty of unseaworthiness contained in Clause 5.2 of the ICC Policy.

Additional information.

Each party to this action is likely to be privy to information that the other party does not know about. Further investigation of third parties to the action may well turn up new information that might be central to the resolution of the dispute. Each party is likely to have a hidden agenda. In other words, this is the typical situation faced by party representatives and their clients on the day that a brief is accepted.

Background Statistics for BOE v TPI

Subject Matter :	130,000 tons oil : i.e. 1.5m barrels at $28 US / barrel.	$42.00m US
Insurance Premium :	2% of cargo value.	$8.40m US
Freight :	$2.5 US / barrel.	$3.75m US
Time Charterparty Rate :	$22,000 US / day. Monthly in advance	$0.66m US

---

(1) A warranty, in the following sections relating to warranties, means a promissory warranty, that is to say, a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts.

(2) A warranty may be express or implied.

(3) A warranty. As above defined, is a condition which must be exactly complied with, whether it be material t o the risk or not. If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date.

103 Clause 5.1 Institute Cargo Clauses (A)
In no case shall this insurance cover loss damage or expense arising from unseaworthiness of vessel or craft, unfitness of vessel craft conveyance container or liftvan for the safe carriage of the subject-matter insured, where the Assured or their servants are privy to such unseaworthiness or unfitness, at the time the subject-matter insured is loaded therein.

104 Clause 5.2 Institute Cargo Clauses (A)
The Underwriters waive any breach of the implied warranties of seaworthiness of the ship and fitness of the ship to carry the subject-matter insured to destination, unless the Assured or their servants are privy to such unseaworthiness or unfitness.

105 See ISM Code, Annex 1 below.

106 **Manifest Shipping & Company Ltd. v Uni-Polaris Insurance Company Ltd. and La Reunion Europeene (The Star Sea)** [1997] 1 Lloyd's Rep 360 C.A. : [1995] 1 Lloyd's Rep 651 at 1st instance.

Global Legal Costs of Claim :	$1m		$1.00m US
Hull Insurance:	$300 US / day	4 day voyage total $1,200	
Time to Court Settlement :	2-3 years		
Interest on claim for 1 year	at 4% (SBR +1%)		$2.17m US

RISK ANALYSIS EXERCISES

Introduction

The basis of any negotiated settlement turns on the evaluation that each of the parties makes of their respective chances of success in litigation / arbitration and of their respective risks of failure. The outcome of the suit will be based on an application of both facts and law. Were establishing any fact or any rule of law is uncertain a risk arises as to the outcome of the dispute. A risk analysis therefore must consist of a chart identifying the variable factors that will arise during the trial in the order that they will have to be decided and the outcomes that flow from the decision going for or against the litigant. This is illustrated in the quick sketch line diagram below.

FIGURE 1 QUICK SKETCH Simple line drawn decision tree.

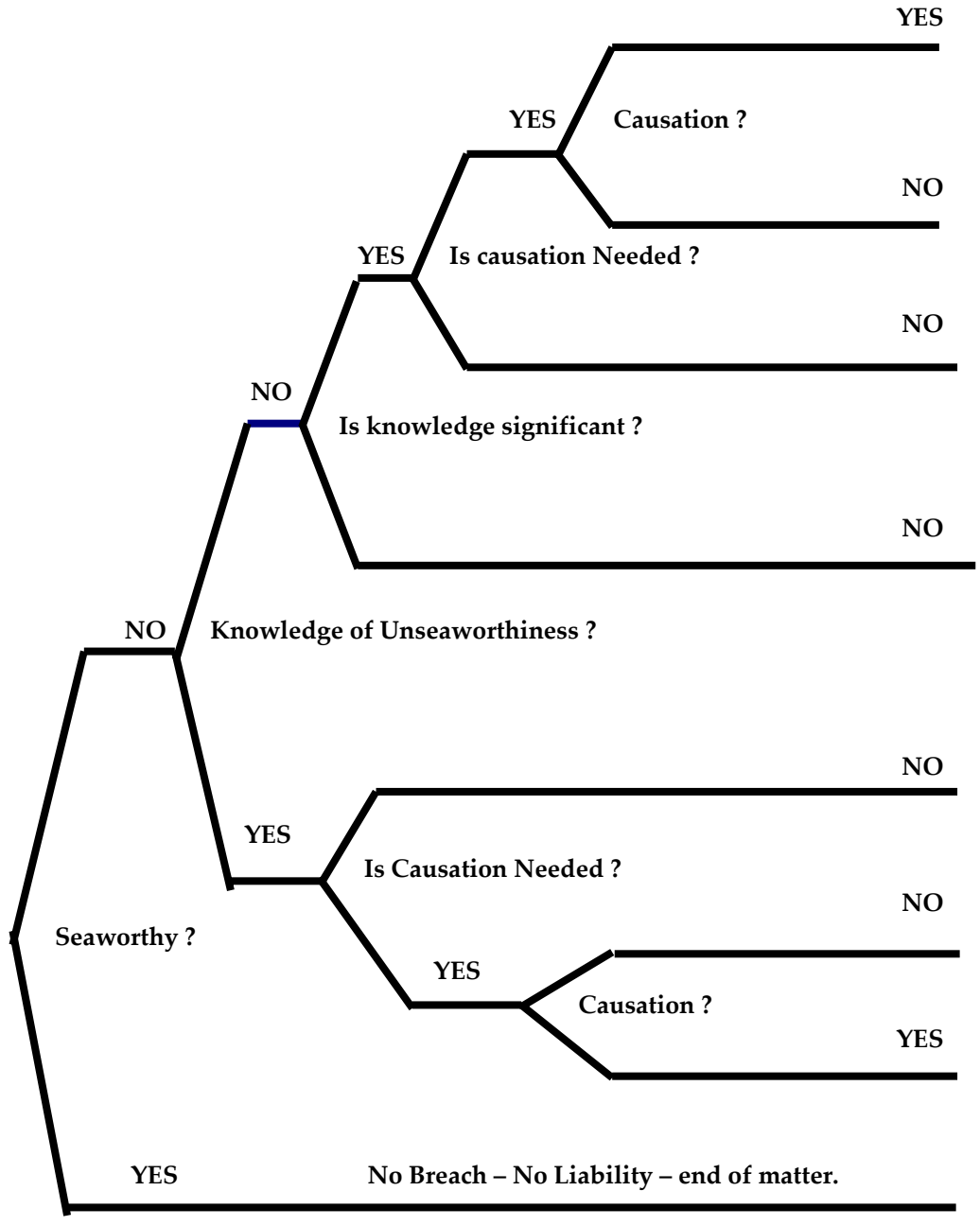


Figure 2 Win / Lose Decision Tree

This diagram covers the same factors as the simple line scheme but provides an opportunity to input more information about the decision making process and paves the way for the introduction of figures and calculations at a later stage.

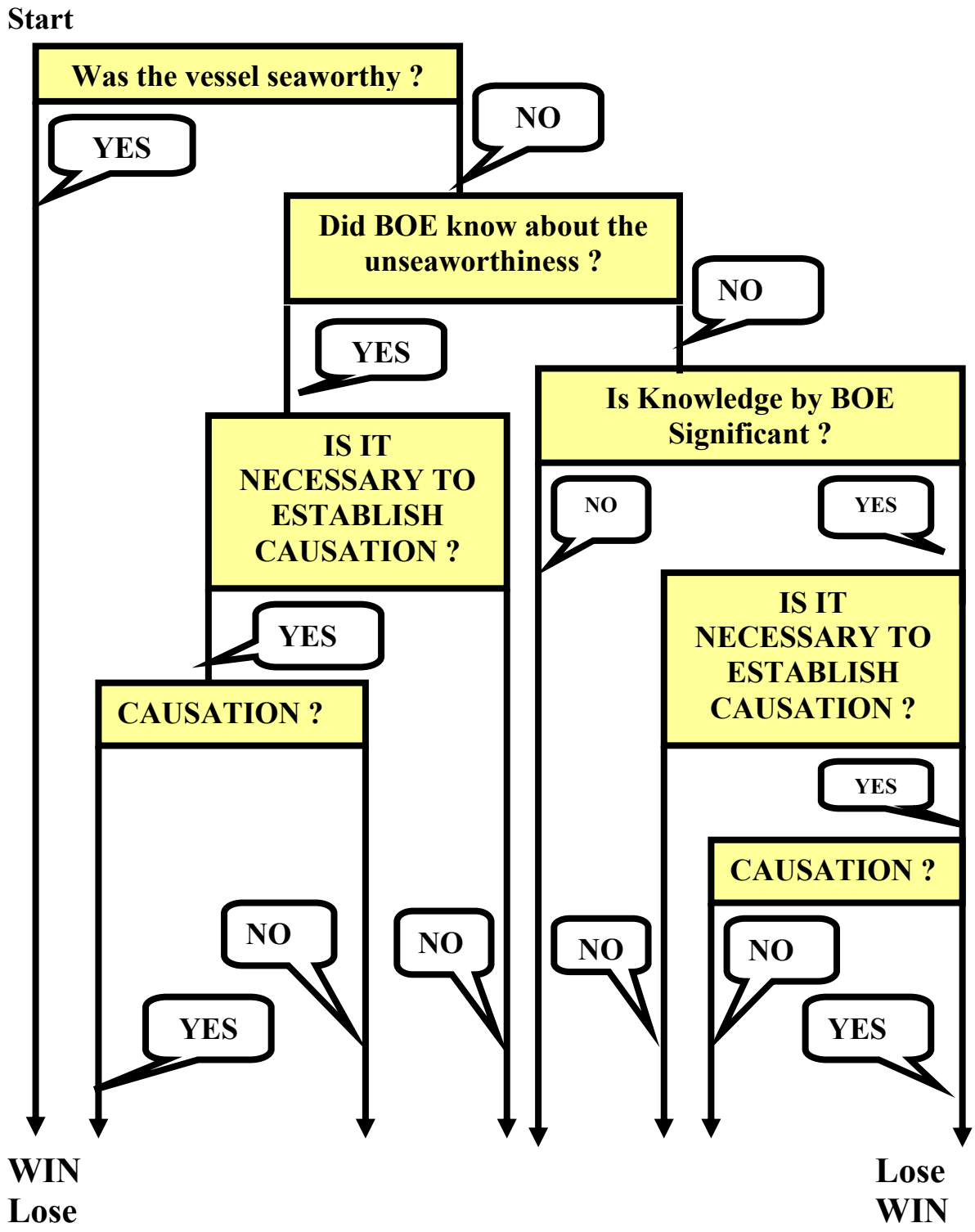


FIGURE 3. Win / Lose Decision Tree Strengths and Weaknesses

The same diagrammatic scheme can be expanded to include information about the factors that influence the assessment of risk, be they factual or legal. This enables the assessor to make a reasoned and considered assessment of the risk factors.

Start

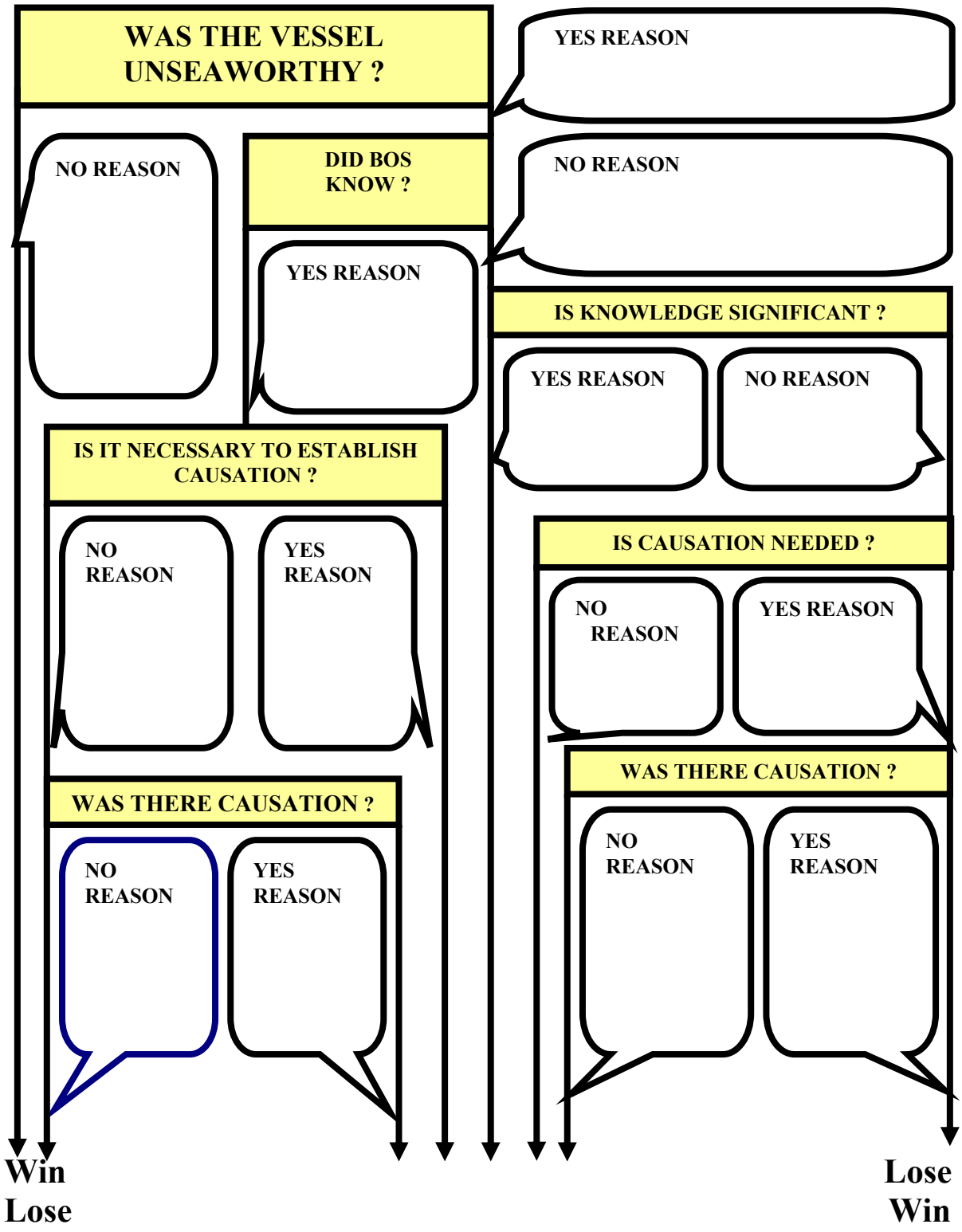


Figure 4 **Win / Lose Decision Tree : Qualitative Analysis**

This diagram contains information regarding a qualitative analysis of the projected outcome of the trial of each stage of the decision making process.

Start

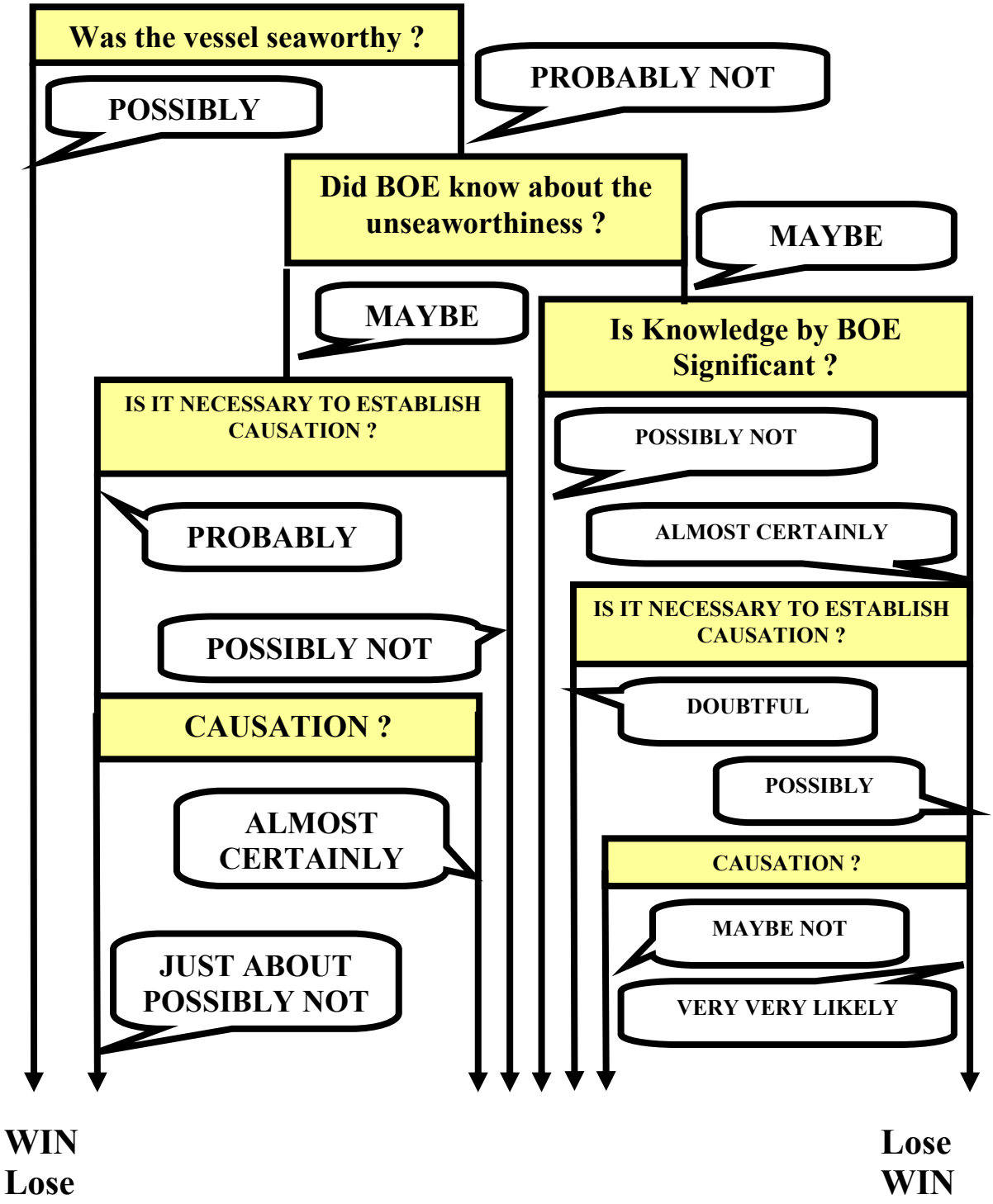
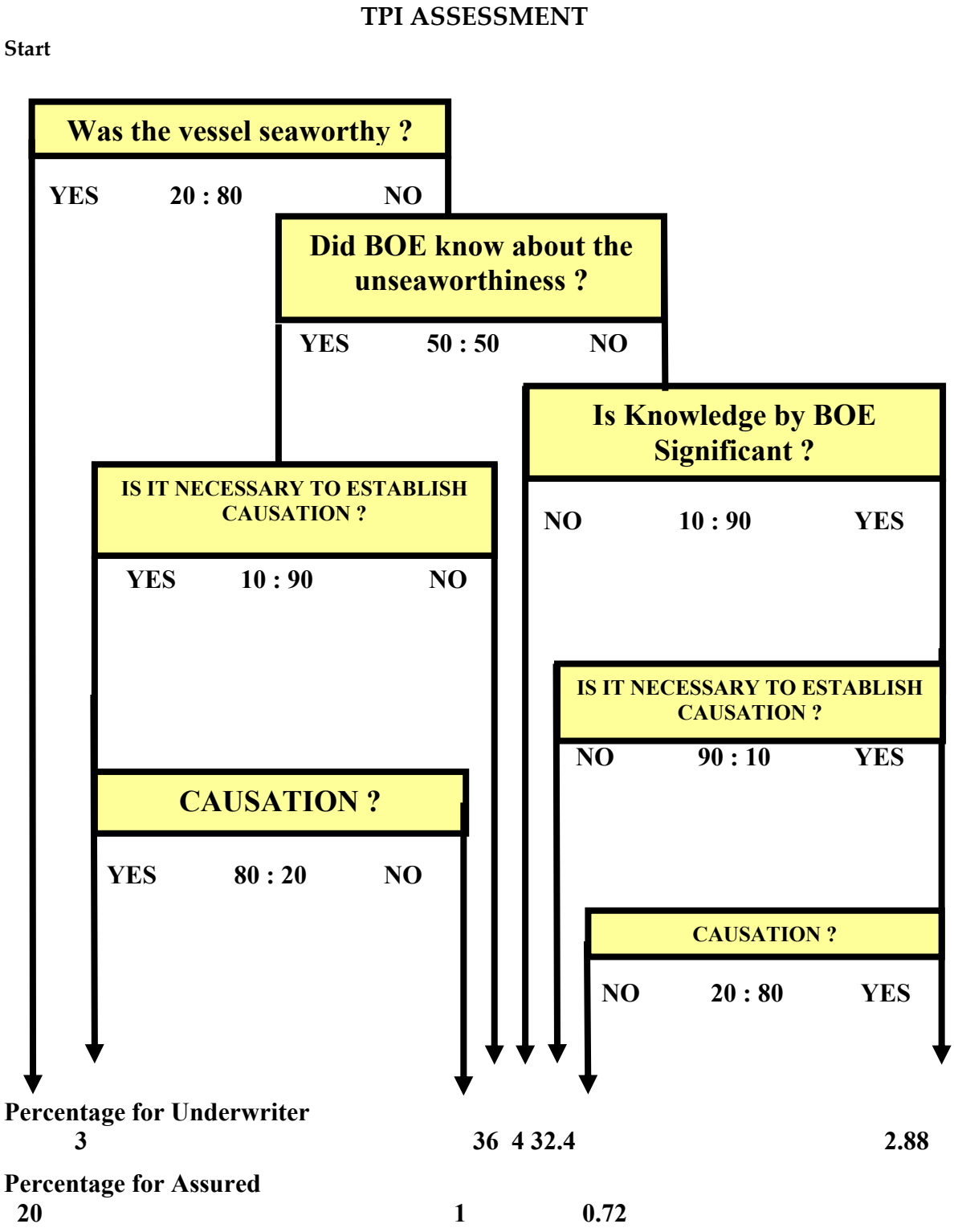


Figure 5 **Win / Lose Decision Tree : Quantitative Analysis**

Qualitative analysis gives the parties a feeling for their chances of success, but negotiation requires hard figures. A quantitative analysis produces concrete percentages much like the odds used for betting. Just like an accumulator where the winnings of successive races are put onto the next race, the odds of each of the risks of winning and losing each stage of the decision making process can be totted up to produce an assessment of the global risk involved in the trial.



The probability that the assured's claim fails in court is thus 78:22 (78.28 : 21.72)

Figure 6 Claims and Costs.

A significant factor in the settlement of any dispute involves an assessment of not only what the party seeks to recover of defend against but also the costs of taking the case to trial. The assessment of risk arrived at in figure 5 can then be used in conjunction with the concretized costs and expenses involved in the trial which are also at risk in order to identify the optimum figure for settlement of the dispute.

Figure 6a

Claimant : Assured - BOE

Costs & Claims in £ Sterling	NonRecoverable	Recoverable
A : Cargo		£A
B : Freight		£B
C : Premium		£C
D : Lost Executive Time : Administration : Travel : Accommodation	£D	
E : Pre-Trial Legal Advisors Cost	£E	
F : Legal Advisors Costs at Trial		£F
G : Witnessess & Experts		£G
H : Court Costs		£H
TOTAL : X - W	**£W**	**£X**

Total sum to be recovered if successful : X (A + B + C + F + G + H) **– W** (D + E)

Figure 6b

Defendant : Underwriter TPI

Costs & Claims in £ Sterling	NonRecoverable	Recoverable
A : Cargo		£A
B : Freight		£B
C : Premium		£C
I : Lost Executive Time : Administration : Travel : Accommodation	£I	
J : Pre-Trial Legal Advisors Cost	£J	
K : Legal Advisors Costs at Trial		£K
L : Witnessess & Experts		£L
H : Court Costs		£H
TOTAL : Z – Y	**£Y**	**£Z**

Total costs of the trial even if successful : Z (I + J) **– Y** (A + B + C + K + L + H)

Both parties can repeat the exercise to evaluate the costs involved in losing.

Figure 7 Win / Lose Decision Tree : Cost Analysis

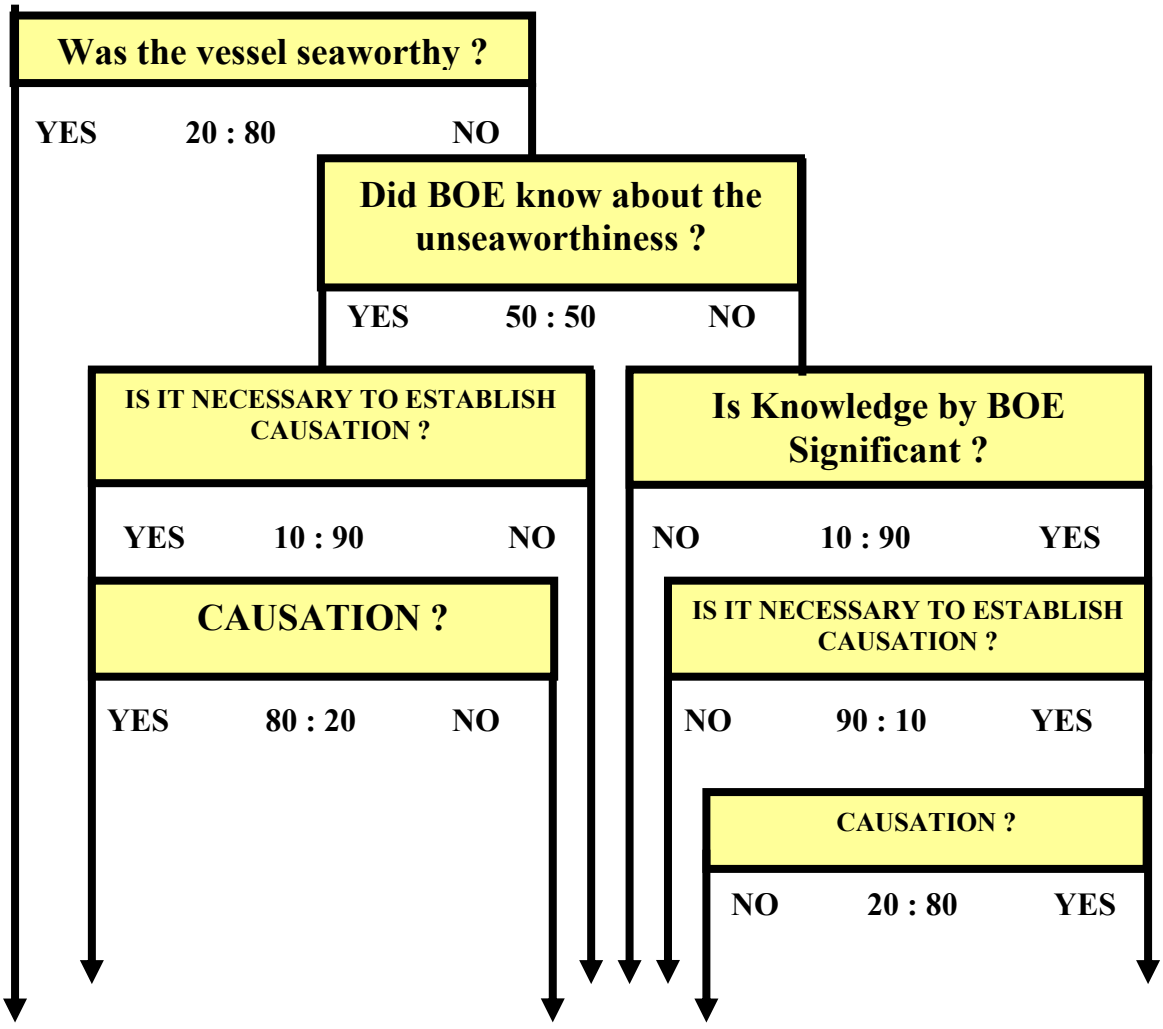
The figures generated in figure 6 can be fed into the decision tree cost analysis by either party.

Percentage down the total loss or gain figure and insert at the end of each branch.

If BOE wins its ultimate financial position will be X – W
IF BOE loses its ultimate losses will be X + W +Z

If TPI wins its ultimate financial position will be Z – Y
If TPI loses its ultimate loses will be X + Y +Z

Start



Percentage for Underwriter

3 £* 36 £* 4 £* 32.4 £* 2.88 £*

Percentage for Assured

20 £* 1 £* 0.72 £*

FIGURE 8 Converting the probabilities into a graph

Using a graph provides a very clear but direct way of illustrating the risks and costs involved in litigation. TPI sets out with a top side target of £Z-Y and a bottom side of X +Y + Z

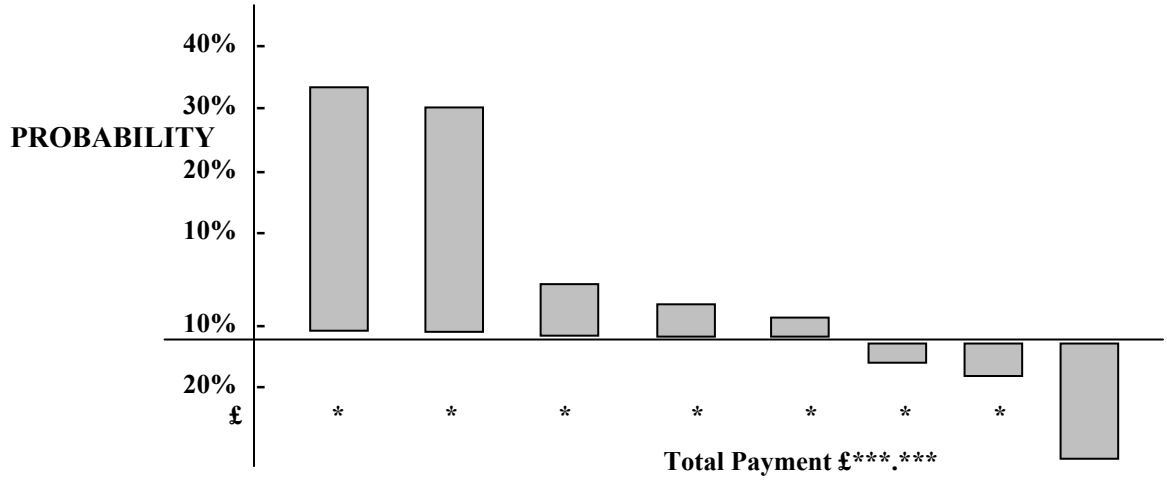


FIGURE 9 : The probability weighted average or "Expected Value"

By adding all the weighed probabilities of recovery together and subtracting the totaled weighted probabilities of expenditure the expected value of litigation, represented by the sum of the percentage value of each probability, can be generated.

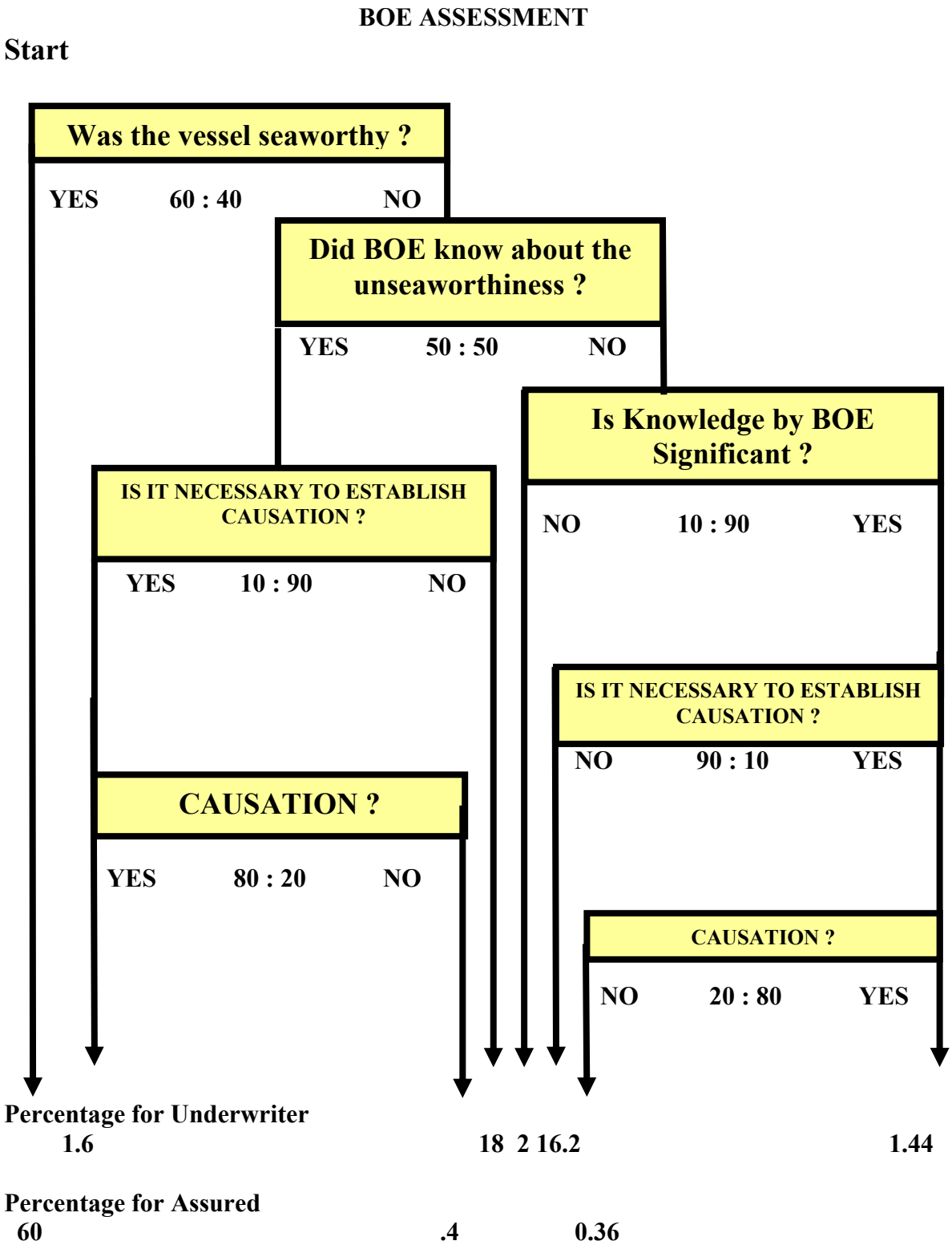
ADD				
£**	x	36%	=	£**.
£**	x	32.4%	=	£**.
£**	x	4%	=	£**
£**	x	3%	=	£**.
£***	x	2.88%	=	£**
SUBTRACT				
£**	x	20%	=	£**
£**	x	1%	=	£**
£**	x	0.72%	=	£**
TOTAL		**100.00%**	=	**£***.**

This is the optimum figure for a settlement for TPI Less would be a win : more would be the equivalent of a loss.

This evaluation process should be carried out by both parties. Since at the outset both parties anticipate success, it is hardly surprising that the figures imputed into the process will differ significantly from TPI. Thus, as demonstrated in the final diagram, figure 10, BOE's qualitative analysis would project a positive view of their probability of winning the action.

The difference between the two assessments will expose the gap that the mediator has to try and bridge. The task of the mediator is, by way of reality testing to, where appropriate, modify the evaluations of both parties in figures 5 and 9 so that the gap between their assessments of success and failure are narrowed as much as possible. If the gap is sufficiently small that it out weights the perceived risks of litigation for both parties a settlement is assured. However, if the perceived risks are not significant, in the absence of other extraneous factors such as the long term mutual benefit of maintaining the training relationship which outweigh the potential gains through litigation, a settlement will not be achievable.

FIGURE 10 **Win / Lose Decision Tree : Quantitative Analysis**



Probability assured's claim succeeds in court: 61 : 39 (60.76 : 39.24)

Conclusion

Given the assessment's of the parties at the outset, BOE the claimant assured predicts, in round figures, that there is a 61% chance of success. By contrast the defendant TPI predicts a 78% chance of successfully defending the claim. The scenario deliberately does not provide concrete figures for the claim and counter-claim, because an integral part of the live demonstration that will take place this afternoon requires each of the parties to put figures on their claims and counterclaims and to fix the figures at this stage would rob the demonstration of its vitality and immediacy. However, given the fact that the claimant is seeking to recover $42m for the lost oil, $8.4m insurance premium and $0.66m freight the global claim excluding litigation costs is $51.6m US.

The claimant started out with an expectation or Best Alternative To a Negotiated Agreement (BATNA) of $51.6m and a Worst Alternative To a Negotiated Agreement (WATNA) of $0.0 US. The defendant started out with a BATNA of $0.0 US and a WATNA of $51.6. This therefore results in an enormous gap between the expectations of the parties at the outset. However, if the parties are prepared to settle on the basis of their evaluation of the chances of success or failure then the BATNA figures of the respective parties become 78% of $51.6 and 39%, resulting in a divide of $39m - $20m. Whilst $19m is still a considerable gap between the expectations of the parties it is considerably less than $51.6. The gap may well still be too large at this stage to bridge but the task is immediately less daunting.

The risk assessment weightings put into each party's risk analysis are purely subjective. This is as much an art as a science. Different advisors might well input different figures, depending on the degree of optimism they have towards the outcome of the dispute based on their own professional experience. The task of the mediator would be too provide reality checks for both parties on their expectations, thereby reducing their probability assessments even lower in appropriate circumstances. If successful and taking into account the costs of litigation which are also at risk, it is often possible to narrow the gap between the expectations of each party to a level where the expectations either converge or the gap is so insignificant that the risks of trail no longer appear to be justifiable and a settlement then becomes probable.

It is not only the parties who should carry out such risk analysis exercises. Once a mediator has sufficient knowledge and understanding of the respective stances of the parties to be able to make an objective analysis doing so is valuable for the mediator. The analysis will give the mediator a target range for an achievable settlement that would be demonstrably reasonable for both parties. Any settlement within that range would be viewed as a WIN/WIN situation and the outcome of the mediation would thus be a quantifiable success. This is a tried and tested analysis process. As a mediator, the author has successfully predicted, with a very small margin of error, the final settlement figures of a large number of disputes before him at mediation.

This afternoon you will have the opportunity to see a live demonstration of a mediation of the BOE v TPI dispute, conducted by members of the panel. This should give you all a bird's eye view of the mediation process in action and demonstrate the way that both the mediator and the parties evaluate their risks and apply them to the dispute resolution process. Judge Richard Faulkner will act as mediator. Dr Susan Hodges will act as representative TPI and Professor Geoffrey M Beresford-Hartwell will act as claims adjuster for TPI. Corbett Haselgrove-Spurin will act as representative for BOS and Ernest Azad will act as the cargo owner claimant. The demonstration is completely unscripted. The panel members have the same information that you have been provided with. The question as to whether or not a settlement is achievable or not and if so what the terms of the settlement will be is completely open. I hope you enjoy the demonstration and learn a great deal about the mediation process from watching it.

Following the demonstration there will be an open panel discussion where you will have the opportunity to ask the panel questions about the settlement process and how the parties arrived at their final assessments of risk and why they adopted their final stances at the end of the process. [107]

Published by NMA UK & NADR UK Ltd. Registered Office, Stockland Cottage, 11 James St, Treforest, Pontypridd, CF37 1BU,
Tel : 0044 (0)1443 486111 : Fax : 0044 (0)1443 404172 : e-mail : The Editor@nadr.co.uk. Web-site : www.nadr.co.uk