ADR NEWS

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

ADR FORUM

UNIVERSITY OF GLAMORGAN

School of Law and School of Technology

Wales Branch | In association with the | Law & Technology

CHARTERED INSTITUTE OF ARBITRATORS

SPONSORING HOST'S WELCOME

Good afternoon Ladies and Gentlemen. Allow me to introduce myself. I am Professor Michael Stuckey, Head of Law here at the University of Glamorgan. It is my pleasure to once again welcome the Welsh Branch of the Chartered Institute of Arbitrators to the Business Centre at the University of Glamorgan, for the fourth annual ADR Day. This years theme, addressing the changing legal environment within which the legal profession operates both here in Wales and globally, is most apposite.

The Law School recognises that the Government is committed to the encouragement of diversity in dispute resolution provision and accordingly that ADR practice and procedure is becoming increasingly important for the legal profession and its clients. Glamorgan enthusiastically supports ADR training in South Wales.

You have a varied and interesting program lined up for this afternoon. The Law School thanks all the speakers for the time and effort that they have put in to preparing for today and for taking time out from busy schedules to be with us today.

Contents

Our own ADR guru, Corbett Spurin will talk to you about what mediation means in the context of court sponsored civil mediation, a theme which Paul Newman returns to in his paper on Managing Mediators, a copy of which is available for you to read later. Graham Ross will explore with you how to make the best of electronic communications for the settlement of disputes.

The Chartered Institute of Arbitrators has made much progress in recent years in developing niche markets for arbitration and the opportunities that these panels offer for local arbitrators, which Dr Mair Coombes Davies is presenting on is something that I am sure will be of particular interest to delegates.

The Construction Industry is important both for the University, in particular for the School of Technology, and for the future of Wales. With that in mind we look forward to hearing from Steve John, Derek Griffiths and Robert Shawyer, on specialist areas of construction contract management and the management of construction disputes.

Now allow me to pass you over to your Chairman, Corbett Spurin. I hope you all enjoy your visit to the University and go away reinvigorated to meet the new challenges that await in the coming year. I look forward to welcoming you all again to the University next year.

PANELS

M. Coombes Davies[1]. Chairman, Panels Management Group Working Party

Panels

1. The Chartered Institute of Arbitrators operates through the Panels Management Group (PMG) numerous arbitration, adjudication and mediation panels covering a wide area e.g., holidays, funerals, communication and internet services, personal injury, motor industry, landlord and tenant, finance and leasing, mortgages, coal mining subsidence, football league, marine, construction industry, solicitors, surveyors etc.

Panels Management Group

2. The historical role of the PMG is to:
   i. Establish lists and panels of experienced practitioners;
   ii. Provide for their appointment;
   iii. Establish procedures to enable them to carry out their professional duties;
   iv. Assist in supervising and monitoring members through an independent and impartial system.
3. The PMG is also responsible for conducting the final assessment interviews for Fellowship and Chartered Arbitrator status and for candidates seeking admission to the Panel of Mediators and the List of Construction Adjudicators.
4. The future role of the PMG has been greatly extended within the new Byelaws to include:
   i. The composition, operation and control of the Peer Review Panels and the Panel Appointments Certificate Scheme;
   ii. Advising and supporting the development of private dispute resolution schemes;
   iii. Advising on specific training or retraining.
5. The membership of the PMG is to be enlarged and restructured to include representatives from the worldwide regions to make the PMG fully global in its scope.

Worldwide

6. The Chartered Institute of Arbitrators has 7 regions covering 29 branches.. The regions are the UK, Australasia, Europe, East Asia, Africa, Middle East/Indian sub-continent and the Americas.
7. Many regions or branches currently operate or aspire to operate schemes or appointment systems which are unique to that particular region.

Questionnaire

8. For the PMG to undertake its future role effectively we wanted to understand what schemes or appointment systems each region or branch currently operates or proposes to operate in the immediate future, how practitioners are appointed and by whom. Also what are the standards the branch or region expects a practitioner who is appointed to achieve both in conducting an arbitration, adjudication or mediation and also in writing any award, decision, order or other document. We also wanted to learn about how the branches would like things to run, to receive suggestions not only for identifying and appointing suitably qualified practitioners but also for supervising and monitoring performance.
9. An unprecedented number of replies were received to the PMG Working Party consultation questionnaire which was sent to each of the regions/branches:
   i. 20 regions/branches have responded to the questionnaire[2]: Australia*, Channel Islands*+, East Asia, East Midlands, European, Lebanon, London, Malaysia*, N. America, North East, N. West, Nigeria*+, Scottish*, South East, Southern, Thailand, Thames Valley, Welsh, West Midlands and Western Counties. Generally, appointments may be made through branch chairmen, standards are indicated by the Institute qualification held by the practitioner and the maintenance of standards may include seminars, review courses and feedback.
   ii. 3 regions/branches who may operate or aspire to operate their own schemes did not respond: Bermuda (anecdotally, possibly 1 person appointing a small number to numerous arbitrations), Irish (anecdotally, possibly construction and travel schemes) and Kenya.
   iii. 6 regions/branches where the situation is not known: Bahrain, Cairo, Cyprus, East Anglia, United Arab Emirates and Zimbabwe.

Future Structure

10. The PMG Working Party in addition to consulting the regions/branches around the world considered and analysed numerous papers, reports and documents before making recommendations for the proposed future structure of the Panels Management Group. The recommendations were approved by the Board of Management.
11. The basis of the proposed future structure of the Panels Management Group is that it should be transparent. With this in mind the PMG Working Party recommendations cover procedures and a code of ethical practice and quality for identifying and selecting suitably qualified practitioners in each region for inclusion on the list of potential Peer Review Panel Members and for holding a Panel Appointments Certificate; the effective operation of the Peer Review

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[2] *Those which are making appointments are indicated *. Those which propose to operate a scheme in the immediate future are indicated +.*

Panels and Panel Appointments Certificate Scheme; the appointment of practitioners; overseeing branch panels around the world by supervising and monitoring performance through an independent and impartial system.

12. The recommendations are:

1. Current

1.1 The Institute move forward without the input of those regions/branches who did not respond to the PMG Working Party consultation questionnaire.

1.2 The PMG Working Party advise the regions/branches of such although their participation even at this late stage would be valued.

2. Ethics and Procedures

Ethics

2.1 The Practice and Standards Committee be requested to draft a modernised, '*Code of Professional and Ethical Conduct*', which clearly and simply states:

i. Key general principles.

ii. Specific requirements for:

- Arbitrators.
- Adjudicators.
- Mediators.
- Third party neutrals and experts.
- Those who hold appointing authority.
- Officers.

2.2 The above (other than the Specific Requirements for Officers) are placed in the public domain.

Procedures

The Guidance

2.3 The PMG Working Party be requested to:

i. Draft a single document the, '*Guidance*'[3], containing all relevant ethics, procedures and standards which would be available to all regions/branches and members.

ii. To revisit the existing base documents to ensure that they, '*read*', consistently for incorporation into the, '*Guidance*'.

2.4 The Director of Operations be requested to draft for inclusion in the, '*Guidance*' :

i. A description of the panel structures.

ii. A description of the appointment procedure operated by the Institute.

iii. A modified PACS to include arbitrators, adjudicators, mediators, third party neutrals and experts.

Peer Review Panel

2.5 Members of a Peer Review Panel should be selected / approved by the PMG on the basis of the criteria set out in the, '*Person Specification for Interviewers and Peer Reviewers*', (4 October 2004 as modified 2006, Veena Kanda).

Arbitrators

2.6 The peer review of an arbitrator be based on:

i. Feedback forms from appointing bodies or professional representatives of parties where appropriate.

ii. Annual CPD forms.

iii. Awards / orders / directions from a spread of at least three cases the arbitrator has conducted over the last 3/5 years.

2.7 The Peer Review Panel have power to act appropriately in all the circumstance where any document requested for the review is not available.

[3] *Working title.*

2.8 The Peer Review Panel may interview an arbitrator.

2.9 The Peer Review Panel have power to set up appropriate remedial action for an arbitrator.

Adjudicators

2.10 The peer review of an adjudicator be based on:

i. Feedback forms from nominating bodies or professional representatives of parties where appropriate.

ii. Annual CPD forms.

iii. Decisions and directions from a spread of at least three cases the adjudicator has conducted over the last 3/5 years.

2.11 The Peer Review Panel have power to act appropriately in all the circumstance where any document requested for the review is not available.

2.12 The Peer Review Panel may interview an adjudicator.

2.13 The Peer Review Panel have power to set up appropriate remedial action for an adjudicator.

Mediators

2.14 The peer review of a mediator be based on:

i. Feedback forms from nominating bodies, parties or their professional representatives where appropriate.

ii. Annual CPD forms.

iii. Evidence provided by the mediator of practice from a spread of at least 3 mediations the mediator has conducted over the last 3 / 5 years.

The Peer Review Panel have power to act appropriately in all the circumstance where any document requested for the review is not available.

2.15 The Peer Review Panel may interview a mediator.

2.16 The Peer Review Panel have power to set up appropriate remedial action for a mediator.

Panels Appointment Certificate

2.17 A list of those holding a Panel Appointments Certificate is placed in the public domain.

3. Panels Management Group

3.1 The Board of Management consider appointing all the members of the PMG from among volunteers drawn by the Institute from its global membership.

3.2 To encourage development and transfer experience and information of panels management in an open and transparent manner throughout the Institute, the membership of the PMG should meet the following criteria:

i. At least 50% should be drawn from England and Wales as this is where all current knowledge resides.

ii. The remainder should reflect the different jurisdictional, cultural and regional interests of the Institute with each current region being represented by at least 1 member.

iii. Include the conveners of the main panels of the Institute, where appropriate those of the regions/branches and DRS panel structures and DRS.

iv. Overall the complete membership of the PMG should provide an appropriate reflection of all the primary disciplines within which the Institute operates i.e. arbitration, adjudication, consumer and commercial adjunctions, and mediation.

Timetable

13. The recommended future structure has been communicated to the regions/branches for the second written consultation. In **November 2006** it will be presented to Congress for oral consultation. Based upon the responses received from these consultations the recommendations will be reviewed.

14. By **1 January 2007** it is anticipated the new structure including the, '*Guidance*', will be brought into operation, the PMG Working Party having been tasked with their implementation.

"DOES CMR MEAN ADR?"

Is Case Management Resolution < than, = to, or > than Alternative Dispute Resolution?

by Corbett Haselgrove-Spurin.

INTRODUCTION

The South and West Wales Court mediation service was launched in Cardiff in November 2003 by Lord Falconer of Thoroton, the Lord Chancellor. Almost three years hence and despite the fact that in excess of 100 disputes have been channelled towards mediation by the local bench, it would appear that some District Judges on the South Wales circuit are of the opinion that, with regard to lower value civil claims in particular, [4] court based mediation is superfluous, particularly since the reforms brought about by the Civil Procedure reforms have produced an efficient, cost effective civil court system that in their view provides its clients with a first class "*one stop shop*" dispute resolution service.[5]

There is a degree of impatience amongst members of the bench with the number of judicial training courses that have focused on mediation. There is a feeling that ADR has been done to death by Her Majesties Court Service and the Department of Constitutional Affairs. Any assumption that the judges do not possess sufficient knowledge of and or fully understand the importance and value of mediation is resented. Some go further and assert that District Judges routinely "***mediate***" between the parties during case management, often successfully, leading to the resolution of disputes through inter-party settlement agreements. Accordingly, they are of the view that outside mediation offers little or no added value for the court's clients and worse, that recourse to mediation invariably leads to increased costs and potential delay. Many legal practitioners concur with these ***views***. The track record for court based mediation in South Wales does little to dispel these views. It would appear from information available to the court mediation steering committee that in excess of 25% of the disputes were settled by mediation. Whilst some cases were discontinued, a number of others settled before or after mediation. Nonetheless, a sizable number in the region of 40-50% were returned to the court listing.[6] Care should be taken not to read too much into such figures. Whilst at first sight it would appear that the statistics raise questions about the effectiveness of the court mediation service, they reveal nothing about the nature of the disputes referred and whether or not mediation was the most appropriate vehicle for their resolution in the first place, which is not likely to have been the case at least in respect of those cases that were ultimately withdrawn.

Whilst some support for pro-bono mediation was evident from the bench, there was little evidence of confidence that the mediation community could or would provide such a service. The mini half hour mediation concept operated elsewhere outside the Principality did not appeal either, being dismissed by one senior member of the bench as a "*denial of justice*," on the basis that the time scale was too short to lead to a consensual settlement of the dispute, the implication being that the mediator shaped the settlement and coerced the parties to accede to the proposed solution. This was perceived of as a poor substitute for the "*high quality*" adjudicatory service that the District Judges consider they provide to the court's clients.

The issues :

There are two distinct and separate, albeit interrelated, issues here. The first concerns whether or not case management and mediation are interchangeable. The second relates to the question whether or not mediation has anything of value to contribute towards the settlement of low value civil disputes.

ISSUE 1 : DOES CASE MANAGEMENT SUBSUME MEDIATION?

The courts ascribe legal meaning to words. They have the authority to do so. We have to accept their definitions since the courts then apply those meanings during the course of judicial proceedings. Paraphrasing Humpty Dumpty, `*When the court uses a word …. it means just what the court chooses it to mean -- neither more nor less.*' Here however, the assimilation of case management and mediation is taking place outside the court room, not during proceedings, leaving us happily free to challenge the assertion.

Are we being presented with an upside down Alice in Wonderland World, one where adjudication and mediation are indistinguishable and where the judge vacillates between his true magisterial being and an intermediary alter-ego? How could this possibly be the case? After all, did not the TCC in ***Glencot v Barrett***[7] make it clear that it was of the view that there is a strong potential of prejudice within the adjudicator cum mediator arrangement, to the extent that outcomes would be considered unsafe by the courts in the absence of informed consent to exposure to risk of prejudice. With that

[4] This article is not concerned with Family Mediation, about which the concerns expressed by some members of the judiciary were or a quite different order and nature. Contrary to the views gleaned from meetings with District Judges in South Wales about small civil claim mediation, the same judges expressed approval of community and social mediation in respect of disputes that do not fall naturally or easily within the remit and jurisdiction of the civil courts. Indeed, mediation was perceived of as a useful vehicle to get rid of what were considered to be "*nuisance*" cases. Equally, the same District Judges expressed the view that mediation has a valuable role to play in respect of higher value / complex disputes, offering the potential for timely settlement of disputes, cost savings and the avoidance of protracted civil trials.

[5] Similarly, in respect of the view that the TCC now represents the ideal forum for the settlement of construction disputes see the comments of Mr Justice Jackson in ***Machenair Ltd v Gill & Wilkinson Ltd*** [2005] EWHC 445 (TCC) at paras 56-61.

[6] The brief records maintained by the Civil Justice Centre, which are not generally available, are not complete and it is not possible to produce from them a statistical analysis of the success or otherwise of the South and West Wales court mediation service.

[7] ***Glencot Development & Design Ltd v. Ben Barrett & Son Ltd*** [2001] EWHC TCC 15 per HHJ Humphrey Lloyd. The court considered that the impartiality of the adjudicatory process could be prejudiced by any exposure to unproven assertions of the type common in mediation, much of which might be inadmissible at trial. Further, whilst it is possible for an individual to possess the necessary skills to serve either as a judge or a mediator in respect of distinct and separate disputes, to attempt to make the necessary switch in mindset in mid-stream is considered by some commentators to be fraught with difficulties, in that it requires the mediator cum adjudicator to seamlessly move from one set of objectives to another without confusing the means involved in achieving either objective.

warning in mind, the TCC mediation panel[8] has taken clear steps to construct a Chinese wall between the trial judge and the mediating TCC judge.

The explanation lies in contextual uses of terminology and mixed metaphors which lead to conclusions which, reinforced by grains of truth, act as a barrier to the development of effective strategies for dealing effectively with low value disputes. Firstly ADR is here equated with mediation and secondly ADR is used in two distinct and separate ways. The Civil Procedure Rules refer in section 1 to recourse to "***An ADR***", which confusingly is not the same thing as ***ADR*** as in Alternative Dispute Resolution.

First, mediation is one of the alternative processes used to bring a dispute to an end. It is however only one of many alternatives. It is not the only game in town, even when ADR is limited to negotiated settlement processes as opposed to all alternatives to the judicial process. It is not satisfactory to assimilate mediation and ADR since this gets in the way of drawing distinctions between mediation and the other dispute resolution processes embraced by the term ADR such as conciliation and early / expert evaluation.

Second, ADR is commonly used as an alternative to the judicial process whereas "***An ADR***" is used in the context of the Civil Procedure Rules as any "*alternative dispute resolution procedure*" that the court feels is appropriate to the task of case management. Thus the overriding objective of the Civil Procedure Rules is stated to be to enable the court to deal with cases justly. This is to be achieved by case management. Section 1.4(2) of the Rules goes on to specify [*with emphasis on (e) and (f)*] that active case management includes -

- *(a) encouraging the parties to co-operate with each other in the conduct of the proceedings;*
- *(b) identifying the issues at an early stage;*
- *(c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;*
- *(d) deciding the order in which issues are to be resolved;*
- ***(e) encouraging the parties to use an alternative dispute resolution (GL) procedure if the court considers that appropriate and facilitating the use of such procedure;***
- ***(f) helping the parties to settle the whole or part of the case;***
- *(g) fixing timetables or otherwise controlling the progress of the case;*
- *(h) considering whether the likely benefits of taking a particular step justify the cost of taking it;*
- *(i) dealing with as many aspects of the case as it can on the same occasion;*
- *(j) dealing with the case without the parties needing to attend at court;*
- *(k) making use of technology; and*
- *(l) giving directions to ensure that the trial of a case proceeds quickly and efficiently.*

The courts have further developed the concept of case management beyond the overriding objective of dealing with a case justly, to embrace efficiency in achieving closure. In ***Cowl v Plymouth***[9] Lord Woolf stated that "*The courts should … make appropriate use of their ample powers under the CPR to ensure that … parties try to resolve the dispute with the minimum involvement of the courts. ….. the parties should be asked why a complaints procedure or some other form of ADR has not been used or adapted to resolve or reduce the issues which are in dispute.*" Note that the scope of the ADR procedures the parties should have recourse to is widely drawn embracing even complaints procedures, and secondly the objective is stated to be to resolve or reduce disputes, in order to achieve the minimum involvement of the courts. It is not surprising therefore that District Judges, with regard to the other specified matters, namely (a)-(f) and (j)-(l) see part of their management role as helping the parties to broker closure and not simply as preparing for and managing the trial process. Rather, if carried out successfully there is every chance that a trial might be avoided, if the parties can be persuaded or guided towards a settlement.

The similarities between the objectives of case management and mediation are striking, namely persuading or guiding disputing parties to a negotiated settlement. Further, if one looks at the case management "tool kit" and compare it with the mediator "tool kit" further striking similarities are evident. Both encourage co-operation between the parties; identify issues; priorities issues; establish the running order etc. There is virtually nothing between (a)-(l) that any mediator would not identify with. The mediator, just like the judge, will seek to case manage from referral all the way through to the end of the mediation, drafting and signing of the settlement agreement. It only takes a short but fatally flawed leap in logic to conclude that case management and mediation are one and the same.

Distinguishing features between judicial case management and mediation.

Hearings **:**

An important difference, though one that on paper is not immediately apparent, is that the mediation process "***involves the parties***" and a "***hearing***" (even if it is a virtual hearing in the case of on-line mediation) whereas whilst District Court case management may involve a meeting of the parties, their solicitors and the judge in chambers, this is not the norm. It is more likely that only the solicitors would attend a meeting in chambers (or take part in a telephone-conference) and more often than not the management process will be conducted entirely as a paper process. The similarities between case management and mediation immediately start to evaporate. The general and specific pre-trial protocols set the scene for subsequent case management. Where for instance the construction protocol applies (*in general construction*

[8] See www.hmcourts-service.gov.uk/docs/tcc_court_settlement_process.pdf

[9] ***Cowl (Frank) v Plymouth City Council*** [2001] EWCA Civ 1935

disputes involve higher value claims), attendance of both parties and representatives is mandated but this is not a requirement in respect of the general protocol most applicable to lower value claims.

The general protocol encourages communication between the parties and then by contrast to construction, 4.7 specifies as follows : - *The parties should consider whether some form of alternative dispute resolution procedure would be more suitable than litigation, and if so, endeavour to agree which form to adopt. Both the Claimant and Defendant may be required by the Court to provide evidence that alternative means of resolving their dispute were considered. The Courts take the view that litigation should be a last resort, and that claims should not be issued prematurely when a settlement is still actively being explored. Parties are warned that if the protocol is not followed (including this paragraph) then the Court must have regard to such conduct when determining costs.*

It concludes by directing the reader to ***The Legal Services Commission*** booklet, '***Alternatives to Court'***, CLD Direct Information Leaflet 23, which lists a number of organizations that provide alternative dispute resolution services. Clearly the protocol envisages ADR as something quite distinct and separate from the case management role performed by the judge.

Authority versus respect :

The judge is by virtue of his standing automatically accorded authority and respect. At the end of the day, the judge will settle the matter if the parties fail to do so themselves. The parties are well advised to pay close attention to anything the judge says, particularly regarding any indication of likely outcomes and prospects. These will give an indicator of what the parties should pay most attention to as potential roads to success and correspondingly factors which are likely to be a lost cause. The only time counsel might chose to flog an apparently "*dead horse*" is if that is the only game in town and to do so could pave the way for an appeal which would be pre-empted if one conceded by default.

By contrast, the mediator has no inherent authority and has to earn the respect of the parties, though prior reputation will assist. The mediator has no power to impose outcomes on the parties. The extent to which a mediator will venture an opinion varies from those who will never do so, via those who will if both parties agree, to those who see it as their job to provide a considered evaluation of each party's prospects or even to second guess what the court would do if the case proceeded to trial. How much attention the parties will pay to any evaluation depends on the degree of respect and belief they have in the opinions of the mediator.

To sum this up, the judge is essentially inviting the parties to consider whether or not they think they can persuade the judge to alter his initial opinion based on their statements of case and skeleton arguments, whereas the mediator is inviting the parties to consider whether or not they think they could successfully persuade the court to reach a different outcome to that which the mediator deems to be likely. It would not be unreasonable to imagine that a party might fancy its chances far more with the second than the first.

Private and shared communications :

Anything an adjudicator says to one party must be communicated to the other. All parties must have an opportunity to consider and respond to anything that is said and done before a tribunal. A failure to do so opens up any decision to a charge of breach of due process. By contrast, the private session/caucus is a standard feature of commercial mediation. The mediator is constrained from communicating anything learnt in a private session to the other party in the absence of express authority to do so. The rationale here is that this enables the mediator to brainstorm options with each of the parties without either prejudicing their position. Any idea, however absurd can be floated like a trial balloon and rejected out of hand if it does not find favour. The mediator can play devil's advocate without putting either party's head on the line, since they only have to respond to the mediator and not to the other party. Nor do they have to respond to the satisfaction of the mediator since the mediator does not have to be persuaded.

The mediator acts as a diplomatic communications corridor between the parties, but does not act as an advocate for either party. In so doing the mediator may temper a message, putting it in a less confrontational manner than a party might if communicating directly, but a mediator does not have to be convinced of a message in order to convey it. It is dangerous for a mediator to omit to communicate a message sent by one party to the other, even if the mediator feels the message is unhelpful, since the sender will act on the assumption that the message has been delivered and if no rebuttal is forth-coming is likely to assume that the message has been taken on board. The problem will then come back into focus when drafting the settlement order if crux of the message is to be included in the settlement terms, since for one party it is now a done deal, whereas for the other it is at best unfinished business or worse is something which had not even been put on the table.

There is a fuzzy edge between the expressing of an opinion and communicating the other party's bottom line. There is little difference between "*the best you can expect today is £x*" and "*£x is their final offer – take it or leave it*", but there is no requirement to opine that "*£x is a good (or bad) deal*" or even to express a personal opinion as to whether or not the mediator considers that it might be worthwhile to take the risk of hanging out for more. This is the time when a party has to put his hand up and be counted, to decide whether to go for what is in hand or to hang out for the glittering but potentially illusive prize that litigation offers. If a mediator commends an offer at an early stage, or where the mediation has made little or no progress in narrowing down differences, there may be a perception of bias. However, if the offer is the end result of compromise on both sides after extended mutual hard bargaining the mediator may well form a balanced view of what is on offer. There is a danger however that the mediator's view is coloured by a sense of progress towards the settlement goal rather than on the value to the respective parties of the offer. Even if it is the best

that might be hoped for on the day does not mean it represents a "Win/Win" situation. Contrary to the jargon commonly promoted about mediation, mediation can and does produce "Win/Lose" outcomes.

To sum up, any brainstorming before a judge has to be done by hypothesis since everything is conducted in on open forum. This is a delicate if not tedious process, but to concretize would run the risk of concessions which would become final and hence impossible to row back from. The judge is limited in case management to encouragement of the parties to settle, based on what the parties have proposed to put to the court. By contrast the mediator can canvass with ease avenues for settlement that are beyond the scope of the judicial case management forum.

Barter-bank :

A court will oft times act as a reservoir for payments in, Part 36 CPR settlement offers from either party, whilst open offers, Calderbank offers, with or without prejudice to costs, lurk in the fore or back ground. Open offers apart, whilst the judge may well be aware that settlement offers have been made, detail will remained concealed from view until judgment is passed and attention is turned to costs. For the judge during case management, all will remain to play for. By contrast, since the parties will be privy to all offers and counter offers, the mediator will be fully aware of the current state of play, which will thus define the differences between the parties that the mediation seeks to bridge. The "*cost card*" impacts upon both case management and mediation but in different ways. It is only in mediation that it is addressed head on.

CONCLUSION TO FIRST ISSUE.

Whilst case management and mediation share some common objectives, whatever else is involved in case management, it is not mediation. Its remit and modus operandi are quite distinct and different. The mediator's authority is less than that of the judge, but the mediator's scope and range is more extensive. Case management is not a substitute for mediation. Case management is free standing. Mediation may complement and assist it. As exemplified by the many recommendations of the Court of Appeal, where following a successful appeal the court sends a case back to the court of first instance for re-trial before another judge, with a recommendation that the parties first attempt to mediate a settlement, mediation can if successful pre-empt a retrial and hence obviate the need for case management.[10] Similarly, despite granting leave to appeal, the Court of Appeal frequently invites the parties to first attempt mediation.[11] Again, it is evident that the Court of Appeal considers that mediation is a distinct and separate process to case management.

ISSUE TWO : THE VALUE OF MEDIATION IN THE SETTLEMENT OF LOW VALUE DISPUTES.

A). Introduction : Background to Court based mediation.

The court based / promoted mediation cause is well advanced in the UK. Her Majesties Court Service has thrown all its might and support (if not its cash) at promoting mediation as an additional service available to its clients. The objective is that mediation will be available to every litigant in every civil court throughout the land, whether the claim be small, modest or large.

The appointment process under the HMCS court mediation scheme.

Driven forward initially by a small band of mediation enthusiasts, with different schemes in different courts, Her Majesties Court Service is gradually homogenizing the process, with the assistance of the Civil Mediation Council. The only obvious exception to the model is the Manchester Scheme presided over by a member of the court staff.[12] Otherwise, where mediation is advised or requested, from the 1st October 2006 appointments will be channelled through the Mediation Helpline, which will then pass applications onwards to mediation nominating bodies registered with HMCS.

HMCS has established 43 mediation centres to cover the whole county. CEDR, the ADR Group and the Chartered Institute of Arbitrators are registered in all 43 centres. Other providers (there are 15 other registered providers at the present time) operate at a more local level, ranging from a single to 8 regional centres. It is notable that a number of the most prestigious international mediation service providers in the City of London have not yet registered, which is an indicator that these organizations do not perceive court based mediation as being central to their business. In order to be listed by HMCS the mediator nominating body must first successfully apply for accreditation with the Civil Mediation Council and then demonstrate local capacity to HMCS.

Current CMC accreditation requirements (*note these are in the process of being amended*)

7. The characteristics to be examined by the CMC in the pilot scheme when assessing a candidate provider are broadly:
   (a) **Adequate mediator training** - the method by which the candidate has and will continue to admit mediators to membership of its panel, list or group: this includes the minimum training requirement it sets for candidate members, the means by which it assesses whether that training is sufficient and whether the candidate has a sufficient understanding of role and duties of a mediator to be appropriate for admission. The CMC has based its initial criteria on practice within the civil mediation community in the UK and abroad but will refine and may revise its requirements in due course following research work to be conducted in parallel to this pilot scheme on the effectiveness of mediator training, performance and outcomes.

[10] Eg. ***Burne v A*** [2006] EWCA Civ 24.
[11] Eg. ***Crowther v Brownsword*** [1998] EWCA Civ 1040.
[12] The Courts Service is planning a major expansion of in-court mediation by April 2007 as part of a drive to cut the number of defended small claims. The service is to set up nine more pilot court-funded mediators – probably located in the larger courts – on the same lines as that operated at Manchester County Court. The mediation will be free to the parties involved, meaning the only costs for parties would be the initial court fees. The Law Gazette. 14th September 2006.

(b) **Code of Conduct** – whether the provider has instituted or adopted, and implements, an appropriate Code of Conduct for its members to follow: the CMC endorsed and adopted the EU Model Code of Conduct for Mediators in 2004 and expects that the Code should be embraced by an accredited mediation provider.
(c) **Supervision and Monitoring** – the means by which the provider provides adequate and appropriate supervision, mentoring, monitoring and pupillage for its mediators; the provider's CPD policy and programme or requirements; the scheme the provider adopts for handling complaints and feedback; and the opportunity for peer review.
(d) **Insurance** – whether the provider can demonstrate that it has adequate insurance in place for the activities it and its members undertake.
(e) **Efficient administration** – whether the provider can demonstrate that it has a suitable and sufficient efficient administration proportionate to and for the work and workload it undertakes, including the handling of enquiries, the recording of calls, the accurate accounting for fees and the proper rendering of bills to the consumer.
(f) **Allocation of mediators** – the method by which the provider can demonstrate that it ensures (save where the parties decide their own choice of mediator) that an appropriately trained, experienced and skilled mediator is allocated to each case with which it deals.

8. In order to be qualified at the inception of this programme a provider must meet the following minimum requirements:

A. Mediator Training

(1) An Accredited Mediation Provider's mediators must have successfully completed an assessed training course.
(2) That course must include training in ethics, mediation theory, mediation practice, negotiation, and role play exercises.
(3) If the mediator is not professionally qualified in a discipline which includes law, the mediator must demonstrate a grasp of basic contract law.
(4) Performance during or on completion of training must be assessed.
(5) The training course will include not less than 24 hours of tuition and role-play followed by a formal assessment.
(6) An Accredited Mediation Provider will also be expected to require its mediators will be required to have attended at least two mediations as an observer before acting as the appointed mediator.

B. Code of Conduct

(1) An Accredited Mediation Provider must have an appropriate written Code of Conduct for its members to follow.
(2) That written code must be no less rigorous than EU Model Code of Conduct for Mediators published in 2004.

C. Complaints Handling and Feedback

(1) An Accredited Mediation Provider must have in place a written complaints handling procedure and keep written records of any complaints.
(2) An Accredited Mediation Provider must have a feedback system under which it invites, receives, assesses and reviews, internally and with the mediator, comments by the parties and their lawyers in respect of mediations.

D. Insurance

(1) An Accredited Mediation Provider must either provide or require mediators to obtain and provide evidence of professional liability insurance cover of not less than £1,000,000.
(2) Where mediators are doing work involving sums exceeding this amount, an Accredited Mediation Provider must have appropriate insurance cover in place and be able to provide evidence of the same.

In April 2006 HMCS issued National Mediation Helpline Provider criteria, but has subsequently withdrawn them. HMCS also revised its "Mediation Toolkit" but again this is not currently in the public domain. Nonetheless, the stated strategy appears to be to encourage local provision, but with a limit of 4-5 providers at each centre up to a maximum of 8 in London. It is thus envisaged that each area will have a localized nomination provider approved by the CMC. It is less clear how the Court of Appeal mediation service fits into this scheme, but presumably it does so through the registered London providers.

Does court based mediation offer value for money in respect of low value disputes?

The current rates for mediation through the Mediation Helpline are as follows :-

"Dispute	*Fees*	*Time allowed*
Claim under £5,000	*£250 (each party to pay £125) + VAT*	*2 hours*
Claim between £5,000 and £15,000	*£500 (each party to pay £250) + VAT*	*3 hours*
Claim between £15,000 and £50,000	*£750 (each party to pay £375) + VAT*	*4 hours*

For claims above £50,000, the fee would have to be agreed with the mediation provider.

Additional Costs : *Parties should try, where possible to provide a suitable venue for the mediation. If a venue has to be hired, the costs of the same are to be paid by the parties."* Note that whilst some court centres provide free accommodation this is not always the case.

The above of course does not represent the full costs of the mediation, since the parties will also have to fund the costs of representation. Assuming that there is the facility to extend the time allocated for mediation (which might not be the case, particularly where the court centre provides accommodation), the costs would also rise pro-rata for any additional time unless waived by the mediator. It is not uncommon for a mediation to resume at a subsequent date, allowing the parties time to sleep on the matter. This can happen where the mediation runs out of time or alternatively, where having had time to reflect on their position, an obdurate party subsequently seeks to return to the mediation table, having initially rejected what was on offer.

What does mediation bring to the dispute resolution table?

There is something satisfying about parties co-operating together to resolve their differences. It speaks of maturity and mutual respect which is conducive to future cooperation and the maintenance of relationships, which is desirable both socially and commercially. By contrast, in adjudication respect is accorded to a third party who imposes outcomes that are more likely to drive the parties further apart, leading to distrust and resentment. It is easier to blame the referee than one's own team for its shortcomings. All of this is all very well and good but is based on the assumption that relationships are worth preserving. Where this is not the case, it needs to be demonstrated that the other potential benefits of mediation over litigation are sufficient to justify resort to it in lieu of litigation.

An important commercial driver of mediation is the potential of cost savings. Examples abound of the cost savings of mediation compared to the costs of a major, extended trial. Indeed, the costs issue tends to play a central role in settlement negotiations, since potential litigation costs that are not recoverable can be set off against real loss or gain. Such irrecoverable loss may be substantial, particularly in terms of manpower, lost opportunities and cash flow. This leads into the other important driver, namely prompt and timely settlement. A mediation can frequently be put in place long before a case is scheduled for a hearing. The mediation is likely to be concluded in a relatively short period of time. A single day will often suffice.

However, when viewed from the perspective of low value dispute resolution, the bread and butter of the District Court, the cost/time saving benefit of mediation is much less apparent. First, once a party has paid the filing fee (see chart below) for a dispute below the small claims track threshold, there is nothing more to pay and nothing to be saved by settling out of court as opposed to going through the trial process and final determination by the judge whereas mediation will cost each party an additional £125 plus VAT. Whether or not the National Helpline Service can deliver a more timely mediation is another matter, but at best when the District Courts are regularly hitting their 11 week target and frequently beating it, any time saving is likely to be modest. Nor is the duration of the mediation likely to be shorter than a court hearing since it would appear that 1 hour 45 minutes is the average trial time before the District Court. Thus there are virtually no savings to be made on representative costs if the case settles. By contrast, if it does not settle the client's bill could virtually double, especially if the clients have to pay for the venue.

High Court and County Court Fees: Includes Small Claims Court : As From 10th January 2006

Money Only Claim or Counterclaim		
Claim	**Fee**	**Money Claim Online**
Amount claimed is up to £300	£30	£20
Amount claimed is between £300 and £500	£50	£40
Amount claimed is over £500 but not over £1,000	£80	£70
Amount claimed is over £1,000 but not over £5,000	£120	£110
Amount claimed is over £5,000 but not over £15,000	£250	£240
Amount claimed is over £15,000 but not over £50,000	£400	£390
Amount claimed is over £50,000 but not over £100,000	£700	£690
Amount claimed is over £100,000 but not over £150,000	£900	
Amount claimed is over £150,000 but not over £200,000	£1,100	
Amount claimed is over £200,000 but not over £250,000	£1,300	
Amount claimed is over £250,000 but not over £300,000	£1,500	
Amount claimed is over £300,000 or not limited	£1,700	
Application for Summary Judgment	£60	
Claim other than money	£400	
Allocation Questionnaire Fee	£100 County Court £200 High Court	
Application Notice	£65 County Court £100 High Court	
Without Notice Application	£35 County Court £50 High Court	
Filing Proceedings against party not named in original proceedings	£50	

Judges' Fees

For every day or part of a day (after the first day) of the hearing before:
a) A judge of the commercial court - £1,800
b) A judge of the technology and construction court appointed as an arbitrator or umpire - £1,400

Two things are evident from the above. Firstly, that the potential savings from mediation are directly proportionate to the value of the dispute and secondly, that the Court Service has introduced a paper only internet dispute resolution

service[13] which involves cost savings both in terms of the filing costs, and in terms of representation since the parties can complete all the paperwork themselves, though no doubt there are times when clients may seek legal assistance. Whilst limited to money claims, it is submitted that mediation has little to offer someone who can avail themselves of this service.

Other and further costs that a party contemplating mediation in lieu of litigation are set out below.

Trial Fee

Listing Questionnaire	£600 High Court
Multi-Track Cases	£500 County Court
Fast-Track and other cases (excluding small claims track cases)	£275 County Court
County Court Application for permission to appeal	£100 County Court £200 High Court
Appeal Notice	£120 County Court £200 High Court
Appeal Questionnaire (Appellant)	£400
Witness Summons	£35 County Court £50 High Court

Where any of the above might be needed in furtherance of a trial costs continue to spiral. In such circumstances, the prospect of avoiding such costs where there is a realistic chance of brokering a mediated settlement, make the process increasingly attractive.

Enforcement

Attachment of Earnings	£65
Application for Charging Order	£55 County Court £100 High Court
Warrant for Recovery of Land / Property	£95
Warrant of Execution / Possession / Delivery	where the amount less than £125 - fee is £35 where the amount is over £125 - fee is £55
Application for 3rd party debt order	£55
Application for order that debtor attend court for questioning	£45 County Court £50 High Court
Warrant of Delivery	£95
Reissue Warrants of Execution, Delivery or Possession	£25
Judgment Summons	£95
Debtors Bankruptcy Petition	£150
Creditors Bankruptcy Petition	£190
Petition to wind up a company	£190
Certificate of discharge from bankruptcy	£60
Further copies of discharge cost per copy	£1
Appeals	£100 £200 (Court of Appeal)
Application to register a judgment or summons	£50
Certificate of Satisfaction	£15

Mediation : Structured settlement and insolvency.

The costs involved in bankruptcy proceedings represent but one factor that needs to be taken into account. The other is the potential recovery that might follow from such a petition. Evidently, a creditor has little option where administration is instigated by the debtor. However, where administration is threatened by a debtor or is the likely consequence of litigation, any victory enjoyed by a creditor may well prove to be empiric. Administration is not something that should be taken lightly and is best avoided by any debtor if an alternative strategy can be developed. Mediation has much to offer in the situation where a debtor would like to pay but is not currently in a position to do so, particularly if the premature demise of a business before the realization of prospective windfalls. Whilst a court award might not be immediately available or realizable by a successful litigant, it may be possible through mediation to broker structured payments over a period of time, or even for the creditor to take a stake in the business of the debtor, turning the debt into an investment. Whilst it is not possible to get "*blood out of a stone*" it may be possible to turn seemingly difficult if not impossible situations to one's advantage.

[13] https://www.moneyclaim.gov.uk/csmco2/index.jsp

B). Independent / pre-filing Mediation :

It should not be forgotten that mediation may also be free standing. It does not have to operate in the shadow of case management. Mediation is quite possible without the filing of suit. Indeed, the same District Judges who have serious misgivings about court based mediation are of the view that mediation should take place before suit is filed. Two questions arise. Firstly, is independent mediation value for money for low value disputes? and secondly, how can a market in mediation independent of the court be established?

1. The value of self standing mediation for low value disputes.

It is unlikely that mediation can compete with fast-track litigation on price alone, as noted above. Furthermore, if the mediation fails and the dispute then goes to court, the recourse to unsuccessful mediation will have resulted in additional expenditure. The value of self standing mediation lies therefore not in cost, but in added value. First, the parties remain in control of the outcomes, taking an active part in shaping them, leading to a sense of fairness that is shared by both parties. The same cannot be said of litigation where hard and harsh outcomes are not uncommon. Second, the earlier a mediation takes place the better, since a negotiated settlement is far more likely to be brokered at a stage when the parties positions have not yet hardened. It is possible to arrange a mediation at a very early stage as a substitute for the extended period of time of exchange of letters between solicitors in the run up to litigation. In such circumstances mediation can result in very timely and prompt resolution. Third, where the prospective protagonists have continuing relationships, as in landlord and tenant, utility provider and client, employer and employee etc, a mediation which minimizes antagonism between the parties is beneficial to the maintenance of long term relationships.

The advantages of mediation in clarifying issues and resolving satellite disputes even where the main dispute is not resolved, which lead to cost savings in the subsequent trial are well known. However, the value of this aspect of mediation grows proportionately with the value and complexity of a dispute and has little relevance to low value disputes.

The conclusion is that whilst mediation has distinct advantages over litigation, it is not clear that all low value disputes would benefit from mediation. Where one of the parties needs to a legal precedent to guide future commercial conduct mediation is not ideal. Where one of the parties is not prepared to contemplate compromise mediation is unlikely to work. Where both parties want "an answer" litigation is ideal. Mediation should be used where both parties will benefit from the "added value" set out above.

2. Establishing a mediation market independent of the court.

The problem here is working out how to inform potential litigation partners of the existence and or value of mediation and persuading them to exhaust that avenue of settlement first. In most cases this would require the intervention of solicitors in the absence of an ADR provision governing the relationship between the parties, a route paved with more good intentions than reality at the present time.

Mediation facilities are advertised in many court buildings. Where a court sends out an information pack to potential clients, the parties can be averted to the value of mediation before filing. There is a chance that the applicant might then invite the other to mediate and that the other might accept the invitation. However, if the first introduction to mediation for a client is a brochure in the court house, collected on the way to file a claim, it is unlikely that the applicant will change course at that late stage.

If a solicitor is handling a case, mediation is likely to depend on whether or not the solicitor commends that course of action to the client, as opposed to merely inviting the client to consider mediation to ensure that the client can reassure a judge, if asked pursuant to 4.7 of the General Practice Direction to provide evidence that alternative means of resolving their dispute were considered. The low level of mediation referrals pre-filing is indicative of an absence of enthusiasm for civil mediation (with the exception of Family Mediation) within the broader ranks of the legal profession. This cannot be because solicitors are not aware of the existence of or the asserted benefits of mediation. Mediation has been widely promoted to the profession over the last 15 years and most solicitors will have taken part in at least one CPD mediation program. The conclusion must be that solicitors in general do not value mediation as a beneficial service for their clients or perceive mediation as not being in their own best interests. Whether or not this should be the case however, is a matter for consideration at another time.

If self standing mediation is the way forward, the key to expanded take up must lie in client awareness campaigns. If clients made it clear to their solicitors that they wished to engage in mediation in lieu of litigation, the profession would quickly embrace the process and fulfill the role of client representative / advisor. Equally, if ADR became a common feature of general contract documentation, self standing mediation would become the norm. Whilst various of the ADR service providers have targeted specific industries and activities (e.g. pet care, travel and landlord & tenant etc) there is no obvious candidate to provide the pump-priming finance for such an advertising campaign. The ADR providers have not sought to reach out to the general public. The potential returns on such an investment are far too uncertain to commend such a course of action. It appears highly unlikely that the legal profession would mount such a campaign given its evident antipathy to the process. Perhaps what is needed is a government sponsored TV advertising program to promote mediation to the general public as a viable alternative to litigation. As will be demonstrated below this does not appear to form part of the current ADR development strategy being pursued by the government through Her Majesties Court Service. Indirect public exposure to the mediation concept through TV documentaries and mediation based story lines in popular sitcoms and soaps such as Coronation Street and East Enders could do much to promote general public awareness of the process.

In the UK mediation is wedded to the main stream mediation service providers, who act both as a quality assurance and regulatory mechanism and as mediator nominating body. By contrast, whilst court appointed mediation and mediation service providers are common features, there is also a vibrant market in private mediation practice, whereby specialist mediators advertise their services and parties who have agreed to mediation approach the mediator of their choice directly. Alternatively, if approached by one party, a mediator will approach the other party, often successfully, with an invitation to mediate. Since overheads are less and the costs of a mediation service provider are avoided such services tend to be cost effective in this competitive market and speedy. This market is only possible because there is a high degree of awareness and understanding in the general public about the value of mediation and the advantages that it offers over litigation. Whether or not such a market could be realized in the UK is another matter.

The drivers behind mediation in the US are quite distinct and it would be a mistake to imagine that mediation can achieve the same degree of take up in the UK since the reasons for its success are not replicated here. "*Doing a deal*" is part and parcel of the US psyche, which means that the public is more susceptible to the mediation concept. The US citizen has far less expectations of the state in terms of education, health care and social services. Thus the concept of self help and getting on with things and making the best of a situation is far stronger. All of this has contributed to the development of the mediation market in the US. Furthermore, the civil trial is a far more elaborate affair in the US, involving juries. The process is potentially intimidating for litigants, making informal alternatives much more attractive. Mediation if it is to grow in the UK it will be necessary to identify and promote its unique selling points over and above what is provided by the UK courts. Rather than reaching out to the general public, it is likely that future growth will come out of the further development of niche markets.

CONCLUSIONS.

Mediation provides a viable method of dispute resolution. In appropriate circumstances mediation can be very cost effective. It also has many additional attributes over and above those offered by litigation. It is particularly suited for the resolution of larger scale domestic disputes and even more so for international disputes, since it can overcome many of the conflicts of laws barriers. Mediation is very useful for class actions and multi-party disputes. It also has a useful role to play in Family, domestic and social dispute resolution. All that apart however, it is far from evident that mediation is either efficient or cost effective for the resolution of low value disputes that can be dealt with quickly and efficiently by fast tract procedures, particularly where the mediation is conducted at the behest of a District Judge post filing of fees.

If the commercial mediation community and HMCS consider that there is a valuable role for mediation to play in respect of such disputes, it is submitted that there is the need for a major rethink about how to realize that objective.

One pointer towards a potential way forward lies in the on-line adjudicatory service provided by HMCS noted above. It may be possible to develop on-line small claims mediation facilities which could be promoted by HMCS in addition to the current Mediation Helpline services currently on offer, provided the main-stream mediation providers such as CEDR, The ADR Group and the ClArb were willing to take the initiative and set up such a service. The advantages lie in that such a service could be very cost effective. No accommodation is required. The parties could participate from their own computer terminals. Organisations such as ***The Mediation-Room***[14] provide the soft ware for on line mediation, so the means of providing such a service exist. Such a mediation may be conducted in real time or over an extended period of time as messages are sent back and for between the parties. Such a facility could prove to be very attractive for the parties since it would not impact adversely on work commitments. One further advantage for such a scheme would be that it would provide an opportunity for newly qualified mediators to gain invaluable experience, which at the present time is not readily available, given the small numbers of low value disputes that are currently dealt with by mediation.

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[14] www.TheMediationRoom.com.

DISPUTE RESOLUTION BOARDS AS ONE FORM OF ALTERNATIVE DISPUTE RESOLUTION ("ADR")

1. INTRODUCTION[15]

What I have to say on the subject of ADR is set in the exclusive context of disputes in the construction industry. My position has been shaped by more than 25 years of having practised law at the coal face as in-house counsel, firstly, to domestic and international contractors, and then to an employer of international contractors and consultants on a very large scale. More recently, this experience has been supplemented by my consultancy work.

As a result my attitude and this paper is informed more by what the "participants" (some might call them protagonists, so notorious is the bracketing of disputes and the construction business) are looking for in a construction dispute resolution process, than might be the case with some of my co-speakers, who might lean more towards finer points of law or jurisprudence.

However, I think I can safely say that we would all agree with the view expressed by Lord Justice Dyson in ***The Eversheds Lecture 2000*** [16] that perfection in any system of justice is as unattainable as it is in any human endeavour. This is as true of the approach to construction contract claims and disputes and their resolution by dispute boards as it is for any other means of trying to avoid disputes or resolving them.

All we can realistically achieve is incremental improvements, recognising that there will be possible set backs if some parties resile from the agreements they have made, or seek to challenge the outcomes of those agreements if they do not like them as history teaches us that they do from time to time. It is these cases which create the headlines and the continuing interest in subjects like this one. The millions of construction projects, small, medium and mega which go on smoothly all around the world without ever hitting the headlines are taken for granted; they make poor copy.

The noun "participants" means more than just the parties to the contract. It includes consultants such as architects, engineers, quantity surveyors, project managers and, increasingly, financiers, who constitute the movers and shakers of construction contracts and, therefore, of the type and forum of dispute resolution to be used, or should do.

In the world of finance, for example, in the international field (where I have experience) the multi-national development banks such as the World Bank, and its off-shoots, and the European Bank for Reconstruction and Development have a big say in the forms of contract to be used. As we shall, see these financing institutions have embraced the idea of dispute resolution boards.

Beyond going along with the one provided by the chosen particular standard form of contract, it has been my experience (drawn from both sides of the construction industry) that when parties and their non-legal advisers are asked to consider the form of dispute resolution to be agreed before a contract is made one is met by an air of general indifference (the issue is too far into the future), dismissed as a negative pessimist (why raise problems before anything happens and where is your faith?) or receives a stock answer.

The stock answer is a string of sound bites such as "we are looking for a cost-effective, user-friendly process, which provides a 'win-win situation' and keeps 'the lawyers, out "; the last element (lumped together pejoratively as a class with no distinguishing features) being seen as a pre-requisite of all the good things which precede it.

The good news, for those who push any thoughts on the subject into a seemingly distant future, is that in this country, and a few others like it around the world, legislation has (without them having to think too much about it) provided them with a tool as far as disputes arising under statutorily defined construction contracts are concerned. I am, of course, speaking of adjudication and the legislation as far as this country is concerned is the Housing Grants, Construction and Regeneration Act 1996 ("the Act")

The good news for 'the lawyers' is that, in those cases where push has come to shove (especially expensive shove) parties have become protagonists and the partnering / alliancing marriage is in trouble, their services are as much in demand as they ever were either in the adjudication process itself or in its aftermath. I am aware of two cases where this is true of dispute resolution boards as it is of other forms of ADR, arbitration and litigation, but, as will be seen, the preferred type of board will bring one advantage the others do not have. The resort to lawyers in matters of contract disputes should not surprise those who think about it. After all contracts, even those concerning ADR, need the sanctification of the law to distinguish them from mere gentlemen's agreements, whose weakness is exposed when the parties to them cease to be gentlemen.

The good news for the better lawyers, and others who think about these things in greater depth, and who have an appreciation of jurisprudence, is that many of the issues which continue to raise their heads in the ADR era are concerned with natural justice, perceived and actual bias, conflicts of interest, jurisdiction and the like, concepts which are learned at the cradle of law schools.

2. WHAT IS A DISPUTE RESOLUTION BOARD?

The first thing to say is that, unlike court litigation, which is a process of the state, the existence of a dispute resolution board, and the type it takes relies entirely on the agreement of the parties who chose to establish it for their purposes.

This means that provided the agreements do not offend the law in any way (for example, by being illegal, or being regarded as an attempt to oust the jurisdiction of the court)

[15] This paper has been produced in the very short time available to me since I volunteered to speak on this subject. A fuller history of the origins and evolution of the dispute resolution board process can be found on the website of The Dispute Resolution Board Foundation Inc www.drb.org. A more detailed outline by Peter H.J.Chapman can be found on *www.fidic.org/resources/contracts/docs/chapman_25Feb04.rtf* A paper by Robert Knutson is recommended reading, for a longer historic, and a more erudite juridical, examination of the process amongst the other tools developed by we humans to deal with the disputes which have been with us since we first emerged as a species and which are unlikely to disappear any time soon. See www.robertknutson.com/downloads/Dispute_Adjudication_Board-paper Nov 2004.doc

[16] Volume 66 Number 4 November 2000 The Journal of The Chartered Institute of Arbitrators.

a dispute resolution board can be whatever the parties agree it should be.

Further, (with one caveat if the support of the law is sought and is to be given) a dispute resolution board can do whatever it is the parties agree it can. The caveat can be summed up by a need for due process or adherence to the rules of natural justice.

3 THE GENEALOGY OF DISPUTE RESOLUTION BOARDS

Just like the blues, rock and roll and Bruce Springsteen, the concept of the dispute resolution board was born in the USA, as was partnering with which it is very often bracketed. More particularly, it was born in the heavy construction industry of the USA.

The first recorded sighting of it as a process (before a name, and the ubiquitous acronym, became attached to it) was in the 1960s on the Boundary Dam and Underground Powerhouse in Washington State. Here the Owner/Employer was already involved in lengthy, expensive and messy litigation on another project.

Seeing that the Boundary Dam was in danger of going the same way, it suggested to the Contractor that they should each appoint two members to a body called a joint consulting board with a view to avoiding that happening. It seems that the objective was achieved by a mixture of the board making recommendations regarding conflicts on the site and the contractor's claims and their streamlining several administrative procedures on the project.

The result was that relations between the Contractor and the Owner were improved, several claims were settled and those remaining after the job was finished were resolved without litigation. It is suggested that there were heavy overtones of partnering here comparable to the concept of the partnering adviser in the ACA Standard Form of Contract for Project Partnering and possibly to the concept put in place in South Africa dealt with in section 5 of this paper

The first generally recorded use on a project of the type of body to which the acronym DRB (standing for Dispute Review Board at the time) would become attached was after the publication in the USA in 1972 of a report called Better Contracting for Underground Construction. The report was the result of the study undertaken by the U.S. National Committee on Tunneling Technology, Standing Subcommittee No.4 into contracting practices around the world. The project in question was the second bore of the Eisenhower Tunnel in Colorado, the construction of the first bore between 1968 and 1974 having been a financial disaster.

The use of a DRB on the second bore successfully averted a repeat, and another ADR process was launched into the world. Surprisingly perhaps, the next take-up of a body bestowed with the acronym DRB was not in the land of its birth, but in Honduras on the El Cajon Hydroelectric Project. This represented its first step into the international construction market place. From there it has mutated into different forms of body, spread into different parts of the world and a non-profit making organisation which promotes its use was established in 1996.

Originally called the Dispute Review Board Foundation Inc,. the organisation has been re-named as the Dispute Resolution Foundation Inc ("the DRBF").[17] This re-naming recognises the growth of forms which resolve disputes by adjudicating and making decisions on them, as well as those which review them and issue recommendations about how to resolve them. As a result, the acronym DRB has come to stand for Dispute Resolution Board, and, except where the context otherwise requires, that is what it stands for from this point in this paper.

4 PERSONAL INVOLVEMENT WITH DRBs

My first experience of the process was on the Channel Tunnel, where it followed Jack Lemley's team across the Atlantic, into the structure of the Contractor, and the Bechtel team into that of the Employer. It is public knowledge that the relationship between the parties on this contract was stretched to almost breaking point. It was evidently felt that the injection of a process similar to what had worked on mega-projects in the USA might improve things or at least prevent a very messy parting of the ways. The parties agreed to set up a Dispute Review Panel consisting of a French Professor of Law and four Engineers to deal with disputes and breaking point was averted. However, unlike the American approach, this body was vested with decision making powers.

My next involvement was on Phase 1A of the Lesotho Highlands Water Project ("the LHWP"). When I arrived in Lesotho in November 1994, as the construction specialist lawyer to the Lesotho Highlands Development Authority ("the LHDA"), I found that, following some American missionary work, a three-member Dispute Review Board had been established for the Katse Dam (a 189m high double curvature dam) contract and another for the contracts to drive hard-rock tunnels(of a total length of about 90 kilometres) through the massif of the Lesotho Highlands by tunnel-boring machines ("TBMs"). One of the tasks I had was the analysis of these Contactors' claims and contributing to the preparation of the LHDA's case before the DRBs on those which were disputed.

All this construction was being carried out on the Lesotho side of the border with South Africa. However, as the water harnessed by the LHWP was ultimately destined for that country, some tunnelling and associated work had been contracted for on the South African side of the border. I played no part in the South African side of the project. However, I became aware that the arrangements for dealing with claims and disputes there differed in type from those prevailing in Lesotho.

Simultaneously with handling claims on Phase 1A, I was involved in drawing up tender documents for Phase 1B of the LHWP. These included the documents for the construction of a 145m high dam, a 32.5kilometre hard rock tunnel by TBM, a weir and another 6.5 kilometre tunnel by drill and blast methods. This called for a policy decision over whether to adopt a DRB on these contracts. After considerable debate on, and reservations by some about, the merits of doing so after Phase 1A, it was decided to do so subject to a changed DRB specification, which I drafted to deal with what were perceived to be flaws in the Phase 1A agreements.

[17] For those who are interested the DRBF has a website which can be visited (www.drb.org) It also has a quarterly publication, the Forum on which it claims that its mission is "Fostering Common Sense Dispute Resolution Worldwide"..

5 TYPES OF DRB. After-the-fact DRBs

Those who practice across the spectrum of dispute resolution processes will appreciate that most of them amount to an after-the-fact (very often long after-the-fact) process in which each party tries to re-construct what has happened in the past to suit its own position, the third party must try to obtain an understanding of what has happened and either decide which party's presentation is to be accepted or how best to try to bring them to an agreement by which the dispute will be resolved. This is as much a feature of the non-adjudicative ADR processes such as conciliation, mediation and early-neutral-evaluation as it is of adjudication, arbitration and, of course, court litigation.

It is also a feature of the standard forms of dispute resolution agreement produced by the Federation of International Consulting Engineers ("FIDIC") in its Conditions of Contract for Plant and Design-Build ("the Yellow Book") and its Conditions of Contract for EPC/Turnkey Projects (" the Silver Book").

It will inevitably also be a feature of any process which is introduced after the project has commenced, the lack of contemporaneousness depending on when the DRB is established relative to the commencement. Further, it will be a feature even if the DRB is established upon or very near to commencement if the DRB does not keep abreast of the history of the project by way of regular, periodical reports between periodic, say quarterly, visits to the seat of work to see for itself how it is progressing.

Apart from possibly having someone of the parties own choice, with specialist knowledge of the subject, and that would be possible even when a dispute has already arisen, I cannot see that a DRB which is limited in any of these ways is providing any more than any of the other after-the event processes.

On the contrary, it has all the weaknesses of such a process. In short it does not live up to the DRBF's aspiration of common sense dispute resolution in any part of the world.

In fairness, it must be pointed out that the DRBF does not favour this form of DRB, and, although its opinions and those of its individual members are not infallible, I they think that the DRBF are right not to favour it.

6 Early-appointed-DRBs and their varieties

These are the types of bodies which, more or less, have in common the simple description of a DRB provided by the DRBF. That is, "it is a board of impartial professionals formed at the beginning of a project to follow construction progress and available at short notice to resolve disputes for the duration of the project." See the DRBF Practices and Procedures Manual, Chapter 1-1.

Although, as previously mentioned, they have much in common, these types do differ in a variety of ways and have a variety of strengths and weaknesses. This section of the paper discusses the variety and the relative merits of them.

"In-house DRBs" This is a self-coined label which you are unlikely to come across in any other work on the subject of DRBs. It refers to those arrangements where the Owner/Employer and the Contractor agree that they should establish a body made up of the great, the good and, therefore, it is thought, the impartial of their organisations and of that of the Contract Administrator (for example, the Engineer) to the Contract, where there is one, to oversee the project, and to bring balmy light, objectivity and rationality, where there is only heat subjectivity and irrationality, to head off disputes or to resolve those which escape the first attempt. I present two case studies of this type of DRB.

Case Study No.1 A fuller account of this case study is provided by Loots and Fraser's paper "Alternative Dispute Resolution in Practice in South Africa", published in the DRBF's Forum July 1999. It is, of course, the example mentioned earlier taken from the South African side of the LHWP. The authors explain that the Trans-Caledon Tunnelling Authority or TCTA (the LHDA's counterpart on the South African side of the Caledon river) departed from the norm [in the USA], as subsequently adopted by the LHDA.

The TCTA had opted to form a three-member body made up of senior directors. One from its own organisation, one from that of the Contractor, and the third from that of the Engineer. The individuals chosen had to be demonstrably remote from the project and given decision making powers. Of course, remoteness is necessary to provide aloofness from the emotions and personality clashes which can very often plague projects; sometimes understandably so given the rigours and complexities very often associated with the construction process. The structure was seen to be cost-effective and sufficiently objective to provide rational and contractually sound engineering solutions to disputes as part of what, they call, the FIDIC amicable settlement requirement.

Things worked out satisfactorily on the other side of the Caledon with this model, but almost presciently in the light of Case Study No.2, the authors recognised that this type of arrangement might be insufficiently robust if it did not work, before going on to set out the arrangements adopted on the Lesotho side of the river by the LHDA.

Case Study No.2 This case study has been reverse-engineered out of the Bailii reports about the goings-on between Carillion and Royal Devonport Dockyard under a modified NEC2 sub-contract. As we all know, by way of early warnings and the like, this form of contract is intended to sort out problems before they become disputes. This is to be done by resorting to modern, best-practice management techniques. However, the advocates of the form know human nature well enough to expressly provide for independent dispute resolution, and not simply rely on the Act to fill the gap; which might not be applicable should the project turn out to be not a construction contract.

In addition to the sub-contract, the parties simultaneously entered into an Alliance Agreement which supplemented, and in part, superseded the sub-contract. One of the expressly stated objects of the Alliance Agreement was to promote partnering and harmonious relations between the parties, who, having excluded their relationship from a long list of those legally recognised, agreed that each of them would exercise control, management and direction of their activities so that they were carried out for the common good of the Alliance parties and the sub-contract works. Presumably with those laudable declarations in mind, and recognising that even with the best intentions disputes could arise(particularly over the meaning of the declarations if they had to be put to the test) the Alliance Agreement also provided that disputes would be referred to an Alliance Board and, if necessary, to a body (strangely in a

partnering arrangement) called the Star Chamber. It is understood that each body consisted of senior officers of the parties, and of increased seniority on the latter.

That the disputes between the parties occupied the time of an adjudicator appointed under the Act on two occasions, and that of the TCC and of Court of Appeal on a number of other occasions is evidence that the impartiality of the members, which I am sure they had every intention of bringing to the process, dissolved under the competing financial interests of their constituents and the result fulfilled the caveat made by Loots and Fraser.

The missing ingredient in the TCTA and Dockyard arrangements was independent members, whose impartiality would not wilt according to either party's financial interests; or at least it should not if the members are people of integrity, which must be assumed unless the contrary is proved. The impartiality of an independent DRB is underpinned by it being an agreed joint appointment. This applies as much to, say, a three member DRB, as it does to a single member DRB.

Given the history of the project post-contract formation, the Dockyard arrangements do not seem to have been cost-effective. For that, and other reasons dealt with later, it might have made more common sense to have appointed a body of independent people along the lines of the arrangements made by the LHDA, which occupied the remainder of Loots and Fraser's paper and was commended by them. These arrangements were based on what is now called the American Model.

The American Model and its Derivatives ("the DRB")

The general feature which distinguishes this group of models is that at the end of the process of considering any particular dispute (whether after an oral hearing or written exchanges) the DRB makes non-binding written recommendations of how the parties should resolve the dispute. The recommendations are accompanied by reasons of why they should do so.

This group can show variations made to meet the circumstances of the case. For example, on both phases of the LHWP, where the contracts were governed by modified versions of the FIDIC 4 Conditions of Contract, the DRB was only shifted into dispute resolution gear after the disputes had first been referred to the Engineer and one of the parties had given notice of its intention to refer the dispute to arbitration. That notice triggered the involvement of the DRB, and was considered to form the first, and additional, part of the amicable settlement period which must elapse before any arbitration, for which a notice of intention to commence has been given, can actually commence.

As amicable settlement negotiations are intended to be non-disclosable, and as the DRB's proceedings and recommendations would be part of them, the DRB agreements for Phase 1B made the proceedings and the recommendations expressly non-disclosable in any subsequent arbitration of disputes not resolved by them. This is not the case in the American Model, the DRBF recommends disclosure and the LHDA provision of non-disclosure has met with some criticism. However, the specification which included it was commended by Loots and Fraser (who had no hand in drawing it up) as representing possibly the most comprehensive and effective, if somewhat over-specified, system by 1999.

Other features built into the Phase 1B specification which do not appear in the basic American Model, and did not appear in the Phase 1A specification, included a provision which made the recommendation final and binding unless a notice of dissatisfaction with it was given within the specified period.

It also vested the DRB (without prejudice to a party's rights to challenge it later) with the power to decide whether a dispute had arisen for the purposes of establishing its jurisdiction, rather than have people travel from half way around the world to try to resolve things only to find that a party's opening shot is that there was no dispute on which they could deliberate, and, therefore, no jurisdiction in the DRB.

You will recognise this syndrome, together with the gallons of ink which have been poured on reams of paper generating hundreds of court hours about it, as more and more infinite hairs are split over whether the animal before the tribunal was or is a dispute or not. I would suggest that any such arguments are a sign of a party playing for time. Furthermore, a dispute about whether there was or is a dispute is a sure sign that there either was or is or, if not, there will be one very shortly.

The ICC has also developed a form along the lines of the American Model, as one of the three optional specifications of what it calls Dispute Board Rules, that it has made available to the international business community since 1 September 2004 as an alternative to its well known Rules of Arbitration. I am referring to the Dispute Review Board ("DRB") rules of the ICC as compared with its Dispute Adjudication Board ("DAB") rules. I do not think there is any more to be said about these ICC DRB rules by themselves.

However, this is a convenient place to remind ourselves that the ICC serves the entire international business community and not just its construction arm. One might expect, therefore, the expansion of the dispute resolution board process of any stripe, which has already started out of construction into other forms of business; some still linked to the initial construction of a facility by way of a long term concession to run it, and others which are not, to grow apace.

The Dispute Adjudication Board ("DAB")

In this paper the distinguishing feature of a DAB is that it adjudicates and reaches a decision on the disputes brought before it, rather than makes a recommendation about how the parties should resolve them and why. As far as I am aware this form of dispute board is not used in the USA, its inspiration, in my opinion, has the same source as adjudication under the Act and the specifications identified below have a lot of features displayed by the Act, the scheme and, indeed, the Arbitration Act 1996.

If one brackets the DABs accepted by the Multi-national Development Banks with those catered for in the FIDIC Conditions of Contract for Construction ("the Red Book") currently there are three standard specifications for DABs. They are the specification set out, or incorporated by reference, in Clause 20 of the Red Book (which is mandatory unless amended by a Particular Condition) and those provided, as already mentioned, by the ICC and, more recently, by the Institution of Civil Engineers ("the ICE") each of which is only applicable if the parties agree to adopt it.

In keeping with the acknowledgement given to FIDIC in the publication containing them, the ICE DAB specifications have a great deal in common with those of FIDIC. The ICE offers two DAB specifications. One is intended to be Act compliant, to be used on disputes arising under the construction contracts which are within the ambit of the Act. The other is intended for disputes on international contracts and for contracts in this country which fall outside the ambit of the Act.

The material difference between the specifications is that by being incorporated into the contract, the first sets out to meet the requirements of the Act as they are set out in subsections (1) to (4) of section 108

The requirements of section 108 (2)(a),(b),(c) and (d) are met by Clauses 4.1, 4.2 and 4.5 of the specification. The first enables a Party to give notice at any time of his intention to refer a dispute adjudication.. The DAB already being in place, and having been agreed in Clause 8.1 (4) to be the adjudicator where the Act applies, the second provides that the Party which issued it shall within 7 days of the notice refer the dispute in writing to each Member of the DRB for its decision, with copies not only to the other Party, but also to the contract administrator. The third provides that within a period of 28 days after receiving such reference, or within a period of 42 days, with the consent of the referring Party to an extension of 14 days, or such other period as may be agreed by both Parties the DRB shall give its decision, with the additional requirement that it shall be reasoned.

The duty of impartiality is imposed on the DRB, as required by section 108 (2)(e), by Clauses 9.2 (1) and 10.5(a) of the specification. Clause 10.8(d) empowers the DRB to take the initiative in ascertaining the facts and the law and any matters required for a decision as required by section 108 (2) (f).

The agreement that the decision is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement required by section 108 (3) is met by Clause 4.6 of the specification.

The requirement of section 108 (4) that the adjudicator is not liable for anything done or omitted in the discharge, or purported discharge, of his function as adjudicator unless the act or omission is in bad faith is met by Clause 9.4 (3) (d) as far as the adjudicator is concerned. However, the protection is not extended to an adjudicator's agents or employees. This being so, by reason of subsection (5) of section 108, the Scheme will apply. In these circumstance, unless the parties submit to it for the intrinsic benefits it brings (dealt with later in this paper) it is difficult to see how Alternative 2 can work as intended, even though the DRB will have been agreed as the adjudicator where the Act applies. A surer way forward would be for the parties who wish to use Alternative 2 to extend the protection afforded by Clause 9.4 (3) (d) to the DAB's agents and employees by express wording.

Leaving aside the other features it has which are common to most forms of dispute resolution boards, the substantive centrepiece of the DAB process is the decision and its important spin-offs. Aside from differences of Clause numbers and details of wording, the DAB specifications referred to above provide that: the DAB's decision is provisionally binding, the parties will promptly give effect to it, until and unless it is revised by one of the processes previously mentioned, it will become final and binding unless one of the parties gives a notice of dissatisfaction with it within a specified time limit and that where the forum of final resort for the dispute is arbitration neither party shall be entitled to commence arbitration unless it has within, the required time, given notice of dissatisfaction with the decision, or with the DAB's failure to decide the dispute within the time frame required by the Act (where it applies) or by the particular DRB specification.

7 WHAT IS COMMON SENSE DISPUTE RESOLUTION?

In keeping with what Lord Justice Dyson said in The Eversheds Lecture, we must recognise that common sense dispute resolution cannot mean perfect dispute resolution; to think otherwise would be to defy the commonsense espoused by the DRBF.

As it stands today, my opinion of what is commonsense dispute resolution for construction disputes has been more than 30 years in the making, and it is still open to adjustment in the light of experience. My present opinion is that of a construction professional, who, for most of those years, practised law from the inside on both sides of the industry alongside construction professionals of other disciplines.

Acknowledging that it is no more than opinion, in this section I lay out the matters which must be recognised before it can be claimed that a particular dispute resolution process is imbued with commonsense. They are as follows:

a) Some of the parties who sign up to the process will try to slip the moorings if the outcomes are not to their liking. Although adjudication under the Act is irrevocably implied into construction contracts in the United Kingdom, and although, in the main, the parties have abided by them, adjudicator's decisions have come before the court in a growing number of cases. In the majority of those cases the court has given short shrift to the arguments put forward for not abiding by the adjudicator's decision.

   However, there are cases where the court has ruled against the enforcement of such a decision. This is not because the adjudicator was wrong on the facts or the law; that is dealt with the right questions but came up with the wrong answers. Rather, the successful resistance to adjudicators' decisions has been on the basis of such thing as lack of jurisdiction (including not answering the right questions or failing to address all the questions required to be to decided) or failures of due process required by the rules of natural justice

   Interestingly the jurisdiction of the same adjudicator to whom Carillion referred two disputes on separate occasions in the Dockyard case had his jurisdiction challenged on each occasion for lack of jurisdiction. The first challenge, which was based on a variation to the contract (not of the Works) not being in writing, as required by the Act, was successful. The second, which was based on allegations that the adjudicator acted in excess of jurisdiction and in breach of the rules of natural, justice was not.

b) Following on from the first matter, it must be recognised that, like it or not, disputes concerned with contracts, or duties created by other, non-contractual, provisions of

the relevant law of obligations, are matters of law, as are the agreements about how they are to be resolved and that knowledge of the law is indispensably a part of participating in the process.

c) That knowledge shows that the law and commonsense are not strange bedfellows. Indeed Lord Coke, the seventeenth century Lord Chancellor of England, claimed that the common law of England is but common sense. That claim is borne out by the case law in the areas which, more often than not, form the bedrock of most construction disputes. They are contractual terms and their construction and cause and effect and its proof. I offer a small selection of adaptations made for this paper from the judgements of express or inferred references to common sense.

i If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to the business common sense. Lord Diplock in ***Antaios Compania –v- Salen A. B.*** In the business of construction add the word "construction".

ii The way in which documents … are interpreted by judges is to apply common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of legal interpretation has been discarded. Lord Hoffmann in ***Investors Compensation Scheme-v-West Bromwich Building Society***.

iii On what Lord Justice Lloyd called the "***the crucial question of causation"***, in ***McAlpine Humberoak-v-McDermott***, Byrne J, in ***John Holland Pty Limited-v-Kvaerner RJ Brown Ltd,*** said that " *questions of causation must be treated by the application of commonsense to the logical principles of causation*".

iv Questions of remoteness or causation have to be answered, not by the logic of philosophers, but by the common sense of ordinary men. Lord Justice Stephenson in **Knightley-v-Johns**.

v An ordinary man is not to be taken as the man in the street unless he is also an informed in the matters which have to be considered. Thus, in a construction dispute the test of causation or remoteness would be what view an informed person in the construction industry would take, without too much microscopic analysis but on a broad view. His Honour Judge Bowsher QC, in ***P&O Developments Limited-v-The Guy's and St Thomas' NHS Trust***.

vi The court should adopt a sensible and pragmatic view in matters of causation. The context in which the view is formed is the realities of the construction site, but mere common sense cannot supplant proof, which to be effective needs to be at least adequate. His Honour Judge David Wilcox QC in ***Skanska Construction UK Limited-v-Egger Barony Limited ("the Egger case")***. Context, of course, is also relevant to the construction of contracts and so the span of subjects prone to dispute opens and closes with the use of common sense.

d) Without the need to have any legal pronouncements on the subject it is also a matter of common sense that the amount of resources devoted to, and money spent on, any given dispute must be proportionate and that only the parties can ensure that to be the case. It is for the parties to carry out for themselves the cost benefit ratio analysis of any particular course of action before they set out on it and at all points along the way, just as it is with any kind of investment.

e) Again without the need for any legal pronouncement, it makes common sense that, provided the costs warrant the benefits, the closer the dispute resolving body is to the facts as the story unfolds, and the wider the range of experience and skills it has to deal with the issues which might arise (as far as they are sensibly foreseeable) the better.

8 DO DISPUTE RESOLUTION BOARDS MAKE FOR COMMON SENSE DISPUTE RESOLUTION?

My answer to the question is set out in section 9 of this paper but before it can be answered the question must be set in some in some context and be made subject to some provisos.

The context is one of comparison with other forms, and between the various forms of dispute resolution boards which have emerged to date, as far as they are known to me.

The provisos include the statement that, as with all consensual arrangements, the parties will do their utmost to make them work and that members of any particular board will do everything possible to retain the confidence of the parties and, quite importantly, that of their professional advisers of all disciplines which are part of the dispute resolution mix, accepting that, as with all human endeavour, some serious difficulties might arise amongst all the participants in the process, and not just between the parties, along the way.

The provisos also include the fact that, with one or two exceptions (which I shall not go into here) as far as I am aware the process itself has not been tested before the court of any jurisdiction, nor have any decisions which have been made by a board with decision making powers. For what it is worth, the way I read Robert Knutson's paper the portents for supporting the concept and its outcomes are good.

Comparison with other forms.

I include in these forms in-house boards, even though, unlike the others, they have the merit of contemporaneousness. I also include after-the-event boards, even though they might bring more technical expertise, than might some of the other fora, coupled with the complementary legal expertise.

I think the fact that Carillion had to resort twice to adjudication, and that after that the matter went on to the court, in itself speaks for the weakness of good intentions of impartiality without independence of in-house boards.

The description "after-the event" speaks for the weakness of boards of that stripe. As previously mentioned it is a weakness shared by other after the event fora including the court. The weakness is that it is not able (if only from the sidelines, and with the joint assistance of the parties) to follow the action of the project as it unfolds in the field, nor is it able, (if only within agreed limits), to actively intervene to head off disputes, or to passively defuse them simply by

the prestige of its presence as a referee who might never have blow his whistle.

Subject to the provisos concerning cost, party commitment and forum performance mentioned above, I believe that early-appointed independent dispute boards represent the best form of common-sense dispute resolution currently available. A detailed discussion of whether such a board should have powers of recommending a solution to the parties by which they should resolve their disputes (mediation/conciliation) or should have decision making powers (adjudication) must be left to another day. Suffice it to say what follows.

In Lesotho (except for one batch of claims). although not entirely accepted by either the Employer or any of its Contractors (of which there were many), the DRBs' recommendations formed the basis of the settlement of all the disputes referred to them. The exception went to arbitration, and then on, eventually, to the House of Lords, but only on matters arising from the award itself which had nothing to do with the DRB.

Given that it was empowered to decide disputes, and that it was an entirely after-the event process, preparations for proceedings before the Dispute Resolution Panel were far more exhaustive than in Lesotho.

To answer the question posed in the heading to this section, I propose to demonstrate that an early-appointed dispute resolution board represents the best common sense dispute resolution process currently available by measuring it against the judicial pronouncements set out in section 7 c) and by reference to another case study. This case study is taken from the Egger case.

Case Study

I feel sure that, even before I outline it, those who know this case will agree that if ever there was a case of how to not administer a contract, deal with the differences and disputes that arose in its course and their later resolution this is it. To see what His Honour Judge David Wilcox thought of it go to the first 39 paragraphs of the Bailii report on the costs issue mentioned below.

It concerned a guaranteed maximum price contract. The maximum price at contract formation was £12,000,000.00 for which the Contractor agreed to develop the design as well as construct the Works.

Excluding disputes over the construction of the insurance clause and the associated underlying liability clause, which occupied the TCC in 2001 and the Court of Appeal in that year and again at the hearing of the appeal (for which leave had earlier been granted) in 2005, the disputes referred to by Judge David Wilcox occupied the time of the court on three other occasions.

A report of the second occasion in 2004 and that of the third in 2005 is to be found on Bailii's website:www.bailii.org The second occasion was concerned with quantum and the judgement stated that it had to be read with the liability judgement of 1st.May 2002. The third occasion was concerned with the costs of the affair, and which party was the winner, whose costs (that is the part properly recoverable) should be paid by the other party.

Alone this last judgement of Judge David Wilcox ran to 232 paragraphs as it seemed to run through once again, blow by blow, the liability and quantum cases. The first 39 paragraphs amount to a critique by the judge about the administration side of the contract and the attitudes adopted by the parties during the contract and later in the thick of the disputes.

In paragraph 3 the judge made the negative comparison between the time devoted to the many disputes arising on this complex and high speed project, which, he said, stood in marked contrast to the time devoted to its conception, planning and construction, which in less than a year had transformed a redundant colliery site in Ayrshire with varying levels into a state of art automated chipboard factory.

In paragraph 15 he criticised the Employer's administration of the contract, which was such that the necessary co-operation and contemporary open handedness during the currency of the contract works was not forthcoming. This was principally due to the under resourcing of the administration and the misperception by the Employer's managing director about the guaranteed minimum price ("GMP"). He had no concept of the difference between changes under the contract giving rise to an entitlement to additional monies and design development which did not. The managing director's views [in the main wrong as things were to turn out] were sufficiently strong to affect the [Employer's] expert evidence and to be reflected in the positions later taken by his cost consultants, often, it became apparent against their better and privately expressed judgement.

In paragraph 17 the judge found that the Employer's failure to properly administer the contract by dealing with vital matters, such as RODs [requests on design?] and applications for extension of time("EoT"), led to a hardening of attitude by the Contractor who was ultimately driven to accept an absurd view of events, asserting that there was no concluded agreement and that on evaluation 14,on a contract analogous basis, their total entitlement for the project was just under £27,000,000.00 compared to the initial GMP of £12,000,000.00. At the turn out of events the Contactor was to recover just under £3,000,000.00.

In paragraph 18 the judge found that throughout the course of litigation there had been little softening of attitude by the parties despite the very best endeavours of their legal representatives and certain experts [but not all of them] expressing their robust and independent views.

Having criticised the parties in this way, in paragraph 30 Judge David Wilcox made the very true observation that complex litigation, where there are multiple claims embracing highly technical issues depending on expert evidence and delay analysis, has a dynamic of its own.

Having said that he pointed out in paragraph 31 that this was a case to which the neither the Construction and Engineering Protocol nor the Act applied, as it its seeds had been planted before their provisions were operational.

He opined in paragraph 32 that had they done so the posturing and failure of each party to co-operate at various stages would have been frustrated. He added in paragraph 33 that the imperative of proper contract administration would have been reinforced had swift references to adjudication been available during the currency of the contract. The Employer's personnel would have been unable to bury their heads in the sand by

refusing to consider RODs and EOTs or to properly use the resource of his cost consultants. Claims would have been contemporaneously examined and investigated and then paid, or rejected in a reasoned way.

To express an opinion of my own, this might not have been the case as evidence has grown that more and more complex cases seem to be referred to adjudication a long time after the event, even to the point that parties have, in two cases, suggested before the court that the time within which the decision must be issued is too short for it to be fair.

On the facts of those cases, the court found that the time within which each adjudicator was allowed to issue his decision was not too short. In each case it was more than the 28 days allowed by the Act for a decision. It was also more than the 42 days born of an adjudicator's ability to have 28 days extended by 14 with the consent of the referring party.[18]

However, the possibility of succeeding with such an argument on the right set of facts is to be seen in the judgement of, for example, Judge David Wilcox himself in ***London and Amsterdam Properties-v-Waterman Partnership,*** where he says that "*it must…be recognised that there may be some disputes…which are too complex to permit a fair adjudication process within the time limits provided*".

The view expressed by His Honour Judge Toulmin on the argument put to him by Birse, is that "*the test is not whether the dispute is too complicated to refer to adjudication, but whether the Adjudicator was able to reach a fair decision within the time limits allowed by the parties*" He added that there is a "*duty on the adjudicator to reach a decision provided that the conditions in section 108 (2) [of the Act] are met. This means that the Adjudicator must be able to discharge his duty to reach a decision impartially and fairly within the time limit stipulated in sction108 (2)9c) and (d). A defendant is not bound to expand the time limits, even if such a refusal renders the task of the Adjudicator impossible*".

Before suggesting how an early appointed dispute resolution board might avert the horror movie which it became, it is necessary to outline some other features of the Egger case which contributed to the horror.

The liability trial involved considering in minute detail years after the event whether something required by the Employer was a new and changed design entitling the Contractor or his Sub-contractors to additional money and an EOT or the development of the original design which he and the relevant Sub-contractors were obliged to carry out at their agreed initial prices.

The quantum trial (which resulted in a 522 paragraph judgement by Judge David Wilcox) also raked over the embers, if not the ashes, of facts which had happened amidst a multitude of other facts acted out all over the site many years previously. It also went into realms of whether the tender was adequate or not even without the disputed events.

The trials were characterised by the presentation of the conflicting opinions of experts of various disciplines, who, using imperfect materials were involved in trying to retrospectively piece together the history of the project with a view to categorising events as design development or changed design and to demonstrating the effects of various events in terms of critical delay to completion for EOT/liquidated damages purposes and delay and disruption purposes.

Amongst those experts were two who were concerned with time analysis. The Contractor's expert S had been employed by him on the project and had later been retained as a consultant.

The Employer's expert, P, was renowned in his field, but had only been instructed with the leave of the court to respond to S' evidence.

S impressed the judge [because, notwithstanding his status with the Contractor], he was someone who was objective, meticulous as to detail and not hidebound by theory as when demonstrable fact collides with computer logic. This approach was clearly seen by the judge to be a necessary pre-requisite to the persuasiveness or otherwise of any computer programme logic. The lack of it was not compensated by a report running to hundreds of pages, supported by hundreds of charts; in this case 240 See the report of the quantum trial paragraphs 407 to 441 which I have distilled.

Earlier, at paragraph 324 of the same judgement, the judge sets out his position on the submission made to him by the Contractor's Counsel about the proper approach to a party proving it has suffered loss and damage. As recorded in paragraph 323, that submission is that the approach is one based on common sense and practicality, with the court taking into account its considerable and specialist experience. Perfect proof may on occasion be lacking but that is no reason for the court not to do the best it can.

As previously indicated in section 7 c)(vi) of this paper, the judge accepted that the court should adopt a sensible and pragmatic approach. He saw the context of the approach as being the realities of the construction site, but mere common sense cannot supplant proof, which, to be effective needs to be at least 'adequate'. It seems to me that putting it that way is itself common sense; who would cavil at the idea that it would not make common sense to make any finding without adequate evidence. By cloaking the adjective adequate in single quotation marks the judge is acknowledging that what is adequate must (as a matter of common sense I would suggest) be left to be considered from case to case to case and its own construction site realities.

Although this view is not expressed in the later paragraphs 407 to 441 distilled above, I submit that it applies equally in the battle between actual based proof and computer generated proof, if the latter is not an oxymoron.

9 WHY EARLY APPOINTED DRBs MAKE FOR COMMON SENSE DISPUTE RESOLUTION ("the answer")

An easy, but lazy, answer would be to point to the wide endorsement of early appointed dispute boards in the USA, and by FIDIC, the World Bank and the like lending institutions, the ICC and, of course, the ICE for use around the world and my own endorsement of them based on my personal experience.

In the case of the ICE's Alternative 2 I could, in addition, speculate that the ICE might have thought that the type of

[18] See ***CIB-v-Birse Construction Limited*** and ***William Verry (Glazing Specialists-v-Furlong Homes.***

argument mounted in the Birse and Verry cases in relation to adjudication under the Act be fended off if the DRB as the agreed adjudicator was aware of the history of the project and its progress before shifted into adjudication gear by a notice of intention to refer.

However I said earlier that I would justify my answer by reference to what the judges have said about the common sense approach to the construction of contracts and causation and taking the Egger case as an example. The answer comes with two provisos.

The first proviso is that the board is comprised of people having the right mix of skills and experience. As I see them, they are person(s) with skill and experience in the actual construction process involved, for example, at least a civil engineer (if not a more specialist one) if it is a civil engineering project, a project manager/programmer (if not a more specialised one) because most claims have management and cause and effect elements in them and a construction lawyer (sympathetic to common sense solutions for the parties) with non-contentious and contentious experience in the type of contract and, if possible, the type of construction, because contracts, tort/delict and even dispute resolution processes themselves are tied to the law by an umbilical chord; at least those in countries who espouse the rule of law and preach its virtues

This combination might be harder to find in a one man board, to whom the appellation "adjudicator" is attached by FIDIC, than say a three man board which is more common, or, less commonly, a panel (like the one on the Channel Tunnel) of more than three, where the recommendation or decision itself might emanates from members selected according to the nature of the dispute even though all the panel members might participate in the hearing.

The second proviso is that the board is supplied with and scrutinises copies of the entire contract documents, construction progress reports including details of any variations, minutes of weekly or monthly project meetings, certificates and notices concerning extensions of time or intention to claim money additional to the sum agreed to be paid at contract formation as well as making regular visits to the seat of the project. This is how the board brings vital ingredient of contemporaneousness to the process which is missing from every other alternative.

Such a board would meet the criteria set out above and improve the chances of avoiding the disasters in Egger as described by Judge David Wilcox in the following ways.

It is more likely to construe the terms of the contract as a whole (not just the general conditions) by applying common principles by which any serious utterance would be interpreted in the ordinary life of the construction community and, on the balance of probabilities, to arrive at the right interpretation in the eyes of that community. Put another way it is less likely to indulge in semantic and syntactical analysis of words which would lead to a conclusion that flouts common sense and if such an analysis were to do so in the context of the construction being undertaken it would make it yield to common sense. That is, they would apply the views of Lords Hoffmann and Diplock and they would have a better idea than most of what is and is not common sense in their milieu.

They would not ignore Lord Justice Lloyd's view of it as being crucial, but they would approach causation by the applying the common sense to its logical principles, recognising that it is not the logic of philosophers which is required but that of ordinary man, who, in this context, is an informed person in the construction industry and would judge the matter without too much microscopic analysis but on a broad view, providing that there was adequate proof because mere common sense cannot supplant it. They would be able to do so by applying their own accumulated and aggregated common sense acquired in the field and their own sense of what proof is adequate and which is not.

Leaving aside their function as mediator or adjudicator of disputes referred to them, the incorporation of a board as a silent actor, as it were, in the project, which also (albeit from a greater distance than the others) witnesses behaviour which might be unfavourably commented upon in any recommendation or provisionally binding decision and disclosed in any final proceedings which might follow, would act as a deterrent to the kind of posturing and blind hubris described by Judge David Wilcox. The board would not be tied by obligations of confidentiality, and commercial considerations of further future work, which inhibited Egger's consultants, only for them to emerge much later. I am told that this mere overseeing of the project has also been known to keep projects free of disputes.

In addition to that silent role, subject to safeguards, it is common to give a board the power to provide advice and opinions between resolving disputes. Such advice and opinions might even prevent disputes, or if not that, lead them to be settled, without the board having to be mobilised into recommendation or decision making mode. The FIDIC specifications require the initiative to be a joint one by the parties and in the case of a board with more than one member require the agreement of each member to providing the advice or opinion. Under the ICC specification the board can exercise its own initiative to informally resolve any disagreements, but can only proceed to do so with the agreement of both parties. With the agreement of both parties the ICC board can even go into med-arb mode, which might run the gauntlet of the ***Glencot*** case and the more purist amongst us, but would surely be in keeping with the robust culture of the business of construction.

It seems to me that, subject to any new successful challenge which has yet to emerge the foregoing makes out the case that DRBs do amount to common sense dispute resolution and that to add that they also amount to a forum for early-neutral-evaluation before the parties ratchet their differences up to the next and very expensive level which aside from the DRBs recommendation or decision will be considering things retrospectively, possibly a very long time after the event and not contemporaneously leading to the kind of costs incurred in the Egger case. The subject of costs points us to the concluding remarks of this paper.

10. CONCLUDING REMARKS

No submission on common sense dispute resolution can be complete without considering the subject of costs. As is the case with all its competing forms dispute resolution by dispute boards comes at a cost.

In kind the costs of all the forms are the same . They are the costs of the parties' representatives and the fees and

expenses of the third party who is brought in by them to resolve or to try to help them resolve their dispute. In that respect resolution of disputes by dispute boards is no different in principle from any other form.

The difference comes with a dispute board which monitors the performance of the contract by the parties and, say, the Engineer, or any other agent of the Employer, and the progress of the works. Clearly these people are not going to do all their homework or their travelling to fulfil these duties for nothing and only be paid for dealing with disputes which may never happen.

Apart from saying that, on balance, the LHDA and its Contactors thought that the payments made to the board members by way of retainer to do the homework expected of them on Phase1A of the LHWP to adopt the process on Phase 1B I have no personal knowledge of how much these duties of a board might cost. However, in the article of his identified in the introduction to this paper, which paper I acknowledge, Peter Chapman and eminent and very active practitioner in this field, states that three-man DRBs can cost between 0.05% and 0.3% of total project costs.

Like everything else in life you chose horses for courses, you get what you pay for and you must make a cost benefit calculation before you decide what the budget can bear and what you are prepared to pay.

For example if FIDIC suggests that might not be appropriate to have a three-man board, where the average monthly certificate is unlikely to exceed $1,000,000.00 and that a man board (adjudicator) would be more appropriate.

I shall conclude by submitting that even if it had been a three-man board and the cost had been 0.3% of the total contract price (which at the end of the quantum trial was of the order of £15,000,000.00, compared with initial GMP of £12,000,000.00) the cost of £45,000.00 would have been a wonderful investment compared with the approximately £9,000,000.00 in costs of resolving the disputes in the Egger case mentioned in paragraph 5 of quantum judgement. That is without adding the hidden cost of all the nervous energy and diversions from other more productive work which were devoted to pre-1999 disputes from that date until 2005

This was on a project that lasted for under 12 months so that the cost of the board would have been less than £45,000.00. If that does not represent common sense dispute resolution then what does.

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"Large construction contracts – a changing dynamic"

Large Construction Projects

Typically:- dams, airports, metros, tunnels, oil, gas & petrochem facilities, large PFI schemes, large commercial developments etc.

- Complex & multi disciplinary
- High cost & high risk
- Take a long time
- Often politically driven
- Usually very high revenue streams upon completion
- Finance & business plan usually make them very Schedule Critical

Usually an oligopoly market

- Only a small number of players with both the expertise and the financial ability to be able undertake such works.
- For Large LNG EPC projects the market is probably no larger than say 6 - 8 companies in UK (probably only 1 or 2 in 100% UK ownership) say 20 – 25 companies worldwide.

For such projects market forces influence / dictate the contract terms and the nature of risk apportionment in the Agreement – far more so than is normal in smaller projects and usually more in favour of the contractor

Apportionment of risk and power

Tendency on smaller projects to try to pass much of the risk via the contract to the contractor – often due to market conditions and the relatively low power of the contractor they often accept this at tender and try to fight later via change orders, claims etc. This leads down the well worn path of dispute and ADR

On large projects, especially in an oligopoly market, the contractor has much more power, will not accept risk imbalance and can influence the terms and conditions of the appointment. Watch for last minute demands to change the T&C's This introduces other negotiating dynamics into contract award and selection other than just ability and price.

Once appointed, the contractor in many cases can use, maintain and exploit this additional power during the works in negotiating change orders, and seeking advantage and concession from the Employer – often concerning progress or inevitable essential changes.

Management of such contracts therefore presents a different dynamic and requires a different approach

Some Observations

- Whilst many large public or Government funded projects utilise standard forms of contract, many private / commercial projects, particularly oil and gas distrust the impartiality of standard forms and seek to utilise their own bespoke contract forms.
- Schedule is often more important to Client's than construction costs, as future revenue stream often exceeds acceleration costs – financial performance incentives are common.
- Whereas risk, money & profitability are often more important to a contractor
- Change is usually expensive in terms of both cost & schedule impact. Most clients and third parties usually fail to accept the real full cost of change which is often executed outside of planned, efficient procurement and construction sequences
- LAD's are often an ineffective tool, as true LAD's would be very high and unacceptable to bidders .

  Typical lost revenues can exceed $10M / day. Most contractors include LAD's in their bid anyway.
- Huge reluctance by either party to instigate any dispute mechanism, which are often complicated, slow and expensive – negotiation is usual.

How this effects ADR

Little effect on the strict application of the contract terms and the law to disputes - such as in Adjudication or Arbitration. Although it is useful for Adjudicators and Arbitrators not familiar with large projects to be aware of the dynamic of the relationship between the parties.

Huge effect in the areas of negotiation, mediation, conciliation and DRB's and in claim management and advocacy. It is vitally important to recognise the changed dynamic and power balance.

The best overall strategic solution for a large project is not always what appears right or fair on an issue Reputation and preservation of relationships particularly during a long project are important.

By Steve John[19]

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MANAGING MEDIATORS

"If mediation is such a worthwhile ADR mechanism, why do we need an awareness week?"

It may enter on a wave of indifference and depart in like manner. However, the Department for Constitutional Affairs is pledged to the holding of its second National Mediation Awareness Week (NMAW) from 9 October 2006. Teams of mediators (civil and family) throughout England and Wales will bang the drum and inform lawyers (*if they still need informing*), the public and businesses of the benefits of mediation. Perhaps the DCA's enthusiasm for mediation is less the psychotherapeutic benefits it may bring disputants, rather than the fiscal advantages, which its widespread use might bring to the Treasury.

For the cynical, the need to resort to an '***awareness week***' is perhaps indicative of mediation's slow development to date. Some providers, such as CEDR and the ADR Group, have been promoting their services since the early 1990s, but all the mediation providers remain curiously reluctant to shout loudly and clearly to the public how the number of referrals is soaring. There has been no absence of endeavour on the part of certain parts of the judiciary to promote mediation. Mr Justice Coleman from the Commercial Court has been an assiduous supporter of mediation and various judges, including Court of Appeal ones, have barked at litigants, stating that it is a very serious failure not to consider ADR/mediation. The 41st Amendment to the CPR (April 2006) reinforces that message. All may not be gloom in the mediation community. NMAW may be a tacit acceptance that mediation has reached the stage of being a reasonably healthy primary school child but has to enter successfully its teenage years before becoming a well developed adult.

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The contract forms part of the $13bn Qatargas II project for construction of a dedicated supply chain providing liquid natural gas from sub sea Qatar to UK via an importationterminal at Milford Haven to satisfy an initial 25 year supply contract for 20% of UK's gas Demand
$13bn of scrap metal until all 6 sub projects in the supply chain all operate properly

Agreed-upon solutions

For many people, mediation remains instinctively anathema. Some years ago Scott Donahey writing in *Arbitration* (the journal of the Chartered Institute of Arbitrators) said:

> *"In various Asian countries, there is a profound societal philosophical preference for agreed-upon solutions. Rather than a cultural bias towards 'equality' in relationships, there exists an intellectual and social predisposition towards a natural hierarchy which governs conduct in interpersonal relations. Asian cultures frequently seek a 'harmonious' solution, one which tends to preserve the relationship, rather than one which, while arguably factually and legally 'correct', may severely damage the relationship of the parties involved."*

Lawyers are taught to fight and many may shy away from compromise (especially if they feel they have half an argument to advance). Even when lawyers seek to be consensual, their grey suits, diction, caution, body language and choice of words can (without care) create an aura of pomposity, which is inimical to the message that they want to get things done and are 'nice' people. However, to litigate over-vigorously is akin to playing with someone else's money. For a client to engage a lawyer is in part an exercise in trust, i.e., the lawyer will act sensibly and prudently, a broader concept than simply avoiding professional negligence. Some years ago, *The Times* newspaper reported a litigation conference hosted by a major law firm. In perhaps the Blair-Bush moment, not knowing that others were eavesdropping, a senior litigation partner asked a cluster of litigation lawyers to put up their hands if they would litigate on their own behalf. Fidgeting, the audience sat on their hands and tittered nervously. They all knew the havoc litigation could bring.

Identity crisis?

What the DCA must recognise is that the mediation community is still striving to define what mediation really is, being a process heavily influenced by the temperament of the particular mediator, rather than any 'rule' book. Most lawyers know the mechanical processes and these do not benefit from repetition. In addition, many lawyers have assisted clients in a range of mediations with different mediators. Comments suggest that some lawyers have found the behaviour of certain mediators alarming. Mediation is not counselling; the mediator is there to get a result and move on to the next case. In their initial analysis of the case papers, mediators decide where the appropriate pressure points lie and which of the parties to target in order to start the process of settlement. On occasions, clients and lawyers are disconcerted. Some mediators come on instantly 'strong' or evaluative. *"I see that this is a PI case, but I very much doubt that I can take the indemnity insurers over 50 per cent. You must decide or consider with your lawyer what you would reasonably settle for."*

Other mediators feel the need initially to reassure and will try to engage the lay party, potentially setting a finite period of time in which in truth to go round the houses with them before addressing the need to progress towards settlement. Take the following example. The franchisee enters into a franchise agreement, but then stops paying the rentals. The franchisor sues for accrued liquidated

damages. The franchisee counterclaims for the franchisor's allegedly shoddy performance. The mediator could choose immediately to focus on the merits – the validity of the liquidated damages' clause, asking, for instance, if it is it a penalty or a genuine pre-estimate of loss or has the franchisor complied with any conditions precedent? Going round the houses and listening to the franchisee's complaints may reveal the truth that whatever the validity of the liquidated damages' clause the underlying reality is that the franchisee is almost bankrupt and cannot pay. That would allow both parties to focus on a realistic solution.

Striking the balance between facilitation and evaluation is a tricky one. Some mediators quake when one of the parties asks: ***"What do you think of my case?"*** The facilitative mediator patiently explains that he is not there to give advice or comment – his role is to assist the parties in finding their own solution. As construction law barrister and legal pundit, Tony Bingham, wrote in a recent edition of construction industry journal, ***Building***, part of engineering a settlement sometimes lies in giving a steer. "*When asked by one party what I think of their position, I tell them… Giving an opinion in private to X and Y separately really does push things towards a settlement.*" Bingham also refers to the tug of war in the mediation camp between the two types. For facilitative mediators, evaluative mediators are '*muscle mediators*', '*Rambo mediators*', '*Attila mediators*'. In similarly pejorative terms; facilitative mediators are 'tree huggers', 'touchy feely', 'potted plant' mediators; in short, the type of people who make an environmental statement in the purchase of certain hybrid motor vehicles.

A role for lawyers

Some lawyers wonder what role they can possibly play at a mediation. They know the mediator will concentrate on the lay client and points of law are rarely argued if the mediator has his way. It is only at the end of the process, with a done deal, that the parties reach for the lawyers, by now heavily dosed on caffeine and biscuits, to structure the settlement terms in a legally binding agreement. However, the proactive lawyer can play an effective role throughout the process. Reading the mediator is an important skill with which lawyers can assist clients in mediation. Focus on his body language and words. Is he trying to undermine your client's confidence? Some mediators demand very close attention, as they can switch deftly between the facilitative and the evaluative modes. If the mediator tries to marginalise the lawyer in order to prise a settlement or concession out of the client, an adept lawyer can assist in correcting this exploitation of power. If any mediator is coming on strong, hassling your client, feel free to take the client to the metaphorical balcony by asking for time out to review options. However, do not overreact to mediator blunders by reaching for the door handle, forgetting the need to adapt to your client's weak points and work for a solution.

Many mediators, unsure of the initial ground or where the balance of weakness lies, start in facilitative mode. "*How do you feel the joint opening session went?*" "*Did you learn anything?*" Moving to case analysis, rather than, say, the mediator's instinct that a party is on weak ground on certain points, the mediator may suggest: "*I would like to explore…in greater detail…*"; "*I do not fully follow…*"; or "*…might benefit from further exploration*". The mediator hopes that, if the case is strong, he will learn more about the good points and, if the case is weak, the party will work this out for himself through the mediator's combination of questions. Lawyers may find the mediator is culpable, not grasping the situation, which ultimately may work to their client's detriment. If the mediator is not making the right point, feel free to interject, rephrasing the mediator's question in a more suitable way to produce a comment that may lead to progress being made. Do not sit dumbly while a mediator makes a hash of things. It is a very simple mistake. Assisting the mediator out of his culde- sac may ultimately help your client too.

Reconciling facilitation and evaluation

Even the most doggedly facilitative mediator must sometimes resort to an evaluative approach because, as George Bernard Shaw remarked: "*All progress depends on the unreasonable man.*" The mediator's switch of tempo can disconcert, and when it occurs lawyers must decide how far to permit the mediator to go. Watch out for the following: "*Of course, this mediation is running in tandem with the litigation. If you do not conclude the mediation successfully today, then you will be back in court. As your lawyers have indicated (I am sure) to you the purpose of the court is to test evidence. You make a number of statements in your position statement. Are you confident that you will be able to back these up at trial? Do you have the witnesses available?*"

The essence of such comments is reasonable. All litigators should have considered the evidence and assessed witness quality and availability with the client. Similarly, a party may boast to the mediator that he has received a favourable counsel's opinion. If the opinion offers the client a 70 per cent chance of success at trial, the mediator may ask how the party feels about the 30 per cent risk factor.

The mediator desperate for a '*result*' may become more strident and you might get real psychological pressure: "*I thought you came here in good faith to negotiate and we seem to be getting nowhere. It's time to table your bottom line position.*" At that stage you can either up sticks and walk out, or think of some creative way forward. By contrast, the more cautious mediator may emphasise that it is the parties' decision whether to move forward or not. "*If you have hit a blockage, we can either adjourn the mediation to allow you all to think about things, or simply call it a day and let the judge decide.*" Once again you are on the spot, but placed there less aggressively. The onus remains on you how to move forward.

So let us return to National Mediation Awareness Week. True, mediation does attract Bingham's tree-huggers, who dwell on the cathartic release mediation may bring, but in civil and commercial disputes think of the potential strong arm of the Treasury lurking behind the DCA's mediation enthusiasm. Where cash is king, the future lies with those mediators who get results and so who in truth blend facilitation with generous dollops of evaluation.

By Paul Newman[20]

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[20] This paper is based on an article of the 6th October 2006 in the Solicitor's Journal. Paul Newman is a barrister specialising in construction law and mediation. He is the DCA NMAW co-ordinator for South Wales .

Its the Medium not the Message
A Practical Perspective for Online Dispute Resolution

By Graham Ross. Founder &CEO, The Claim Room.com Ltd

Explaining Online Dispute Resolution (ODR) in a way that is immediately encouraging of its use by dispute professionals (lawyers, mediators, arbitrators and judges) is a challenge. In this presentation I will address the nature of that challenge and suggest how this can be overcome and, indeed, why it is in the interests of professionals and clients that it is overcome. In so doing I will demonstrate the issue with a live role-play case in a shipping dispute run on my company's online mediation platform at www.TheMediationRoom.com.

The first mistake often made by those involved in disputes, whether as parties, advocates, neutrals facilitating (mediators, conciliators) or neutrals determining (judges, arbitrators) resolution is failing to see ODR in its full and true context. Focusing just on the concept it is, understandably often seen as a novel , quirky, if not downright 'geeky', practice. How can lawyers and dispute neutrals, steeped in the traditions and skills of person to person discourse, possibly take seriously the concept of a virtual courthouse or a virtual mediation room? If there is any interest generated it is probably something that is best left for the future when other, perhaps braver, souls have taken what is seen as the first 'leap'. Worse that that, many may see it as a direct challenge to their professional status and skills, if not fee earning, and feel that it their duty to advocate against it.

The true message for ODR is that it is not the message. In contrast, and expanding on McLuhan's well known theme, it really is no more than the 'medium'. But what a powerful medium and what benefits it has to deliver. Instead of , or, importantly, in addition to , presenting argument and/or negotiating in traditional forms of writing, as well as orally or in meeting or a forum, with or without the assistance or determination of a neutral, much can now also be done on a secure and convenient online file. It is the phrase 'in addition to' that is the key. Use of ODR does not dictate that you cease to use other media or forums. When the fax was invented, we did not criticise its output as not being as acceptable as surface mail. Nor did we cease to use surface mail. Fax is used when it adds benefit over surface mail, such as immediacy. Just as it is important to not reject the fax machine simply because the paper does not have the same thickness, texture and depth of colour as surface mail. Use it for what it brings to the party … the benefit of immediacy.

ODR does not challenge the importance and benefit of the visual and aural clues of face-to-face mediation or in-person arbitration, nor the value and worth of professional representation and advocacy. Rather the very nature of the medium adds benefits that extend the market for professional skill and dispute resolution services, as well as improving the success rate of such services.

As to the market, the online medium enables mediators and arbitrators to assist with cases that otherwise would be beyond their reach, e.g. because the parties are at such a geographical distance from each other that the cost and time of travel is too costly and disruptive as to be economic and justified by the value of the dispute. Further ODR systems that attract direct use by the public, inevitably promote knowledge of the whole art of mediation and other techniques for dispute resolution that can only bring more business to the dispute professions. In empowering the public with techniques of dispute resolution, it advances knowledge and appreciation of the work of all mediators, conciliators, arbitrators and judges.

ODR should also not be seen as an alternative to what is already an alternative – ADR. Rather it is an additional tool. Even in face-to-face mediation, for example, preparatory secure online discourse in a mediation structure such as on www.TheMediationRoom.com can only increase the prospects of success at the eventual face-to-face meetings. Prior to a mediation meeting, the mediator's understanding of the matter is usually limited to a statement in writing by the parties and possibly, but not always, a telephone conversation. Much of the initial time in the first private caucus meetings is taken up with the mediator gaining a more in depth understanding of the facts and what the dispute means to the parties. He may often have to try to assist the parties in controlling any negative emotions provoked by the dispute and the other party. He will also need to help the parties understand fully, and be confident of, the impartial nature of his role. This can take up much time, certainly often the whole of the first two private meetings. However, by using secure and confidential private discussion areas to 'talk' to each party, the mediator will be able to significantly improve his understanding of the matter, and help the parties address the mediation in a positive frame of mind, before the date of the meeting. Thus, when the 'face to face' part of the mediation commences, the mediator will be able to 'hit the ground running' to improve the prospects of a successful solution being found before the time allowed for the meetings expires. This will be particularly important for short time period mediations.

In disputes were damage is growing daily, such as often is the case in shipping disputes, the mediation process can commence immediately online so that the heat can be taken out of the situation and perhaps some arrangements reached on peripheral issues to stem the flow of damage pending a later face-to-face mediation.

If a face-to-face mediation does not result in an immediate resolution of the dispute, further attempts to resolve the matter can continue to take place online, thus improving overall the prospects of success. This occurred recently on our platform in a complex IT case in Australia. This is very important in time based mediations where often the pressure of time leads, if not to non-resolution, to something worse, a rushed resolution that does not stand up afterwards.

In disputes in which there are a number of people with an interest, our platform can enable them to be involved in pre-mediation discussion or simply to 'watch' the process. This may be useful when those directly involved may not have fullest authority to settle. An online monitor with authority can give that authority as and when a suitable proposal is reached.

One of the most important benefits when using an online platform additionally to traditional techniques of mediation is that it provides a useful shared resource of documents and evidence, which can be consulted and

reviewed at any time to further help preparation and shared understanding. In casework on www.TheMediatonRoom.com the parties and the mediator can have the benefit of the running of graphic reconstructions. A picture really does paint a thousand words, particularly in disputes with a technical background. An example movie is available in the shipping dispute role-play.

During face-to-face mediations, the online file can be accessed to log proposals and clarify in writing any significant statements. In this way, while the mediator is in private meeting with one party, the other party could be reviewing the observations of the mediator, which may include some suggestions for resolution, as well as any significant statements and/or could be putting in writing any thoughts, or clarifying any information, as requested by the mediator. In this way more productive use can be made of the time that is available. Further, the negative, paranoia related issues of a party being left to wait whilst the mediator talks in private to the other party can be reduced.

If use has been made of the online file during the pre-mediation phase prior to the meetings, the mediator can access the file to remind himself of relevant issues and facts as explained to him in posted messages. For example, he could be reading the posted discussions from a private online session with one party whilst in private meeting with that person, to identify any shift in position, or indeed whilst in meeting with the other party.

When one party makes a suggestion, the other party's view of the suggestion is often partly coloured by suspicion of motive On www.TheMediatonRoom.com, an area can be set aside for the anonymous posting of suggested solutions. Anonymising the proposal helps focus attention on the proposal itself. For obvious reasons this will only be of value when there are more than two participants ('if it wasn't me then it must have been you'), but that can include lawyers and other representatives.

Overcoming negative perceptions is not difficult. They just have to addressed. These thoughts have developed from discussions with various stakeholders who have now entered into arrangements with my company to make our online mediation platform available to their members. To date these have included the Law Council of Australia (the member body for all State Law Societies throughout Australia), the Commonwealth Telecommunications Organisation (the member organisation for technology companies in the telephony industry throughout 51 countries) , the ADR Group (one of the leading mediation training and provider organisations in Europe and the first in the UK), LEADR (one of the leading mediation training and provider organisations in Australia) and Quadrant Chambers, a leading barristers chambers in London. In all cases we have built configurations of our platform branded to these organizations.

The model we have used can be seen in this role-play case on which all will be able to participate after this course. We have had developed a unique piece of software that provides simple and intuitive usability in the form of a collaborative negotiations. Each dispute file contains a set of message areas. The message areas displayed will vary for each participant. The reason for this is because each participant is strictly controlled as to access to and, use of, the message areas. If they have access to an area, then the system will control whether such access allows the participant to post messages or only to read them. For example, one area will be accessible only to the mediator and one party and his or her lawyer, if any, and another by the mediator and the other party and his or her lawyer. In this way the mediator can have private and confidential sessions with each side. There will be another area in which the mediator can post messages to both sides, who can read them but not respond to them and also ,at his option (some mediators prefer not to) , he can access an area where he can keep private notes to which no-one else has access.

Every time a message is posted to one of the message areas, everybody with power to read such messages receives a system generated email alerting him or her to the fact that a new message has been posted with a link to the site.

In tailored and branded versions of this platform, multiple party disputes can be catered for. In all versions full confidentiality can be maintained within the various groupings of participant

CONCLUSION

ODR has much to deliver to widen the available market for dispute resolution services and to improve the output of its skilled practitioners. But the obstacles of inappropriate perception need to be overcome. ODR as a generic term does not describe either a system or a service. It describes a medium, now available and operational, that is of direct and practical benefit to all those in the dispute resolution industry.

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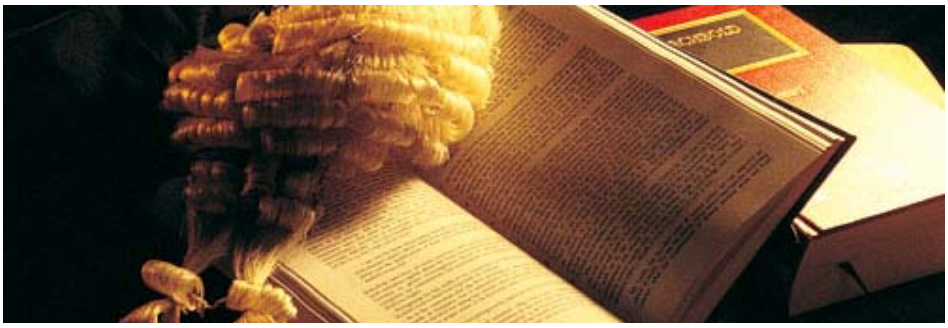
Adjudication : Techniques in Drafting"

Robert Shawyer, of Alway Associates and current Vice Chairman of the Wales Branch, Chartered Institute of Arbitrators, presented a bullet point presentation setting out the procedure involved in and the legal framework within which a construction dispute may be referred to adjudication in the UK.

This was followed by an examination of what constitutes a valid notice of adjudication and a compatible reference both in terms of what is required by the statutory regime and with reference to any specific requirements in the contract that gave rise to the dispute in the first place.

Particular note was made of strategies and tactics that may be adopted by the parties at the contracting stage to maximize their position during the adjudication process in the event of a dispute arising. He noted in particular that where a dispute is anticipated, it may be in a party's best interests to take the initiative and commence an adjudication, thus framing the adjudication on their own terms rather than waiting for the other party to commence the process. The point here being that the jurisdiction of and hence the scope of the adjudication is defined by a combination of the notice of intention to refer and the actual reference documentation.

The Law School University of Glamorgan



Courses in Law available at Glamorgan include :-

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- **LLM Masters in Law**
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- **LLM Employment Law and Practice**
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- **LLM Intellectual and Industrial Property Law**
- **LLM Commercial and International Commercial Law**
- **LLM Public International Law**

University of Glamorgan	**Accreditation from the Chartered Institute of Arbitrators**		
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