THE USE AND DEVELOPMENT OF MEDIATION TECHNIQUES IN UK AND INTERNATIONAL CONSTRUCTION DISPUTES

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Introduction

This paper looks at the use and development of mediation techniques in the context of construction disputes. I begin by placing the use of mediation in the context of recent developments in the UK, and looking at some of the practical issues and problems my colleagues and I have experienced in the use of mediation in the construction arena. I then touch on the international scene, looking at how mediation techniques are increasingly embraced in the context of international construction contracts. I will also look at some recent innovations, notably the introduction of the International Chamber of Commerce (ICC) ADR Rules last year,[1] give a brief overview of the growing use and influence of dispute review boards (DRBs), and conclude with a passing reference to partnering (and how in that context parties seek to avoid disputes).

This paper provides a chance to reflect on the advances as to the manner, approach and attitudes adopted by parties towards dispute resolution today; over the last decade or so they have largely been transformed. I find myself wondering whether some of my early experiences and skirmishes in the world of heavy weight dispute resolution might have been avoided had some of the techniques around now been deployed then. I can only recall with a continued sense of disbelief, how in the late 1980s, the Hong Kong Government (for whom I was then acting) and New World Development could have locked horns in a dispute over the compulsory acquisition of Shun Fung Iron Works in Junk Bay in a trial that lasted two years! Today, with the deployment of common usage techniques, surely much of the two years of my life sitting before Mr Justice Rhind and Mr Philips in the Hong Kong Lands Tribunal would have been spent rather differently.

My colleagues have differing views, both positive and negative, about the use of mediation when employed in the context of construction disputes. If the department of which I am a member fairly represents the legal profession's view of mediation, sadly it is difficult to draw many concrete conclusions as to its effectiveness.

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1 ICC ADR Rules, in force as from 1st July 2001.

Recent UK developments

Mediation

Turning first therefore to recent UK developments, in the UK domestic market the focus on mediation as a commercially attractive alternative to litigation or arbitration – or at least a logical first step before embarking on proceedings – was enhanced throughout the 1990s by the drive towards the resolution of disputes using simpler, quicker and cheaper methods. Encapsulated in an overriding philosophy of 'litigation to be avoided whenever possible', with the advent of the Woolf reforms and the Civil Procedure Rules in April 1999, new case management powers and duties enabled courts to actively encourage parties to seek dispute resolution through ADR (which in the context of the construction industry principally meant the increasing use of mediation and conciliation).

Whilst in the last eighteen months there are indications that the general surge in mediation has levelled off, the initial objective (to resolve conflicts with a minimum of cost, complexity and time) continues to keep the spotlight on ADR in the context of construction. In line with this general trend, in March 2001, the UK Government announced that in future standard procurement contracts would include clauses committing the parties to use ADR instead of litigation. Wherever possible claims for financial compensation will be dealt with by an independent assessor rather than resource to the courts. The Government pledge was to settle legal disputes out of court, trumpeting that arbitration, mediation and independent assessment will bring simpler, cheaper and quicker ways of resolving Government legal cases, an initiative promoting ADR in place of litigation.

Statutory adjudication

In parallel with a concentration on ADR, the Housing Grants Construction and Regeneration Act 1996 introduced a scheme of statutory adjudication, which became applicable to the overwhelming majority of construction contracts as from 1st May 1998. Broadly, disputes are referred to a single adjudicator who is required to dispose of the matter within a relatively strict timetable. Speed is generally combined with a relatively informal procedure, resulting in a decision that is binding on the parties unless it is varied in litigation or arbitration proceedings.

Mediation now settles neatly between, on the one hand, the changes brought about by the introduction of the new Civil Procedure Rules and, on the other, the statutory scheme of adjudication.

Pre-action protocols

Disputing parties to construction contracts who are not obligated to use specific or multiple tiers of dispute resolution procedure and who wish to pursue their claims in the English courts, must now respond to and rigorously apply pre-action protocols applicable to all construction and engineering disputes. These dictate, amongst other things, that parties should formally

meet at an early stage to agree issues and, in particular, consider how the dispute might be resolved without recourse to litigation. The guidance notes describe the purpose as encouraging settlement without recourse to the court, and encouraging dialogue without loss of face. Failure to follow the protocols is taken into account should subsequent proceedings be necessary, with the court being given attendant powers to deliver sanctions in the form of swinging penalty costs orders.

Under the newly introduced construction pre-action protocols, parties to construction disputes are therefore actively encouraged to engage in discussions and mediate their differences.

Problems in practice

My experience as to the wide spread use of mediation in construction disputes in the UK is inconclusive. On the one hand, it is fair to say that my firm is no stranger to the use of ADR.[2] On the other hand, where mediation has been used by my colleagues, its effectiveness has on occasions been critically questioned, particularly in circumstances where the mediation has failed for one reason or another and the dispute has subsequently gone to arbitration or litigation. I offer just a few samples of where we have run into difficulties.

Mediation in its purest sense (as distinct from DRBs, to which I will turn later) is not always conducive to the particular rigours of construction projects. Mediation demands compromise, which in the life span of a long term project may not necessarily be in the project's best interests.

A true commitment to the process often demands candour by the parties. This is not without draw backs. The process often leads to the disclosure, inadvertent or otherwise, of confidential – or at the very least sensitive – information which has a habit of coming back to haunt the client, often with damaging effect, in subsequent proceedings should the mediation fail.

Claims advanced in mediation can sometimes bear little resemblance to those advanced subsequently in arbitration or litigation. They can create opportunities for fishing expeditions or for parties to redefine an otherwise unsustainable case (or defence) in subsequent proceedings, damaging when subject to critical scrutiny by an adjudicator, arbitrator or judge.

In the UK context there also remains the ever present threat of a notice to adjudicate being served, cutting across the mediation process. Through the rigid and draconian time table imposed by adjudication, this is capable of throwing the resolution process into chaos. The availability of adjudication and its use (and sometimes abuse) is often difficult to rationalise with the philosophy underpinning mediation: preserving relationships. Alongside concerns within the industry that the adjudication procedure can lead to cases

2 Hammond Suddards Edge won the biannual CEDR prize for use of ADR in 1998 and 2000.

where one party is effectively 'ambushed',[3] the fact that there is the right to take a dispute to adjudication 'at any time'[4] creates uncertainty and can undermine the confidence of any party whose opponent is not fully engaged in the mediation process.

Finally, mediation demands that all relevant parties engage in the process. However, this does not always happen. With the multiplicity of parties generally associated with the construction process, often with each having competing interests, the capacity for just one disengaged party to undermine the genuine efforts of the other parties to settle remains an ever constant threat to the process.

The international scene

However great the potential for disputes in the domestic construction industry, the scope for dispute is inevitably enhanced in an international setting. Coupled with the traditional reasons why construction contracts are fertile ground for dispute (notably their scope, complexity, size and length of project, unfair attribution of risk etc) typically, in the nature of international construction projects, there are several participants from different countries who might all bring to the project different legal and commercial traditions, leading to conflicting interpretations of the agreed contractual wording. In the context of large scale projects, carried out over several years, with specifications that may import highly technical complexities or innovative practices, the potential for conflict among the participants is virtually without limit. However, it is essential for all concerned that disputes among the parties do not impede the progress of the project.

The international construction industry has developed an important form of mediation that employs a designated third party to resolve disputes that may arise in the course of a major construction project. The construction contract will usually designate an engineer, review board, permanent referee, or dispute advisor, with varying powers, to handle disputes as they arise in a way that will allow the construction work to continue. Sometimes, the third party will have the power to make a decision, which may later be challenged in arbitration or the courts; alternatively the third party may take the role of a mediator, by engaging in fact finding or facilitating communication between the parties in dispute.

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3 See paragraph 3.1.1 of *The Review of the Scheme for Construction Contracts – A CIB Report to the Construction Minister*, December 2000, which discuses ambush in the form of excessive information appearing in the submission and recommends that paragraph 17 of the Scheme for Construction Contracts be deleted. Whilst the subsequent DETR consultation paper *Improving Adjudication in the Construction Industry*, April 200,1 did not adopt the recommendation, paragraph 3.4 of the paper suggests that both adjudicators and the parties be given guidance on their respective powers, duties and rights as provided for in the Scheme. The *Guidance to Adjudicators* currently being drafted includes a section on intimidatory tactics.

4 Housing Grants Construction and Regeneration Act 1996, section 108.

There follows a brief overview of the institutional forms of mediation that are more commonly found in international construction projects. The technique that is acquiring increasing recognition in this context is the use of the DRB, a concept particularly familiar in Hong Kong, where it has been broadly embraced. Before turning to DRBs, I make a passing reference to the ICC.

International Chamber of Commerce

The ICC is widely used in international construction project agreements, enjoying widespread international credibility, which in part stems from the role of the secretariat based in Paris, which (together with the International Court) has developed a reputation of competence and impartiality.

On 1st July 2001, the ICC introduced its new ADR Rules (replacing the 1988 Rules of Conciliation) described as offering 'a framework for the amicable settlement of commercial disputes with the assistance of a neutral'.[5] Stress is placed on the consensual nature of the new Rules, with the success of the service depending on the goodwill of the parties.

The parties are free to choose the technique they consider best suited to the nature of their dispute.[6] The possibilities include mediation (to be used in any event where there is no alternative agreement between the parties[7]) involving the services of a neutral to facilitate negotiation; or the mini-trial, involving a panel comprised of a neutral and representative from each party. The parties are not restricted to one technique, but may employ a combination if that is deemed appropriate.

Points to note are :

(a) Unless the parties have agreed otherwise, the decision reached by, or in collaboration with, the neutral is not binding on the parties.

(b) There are four specimen clauses for referral in the Rules.

(c) The new Rules seek to expressly address some of the concerns to which I have alluded earlier. They provide that the ADR proceedings and the outcome are to remain private and confidential.[8] In order to underline the importance of the preservation of confidentiality, the Rules expressly state that in subsequent judicial or arbitration proceedings, the parties are not to call into evidence matters arising in the course of the ADR proceedings (such as views expressed by any party regarding the possibility of settlement, admissions made by any party or the views/proposals of the neutral).[9] This prohibition is subject to the requirements of law, or steps taken in the implementation or enforcement of any concluded settlement.

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5 ICC ADR Dispute Resolution Services, Introduction, at www.iccwbo.org.
6 ICC ADR Rules, Article 5.1.
7 See note 6, Article 5.2.
8 See note 6, Article 7.1.
9 See note 6, Article 7.2.

Dispute review boards

The DRB, which is perceived in some quarters as a form of mediation,[10] was developed in the USA where it has been employed for many years as a means of avoiding and resolving disputes. In the UK domestic market, it has been adopted as the dispute resolution mechanism in prime contracting. Internationally, DRBs have been used on a variety of major projects, such as the construction of the Channel Tunnel and the Hong Kong Airport. It is now incorporated in the bidding documents produced by the World Bank for use in major infrastructure projects over a financial threshold. It also forms an integral part of the dispute resolution procedure found in several of the FIDIC conditions of contract, for example the Orange Book (Conditions of Contract for Design-Build and Turnkey).[11]

The DRB is usually composed of three members, although there may be more, or just one. At the commencement of the project, each party proposes one member. Some processes dictate that the nominated members can only serve if accepted by the other party.[12] The third member is usually selected by the other two, but again is only eligible to serve if acceptable to the parties. Clearly, in terms of credibility to the parties, it is essential that there is confidence in the expertise, integrity and neutrality of the DRB members. The names of those on the DRB should appear in the contract, or if selected after the commencement of the project, a separate record should be kept.

The procedure for the DRB will obviously be dictated by the provisions of the contract. It is generally an express requirement that the DRB visit the site at regular intervals and particularly 'at times of critical construction events'.[13] As regards actual dispute resolution, the expectation is that the procedure will be flexible, informal and appropriate to the nature of the dispute. The DRB is generally empowered to examine all disputes and to make recommendations to the parties concerning settlement, which may be either binding or non-binding. The procedure under both the World Bank standard bidding conditions and the FIDIC contracts is that if the parties to a dispute do not object to a recommendation or decision, it becomes binding. However, if they are dissatisfied, they may proceed to arbitration, litigation or other form of mandatory dispute settlement. The parties usually share the cost of the DRB equally.

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10 See for example, Jeswald W Salacuse (Henry J Barker Professor of Commercial Law, The Fletcher School of Law and Diplomacy, Tufts University) *Mediation in International Business* at www.fletcher.tufts.edu/salacuse/mediation.html.

11 In FIDIC contracts the DRB is referred to as the 'dispute adjudication board'.

12 See the USA model contained in the *Construction Dispute Review Manual* cited by George Anthony Smith in his seminar paper *A Comparison of Dispute Review Boards and Adjudication* presented at the Conference of the International Bar Association, Cancun, Mexico, 28th October – 2nd November 2001.

13 For example ,the FIDIC Orange Book – Appendix A, clause 1 of the Model Terms of Appointment for a dispute adjudication board.

Advantages

DRBs are perceived as comparing favourably with both ad-hoc mediation and the UK statutory adjudication scheme. The main advantages of the DRB are:

1. The procedure whereby the parties designate the members of the DRB at the commencement of the project, before any specific dispute arises, accords those members a high degree of legitimacy as they approach the task referred to them by the parties.

2. With the requirement for regular site visits, the DRB should acquire a reasonably in-depth understanding of the project, being in a position to observe it from the outset and witness the manner in which it evolves. When disputes arise, this understanding should produce a better recommendation or decision, in a shorter time.

3. The involvement in the resolution of the dispute by the DRB is also likely to occur at an early stage, when the parties' impression of the events creating the conflict are fresh and untainted by the passage of time. The DRB will probably have had opportunities to form contemporaneous independent impressions of the issues whilst they are still crystallising. An adjudicator or ad-hoc mediator will not usually have any prior knowledge of the project, which must be acquired during the adjudication or mediation process.

4. A common criticism of adjudication is the potential for one party to 'ambush' the other, so that the responding party may suddenly be faced with a referral to adjudication after the referring party has had ample opportunity to prepare it's case, by which time the parties are locked into a strict time frame for the disposal of the dispute. Taking into account the background knowledge of the project that the DRB has, the time constraints within which the recommendation or decision must be delivered are less problematical.

5. The DRB is comprised of personnel with recognised technical expertise, likely to be applicable to most disputes that may arise in the course of the project. This has the additional benefit that it may fill a gap in those jurisdictions which do not have the benefit of a judiciary experienced in commercial construction disputes.

6. It is not essential that the DRB process produces a compromise result: the DRB does not have to accept the arguments advanced by one of the parties but can exercise its own skill and judgment to arrive at an alternative solution. Sometimes, avoiding the type of compromise which results from mediation may contribute to the effective maintenance of commercial relations between the parties.

7. The non-binding nature of most decisions produced by DRBs can be a virtue, although some argue that the decisions are weaker than those produced in adjudication (where the adjudicator's decision is at least temporarily binding). With the DRB, there is less of an impression of

'winner:loser', which may provoke the parties to become more entrenched in their positions, leading to the adoption of a more adversarial approach for the final resolution of the conflict.

8. DRBs can have the incidental benefit of dispute prevention: parties are reluctant to submit frivolous or unmeritorious claims. In addition, the prospect of a DRB recommendation provides an incentive for the parties to reach a negotiated settlement themselves.

Disadvantages

There are disadvantages. The first is the cost inherent in the procedure. Clearly if the DRB is to visit a project that spans several years on a regular basis, regardless of any controversy in the execution of the works, its use is likely to be warranted only on larger projects. The cost of DRBs is possibly disproportionate to the benefit that can be brought to a small scale project. Neither adjudication nor mediation, when used to address a specific dispute, results in the on-going costs that come with the degree of involvement inherent in a DRB.

A lesson learnt on Hong Kong's Chep Lak Kok airport is that the mandate of the DRB may end too soon after completion of the project. In the case of the airport, numerous disputes which were not dealt with in the course of the project eventually ended up in arbitration. However, for reason of cost alone, it is perhaps unrealistic to extend the DRB's mandate significantly beyond completion.

Ultimately the role of a DRB is similar to that of a mediator, facilitating communication between the parties, identifying issues and helping the parties to consider solutions. The availability of what may be described as 'permanent mediators', on hand to assist the parties to resolve disputes as they arise in the course of the project, has proved to be a cost effective means of settling disputes, while permitting the continuation of the construction project in an expeditious manner. In commenting on the American model, George Anthony Smith describes the process as being 'almost universally successful in finally resolving all disputes during construction'.[14]

International project experience of DRBs

Some examples of where DRBs have been utilised in international projects around the world are:[15]

- **The Channel Tunnel**: the contract contained a DRB procedure. The DRB was comprised of five persons. Whilst all five members heard

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14 See note 12.

15 Cited in Pierre M Genton, *The DRB/DAB, A True Complement to Arbitration*, Gulf Co-operation Council Commercial Arbitration Bulletin Issue No 7, www.gccarbitration.com/english/issues/issue7/nashram76.htm and Jan A Bosch, *The Role of ADR in the Construction of the Hong Kong Airport and the Maeslant Water Barrier* (2001) 17 ConstLJ No 6, 498-506.

any disputes referred to it, the decisions were taken by a three person panel, comprising the chairman and two other members.

- **The Channel Tunnel Rail Link**: for this project, two panels have been created. The technical panel comprises engineers whose mandate is to give decisions on construction related disputes. The finance panel comprises accountants and financiers, and aims to resolve disputes relating to the financial provisions of the concession agreement.

- **Vasco da Gama Bridge over the Tagus River**: the concession contract between the Portuguese Government and the concessionaire provided for two committees of three experts each (one technical and one financial). For the contract between the concessionaire and the contractor, one adjudicator was chosen.

- **Mass transit system in Athens**: the turnkey contract gives the opportunity to appoint an expert committee for any dispute arising during the contract execution.

- **Lesotho Highland Development Project (Lesotho-South Africa):** the bill of quantities contract provides for two DRBs, one for the dam and the other for the 80km transfer gallery to South Africa.

- **The Maeslant Water Barrier Project in the Netherlands**: for the construction and five year maintenance of the water barrier, situated near Rotterdam, the contract provided that disputes were to be submitted to a panel of three independent experts. For the contract governing the construction of the computer support system to control the electronic movements of the slides of the barrier, it was again provided that disputes be referred to a panel of three independent experts. However, in this latter contract 'a primacy' was established alongside the panel of experts, comprising two experts nominated by each party. The primacy operated closer to the actual working of the project, dealing with 'shop floor' disputes.

- In China: **The Extran Hydro Development** (hydro-electrical scheme of 3,300MW), the **Xiaolangdi Multipurpose Project** and the **Longtan Hydro Development.**

Hong Kong Chep Lak Kok Airport

The construction of Hong Kong's airport, one of the largest infrastructure projects in Asia, illustrated the workings of three different forms of ADR, in the context of the construction of the infrastructure, the new underground line and the airport itself. For the eight infrastructure projects, the dispute resolution process between the Hong Kong Government and the contractor was referral in the first instance to the engineer. If this failed to resolve the matter, it went to a mediator. If no agreement was reached, the next port of call was adjudication. The contracts contained 'Special Rules for Mediation,

Adjudication and Arbitration'. The secretariat for all three was the Hong Kong International Arbitration Centre.

The route for dispute resolution in the second category of contracts, construction of the new underground line, began with the engineer. Thereafter the parties could ask for mediation or arbitration.

In the context of the construction of the airport itself, the route was engineer, followed by an appeal to the project director. If the parties were still dissatisfied, the parties had ten days within which to consult a DRB. Thereafter, the final resort was arbitration.

In this project, the DRB consisted of six members plus a convenor, which met on site every three months and was therefore readily available to intervene on any conflict before it developed into a dispute. The members were selected to cover the range of expertise that might be necessary to understand the technical features of any dispute. For dispute resolution, a panel of one or three members was chosen, depending on the nature and complexity of the dispute.

In fact there were few referrals.[16] The DRB made six binding decisions, with only one case being taken to arbitration. The relatively low number of referrals suggests that the existence of the DRB deterred the referral of disputes and it may be that it encouraged the settlement of matters between the parties without further recourse to third party intervention. It is reported that a number of disputes were set aside until the airport opened, with several ending in arbitration.[17] In May 2001, there was apparently still some HK$6.3 billion outstanding. With the intervention and assistance of one or more mediators, settlements have largely disposed of the remaining matters.

Partnering

Whilst the partnering process has been a long standing feature of the American construction industry, it is very much a buzzword in today's UK construction industry. Much has been written on the subject and new forms of contract introduced. Its proponents hold it out as the panacea for the industry's well-publicised woes – adversarial relationships, low profitability and poor performance – and its detractors say that this is wishful thinking, or that they already observe its principles.

Whilst partnering is not strictly a dispute resolution process, its objective is dispute prevention. The critical element of partnering is the *core group* which provides the means for the key decision makers for all the parties involved in a project to meet and get to understand each others priorities, needs and interests. Essentially, partnering aims to build a successful working relationship by opening up communication and developing trust. In the context of dispute resolution the core group seeks to identify efficient dispute

16 See Jan A Bosch, note 15.
17 *ICC International Court of Arbitration Bulletin*, December 2001.

resolution methods, in particular ADR. Parties acknowledge that disputes will occur in the course of a project and consider the appropriate methods by which those disputes can be resolved (other than by litigation or arbitration). Use of negotiation and mediation is promoted as these are both consistent with the philosophy which underpins partnering, that 'prevention is better than cure'.

It is hoped that the partnering process will foster co-operation between the parties at an early stage, and therefore avoid adversarial confrontation during the life of the project.

Conclusion

In response to the increasing burden placed on the global construction industry by the costly and time consuming nature of the traditional routes for dispute resolution (arbitration and litigation), ADR in its many forms has increasingly been embraced within the construction sector – often ahead of many other areas of commercial business – as a means for getting parties round the table and creatively finding solutions to their differences. ADR is not the answer for all ills, but given the endorsement that has now been offered by organisations such as the World Bank, the ICC and FIDIC to a less adversarial approach to conflict, it is hoped that an increased familiarity with the options available within the umbrella of ADR will naturally lead to a growing confidence in its capacity to settle disputes effectively, to the satisfaction of all involved in the process.

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