CHOICE OF DISPUTE RESOLUTION PROCEDURE

EXTRACT OF A NOTE PREPARED BY PHILLIP CAPPER AND ROBERT HUNTER, LOVELLS

The choice of dispute resolution mechanism in a contract is too often considered to be a secondary consideration, resulting in the insertion of a standard boilerplate clause once the "real" negotiation has been concluded. Failure to agree a suitable dispute resolution forum and procedure in respect of an international contract can have significant disadvantages in the event of a subsequent dispute.

Failure to agree a dispute resolution mechanism

Where there is an international element to a contract, failure to agree a dispute resolution forum and procedure may result not only in the loss of benefits which a well considered procedure might have brought, but also in litigating a dispute in a foreign court with some or all of the following positive disadvantages: an unfamiliar procedure, an inconvenient location, excessive delay, a foreign language, a restricted choice of representation, an unfamiliar substantive law (even one influenced by a fundamentally different underlying social philosophy), unduly restrictive or excessive awards of damages and costs, and the possibility of a biased tribunal.

Is there an international element?

Deciding whether there is an "international element" to a contract is not always as obvious as it might seem. It is clearly present, for example, if:

- The parties have their places of business in different countries.
- The contract is to be wholly or partly performed in a foreign country.
- The contract concerns property in a foreign country.

An international element might also, but rather less obviously, be present if:

- A third party to the contract or someone closely concerned with it (for example, a bank providing a letter of credit or a parent company guaranteeing a subsidiary's obligations under a lease), or a future assignee, has its principal place of business or has to perform its obligation abroad.
- One of the parties has a parent or someone exercising some degree of control over its operations abroad.
- Goods supplied under the contract may ultimately reach consumers abroad.

Choosing a dispute resolution mechanism

A number of issues need to be considered when choosing the correct dispute resolution mechanism: choice of law; consequences of no choice of jurisdiction or arbitration; arbitration or litigation; options in choice of jurisdiction; options in arbitration; alternative dispute resolution; and other adjudicative dispute resolution mechanisms.

Choice of law

The method of dispute resolution and the place where the dispute is to be resolved are two essential elements in creating a dispute resolution mechanism. It is usual to consider them in conjunction with the choice of governing law. Ideally the system of law which is to govern the contract should coincide with that of the forum, otherwise providing evidence of the governing law is likely to be a costly exercise involving expert witnesses and possibly also the inconvenience of conducting proceedings in a language different to that of the governing law.

The choice of law in particular should be considered at the very beginning of the drafting exercise as whichever law is chosen will provide the legal context in which the contract is to be drafted: only once that is known can a contract be made which will reflect accurately the parties' intended apportionment of obligation and risk.

In the absence of an express choice of governing law, a court will have to decide which law to apply to the contract according to that court's conflict of law principles. An arbitrator may have the additional difficulty of having to decide which country's rules of conflict are to apply before being able to determine the governing law in accordance with the rules he chooses.

Most developed legal systems will respect an express choice of law in a commercial contract, unless it is considered to have been chosen deliberately to avoid a mandatory provision of a national law or there are other particular public policy reasons for not doing so. Within the European Union the Rome Convention has brought about the harmonisation of the rules for establishing the law applicable to contracts.

Consequences of no choice of jurisdiction or arbitration

In the absence of an effective jurisdiction or arbitration agreement in an international contract, the parties will be thrown back on to the rules of private international law to determine the correct forum for their dispute. This can often cause serious uncertainty and inconvenience. Within Europe, there is a reasonable degree of certainty provided by the Brussels and Lugarno Conventions.

Factors bearing on the choice of jurisdiction or arbitration are linked. Generally, a contract should nominate either arbitration or the courts of a chosen jurisdiction for the resolution of disputes (although it is possible to have part of a contract subject to arbitration and part subject to a specified jurisdiction, or to provide for a specified jurisdiction should the arbitration clause fail to cover a particular dispute). A convenient jurisdiction may well be a factor in deciding not to choose arbitration. For example, resolving a dispute before the Commercial Court in England which has great experience of determining commercial disputes and a responsive procedure, is an attractive alternative to arbitration. Quite the opposite is likely to be the case, however, if the only alternative to arbitration is the jurisdiction of a country where there is a concern about delay, incompetence or bias on the part of the courts.

Arbitration or litigation?

The following are the principal factors to be considered when deciding whether to opt for litigation or arbitration:

- *Neutral forum.* Arbitration can provide neutrality where parties come from different countries, particularly countries with different legal cultures. It is possible instead to nominate the courts of a third, unconnected country, but in this case care should be taken with regard to the enforceability of any judgment.

- *Expert "judge".* A judge will always be first and foremost an expert in the national laws and procedures of his own country, although specialist courts do exist, for example the Patents Court. Arbitration gives the parties scope for appointing an arbitrator with particular expertise in the subject matter of the dispute. This can be a particular advantage where a dispute turns on a technical point with which a chosen arbitrator is familiar.

- *Flexible procedure.* The arbitration laws of most countries allow a more flexible procedure in arbitration than is available in the courts. Subject to observing any mandatory requirements of the procedural law of the place of arbitration, and satisfying the requirements of the country of enforcement as regards due process,

the parties have considerable freedom to agree, and the arbitrator considerable freedom to order, a procedure tailor-made for the dispute and the parties in question.

A judge, on the other hand, will be constrained by the procedural rules of his legal system. An arbitrator's flexibility is valuable when parties come from very different backgrounds and compromises need to be found which are fair to both parties in relation to, for example, discovery, examination on oath, rules of evidence, or the form of any pleadings. With arbitration, there is also more geographical freedom, and a greater freedom of representation (there is usually no requirement for the parties to be represented at the hearing by a locally qualified lawyer, and the absence of a formal national procedure diminishes the need for local procedural expertise).

- *Confidentiality and privacy.* Most national court procedures require that a trial be accessible to the public. Arbitration requires no such openness. It is generally accepted that the hearing should be held in private. If a specific obligation of confidence is required, this should be spelt out in the agreement to arbitrate.

- *Finality.* In many jurisdictions, an international arbitration award will not be appealable on the merits, and a party may only apply to have it set aside for a fairly limited number of reasons (for example, that it was obtained by fraud, one party was unfairly treated or the arbitrator exceeded his authority). This is an advantage in that it prevents a losing party delaying enforcement of the award by pursuing unmeritorious appeals through the courts, but there is a risk of unfairness if a party is unable to challenge a plainly wrong award.

- *Enforceability.* Which will be easier to enforce: an arbitral award or a court judgment? If enforcement is likely to be required in a country other than that which is to play host to the litigation or arbitration, enforcement will be easier if there is a treaty between the two countries for the mutual recognition and enforcement of judgments or awards. There is no worldwide mutual enforcement treaty for court judgments which compares to the New York Convention for the enforcement of arbitral awards. There are, however, numerous regional and bi-lateral treaties, the most important in Europe being the Brussels and Luganno Conventions, which provide for mutual recognition and enforcement of judgments throughout the European Union and EFTA countries. There are also a number of regional and bi-lateral treaties relating to arbitration in addition to the New York Convention. If in doubt at the eleventh hour, outside the European and EFTA countries it is probably safer to opt for arbitration provided the likely country of enforcement is a party to the New York Convention.

- *Speed and cost.* Ultimately, the time and cost of proceedings, whether litigation or arbitration, depend heavily on the attitude of the parties. If all parties wish a dispute to be heard quickly and efficiently, both arbitration and litigation can meet this requirement. In an international commercial context, arbitration has the benefit of being usually final, thus ruling out appeals on the merits, and may also be more easily enforceable abroad. Arbitration procedure can be more flexible than litigation, and an arbitrator can be chosen who has time available to proceed quickly with determining the dispute.

  On the negative side, there is scope for a party to challenge the arbitrator's authority to hear all or part of the dispute; at their worst, such challenges can cause very serious obstruction and delay. Finding a hearing date convenient for the arbitrator(s) and each party may result in as much delay as would have been

incurred in waiting for a trial. Also, in any arbitration an arbitrator's fees and the administrative costs (such as the hearing room) have to be met by the parties rather than the taxpayer. Having a three person tribunal may lead to delays in achieving hearing dates and will increase the fees and costs.

- *Coercion.* A national court will usually be in a stronger position to prevent obstructive tactics from a difficult opponent than an arbitrator, who lacks the penal sanctions of a judge and who must also take great care to be seen to be acting fairly so as to prevent a subsequent challenge to his award.

- *Multi-party.* National courts have the power to join third parties to litigation proceedings, whereas they very rarely have such power in relation to arbitration proceedings without the consent of all concerned. Indeed, the presence of a party to a dispute who is outside the arbitration agreement may enable a court to seize jurisdiction over the whole dispute and override an agreement to arbitrate. Where there are likely to be multiple parties to a dispute, litigation is likely to be a more satisfactory solution than arbitration unless complex back-to-back arbitration clauses are incorporated into all the relevant contracts.

- *Certainty.* Arbitration awards have no formal "precedent" value as regards non-parties. A judgment on a standard form may be more useful in the long run than an endless series of arbitrations against many trading partners.

Options in choice of jurisdiction

If litigation is the chosen mechanism, it will be necessary to consider the following issues:

Ease of enforceability. Is a judgment likely to be capable of enforcement? If abroad, it might be easier to seek the judgment there in the first place.

Matters of procedure. How long are proceedings likely to take and how much are they likely to cost in the suggested jurisdiction? Consider also what orders may be made for costs, what restrictions there may be on the choice of legal representation, and what interim orders the court has power to make (for example, security for costs, *Mareva or saisie conservatoire*). What are the defining characteristics of the procedure (for example, the extent of discovery, whether there is oral examination by the court or by lawyers, whether there are court-appointed or party-appointed experts)? What are the practical effects of the appeals procedure? Are the rules of evidence different to those to which the parties are accustomed?

Convenience. Matters such as geographical location, familiarity with local procedural laws, language, and knowledge of and access to local lawyers should be considered.

Exclusive or non-exclusive. A contract may provide for either exclusive or non-exclusive jurisdiction. *Exclusive jurisdiction* should be chosen if proceedings are to be brought in one country only and no other. The effect will be that if one party brings proceedings in another country, the other party may apply to prevent them continuing. *Non-exclusive* jurisdiction will enable either party to bring proceedings against the other in the agreed jurisdiction, but it will also enable a party to bring those proceedings in any other country which has jurisdiction over the dispute under its own jurisdictional rules. The cost of such flexibility is that the other party may sue first in his favoured jurisdiction.

It is also possible to provide that the chosen jurisdiction is exclusive as regards one of the parties (that is, that party may sue the other only in the courts of the nominated country) but non-exclusive as regards the other party (that is, that second party may sue the first either in the nominated jurisdiction or in any other country which has jurisdiction over the dispute under its own laws).

Service of proceedings clause. Where one of the parties is domiciled in a jurisdiction other than that specified in the contract, it can save time and expense when later commencing proceedings if there is a clause in the contract providing for valid service of proceedings to be effected by delivery to an agent within the agreed jurisdiction. Otherwise, service will have to be effected on the defendant party where he can be found and in accordance with the procedural law of wherever that is. Thought should be given in such a clause to providing an automatic substitute should the particular agency fail.

Options in arbitration

If arbitration is the chosen mechanism, it will be necessary to consider the following:

Place of arbitration. This will determine the procedural law governing the arbitration. It will often also be the geographical location of the arbitration hearings. It may also affect:

- The applicable rules of conflict of laws.
- The chances of successful enforcement.

The procedural law governing the arbitration is of considerable importance. It will dictate matters such as:

- Whether the agreement to arbitrate will be recognised as excluding the jurisdiction of the courts.
- What degree of autonomy is given to the parties and the arbitrator to decide on procedure.
- What support the court will give to the arbitration (for example, compelling the attendance of witnesses or appointing an arbitrator in default of agreement).
- Whether it is possible to appeal on the merits and the grounds for applying to set aside an award (for example, for lack of jurisdiction).
- The extent to which the arbitrators are themselves able to decide whether or not a particular dispute or head of claim falls within their competence to decide.

Modern international jurisprudence has given rise to the concept of the 'seat' of an arbitration. This is a juridical place where the arbitration will be deemed in law as taking place whether or not that place corresponds to the geographical location of the hearings or where the award is issued.

Failure to specify a place of arbitration can cause considerable uncertainty, cost and delay.

Type of arbitration

There are two broad types of arbitration:

Administered. This is an arbitration supervised by an arbitral organisation. The administration will usually consist of three elements:

- Assistance in appointing the arbitrator(s).
- Provision of a set of rules of procedure.
- Some degree of administration of the arbitration, in particular supervision of the costs of the arbitrators themselves.

Ad hoc. This is an arbitration in which the procedure is determined by the parties themselves and the arbitrators.

If an ad hoc arbitration is chosen, it is possible to nominate an appointing authority (such as the President of the Institution of Civil Engineers, an official of a recognised trade or regulatory body, or an arbitration organisation) to appoint the arbitrator(s) in the absence of agreement of the parties, but to take no further administrative role in the arbitration. If no appointing authority is nominated and the parties are later unable to agree on an arbitrator, the party wishing to commence arbitration proceedings will have to apply to the court for a nomination.

Procedural rules

It is common to import a recognised body of rules into an arbitration clause to provide a ready-made procedural framework for the arbitration. If an administered arbitration is chosen, the rules of that organisation will be imported. If not, the United Nations Commission on International Trade Law (UNCITRAL) has drafted a convenient and widely-respected body of rules for use in ad hoc arbitration. Alternatively the parties and the arbitrator may draw up their own.

All the well known bodies of rules give the parties and the arbitrators wide discretion to agree on procedure. Ideally, the specific body of rules intended to be incorporated into an arbitration clause should first be checked to ensure that they do not contain any objectionable rules or inconvenient schedules and that they do contain all the specific procedural rules likely to be required. Care must be taken in altering any such bodies of rules so as not to disrupt the underlying administrative framework, particularly in an ICC (International Chamber of Commerce) arbitration; otherwise there is a danger of incompatibility within the agreed framework or of undermining the structure or even purpose of the chosen rules. In particular the following rules should be considered:

- The appointment of arbitrators.
- The incapacity or non-participation of an arbitrator.
- Time limits.
- The arbitrator's power to make interlocutory orders such as preservation of property or security for costs.
- The finality of awards.
- The awarding of costs.

Some rules require a significant deposit to be paid to the organisation up front and a "full statement of case" to be filed almost immediately. The current ICC rules provide for this although it is likely that new rules which are under discussion will introduce more flexibility into the timing of both these requirements. It is important to be conscious also that the organisation may change its rules at any time. In order to avoid being subject to any such changes the contract may be expressed to incorporate those rules current at the time of executing the contract.

Whether a body of rules is adopted or not, there may be specific permissive or prohibitive rules that one may wish to spell out; for example, that any hearing take place only by way of written submissions and witness statements, or that there be no or only limited discovery.

Number of arbitrators

The advantages of having three arbitrators may be:

- Broader expertise.
- Greater assurance of an acceptable award.
- Wider experience of different legal and business cultures.

Depending on the rules that have been chosen, two of the three arbitrators may also be able to continue with the arbitration if the third is incapacitated. On the other hand, the advantages of a three-person tribunal may be outweighed by the significant disadvantages of delay and cost inherent in using three arbitrators. Consideration should be given to providing (if not in the relevant rules) for a majority decision if there are three arbitrators. It should be borne in mind that if there are three arbitrators, one will be your appointee, one the other party's; the chairman is usually appointed by the other two.

If a set of arbitral rules is to be used care should be taken in determining the number of arbitrators specified. Some rules (for example, LCIA (London Court of International Arbitration) and ICC) provide for one arbitrator and others provide for three. In default of a number of arbitrators agreed between the parties, the number specified by the rules adopted will apply.

Type of arbitrator(s)
If an arbitrator with a specific technical (or other) qualification is required this should be specified in the agreement. The more specific the qualification, the greater the possibility of conflicts of interest or limited availability of arbitrators with those qualifications. In practice, the most important attributes of an arbitrator are the ability and experience to conduct the whole arbitration fairly and efficiently; technical expertise is of little use if the appointee lacks judgement or fails to push the proceedings along firmly and fairly.

Procedural rulings
When there is to be a three-person tribunal, it is often efficient to provide that the chairman shall have power to make procedural rulings alone after consulting the other two. This is already provided in some arbitral rules, for example, Article 5.3 of the LCIA Rules.

Language
The language in which the arbitration is to be conducted should be specified.

"Fast track" arbitration
There is a dearth of standard contract wordings designed specifically to ensure that any arbitration is "fast track" and capable of overcoming the cost and delay criticisms frequently made of typical arbitrations. A number of arbitral procedures (for example, ICC) are capable of being (and are) used to provide fast track arbitration (even within days) but this is usually agreed between the parties when the dispute arises and requires the concurrence of all of them. The City Dispute Panel Rules include a specific clause providing for "Rapid Determination of a Dispute".

One way of trying to achieve this is for the arbitration clause to provide for one arbitrator and for the arbitration hearing to take place, and the arbitration award to be produced, within a specified time.

LIMITS ON THE PARTIES' CHOICE AND PUBLIC POLICY

Under many legal systems, parties have considerable freedom (in the area of commerce at least) to choose the law and procedure they wish to apply to determine their dispute. Obviously, this freedom cannot be absolute as this would ultimately threaten the Rule of Law itself. What then are the restrictions on this freedom? It is necessary to look at this in three different circumstances:

- *Where a dispute is decided by a court under its own governing law.* Submission to a national law is sometimes unavoidable (as in the case of disputes relating to immovable property), sometimes voluntary, and sometimes by default (where no agreement has been made and the applicable governing law has been determined by a court in accordance with its principles of private international law). In such cases, there are certain mandatory rules which will apply irrespective of any attempt by the parties to exclude them. Examples include, provisions relating to title in goods or the exclusion of liability for breach of contract. Other provisions may be deemed to apply unless expressly excluded.

- *Where a dispute is decided by a court under a foreign governing law.* The parties will have more freedom to escape from mandatory provisions of a national law if they are litigating in the courts of that jurisdiction but have agreed to choose a different governing law. In such a case, a national court will look first to see if the choice of law is a proper one. Broadly speaking, the parties' express choice will be respected unless it has been made with the intention of avoiding mandatory provisions of law. Thus, under the Rome Convention, where all elements relating to the question of choice of law are connected with a country other than that of that parties' chosen law, rules of the chosen foreign law will not be able to "prejudice" any mandatory rules of the law of the connected country. Similarly, under English common law, a contract will not be upheld if performance of it would be illegal under the law of the place of performance. If the court is satisfied that the choice of law is a proper one, it may still not recognise or apply what would otherwise be the appropriate foreign rule of law when to do so would be manifestly incompatible with its own public policy.

- *Where a court is asked to enforce a judgment of a foreign court or a foreign arbitral award.* In some cases, recognition and enforcement will be governed by a convention or treaty such as the New York Convention. Otherwise it will be a matter of common law. Provided that an award or judgment has been validly made, it will, broadly speaking, be recognised and enforced unless that would be contrary to public policy.

Most developed legal systems construe the concept very narrowly. It is not sufficient that the principles by which the case has been decided would be contrary to the law of the enforcing country, even to its mandatory provisions. Such an objection will be rarely upheld to assist a party seeking to resist enforcement of a judgment or award particularly in commercial disputes. This should be considered carefully when asked to agree to submit to an unfamiliar governing law and jurisdiction at the time of drafting a contract.

There is a debate about the extent to which an international arbitrator is bound to apply rules of law which are mandatory in the place of performance of a contract when the parties have chosen a different governing law and a place of arbitration outside the relevant jurisdiction. Is he bound, or even entitled, to apply those mandatory principles against the parties' choice? An important example is the unfair competition provisions of Articles 85 and 86 of the Treaty of Rome. There is widespread (but not universal) acceptance that a tribunal should apply such principles in narrowly defined circumstances, for instance where the governing law has been chosen deliberately to attempt to bypass such provisions or where failing to apply such provisions would render the award liable to be set aside or refused recognition.

ALTERNATIVE DISPUTE RESOLUTION

The term ADR is usually (and for the purposes of this article) used to describe all those methods of resolving disputes spanning the area between the adjudicatory dispute resolution systems (including litigation, arbitration, adjudication, and expert determination) and simple negotiation. ADR is increasingly being used as an alternative or precursor to arbitration or litigation.

Its most common form is mediation, a voluntary dispute resolution process in which a neutral person (the mediator) helps the parties to reach a negotiated settlement. Mediation usually takes the form of an opening session of all the parties and the mediator, at which each of the parties briefly outlines its case, followed by a series of "caucus" meetings between the mediator and each of the parties.

The executive tribunal (sometimes known as "mini-trial") is, in effect a more structured version of mediation. Each side puts its case to a panel which consists of a neutral third party and an executive from each of the companies involved. The neutral's role is to chair the panel session and to facilitate the subsequent settlement negotiations between the executives.

Each neutral evaluation (ENE) may become more commonplace. In an ENE the neutral, who is likely to be a judge, retired judge or leading counsel, hears each party's submissions and then states his view on the likely outcome at trial. That view is "without prejudice" and has no binding effect. The authors are not aware of any ENE clauses. This ADR procedure is likely to be used on an ad hoc basis when a dispute is being litigated, at least until there is more experience of it in use.

Non-exclusive. Litigation and arbitration are alternatives and mutually exclusive. ADR, notwithstanding its name, need ***not*** be mutually exclusive to litigation or arbitration. For example, the Modern Mediation Procedure of the Centre for Dispute Resolution (CEDR) specifically provides that litigation or arbitration may "be commenced or continued notwithstanding the mediation unless the parties agree otherwise".

Reasons for an ADR clause. An ADR clause may not be enforceable and in practice a mediation involving a party who does not want to settle is likely to prove useless. Nevertheless, an ADR clause provides an opportunity for a party in a dispute to approach another party in circumstances where otherwise that party might be concerned that such an approach would be interpreted as a sign of weakness. A dispute resolution clause providing simply for negotiation may overcome this objection but the advantage of a mediation clause is that it:

- Triggers a process that unlike negotiation would not necessarily occur to the parties.
- Provides a specific process which gives the parties a framework for negotiations.
- Involves a neutral third party to facilitate those negotiations.

Mediation in context

Negotiation is by far the most common way of resolving commercial disputes. Most litigation cases are resolved before judgment at trial, primarily by negotiation. Many of those cases, however, settle well into the litigation, often shortly before, or even during, trial. By that stage the litigation costs are high, sometimes higher than the amount in dispute, so negotiating the settlement tends to be significantly more difficult than it would have been at a much earlier stage. The need for most companies, and therefore the challenge for their dispute resolution lawyers, is to settle disputes as cost effectively as possible. One of the most effective ways of doing that is to settle them earlier, ideally even before litigation. Mediation can be a very efficient way of making settlements happen earlier if it is brought into play as soon as negotiations become deadlocked, or are making such slow progress that the related litigation costs and disruption are mounting up. Mediation is, in effect, a technique for enhancing negotiation, the most common method of dispute resolution.

The increased use of multi-step resolution clauses in contracts - typically negotiation, then mediation and finally arbitration - illustrate the growing recognition of mediation. A further illustration of that recognition is that insurers, who are a significant factor in much litigation, are showing an increasing enthusiasm for mediation.

Mediation: a definition

The concept of mediation is simple: it is settlement negotiation with the assistance of a neutral third party. It is by far the most common form of ADR.

The negotiations in a typical mediation will be led by the principals and will involve all the parties being physically present at the mediation; they will not be conducted by lawyers over the telephone, as often happens in the typical litigation scenario.

The mediator has no adjudicative powers and will rarely risk compromising his neutrality by even expressing a view on the merits of a party's case. But he may question a party, at some length if necessary, about particular aspects of its case, as a means of helping that party to adopt a greater sense of objectivity both about its and the other party's positions.

The process is entirely confidentially and without prejudice and the parties can walk away from it at any time. Only when a settlement is concluded are the parties bound.

Distinguishing features of Mediation

Mediation may be distinguished from both litigation (and arbitration) and from negotiation.

Mediation vs Litigation. The main features of mediation which distinguish it from litigation and conventional arbitration are:

- It is a consensual, not an adjudicative, process; no judge or arbitrator imposes the settlement on the parties. There is none of the unpredictability of outcome that is an inherent feature of relying on a third party to impose a binding solution. Only if both parties are willing to accept a particular solution does it become binding. In most mediations the parties are willing to accept, and be bound by, the solution they have devised.

- The time and cost of resolving the dispute are likely to be very significantly less than if litigation takes its normal course. A mediation is usually set up and takes place in a matter of weeks; sometimes it is done in days.

- It focuses on the current and future problem that the dispute poses for both parties, rather than on who is to blame for what has happened in the past. This moves the emphasis away from strict legal rights to commercial interests. A good mediator will move the parties away from debating the legal strengths of their cases to what they want to achieve from a business standpoint, including, possibly, a continuing (or even new) business relationship.

- There are many and various options open to the parties for solving the problem. It may be possible to rewrite a contract instead of paying damages, or to recoup a loss by payment in some non-momentary form such as the transfer of intellectual property rights. In some cases, one party can make a concession which is of little value to that party (such as the use of a trading name) but of considerable value to the other party. The options open to a judge (or arbitrator) when delivering a judgment are very limited and essentially involve one party winning, the other losing.

- It is a flexible and adaptable process. Mediations tend to be run by reference to model procedures rather than rules. Both the preparatory stage and the conduct of the mediation can, and often are, adapted (often on an *ad hoc* basis) to suit the needs of the parties. This is one of the reasons why mediation is increasingly being used for complex multi-party disputes.

All of these features distinguish not only mediation, but also negotiation, from litigation (and arbitration). Like arbitration, mediation and negotiation are private and confidential.

***Mediations vs Negotiation*.** The features of mediation which distinguish it from negotiation, are less obvious. They include:

- The fact that it is a distinct process. Although mediation is flexible and adaptable, it is a distinct process beforehand by the adoption of a model procedure. It is sometimes described as structured. Apart from giving the parties a framework within which to negotiate, this can in some cases, make a proposal for mediation psychologically easier than a proposal for a settlement negotiation, which can be regarded as a sign of weakness. The encouragement of ADR by national courts, and the increasing use of ADR clauses in contracts both lower the psychological hurdle of the opening settlement proposal.

- The creation of the best possible negotiation scenario. A mediation should bring together relatively senior people who should both have a degree of objectivity by virtue of not having been directly involved in the dispute and have the necessary authority to agree a settlement:

    - in the same place (ideally neutral);
    - at the same time;
    - with the same objective of settling the dispute.

The combined effect of these factors most, if not all, of which are rarely evident in a typical negotiation can not be underestimated and can give the mediation similar dynamics to those of a court steps settlement negotiation, hopefully at a much earlier stage.

The mediator. The involvement of an independent neutral person, the mediator, is the crucial feature differentiating mediation from negotiation.

The role of the mediator

The mediator is crucial to the success of the mediation. The mediator, by virtue of his neutral position, is able to:

- Focus the parties on the problem rather than the dispute, on their commercial interests rather than their strict legal rights, on the future rather than the past.

- Enables the parties to see their own and the other party's case objectivity and realistically which is notoriously difficult to do when parties are locked in litigation.

- Reminds the parties of the alternatives to settlement (which are usually expensive).

- Keep momentum in the negotiations, particularly by diverting the parties from wild goose chases and useless tangents and dissipate the emotional elements that so often lie below the surface of many disputes.

- Facilitate communication by avoiding the typical confrontational bargaining style of negotiation. For example, making the opening offer, or giving an apology, can often be more easily done through a mediator, rather than face to face.

Getting a dispute to mediation

It is generally recognised that over 90% of cases are settled before trial. It may be assumed that the vast majority of these cases are settled by negotiation and are therefore capable of being settled by mediation.

It is sometimes said that mediation is unsuitable for cases involving, for example, fraud and interlocutory injunctions. There are, however, numerous examples, of fraud cases being settled by mediation. Similarly, many cases are settled by negotiation after the injunction stage and mediation is being used increasingly to resolve these types of case.

The difficult issue, however, is at what stage is a case suitable for mediation? If there is enough information about the dispute, negotiations are the obvious initial option. If negotiations are making slow progress or are deadlocked, then mediation should be the next option to consider.

It should not be assumed that there will only be enough information once the disclosure stage in litigation is complete. By this stage significant costs will have been expended on preparing for litigation. Creating the most effective solution for the client in terms of both costs and flexible outcomes should be the starting point when deciding when to launch a settlement initiative. A failed attempt to settle (even a failed negotiation or mediation) costs little and does not stop a subsequent initiative. On the other hand, the later the mediation takes place the less cost effective it will be.

The problem in getting a dispute to mediation is that both parties must want to settle. One party may have decided that the time is right but persuading the other party (or parties) is often very difficult. The CPR should make that easier for disputes that have gone to litigation as the other party will be able to request an ADR order from the court.

Some disputes may be more amenable to settlement once litigation has been launched and run at least its early stages, notwithstanding the cost implications. One party, for example, may not be willing to contemplate settlement until it is apparent that the other party is determined to pursue its claim. The case, however, for pre-litigation negotiation and mediation is strengthened by the approaches to costs by some state courts. Where a company wants to try to avoid those costs (not to mention avoid exacerbating a business relationship) there are a number of techniques for getting a dispute to mediation:

- If there is a mediation clause in the contract to which the dispute relates, this is the obvious route which should avoid the (albeit often misplaced) concern that making the opening approach is an indication of weakness.

- Contact the opposite party direct rather than through lawyers.

- Use a neutral third party, such as an ADR body to approach, or discuss mediation with the other, often hesitant, party.

- Avoid the jargon. A party unfamiliar with, and therefore hesitant about, mediation may be more receptive if it is suggested that there be a settlement meeting chaired by a neutral third party.

- Point out that if the dispute does escalate into litigation, the court may require the parties to try mediation, so why not pre-empt compulsion?

Preparing for mediation

There are no hard and fast rules governing the preparation for, or conduct of, a mediation. A mediation of a commercial dispute tends to follow a typical pattern and often a model procedure

will be adopted but this can be varied to suit the particular circumstances of the dispute or the particular requirements of the parties. Usually the following stages will be involved:

- Decide whether to use an ADR body to help in setting up and running the process.

- Sort out the administrative aspects, such as where, when and for how long should the mediation take place, who will attend it and what form of mediation procedure and agreement will be adopted.

- Appoint a mediator.

- Prepare the written case summary and supporting documents.

- Meet before the mediation. Those who are going to be at the mediation (usually at least the principal and the lawyer) should meet shortly before the mediation.

Using an ADR body

The parties may either set up the arrangements themselves, with or without the assistance of the mediator (often described as a self administered mediation) or use an ADR body (eg will known commercial ADR bodies such as CEDR or CPR). The points to consider in deciding which route to take are:

- *Neutral role:* Parties in a dispute tend to have a knee-jerk reaction to whatever the other party suggests. This can make agreeing what should be a relatively straightforward issue (such as the location of the mediation) quite difficult and what is a more important issue (most obviously who should he the mediator) very difficult. Using a neutral third party can reduce the friction and speed up the preparations. The ADR bodies have a depth of experience in setting up mediations and often play a crucial diplomatic role in sorting out the difficulties of getting the mediation in place.

- *Cost:* An ADR body will charge for its service but that cost may be less than the cost, for example, of lawyers dealing with the administration. Sometimes if an ADR body is not involved, the mediator himself will handle some of the aspects of preparing for the mediation and will probably charge at an hourly rate. What may at first sight look like a cheap option may be more expensive than paying the ADR body's fee (which will usually include the mediator's fee). However, if the parties in the mediation (and the lawyers, if any) are familiar with mediation and can agree who should be the mediator then the self-administration route may make sense.

Administration

If an ADR body is being used most of the administrative aspects will be handled by it. These will include:

- *When and for how long the mediation will take place.* Usually a day is sufficient. Even complex multi-party disputes rarely need to have more than three days set aside. If the parties are agreed on going to mediation, it rarely needs more than three or four weeks to set it up, and where the parties are in a hurry it can be done in days.

- *Where the mediation will take place.* Ideally the venue should be a neutral place but if the parties are willing to use the facilities of one of the parties, this will save costs. There should be a room for each of the parties and one room large enough for the mediator and all the parties.

- *Who will participate.* The parties should inform each other as to who will be attending the mediation. It is important that the lead representative of each party has sufficient authority to settle the dispute on the day without having to refer to anybody else. Lawyers are usually present with their clients. Technical experts sometimes attend but it is important that they appreciate the nature of mediation otherwise there is a danger that they will sidetrack the negotiations. The mediation team should be kept small as this tends to speed up the discussions and to keep the costs down.

- *What documents* should be produced and when.

- *Costs:* The most common approach to costs is for the mediation fees (including the mediator's fees) to be shared equally by the parties and for each party to bear its own costs of preparing for, and participating in, the mediation.

All of these arrangements should be tied up in a simple mediation agreement whose other purpose is to address some procedural aspects. This is usually done by incorporating the model procedure (or rules) of an ADR body. These typically will include provisions as to the confidentiality and without prejudice nature of the mediation.

Appointing a mediator

A mediator requires distinct, subtle skills based on a sound training. A CEDR accredited mediator, for example, will have been on a five-day intensive course and have attended two mediations as a pupil before his first appointment as a mediator. It is more important that the mediator has been properly trained than that he knows about the subject matter of the dispute in question. Trained mediators, however, come from a broad range of backgrounds and often a mediator with knowledge of the relevant subject matter can be identified by the ADR bodies. Otherwise the lead mediator can work with an assistant (or "pupil") mediator who has the relevant knowledge.

ADR bodies have trained, and have access to, a large number of mediators and are an obvious place to turn when looking for a mediator. An appointment of a mediator by such a neutral body will avoid the problem of one party suggesting a name and the other party objecting simply because it fears that the suggested appointee may be biased in favour of that party. Usually the ADR body will only appoint a person agreed by both parties.

Mediation documents

The usual documents for a mediation consist of a short case summary (or submission) and a set of key supporting documents, preferably a joint set agreed between the parties. The documents should be kept short and consideration should be given specifically to agreeing the maximum length or volume of these documents.

The primary purpose of the summary is to explain as succinctly and persuasively as possible to the other party(ies) the party's position and objective in the mediation - its case in related litigation (if any) will already be familiar to the other side from the court documents. The secondary purpose is to explain the dispute, and the party's position in it, to the mediator. It should include details of any previous settlement discussions. It is also helpful in some cases to include a chronology.

The documents are usually exchanged between the parties and supplied to the mediator at least a week before the mediation. If an ADR body is involved this may be done through it.

Pre-mediation meeting

The team that will be attending the mediation should meet before mediation to, for example:

- Discuss how mediation works and the role of the mediator. It should be decided who is to make the opening statement and the points it should make. In most cases a presentation by the principal rather than the lawyer is likely to make more of an impact on the other party's principal. If the lawyer is to do the presentation, consideration should be given to the principal adding his own words after the lawyer had spoken.

- Decide on tactics and identify the realistic commercial objectives.

- Explore possible settlement options.

- Review the prospects of success at trial.

- Quantify the costs issues (including potential management time involved in litigation).

- Carry out a risk-benefit analysis of the alternatives to a settlement, taking into account the potential upside and downside of winning and losing at trial (and even at appeal).

- Finally, it is important to ensure that the principal has the necessary authority to settle on behalf of his company, or organisation.

Participating in the mediation

A typical mediation consists of a number of stages.

Opening session

The mediation begins with a joint session chaired by the mediator. The mediator will typically open by:

- Explaining his role both as neutral facilitator of the negotiations with no decision-making power and as chairman of the mediation meeting.

- Reiterating the key ground rules as set out in the mediation agreement and model procedure.

- Dealing with the administrative aspects, including time issues.

- Inviting each of the parties to make its opening presentation or statement.

The mediator may take the opportunity to set the tone of the mediation by briefly reminding the parties of the importance of:

- Exploring commercial solutions rather than attempting to establish legal rights.

- Looking to the present and the future rather than re-examining past events.

- Thinking laterally and creatively about options that will not be available in litigation.

- Remaining optimistic about the outcome - keeping in mind that there is about an 85% chance of the mediation resulting in a settlement - even though there may well be a stage in the mediation when the way forward looks impossible.

Each party will then make its presentation. This should:

- Be directed to the other party(ies) rather than the mediator. It follows that terms such as "My client" (as opposed to "You" or "Mr….") or "I submit" are inappropriate.

- Be succinct and concentrate on the key issues. A repetition of the case as pleaded in the litigation, or even as set out in the mediation summary, is unlikely to carry much weight. A five to ten minute presentation is likely to be more effective than a half hour one.

- Be non-confrontational. The way in which the presentation is given can be as important as the content. An informal explanation of the party's position is likely to create a more constructive atmosphere than an aggressive rant or a court style submission. This does not mean that the opening cannot be forceful and delivered with conviction, even emotion. It should be remembered that the whole process is without prejudice and this should enable a degree of openness which may encourage a co-operative approach to resolving the dispute.

This can be an important part of the process as it may be the first and last time at which each party can impress the person in the executive role for the other party face-to-face with the full force of its case, and its strength of feeling.

This stage may be followed by each party seeking further clarification of points raised in the opening statements, which may lead to initial across-the-table discussions.

Private sessions. As soon as the opening session has gone as far as it usefully can, the mediator will ask to see the parties in private session (or caucus). The purpose of the initial of these sessions is to enable the mediator to grain a better understanding of each party's position including any hidden agendas or underlying issues not apparent from the written summaries and opening presentations.

It is important to take advantage of the fact that these meetings are entirely confidential and anything said at them will only be passed on to the other party with the specific authority of the party. Trust in the mediator and a degree of frankness is likely to assist in the progress of the mediation. Gaining an overview of both parties' interests and concerns will often enable the mediator to steer the parties towards fruitful negotiations.

The private sessions will take up most of the time of the mediation, moving from the initial exploratory stage to the negotiating stage. The interposing of a neutral third party in the form of the mediator can overcome the reluctance, often encountered in typical negotiations, of making settlement proposals face to face.

The teams representing each of the parties (particularly in multi-party cases) must expect, and plan for, spending a lot of time by themselves, not actively engaged in the process. The lawyers, should, however, encourage their clients to use this time in exploring options and tactics in the light of the previous private session; sometimes the mediator will make specific suggestions as to what should be done (for example, preparing financial projections) before the next session.

Reconvened joint session. If the mediator thinks that negotiations are at a stage where they are likely to make more progress face to face, he may bring some or all of each of the parties together. Sometimes reducing the crowd and, for example, bringing just the principals, or lead representatives together without lawyers, can be productive.

Settlement agreement. If the parties reach agreement, the mediator will, wherever feasible, insist that it is written out and signed there and then. It is only then that it becomes binding. Even if it is impossible to produce a comprehensive agreement, as much as possible should be

documented and signed - a "Heads of Agreement". Ideally, the steps to be taken to conclude the final agreement should also be set out.

The lawyer's role

The business person, rather than a lawyer, should play the lead role in a mediation. This gives control of solving the problem to those whose problem it is. Lawyers (external and in-house), however, can and do play an important role in mediations.

General advice. Lawyers should advise if and when mediation should be tried, as part of their general dispute resolution role both when initially instructed and during the currency of the dispute and any related litigation. Failure to do so could amount to negligence.

Preparation for the mediation. The lawyer will often draft the case summary and put together the supporting document bundle, as well as sorting out the administrative aspects either with the ADR body or with the mediator and the other parties direct. The lawyer should also organise the pre-mediation meeting.

Supporting during the mediation. During the mediation the lawyer should play a vital support role in the negotiations. The lawyer should help the client to be:

- Creative in looking for options that could lead to a settlement, such as a new or varied agreement with the other party or a deferred payment arrangement.

- Objective and realistic about his commercial and legal position. Often this will involve trying to persuade the client to be objective rather than emotional about the dispute and the other party.

- Constructive in the approach to negotiating, avoiding the positional bargaining that typifies many negotiations. The most successful mediations are those where the parties can adopt the approach that the dispute is a problem for all the parties which can best be resolved by working co-operatively.

To some extent this role involves the lawyer appreciating what the mediator is trying to do and assisting him in that objective. It is important that the lawyer steps outside the usual litigation mindset and plays a more creative role than is typically the case.

Legal alternatives. The lawyer may advise before and at the mediation of the legal alternatives if the case does not settle, including the prospects at trial and the costs. It is important that the lawyer has to hand at the mediation details of:

- Legal costs to date.

- Estimated costs of winning at trial, that is, own costs less costs recoverable from the other party.

- Estimated costs of losing at trial, that is, own costs and the other party's costs.

- Estimated costs of winning and losing on appeal.

Effectiveness of the settlement. The lawyer should ensure the legal effectiveness of any settlement, including drafting the settlement agreement at the end of the mediation. This may involve advising on related aspects such as enforceability (by, for example, incorporating it into a court order), tax or competition issues.

A different approach. A clear understanding of the dynamics of mediation on the part of the lawyer is essential. If the lawyer does not appreciate that his role is different from that needed for litigation, that involvement may be detrimental. An ability to listen to what the other party is saying, so as to understanding rather than refute, is essential.

In order to maximise the cost-effectiveness of mediation, the lawyers should resist any temptation to produce unnecessary lengthy case summaries, voluminous documents and too large a team at the mediation.

Multi-party and cross-border disputes

An increasing number of multi-party and cross-border disputes are being resolved by mediation. In cross-border disputes mediation should enable parties to side-step the jurisdictional issues which can bedevil and delay litigation. Parties to an international mediation can achieve this by, for example, providing:

- A venue for the mediation in a neutral country.
- A mediator whose nationality is different from that of the parties.
- A mediation agreement confirming the without prejudice and confidential nature of the process.
- Confirmation of the right to pursue adjudicative remedies if the mediation fails.

The procedural complexity of managing the litigation of multi-party cases contrasts with the flexibility of mediation, where the mediators can work with appropriate groups of the parties as seems productive as the mediation develops. If there are two mediators (either co-mediators or a lead and associated pupil mediator) they can work with different groups to speed up the process. Those participating in such a mediation nonetheless need to come to it in the expectation that they may spend a considerable amount of time on the sidelines.

Taking advantage of the mediation option

Mediation is not a dispute resolution panacea; nor is it necessarily an alternative to litigation. Often it will be the fallback from negotiations and run in parallel with litigation (or arbitration), which will still be the longstop process. Nonetheless its focus on the future not the past, on commercial interests rather than strict legal rights and on preserving rather than damaging business relationships, should make it an attractive option to businesses and their legal advisers at the appropriate time in a commercial dispute.

An attraction of mediation for a company is that it puts control of resolution of its disputes into the hands of its management, rather than its external lawyers. Above all, the upside of a successful mediation, in terms of savings in costs and management time, will in most cases easily outweigh the downside of the relatively small chance of an unsuccessful mediation. Its potential can be increased by including provision for it in dispute resolution clauses in commercial contracts. There is also scope for using it as a way of clearing logjams in contract negotiations.

Glossary

Alternative dispute resolution (ADR). There is no one accepted definition of ADR. To some, particularly in the US, the term includes all dispute resolution methods other than the court; it therefore includes arbitration. In the UK, ADR is generally understood to describe all dispute resolution methods other than the court and arbitration or just non-adjudicative dispute resolution methods such as mediation, executive tribunal (in essence a more formal type of mediation, known in the US as "mini-trial") and early neutral evaluation.

- *Expert determination*. Expert determination is a binding, inquisitorial process that can offer an effective means of settling a technical issue or dispute between contracting parties. Although it is possible to arrange an expert determination on an *ad hoc* basis, it is most usually provided for in commercial agreements.

- *Adjudication*. A hybrid procedure which usually provides for the adjudicator's decision to be binding, but only for an interim period - until completion of a project or until review in arbitration or court proceedings. It is best known in the construction field where the Housing Grants, Construction and Regeneration Act 1996 requires all construction contracts entered into after 1st May, 1998 to provide for rapid adjudication of all disputes.

- *Early neutral evaluation (non-binding)*. In an early neutral evaluation, the neutral, who is likely to be a judge, retired judge or senior counsel, hears each party's submissions and then states his view on the likely outcome at trial. That view is without prejudice and has no binding effect. This procedure is more likely to be used on an *ad hoc* basis when a dispute is being litigated, at least until there is more experience of it in use.

- *Mediation.* Mediation is the most common form of ADR. The term ADR and mediation are sometimes used synonymously.

Dispute resolution within the performance of contracts

1. The key issue here is: dispute resolution *within the performance of contracts*.

2. What are the "non-binding" techniques?

   - o dispute avoidance techniques (partnering)
   - o ADR
   - o dispute review boards

3. How can large contracts provide for effective dispute resolution, during the works?

4. Is the traditional FIDIC-style "Engineer's Decision" still an option?

   - o is there an Engineer?
   - o is the Engineer recognised as being an independent neutral decider?
   - o is it a turnkey, or design & build, rather than a traditional Owner-designed project?

5. The prior questions:

   - o what sorts of disputes typically arise on large projects?
   - o can their occurrence be minimised, or avoided?

6. Weaknesses of traditional FIDIC-style project contract forms

   - o weak contractual provisions on programme management
   - o weak contractual control and management of changes
   - o postponing decisions on extra time and cost entitlements

7. Dispute-reduction techniques in the New Engineering Contract

   - o strong programming provisions, with early warning mechanisms
   - o prior assessment of time/cost impact of changes, before implementation

8. Where disputes still necessarily do occur, what third-party neutral methods are best effective:

   - o escalating the issue - for resolution by detached higher management
   - o will a non-binding method break the impasse: wise man/expert report?
   - o structured resolution methods: optional/mandatory? advisory/binding?

9. Which types of dispute are suitable for which method?

10. Is the mechanism sensitive to third party influences (state, regulatory, programme)?

11. Should there be provision for third party inputs; eg checking engineers. advisers of financiers?

12. Current trend: mandatory and binding first-level resolution by third-party neutrals ("DR" eg Adjudicators)

13. What is the true legal nature of this mechanism: adviser, independent expert, adjudicator, arbitrator?

14. What are its powers?

15. Openness of procedure: discouraging rulesmanship

16. Avoiding the sequential briefs syndrome

17. The project must go on: but on what terms?

18. Reasonably short time-limits

19. Is the DR's decision constitutive: immediately contractually binding?

    - not dependent on the parties' implementation
    - but the Owner can still choose in accordance with it

20. How does one establish sufficient proof, and a fair (enough) hearing, given the nature of the process?

21. What supervision by the courts is, or should, be possible?

22. Jurisdictional issues arising from classification of disputes

23. Who has jurisdiction for interim/conservatory relief?

24. Is final resolution (arbitration or litigation) to be postponed until after completion?

25. Why may there be conflicts between the mandatory first-tier DR and eventual tribunal

    - what is referred, the dispute or the decision?
    - disputes around or after completion (or termination)
    - arbitrators' jurisdiction over true set-offs, but not counterclaims still to be adjudicated by the DR.

Typical dispute scenarios

I. CONTRACTOR'S ENTITLEMENTS

A. Payments:

1 assessment of amount due
2 information required
3 under-certification, non-certification
4 deductions

B. Compensation events (extra time or cost)

1 issue as to event or not
2 information required
3 disagreement over assessment

II. PERFORMANCE AND COMPLIANCE

A. Excessive/unnecessary tests and inspections
B. Re-iterative/abortive/ultimately useless design studies
C. Interpretation/Inadequacy of specification, Works Information
D. Arguments over applicable standards, fitness for purpose
E. End result not performing, compliant with expectation

III. CHANGES

A. Is it a change? Was it implicit?
B. Was it Employer or Contractor change?
C. Postponement, inaction, avoiding the issue

IV. CONSTRUCTION METHODS

V. PROGRAMME

A. Employer/Owner forcing acceleration by evading action on compensation events

VI. MISREPRESENTATION

A. Misleading tender documents
B. Misleading financial information

VII. INSTRUCTIONS

A. Generic instructions outside specific contractual procedures
B. Instructions to proceed in advance of resolution on changes, compensation event

VIII. SUPPLIERS AND SUB-CONTRACTORS

A. Interference by direct Employer/Owner intervention bypassing Contractor
B. Instructions to include/exclude entities from tender lists
C. Inconsistencies: specification-compliance vs Employer/Owner sourcing requirements

IX. TERMINATION AND RIGHT TO SUSPEND

X. ACQUIESCENCE, WAIVER, CONVENTIONAL DISREGARD OF CONTRACT PROCESSES

A. Requiring Contractor to satisfy third party regulators, financiers, users of site.

XI. OBJECTIVES BEYOND THE CONTRACT/THIRD PARTY INFLUENCES

A. Requiring Contractor to satisfy third party regulators, financiers, users of site.

B.