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ALTERNATIVE DISPUTE RESOLUTION (ADR) – AN OVERVIEW OF SOME COMMON MECHANISMS, AND THEIR STRENGTHS AND WEAKNESSES IN CONTEXT

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Abstract:

Alternative Dispute Resolution, or 'ADR', offers parties in dispute an alternative to traditional court-based litigation, which is often seen as slow, costly and ineffective. ADR frequently involves a neutral third party who will settle or facilitate resolution of the dispute. This paper examines three common ADR mechanisms, adjudication, arbitration and mediation, and explores their relative advantages and disadvantages in different contexts.

Keywords: Alternative Dispute Resolution; ADR; adjudication; construction adjudication; arbitration; mediation; negotiation

Introduction

With the Jackson Reforms increasing the pressure on disputants to reach early settlements,[2] and with business widely conducted on the international stage, never has the field of ADR been so markedly in the spotlight. The Civil Procedure Rules (CPR) which govern civil court proceedings in England and Wales[3] stipulate that disputants should engage in ADR, and furthermore may be subject to costs sanctions if they proceed to litigate without having done so.[4] Aside from academic debate on the topic,[5] this point alone underlines the importance of

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[2] The Jackson Reforms comprise changes to the civil litigation process in England and Wales which have developed from the *Review of Civil Litigation Costs: Final Report* by Lord Justice Jackson (The Stationery Office 2009) http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/jackson-final-report-140110.pdf 15 November 2013. They are 'designed to control costs and promote access to justice' (p.i). The Jackson Reforms encourage ADR both explicitly – including a call for 'a serious campaign to ensure that all litigation lawyers and judges are properly informed about the benefits which ADR' and the publication of an 'authoritative handbook' on ADR (pp.486-9) – and as a consequence of tighter costs controls in litigation incentivising early settlement.

[3] Pursuant to the Civil Procedure Act 1997. The most recent amendments to the CPR are contained in the 66th update: The Civil Procedure (Amendment No 7) Rules 2013 SI 2013/1974 and associated Practice Direction Making Document.

[4] CPR 4.1 and 4.4(3) state that the court can 'take into account […] when making orders about who should pay costs' that a party has 'unreasonably refused to consider ADR' prior to litigation (pursuant to the relevant so-called 'pre-action protocol') or indeed during proceedings.

elaborating on what is meant by the term ADR. The CPR mention as examples of 'some of the options for resolving a matter without starting proceedings':

> '1) discussion and negotiation;
> 2) mediation (a form of negotiation with the help of an independent person or body);
> 3) early neutral evaluation (where an independent person or body, for example a lawyer or an expert in the subject, gives an opinion on the merits of a dispute); or
> 4) arbitration (where an independent person or body makes a binding decision); many types of business are members of arbitration schemes for resolving disputes with consumers.' [6]

Furthermore, the companion publication to the Chartered Institute of Arbitrators' (CIArb) 'Introduction to Alternative Dispute Resolution' course outlines some 14 mechanisms, whilst noting that this is not only not an exhaustive list but that 'new names and titles are continually being invented to describe' the various existing forms.[7] Brown states that what unifies the numerous ADR mechanisms is that they serve as 'alternatives to litigation through the courts' and 'generally involv[e] the intercession and assistance of a neutral and impartial third party'.[8]

The mutable and fluid nature of the field is its strength: there is room for creativity and different ways of thinking in addressing a dispute. At the same time, different forms of ADR are subject to different levels of regulation, a feature which has the potential to create uncertainty, anxiety and unsatisfactory outcomes for the disputants.

ADR mechanisms can be divided into the 'decisional' and the 'facilitative'. Decisional mechanisms, also termed 'dispute settlement' mechanisms, involve a neutral third party imposing a solution or decision upon the disputants. Facilitative mechanisms are also termed 'dispute resolution' mechanisms and, if they involve a neutral third party, his or her

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[5] To the extent that even what the term ADR stands for has been the subject of discussion. The initial 'A' has been variously referred to as denoting 'alternative', 'appropriate' and 'amicable'. 'Appropriate' is used inter alia by Menkel-Meadow, C., in 'Mothers and Fathers of Invention: The Intellectual Fathers of ADR', *Ohio State Journal on Dispute Resolution*', 16(1), (2000), p.2, though 'Alternative' is widely accepted in the UK, referred to in the CPR, and by CIArb (see Crooke below), the Ministry of Justice (see note 19 below) and many other authoritative sources.

[6] CPR 8.2.

[7] Crook, J. A., 'A Note to the Reader', in Betancourt J. C. (ed.), *What is Alternative Dispute Resolution (ADR)* (London: 2010), p.xi. The author attended CIArb's 'Introduction to Alternative Dispute Resolution' on 5 March 2013.

[8] Brown, H. et al, *ADR Principles and Practice*, (London: 1999), p. 12, cited in Crook, J. A., 'What is Alternative Dispute Resolution (ADR)?' in Betancourt, *What is Alternative Dispute Resolution (ADR)?,* p.1.

function is to help the disputants reach a mutually acceptable solution. This paper will examine three ADR mechanisms, beginning with two common decisional forms: adjudication and arbitration. It will then move on to consider at greater length mediation, a common facilitative mechanism. It will focus on comparing and contrasting these mechanisms and assessing their appropriateness in a variety of contexts.

1 Adjudication

Adjudication is employed primarily in construction disputes, and has a statutory basis in this respect in England and Wales, discussed further below.[9] In such contexts, delays caused by trying to resolve a dispute in a more traditional channel such as litigation or negotiation could be fatal not only to the construction project but also to the survival of the construction organisations involved. Cash-flow is of crucial importance in this industry and if necessary funds are withheld due to the parties waiting for a dispute to be resolved, projects may be abandoned entirely and/or companies wound up. Adjudication allows a neutral third party to make a decision on a disputed matter, typically on the interpretation of a particular clause in the construction contract, by which the parties agree to abide in order to resume completion of the contract, and trigger payments under it.

Swiftness of outcome is a priority for parties engaged in adjudication. A just decision, whilst clearly important, does not trump the need for a quick resolution. In England and Wales, the parties are at liberty to revisit the dispute after the adjudication award has been made, that is, the outcome of the adjudication is only binding unless and until the dispute is resolved by litigation, arbitration, agreement, or other means as the case may be. Thus it is generally unsuited for disputes where time and/or cash-flow are not of the essence. In such contexts, it would merely add an unnecessary additional layer of dispute settlement, which might be overturned at a later date. In contexts where time is of the essence, however, its strength lies in its potential to save money and keep on track a project which may have been derailed by other forms of dispute resolution.

In England and Wales, the Housing Grants, Construction and Regeneration Act 1996 applies to most companies and individuals operating in the construction industry and requires construction contracts: to provide a timetable for appointing an adjudicator and referring the dispute to him within 7 days of the adjudication notice; and to require the adjudicator to reach a decision within 28 days of the referral, or within a timeframe agreed by the parties. The parties must act upon the adjudicator's decision immediately. Whilst the mandatory

[9] Housing Grants, Construction and Regeneration Act 1996.

nature of these provisions may place construction adjudication in the England and Wales outside certain commentators' definition of ADR, its value in providing a swift, practical solution to time-sensitive projects is clear. Furthermore, the fact that other more thorough dispute resolution mechanisms can be applied to the dispute after completion of the project limits the potential for a quick outcome being achieved at the expense of a just one.

2 Arbitration

Arbitration is a process by which the parties entrust the settlement of their dispute to a neutral third party (an individual or panel of individuals who are the arbitrators), who, notes Lew, 'derive their powers from a private agreement, not from the authorities of a State, and who are to proceed and decide the case on the basis of such an agreement'.[10] This appraisal needs some qualification in the context of England, Wales and Northern Ireland at least, where arbitration has a statutory basis which supplements any arbitration agreement under which the dispute is being conducted, and thus has at least a degree of state input.[11] Furthermore, an international convention – the 'New York Convention' – governs recognition and enforcement of foreign arbitral awards in respect of its signatory states, an additional example of state authority supplementing what is primarily a private method of dispute resolution.

As a summary definition, arbitration could be termed a 'private court', where parties make their respective cases and then agree to abide by the decision of the arbitrator.

A dispute is referred to an arbitrator:

- by parties agreeing at the outset of their legal relationship that any disputes will be taken to arbitration rather than litigation (typically through an 'arbitration clause' in a contract);
- by parties agreeing to go to arbitration once a dispute has arisen, via a 'submission agreement' (albeit consensus may be more difficult to achieve once a dispute has arisen); or
- pursuant to a compulsory scheme.

Depending on the way in which any arbitration clause or agreement is drafted, parties typically have some control over who the arbitrator is (for example, a surveyor may be agreed upon for a property dispute) as well as (along with the arbitrator) over the timeframe and format of the proceedings. The arbitrator will make a decision at the end of the proceedings, to which the parties will have agreed to adhere.

[10] Lew, J. et al, *Comparative International Commercial Arbitration*, vol 1, (The Hague 2003), p.2, cited in Crook, J. A., 'International Commercial Arbitration' in Betancourt, *What is Alternative Dispute Resolution (ADR)?* p.11.
[11] Arbitration Act 1996.

A primary advantage of arbitration is the level of control it gives to the parties. Whilst in litigation the court system largely determines the timeframe and format of the proceedings through active case management, and also the identity of the judge, in arbitration the parties can have some input into these factors. Furthermore, proceedings which may have been in the public domain in the traditional courts can be kept confidential in arbitration. It is often attractive to commercial organisations who want a swifter conclusion to the dispute than would be available in the courts; who want their dispute looked at by an industry expert; and who would rather not have the workings and conduct of their company in the public domain.

Arbitration is commonly employed in the international arena. Disputants from different jurisdictions may each be reluctant to be seen to submit to the other's foreign legal system. Addressing the dispute through arbitration:

- reduces the potential for such political sensitivities to further complicate the dispute;
- provides the parties with a dispute resolution mechanism with which they may feel more comfortable in comparison to a foreign legal system; and
- may offer the parties some comfort in respect of enforcement following the award, allowing them to rely (where applicable) on the New York Convention rather than a foreign jurisdiction's enforcement laws.

Furthermore, arbitration is often appropriate where a party wishes to instigate legal proceedings against a country, given the potential complications and political sensitivities involved in such an undertaking.

3 Mediation

In contrast to adjudication and arbitration, mediation is a mechanism by which the disputants aim to come to a mutually agreeable solution to the dispute, rather than have a solution imposed upon them. The mediator, a neutral third party ideally with skills and training in this field,[12] fulfils a role which includes facilitating constructive dialogue between the parties, helping them realistically assess their positions, and aiming to assist them in reaching a resolution.

Unlike construction adjudication, the mediation process in England and Wales is not dictated by statute, making it particularly important for the mediator and the disputants to agree on the scope of the mediator's brief and the format of proceedings. The parties and the

[12] See note 20 below.

mediator should sign a mediation agreement, for which there are standard precedents,[13] covering areas such as:

- the mediator (if he/she is fulfilling a truly facilitative role) agreeing not disclose to one party his/her views on the merits of the other party's case;
- the outcome not being dictated by the mediator's decision;
- the mediation being conducted on a 'without prejudice' basis, so as to enable each party to negotiate freely without fear that what they say within the mediation may be used against them in litigation, should the mediation break down;[14] and
- a confidentiality clause whereby the parties and the mediator agree to keep confidential issues arising from the mediation and terms of any settlement.[15]

A mediation established along these terms could be described as 'facilitated negotiation'.

The mediator may at the outset discuss the intended format with the parties. In a commercial mediation, this will typically include an introductory session with all parties present, then a series of discussions – the mediator talking with each party individually, gauging and managing their expectations, encouraging them to think laterally about the dispute, and discussing possible settlements. The parties may meet together again – perhaps a number of times – with or without the mediator present, depending on the dynamics of the process. The aim is typically to conclude the process with the signing of a binding 'settlement agreement' which sets out the terms of the settlement by which the parties have agreed to abide.

With mediators and parties generally free to determine the format of a mediation. the key factors likely to impact on the potential for a successful outcome are:

- the willingness and preparedness of the parties; and
- the skills of the mediator.

In respect of the former, it is important to define the key points at issue prior to the mediation (typically by parties exchanging, and sending to the mediator, 'position statements' beforehand), as well as to identify the goals of the mediation. The recent Court of Appeal

[13] For example the Centre for Effective Dispute Resolution (CEDR) Model Mediation Agreement (13th ed.) – http://www.cedr.com/about_us/modeldocs/?id=20 15 November 2013.

[14] Although case law indicates that the 'without prejudice' nature of mediations will not prevent the court from examining discussions had during a mediation where the point at issue is whether or not an agreement has been reached (*Unilever v The Procter and Gamble Company* [1999] EWCA Civ 3027, applied in *Brown v Rice* [2007] EWHC 625 (Ch) at 21).

[15] Subject to the caveat that whilst the court will generally uphold confidentiality provisions in a mediation agreement, it can require a mediator to give evidence in the interests of justice: *Farm Assist Limited (in liquidation) v The Secretary of State for the Environment, Food and Rural Affairs (No. 2)* [2009] EWHC 1102 (TCC) in which an allegation of economic duress regarding what was said during a mediation was held to warrant obliging a mediator to give evidence on the matter.

case of *Frost v Wake Smith and Tofields Solicitors*[16] illustrates the need for parties to understand clearly what they can reasonably expect at the end of mediation, and what they cannot. Disputants David and Ron Frost attended a mediation with their respective solicitors. "The mediator performed a small miracle" in facilitating an agreement between the parties,[17] but once the disputants had left (separately) to celebrate their apparent success, it became clear that more information was required regarding the brothers' various property interests in order for their solicitors to draft the settlement agreement. Ultimately, David Frost sued his solicitor for failing to complete a settlement agreement which was enforceable against his brother. The Court of Appeal found that Mr Frost's solicitor could not have been expected to achieve a binding settlement when negotiations had not proceeded sufficiently to allow this to happen. Put succinctly, the solicitor could not "conjure finality from their provisional agreement."[18] *Frost* indicates the importance of parties defining their goals precisely, having the necessary information to hand to achieve them, and understanding the limits of the process, all areas in which the conscientious solicitor will advise his client.

In respect of the latter variable – the skills of the mediator – there is currently no central regulatory body or (where privately appointed) any particular training requirements for mediators. Factors which may influence the parties' choice of mediator include word-of-mouth, professional reputation, cost, geographical location, availability, personality, experience, and allegiance to one or more of the various mediation organisations.[19] In October 2011, the Law Society published a list of approved training providers for its Civil and Commercial Mediation Accreditation Scheme,[20] though there are practising mediators who have trained elsewhere. Ideally a mediator will be distinguished by his or her skills rather than allegiance to a professional organisation or training body. Each professional organisation would doubtless say that a good level of skill in the field is a requisite for membership, and in practice market forces may determine that certain bodies emerge as more trusted than others.

[16] [2013] EWCA Civ 772.
[17] Per Tomlinson LJ at 1.
[18] Ibid.
[19] For parties seeking a fixed fee mediation (on a sliding scale according to the amount in dispute) the UK Ministry of Justice runs a 'Find a Civil Mediation Provider' service via their website: http://www.civilmediation.justice.gov.uk 15 November 2013.
[20] www.lawsociety.org.uk/accreditation/documents/civil-commercial-approved-trainers 15 November 2013, comprising: ADR Chambers UK, ADR Group, CEDR, CIArb, the London School of Mediation (formerly Clerksroom) and Regents College School of Psychotherapy and Counselling.

Fisher and Ury's seminal publication on negotiation theory *Getting to Yes* provides examples of techniques and approaches a mediator may employ.[21] Roberts and Palmer note that that bargaining strategies can be broadly categorised into two approaches, variously termed:

- 'adversarial' as opposed to 'problem-solving';
- 'claiming value' as opposed to 'creating value';
- 'competitive' as opposed to 'co-operative'; and
- 'positional' as opposed to 'principled'.[22]

In the former approach in the categorisation, the parties are likely to see the dispute as a 'zero sum game'.[23] What one party wins, the other loses. If one side wins (for the sake of example) an orange, the other side is left without the orange. In the latter approach, the aim is to think differently about the dispute, in a more curious, questioning way; using the orange example, to ask: why does each side want the orange? If one wants it to juice, and the other to use the zest for a cake, a win-win outcome can be achieved, and it is not the 'zero sum game' it at first appeared.[24]

Fisher and Ury expand on the problem-solving, principled approach, identifying four strands. These comprise:

i) Separating the people from the problem. Fisher and Ury advocate an approach whereby both parties see each other as standing side by side, attacking a common problem, rather than facing each other down, attacking one another;[25]
ii) Focusing on interests, not positions. Here, they refer to the fact that negotiating positions are often arbitrary and encourage parties not to make concessions, even at the expense of what would eventually be a better outcome for them. The theory posits that focusing on interests will prevent this from happening and help both parties better achieve what they actually want. The orange example above is an illustration of this;
iii) Inventing options for mutual gain. This is related to i) and ii) and entails thinking laterally, creatively and questioningly to identify shared interests opportunities to work together; and
iv) Insisting upon objective criteria. This is designed to avoid the sense that one party is 'giving in' or conceding to the other. Basing a solution on some arbitrary criteria stipulated by one party will leave the other party feeling hard-done-by. Basing the solution on objective criteria, for example, an industry standard, should prevent this from happening.

Whilst the approaches open to the mediator and the parties whose negotiations he/she is facilitating are varied and numerous, it is clear that a mediator who successfully employs the above approaches (or more accurately enables the disputants to do so), will add value to the

[21] Fisher R., and Ury, W., *Getting to Yes*, (Random House, London 2012). *Getting to Yes* was first published in 1981.
[22] Roberts, S., and Palmer, M., *Dispute Processes*, (Cambridge University Press, 2005), p.134.
[23] Ibid.
[24] This example is used in Fisher and Ury, *Getting to Yes*, p.75.
[25] Ibid, p.12.

dispute resolution process. This illustrates a major strength of mediation. It is well-suited to situations where it is important to maintain good, or at least cordial relations between the disputants, for example companies in an ongoing commercial relationship, families or an employer and employee. The best case scenario would be that the mediation would actually *improve* the relationship, if the parties find a way to embrace Fisher and Ury's strategies and find approaches providing mutual gains. Whilst in many cases this would be too much to ask, mediation is at least likely to provide a solution to which both parties are content to adhere, given that it is a creation of their own design.

There may of course be mediations where one party does feel that it has come out of the process having lost more than the other. Often, this party can console itself with the thought that the alternative of taking the dispute through the courts is likely to have cost more, in money, time, and energy, than the mediation.

Conclusion

Discussions of the influential figures of the modern ADR movement highlight the central role of Frank Sander, specifically his paper for the 1976 Pound Conference on the Causes of Popular Dissatisfaction with the Administration of Justice.[26] Moffitt observes that Sander's speech is 'widely seen, particularly within the legal academy, as the "big bang" moment in the history of alternative dispute resolution'.[27]

Yet many of the reasons – cited by Sander – behind the desire for the adoption of ADR mechanisms in the 1970s remain today: overly congested, costly courts; delays; and ineffective means of securing access to justice – in the USA, where Sander lives and works; in the UK; and further afield. In England and Wales, the Jackson Reforms are designed to address just these issues and to a significant degree appear to be turning to ADR for the answers. Whilst this shows considerable, not unjustified, faith in ADR, difficulties are likely to arise if ADR mechanisms are seen as a cheap alternative to the court process. If ADR is to thrive on a wider legal landscape than ever before, mediators will need to continue to train to a high level and regulation may be required in order to protect disputants and maintain trust in the mediation profession. Experienced and qualified arbitrators and adjudicators will need to be available in sufficient numbers in order to prevent these mechanisms from becoming prohibitively costly and subject to longer delays than the court processes.

[26] Sander, F., 'Varieties of Dispute Processing', in Levin, A. and Wheeler, R. (eds), *The Pound Conference: Perspectives on Justice in the Future* (West, St Paul 1979).
[27] Moffitt, M. 'Frank Sander and his Legacy as an ADR Pioneer' (2006), *Negotiation Journal* October 2006, p.437.

Each mechanism discussed above is distinct and has its own place in the ADR spectrum while at the same time sharing common strengths. Above all, they share with the full gamut of ADR mechanisms – however fluid the list, and debatable the definitions – the fact that they offer something which the traditional court approach cannot. A good level of support for and understanding of these mechanisms will ensure that they can continue to do so.