

THE “BEST” METHOD OF RESOLUTION OF CONSTRUCTION DISPUTES: ELUSIVE OR ILLUSORY?

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“An ordered efficient dispute resolution mechanism leading to an enforceable award or judgment by the adjudicator, is an essential underpinning of commerce. Disputes arising from commercial bargains are unavoidable. They are part of the activity of commerce itself. Parties therefore often deal with the possibility of their occurrence in advance by the terms of their bargain.”²

“ . . . honest business people who approach a dispute about an existing contract will often be able to settle it. This requires an honest and genuine attempt to resolve differences by discussion and, if thought to be reasonable and appropriate, by compromise, in the context of showing a faithfulness and fidelity to the existing bargain.”³

INTRODUCTION

The argument about what is the “best” method of resolution of construction disputes has been a topic of discussion at recent construction law conferences, if perhaps somewhat tongue-in-cheek. For example, at the Second International Construction Law Conference in London in 2008, there was a debate entitled “Arbitration—is it the best form of dispute resolution?”

At the IBA Vancouver Conference in 2010, the International Construction Projects Committee ran a session entitled “Construction dispute resolution—is it broken or can it be fixed?” The questions posed in the publicity for that session are typical of the search for the “best” dispute resolution method:

- Is 21st-century arbitration too much like litigation?
- Is it failing to deliver cost-effective and timely decisions?
- Should arbitration be more like adjudication?
- Should tribunals have more inquisitorial powers?
- Is disclosure necessary in every arbitration?
- Should arbitrators be able to direct what evidence is heard?

¹ Melbourne TEC Chambers.

² *Comandate Marine Corporation v. Pan Australia Shipping Pty Ltd* [2006] FCAFC 192, 157 FCR 45, 95 [102], *per* Allsop JA.

³ *United Group Rail Services Ltd v. Rail Corporation New South Wales* [2009] NSWCA 177, [70], *per* Allsop JA.

- Who owns the process and who should own it: the clients, lawyers, the arbitrator or the institutions?
- Is there a way forward?

Such issues are not confined to construction disputes. A conference in Ireland, “Alternatives to Litigation in a Civil Society”⁴ recently discussed “some of the most pressing issues in current international dispute resolution”, including whether viable arbitration and mediation regimes are a critical component of a modern justice system, and how do states, investors and NGOs bring about a change in the culture of justice.

The “best” method of resolution of construction disputes is arguably the avoidance of disputes. Considerable attention has recently been given to techniques for avoiding differences between the contracting parties from becoming disputes that need resolution. Alliancing, in which the parties agree to “no disputes”, and Dispute Boards are two such techniques that have proved effective in many projects. The emphasis on communication and risk management in modern standard form contracts such as the New Engineering Contract (NEC) and Fédération Internationale des Ingénieurs-Conseils (FIDIC) contract suites are also aimed at reducing the potential for disputes to occur. However, such dispute avoidance techniques do not come cost-free—there are recurring criticisms that the costs of alliancing, Dispute Boards and the use of NEC contracts are higher than those incurred in more “traditional” contracting. It is suggested that such criticisms rarely consider the real cost of the more frequent disputes that occur in traditional contracting, or that higher up-front investment in dispute avoidance may be “insurance” money well spent.

However, despite the parties’ efforts at avoidance, construction disputes continue to occur, and require resolution. To use the well-worn legal cliché, the “best” method of resolution of such disputes “depends”.

First, it depends on what criteria are appropriate to determine what is the “best” method. This paper is based on the premise that, consistent with various civil procedure and arbitration rules, the objective of dispute resolution (DR) is to find a just solution in a timely manner with a minimum of expense. However, a “just, quick and cheap” method is almost certainly an oxymoron, as no method can deliver the most just outcome in the shortest time at the least expense. In what follows, the time, cost and “justice” (or quality of outcome) of a DR method will be referred to as its *elements*.

Secondly, a given dispute has a specific scope, involves specific parties, and occurs at a particular place and time. Since by definition disputing parties have different interests and different views of the relevant facts and/or the application of the law to the facts, there will often be different subjective and perhaps irreconcilable views of what criteria determine the

⁴ International Centre for Dispute Resolution, American Arbitration Association & Trinity College Dublin School of Law, 11 October 2011.

“best” method of DR. For example, a plaintiff usually seeks a speedy resolution of a dispute, whereas a defendant may have commercial reasons to delay so as to defer the time when damages are payable.

Thirdly, each DR method has a unique combination of features that may all have a bearing on what each party perceives as the “best” method for the particular dispute. This paper discusses these features, and notes that some of them may assume overwhelming importance in specific situations or for individual parties.

The paper suggests some criteria that may make the search for the “best” method of DR for a particular dispute not illusory, and hopefully a little less elusive. It is implicit in the following that the analysis must ultimately be in the context of a specific and unique dispute, and not a generalised class of disputes. In each dispute, the disputants will view the relevant factors from their own subjective viewpoint. Accordingly, it is submitted that there is no objective “best” method in the abstract, even for a generalised class of disputes.

The thesis of this paper is that the “best” method of resolution of a particular dispute from an individual disputant’s perspective is typically the one that achieves the appropriate proportionality between the competing demands of the time and cost of the process, and the “justice” it delivers. In practice, this generally involves the selection of a DR method that gives the highest priority to the most important element(s), and balances the remaining element(s) accordingly, whilst giving necessary weight to the desired features of the process.

CATEGORIES AND METHODS OF DR

Methods

The methods of DR considered here include all forms of “ADR” (however defined), as well as arbitration and litigation.

There are many methods of dispute resolution in current use, with generally understood terminology such as mediation, expert determination or adjudication. There are, however, no universally accepted definitions that specify the exact characteristics of each method. For example, the way in which mediation is practised in one country may be different to the way it is practised in others; the same may well apply between mediators with different “styles” within one country. Furthermore, the nature and extent of the features which are inherent in any method of dispute resolution mean that there is a virtually continuous spectrum of alternatives, and one method may overlap with another because of certain common characteristics. For the purposes of this paper, the exact definitions of different methods of dispute resolution are unimportant, although there is value in noting the different characteristics of some broad “families” or categories of dispute resolution methods.

It is suggested that the methods of dispute resolution in common use can be conveniently classified into the following broad *categories*, each of which has certain distinctive features:

- Negotiation
- Facilitation
- Evaluation and
- Determination.

Negotiation

The distinctive feature of negotiation is that it involves the disputing parties only, and does not require a third party.

Facilitation

Facilitation includes methods such as mediation, conciliation and non-binding expert determination; the distinctive feature of these methods is that an independent third-party (Neutral) endeavours to facilitate the parties' own resolution of their dispute, but does not impose a solution on them. In both negotiation and facilitation methods, the parties' resolution of their dispute is typically on a commercial basis rather than on the basis of strict legal rights. It is also commonly accepted that the commercial outcomes that often result from negotiation or facilitation methods are the ones most likely to preserve business relationships, rather than the more formal evaluation and determination categories that determine the parties' legal rights according to their contract and the law.

Evaluation

Evaluation includes methods such as early neutral evaluation, mini-trial and adjudication (both statutory and contractual). The distinctive feature of evaluation methods is that a Neutral evaluates the parties' rights in the dispute and (generally) provides a reasoned decision of how the dispute should be resolved according to the parties' legal rights under the relevant contract and otherwise according to law. The Neutral's decision is provisionally binding on the parties whether they agree with it or not, and may become finally binding unless the decision is disputed in accordance with a defined procedure.

Determination

Determination includes binding expert determination, arbitration and litigation; in these methods a Neutral assesses the facts and the law in relation to a specific dispute, and provides a reasoned determination on how the dispute is to be resolved according to the parties' legal rights.

Determination methods of DR can be distinguished from evaluation methods in that, subject to limited rights of appeal (if any), a binding expert determination, arbitral award or litigation judgment is final and binding on the parties.

It should be noted that similar procedures may be used in different methods. For example, a Dispute Board meeting with the parties before any dispute has arisen will function in a facilitation role in an endeavour to avoid disputes, however, it must act in an evaluation role once a formal dispute has been referred to the Board.

The terminology adopted in this paper distinguishes between *categories* of DR (negotiation, facilitation, evaluation and determination), *methods* of DR (mediation, adjudication, arbitration, etc.), and the *procedures* under which a DR method is conducted.

Hierarchy of DR categories

It is suggested that these four categories of DR methods comprise a gradation of both increasing time and cost and increasing formality. The term formality is used somewhat loosely to include issues such as the role of the Neutral and the rules/procedures within which (s)he must operate, options available for possible outcomes, the extent to which the parties must be afforded natural justice, the nature and conduct of any hearing, the rules in relation to evidence, the extent to which a resolution of the dispute is binding, and the availability of further dispute resolution methods if either party is unhappy with the outcome.

To a large extent, the time and cost of a DR method go hand in hand—the longer a given method takes, generally the more it will cost when compared with methods that can be completed in a shorter time. One of the drivers for the modern approaches to expedite arbitration or litigation is a clear recognition that one of the most significant cost factors is the overall time taken for the process, and arbitrators and judges make strenuous efforts to shorten it.

These different categories are frequently used in a hierarchy of DR methods in progressive attempts to resolve a dispute, presumably on the basis that those methods lower in the hierarchy (such as negotiation), if successful, will resolve the dispute in a shorter time and at less cost than those higher up the hierarchy (such as arbitration). The FIDIC Red Book⁵ provides a practical example of the use of such a hierarchy:

- The contractor submits a claim if he “considers himself to be entitled to any extension of the Time for Completion and/or any additional payment”.⁶ The engineer is then required to consult

⁵ Conditions of Contract for Construction 1999.

⁶ *Ibid.* sub-cl. 20.1.

“with each party in an endeavour to reach agreement”,⁷ and thereby seek to avoid a dispute over the claim. Only if the claim is disputed is the engineer required to make a determination of the extension of time and/or any additional payment.

- The parties appoint a Dispute Adjudication Board (DAB) at the outset of the project, which conducts regular site visits “to enable the DAB to become and remain acquainted with the progress of the Works and of any actual or potential problems or claims”.⁸ “If at any time the Parties so agree, they may jointly refer a matter to the DAB for it to give its opinion.”⁹ In this role, the DAB would provide a non-binding expert determination of a potential or actual dispute.
- Either party may refer a dispute to the DAB for its decision.¹⁰ The DAB is required to give its reasoned decision on the dispute in a limited time (84 days), and in accordance with the pre-defined procedural rules which require that the DAB
 - “(a) act fairly and impartially as between the Employer and Contractor, giving each of them a reasonable opportunity of putting his case and responding to the other’s case, and
 - (b) adopt procedures suitable to the dispute avoiding unnecessary delay or expense.”¹¹

The DAB may conduct a hearing on the dispute.¹² This contractual adjudication (evaluation) is evidently intended to afford the parties procedural fairness, and the limited time frame is possible because of the DAB’s familiarity with the contract and the project.

- The DAB’s decision is provisionally binding on the parties, and becomes final and binding if neither of the parties submits a notice of dissatisfaction within 28 days. If such a notice is served, then “both Parties shall attempt to settle the dispute amicably before the commencement of arbitration”.¹³ The procedure for attempting amicable settlement is not defined, but clearly could include, *inter alia*, negotiation and/or mediation.
- If attempts at amicable settlement do not resolve the dispute within 56 days, or if no such attempts are made, the dispute shall be finally settled by international arbitration under the Rules of Arbitration of the International Chamber of Commerce.¹⁴

Thus, whilst the adjudication prepared in accordance with the FIDIC Red Book procedures is initially an “evaluation”, it becomes a final and binding

⁷ *Ibid.* sub-cl. 3.5.

⁸ *Ibid.* Annex, Procedural Rules 2.

⁹ *Ibid.* sub-cl. 20.2.

¹⁰ *Ibid.* sub-cl. 20.4.

¹¹ *Ibid.* Annex, Procedural Rules 5.

¹² *Ibid.* Annex, Procedural Rules 6.

¹³ *Ibid.* sub-cl. 20.5.

¹⁴ *Ibid.* sub-cl. 20.5, 20.6.

“determination” if neither party issues a notice of dissatisfaction. If a notice of dissatisfaction is issued, the parties are encouraged (by means of the 56 days’ delay in commencing arbitration) to resolve their dispute by amicable methods (such as negotiation or facilitation) before embarking on the time and expense of arbitration. If that does not resolve the dispute, the parties are left to the final and binding determination of a formal arbitration.

The proportionality between time, cost and quality

It is implicit in this approach to DR categories that there is an increase in the time and cost of resolving a dispute as the parties move up the hierarchy. The value of adopting such hierarchical methods is that the time and expense of resolving a dispute is confined to the extent required to achieve an outcome accepted by all parties.

It is suggested that, along with increasing time, cost and formality as one moves up the hierarchy, there is also increasing “quality” or “justice” in the outcome. “Justice” in this sense is that there is a greater likelihood that the dispute will be decided correctly in accordance with the parties’ legal rights. Thus, whilst the required outcome of an adjudication of a dispute under the FIDIC DAB procedures, or under the Housing Grants, Construction and Regeneration Act 1996 (UK) (HGCRA), is a decision in accordance with the parties’ legal rights, the limited time available (and consequently limited cost) means that the result may not be of the “quality” that could be achieved by a more “formal” method such as arbitration or litigation. That is, the trade-off in adjudication is that a resolution is achieved in less time and at lower cost than arbitration or litigation, but at the risk that the outcome may not be legally correct. This is not a criticism of adjudication, but an observation that the limited time and cost of the method may not permit the more comprehensive investigation of the facts and the law relevant to the dispute that would take place in arbitration or litigation (and which may be required to determine the “just” outcome).

It is suggested that the undoubted success of “quick and cheap” methods of DR is a reflection of the importance that parties place on the time and cost elements of a DR method, whilst recognising that they may not necessarily produce the most “just” outcome. Parties to a HGCRA or Security of Payment adjudication are aware that an incorrect evaluation, although provisionally binding, can be overturned in arbitration or litigation. The fact that so few adjudicated disputes are subsequently so determined is evidence that, to a substantial extent, parties are prepared to accept the “rough justice” of an adjudication.¹⁵ It appears that in the majority of cases, the parties accept that the justice they receive from the

¹⁵ Robert Fenwick Elliott, “Building and Construction Industry Adjudication—the UK Experience” <http://www.feg.com.au/papers/AdjudicationUKExperience.htm>

adjudication is appropriately proportionate to the time and cost of the process. As in construction projects, the required “quality” of a DR method may ultimately be governed by what the parties are prepared to pay for.

The concerns of constraining the cost and time required for DR are manifest not only in the emergence and development of new methods, but also in a continuing focus on reducing the time and cost of arbitration (e.g., by limited time arbitration¹⁶) and litigation (e.g., by significant constraints on disclosure¹⁷).

It is submitted that as no method of DR can deliver in equal measure the mutually incompatible aims of a just, quick and cheap outcome, one of the most significant differentiators of dispute resolution methods is in their different emphasis on the three essential elements of time, cost and quality. Every method achieves some proportionality between the demands of time and cost on the one hand, and “justice” on the other; the fundamental distinction between methods is in where the balance between “justice”, and time and cost is struck.

The acceptable proportionality between the time and cost of a DR method and the “justice” it delivers is not immutable. For example, until recently the High Court in Australia considered that the requirements of justice meant that a litigant could not be prevented from litigating a fairly arguable case, even if that resulted in significant delay and additional cost: “Justice is the paramount consideration in determining an application such as the one in question [seeking leave to amend pleadings].”¹⁸ In a recent decision, however, the High Court held that the just resolution of a dispute was not to be determined without considering the time and costs of the process:

“An application for leave to amend a pleading should not be approached on the basis that a party is entitled to raise an arguable claim, subject to payment of costs by way of compensation . . . limits will be placed upon their ability to effect changes to their pleadings, particularly if litigation is advanced. That is why, in seeking the just resolution of the dispute, reference is made to parties having a sufficient opportunity to identify the issues they seek to agitate.”¹⁹

The reference in this judgment to a sufficient opportunity was a reference to rule 21 (1) of the Court Procedures Rules 2006 (ACT), which in common with other modern Civil Procedure Rules²⁰ and Arbitration Acts²¹ states an overarching purpose: “The purpose of this chapter, and the

¹⁶ E.g., Institute of Arbitrators and Mediators Australia Fast Track Arbitration Rules.

¹⁷ E.g., Lord Justice Rupert Jackson, *Review of Civil Litigation Costs: Final Report* (2010).

¹⁸ *Queensland v. JL Holdings Pty Ltd* [1997] HCA 1, (1997) 189 CLR 146, (1997) 141 ALR 353, (1997) 71 ALJR 294.

¹⁹ *Aon Risk Services Australia Ltd v. Australian National University* [2009] HCA 27, *per* Gummow, Hayne, Crennan, Kiefel and Bell JJ.

²⁰ Civil Procedure Rules 1998 (UK), r. 1.1; Uniform Civil Procedure Rules 1999 (Qld), r. 5; Civil Procedure Act 2005 (NSW), s. 56; Civil Procedure Act 2010 (Vic), s. 7.

²¹ Commercial Arbitration Act (2010) (NSW), s. 1C; Arbitration Act 1996 (UK), s. 1; Arbitration Ordinance (Cap 609) (HK), s. 3 (1).

other provisions of these rules in their application to civil proceedings, is to facilitate the just resolution of the real issues in civil proceedings with minimum delay and expense.”

The acceptance of the need for proportionality in the costs of attaining justice in litigation in NSW is recognised in modern Civil Procedure Rules, e.g., section 60 of the Civil Procedure Act 2005 (NSW): “In any proceedings, the practice and procedure of the court should be implemented with the object of resolving the issues between the parties in such a way that the cost to the parties is proportionate to the importance and complexity of the subject matter in dispute.”

On the premise that the fundamental objective of DR is to find a just solution in a timely manner with a minimum of expense, it is suggested that the theoretically “best” method of DR is the one that gives the most “just” outcome for the cost and within the time that the parties are prepared to accept.

SIGNIFICANT FEATURES OF DR METHODS APPROPRIATE TO CONSTRUCTION DISPUTES

Within any category of DR there are a number of methods that have distinct features. In a specific dispute there may be particular features of such importance as to determine effectively which DR method within a given category is “best”. Further, certain DR methods are statutorily mandated (e.g., adjudication of disputes under the HGCRA in the UK or certain cost disputes in Australia, New Zealand and Singapore under the relevant Security of Payment Acts), or prohibited (e.g., contractual commitment to arbitration of domestic building disputes in a number of Australian jurisdictions). Where such statutes apply, to the extent that they cannot be contracted out of, their requirements will prevail over normal party autonomy. Such legislative abrogation of the freedom of contract principle is generally justified as intended to protect weaker parties in construction projects, e.g., home owners and subcontractors.

The following are some of the important features of DR methods that need to be evaluated in the context of the suitability of a particular method to a specific dispute:

- Time and cost.
- Is a Neutral required to assist the parties?
- Party selection of Neutral: subject to agreement of the parties, or determined by a third party?
- Role of the Neutral: facilitation, evaluation or determination?
- Party and/or Neutral control over the DR proceedings: flexible subject to party agreement or limited by specific rules?
- Predefined procedures: none, broad guidelines or specific rules (e.g., Rules of Court)?

- Privacy and confidentiality of the proceedings: private and confidential, or open to the public?
- Finality and enforceability: determined by agreement of the parties, provisionally binding or finally binding?
- Possible outcome: non-contractual resolution that addresses other aspects of the parties' relationship, or legal rights according to law?
- Use/acceptance: well-known and widely accepted method, or bespoke and innovative?
- Hearing: do the parties have the right to be heard by the Neutral, or can the Neutral make a decision on the papers?
- Natural justice: are the parties to be afforded natural justice?
- Statutory requirements: are there statutory requirements mandating or prohibiting specific methods or procedures, and if so to what extent can they be contracted out of?

Any disputing party is likely to have preferences for desirable features, and may even be able to rank them in order of importance. Further, a party may have specific requirements that make one or more of the above features of overwhelming importance. Some typical examples of such cases in which the importance attaching to a particular feature may well dictate the only acceptable method of DR are as follows.

- Many construction disputes involve a complicated intersection of the facts and the law, in a contractual environment in which there may be a number of participants with potential liability. In some such cases, the time and costs of any formal method of DR, even facilitative methods, may be out of proportion to the amount in dispute. In these cases, the only commercially feasible method of DR may be negotiation.
- In a situation where preserving commercial relationships is paramount, the ability to achieve a "win-win" non-contractual outcome indicates that a facilitative method may be most suitable. Arguably the "win-win" outcomes so promoted by the protagonists of facilitation methods such as mediation come at the expense of the "just" resolution of the dispute according to the parties' legal rights. Such an outcome negotiated to preserve the parties' commercial relationship may result from one or both parties surrendering part of their legal entitlements.
- A commercial organisation may have a strong legitimate interest in maintaining confidentiality in the existence of a dispute. Whilst this is generally not problematic for negotiation, facilitation or evaluation methods (which are based on agreements between the parties and usually contain confidentiality provisions), it may make litigation unacceptable as a final and binding method, because of the public interest in open court proceedings. In these circumstances

binding expert determination or arbitration may be the only acceptable alternatives.

- Some organisations, such as insurance companies are “repeat players” in DR in that the nature of their business inevitably generates a number of disputes with common characteristics. Such organisations have an interest in being able to resolve disputes with certainty, strictly in accordance with the law. If there is any uncertainty in the law on a particular issue that continually recurs, it is in the interest of a repeat player to have the law settled by litigation in a court of law, in order to establish a binding legal precedent. This wider interest in the resolution of a particular dispute may mean that negotiation, facilitation and evaluation methods are unsuitable. Nothing less than the time and cost of litigation will achieve the desired outcome of a legally binding precedent that can subsequently be used to resolve similar disputes in the future (probably by DR methods lower in the hierarchy).

COMMUNICATION

Negotiation between contracting parties to resolve a dispute is always theoretically possible under the principle of freedom of contract. Whether or not there are formal requirements for negotiation built in to the contractually specified DR mechanism, the parties are always free to negotiate and agree to something different to that provided for in their original contract, e.g., an extension of time that the contractor is not contractually entitled to. The potential difficulty with negotiation, or any other form of DR not contractually specified is that, by the time a dispute formally crystallises, communications between the parties may have broken down to the point that the parties are unwilling to agree to anything.

A further communication issue may arise once the disputing parties’ lawyers are driving a dispute. The natural adversarialism of the DR methods the lawyers are familiar and comfortable with, and their professional (and commercial?) interest in achieving their client’s strict legal entitlements, may be more prominent than ongoing negotiations to preserve the parties’ future commercial relationship.

It is trite to observe that inadequate or lack of communication between disputing parties is often one of the root causes of disputes that arise. Unless appropriate communication in relation to a dispute can be established and/or maintained, neither negotiation nor facilitation methods are likely to be effective in resolving a dispute, since these methods are based on the parties finding their own resolution. The more “formal” methods of evaluation and determination are not predicated on party agreement, but explicitly include default provisions that apply in the absence of party

agreement, e.g., the method of appointing an arbitrator in the event that the parties cannot agree.

WHEN SHOULD DR METHODS BE SELECTED?

Perhaps in an ideal world, all construction disputes would be resolved by negotiation, thereby preserving the parties' autonomy at the least expense and resolving their dispute in the quickest time. However, whilst such negotiation would achieve a commercial outcome, it is unlikely to always achieve a "just" outcome because of factors such as an imbalance of power between the parties. The involvement of a Neutral, perhaps technically qualified, in some role becomes essential if parties cannot resolve their dispute by negotiation.

Each of the DR methods within any category has its strengths and weaknesses, and may be more or less suitable for a particular dispute. The "best" DR method should ideally be selected as appropriate to the features of the particular dispute. The difficulty with this approach is that the features of a dispute are only known when the parties are already in dispute, at which time they may be disinclined to agree to anything. In the absence of any agreement on methods of DR, a party seeking a remedy is left to its legal rights, i.e., litigation in the courts, or such other tribunal as is specified in any relevant legislation.

Hence, as a threshold issue, there is a need for parties to agree to the use of any alternative method(s) of DR to litigation, whether these are negotiation, facilitation, evaluation or arbitration as the final and binding method of determination. Many standard form contracts include a hierarchy of DR methods culminating in arbitration or litigation. There are obvious practical advantages in the parties defining alternative DR methods in the original works contract, which is negotiated before work starts when both parties have an obvious incentive to reach agreement. However, such prior agreement may commit the parties to use DR methods that, in the event, are not the most suitable for the particular dispute that ultimately transpires.

A more flexible alternative approach, which can be incorporated in the works contract, is to leave selection of the most appropriate DR method(s) for a particular dispute to be determined by the parties with the assistance of a Neutral. This is the approach taken in the International Chamber of Commerce (ICC) ADR Rules. These Rules are based on the appointment of a Neutral who assists the parties in determining the most appropriate ADR technique for the particular dispute, from the various alternatives of mediation, neutral evaluation, mini-trial, any other settlement technique, or any combination of techniques. In the absence of agreement to use another ADR technique, mediation will be used. These ICC ADR Rules

need to be supplemented by an arbitration agreement, if the final and binding determination of a dispute is not to be litigation.

The ICC ADR Rules give effect to party autonomy, to the extent that the parties agree. The Neutral's role can therefore be more or less proactive, depending on the parties' requirements. In neutral evaluation or mini-trial, for example, the technical and/or legal expertise of the Neutral can be drawn on in recommending a settlement, or making a determination. The parties' autonomy extends to the procedures to be adopted for the chosen form of ADR, as these are not specified in the Rules. Thus, the parties could agree to the use of any appropriate institutional rules, or a "bespoke" set of procedural rules agreed to by the parties or proposed by the Neutral.

As institutional rules, the ICC ADR Rules provide for the administration of the procedure by the ICC. This has the advantage of a default mechanism for the nomination of the Neutral in the event that the parties cannot agree, and the quality control procedures inherent in the ICC process. Disadvantages include the additional costs, and perhaps time, involved in an ICC-administered ADR procedure.

“FINAL AND BINDING” DETERMINATION

The majority of disputes are settled by a DR method in one of the categories of negotiation, facilitation or evaluation. To successfully resolve a dispute, each of these methods requires party acceptance of the outcome—of a negotiated settlement, a non-binding expert determination, an adjudication, etc. Accordingly, none of the methods in these categories guarantees a successful outcome that will be acceptable to all disputing parties. There is thus always the possible need for a method of determination that will provide a final and binding resolution of a dispute, irrespective of whether the parties agree with it or not.

At the top of the DR hierarchy are those methods of determination that do not depend on party agreement of the outcome: binding expert determination, arbitration and litigation. Each of these methods decides the parties' rights according to law, and is subject to no or limited rights of appeal. The procedures of arbitration and litigation afford the parties natural justice or procedural fairness, and are likely to remain the most widely used ultimate methods of DR. The distinctions between arbitration and litigation define features that may be determinative of which is the "best" for a given dispute.

Arbitration

In arbitration, but not in litigation, the parties have significant autonomy to agree on the conduct of the DR process. Importantly this includes the identity of the Neutral(s), the timetable and the procedures to be adopted.

Further, arbitration can be truly international, whereas litigation must always be conducted in courts subject to the laws of a single jurisdiction.

A corollary of the parties' autonomy in the conduct of arbitration is that they can maintain confidentiality of the proceedings. This is generally not available in litigation because of the overarching public interest in the open administration of justice.

The above distinguishing features of arbitration identify a number of possible reasons why arbitration may be the "best" DR method for a particular construction dispute:

- Confidentiality of proceedings may be of overwhelming importance, particularly for large multinational companies that want to keep the existence of disputes and their ultimate outcome confidential because of commercial considerations.
- Party choice of Neutral(s) may be very important where there are complex technical issues that need particular expertise for a proper understanding of the issues in dispute.
- The outcome of "international" disputes may need to be enforced in several jurisdictions, or there may be a perception that the local courts may favour the "home team".

There are only limited circumstances in which a party unhappy with an arbitration award may have it overturned or not enforced by a court. Notwithstanding the parties' original acceptance of arbitration as the final and binding resolution of their dispute, the courts have ultimate jurisdiction to determine whether the due process of arbitration and the law was followed. This is not to say that litigation is a normal avenue of appeal from arbitration; courts in most jurisdictions around the world recognise the parties' freedom of contract to agree on arbitration as their final and binding method of DR. This is particularly so in those jurisdictions which have accepted the New York Convention or whose arbitration laws are based on the UNCITRAL Model Law, or similar principles.

Litigation

The High Court of Australia has expressed the courts' unique role in DR as follows: "The 'unique and essential function' of the judicial branch is the quelling of controversies by the ascertainment of the facts and the application of the law. Once a controversy has been quelled, it is not to be relitigated."²²

In their function as the ultimate arbiter of legal disputes, courts occupy a unique position in the DR universe. Litigation in the courts has a number of characteristics that may make it the "best" DR method for a particular

²² *D'Orta-Ekenaike v. Victoria Legal Aid* [2005] HCA 12, *per* Gleeson CJ, Gummow, Hayne and Heydon JJ.

dispute. Some of these characteristics that may be significant for resolution of a construction law dispute include:

- The final “quelling of controversies”: once litigation (including any appeals) has been concluded, there are no other DR avenues available.
- Court judgments state (or restate) the law, including both the authoritative construction of statutes and the common law.
- Court proceedings are generally public, and judgments are in the public domain and are widely known and discussed in the academic literature.
- The appeal process generally ensures that the final outcome is not dependent on the (perhaps idiosyncratic) views of a single judge.

Thus, in the quest for a “final and binding” resolution of a dispute, litigation could be preferable if the arbitration process adopted was readily susceptible to challenge in the courts. One of the modern responses to make arbitration a genuine alternative to litigation has been change in Arbitration Acts to substantially narrow the grounds on which an award can be appealed.²³

CONCLUSION

In the second decade of the 21st century, there is a veritable smorgasbord of DR techniques. Each of them has its protagonists who sell (oversell?) its benefits and virtues, sometimes with the implicit message that a particular technique is the “best” method of dispute resolution.

For a specific dispute, one method may well be the “best” from a particular disputant’s subjective perspective. It is suggested that, other things being equal, it will generally be chosen to achieve the most appropriate proportionality of speed, economy and justice for the specific circumstances that the individual disputant judges to be efficacious. However, particular features required, such as confidentiality, the ability to choose an appropriate technically qualified Neutral, or the requirement for a legally binding precedent may in fact determine the “best” method of DR. To the extent that disputing parties may have very different perspectives, the search for the “best” method for a particular dispute may be elusive.

It is suggested that the ultimate selection of the “best” method for a particular dispute should ideally be selected after the parameters of the dispute are known, if necessary with the assistance of a Neutral. This proposal is however, subject to the caveat that, if the parties propose to use arbitration as their final and binding method of DR, the arbitration

²³ E.g., Commercial Arbitration Act 2010 (NSW); Arbitration Ordinance (Cap 609) (HK).

agreement should be entered into at the time of the original works contract.

The fundamental thesis of this paper is that there is no one “best” method of dispute resolution, either for a particular type of dispute, or from a particular protagonist’s point of view. To that extent, the search for the “best” method is illusory.