

**SOCIETY OF CONSTRUCTION ARBITRATORS**

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**Current Trends in Dispute Resolution -  
Focus on ICC Dispute Resolution Boards**

by

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1. **INTRODUCTION**

1.1 We live in exciting times. When I was called to the Bar twenty-seven years ago “alternative dispute resolution” did not exist, and even the phrase “dispute resolution” was rarely used. The only forms of dispute resolution regularly employed were Court litigation and arbitration. On isolated occasions there might be an expert determination. All three of these procedures (litigation, arbitration and expert determination) are, of course, final determinations subject only, in certain cases, to appeals in confined circumstances.

1.2 However, in the last ten years a whole range of new dispute resolution procedures has become available, particularly in the construction industry (which is my primary concern). These new procedures are, generally, not finally determinative in the way that litigation or arbitration or expert determination is. The new procedures are, in effect, preliminary processes which the parties can use, if they so choose, in order to

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avoid a subsequent final determination by a Court, Arbitrator or expert. Further, these new procedures have been welcomed and adopted widely, both in the UK and abroad, because they offer to parties the possibility of controlling and reducing the particular hazards associated with the final determination procedures, namely:

- (i) cost;
- (ii) time; and
- (iii) uncertainty of outcome.

1.3 Thus, the rapid adoption of the new procedures has been entirely market driven. Even where, ostensibly, a procedure, such as statutory adjudication, has been imposed by the legislature, the introduction of that procedure was perceived by Parliament as meeting a widespread market need.

1.4 What this lecture aims to do is to take an overview of the various forms of dispute resolution now available, note the trends which have emerged in the last decade, give a snapshot of the present position, and hazard some guesses as to the future. Although I will be primarily concerned with the jurisdiction of England and Wales, I will, occasionally, take account of the international position as well. The seven types of dispute resolution which I will consider naturally divide themselves into two categories:

[A] Final Determination Procedures

- (i) Court litigation;

- (ii) Arbitration;
- (iii) Expert Determination.

[B] Preliminary Determination Procedures

- (iv) Mediation;
- (v) Early Neutral Valuation (ENE);
- (vi) Adjudication; and
- (vii) Dispute Boards/Panels.

Each of the above is dealt with seriatim below.

[A] **FINAL DETERMINATION PROCEDURES**

2. **Re (i): Court Litigation**

2.1 For the purposes of construction disputes, “court litigation” means trials in what was known as the Official Referee’s Court and is now (since 1998) known as the Technology and Construction Court (TCC). A quarter of a century ago I began practising in the ORs Corridor<sup>i</sup>. At that point, at the end of the 1970s, these Courts were experiencing a very rapid expansion in their workload as litigant Plaintiffs realised how widely they could cast their net when bringing proceedings, not only in contract but also in tort, in reliance upon the doctrine in cases such as Anns v Merton London Borough Council [1978] AC 728 (HL). This meant, in practice, that most

disputes were multi-party affairs with substantial numbers of counsel and solicitors. The consequence was lengthy and very expensive trials with each witness cross-examined several times. This resulted in the recruitment of additional Official Referees. Notwithstanding the increase in the number of Judges, the substantial number of lengthy trials meant that each Judge had a very full list, so that, generally, when a case was set down for a hearing the date given by the Court would be eighteen months or two years ahead, marked “second” or “third” or even “fourth fixture”. This meant that the Court was counting on one or more cases that had already been booked into the time slot settling so that the subsequent case could be heard.

2.2 The position today, in the TCC, is markedly different from the situation I have just described. A case set down today can be given a trial date as soon as the parties are ready for it, often in a matter of months. The old procedure of second, third and fourth fixtures is long gone. The TCC Judges’ lists are no longer full and the Judges are available to act as arbitrators if the parties so choose. On 2<sup>nd</sup> May of this year HHJ Humphrey Lloyd QC retired as a TCC Judge, in order to resume his illustrious career as an international arbitrator. I understand he will not be replaced. Further, the recently published leaflet on the TCC Court draws attention to the fact that a TCC Judge can be appointed as an arbitrator, and it states: “*The fees are highly competitive*”.

2.3 An indication of the changing workload can be found in the statistics for new proceedings issued in the TCC over the last ten years. These are:<sup>ii</sup>

1995 - 1,778

1996 - 1,500

1997 - 721  
1998 - 615  
1999 - 297  
2000 - 488  
2001 - 483  
2002 - 502  
2003 - 474  
2004 - 390

2.4 Thus, the figure for last year (390 new cases), compared to the 1995 figure (1,778) shows that the number of new proceedings has dropped to 22% of what it was ten years ago. However, these bald statistics are not, in fact, as bad as they sound. Many of the 1,778 actions commenced in 1995 would never have come near to trial. A decade ago it was common for writs to be issued simply as part of the negotiation process. All that changed with the introduction of the Woolf Reforms, embodied in the 1998 Civil Procedure Rules (CPR) which came into force on 26<sup>th</sup> April 1999. One of the consequences of the CPR is that throughout the Court system (not only in the TCC) litigants must go through a number of procedures, for example: fulfilling the requirements of Protocols involving alerting the other party to the nature of one's case, prior to commencing proceedings. Firstly, this weeds out those disputes that, a decade ago, would have been associated with a writ that was never seriously intended to result in a trial. Secondly, because parties must nowadays incur substantial costs before they are in a position to commence proceedings, there is more pressure to seek to negotiate a compromise without commencing proceedings at all.

2.5 The result of the CPR is that right across the court system the number of new proceedings commencing has substantially dropped. For example, within 2 years of the reforms taking effect civil litigation overall was down by 37%. In the first 18 months the number of new civil claims issued fell from 220,000 to 175,000 (The Times, Law, 26.6.01, p3). County Court work had been expected to rise because the CPR increased the County Court jurisdiction to £15,000. However, work there has dropped by 26%. (The Times, 22.5.01). In the Chancery Division the number of new actions dropped from about 18,000 in 1990 to about 7,500 in 2001, a drop to 42% of the former level.<sup>iii</sup>

2.6 Various costs issues have also made the civil courts less attractive, notwithstanding that CPR introduced summary assessment of costs after shorter hearings to simplify the costs question. Costs problems include:

- (i) conditional (no win, no fee) arrangements, introduced in 1995 as a new means of funding litigation, provide for a success fee. However, disputes over the recovery of the winner's lawyer's success fee and any "*after-the-event*" insurance premiums, has spawned satellite litigation. (The Times, Law, 26.2.02, p3).
- (ii) From Spring 2005 increased court costs have applied, so that users of the courts contribute more to the real cost to the state of providing the system. Compared with 24 years ago, the court fees for bringing a claim in excess of £300,000 have jumped by 4,150%. From January this year it has cost £1,700 simply to register a claim of more than £300,000. There are also setting down

fees and trial fees. (The Times, 7.12.04, p24). Hourly rates for Judges were introduced in April this year. (The Times, Law, 21.1.05, p5).

2.7 Turning back to the TCC figures, it is clear that many of the serious disputes which would have gone to trial a decade ago are still going to trial today. Complex cases, involving a plethora of issues of fact and law, with very big sums at stake, are notoriously difficult to settle and many of these are still reaching the Courts. Another feature of the current TCC figure is that many of the matters now occupying court time are concerned with enforcement of adjudication decisions. However, the huge multi-party trials which characterised the early 1980s, as referred to above, are long gone, largely as a result of restrictions on tortious litigation, as exemplified, by the House of Lords decision in Murphy v Brentwood D.C. [1991] AC 398 which overruled Anns v Merton L.B. (supra).

2.8 In the construction field I have seen indications of a resurgent confidence in TCC litigation. Some parties have deleted arbitration clauses within existing standard forms and inserted court litigation as the stipulated means of dispute resolution. Further, the 2003 JCT Major Projects standard form has, unlike other JCT contracts, litigation stipulated, instead of arbitration, and the form also refers to mediation and adjudication.

2.9 Broadly, therefore, litigation generally (i.e. not limited to construction litigation) has been affected by the introduction of

- (i) the CPR (which came into force on 26<sup>th</sup> April 1999); and

- (ii) Mediation (which was introduced from the USA about 15 years ago).

In addition, the TCC courts have been affected by the runaway success of adjudication (see below) and by the reduction in tortious claims.

2.10 An indication of the impact of mediation on the court system as a whole can be seen by considering its effect on Appeal Court business. In the year 2000-2001 558 appeals arising from the Queen's Bench Division were set down for a hearing. In 2003-2004 only 359 such appeals were set down, a drop to 64% of the figure three years earlier. That drop in appeals set down, presumably, simply reflects the drop in Queen's Bench business as already referred to. However, of the cases set down in this past year, 63 were referred to the Court of Appeal's new mediation scheme, in the period between 1<sup>st</sup> April 2003 and 31<sup>st</sup> July 2004. Of those cases 38 were actually mediated and, of those, 23 were settled, giving a 60% success rate for cases actually subjected to mediation. In addition, quite apart from cases mediated at the appeal stage, many cases set down before first instance judges went to mediation and were compromised either because the parties initiated it or because the Court actively encouraged them to seek mediation.<sup>iv</sup>

2.11 In summary:

- (i) Primarily because of the CPR and mediation, there has been a substantial reduction in court litigation, in recent years, affecting most of the principal divisions of the court system. Since mediation is increasing, this reduction will continue. Some areas of court work have not been affected. For example bankruptcy petitions have not reduced.

- (ii) As regards construction litigation in the TCC, the additional effect of adjudication means that the number of trials is likely to continue to fall in the foreseeable future. This will impact not only on the size and nature of the TCC Courts, both in London and in the provinces, but also on the mix of work undertaken by the lawyers (both counsel and solicitors) servicing those courts.

### 3. **Re (ii) Arbitration**

3.1 Domestic English arbitration is, of course, subject to the impact of adjudication and mediation just as the Courts are (see above). Consequently, there has been a substantial reduction in construction arbitrations in the course of the last decade. The Royal Institution of Chartered Surveyors (RICS) reported a 10% reduction in arbitrations with which it was concerned in 2001<sup>v</sup>. Although figures are harder to obtain, because of the diversity of the arbitrator nominating bodies, there is a general impression amongst practising arbitrators in the construction field that the decrease in arbitrations, comparing numbers today with those of ten years ago, is something in the order of one-third. **[View of the SCA Conference?]**

3.2 So far as international arbitration is concerned, although adjudication is being adopted by a number of other countries (e.g. Singapore, New Zealand, Australia, Hong Kong etc), and notwithstanding that mediation is available worldwide, the international arbitrator appointing bodies have seen, at worst, only slight dips in the number of disputes handled. For example, in the five years leading up to 2002 the London Court of International Arbitration (LCIA) received between 52 and 87 referrals, with about 71 in 2001. In the LCIA's biennial monitoring period 2003/4 a total of 191 cases

were filed, a 23% increase on the previous period. (LCIA News, Vol. 10, Iss. 1, March 2005, p3).

3.3 So far as the International Chamber of Commerce Court of International Arbitration (ICC) is concerned, the number of annual referrals in recent years has remained in the order of about 580.

3.4 As regards the number of new Arbitrations commencing with the ICC, the statistics are as follows:

1997:	452 new requests for Arbitration.
2001:	540 (similar to 2000)
2003:	580 <sup>vi</sup>
2002	600 approx.
2004:	570 (ICC UK Annual Report 2004).

Of course, only a percentage of the above disputes concerned construction/ engineering subject matter.

3.5 There are, of course, a number of other significant international arbitration bodies worldwide, including, for example, the China International Economic and Trade Arbitration Commission (CIETAC) whose volume of business exceeds that of the ICC, although it is confined to Chinese disputes. Besides using supervisory bodies such as those already mentioned, international parties can, of course, arrange their own arbitrations, whether by using the UNCITRAL procedure or otherwise. It is

noteworthy that a number of arbitrations have already been generated by the reconstruction of Iraq. There are also currently about 60 ICSID arbitrations.

3.6 In summary, UK domestic construction arbitration has suffered the impact of adjudication and mediation just as court litigation has. Since both adjudications and mediations are growing, the reduction is likely to increase. By contrast, international arbitration (including construction disputes) appears to be maintaining its position.

#### 4. **Re (iii): Expert Determination**

4.1 As referred to above, expert determination has generally been little used and statistics are extremely difficult to obtain. Commonsense would indicate that there must have been some reduction in the number of expert determinations as a result of the influence of adjudication and mediation, but perhaps not as great as the effect upon litigation and arbitration. Since the numbers of disputes dealt with by this procedure are so small, it is unnecessary to spend any significant time upon it.

4.2 Expert determination is a procedure available to parties who have written it into their Contract or subsequently decided to use it. They engage a third party, with expertise in the particular subject-matter in issue, to give a determination upon that specific issue.

(i) It is generally used for a single issue, or a handful of associated issues, and rarely for more complex disputes.

(ii) Whereas arbitrators are subject to a certain degree of control by the court pursuant to the Arbitration Act 1996, experts are subject to little court control, since their decisions are not open to appeal.

(iii) An expert may be liable for negligence in performing his functions, whereas an arbitrator is generally immune from an action for negligence.

(iv) An arbitrator must observe the rules of natural justice and conduct the procedure with fairness. An expert can, if he chooses, adopt an inquisitorial procedure, and is not obliged to refer the results of his enquiries to the parties before making his determination. By contrast, of course, an arbitrator may only take the initiative in circumstances where he has the parties' agreement to do so, and he must refer to the parties the results of his enquiries before making his award.

4.3 My own experience is that, partly as a result of other new procedures becoming available, parties are more aware nowadays of the expert determination process and, therefore, are tending to make more use of it, albeit that the level of usage is still very modest. In summary, therefore, although the uptake of this process has presumably been dampened by the effects of adjudication and mediation, because parties are becoming more innovative in the face of the rapid expansion of the range of dispute resolution procedures available, overall the number of expert determinations has increased slightly in the course of the past decade. However, the number of such determinations is so small as not to have any significant effect upon trends overall.

[B] **PRELIMINARY DETERMINATION PROCEDURES**

5. **Re (iv): Mediation**

5.1 Mediation is a loosely used term which can be applied to either “*facilitative*” mediation or “*evaluative*” mediation (more commonly called conciliation in the UK). In this lecture I will use mediation to refer to the facilitative approach espoused by CEDR Solve, the pre-eminent mediation provider. In my experience evaluative mediations rarely succeed in securing a compromise by mediation. This is for the very good reason that where both parties are aware that, if no mediated deal is achieved, the mediator will turn himself into a evaluative tribunal and state publicly that one party’ case is stronger than the other, then neither party will be frank with the mediator during the course of the private caucuses in the mediation. This will virtually guarantee that no mediated deal is achieved. By contrast, if both parties are aware that the mediator will never be anything other than a facilitator, they are encouraged to reveal to the mediator, during the course of the process, the concerns which they have about the weaknesses within their case. This enables the mediator to guide both parties towards a mutually satisfactory compromise. Where parties positively want an evaluative process I generally recommend that they proceed straight to an early neutral evaluation (ENE) (see below). If they want a mediation, with an evaluative decision as a fallback position, then I suggest that they split the procedure and have a mediation before one person, and, if no deal is achieved, an ENE in front of a different person. Since the facilitative mediation has about a 70-80% chance of success, an ENE is rarely required.

5.2 Why do mediations work? In my experience there are a number of reasons:

- (i) At a mediation everyone who matters (including, particularly the decision makers for all parties), will be present.
- (ii) By “*reality testing*” a mediator will encourage each party to face up to the difficulties in its own case. Since the mediator is an independent third party the parties involved in the dispute are much more willing to listen carefully to his concerns about the weaknesses in their position than if the same points are made by the opposition.
- (iii) The process is entirely confidential, and is “*without prejudice*” so that nothing said or admitted in the mediation is admissible as evidence in any court or arbitration or other proceedings.

The CEDR website lists various advantages that mediation holds over litigation and arbitration, including the following:

- (a) Over 70% of cases referred to CEDR result in settlements on the day or soon afterwards.
- (b) A mediation can generally be set up within a few weeks, and most last for only one day, with the result that costs are minimal compared to arbitration or litigation.
- (c) The parties retain complete control over the process and the outcome and have a choice as to whether or not to settle the dispute or take it on to litigation or arbitration.

- (d) Mediation need not delay litigation or arbitration since it can take place contemporaneously.
- (e) A successful mediation is likely to result in the maintenance of business relationships, whereas litigation or arbitration, in which one party must inevitably lose, is unlikely to do this.
- (f) The mediation process enables a much wider variety of settlement options to be brought into consideration, e.g. apologies or the promise of future business, which litigation or arbitration, by their very nature, exclude.

5.3 Mediation was first introduced to the UK about 15 years ago. A Steering Committee was set up, involving barristers, solicitors and businessmen who were interested in investigating this new American procedure which promised to get compromises at a fraction of the cost and time which litigation and arbitration involved. CEDR grew out of that Steering Committee and is now responsible for appointing and overseeing mediations throughout the UK, as well as in Europe. The statistics for CEDR's mediations over the last few years are instructive:

1998/9: 257 mediations, of which 28% (i.e. 72) were construction/engineering/property.

1999/2000: 462 cases, of which 17% (i.e. 78) were construction/engineering/property.<sup>vii</sup>

2000/2001: 467 cases, of which 14% (i.e. 65) were construction.<sup>viii</sup>

2001/2002: 338 cases, of which 12% (i.e. 47) were construction.

2002/2003: 516 cases, of which 9% (i.e. 46) were construction and engineering.

2003: 631 cases, of which 9% (i.e. 57) were construction.

2004: 693 cases, of which 6% (i.e. 42) were construction.

5.4 What is apparent from the above is the broadly rising usage of mediation overall but, so far as CEDR's statistics are concerned, a reduction in the percentage represented by construction disputes. This could be because of one or both of the following factors:

- (i) Adjudication will have reduced the number of disputes going to mediation, and adjudication only affects construction disputes as opposed to other forms of mediation.
- (ii) A significant number of construction mediations are now being dealt with by bodies and individuals quite apart from CEDR. Thus, if 28% (CEDR's figure for 1998, prior to any significant other providers appearing) represents the real extent of construction mediation in the overall mediation market, then the 9% currently experienced only represents about one third of the total. This means that whereas CEDR are handling 42 mediations in the construction field currently, there are in fact at least 126 construction mediations being dealt with. CEDR's overall success rate is at least 70%. If that success rate applies to all mediator providers, then of the 126 estimated construction mediations

occurring per year, about 88 are settling. No doubt some of these would have settled by negotiation if there had been no mediation process available. Also, mediation is such a cheap and quick process that, if mediation were not available, the parties would not have litigated or arbitrated a number of these matters in any event. However, it must be the case that a significant number of those 88 cases would have otherwise proceeded to litigation or arbitration.

5.5 The growth in mediation is fuelled by its obvious attractions of cheapness and speed. The Lord Chancellor has pledged to use ADR for government disputes (The Times, Law, 3.4.01, p19) and only to go to court as a last resort. Parties are also anxious that if they refuse to mediate without good reason they may be penalised in costs even if they win (Halsey v Milton Keynes (2004) EWC A Civ. 567).

5.6 In conclusion: mediation is growing steadily, so that for the foreseeable future it will continue to reduce the number of court and arbitration cases.

## 6. **Re (v) Early Neutral Evaluation (ENE)**

6.1 The CEDR Solve website contains a useful definition of ENE, which makes plain that it is a preliminary assessment of the issues in dispute, designed to serve as a basis for further negotiations or avoid unnecessary stages in litigation/arbitration. An independent person is appointed by the parties and he or she expresses an opinion on the merits of the issues raised. The opinion is non-binding but gives the parties an unbiased evaluation of their relative strengths, and guidance as to the likely outcome if the matter proceeds to court or arbitration.

6.2 It is interesting to note that in the White Book, Civil Procedure Vol. 2, page 216, paragraph 2A-101, Early Neutral Evaluation is dealt with, alongside mediation, as being alternative dispute resolution procedures specifically recognised by the courts. However, whereas mediation is a procedure which the courts will, if appropriate, encourage by adjourning a case so that a third party may undertake the mediation, ENE is a procedure which the court itself will undertake where appropriate. Thus, paragraph 2A-101: G2.1 states:

*“In appropriate cases and with the agreement of all parties the court will provide a without-prejudice, non-binding, Early Neutral Evaluation (“ENE”) of a dispute or of particular issues.”*

6.3 As made clear in the relevant paragraph of the White Book, the procedure is that the judge who conducts the ENE will, having given his evaluation, take no further part in the case, so that if the production of the evaluation does not result in a settlement, the matter will then continue in front of a different judge *“unless the parties agree otherwise”*.

6.4 In my experience the ENE procedure is not commonly used for construction disputes, whether as part of the court system, or in ad hoc arrangements before a non-court tribunal. Nevertheless, the fact that it is a procedure now recognised in the White Book does mean that the number of such evaluations taking place is likely to increase steadily, and many of the matters dealt with in this way are likely to settle after the production of the evaluation, so that a dispute which might otherwise have proceeded to arbitration or trial will now disappear.

6.5 One of the reasons why there has not been a significant take-up of ENE as a procedure for construction disputes is, I suspect, because it is in many ways similar to

adjudication, and parties in the construction industry are now so familiar with the adjudication procedure that they feel more comfortable taking that route rather than embarking on an ENE. Accordingly, I would expect any growth in ENE to come in respect of commercial disputes (where adjudication is not available), particularly since the White Book deals with ENE as part of the section on The Admiralty & Commercial Courts procedure.

7. **Re (7): Adjudication**

7.1 Although certain construction standard form contracts, particularly building sub-contracts, have long had provisions allowing adjudication of various types, nowadays the term “*adjudication*” in the construction field generally refers to the procedures set out in Part 2 of The Housing Grants, Construction & Regeneration Act 1996 (“The Construction Act”). Section 108 thereof allows the parties to a “*Construction Contract*” (which is a defined term) to refer a dispute to adjudication “*at any time*”. The Courts have been vigilant to give this phrase its full weight. See, for example, John Mowlem v. Hydra-Tight (2000) CILL 1649. The Courts have also strenuously rejected attempts to rob adjudicators’ awards of their temporary finality, and have broadly insisted that, save where there was no jurisdiction, or the rules of natural justice have been breached, the decision must ordinarily be complied with, even if wrong, unless and until it is overturned in court or arbitration.<sup>ix</sup>

7.2 Although the parties may (Section 108(3)) choose to accept the adjudicator’s decision as finally determining the dispute, in practice it is unusual for any formal agreement to this effect to be made. Nevertheless, anecdotal evidence indicates that the vast majority of adjudication decisions are not taken on to arbitration or litigation, and are effectively accepted by the losing parties. Figures given anecdotally are that there

have been about 15,000 adjudications thus far, the vast bulk being dealt with by members of the RICS. Of this enormous number only about 300 have reached the courts, and of these about 200 reported decisions have resulted. It is believed that well over 80% of adjudication decisions are simply accepted, with the losing party content that it has had a fair chance to put its case to an independent tribunal. [SCA **Conference view?**] Crucial components in the final acceptance of a decision are that:

- (a) The parties have confidence in the adjudicator appointed;
- (b) The parties have an adequate opportunity to present their case (for example, in complex final account cases the Respondent must be given sufficient time to deal with the voluminous material in the Referral document),

7.3 The indications are that adjudication is one of the principal factors accounting for the significant reduction in litigation and arbitration in the construction field in recent years, as discussed above. It is also worth noting that the attractions of adjudication are likely to increase, since the Department of Trade and Industry has recently (March 2005) produced its consultation paper on proposed revisions to the 1996 Construction Act. Chapter III of their document deals with Adjudication Proposals, and page 5 states that their purpose is:

*“Reducing the disincentives to referring disputes to adjudication where it is suitable. The review has suggested these might include avoidance or frustration of the process or outcome, unnecessary legal challenge or unpredictable or excessive costs”.*

Five particular items are then listed:

- (i) Preventing the use of “*trustee stakeholder accounts*” to suspend an adjudicator’s award pending litigation, other than where the recipient is involved in insolvency proceedings.
- (ii) Providing the adjudicator with the power to rule on certain aspects of his own jurisdiction, and providing a right to payment in cases where the adjudicator stands down due to lack of jurisdiction.
- (iii) Providing the adjudicator with the right to overturn “*final and conclusive*” decisions where these are of substance to interim payments only.
- (iv) Extending the adjudicator’s immunity under the Construction Act to claims by third parties.
- (v) Applying provisions on adjudicator independence from the Scheme for Construction Contracts to all adjudications in Section 108 of the Construction Act.

7.4 Although one of the advantages of adjudication over arbitration or litigation is said to be the much lower costs involved, one study indicates that average fees for adjudicators in construction cases are nearly 5% of the sum claimed.<sup>x</sup> Using data submitted to a website, figures for 169 adjudications indicate that the mean average fee is £3,725, which is a 10% increase since a survey 4 years ago by Caledonian University in Glasgow (when the fee represented about 2.5% of the sum in dispute). This same analysis indicates that about half of all adjudications concern sums in

dispute of less than £50,000. The Report speculates that the increase in adjudication fees reflects a demand for detailed written reasons in decisions.

7.5 It has often been suggested that, notwithstanding that the Act permits the most complex of final account disputes to be referred to adjudication, this process is unsuitable for such complex multi-issue disputes, where many lever arch files will be involved and where the statutory time limits are grossly inadequate. Nevertheless, in the recent case of CIB Properties v Birse Construction (2004) EWHC 2365 (TCC) Judge Toulmin did not conclude that adjudication is an inadequate method for resolving complex disputes. What matters is that the adjudicator is able to reach a fair decision within the time limits imposed by statute or subsequently altered by the parties.

7.6 Thus, adjudication is a procedure that, as a statutory mechanism, has only come into existence since early 1998, and yet now dominates the construction dispute field. It has been so successful that the Government is regularly reviewing how to improve the procedure and thereby encourage even more disputes to be adjudicated rather than to be dealt with in any other way. As more parties become more familiar with Adjudication, and as its procedures are streamlined to meet the needs of the market, it is to be expected that the reduction in arbitration and litigation will increase.

7.7 It is noteworthy that although the number of court and arbitration cases is down, the number of lawyers, both solicitors and barristers, is rising. This is a sure sign that the legal profession is needed by the marketplace. When I was called to the bar in 1978 there were about 3,000 barristers and 60,000 solicitors. Today the bar numbers over 11,000 and the number of solicitors has doubled. Indeed, throughout that period the

bar has increased in size every year without exception (Morrison, N., 'Mosaic of Memories', Counsel, Feb 2005, p30). This applies also to the construction bar. When I joined Keating Chambers in 1979 I was the 13<sup>th</sup> member. Today we have 42 members, and we continue to grow. This tells us that although the mix of construction dispute work has changed, it continues to grow. In particular, the reduction in court and domestic arbitration cases has been more than compensated for by new work flowing from adjudication and mediation, and by the buoyancy of international work.

8. **Re (vii): Dispute Boards/Panels (DBs)**

8.1 Dispute Boards (DBs) involve a procedure whereby a panel of 3 engineers/lawyers (sometimes just one) is appointed at the outset of a project. The DB visits site 3 or 4 times a year and deals with any incipient disputes. This generally avoids a dispute crystallising into an arbitration.

8.2 With World Bank encouragement, FIDIC has included the DB procedure in its standard form for some time. Recently the ICC has produced a set of DB rules. The material which follows is taken from a lecture given by the Author at an ICC conference on 14.10.04.

8.3 **Contrasting DB and other Procedures**

The Dispute Board procedure has certain characteristics which differentiate it from other dispute resolution processes. These are:

- (a) The conclusion produced by a Dispute Board will ordinarily be only temporarily binding. Essentially, if one or both parties wish to challenge a

Board's determination, the dispute must be taken to arbitration or court litigation, depending on the contract terms. A Board's determination is not enforceable in the way that an arbitration decision is.

- (b) A Dispute Board should be appointed at the commencement of a project and stay in place until its conclusion. By contrast, other procedures, such as arbitration or mediation, are simply invoked once the dispute in question has arisen.
- (c) The Board should meet on site about three times a year.
- (d) The function of a Board should be to "nip in the bud" problems before they crystallise into disputes and, if a dispute does arise, to deal with it by producing either a "Recommendation" (in the case of a Dispute Review Board – see below) or a "Decision" (in the case of a Dispute Adjudication Board – see below).

There is, of course, a variety of Board "types", but generally, they will exhibit most, if not all, of the above characteristics.

#### 8.4 Why DBs Succeed

Experience shows that Dispute Boards are successful, that is, they deal with and finally dispose of virtually all the disputes that come before them. Broadly, it seems that something in the order of 97% of disputes referred to a DB will not go beyond that procedure into arbitration or litigation. Why are DB's so successful? The following reasons are often put forward:

- (i) Because the Board meets on site at regular intervals, and hears the complaints of all parties concerned at an early stage. “Gripes” are dealt with at the outset and never develop into disputes.
- (ii) The DB gives all parties concerned an opportunity to “have their say” and the catharsis of “getting it off your chest” is the extent of what most parties want. Hence, it is unnecessary to go before a formal Tribunal.
- (iii) An unexpected dynamic develops so that the parties, who work with each other on site every day, see the DB as a group of intruders, against whom the site personnel must “gang up” in order to repel them. Accordingly, when the DB arrives on site for its regular visit, the parties will put on a common front, and hastily compromise whatever incipient disputes there may be, so that they do not have the DB “interfering” in the site’s “private business”. This has been put forward as the explanation for why the DB procedure does not act as a “fly-paper” which attracts disputes, and instead only minimises disputes.
- (iv) Most members are not lawyers! Generally, the “mix” on the Board will be two engineers, and one lawyer. The parties will often see this as a more “user-friendly” entity than the forbidding sight of three lawyers.

### **BACKGROUND TO THE DRB PROCEDURE**

8.5. The emergence of the ICC’s Dispute Board (DB) Documents may be viewed as the result of the intersection of three important recent developments. These are:

- (i) A concern in the USA construction industry in the 1960s and 1970s about the escalating cost of arbitration and litigation;
- (ii) A concern in the UK and international civil engineering industries about the role of the Engineer as a dispute decision-maker under the contract; and
- (iii) The emergence within the UK construction Industry of the concept of adjudication and the production of a temporarily-binding decision, to facilitate the prompt payment of sub-contractors.

Each of these three developments will be described briefly below.

## 8.6. U.S. Concern about costs

8.6.1. It seems one of the earliest usages of the Dispute Board Procedure was on the Boundary Dam in Washington in the 1960s. The procedure was also used in 1975 on the Eisenhower Tunnel, and the popularity of the procedure grew steadily from that point. By 1981 the procedure was being used internationally, for example the El Cajon Dam in Honduras. Experience indicated that, notwithstanding that DB members had to be paid for their involvement throughout the project, the total costs of the procedure were substantially less than the conventional method of a major project being followed inevitably by a major arbitration. Some practitioners have calculated that a DRB will generally cost in the order of 0.2% of the project costs. Obviously, the bigger the project, the less the cost of the procedure in relative terms. US experience shows DBs are cost effective for medium sized projects upwards.

8.6.2. The successful U.S. experience led, in 1995, to the World Bank making the procedure mandatory for all International Bank for Reconstruction and Development (IBRD) financed projects in excess of US \$50 million. That led naturally to the procedure being used, in 1997, by the Asian Development Bank, and also the European Bank for Reconstruction and Development.

8.6.3. The commonly favoured model for Dispute Boards in the USA was and is the Dispute Review Board (DRB), under which “Recommendations” are issued in respect of the particular dispute being dealt with. This is a relatively consensual approach to dispute resolution. Broadly, if neither party formally expresses dissatisfaction with a Recommendation within a stated period of time, the contract provides that the parties are obliged to comply with Recommendation. If either or both parties do express dissatisfaction within the limited time period, then the dispute may go to arbitration or court litigation. Although the parties may choose voluntarily to comply with a Recommendation while awaiting the decision of the arbitrator or court, there is no compulsion to do so.

#### 8.7. FIDIC/ICE Usage of DRB Procedure FIDIC/ICE Usage of DRB Procedure

8.7.1. By the 1990s, major civil engineering contractors in the U.K. and internationally, had become critical of the central role played by the Engineer appointed under the FIDIC and ICE standard forms. In January 1995 the World Bank introduced the DB concept into its standard bidding document and made it obligatory for projects of more than US\$ 10 million. A 3- person board was stipulated for projects in excess of US\$ 50 million.

- 8.7.2. In 1995 FIDIC introduced a Dispute Board approach into its Orange Book form. In November 1996 FIDIC introduced the procedure into Clause 67 of its 4<sup>th</sup> edition Red Book. The approach adopted by FIDIC is the Dispute Adjudication Board model, whereby effect must be given forthwith to a Board decision. A firm decision was more attractive than the possible alternative of a recommendation that need not be complied with, i.e. the more consensual Dispute Review Board model. If no Notice of dissatisfaction is issued within 28 days of the Board's decision it becomes final and binding. If a Notice is issued then the matter may proceed to arbitration, although the parties are obliged to comply with the decision in the meantime. This approach, of an immediately binding decision, has been maintained in subsequent versions of the Red Book and is still to be found in the draft of the forthcoming 2005 Second Edition of its 1999 form, in Clause 20.4 thereof.
- 8.7.3. In February 2005 the Institution of Civil Engineers (ICE) produced its Dispute Resolution Board Procedure, First edition. The acknowledgements state that the ICE has drawn upon the work of FIDIC. The Introduction describes a DRB as a “*‘job-site’ dispute adjudication or conciliation board*”. This ICE document offers two procedures, the first for projects not subject to the 1996 Construction Act, and the second for where the Act applies. The principal difference between the procedures is that the procedure governed by the Act caters for a referral to the Board at any time. Clause 4.5 in both forms makes plain that the service of a notice of arbitration or application to the courts is not a reason for failing to give effect to a DRB decision. Thus, the ICE procedure adopts a similar approach to the long-established FIDIC arrangement.

## 8.8. U.K. Adjudication

8.8.1. The late payment of subcontractors has long bedevilled the UK construction industry. By the late 1980s adjudication clauses were commonly used in sub-contract forms such as the JCT DOM/1 agreement. It was unclear at that time precisely what status an adjudicator's decision had, and in November 1989, I represented a sub-contractor in the case of Cameron v John Mowlem 52 BLR 24. We sought summary judgment upon an Adjudicator's decision. His Honour Judge Fox Andrews, Q.C. gave us judgment for the full amount claimed. However, the Court of Appeal subsequently held that a decision of an Adjudicator given under DOM/1 was binding only until the determination by an Arbitrator on the disputed claim, and so the Adjudicator's decision was not equivalent to an arbitration award.

8.8.2. As a result of continuing concern about the non-payment of sub-contractors, the Government commissioned the Latham Report, which resulted in the 1996 Housing Grants, Construction and Regeneration Act (the 1996 Construction Act). This provided for statutory adjudication and the Technology & Construction Court provided easy enforcement. This has revolutionised the construction industry.

8.8.3. Since the U.K. construction industry is now thoroughly familiar with the adjudication process, and the concept of a temporarily-binding decision, it is able readily to use a Dispute Adjudication Board procedure, which is, in effect, an arrangement that provides for serial adjudications through the course of a project.

## 8.9. The ICC DB Procedure

8.9.1. In view of the three developments described above, it can be seen how the production of the ICC DB Documents has come about at a propitious moment, when the U.K. construction industry is fully conversant with the DAB approach by reason of the 1996 Act, the international construction industry is familiar with the DAB approach as a result of FIDIC and the World Bank adopting it almost ten years ago, and where the U.S. construction industry originated and developed the Dispute Review Board (DRB) procedure in the first instance.

8.9.2. Thus it is that the ICC's DB approach, offers three types of Dispute Board:

- (i) The Dispute Review Board (DRB) model involving "Recommendations";
- (ii) The Dispute Adjudication Board (DAB), model, where "Decisions" are issued; and
- (iii) the Combined Dispute Board (CDB) model where Recommendations are normally issued, but Decisions may be requested. This is a hybrid procedure drawing upon both the DRB and DAB models.

## **APPOINTING AND OPERATING A DISPUTE BOARD**

### 8.10. Dispute Resolution Clauses

As we have seen, nowadays many funding bodies, such as the World Bank, insist upon the appointment of a Dispute Board for projects with which they are concerned. In addition, a number of standard forms, such as those produced by the Federation des Ingenieurs' Conseils (FIDIC), include Dispute Board clauses within their dispute resolution procedures. Of course, since (see paragraph 1.2 above) the essence of a Dispute Board is that it produces determinations that are potentially temporarily binding, where a contract provides for a DB it will be as part of a multi-layered dispute resolution clause. It is not uncommon nowadays, on big projects, for very sophisticated disputes clauses to be used. For example, a clause might provide for some or all of the following procedures:

- (i) A Dispute Board to operate throughout the course of the project.
- (ii) Some (e.g. financial or technical) disputes to be referable, in certain circumstances, to:
  - (a) Senior executives from the parties concerned; and/or
  - (b) Independent experts.
- (iii) Mediation;
- (iv) Arbitration or court litigation. (It is, of course, essential to have this final possible procedure available because the earlier procedures may not succeed in finally disposing of a dispute. Therefore, the ICC has

helpfully produced standard ICC Dispute Board clauses which provide for a Dispute Board (in one of three types, as referred to in above) followed, in each case, by ICC arbitration if required.

#### 8.11. Documents Necessary

Getting a DB up and running requires a number of documents:

- (i) An agreement, or a clause in the project contract, requiring the parties to establish and cooperate with a Dispute Board, and to pay the members. Generally, the costs of the Board are split between the project parties.
  
- (ii) Engagement agreements with each member of the Board. Such an agreement would oblige the members not only to attend on site at, roughly, four-monthly intervals, but will also require them to attend on any other specific occasion when the parties so desire. (This obligation can sometimes be problematic, since the sort of professional person appointed to a DB is generally very busy and having suddenly to make themselves available in a far-flung corner of the Empire may not be easily achieved. However, experience shows that a little “give-and-take” on all sides generally achieves whatever is necessary.)
  
- (iii) A set of Rules to govern the DB procedure.

Fortunately, the ICC has now produced admirable documents fulfilling all three functions just described.

## 8.12. Site Visit

Once the Board has been appointed, the Chairman needs immediately to become proactive. He must set a date for the first site visit, and establish an agenda for it. Two or three days on site are generally necessary, depending upon the stage of the project. The stages involved in a visit are broadly:

### (i) Walk the Site

The visit is likely to start with tramping around the site to see what work is actually being done. This is essential, because, many months later, there may be allegations that, for example, the Purchaser failed to provide roads that he ought to have done, with the result that the muddy tracks around the site delayed transportation and prevented the Contractor achieving a certain milestone on time. If the Board themselves walked around the site at the material time they will be able immediately to form a clear view as to whether or not such an allegation has substance.

### (ii) Meeting

Thereafter, a semi-formal meeting should be held in a sufficiently big office on site, or at some locality that all interested parties can reach without difficulty. This meeting is the opportunity for each party, in turn, to have its say, and air any grievances. Although the essence of a DB meeting is that it is not rigidly formal, it is essential that the Chairman ensures that, at the least:

- (a) Each party has its say, and has an opportunity to respond to any allegations made against it.

(b) The Board is seen as entirely neutral. (This objective may not always be easy to achieve, given the informal nature of Board visits. For example, Article 16 in the ICC Rules provides, in 16(2), for the DB giving informal assistance by, for example, separate meetings between the Board and any party with the prior agreement of all the parties. Even though both sides will have “signed up” to the holding of separate meetings, under this procedure, it is not unknown for one party or the other, in such circumstances, to feel that the separate meeting with the other side went on far longer than its own separate meeting, demonstrating some bias on the part of the Board. Certainly, absolutely no separate meetings should be held unless both parties have previously agreed. I know of one case where the legitimacy of the Board was called into question after the DB Chairman bumped into a representative of one party in the hotel in which they were both staying, and they had a drink together. When the other party discovered this they took it as clear evidence of bias, and ceased cooperating with the Board.)

(iii) Determinations by the DB

By the end of the meeting any matters raised for the consideration of the Board should have been dealt with, or a procedure established for dealing with them. If this is done in some oral determination then the formal written Report (see below) that follows should formally record the outcome.

(iv) The Report

Prior to the Board departing it should produce a short written Report which is distributed to all parties. In practical terms this means the Chairman must carry a laptop with him. The Report need not be long, but, in my experience, should deal with at least the following:

- (a) Record the meeting's date, time, locality, length and attendees.
- (b) Record what was seen, in general terms, by the Board when it tramped around the site.
- (c) Record what issues were raised at the meeting, by whom, and with what response from the other side, in brief terms.
- (d) What determinations (whether Recommendations or Decisions) were made by the Board.
- (e) What future action is required of the parties (e.g the production of certain documents for the next meeting) and what the Board itself will be doing, if anything, prior to the next meeting. A proposed date for the next visit should be identified.

#### 8.13. Board's Functions

From the above, it can be seen that a Board may fulfil the following functions:

- (a) It can give informal assistance with disagreements simply by "talking through" various complaints from the parties. This is recognised by Article 16 in the ICC rules.

- (b) It can deal, more formally, with specific disputes referred to it, giving a determination which may be (depending on the circumstances and on the type of Board which has been established) either a Recommendation or a Decision. This is recognised at Article 17 of the ICC Rules. (Generally, formal determinations by a Board are admissible in any subsequent arbitration or court litigation, and the Chairman should keep this in mind when drafting the determination. I note that Article 25 of the ICC Rules recognises this).

#### 8.14. End of the Board's Functions

Ordinarily, the Board will remain in place until the conclusion of the project, which is often marked by, for example, a Certificate of Practical Completion or some equivalent document for the work. Some Board engagement agreements provide for the Board to remain available, if required, thereafter, to be paid at a lesser rate.

### **SUCCESS & FAILURE OF DBs**

- 8.15. The most striking effect of a properly appointed and functioning Dispute Board is its ability to catch problems right at the outset and prevent them festering and growing into disputes. Since both parties know that at regular intervals an independent body will scrutinize the behaviour of all concerned, and that the parties will be accountable for any unreasonable behaviour, they tend to cooperate in a matter that does not always happen on a project which is not blessed with a DB.

- 8.16. The success or failure of a DB depends, to a significant extent, upon the personalities involved. If one or both parties are “bloody minded”, the Board will struggle to deal effectively with complaints and disputes. However, in such circumstances, in the

absence of a DB, there would inevitably be protracted arbitration/litigation at the conclusion of the project in any event, so the existence of the Board will not have made things worse.

8.17. Also crucial are the personalities of the Board members. They must be seen as impeccably fair and impartial, and must exhibit the necessary professional skills (often an amalgam of legal and technical expertise). The Chairman needs to establish, at the outset, a good rapport not only with the other Board members, but also with all party representatives that he encounters on site and in the meetings. Harmonious relationships lead, in my experience, to the dissolution of most disputes, and the few matters that do require determination are dealt with in a civilised manner by the parties, and the Recommendation or Decision resulting is accepted with good grace, so that nothing need go on to arbitration or litigation.

8.18. Early Appointment

In my experience one of the biggest potential problems facing a Board is that it is not appointed early enough. Parties naturally balk at paying retainers and site visit fees to outsiders at a time when there are no disputes on the project. This leads them, in many cases, to wait until there is a crystallised dispute before they actually appoint the Board. This means that many of the advantages which a Board can bring (e.g. a knowledge of site conditions right through the project) are no longer available, and the Board is thrown straight into dealing with a tough dispute where the parties have already taken entrenched positions. This is not a propitious beginning for a DB procedure, yet is often happens and must be dealt with.

8.19. Impartiality

The other potential problem is one which can be guarded against. I have mentioned above that the Board must be seen as scrupulously impartial. This may require some effort. Social engagements, such as drinks and dinner, with one party should be off-limits.

## 9. **Conclusion**

9.1. Broadly, the number of construction arbitrations and court cases has reduced by about a third in recent years, as a result of the combined effects of the CPR (on court litigation), adjudication and mediation.

9.2. Although the effect of the CPR should have stabilised by now, the take up on adjudication and mediation increases steadily, driven by their obvious attractions of relatively low costs and high speed. Consequently, the decline in the number of arbitrations and court cases may be expected to continue.

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<sup>i</sup> The term “Corridor” was used because the Official Referees’ Courts were located along a lengthy corridor at the top of a wing within the Royal Courts of Justice. This Corridor was reached by way of an idiosyncratic lift that involved multiple expanding doors.

<sup>ii</sup> I am grateful to the TCC Court staff for these figures.

<sup>iii</sup> J. Ede, *It’s good to talk – rather than sue* (The Times, 26.11.02, page 7)

<sup>iv</sup> *Appeal Court witnesses fall-off in civil hearings*, The Lawyer, 14.2.05, page 4.

<sup>v</sup> *Construction Law*, 2001, 12(8), 1

<sup>vi</sup> ICC United Kingdom Annual Reports 2001, page 18 and 2003, page 22.

<sup>vii</sup> CEDR statistics from [www.cedr.co.uk](http://www.cedr.co.uk).

<sup>viii</sup> *Solicitors’ Journal* (2005) 149 (11) page 307.

<sup>ix</sup> *Macob v Morrison* (1999) BLR 93; *Bouygues v Dahl-Jensen* (2000) ELR 49.

<sup>x</sup> Survey by Hammonds & Building Magazine quoted in *Construction Law* (March 2005) pages 1 and 4.