



“ADR in FIDIC Contracts and the Cyprus perspective”

**Alternative Dispute Resolution (ADR) in the Construction
Industry: History – Advantages and Disadvantages**

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Introduction

- The dispute resolution in the construction industry includes a series of procedures, aimed at settling any kind of dispute that may arise between the parties involved (consultants, client, contractor, appointed subcontractors).
- The importance, therefore, is not only to prevent any dispute regardless of the circumstances, but rather to prevent reaching the point of no return, where a number of issues have accumulated, and where the situation is so dysfunctional that a Dispute has become unavoidable.

Avoidance of disputes

- Depends a lot on personality
 - Avoid trouble
 - Hide from dispute
 - Dispute oriented
- Be proactive by risk assessment and risk management
- Be more careful
- Produce better drawings, details and specifications
- Use the correct contract type
- Understand the terms of the Contract used
- Understand your obligations
- BE FAIR

Avoidance of disputes in general

- In general, dispute avoidance is important for two reasons.

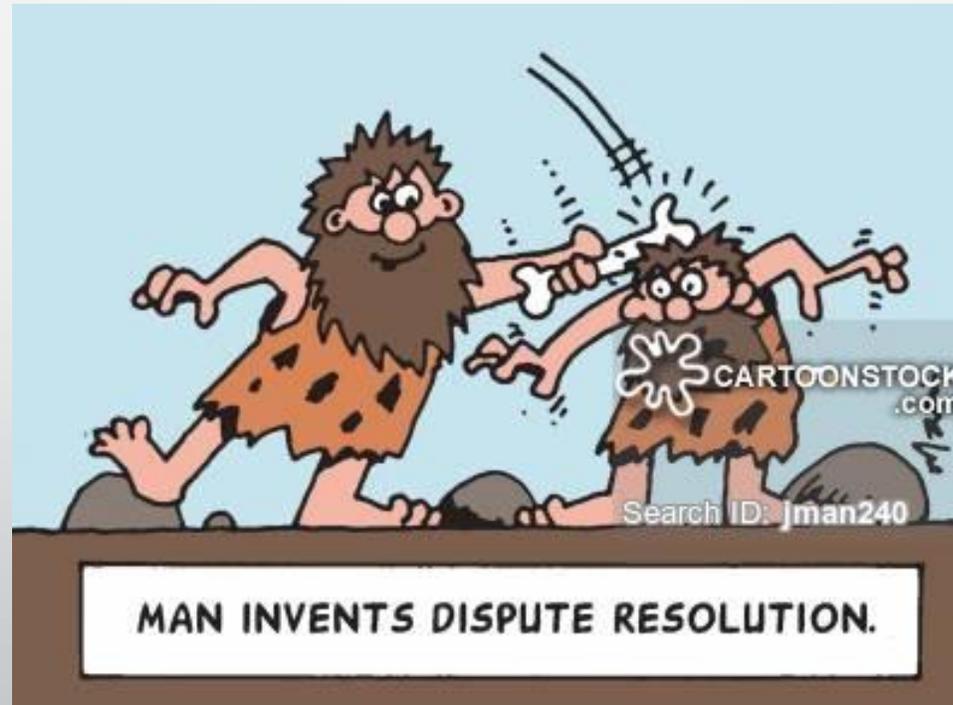
Firstly, it allows [us] to resolve issues as they arrive before they escalate into a dispute, therefore saving a considerable amount of time and money.

Secondly, avoiding disputes is crucial to the maintenance of good working relationships between the different parties involved, such working relationships being most often destroyed by the confrontational nature of litigation or arbitration.

What are Alternative Dispute Resolution (ADR)?

- Generally ADR are procedures for resolving disputes between parties out of Court.
- The ever-increasing difficulty of quick justice any where in the world, has led legal circles, the construction industry, and not only, to seek out compromise and out-of-court dispute resolution methods, which are characterized as alternative dispute resolutions (ADR).
- The various known alternative ways / methods for resolving disputes, except the arbitration are among others:

- a) Arbitration
- b) Mediation
- c) Negotiation
- d) Adjudication
- e) Conciliation
- f) Mini Trial
- g) Arb- Med, Med- Arb
- h) Ombudsman



The resolution of Disputes

- In many cases, however, disputes do arise, due to the inability of the parties to tackle their problems and to handle disagreements effectively. Once a dispute comes about and there is no way to go back, the question thus becomes: **How can the dispute be resolved *properly*?**
- It is now well established that court proceedings or arbitration can have an even more destructive effect on already deteriorated relationships, and can superficially resolve a dispute on the surface, without really “curing” it. Therefore, exploring other dispute resolution mechanisms can be necessary to resolve all aspects of the dispute, and to maintain good business relationships between the parties.

The construction sector

- While dispute avoidance techniques have been developed in diverse areas, the sector in which such techniques are most advanced is the construction sector.
- A major cause of construction project failures is the lack of early stage planning and communication about what to do when disagreements arise. Today, construction and engineering disputes account for the largest share of the caseload at the ICC Court, amounting to a quarter of all cases received in 2015. In times of crisis, disputes in the construction sector will tend to further increase due to the change of circumstances and uncertainty affecting businesses.
- In view of this fact, risk assessment and risk allocation techniques, as well as dispute avoidance mechanisms, have steadily developed and flourished as problem solving methods in the construction sector.

Avoiding disputes at the contract phase

At the contract phase, dispute avoidance lies in the drafting of efficient and well-thought-out contractual provisions. As put forward by Nael Bunni, “Contractual problems generally result from a combination of uncertainty and limited ability of people to think of future problems that may arise from the possible meaning of what they had written”. To that end, lawyers and consultants/ experts need to pay particular attention to:

- The choice of law to govern the contract;
- The conduct of a risk-analysis on a clause-by-clause basis;
- The careful drafting of any amendments to the general conditions; and
- The incorporation of effective contract administration procedures.

Avoiding disputes at the execution phase

- Moving on to the avoidance of disputes at the execution phase, the International Federation of Consulting Engineers (FIDIC) was the first organisation to introduce contract administration procedures in its standard forms of construction contracts.
- **Dispute Boards (DBs)** The 1996 Supplement to the *Red Book*, published by FIDIC (dealing with Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer) established the Dispute Adjudication Board (**DAB**) as a way to avoid the development of issues into disputes during the course of the construction project.
- Later on, the *Yellow Book* (dealing with the Conditions of Contract for Plant and Design-Build Contracts) and the *Silver Book* (dealing with the Conditions of Contract for Engineering, Procurement and Construction/Turnkey Projects) provided for the option of an ad hoc DAB, constituted to decide a single issue, after which its appointment would normally expire.
- Since then, several other institutions have developed rules concerning dispute boards, whether for DABs or Dispute Review Boards (DRBs). These include the ICC, the Institution of Civil Engineers -ICE, the Chartered Institute of Arbitrators.

- **An innovative approach during the London Olympic Games**

An innovative approach for the avoidance of disputes was adopted during the London 2012 Olympic Games.

At the commencement of the project, two panels were created, one being dedicated to the prevention of disputes, and the other to the resolution of disputes which could not be prevented.

Although the system was not publicized, the result is said to have been very successful, with only few disputes which had to be adjudicated, and none of them went to Arbitration or Court.

- **Negotiations:**

- It is the most common method of settling disputes, in which the Parties are attempting to solve the difference between themselves. Carried out everyday by everybody
- Techniques used will probably be linked with their conflict personality type



- **Conciliation:**

It is a purely private way of settling disputes, at the initiative of the Parties. It is a similar method to mediation, but the third person can propose solutions. Unlike mediation, where the Ombudsman does not propose solutions but helps the parties to come to an end on their own. In both cases, the solution is not binding, unless there is a specific agreement (explicit) to indicate otherwise.

- Conciliator like mediator uses their skills to lower tension, improve communication, identify key issues, explore potential solutions.
- Conciliator will try to conciliate by seeking concessions from the parties.

- **Adjudication**

- Legal process by which a neutral person the Arbitrator, reviews arguments and gives his / her decision, which becomes binding unless the dissatisfying party takes the case to arbitration and the decision is overturned by the Arbitrators Award.
- However until the decision of the arbitrator the parties have to comply with the decision of the adjudicator.
- A private, concise way of hearing the case which, in a short time (predetermined), the Adjudicator must complete the proceedings. The decision may be binding but not final, since the Parties may not accept it by sending within a reasonable time a Notice of Dissatisfaction.

- **Neutral evaluation/expert opinion**
- Parties sit down with the neutral evaluator who will listen to the parties and give his opinion based on his own technical knowledge and expertise.

Mediation

- In mediation, the mediator (a neutral person) assists the parties to come to a mutually acceptable resolution of their dispute. The parties may meet altogether in the same room, or often stay in separate offices and the mediator moves back and forth between the parties. Unlike a judge at a trial or an arbitrator at an arbitration hearing, the mediator does not decide how to resolve the dispute.



- The parties themselves decide how to resolve or settle their own dispute. The parties work together to come to a mutually acceptable compromise that satisfies everyone, instead of working against each other. Mediation often leads to better communication between the parties.
- This can be particularly important when parties have a continuing relationship with each other, such as neighbors or colleagues or businesses. It can also be effective where personal feelings are getting in the way of a resolution and a professional mediator can be brought in to act as a go-between. Mediation normally gives the parties a chance to express their concerns in a voluntary, confidential process while working towards a resolution and compromise. Mediation can provide the greatest level of flexibility for parties. This type of resolution is particularly helpful in high stakes litigation when a run away jury could break a business.
- Mediation is one of the most "friendly" approaches to settling disputes and, if necessary, in many respects the most effective, provided that the parties to the dispute are genuinely interested in settling their disputes and have the power to take the necessary decisions in this direction.
- The final solution must be a result of the free choice of the parties involved in the dispute and constitutes a private agreement.

- **DAB, DRB, CDB and now DAAB**

- Dispute Adjudication Boards
- Dispute Review Boards
- Combined Dispute Boards
- Dispute Avoidance Adjudication Boards (Dec 2017)

- **Ombudsman**

- These are new ways of resolving disputes that arise because of the EU regulation, such as the Government Schemes . The Aim of the scheme is to resolve disputes with particular organizations or about particular services.
- Usually a formal complain procedure.
- They hear disputes from the public make their investigation and give decision
- Examples- Commissioner for Administration, the housing Ombudsman, the Consumer Ombudsman, the Financial Commissioner, the Independent Complaint Review etc., which are independent bodies with personal and functional independence and will operate ex officio or after a signed petition.

- **Mini Trial:**

Private resolution procedure before high-level executives, headed by a neutral third party.



Advantages of ADR

- *More flexibility.*

The parties have far more flexibility to select what procedural and discovery rules will apply to their dispute (they can choose to apply relevant industry standards, domestic law, the law of a foreign country, etc.).

- *Select your own Arbitrator, Adjudicator or Mediator.*

The parties can often select the arbitrator or mediator that will hear their case, typically selecting someone with expertise in the substantive field involved in the dispute. The arbitrator (or panel members) does not need to be an attorney. In this way the focus can be on the substantive issues involved rather than on technical procedural rules. In normal litigation, the parties cannot select the judge, and the judge and/or jury may often need expert witnesses to explain complex issues. The greater the expertise of the arbitrator, the less time that needs to be spent bringing him up to speed.

- *A jury is not involved.* Juries are unpredictable and often damage awards are based solely on whether they like the parties or are upset at one party because of some piece of evidence such as a photo that inflames the passion of the jury. Juries have awarded claimants damages that are well above what they would have received through alternative dispute resolution; and they have also done the opposite.
- *Expenses are reduced.* Internationally it was discovered that attorneys and expert witnesses are very expensive. Alternative dispute resolution offers the benefit of getting the issue resolved quicker than would occur at trial – and that means less fees incurred by all parties.

- *ADR is speedy.* Trials are lengthy, and in many states and counties it could take years to have a case heard by a judge or jury. Appeals can then last several months after that. With arbitration, if the parties agree the evidence can be submitted by documents only rather than by testimony presented through witnesses. ADR can be scheduled by the parties and the panelist and be very quick and effective.
- *The results can be kept confidential.* The parties can agree that information disclosed during negotiations or arbitration hearings cannot be used later even if litigation ensues. The final outcome can also be made private if the parties so stipulate and agree. On the other hand, most trials and related proceedings are open to the public and the press.

- *Party participation.* ADR permits more participation by the litigants. ADR allows the parties the opportunity to tell their side of the story and have more control over the outcome than normal trials overseen by a judge. Many parties desire the opportunity to speak their piece and tell their side of the story in their own words rather than just through lawyers.
- *Cooperation.* ADR allows the parties to work together with the mediator or other person in charge, to resolve the dispute and come to a mutually acceptable remedy.
- *Less stress.* ADR is often less stressful than strict, expensive and lengthy litigation. Most people have reported a high degree of satisfaction with ADR.
- **Conclusion.** Because of these advantages, many parties choose ADR (either adjudication, mediation or arbitration) to resolve disputes instead of litigation. It is not uncommon even after a lawsuit has been filed for the court to refer the dispute to an Arbitration or ADR. ADR has also been used in some countries to resolve disputes even after trial, while an appeal is pending.

Disadvantages of ADR

- *There is no guaranteed resolution.*

With the exception of arbitration, alternative dispute resolution processes do not always lead to a resolution. That means it is possible that you could invest the time and money in trying to resolve the dispute out-of-court and still end up having to proceed with litigation and trial before a judge or jury.

However, you will certainly better understand the other side's position!

- *ADR Decisions are not final and binding.*

With the exception of Arbitration ADR decisions are not final. With very few exceptions, the decision of an Arbitrator cannot be appealed, with fraud or misconduct being an obvious exception. Another ground for setting aside an award is if the arbitrator's decision exceeded the scope of the arbitration clause or agreement.

Decisions of a court, on the other hand, usually can be appealed for a variety of legal grounds and for numerous alleged procedural errors.

- *Limits on Arbitration Awards.* Arbitrators can mainly resolve disputes that involve money, or time, or decide on the quality of the final material. For example, Arbitrators generally cannot change title to real property.
- *Discovery limitations.* Some of the procedural safeguards designed to protect parties in court, may not be present in ADR, which make it difficult to obtain evidence from the other party.
- *Fee for the ADR.* The mediator or arbitrator or any ADR person, charges a fee for his or her services. Depending on the Institutional or Ad-Hoc procedure selected, the fees can be substantial. A judge on the other hand, charges no fees for his services.

- *May have no choice.*

Often the contract in dispute contains a broadly worded mandatory arbitration clause. Most Construction Contracts and many lease agreements and employment contracts, for example, contain mandatory arbitration provisions, as do operating agreements and other types of business contracts. Unless both parties waive arbitration, most countries will compel arbitration at the request of any party.

Conclusion

The role of education in promoting dispute avoidance and ADR

- I will conclude my presentation by underlining the key role that education and training play in promoting access to justice through *dispute* resolution methods.
- Aristotle said that “Education is an ornament in prosperity and a refuge in adversity”. It is crucial that professionals of dispute resolution, constantly educate themselves, which proves to be essential in times of adversity. By educating ourselves, we learn to adapt and to apply different methods; but we also stimulate our minds to welcome innovation.

CONFLICT MANAGEMENT FOR COMMERCIAL DISPUTES

PROCESS										
<i>Party equality</i>	INVOLUNTARY			ELECTIVE						
	PUBLIC			PRIVATE						
	THIRD-PARTY DECISION					PARTY CONTROL				
	<i>SETTLEMENT / RESOLUTION</i>						<i>ADVICE</i>			
	FINAL			NON-FINAL			ADVISORY			
	Legislation or Administrative decision	Litigation	Arbitration	Adjudication	Conciliation		Expert Evaluation	Facilitation	Mini-Trial	
					Mediation					
	DISPUTE ('Resolution', 'Advisory', 'Combined' or 'Extended') BOARDS									
<i>Party inequality</i>						Independent Complaints Review / Ombudsman				

slides/conflict management comparison diagram 070213

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Source: William McLaughlin
Conflict management comparison diagram

Comparisons				
Litigation	Arbitration	Mediation	Adjudication	Negotiation
Not voluntary	? Voluntary?	voluntary	Voluntary?	Voluntary
Final and Binding, subject to appeal	Final and Binding, subject to <u>very limited appeal</u>	If agreement, can be enforceable as contract	Final but not Binding, (NoD)	If agreement, can be enforceable as contract
Formal, rigid rules	Based on rules, if chosen by the parties or if Institutional	Informal	Informal?	Informal
Standard procedure. Opportunity for each party to present proofs and arguments; focused on past events	Set procedure. Opportunity for each party to present proofs and arguments; focused on past events	Freedom of procedure	Set procedure in short time	Freedom of procedure
Outcome: imposed decision, supported by reasons.	Outcome: imposed decision, supported by reasoned Award.	Outcome: mutually acceptable agreement sought	Outcome: Decision	Outcome: mutually acceptable agreement sought
Public	Private	Private	Private	Private

Thank you for your attention.

