

RESOLUTION OF CONSTRUCTION INDUSTRY DISPUTES An Overview

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1.0 INTRODUCTION

Construction industry is one of the mainstays of a country's economic progress, it may in fact be not wrong to state that the state of a country's construction sector can be used as a barometer to gauge that country's economic performance. Different people may hold different views, but when a country's economic statistics are heading downwards, the government's "stimulus package" for the economy usually comprises substantial allocation for the construction industry.

However, it is also true to say that the construction industry is a fertile source of disputes. There have been no statistics as far as this writer knows regarding the extent and the prevalence of these disputes in Malaysian construction industry but anecdotal evidence and "grapevine gossips" among legal practitioners and those professionals within the arbitral community are such that a substantial proportion of the disputes that were referred to arbitration involve players from the construction industry. This may also explain the rise of other "sub-industries" such as the "claims industry" and what may be called the "arbitration industry". The reasons for such prevalent occurrence of disputes in the construction industry include, for example, low standard of contracts administration and contract documentation, personality clashes, less than satisfactory understanding of the contract provisions on the part of the contractors and employers (and their consultants), too optimistic pricing on the part of the contractors who harbour hope of "recouping" their losses through claims which are denied; and others. Other reasons may also be the nature of the construction law itself¹ and also the construction process itself which is complex and is unlike simple off-the-shelf product procurement.

¹ See Sandi Rhys Jones, *How Constructive is Construction Law?* (1994) 10 Const LJ 28 where the author has concluded, on p. 37, that there was "a need to challenge the long-held assumptions within the construction industry and the legal profession on issues such as the effectiveness of standard forms of contract, acceptable language, preferred methods of dispute resolution, styles of drafting and management."

Disputes call for their resolution; however it must be stressed that contrary to popular understanding, arbitration is only one of the many dispute resolution mechanisms available to the contracting parties. This paper is thus an attempt to provide a brief overview of the various methods of resolving disputes in the construction industry² with particular emphasis on the use of mediation as a means of resolving construction industry disputes.

2.0 NATURE OF A CONSTRUCTION INDUSTRY DISPUTE

Except for the simplest of contracts, all contracts of the construction industry are reduced into written formal contracts which detail the rights and obligations of various persons³ with the contracting parties usually referred to as “the Employer” and “the Contractor”. A feature of a construction contract is the prominent involvement of a person variously called the Architect (as in PAM '98 standard building form) or the Engineer (as in IEM, ICE and FIDIC standard forms) or the Superintending Officer or S.O. (as in JKR 203 family of forms and CIDB 2000 standard building form) whose duties and powers⁴ are also defined. There may also be the involvement of, for example, quantity surveyors, civil and structural engineers, mechanical and electrical engineers, acoustic consultants, landscape architects etc.

Further, a construction project can be the result of a long-drawn process which can take years to bring it to fruition. It can start with feasibility studies, securing of financing, securing planning approvals from governments both state and/or federal and even those of the local government (some may even add political approval), environment impact assessment studies, engagement of various professionals, design and documentation, tendering and selection of contractor, procurement of materials and equipment, construction, commissioning, securing of certificate of fitness for occupation and others.

With the various persons involved in the same project and the nature of a construction project itself, it will not be surprising that disputes can occur, or as some would say, disputes in a construction project are inevitable. Disputes can occur as a result of the actions, or inactions, of the Employer, the Contractor or the various consultants. Differing opinions on whether certain works constitute variations within the meaning of the contract and if so their valuation; entitlement of extension of time and its quantification; certification of interim payments; the exercise of the powers of the consultants or their non-exercise thereof; delay or

² “Construction industry” is used broadly and loosely to include the industry for the construction of residential and commercial buildings, infrastructure developments such as power stations, highways, ports, water supplies, flood mitigation and others. It is used to include what may be separately referred to as the “building construction” and “engineering construction”. So construed, a “construction contract” includes a contract for the erection of a commercial or residential building as well as a contract for works of engineering construction.

³ “Persons” includes corporations.

⁴ It is important to make a distinction between these two terms for their legal effects differ.

alleged delay in the provision of information; and many others will have their contractual implications.

It needs no emphasis that a construction project is a commercial undertaking from the perspectives of both the Employer and the Contractor and each is entering into a construction contract with a profit-making objective. A construction industry dispute, like other commercial disputes, inevitably involves questions of monetary compensation.

Certain disputes can however arise between the Contractor and the consultants with the Contractor's allegation of professional negligence on the part of the consultants but this seems to be quite rare in the present time in the Malaysian construction industry.

It can therefore be seen that construction industry disputes will have subject matters which are highly technical in nature, involve issues of law which are highly specialized⁵ and require as modes of proof documents which may run into many volumes. All these will translate into money and time. A construction industry dispute is thus one which is technically complex, tedious in the appreciation of the facts and, in view of the fact that contract sums awarded now are quite considerable, the amount in dispute in a construction industry dispute can also be quite substantial. In other words, a lot is at stake.

3.0 VARIOUS METHODS OF DISPUTE RESOLUTION

Means by which disputes in the construction industry can be brought to their resolution include the following⁶:

- (a) negotiation;
- (b) litigation;
- (c) arbitration;
- (d) mediation;⁷
- (e) adjudication;
- (f) expert determination;
- (g) mini-trial;
- (h) hybrid ADR;
- (i) dispute review board; and
- (j) dispute resolution advisor.

Most standard construction contracts will contain provisions for the resolution of disputes between the contracting parties, frequently these will be the Contractor

⁵ An LLB degree does not usually have as part of its syllabus any instruction on construction law.

⁶ The list is by no means exhaustive and other methods of dispute resolution are available.

⁷ For practical purposes, the term "mediation" is taken to be synonymous with "conciliation"; there is no accepted consistency on the use of these two terms.

and the Employer. These provisions contain one or more of the methods listed above. CIDB Standard Form of Building Contract (2000 Edition) for example envisages a two-tier dispute resolution mechanism, *viz.* mediation which if unsuccessful will be followed by arbitration.⁸ Broadly, it can be seen that the above listed methods can be divided into binding and non-binding methods and also whether the methods are rights-based or interests-based: these will be apparent from the discussions below which focus on the various methods of dispute resolution that can be used in the construction industry.

4.0 NEGOTIATION

It should not be wrong to state that most of the construction industry disputes do not go beyond the stage where legal advice is sought, and many disputes get resolved by the parties before one of the parties to the contract evokes the dispute resolution clause in the construction contract and starts the contractual process of resolving the disputes ongoing. Many may not be aware of this, but businessmen, being practical people, have got many disputes resolved by negotiation.

Negotiation as a means of resolving disputes is thus a first step towards many a construction industry dispute and it does not need the evoking of a contractual provision to set it into motion. It is a consensual process and, like all consensual processes, it only works well when *both* parties are genuine and sincere of achieving a resolution of the dispute, the absence of this very ingredient may well spell the doom of negotiation as a means of achieving success in resolving the dispute between the two parties. Very often, a give and take attitude is called for and the result is often a compromised solution not too unacceptable and not too undesirable, to the two parties. A settlement agreement may be the end product of this which should reflect the essence and agreements of the negotiation.

5.0 LITIGATION

Many people are attracted by dramatized courtroom dramas but litigation is said to be feared by most lay people. If businessmen can avoid legal suits, most practical-minded businessmen would gladly avoid them. However, it must be stressed that any contract provision which ousts *absolutely* the right of any party from enforcing his legal rights is void to that extent.⁹

Litigation as a means of resolving disputes focuses on the (legal) rights of the parties and tends to be very confrontational and, as some may say, akin to washing dirty linens in public. This is to a large degree unavoidable if one resorts to litigation given the adversarial nature of the (common law) litigation process. However, much as the very point that litigation is the very ultimate and final

⁸ See Clauses 47.2 and 47.3 of CIDB Standard Form of Building Contract (2000 Edition).

⁹ Section 29 Contracts Act 1950.

means of resolving disputes (other than the appellate system within the litigation process itself), the use of litigation as a means of dispute resolution mechanism has in recent years been eroded. It may not be wrong to say that the trend is towards the use of litigation as a means to supervise, or support, other dispute resolution mechanisms¹⁰ and/or as a means of enforcing, or to a lesser degree avoiding¹¹, the end result of other dispute resolution mechanisms: it provides a supporting role for the efficient implementation of other methods of resolving disputes.

The disadvantages of litigation are rather well known. Backlog of cases and the consequent delay in the parties' own cases are often being heard: the usual adage "justice delayed is justice denied" has very often been invoked. Technical points of law not having direct relevance to the issues in disputes may be raised¹²; technical and complex and some may say inflexible rules of evidence will need to be adhered to; the frequent postponements of cases already fixed for hearing mean further delay; judges are not quite appreciative the facts due to the highly technical nature of the disputes and the issues involved; and many others tend to point to the erosion of litigation as a means of resolving disputes.

Having said so, it may be pertinent to ask if, for example, the drawbacks of litigation such as delay (due to backlog of cases and inherent procedural mechanisms) and high cost can be eliminated, specialist construction judges are to be introduced coupled with a more flexible use of procedure, will the erosion of litigation as a means of resolving disputes be arrested? There are indications in other countries that this may be so and a big 'casualty' of this seems to be the use of arbitration as a means of resolving construction disputes, a brief overview of which we now turn.

6.0 ARBITRATION

Arbitration as a means of resolving construction industry dispute will be the subject of the next paper.¹³ It may be important however to observe that arbitration, like litigation, focuses on the parties' legal rights and an arbitral

¹⁰ See for example, with respect to arbitration, section 6 Arbitration Act 1952.

¹¹ See for example, with respect to arbitration, *The Nema* [1982] A.C. 724. Section 34 Arbitration Act 1952 though expressly provides that the Act shall not apply to certain arbitrations, nevertheless preserves the application of the Act for the enforcement of an arbitral award published subsequent to those arbitrations.

¹² Please see however the recent Federal Court's pronouncement to the contrary which is welcome: *Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Berhad* [2002] 1 MLJ 385.

¹³ See Oon Chee Kheng, *Arbitration in Construction Disputes: A Procedural and Legal Overview* being a paper based on a lecture delivered to The Institution of Engineers, Malaysia (Negri Sembilan Branch) on 24 May 2003 for an overview of the legal and procedural aspects of arbitration. For detailed expositions, see Sir Michael J Mustill and Stewart C Boyd, *The Law and Practice of Commercial Arbitration in England*, 2nd Edition (1989) or Anthony Walton and Mary Vitoria, *Russell on the Law of Arbitration*, 20th Edition (1982).

proceeding is sometime not much different from a court proceeding¹⁴ except that in the case of arbitration, the principle of privacy is upheld and outsiders are not allowed, unless with the tacit approval of the parties and the arbitrator, to be present during the hearing. It is due to this that arbitration is sometime referred, not with commendation it may be said, as “privatized litigation”.

The advantages attributed to arbitration, often stated as a comparison *vis-à-vis* litigation, will often include privacy, confidentiality, cost effectiveness, speedy resolution, flexibility, finality and, with special reference to construction contracts, the power of the arbitrator to “open up, review and revise” the (Architect’s, Engineer’s or S.O.’s) certificates and the decisions of the Architect, Engineer or S.O.¹⁵. The main drawbacks of arbitrations are often stated to be those associated with the question of an arbitrator’s jurisdiction and his¹⁶ degree of competence.

7.0 MEDIATION¹⁷

“Mediation is a facilitative process in which the disputing parties engage the assistance of an impartial third party, the mediator, who helps them to try to arrive at an agreed resolution of their dispute.”¹⁸

Mediation as a means of dispute resolution mechanism is thus a consensual process; it is in a sense a “brokered negotiation” or facilitated negotiation between the two parties to the dispute with the mediator being the facilitator. Unlike in arbitration or litigation where the arbitrator or the judge will pronounce the legal rights of the parties in the form of an award or a judgment, a mediator does not make decision for the parties. A mediator thus has no authority to adjudicate or determine the rights or wrongs of the parties and their disputes; the parties themselves have to come to a settlement acceptable to them, or not too unacceptable to them. In this aspect lies the fundamental difference between mediation and arbitration as a means of dispute resolution mechanism.

Another notable difference between mediation and arbitration is that whereas arbitration (and also litigation) focuses solely on the legal *rights* of the parties, mediation takes a different approach in focusing on the *interests* of the parties

¹⁴ See, for example, Rule 22(a) of IEM Rules for Arbitration, 3rd Edition (1994) which provides that the formal arbitral hearing “will approximate that of the High Court”. The court-style arbitration need not however be the norm.

¹⁵ See for example, Clause 34.4(iv) of PAM '98 Standard Building Form; Clause 55(h) of IEM Conditions of Contract for Works of Civil Engineering Construction; Clause 47.3(d) of CIDB Standard Form of Contract for Building Works (2000 Edition) and Clause 54(e) of JKR 203A Standard Form of Contract.

¹⁶ Like all pronouns used herein, “he/his/him” shall also be read as including “she/her”.

¹⁷ See for a detailed treatment, Laurence Boulle and Teh Hwee Hwee, *Mediation: Principles, Process & Practice*, Singapore Edition (2000).

¹⁸ This definition is taken from Henry J Brown and Arthur L Marriott QC, *ADR Principles and Practice*, 2nd Edition (1999) at p. 127.

devoid of any of their emotional positions. A mediator will attempt to arrive at a “win-win” situation for the two parties to the dispute.

A mediation process can be broadly described as follows. The appointed mediator will first get the two parties to the dispute together and to first build up an atmosphere conducive for negotiation. He will then explain his role in the mediation process and will also lay down the ground rules for its proper conduct. The requirement of maintaining confidentiality will also be highlighted. Each of the parties will then be invited to present his side of the case uninterrupted by the other party and the mediator will try to distill from the presentations what are the main interests, pertinent issues and goals of the parties. Very often the mediator will conduct separate meeting thereafter with one party in the absence of the other so as to have a deeper discussion with the party (maintaining of confidentiality must always be upheld) and this process will be repeated with the other party. The two parties will then be brought together for further negotiations and discussions. A brainstorming session with the parties to generate options for the resolution of the dispute will then be held. If any of the option generated is acceptable to the two parties, this will then be formalized in a settlement agreement. If this settlement agreement is concluded and executed, the mediation process can then be pronounced a success. It has to be appreciated that the mediator does not make any decision nor will he adjudicate on the rights or wrongs of the parties. The parties are at liberty to decide if any solution is acceptable to them. Any party can also walk out of a mediation venue if he thinks that the mediation is not going to work and a resolution of the dispute is unlikely or impossible. Like all consensual processes, the ingredient of success for mediation will include a large dose of goodwill and sincerity from all the parties to the dispute. Another necessary ingredient for the successful use of mediation is the skill of the mediators themselves. One feature with mediation is that not all disputes that are referred to mediation can be a success, i.e. as measured from whether the disputes can be satisfactorily resolved with the conclusion and execution of a settlement agreement; that is the reason why it is still common to talk about the success rate of mediation.¹⁹

Malaysian construction industry has in recent years introduced into the standard forms of contracts provisions for the use of mediation as a means of dispute resolution.²⁰ A teething problem with the use of mediation as a means of resolving construction industry disputes is that currently there may be a shortage

¹⁹ From personal communications with mediation practitioners in Australia, Hong Kong SAR and Singapore, a success rate of about 80% was often mentioned.

²⁰ See Clause 35 of PAM '98 Standard Building Form and Clause 47.2 of CIDB Standard Form of Contract for Building Works (2000 Edition); the difference in approach between these two standard forms towards mediation is that in PAM '98 Standard Form, the parties have the option to go to mediation if they so choose before resorting to arbitration whereas in the case of CIDB Standard Form, it is a condition precedent before the parties submit to arbitration that they must first have an attempt to resolve their dispute through mediation. It is to be noted that both PAM and CIDB have published their respective Mediation Rules.

of *experienced* mediators.²¹ It may be correct to say that the continuing international trend is towards the use of mediation to resolve construction (and other commercial) disputes.²² At least in Malaysia, it may be premature at this stage to agree with the following statement of George H Golvan QC but given time and with the increasing popularity of mediation as a means of disputes resolution, reservations among legal practitioners against mediation discharged and their attitudes changed, and with all the infrastructures for the use of mediation properly in place, a concurring note may be unreservedly given.²³ The statement is this:

“Mediation is such a suitable process for resolving commercial disputes that it may well be arguable in the future that a lawyer who fails to take advantage of an available mediation procedure, and has instead committed his or her client to protracted and expensive commercial litigation, could well be *guilty of a breach of professional duty*.”²⁴

8.0 ADJUDICATION

Very often, arbitration clauses²⁵ in construction contracts are drafted in such a way that referral to arbitration can only be commenced upon the completion or alleged completion of the works.²⁶ The reason for this is that due to the adversarial nature of the arbitral process, the conduct of the arbitration may be too disruptive to the continued execution of the works. This reason is not without justification. However, the fact that some disputes have to wait until the completion of the works for their attempt at resolution cannot be said to have justification. These disputes include, for example, the withholding of certificates, deposit of retention monies in a separate bank account and others. Besides, and from the contractors’ perspective, their cashflow can be severely and adversely affected.²⁷ It is in this situation that adjudication can find a useful place as a means of resolving construction disputes.

²¹ CIDB has initiated a training and accreditation program for construction industry mediators.

²² Bar Council has also introduced its own Mediation Rules and established the Malaysian Mediation Centre in 1999.

²³ As pointed out by Dr Penny Brooker and Professor Dr Anthony Lavers in the conclusion of their research on the attitudes of lawyers towards mediation, that “attitudes are changing and the indications are that the trend will continue rather than be reversed.”: see Penny Brooker and Anthony Lavers, *Commercial Lawyers’ Attitudes and Experience with Mediation* [2002]4 Web JCLI. This article is available at <http://webjcli.ncl.ac.uk/2002/issue4/brooker4.html>, accessed on 6th February 2003.

²⁴ George H Golvan QC, *The Use of Mediation in Commercial and Construction Disputes* (1996) 7 ADRJ 188 at p. 196; emphasis supplied.

²⁵ These are the arbitration agreements within the meaning of section 2, Arbitration Act 1952.

²⁶ See for example Clause 47.3(b) of CIDB Standard Form of Contract for Building Works (2000 Edition), Clause 34.5 of PAM 1998 and Clause 55(b) of IEM Conditions of Contract for Works of Civil Engineering Construction (May 1989).

²⁷ As aptly pointed out by Lord Denning MR, “There must be ‘cashflow’ in the building trade. It is the very lifeblood of the enterprise”, *Modern Engineering (Bristol) v. Gilbert Ash (Northern)* (1973) 71 LGR 162, CA at p. 167.

Broadly, adjudication can be of two types: statutory adjudication and contractual adjudication. In England, the use of adjudication is statutorily provided for and before a party resorts to arbitration, adjudication must first take place and the decision of the adjudicator on the dispute is binding on the two parties to the dispute, until and unless it is challenged and set aside by an arbitral tribunal.²⁸ Contractual adjudication operates in similar manner except that in contractual adjudications, the adjudicator derives his power and authority from the agreement between the two parties.

9.0 EXPERT DETERMINATION²⁹

For this form of dispute resolution, the parties agree to refer the dispute to a mutually agreed independent expert for his determination. The parties can further agree that under what circumstances (if any) that they will treat the determination of the expert to be final and binding on the parties. It is sometime quite common for an agreement to contain a provision that certain dispute or disagreement can be determined by an engineer, accountant etc “acting as an expert and not as an arbitrator”.

The expert will usually examine the written submission from both parties to the dispute and provide them with his determination or appraisal.

Despite the process which can and often expressed to be final and binding, it must be distinguished from that of arbitration as in the later case, the principle of natural justice must always be upheld. The distinction is important for if the process, by whatever name so called, is held to be an arbitration and not expert determination, then the common law rules and the provisions of Arbitration Act 1952 will apply with consequences which may be unintended by the parties. It has to be appreciated that it is the method and process by which the expert comes to a determination of the disputes and not by whatever name he is called that will make him either an expert or an arbitrator.

In the Canadian Supreme Court’s decision of *Sports Maska Inc v. Zittre*³⁰, the Canadian Supreme Court after an extensive review of authorities from various jurisdictions, observed that the court will not be bound by the name given to the person who has been asked to be the adjudicator of dispute and what is being labeled as an expert determination may in fact be arbitration. For example, if the person appointed makes a determination from his own personal knowledge, the process is likely to be an expert determination. However, if the appointed person has to listen to opposing arguments, the process is more likely to be arbitration.

²⁸ See sections 108 (1) – (5) Housing Grants, Construction and Regeneration Act 1996.

²⁹ See for a detailed discussion on this topic, John Kendall, *Expert Determination* 2nd Edition (1996). See also for a shorter but no less perceptive treatment the paper by Robert Hunt, *The Law Relating to Expert Determination* (2001) 20 *The Arbitrator and Mediator* 39.

³⁰ (1988) 1 SCR 564.

The greater the similarity to the judicial process, the more likely it is that the process is arbitration and not expert determination.

10.0 MINI TRIAL

Though named as a trial, it is strictly incorrect and this is sometime referred to as a “conference”; it is really a tribunal formed by senior executives from both parties. Each party presents the issues, usually for the first time, to the senior executives from both parties who are usually assisted by a neutral chairman. The chairman is usually a respected expert and he may give advice on the likely outcome if the dispute is brought in front of an arbitral tribunal or to court. The time frame allocated to each party’s presentations of the issues is usually limited and thus avoiding lengthy submissions. The method relies upon a neutral (the chairman) to facilitate and moderate the “trial” and he usually also assesses the strength and weakness of each party’s position. The parties can attempt negotiation for a settlement thereafter.

11.0 HYBRID ADR

It is possible that the parties to the dispute can structure a process to resolve their dispute which involves a combination of the ADR³¹ processes named above. For example, arbitration can be resorted jointly or consecutively with mediation to serve the parties’ common end, i.e. to have their disputes satisfactorily, economically, fairly and speedily resolved: this is sometime given the name of Arb-Med or Med-Arb depending on which process comes in first. Other combinations are of course possible.

An example of Arb-Med would be to resort to arbitration to settle the issue of liability and to thereafter resort to mediation to mediate on the issue of the quantum of that liability. Counsels and arbitrators would readily agree that the adduction of evidence to prove quantum is one which is labourious and lengthy and the normal judicial or arbitral process which involves examination-in-chief, cross-examination and re-examination followed by oral or written submissions and final decision in the form of a judgment or award is not the most satisfactory, economical, fair or speedy way of dealing and deciding the issue of quantum of

³¹ The acronym “ADR” stands for Alternative Dispute Resolution. The term is usually used to mean all modes of dispute resolution processes other than litigation and arbitration but arbitration is sometime included as a part of ADR. For the connotation that the word ‘Alternative’ carries, ADR is sometime regarded as standing for Additional Dispute Resolution: see Sir Laurence Street, *The Language of Alternative Dispute Resolution* [1992] ADRLJ 144 at p.144. But, as Sir Laurence himself readily concedes, the phrase “Alternative Dispute Resolution” is now “too deeply entrenched to be able to be recommitted”.

damages after the issue of liability is established.³² Therefore the strength of one method is used to compliment the weakness of the other.

An example of Med-Arb would be a situation when the mediator could assume the role as an arbitrator and continue to adjudicate on the dispute as an arbitrator if the earlier held mediation does not result in the execution of a settlement agreement. It is to be noted that there are some reservations, not without justifications, on the continued performance by the mediator of the role of an arbitrator who goes on to publish an award determining the legal rights of one party *vis-à-vis* the other.³³

It may also be pointed out that this hybrid method of designing dispute resolution process to best suit the parties' needs has also found legislative support in some countries such as Ontario, Canada.³⁴

12.0 DISPUTE REVIEW BOARD

In this method of dispute resolution, the dispute review board (hereinafter referred to as "DRB") which is constituted by a senior executive each from the Employer and the Contractor of the project together with a third party. The DRB is established and maintained throughout the duration of the project. The members of DRB meet regularly to keep itself abreast with the development on site (site visits will also be made) and to discuss and consider any issues which have arisen or which may arise. Any potential misunderstanding of position, ignorance of legal standing or any budding problem is thus prevented from developing into a full-blown dispute. The third party member of DRB is usually someone who is independent, familiar with mediation and arbitration and, of course, with the construction industry. He can, for example, advise the parties if a dispute were to be referred to arbitration, certain decision one way or another may be reached.

The DRB system is strictly also another example of a hybrid system and if the parties agree, some interim binding decision can also be made by the third party. In some sense, it is not a "pure" method of dispute resolution but more a combination of dispute *avoidance* cum dispute resolution.

One criticism that is frequently leveled against the DRB system is that it may undermine the position of the Architect, the Engineer or the S.O. who is the certifier and contracts administrator of the project.

³² For this reason arbitration is sometime divided into two stages with the initial stage deals with the question of liability (and an interim award published to the effect) with the later stage deals with the issue of quantum of that liability.

³³ See Sir Laurence Street, *op. cit.* on p. 147.

³⁴ Section 3 of Ontario's International Commercial Arbitration Act provides that the arbitral tribunal may, with the consent of the parties, use mediation, conciliation or other procedures at any time during arbitration and the tribunal members are not disqualified from resuming their roles as arbitrators by reason of the mediation, conciliation or other procedure.

13.0 DISPUTE RESOLUTION ADVISOR³⁵

The dispute resolution advisor (hereinafter referred to as “DRA”) can be considered as a variant of the DRB and was recently developed in Hong Kong SAR. The DRA is appointed at the beginning of the project by mutual consent of both the Employer and the Contractor. The DRA will, like the members that constitute the DRB, make regular site visits and hold discussions with key staff of the project including that of the consultant (i.e. the Architect, the Engineer or the S.O.), and will try to resolve any potential dispute by good faith negotiations. If these negotiations fail, the DRA will then, mindful of the nature of the dispute, prepare a report which would, among others, suggest to the parties how best to resolve the dispute. Senior executives then study the report and try to reach a settlement of the dispute and this too fails, the parties will then resort to a short form arbitration to resolve that dispute.

As is evident from the brief sketch of the DRA system given above, the DRA system is another hybrid system which focuses on both dispute avoidance and dispute resolution incorporating techniques borrowed from different systems described above and also partnering.

14.0 CONCLUSIONS

Litigation and arbitration stand above the other dispute resolution mechanisms briefly described above; and the rest of the means of dispute resolution, commonly and collectively described as ADR, play complimentary role in resolving construction industry disputes. Some of the ADR method such as mediation can stand on its own and obtain results by having the disputes resolved. Others are used in combination with the others to achieve the desired results.

Contrary to the popular perception, arbitration may not be the best nor the most suitable form of resolving disputes arising from the construction industry nor the only one available; the parties can choose which method of dispute resolution mechanism best suits them and their purpose. In deciding, even designing, the method of dispute resolution that best suits a particular project or purpose, the drawbacks of that method will need to be borne in mind; often time, money, fairness and finality are the criteria that the parties will have to bear in mind in coming to a decision on one method or the other.

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³⁵ See Colin J Wall, *The Dispute Resolution Advisor System*, paper presented in KL ADR Seminar on 20 March 2000.