Department of Mechanical Engineering, The University of Hong Kong

BBSE3009 Project Management and Engineering Economics

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Lecture Notes

Alternative Dispute Resolution (ADR)

Alternative Dispute Resolution

The settlement of disputes arising from building contracts by methods other than litigation is common practice. The main reason for this is, that where the substantial questions of the dispute are matters of fact rather than of law, a final and conclusive decision can be obtained in a manner which is quicker and cheaper than the formal legal process. *Arbitration* is the most widely used method of settling building contract disputes. However, alternatives such as *mediation, conciliation* and *adjudication* are rapidly gaining recognition; they are collectively referred to as Alternative Dispute Resolution (ADR).

1. Arbitration (仲 裁)

Arbitration in the legal sense is a process, subject to statutory controls – the *Arbitration Ordinance* – whereby formal disputes are settled by reference to a private tribunal chosen by the parties themselves; the tribunal may comprise of one, two or more persons specially nominated for the purpose. Arbitration is often adopted as an alternative to bringing an action in a court of law which is termed litigation. However, in some cases, arbitration is an exclusive remedy which may be enforced by one of the parties even though there is a theoretical choice of tribunal. Another important point that should be noted is that arbitration does not come under the heading of ADR; this is considered as an alternative to both litigation and arbitration.

Terminology: *Arbitrator* is the person to whom the dispute is referred for settlement. Sometimes there are two in which case a third person, an *umpire*, is appointed to settle the dispute between the parties should the arbitrators fail to concur. *Award* is the term used for the decision of either an arbitrator or umpire; the *Court* means the High Court.

1.1 Arbitration Agreement

An arbitration agreement is a written agreement to refer present or future differences to arbitration, whether an arbitrator is named or not. Such an agreement will be subject to the provisions governing arbitration as set out in the *Arbitration Ordinance*. Clause 35 of the HK Standard Form provides a written arbitration agreement by stating that: *…in case any dispute or difference shall arise between the Employer and the Architect on his behalf and the Main Contractor, then such dispute or difference shall be and is hereby referred to the arbitration and final decision of a person to be agreed between the parties*.

1.2 Appointment of an Arbitrator

An arbitrator must be a disinterested person, independent of both parties. He may be drawn from a particular section of society, but if the arbitration agreement is silent on this point, the parties may appoint any person. There is no restriction on age, gender, or qualification, but both parties must agree on the appointment.

When drawing up the arbitration agreement the parties may either name the arbitrator or arbitrators, leave their appointment in the hands of some named person, such as the president of one of the professional institutions, or leave the matter open until a dispute occurs and then make the appointment themselves. If the arbitration agreement is silent as to whether there are to be one or two arbitrators, then the reference shall be heard by a single arbitrator. If the parties cannot agree on the appointment of an arbitrator or if an appointed arbitrator dies, refuses to act, or becomes incapable of acting and the parties cannot agree on his successor, the Court will appoint a new arbitrator on application.

Clause 35 – Arbitration, provides for the appointment of a single arbitrator to be agreed between the parties. However, if they cannot agree on a person within *fourteen* days after either party has given to

the other a written request ton concur in the appointment of an arbitrator, then the clause provides for a person to be appointed by the President or Vice-President of the Hong Kong Institute of Architects co-jointly with the Chairman or Vice-Chairman of the Royal Institution of Chartered Surveyors.

On application of a party, of his own motion, the arbitrator may at any time during the arbitration appoint a technical or legal *assessor* to assist him in the conduct of the arbitration. The arbitrator will appoint an assessor himself if the parties cannot agree on a suitably qualified person.

1.3 Disqualification of an Arbitrator

The principal reasons for likely disqualification of an arbitrator are either *interest* or *bias*.

- ***Interest*** may indicate that the arbitrator has a direct interest in the subject matter of the dispute or that he is indirectly interested by reasons of a relationship to one of the parties. The latter point may arise in connection with building contracts where the architect, although employed by the building owner, is frequently nominated as arbitrator for the settlement of all disputes arising out of the contract (note that this is not the case under the HK Standard Form). Such as person is not barred from acting as arbitrator if both parties agree and are fully aware of his position at the time of his appointment. However, the Court may subsequently revoke the authority of the arbitrator or grant an injunction to restrain the arbitrator from proceeding, if on the application of one of the parties, it considers that by reason of his position he is not a suitable person to hear the case. Also, the arbitrator cannot act as a witness for either party; this would compromise his neutrality in the reference.

- ***Bias*** indicates a state of mind on the part of the arbitrator which creates a possibility that he will not arbitrate justly and fairly with respect to both parties. For example, where the arbitrator is heavily indebted to one of the parties without the knowledge of the other he can be restrained from acting by the Court. Remarks made during the conduct of a case which clearly show that the arbitrator is biased against one of the parties will probably lead to his removal by the Court for misconduct. For example, in an arbitration reference relating to a collision between two vessels of foreign nationality the arbitrator remarked: *…the Italians are all liars in these cases and will say anything to suit themselves. On the other hand Norwegians in my experience are generally truthful people. In this case I accept the evidence of the Captain of the Norwegian ship.*

  The Court removed the arbitrator for misconduct.

1.4 Time at Which Arbitration may be Opened

Clause 35(2) states that an arbitration reference, except where specifically provided: … *shall not be opened until after Practical Completion or alleged Practical Completion of the Works or termination or alleged termination of the Main Contractor's employment under this Contract, or abandonment of the Works, unless with the written consent of the Employer or the Architect on his behalf, and the Main Contractor.*

Provision for arbitration during the progress of the works is also made under Clause 35(2), in the following cases:

- In the event of a dispute arising in regard to the appointment of a new architect or quantity surveyor under articles 3 or 4 of the articles of agreement.

- In the event of a dispute as to the validity of an architect's instruction.

- In the event of a dispute over whether a certificate has been improperly withheld or is not in

accordance with the conditions of the contract.

- In the event of a dispute under Clause 32 – Outbreaks of Hostilities, and Clause 33 – War Damage.

1.5 Arbitration Procedure

In the event of any dispute arising under the HK Standard Form which either party may desire to refer to arbitration, a written request to concur in the appointment of an arbitrator shall be given by one party to the other. The matter will then automatically be referred to the arbitration of the person so appointed, or in default of agreement, appointed by the President or the Vice-President of the Royal Institute of British Architects co-jointly with the Chairman or Vice-Chairman of the Royal Institution of Chartered Surveyors. Once appointed, full power is given to the arbitrator to act as he may think fit in order to decide the rights of the parties concerning the questions submitted to him for his decision.

1.6 Preliminary Meeting

A preliminary meeting with both parties will be held before the hearing itself begins; there are several reasons for this. The arbitrator is able to introduce himself and meet the parties informally. He will make clear his position as arbitrator, including the important point that his decision is final and binding, and is enforceable in the same way as the judgment of a court. Also, the arbitrator will be able to explain to the parties the procedure at the bearing and what is required of them. The parties will be told that they will need to produce details of their claims, in writing, sending copies both to the arbitrator and the other party, and that they will be required to explain in writing to the arbitrator how they intend to conduct their case, naming witnesses and citing any evidence they wish to use. Finally, a date, time, and place for the hearing, which i5 convenient to both parties, can be arranged.

1.7 Procedure at the Hearing

- The party making the claim (claimant) will open the proceedings by stating his claim and producing any witnesses he requires to prove his poiflt5 of claim. Witnesses have to take an oath; to give false evidence on oath is a crime known as *perjure*.

- Witnesses are cross-examined by the other party (respondent). If any new matters arise during this cross examination, 4hen the claimant may re-examine on those points only.

- The respondent will open his defence to the claim, present his cross claim and call his witnesses.

- The claimant may cross-examine the witnesses, and if any new points arise, the respondent may re-examine on those points only

- After evidence has been completed, both parties in-turn may address the arbitrator summarising their case and the points to which they wish to draw the arbitrator’s attention; these are known as the *closing submissions*. The arbitrator may require that all or part of the closing submissions be reduced to writing.

- At the end of the closing submissions the arbitrator will declare the hearing ended. However, the arbitrator may, if he considers it necessary due to exceptional circumstances, either upon his own motion or of the parties, re-open the hearing before making his award.

- The arbitrator may order the parties to make any property or thing available for his inspection or investigation, and inspect or investigate it in their presence.

1.8 Awards

The arbitrator will make two awards, the first dealing with all matters in dispute among the parties – *the main award*, the second dealing solely with costs – *the costs award*. All awards must be in writing and signed by the arbitrator who is also required to give reasons for every award except the costs award. The main award should be made within *sixty* days of the conclusion of the hearing. The costs award will not be made until at least *fourteen* days after the main award, during which period of time the parties will send their submissions on costs -to the arbitrator. Subject to the *Arbitration Ordinance*, all awards are legally binding on the parties, who must carry out the terms of the awards without delay.

1.9 Appeal

Both parties have the *right of appeal* to the High Court, although such appeals are very rarely successful. In most cases the Court will uphold the decision of the arbitrator, unless there are real grounds for doubting the validity of the award. Such grounds may be that the arbitrator had misconducted himself or the proceedings, or that the award had been improperly brought about. Under such circumstances, the Court may either *set aside* the award, which means they will make it unenforceable, or *remit* the award. If the Court remits the award, they will ask the arbitrator to revise all or certain aspects of the award. An appeal to set aside or remit the award must be made within *six* weeks of the award being given.

1.10 Costs

The costs of the reference and the award will be at the discretion of the arbitrator who may direct to, and by whom, and in what manner, those costs or any part of the costs, must be paid. Such an order is known as the *costs award*. The term *costs* include:

- Reasonable fees of the arbitrator (and assessor).
- Travel and other expenses incurred by the arbitrator (and assessor).
- The cost of providing facilities for the arbitration, including room hire, transcription fees and similar services.
- Fees, travel and other expenses of witnesses allowed by the arbitrator.
- The reasonable legal costs incurred by a party in the preparation and presentation of his case.

Security for costs. If, upon application of a party to the arbitration, after due notice to the other party, it appears to the arbitrator that a claimant (or respondent making a counter claim) may be unable to meet any order for costs made against them in the arbitration, the arbitrator may require that the party in question provide security for the costs of the other party Such security may, for example, be the guarantee of a bank or insurance company.

2. Advantages and Disadvantages of Arbitration

2.1 Advantages of Arbitration

- Disputes involving specialist and technical knowledge can be settled by a person with such knowledge.

- Technical procedural rules of a court of law are not rigidly applied, which greatly simplifies and consequently expedites matters.

- The time and place of the reference can be chosen to suit the convenience of the parties. If litigation is used to resolve the dispute, the parties will be instructed when and where to appear; they have no say in the matter.

- Arbitration is usually less costly, partly because often there are no legal fees involved. Also, costs may be apportioned between the parties at the discretion of the arbitrator.

- It can be made a condition of the arbitrators appointment that be should view the property or sample the goods which are the subject of dispute.

- An arbitration reference is held in private and the decision is not published. This means that neither party is at risk of suffering as a result of possible adverse publicity.

2.2 Disadvantages of Arbitration

- The arbitrator may be required to seek the decision of the courts on points of law which may lead to delay. If there are a number of points of law referred to in a case which require a court ruling, it may prove cheaper and quicker to refer the whole matter to the courts in the first instance.

- There is no automatic right of appeal to a higher court as in litigation; the decision of the arbitrator is final. However, an appeal can be made to the High Court, as previously mentioned, but may only be successful if the reference has been misconducted.

- Only the parties to the arbitration agreement can be bound by the decision 6f an arbitrator. Interests of third parties, such as sub-contractors, cannot be prejudiced (affected).

- There is no precedent in arbitration as there is in court cases. This means that no previous case decisions are taken as the rule; the award will be entirely at the arbitrator's discretion. This is often classified as a disadvantage because there is no basis on which to judge the likely outcome of a dispute. However, some may argue that it is an advantage not to be bound by precedent; allowing each case to be judged on the individual facts presented.

Table 1. Comparison of arbitration and litigation

	Arbitration	Litigation
Duration	Expedited process from start to decision	Lengthy process from start to judgment
Cost	Saving in expense can be effected	High cost of legal representation
Privacy	Assured; held in private, public excluded	No privacy, held in public
Flexibility	Flexible; place, time and conduct to suit parties	Inflexible; place, time and conduct decided by court
Formality/advocacy	Parties represented by anyone (matured/sane) parties may decide	Parties represented by qualified lawyers
Technical expertise	Arbitrator has expert knowledge relating to the technicalities of the dispute	High Court judge is well versed in the law but may lack expert knowledge relating to dispute
Business relationship	Business relationship may be resuscitated	Business relationship damaged by the outcome
Decision	Made private; hence not damaging	Judgment made in public and hence damaging
Settlement finality	With few exceptions, final and binding	Operates appeals procedure

3. Alternative Dispute Resolution (ADR)

Alternatives to litigation and arbitration as a means of settling disputes originated in the United States in the mid-seventies and became known as alternative dispute resolution or ADR. There had been increasing dissatisfaction with litigation as a result of rapidly escalating legal costs and the inordinate delay in getting cases to court. Even arbitration, the traditional alternative to litigation, had become

protracted, costly, and perceived by many as replacing one legally binding decision-making process with another. In addition, there was a growing desire by parties to have more of a say in, and control over, the decision in their disputes. ADR provides a simple and cost effective solution to commercial disputes without recourse to the court system. It is a voluntary, *without prejudice* process, whereby the parties in dispute are assisted in settling their differences by the intervention of a neutral third party, without the need for a judge or an arbitrator.

Facing similar problems to those encountered in the USA – significant direct costs in the form of legal fees, wasted management time and indirect costs imposed by the adversarial nature of the contract construction contract policy makers in the United Kingdom started to re-examine the contract administration process. As a result, ADR provisions, in the form of adjudication and conciliation clauses, were introduced into a number of standard form main and sub-contracts in the private sector. However, the notable exception was the JCT 80 standard-form of main contract (the equivalent of the HK Standard Form and the most widely used private standard form of building contract in the United Kingdom) which to this day does not contain an ADR provision. The situation in Hong Kong is similar in as much as the HK Standard Form, Hong Kong's most widely used private standard form of building contract, has yet to introduce an ADR provision, despite having been given the lead by government. The Government of Hong Kong introduced a provision for mediation in the *Settlement of Disputes* clause of the 1990 edition of their Conditions of Contract; and the 1992 edition of the General Conditions of Contract used for the Airport Core Programme includes provision for both mediation and adjudication, in addition to arbitration.

4. Strengths and Weaknesses of ADR

4.1 Strengths of ADR

- ***Cost savings.*** Approximately 90% of cases which are started through the courts or arbitration, settle just before the hearing. In view of this, a major strength of ADR may be seen as the bringing forward of the traditional date of settlement, from just before the court proceedings or arbitration hearing (the phrase commonly used is, *a settlement on-the-steps of the court*), to a much earlier stage in the procedure, thereby saving legal and executive costs.

- ***Control***. Due to any number of reasons – personality problems that may have developed during the project, differences of emphasis on needs and priorities, difficulties in communication, or simply stubbornness on one side or both – there may be difficulty in reaching an amicable agreement over a dispute. The result is a breakdown in negotiations despite some common ground and it is at this stage that the dispute may be referred to a court or arbitration. However, often the parties in dispute experience a feeling of helplessness once the lawyers take over; they feel that they have lost control. The inherent flexibility of the ADR process allows the parties to directly control the proceedings and decide upon a commercial solution rather than one governed by the 'rule of law' and inappropriate legal principles.

- ***Consensus***. ADR procedure can be adopted only if both parties agree. Indeed, often they will decide on the format and structure. Usually the process will not be binding so, should it fail, the parties will still be able to go on to or continue with arbitration or litigation for the resolution. Furthermore, little is lost by an unsuccessful attempt at ADR in that all the prior preparation will be beneficial when the parties go on to or continue with formal proceedings. On the other hand, if the parties succeed using an ADR procedure, the result can be reduced to a legally binding document.

- ***Continuity of business relations***. The parties, taking a commercial view, often will want to avoid upsetting potentially useful relationships and, as part of a settlement, there may be some new business arrangement between them created as part of the settlement process. Such an arrangement would not be available in the adversarial and more restrictive arena of court

proceedings or arbitration hearings; indeed such arenas for the resolution of disputes are more likely to lead to a complete breakdown in relations between the parties.

- ***Confidentiality***. Unlike court proceedings, but in common with arbitration bearings, no publicity is attracted by ADR processes; publicity which could affect public confidence in a company or allow trade secrets into the public domain.

- ***Multi-party***. All too often construction disputes involve the employer, the main contractor, the sub-contractor and the consultants. All these contractual arrangements are subject to different dispute resolution processes, which often means that an employer is faced with the unsatisfactory prospect of having to resolve some of the disputes through the courts and some through arbitration. ADR allows all disputing parties to come together in a common forum regardless of the requirements of the contract.

4.2 Weaknesses of ADR

- ***Non-binding nature of the settlement may be used as a delaying tactic***. The principle weakness most often quoted is that ADR procedures are not binding on the parties. This affords an opportunity to waste time, particularly if one of the parties is in financial difficulties. Delaying tactics, for example, may be employed by a developer who contests a claim for no other reason than the building has not been sold or let. There may be some validity to this complaint. However, since much of the preparatory work for the ADR procedure will have to be carried out anyway (in the event of an eventual court case or arbitration hearing), the costs and the relatively short period of time spent in the preparation and conduct of the ADR procedure will have little impact on the overall cost of the resolution of the dispute. A mediated agreement through an ADR process is non-binding; it is only enforceable if a contract is drawn up subsequent to settlement, covering the terms of the settlement, and signed by both parties. If such a contract is not drawn up the agreed settlement will remain non-binding.

- ***Discovery and expert witnesses***. An important step in a litigious action is the discovery and inspection of documents. This is the disclosure by both sides of all the documents which relate to the dispute. The rules of the Supreme Court require a party to disclose all documents which are or have been in their custody or power. In cases with a technical or scientific element it is common for one or both sides to produce expert witnesses. These are persons usually unconnected with the case, who are called to give their professional opinion on the matters in issue. Some suggest that it is not possible to settle complex litigation before discovery and, as discovery is one of the greatest expenses of litigation, once it has taken place, the parties are too close to trial for alternatives to be of any value. On the other hand, with ADR there is a risk of proceeding without proper discovery or disclosure of evidence provided by expert witnesses. However, it is possible to minimise this risk by the parties agreeing to disclose key documents and by giving an undertaking that they know of no other evidence which would affect the position of either party significantly. It is also possible to allow the parties to present a statement of the evidence, in addition to the facts upon which they rely, in order that the other party is not taken by surprise. Finally, expert witness statements can be prepared at a very early stage and exchanged for the purpose of the ADR process. The only material disadvantage is that the production of statements at such an early stage would effectively reveal to the opponent the nature of the evidence to be relied upon.

- ***Suggesting ADR may be seen as a weakness***. It is true that the initiation phase in getting ADR off the ground can be difficult because business people and their advisers are still unfamiliar with ADR. The party to whom the suggestion is made sometimes mistakenly believes that it will be very risky and that by making such a suggestion the other party is, in effect, displaying some degree of weakness. In fact, ADR is not a sign of weakness but a suggestion of confidence in an ability to put the cards on the table and to negotiate a positive outcome. Also, business clients

often underestimate the constructive impact that a third party will have on dispute negotiations. The syndrome of 'suggesting ADR conveys a weakness' can easily be overcome by incorporating an ADR clause in the original contract between the parties. Most ADR organisations actively encourage the use of ADR clauses in commercial contracts by providing sample clauses which may be adapted to particular contracts.

- ***Privilege of information and a neutral as witness***. The question still remains unanswered as to whether privilege attaches to records of, or documents disclosed during, ADR procedures. Also untested is the problem as to whether or not a neutral is a compellable witness in any subsequent litigation or arbitration proceedings. The problem of privilege of information and of the neutral as witness can be controlled by asking the neutral and the parties to sign a confidentiality agreement. This will ensure that the process is treated as a without-prejudice negotiation on a strictly confidential basis – the neutral cannot be called afterwards to give evidence of what took place. Control can also be exercised by the terms of any ADR clause that the parties agree to in the original contract. An example of this is the Hong Kong Government *Mediation Ru1es* which govern procedures conducted under the Settlement of Disputes clause in the Hong Kong Government's *Conditions of Contract*. The rules clearly stipulate that the mediator may not be appointed as an arbitrator in any subsequent arbitration between the parties and that neither party is entitled to call the mediator as a witness in any subsequent arbitration or litigation arising out of the same contract.

4.3 Appropriateness of ADR

The advantages of ADR mean that it should be considered first in most cases. However, it is not always appropriate. The following are circumstances under which ADR might be rejected as a first approach.

- The other party/parties have no genuine interest in settlement;
- A legal precedent is required out of the case;
- One of the parties requires the case to be heard in public, in which case litigation is the only route;
- An injunction is required quickly in order to preserve rights and or property;
- Direct negotiations can be handled with reasonable efficiency and effectiveness;
- Legal action needs to be initiated as a way of getting the other party/parties to the negotiating table.

4.4 Misconceptions Surrounding the Use of ADR

- ***Perhaps the most common of all misconceptions surrounding ADR is that its very suggestion displays weakness and is a 'soft' option***. In fact, ADR is a display of commercial acumen and far from being soft, it is a continuous process of structured, condensed, guided and intense negotiation requiring quickness of mind, flexibility and imaginative thinking.
- ***Another common misconception is that ADR is not suitable in cases where the public forum of a courtroom trial is required***. Whilst it is true that ADR cannot provide a public forum, between 80-90% of civil cases settle before trial, often driven by worries over risks and costs rather than because of good solutions or 'justice'. ADR can speed up this process and still provide an opportunity to present the case to an independent third party rather than settle on the basis of an endurance test.

- ***It is often thought that it is necessary to choose between ADR and litigation or arbitration; this is not true, you can have both***. ADR techniques are usually equivalent to 'without prejudice' settlement negotiations They can be used at the same time as litigation or arbitration procedures or can replace litigation. So it is possible to litigate or arbitrate to show serious intentions but to negotiate with ADR to get a better result.

- ***Contrary to what some may believe, the risks of ADR are minimal***. Because ADR is non-binding, settlement is not required at any time unless there is an agreement that both parties can live with. Confidentiality is assured by requiring the neutral and the parties to sign a confidentiality agreement. The greatest risks run are (a) that there will be a greater understanding by each party of the others side's case and (b) a settlement will be reached; 80% settlement rates are reported after mediation. If there is a real worry about revealing information or positions, ADR is flexible enough to work with separate meetings between the neutral and the parties ('shuttle diplomacy'). In any case, it should be remembered that the other side will also disclose their hand; joint disclosure assists settlement.

- ***It is a common belief that managers and lawyers already practice ADR in settlement discussions***. It is true that managers are often practised in the skills of direct negotiations and that lawyers do sometimes bring about a settlement through negotiation. However, this is not genuine ADR in which the powerful influence 6f a skilled third-party neutral plays a very important part. ADR ensures that settlement is truly managed rather than an endurance process dependent on court timetables, legal uncertainty and costs based on the taxi-metre billing system. ADR helps all parties and their advisors to focus on the problem with the benefit of an impartial overview of the case.

- ***It is a misconception that if ADR fails, it is a waste of more time and money***. Even where it fails, ADR has more benefits than risks. ADR can be tried fast and at little extra cost. Parties are free to leave the process if it is unproductive. At the same time, using ADR helps clarify the issues, helps with preparation for trial or further negotiations and encourages a realistic assessment of the case more rapidly than the adversarial process. Many disputes settle soon after a failed ADR process.

4.5 Litigation/Arbitration Procedures and ADR

Under certain circumstances – to demonstrate serious intentions, to encourage serious negotiations or because part of the claim will eventually have to be set before a judge or arbitrator – it may be necessary to initiate litigation or invoke an agreement to arbitrate before ADR can be tried.

- ***Litigation and ADR***. There can be an agreement to delay further legal action during the ADR phase. However, it is possible to continue with both litigation and ADR simultaneously. Again, the earlier ADR is used, the greater the potential benefits. It is sometimes even useful to use ADR after a trial or award; for example, the parties may have been left with uncertainties on how to implement a judgment.

- ***Arbitration and ADR***. As with litigation, this may be used subsequent to an ADR process if the parties seek a legally binding award on the dispute or some of the issues in dispute. Arbitration as a final option may give the parties more control over procedure, timing, and the appointment of the arbitrator. In some cases, with the agreement of both parties, a neutral in an ADR procedure may convert to an arbitrator to deal with any remaining issues in dispute; this is known as *med-arb*.

- ***Court-annexed ADR***. This is a growing area of litigation procedure. The courts or arbitrator require the parties to attempt to reach an early settlement or make available a process to assist in

this. ADR in this form sometimes involves non-binding adjudication. Cost penalties of various kinds may be attached to this process to encourage parties to seek a settlement.

Table 2. Comparison of litigation, arbitration and ADR

Characteristics	Litigation	Arbitration	ADR
Place/conduct	Public court; unilateral initiation; compulsory	Private (with few exceptions); bilateral initiation; voluntary (subject to statutory provisions)	Private bilateral initiations; voluntary
Hearing	Formal; before a judge	Formal; conforming to rules of arbitration; before an arbitrator	Informal; before a third party (a neutral)
Representation	Legal; lawyers influence settlement	Legal; lawyers influence settlement	Legal; only if necessary; disputants negotiate settlement
Resolution/ disposal	Imposed by a judge after adjudication; limited right of appeal	Award imposed by arbitrator; limited right of appeal	Mutually accepted agreements; option of arbitration if dissatisfied
Outcome	Unsatisfactory legal win or lose	Unsatisfactory legal win or lose	Satisfactory business relationship maintained
Time/cost	Time consuming; uneconomic	Can be time consuming and uneconomic	Fast; economic

5. ADR Techniques Examined and Compared

- Mediation (斡旋；調停)
- Conciliation (調解)
- Adjudication (裁定)
- Executive Tribunal (Mini-Trial)
- Expert Appraisal
- FIDIC's 'Amicable Settlement' Clause

5.1 Mediation (斡旋；調停)

Mediation describes a voluntary process (which either side may abandon at any time without prejudice), whereby each side to a dispute is brought together before a neutral mediator, whose function is to assist the parties to arrive at a common position by joint open session and private caucus. During this process the mediator acts only as a catalyst, not expressing his or her own opinion and not disclosing confidential information imparted by one of the parties, to the other. Through this process the parties move closer together until they reach a common position when settlement is reached. Because the mediation process itself is non-binding and entirely without prejudice, it is necessary to record the agreement, in contract form, if it is to have legal-effect.

Although mediation is not a regulated process, some rules do exist and are published by a few organisations. For example, the *Construction Industry Mediation Rules* published by the National Arbitration Committee in the United States, and the *Hong Kong Government Mediation Rules* published by the Government of Hong Kong.

5.2 Mediation Procedure

- Agreement to mediate in the event of a dispute is either through terms of the contract (such as a mediation clause), or by mutual consent when the dispute arises. More commonly, one party approaches the mediation company to begin mediation proceeding. A representative then contacts the other side inviting them to cooperate in a mediation. Experience in the United States shows that 80% of mediations are started by one party and it is in fact the mediator who approached the other side. If the parties agree to mediate, the identity of the mediator, an appropriate venue (must have three rooms: one for open session, two for private caucuses) and the fees (shared equally between the parties – no costs are awarded in mediation) are agreed at this stage. The aim will be to hold the mediation within about six weeks of first contact at a time convenient to all concerned.

- A mediation session is conducted in an extremely informal atmosphere but each party must be represented by a person with authority to settle; the parties may, if they so wish and if the terms of the mediation agreement do not expressly forbid, be represented by a lawyer. The mediator will begin the session by explaining the process to be used and each side is given the opportunity to describe the nature of the dispute and their respective positions. Reference can be made to what witnesses are likely to say, although the witnesses themselves will not be present to give evidence. The object is to give both sides the opportunity to fully understand the nature of the dispute so that they are in a better position to analyse their respective strengths and weaknesses. In an attempt to help the parties reach agreement, the mediator will then discuss in private the possibility of settlement with each party. Whether or not the mediator will attempt a joint meeting will depend on the wishes of the participants.

- The essential role of the mediator is to engage in shuttle diplomacy between the parties, while at the same time not expressing a personal opinion or revealing his assessment of each side's case. Generally speaking, the mediator will meet each party in turn to assist them to examine to examine and highlight the respective strengths and weaknesses of their case and, if he is so authorised, carry offers from one side to the other until the parties reach a common position. At this point a settlement is usually agreed and, if the parties so wish, a contract will be drawn up to make the terms of the settlement legally binding.

- The whole mediation process, from the time the mediator first introduces himself to the parties to the reaching of a settlement, takes, on average, no more than four days.

5.3 Mediation in Practice – Hong Kong

The Government of Hong Kong introduced a provision for mediation in the Settlement of Disputes clause of the *Government of Hong Kong General Conditions of Contract for Building Works/Civil Engineering Works/Electrical and Mechanical Engineering Works, 1990 Editions*, allowing parties the option of attempting to settle their disputes by referring them to a single mediator in the first instance. Provision for mediation (as well as adjudication and arbitration) are also included in the *Government of Hong Kong General Conditions of Contract for the Airport Core Programme Civil Engineering Works, 1992 Edition*. The Government of Hong Kong have also produced a set of *Mediation Rules*, administered by the Hong Kong International Arbitration Centre (HKIAC). These *Rules* are intended to act as a guide during the mediation process. The Government's policy is to implement mediation where it is likely that a dispute can be resolved readily in accordance with the *Rules*. In an ongoing contract this should avoid unnecessary escalation of the dispute or festering of the relationship by providing a cheaper, quicker, and more acceptable solution. The private sector is adopting a wait-and-see attitude to the concept of mediation. At present, none of the private sector standard forms used in Hong Kong provide for mediation as a means of settling disputes.

- ***The mediator***. The rote of the mediator, as a neutral and trained professional chosen by the

parties, is to: provide a framework for negotiation; act as an impartial third party in the negotiation process; and make recommendations as to how the dispute may be settled. A mediator is not given the authority to make legally binding decisions. However, if the parties find the recommendations acceptable, they then have the option of making their agreement legally binding. On the other hand, if they are dissatisfied with the process, either party or the mediator may terminate the mediation at any time. The claimants may then proceed to assert their legal rights through arbitration or litigation.

- ***Appointment of a mediator***. Under the *Hong Kong Government Mediation Rules*, if either party disagrees with a decision of the architect, or if the architect fails to give a decision as required, they may request the initiation of mediation by delivering a written request for mediation to the other party with copies to the architect and the HKIAC. Such a request for mediation must contain a brief self explanatory statement of the nature of the dispute, the relief or remedy sought, and the name of a nominated mediator thought suitable. The party who receives a request for mediation must notify the other party, the architect, and the HKIAC, within *twenty-eight* days after receipt of the request, whether or not he is willing to participate in the mediation, and if so, whether any mediator nominated is acceptable. In the event that the nominated mediator is unacceptable, the parties must within *fourteen* days of the date of the acceptance of mediation attempt to agree on a suitable mediator. Where the parties agree on a mediator and the proposed mediator is willing 40 serve, they will notify the HKIAC. The mediation will then proceed in accordance with the *Hong Kong Government Mediation Rules*. If the parties fail to agree on the appointment of mediator within the stipulated time, they will inform the HKIAC who will, on the advice of the HKIAC Mediation Committee (comprising a balanced representation from various professional bodies connected with the construction industry), appoint within *fourteen* days a single mediator who is prepared to serve and is not disqualified under the disqualification rule.

- ***Disqualification of a mediator***. Under the *Hong Kong Government Mediation Rules* no person may act as a mediator in any dispute in which that person has any financial or personal interest in the result of the mediation; except by consent of the parties. Prior to accepting an appointment, the proposed mediator must disclose to the HKIAC any circumstances likely to create a presumption of bias or prevent a prompt resolution of the dispute between the parties. Upon receipt of the information, the HKIAC are required to communicate the information to the parties for their comments. If any party makes an objection to the proposed mediator within *seven* days, he will not be appointed.

- ***Mediator may not subsequently act as arbitrator***. The mediator may not be appointed as arbitrator in any subsequent arbitration between the parties, whether arising out of the dispute or otherwise arising out of the same contract, unless the parties agree in writing. Neither party is entitled to call the mediator as a witness in any subsequent arbitration or litigation arising out of the same contract.

- ***Time constraints***. Under the *Hong Kong Government Mediation Rules* the mediator is required to enter upon the mediation as soon as possible after his appointment and should endeavour to conclude the mediation (including any report which may be required) within *forty-two* days of his appointment. His appointment will not extend beyond a period of *three* months without the consent of both parties.

- ***Conduct of the mediation***. The parties may be represented by whomever they consider appropriate. The mediator should conduct the mediation in such a manner as will permit full and expeditious presentation to him, by the parties, of their views. The mediator may see the parties together or separately, for the purpose of informing himself of the nature and facts of the dispute. If the mediator considers it appropriate, or if he is requested by the parties, he may express preliminary views orally or in writing on the matters in dispute during the mediation. The

mediator may, and shall if requested by the parties, seek legal or other advice from third parties not connected with the dispute. During the course of the mediation the mediator may attempt various compromise solutions with the parties in an informal manner. Also, the mediator has the option to abandon the mediation whenever in his judgment further efforts at mediation would not lead to settlement of the dispute. He must notify the parties in writing of such a decision.

If the mediator is unable to facilitate a satisfactory solution during the course of the mediation he will submit to the parties a report setting out the facts as he finds them, his opinion in relation to the matters in dispute, and proposing terms of a settlement. Within *twenty-eight* days of receipt of the report the patties will indicate, each to the other, whether the mediator's proposed terms of a settlement are acceptable. The mediation is regarded as being a private and confidential matter between the parties to the contract and the procedures of the mediation should be conducted as such. In the event that the mediation is successful, the terms of the settlement will be recorded in a supplemental agreement to the contract. The parties must inform the HKIAC of the outcome, but not the terms, of the settlement. Nothing that transpires during the course of the mediation is intended to, or in any way affect the rights or prejudice the position of the parties to the dispute in any subsequent litigation or arbitration. For example, the opinion and terms of settlement recommended by the mediator may not be disclosed to an arbitrator or court.

- ***Costs***. Under the *Hong Kong Government Mediation Rules* the sum of $20,000 is to be deposited by each of the parties with the HKIAC before the mediator enters upon the mediation, as a contribution to the cost and proper expenses of the mediation, including the costs of the HKIAC. The mediator may at any time during the course of the mediation require the parties to make a further deposit or deposits with the HKIAC to cover anticipated additional fees and expenses. Subject to any order the mediator may make, after deducting the costs and expenses of the mediation, the HKIAC must return any surplus funds, in equal shares to the parties, at the conclusion of the mediation. If the mediator finds that the mediation has been initiated or conducted frivolously or vexatiously, then he has the power to order the party who initiated or conducted the mediation in a frivolous or vexatious manner to pay the fees of the mediator in full, or such share as he considers appropriate, and to reimburse the other party in respect of its reasonable costs of preparation and attendance.

5.4 Conciliation (調解)

Conciliation is procedurally similar to mediation, and in practice the difference between a mediator and a conciliator is often more perceived than actual. It is often the case that the terms mediation and conciliation are inter-changeable, which often raises doubts over the difference between the two. Indeed at a seminar held by the British Academy of Experts, two leading experts in the field expressed diametrically opposite views on the interpretation of both methods. It would therefore be prudent, if ADR were discussed seriously, to ensure that both parties agree on the precise meaning of the proposed procedure.

The conciliator participates in the proceedings and actively contributes to the discussion between the executives and expresses his own opinion on the merits or otherwise of the respective cases. The conciliator does not meet the parties in private session, therefore he does not engage in shuttle diplomacy as a mediator does. A conciliator will draw up and propose a solution. This view is supported by the Conciliation Clause in the *ICE Conditions of Contract, 6th edition* which requires the conciliator to draw up recommendations. Conciliation is a more formal process than mediation and there are a number of institutional rules for administering conciliations:

- *ICC Conciliation Rules (1988)*
- *The Chartered Institute of Arbitrators Conciliation Rules (1981)*
- *ICE Conciliation Procedure (1988).*

5.5 Conciliation Procedure

The procedure of conciliation is similar to that of mediation in the event of a dispute is either through terms of the contract (such as a conciliation clause), or by mutual consent when the dispute arises. As the definition of conciliation is rather nebulous and there is no consensus on the difference between it and mediation, the ICE Conciliation Procedure is re{erred to for guidance. The following is a summary of the ICE Conciliation Procedure which contains 15 rules:

- A request for conciliation must be made in writing accompanied by a brief statement of the dispute and the remedy sought.
- If the parties cannot agree on the appointment of a conciliator, the President of the ICE (or any Vice-President) is requested to appoint on their behalf.
- A copy of the conciliation request and the names of the parties representative must be sent to the conciliator.
- The conciliator is to commence his work as soon as possible and to conclude within two months, unless otherwise agreed.
- Written submissions will be exchanged between the parties and copies supplied to the conciliator. Each party states their own version of the dispute and attaches documents relied on and any written statement of evidence.
- Further written statements replying to points made in the original submission may be allowed, at the conciliators discretion, within 14 days of the original submission.
- A formal meeting with both parties may be convened by the conciliator, at seven days notice, for the purpose of taking evidence and hearing submissions.
- Legal or other advice may, and if so required by all parties, be sought by the conciliator.
- The conciliator is required to prepare his recommendations within 21 days of the formal meeting.
- On payment of the conciliator's fees and expenses, the recommendations will be sent to the parties. Fees and expenses are the joint and several liability of the parties.
- The conciliator is prevented by rule 14 from subsequently being appointed as an arbitrator for the same case, save with the agreement of the parties.

5.6 Conciliation in Practice

The *ICE Conditions of Contract, 6th edition (1991)* contains a conciliation clause. The essence of this clause, clause 66(5), is as follows: Any dispute may be referred to conciliation where the engineer has made a decision or where the time for making a decision has past, and where no notice to refer the dispute to arbitration has been given. Either party may give notice in writing requiring the dispute to be considered under the *Institution of Civil Engineer's Conciliation Procedure (1988)*. The recommendation of the conciliator is deemed to have been accepted in settlement of the dispute unless a written notice to refer to arbitration is served within one calendar month of its receipt.

5.7 Adjudication (裁定)

Adjudication differs from mediation [and conciliation] in that, to a greater or lesser extent, the

outcome is binding on the parties and therefore its efficacy is not dependent on the co-operation of both parties. It differs from arbitration in that the process is summary and may to some extent be inquisitorial, and the decision is ordinarily only an interim one. It should be made clear that the 'outcome' is the adjudicator's finding which may stand as a permanent binding decision if the parties so agree; or be used as the basis for further negotiations between the parties; or accepted as a temporary binding decision until a certain time has passed (e.g. contract completion) at which time the parties will be free to seek a legal or arbitral award to revoke the earlier decision.

Usually an adjudicator is an individual, although there is no reason why it could not be an organisation (Corporate Adjudication) or a panel of adjudicators (Contract Management Adjudication). Both Corporate Adjudication and Contract Management Adjudication provide for the resolution of disputes by the appointed organisation or panel, who are retained for the duration of the project under a separate contract; the parties share the costs equally.

5.8 Adjudication Procedure

Usually adjudication is stipulated in a contract rather than chosen as a preferred means of ADR. Procedures vary from contract to contract, depending on the wording of the clause. A summary of the variants is as follows: In each instance the adjudicator represents a system of third party intervention normally expected to be invoked by a party that would otherwise have either no remedy in the short term, or face seeking relief from the courts unassisted by the machinery of the contract. Each variant contemplates interim binding decisions reviewable *de novo* (anew) through arbitration or litigation. Broadly speaking, this process is to litigation and arbitration what the function of police powers, pre-trial detention and bail are to criminal proceedings. The main development in this process away from the traditional use of the architect or engineer heading the project team, is the introduction of a neutral third party to make decisions over matters in dispute. This creates a greater degree of actual or ostensible independence on the part of the interim decision maker.

5.9 Adjudication in Practice

Adjudication is in use on Hong Kong's Airport Core Programme. The contract produced by the government for use on contracts in connection with the development of the new airport and associated work is: *Government of Hong Kong General Conditions of Contract for the Airport Core Programme Civil Engineering Works, 1992 Edition*. Mediation has been made compulsory for New Airport Coordination Office contracts; if one party wants it, the other is obliged to at least cooperate. The next possibility, if things are really difficult, is the appointment of an adjudicator, who will make a decision designed to last until the job is completed. In this case, the adjudicator is an independent third party appointed by agreement of the parties, or if they cannot agree by the HKIAC, to make a decision on the dispute that is binding until the completion of the works.

Adjudication is in use in many contracts in the UK, for example: • *ACA Form of Building Agreement (second edition 1984)* allows for the resolution of disputes using an adjudicator although the clause is optional. The adjudicator must be named in the document if the option is to be exercised. The adjudicator's powers extend to matters concerned with extension of time and adjustments to the contract sum. The adjudicator's decision is final and binding until completion of the works after which either party may then refer the matter to arbitration. • *JCT with Contractor's Design (CD 81)* provides an optional supplement for *Resolution of Disputes by Adjudication*. The matters which may be referred to the adjudicator under this clause are not dissimilar to those under the ACA Form.

However, unlike the ACA Form the decision of the adjudicator becomes a provision of the contract and final and binding unless either party disputes the decision within *fourteen* days of receipt. In any event arbitration over the matter cannot take place until after practical completion. • *ICE New Engineering Contract and Sub-Contract (1991)*, it's principle features are that the adjudicator is named from the outset; the right to proceed to adjudication arises on either party disagreeing with an action of the project manager or supervisor, or considering it to be outside their authority; a party

dissatisfied with the decision of the adjudicator has eight weeks in which to refer the matter to arbitration, the clause does not otherwise address the status of-binding effect of the decision; the fees of the adjudicator are shared equally.

5.10 Executive Tribunal (Mini-Trial)

The mini-trial procedure was developed by the Zurich Chamber of Commerce to meet the demand for alternative methods of dispute resolution to the traditionally accepted methods of litigation and arbitration. At approximately the same time a similar procedure was developed in the United States when in 1984, the US Army Corps of Engineers developed a pilot programme designed to expedite the settlement of claims pending before the Board of Contract Appeals. The term coined to designate this pilot programme was *mini-trial* since, although it is essentially an arbitration technique, it incorporated some characteristics of the judicial process.

5.11 Mini-Trial Procedure

- An independent and impartial adviser is appointed to take control of the proceedings, act as advisor to the parties in dispute, to ask questions of witnesses, to provide comments if the parties so request, to enforce time limits and to act as chairman to two assistants who may be selected from among the senior corporate officers of both parties and who are expected to make independent assessment of the issues in dispute.

- The mini-trial panel is expected to hear the parties and then to propose or to facilitate a settlement. If no settlement is reached or proposed within a reasonable time, then the panel should submit a recommendation either unanimously or by the chairman.

- The procedure is brief with only a few weeks allowed for the parties to prepare their case followed by a 'trial' of a few days' duration.

- Lawyers are permitted to represent the parties at the trial.

- A memorandum is exchanged between the parties and copied to the adviser two weeks prior to the trial, in which each party outlines its position on the disputes in question as well as all documentary evidence to be presented at the trial.

- Presentations are informal with rules of evidence not strictly adhered to. Cross examination of witnesses is allowed but severely limited in duration

- The proceedings are confidential and-no transcript or recording is allowed. None of the material generated by the trial may be used as evidence in pending or future proceedings. The advisor is disqualified as a witness, consultant or expert for either party in later proceedings should there be any.

5.12 Mini-Trial in Practice

Mini-trial clauses are not to be found in any of the standard form contracts used in Hong Kong or the UK. However, it is an alternative form of dispute resolution offered by many ADR organisations including International Dispute Resolution Europe (IDR Europe). If the mini-trial is chosen, the parties may adopt one of the following two frameworks available at present: • *Rules of the Centre for Public Resources (CPR), New York*; or • *Rules of Zurich Chamber of Commerce*.

5.13 Expert Appraisal

This technique offers the parties in dispute a technical expert's assessment of their case to assist

negotiations. In some cases, parties may wish to seek such appraisal individually rather than jointly. There is very little in the way of commentary on this technique of ADR, although the Centre for Dispute Resolution (CEDR) in the UK list *expert appraisal* as an ADR technique available through their organisation. Expert appraisal may be viewed as a tribunal of a lay nature, where the parties choose an expert to provide a valuation for them but do not make a decision in a dispute. As such the tribunal is not governed by or subject to the *UK's Arbitration Acts 1950, 1975* and *1979*, or to *Hong Kong's Arbitration Ordinance*.

6. FIDIC's Amicable Settlement Clause

Under the *FIDIC Conditions of Con tract for Civil Engineering Work, 4th edition (1987)*, there is an obligation on both the employer and the contractor to attempt to resolve disputes through amicable settlement under the provisions of sub-clause 67.2, before proceeding to arbitration. The essence of this sub-clause is that when an intention to commence arbitration over a dispute has been given (in accordance with sub-clause 67.4 Engineers' Decision), arbitration of the dispute may not commence unless an attempt has first been made by the parties to settle the dispute amicably. However (unless the parties otherwise agree) arbitration may commence on or after the *fifty-sixth* day on which notice of intention to commence arbitration of the dispute was given, whether or not any attempt at amicable settlement has been made. Under these provisions, it would appear that any ADR technique may be chosen by the parties as a means of arriving at an amicable settlement.

[Review Questions]

(1) Briefly explain the advantages and disadvantages of arbitration.

(2) What are the strengths and weaknesses of alternative dispute resolution (ADR)?

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Web Links

Hong Kong International Arbitration Centre (HKIAC) http://www.hkiac.org/

Hong Kong Mediation Centre (HKMC), http://www.mediationcentre.org.hk