A SUMMARY OF DISPUTE RESOLUTION OPTIONS
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INTRODUCTION

Concerns over costs and delays in litigation procedures together with the increasing globalization of the modern business world have led to the development of more flexible means of resolving disputes which provide alternatives to court-based litigation governed by the law and procedure of a particular state or country.

This section of the directory gives an outline of the main dispute resolution processes now available, whether in substitution for or in addition to court litigation, together with the factors which should be borne in mind when choosing a particular procedure. The law affecting these processes (such as that governing confidentiality and privilege) will vary in different jurisdictions and it is important to take advice in cases of doubt. The outline is not exhaustive. What is described is the most typical form of each process, of which there will be many variations throughout the world.

Outside the USA, there is a tendency to distinguish between arbitration (and expert determination) on the one hand and other non-court dispute resolution mechanisms on the other, the latter often generically referred to as alternative dispute resolution or ADR. The term "ADR" is used in this directory to describe methods of dispute resolution which are alternative not only to court litigation but also to arbitration and expert determination.

There are various ways of categorising dispute resolution processes, the most important of which are as follows:

- Binding or non-binding: arbitration and expert determination are, like court litigation, processes intended from the outset to lead to a result which will bind the parties and most forms of ADR, such as mediation or mini-trial, will only result in binding settlements if the parties subsequently agree

- Adjudicative or consensual: some dispute resolution processes (such as arbitration) are adjudicative, in which an independent third party makes a binding decision based on adversarial presentations, whereas others (including most forms of ADR) are consensual, where the parties themselves reach the decision to resolve the dispute and agree the terms

- Mandatory or voluntary: some dispute resolution processes are the result of references by some other body, usually a court, where the referral may be mandatory (often referred to as court-annexed procedures), whilst others are private and the referral voluntary

- Rights-based or interest-based: in most traditional dispute resolution processes issues are identified, legal arguments are advanced and a decision is reached on the basis of a third party's assessment of the legal entitlements of the parties (arbitration is an example); non-binding ADR processes on the other hand are more interest-based and aim to reach creative, flexible solutions derived from the parties' own appreciation of their motivation and underlying business and other interests.

Arbitration developed initially very much as a true alternative to litigation. Almost every capital in Europe has some form of arbitral centre and an increasing number are being established around the globe. There are also a number of international arbitration institutions, such as the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA) which aim primarily to administer international, rather than domestic, arbitration. Other domestic arbitration bodies, such as the American Arbitration Association (AAA), have developed international rules. However, arbitration itself, particularly domestic arbitration, has become the subject of concerns about delay and cost and in some respects is now seen as beset with some of the problems that are perceived to taint litigation in many countries. This has been the case with construction disputes in the USA and led the AAA to adopt new arbitration rules in 1996 (amended in 1999) establishin a 3-tier system for simple, regular and complex cases. Similarly th ICC and LCIA made modifications in new rules introduced in 1998 to deal with problems of delay. However, despite such measures, there is a movement in much of the world to seek alternatives to both litigation and arbitration. This has led to the development and, at least in some regions, increasing use of ADR procedures.

By far the most common form of ADR is mediation. Outside the USA, and to a lesser extent the UK, other forms are relatively rare. The terms *mediation* and *conciliation* have different meanings ascribed to them in different contexts and are often treated as synonymous.

Although a number of jurisdictions claim to have had active ADR institutions for a number of years, the current interest in the subject has undoubtedly resulted from a movement which began in the USA in the late 1970s. This movement had much to do with a number of perceived problems with the US civil justice system such as unpredictable jury verdicts, punitive multiple damages awards and lengthy pretrial discovery procedures. In the USA through organisations such as JAMS-Endispute and the CPR Institute for Dispute Resolution (CPR), ADR is now well entrenched. Companies commonly attempt to avoid litigation by adopting ADR clauses in their commercial contracts, while CPR's arbitration rules themselves require arbitrators to encourage parties to attempt settlement negotiations even after arbitration has begun

In the UK there is now some recognition of the advantages to be gained in employing ADR techniques. In England and Wales the new Civil Procedure Rules, which provide for case management by the court, state that active case management includes "encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure". Here, the Centre for Dispute Resolution (CEDR) has been at the forefront of ADR since 1990 and other bodies, such as the LCIA, the British Academy of Experts and the City Dispute Panel all offer an increasingly wide range of ADR services. There have been similar developments in other jurisdictions, notably in Australia (LEADR and ACDC), Canada (the Vancouver Centre fo

Commercial Disputes and the British Columbia International Commercial Arbitration Centre), Hong Kong (International Commercial Arbitration Centre), Switzerland (the WIPO Centre), Belgium (CEPANI), in the Netherlands (the Netherlands Mediation Institute and Netherlands Arbitration Institute), in France (Centre National de la Médiation and Centre de Médiation d'Arbitrage de la Chambre de Commerce de Paris) and in India (International Centre for Alternative Dispute Resolution).

In some countries such as the USA, Canada, Australia and New Zealand court-annexed mediation is more common: in others there are advanced forms of conciliation, notably China, Japan and Korea. Outside the USA there is still a certain amount of resistance to and scepticism about ADR and it is in many respects more talked-about on a global basis than practised. This is, however, increasingly less true of Australia and Canada, where the Toronto Private Court offers all forms of ADR, and in the UK where CEDR claims an 80% rate of settlement in disputes where ADR is used. CEDR was also awarded a European Commission grant to consult on the development of ADR in continental Europe.

The general resistance to ADR may stem in part from ignorance and also in part because in some jurisdictions the evils that have led to the adoption of ADR elsewhere are not perceived to constitute such a serious problem. Partly because of this and partly because of cultural differences, it is unlikely that there will be wholesale transmission throughout the world of all the forms of ADR that presently exist in the USA. However, as the different processes become more used in international disputes, it is likely that they will gradually become adapted to conform to local traditions and customs. Developing a system of ADR to suit each country's needs and culture is a complex process that requires time, resources and leadership. The most successful ADR programmes generally have been those which have been tailored responses to specific problems or needs.

What follows in this section of the directory is a description of the main dispute resolution processes divided into five broad categories:

- Non-court procedures designed to result in a decision which will bind the parties without further agreement: these include arbitration and expert determination
- Procedures which are intended to result in an agreed settlement by the parties but which cannot bind the parties in the absence of consent: these include mediation, together with the closely related processes of negotiation, facilitation, and conciliation, as well as mini-trial and fact-finding
- Hybrid processes, comprising procedures which combine the elements of the first two categories, consisting of med-arb and private judging: these processes can lead to a binding decision being imposed on the parties by a neutral but provide opportunities for a consensual decision to be reached
- Court-annexed procedures: these have mainly been developed in the USA and include many forms of early neutral evaluation, multi-door courthouse, settlement conferences and summary jury trial
- Mechanisms intended to prevent disputes occurring as well as resolving disputes which do arise: in this category are partnering and dispute review boards and included in this section are th closely-related procedures of adjudication and filtering o disputes.

1.1 ARBITRATION

Businessmen frequently include dispute resolution clauses in the commercial contracts. In so doing a party may in theory choos between arbitration and litigation before the national courts. Th decision as to whether to arbitrate or litigate may be a difficult on and much will depend upon the circumstances of each case. In a international context, the decision is more complicated. There is n international commercial court to deal with private internation disputes and a party therefore must consider the comparati advantages and disadvantages of various national courts whic might take jurisdiction over the dispute as well as the comparati merits of arbitration over litigation.

What is Arbitration?

Arbitration is an adjudicative dispute resolution procedure in whi a tribunal issues a ruling known as an award. Arbitration is a priva alternative to court litigation. The parties are often represented l lawyers who argue their clients' cases before a tribunal which m comprise a single arbitrator or a panel of arbitrators, usually thr The tribunal is expected to behave "judicially" and will accordin determine the rights and liabilities of the parties on the issues p to it for adjudication.

The Difference Between International and Domestic Arbitratio

A domestic arbitration takes place between parties of the sa jurisdiction, whilst an *international* arbitration in some way transcen national boundaries.

A detailed analysis of domestic arbitration in each of the countr in which it is practised is beyond the scope of this directory. some areas, notably property, construction, shipping, insurance a commodities disputes, arbitration is common throughout the wo There are also many consumer arbitration schemes and otl procedures for smaller disputes many of which are dealt with o documents-only basis.

In deciding whether a dispute is international, two criteria may employed. First, the nature of the dispute: thus an arbitratio international if it involves issues of international trade. Alternativ the nationality or place of residence of the parties. Some natio systems of law have developed the first approach whilst others h adopted the second.

In many cases, the distinction between an international an domestic arbitration may appear academic since many count have enacted laws which apply equally to both. Domestic legislat based on the UNCITRAL Model Law has been enacted in ful in part in many countries. These include Australia, Bulgaria, Can Germany, Hong Kong, Mexico, Peru, Scotland, Tanzania, Cyp and Nigeria. A number of other countries have also implemer arbitration legislation which is clearly influenced by the Model L for example, Switzerland, England and Wales, the Netherla Spain and India.

The last decade has seen an increasing trend towards internationalisation of arbitration. The single most important s

force has been the widespread adoption of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. In more recent times, the UNCITRAL Arbitration Rules and the UNCITRAL Model Law have served to introduce generally accepted "norms" of international arbitration practice. The UNCITRAL Arbitration Rules are designed to regulate arbitral proceedings from start to finish and, whilst originally designed for *ad hoc* arbitrations, they have been used as the basis for the rules of many arbitral institutions.

The peculiarities and unpredictability of some national legal systems have reinforced the attractions of international arbitration over national courts, because international arbitration can provide a system with which all the parties are familiar, whilst the rules of local courts may be less acceptable to at least one of the parties. This is the case in Japan, for example, where western businesses have been reluctant to accept JCAA arbitration because of unfamiliarity with Japanese arbitration practice. Parties may also prefer the resolution of disputes in a private neutral forum rather than facing a public battle in the courts of an unfamiliar country. A growing awareness of the desirability of attracting international arbitration has led to different jurisdictions competing to encourage parties to resolve their disputes by arbitration in their territory. Many regional arbitration centres have been established, aiming to create systems based upon general principles which are neutral in application and serve the broad interests of all those who may be involved in international disputes.

The choice of the place (or "seat") of arbitration is potentially very significant. Generally speaking, the procedural laws to be applied to an arbitration will be the laws of the place of arbitration. The manner in which an arbitration arises or is conducted in various jurisdictions is, in part, influenced by whether there is a common law or civil law system in the place of arbitration since the different procedural characteristics of each have inevitably filtered through into arbitration proceedings through the underlying local law.

Whilst a broad distinction can be drawn between the adversarial approach of the common law and the inquisitorial approach of the civil law, this difference is narrowing as arbitral bodies and arbitrators aim to select the best and reject the worst aspects of each. For example, in Hong Kong and Singapore, both of which are common law jurisdictions, arbitrators are specifically empowered (unless otherwise agreed between the parties) to adopt an inquisitorial approach to the arbitration process. Traditionally, there are certain features which tend to be apparent in arbitrations held in common law countries:

- The proceedings are geared towards a single oral hearing which is formal in structure.
- The role of the arbitral tribunal tends to be passive
- The parties are primarily responsible for assembly of the necessary evidence
- There is greater disclosure of documents.
- In civil law jurisdictions, on the other hand:
- The dispute is generally dealt with at one or more hearings as required
- The tribunal directs the proceedings in an active but, frequently, less formal manner
- The early stages of the proceedings are in writing and the later stages are oral; usually, the written submissions are of primary importance
- There is less emphasis upon disclosure of documents and the examination of witnesses.

Finality of Arbitration

Arbitration may be entered into voluntarily by the parties after a dispute has arisen or as a consequence of an arbitration clause contained in a contract. In each case the parties have entered into an agreement to submit to the arbitral process and to be bound by the tribunal's decision.

In some cases the parties will also have specifically agreed that the tribunal's decision will be final and that there will be no recourse to the national courts to set aside or vary the award. Even without such provision, many developed countries permit challenge to an award only on a very narrow range of grounds such as fraud, lack of impartiality or an arbitrator's refusal to hear certain case-related evidence. For example, the Arbitration Act 1996 in England and Wales allows appeals to the courts only on the grounds of lack of substantive jurisdiction, serious irregularity or errors of law where it is just and proper in all the circumstances for the court to determine the question. This contrasts with the ability in many countries to appeal the decisions of a judge on a broad range of reasons relating to law, evidence or fact.

Traditionally, arbitration is a binding process of a judicial nature. There are, however, circumstances where it can be non-binding in the sense that the parties are not obliged to accept the result. This occurs where the arbitration is not a creature of agreement but rather is the subject of a court order or "court-annexed arbitration". Such form of arbitration is more common in civil law countries although it also forms part of the legal system in many states of the USA.

Court-annexed arbitration is often ordered by courts to expedite resolutions and relieve delay in the court process. In the USA, court-annexed arbitrations occur usually in the context of contract disputes and tort claims which fall within a certain monetary range.

Institutional and Ad hoc Arbitrations

There is an important distinction between arbitrations which are institutional and those which are *ad hoc*. By choosing an institutional arbitration the parties elect to conduct the arbitration in accordance with the procedural rules of the particular institution concerned (although they may modify these rules by agreement) and to have the arbitration administered by that institution. The parties to an *ad hoc* arbitration do not appoint any institution to supervise or administer their arbitration, and are free to establish their own rules of procedure which they formulate to fit the requirements of their case. The parties to an *ad hoc* arbitration may (and in practice frequently do) decide to base their procedure upon a set of non institutional arbitration rules such as the UNCITRAL Arbitration Rules, or at least use them as a starting point.

The best known institutional arbitral institutions are the ICC, the International Centre for the Settlement of Investment Disputes (ICSID), the LCIA, the AAA, the Stockholm Chamber of Commerce (SCC), the Hong Kong International Arbitration Centre (HKIAC) and the China International Economic and Trade Arbitration Commission (CIETAC). In addition, many other arbitral centres have been established world-wide.

Advantages and Disadvantages of Institutional and Ad hoc Arbitrations

The ability to incorporate by reference in an arbitration agreement the rules of a selected institution is one of the principal advantages of institutional arbitration. Another advantage is that most institutions have trained staff to administer the arbitration and ensure that the conduct of it is as smooth as possible. In an *ad hoc* arbitration, on the other hand, the arbitral tribunal itself has the burden of undertaking the administration although it may sometimes delegate certain tasks to one of the parties or appoint its own secretary. The procedural advantages of institutional arbitration should not be under-estimated, particularly in large and complex cases.

One possible disadvantage of institutional arbitration is its expense. The institution will charge a fee for its services. Parties may also experience some delay as a result of having to comply with its procedural or administrative requirements. An *ad hoc* arbitration can sometimes be more easily shaped to meet the wishes of the parties and the facts of the particular case. The principal disadvantage of an *ad hoc* arbitration is that it is more dependent upon co-operation between the parties and their lawyers. It is often the case that where a dispute has occurred, either at the time of the dispute or further on in the proceedings, there is a breakdown of the relationship between the parties. When it becomes impossible for essential matters to be agreed between them, the rules and practices of an institution often provide a safety net, particularly in getting the arbitral tribunal constituted and the arbitration up and running.

Arbitration institutions also tend to supervise the appointment of arbitrators, thereby ensuring the requisite impartiality and quality of the tribunal. Many arbitral institutions such as the LCIA, ICC and HKIAC, offer services as an appointing authority, for example, under the UNCITRAL Rules. Such institutions can also act as the administering authority for UNCITRAL arbitrations. Whilst the appointing function is extremely important, the benefits of an institutional label upon an award should not be overlooked. It is a distinct advantage to arbitrate under the auspices of a body with an internationally accepted reputation which exercises control over the procedures and over the quality of the arbitrators who are appointed. The risk of a rogue decision by the arbitrators is greatly reduced and the possibility of a challenge to the award is diminished.

The Arbitration Agreement

Irrespective of whether or not the agreement to arbitrate forms part of a contract between the parties or whether or not it is reached after a dispute has arisen, it is essential that the parties have clearly agreed to arbitration since the binding quality of an arbitration arises from the parties' consent to be so bound. It is generally accepted that an agreement to arbitrate ought to be in writing. However, in selecting a country in which to arbitrate, or when dealing with a domestic arbitration, the local law may need to be considered.

In Austria for example it is not possible to rely on a tacit acceptar of an arbitration clause printed in standard conditions on document such as an invoice or a sales note; the arbitration will invalid unless expressly referred to in the correspondence or tele: by which the contract is constituted. In Greece, the signatures all the parties to an arbitration agreement are required upon e: original copy of the agreement; an arbitration agreement reflec in an exchange of letters or telexes will therefore not be recogni: as valid. In Italy, arbitration clauses in employment agreements prohibited, nor are they available for IP disputes where they rel to IP rights, as opposed to purely contractual rights. In France order for an arbitration clause to be valid, the clause must eit name the arbitrator or provide a method for the arbitrat appointment. Furthermore, except in the case of an agreement disputes to be resolved by an international arbitration, an arbitrat clause will not be enforceable against individuals without agreement between the parties *after* the dispute has arisen tha should be submitted to arbitration.

Notice of Arbitration

The first step in the arbitration process is usually for one p: formally to request the arbitration. In an *ad hoc* arbitration this take place in the form of a written demand by one party addres to the other. If the arbitration is to take place under the auspice: an arbitral institution, the party will sometimes be required to lo the request for arbitration with the institution which will t usually notify the other parties in writing. Different instituti have different requirements as to the requisite contents of notice. Under the rules of the LCIA and ICC, for example, request must contain a brief statement describing the nature circumstances of the dispute and the relief claimed. Some r state that the request should also nominate the arbitrator arbitrators.

The Selection Process

The freedom to choose, or at least to influence the choice of, arbitrator or arbitrators is an important aspect of the arb process. In *ad hoc* arbitration the parties are free to choose tribunal although they should provide for a deadlock mechanis cases where they cannot reach agreement on the choice of arbitr or the person chairing the arbitral panel. In England, for exam agreements commonly provide for the President of the Law Soc or the Chartered Institute of Arbitrators to appoint an arbitr where the parties cannot agree, whilst in France, under the Fre Code of Civil Procedure, if the parties have not otherwise ag they may bring any problem arising from the appointment o arbitrator before the Président of the Tribunal de Grande Inst: of Paris.

Different institutions have different procedures for selec arbitrators which allow for varying levels of participation by parties. For example, the AAA's new International Arbitra Rules now permit parties to designate their arbitrators or to req the AAA to provide a list of names from its membership o request the AAA to nominate the arbitrator without using the system. The ICC and LCIA rules do not provide for any forma process. In a CIETAC arbitration the parties are limited to choo arbitrators from the CIETAC panel (although an increasing nun of foreign arbitrators are now being appointed to the panel). non-binding, court-annexed reference to arbitration, the parties generally have no role to play in the selection of the tribunal s the arbitrator may well be the presiding judge.

The rules of most arbitral institutions provide for a sole arbitrator but a panel of two or more may also be appointed. Additional arbitrators will of course increase the costs and generally should only be used for large and complex cases.

Where a panel is appointed, some jurisdictions specifically provide that in domestic arbitrations the tribunal must be constituted by an uneven number of members. In any event, an even number of tribunal members is generally unsatisfactory since it may not be possible for them to agree unanimously on the outcome of the case. In rare cases where an even number of members preside one member is given a casting vote in the event of a deadlock.

The parties' freedom to choose or to influence the constitution of the tribunal is limited by the overriding requirement that the arbitrators be independent and impartial. Once an arbitrator has been appointed, private communication with the parties about the merits of the dispute is not allowed. Arbitrators are required to treat the parties fairly and to give them the same opportunities to present their case.

Because of the adjudicatory skills involved, many judges and former judges serve as arbitrators. However, successful arbitrators come from many walks of life and, in arbitrations with three arbitrators, some arbitral organisations recommend that there is at least one individual on the tribunal who is an expert on the subject-matter of a case, such as an engineer or accountant.

The choice of arbitrator is fundamental and it is essential that the parties carefully consider the individual or individuals before a nomination is made. Arbitral organisations can provide a considerable amount of information about potential arbitrators, for example, biographical information, awards made, previous training and the results of post-arbitration evaluations by parties and their lawyers. Parties can also obtain information on experience and background from interviewing the candidates, from legal, professional and dispute resolution directories or from parties to previous disputes or their lawyers. Detailed information about previous cases will, however, often not be available for reasons of confidentiality.

Arbitrators themselves are required to disclose to the parties any conflict of interest they may have in the case, including any past relationships with any party or any financial or personal interest in the outcome. An arbitrator's failure to disclose such conflict of interest constitutes grounds for setting aside an award. Many arbitral institutions require the potential arbitrator to file a resumé of past and present professional positions and a declaration regarding absence of circumstances likely to give rise to doubts as to his or her impartiality or independence. Such disclosure is a continuing requirement until the end of the arbitration.

Challenge to Arbitrators

The rules of most arbitral institutions permit the parties to challenge the appointed arbitrator. Parties must be careful not to make trivial challenges against arbitrators who have been recommended by an arbitral institution but if a party suspects that there is a legitimate ground for complaint (usually on grounds of lack of impartiality), then that party should notify the institution immediately. Once appointed, an arbitrator may subsequently prove to be unsuitable for a number of reasons, including ill-health or unavoidable conflict of interest which subsequently become apparent. An arbitrator can be discharged at any point in the arbitration process by the agreement of all parties to the case. Applicable law may impose additional or supplementary requirements.

The rules of arbitral institutions have different procedures for challenging the selection of arbitrators. One notable difference is often in respect of the time period during which the party must challenge. For example, under the new LCIA rules a party has 15 days to challenge an arbitrator whereas a time limit of 30 days is given under the new ICC rules. In most cases the time runs either from notification of appointment or from when a party becomes aware of facts and circumstances which were previously unknown to it.

Costs of Arbitration

The costs of arbitration may vary widely. In an *ad hoc* arbitration, it will generally be for the parties themselves to negotiate the fees of the arbitrator or arbitrators. There is some debate in the international arena as to whether or not all arbitrators, regardless of experience and country of origin, should be paid the same hourly or daily rate. It is usual in common law arbitrations for the arbitrators to have different rates according to their market status. In certain civil law countries, however, the arbitrators are expected to be paid the same fee as part of an overall policy that each member of the tribunal should be seen to be impartial. In an institutional arbitration, arbitrators generally charge according to a published fee scale and the parties will also have to pay the institution's fee for administering the arbitration. Some organisations such as the ICC have a sliding scale based on the size of the claim and other factors, whereas other organisations such as the LCIA receive an hourly rate. Parties may also be required to put down a deposit before the arbitration can commence. Each party will generally also be charged a fee for each day of the hearing together with any other administrative and out-of-pocket expenses. Under many arbitration systems the successful party will have the right to recover all or part of the fees that it has paid.

Conduct of Proceedings

The conduct of the proceedings is a matter for the parties to agree although usually the mechanics of the procedures, including decisions about evidence and hearings, are dealt with by the tribunal. Under the UNCITRAL Rules and the UNCITRAL Model Law for example, the arbitral tribunal generally has a wide discretion as to the way in which the proceedings should be conducted. There are a few mandatory provisions which are binding on the arbitral tribunal so far as procedure is concerned:

- The parties must be treated with equality and each party must be given a full opportunity of presenting its case
- There must be one consecutive exchange of written submissions which must include certain features
- The arbitral tribunal must hold a hearing if either party requests one
- If the arbitral tribunal appoints an expert it must give the parties the opportunity to interrogate the expert at a hearing and the parties must be given an opportunity to present their own expert witnesses on the points at issue.

The rules of most international arbitral institutions provide the tribunal with wide powers to conduct proceedings in such a manner as it considers appropriate. Where the parties have provided for institutional rules or the UNCITRAL Rules, the tribunal will generally have those powers, subject to any amendments agreed by the parties and subject to any overriding provisions of the law of the place in which the arbitration takes place. In the absence of agreed procedural rules, the tribunal's powers will derive from the local law. Most developed jurisdictions confer powers upon the tribunal to decide procedural matters in the absence of the parties' agreement.

In domestic arbitrations, preliminary matters concerning procedure are usually dealt with by correspondence. In international arbitrations parties increasingly opt for a preliminary meeting for this purpose. There is continuing debate in the international arbitration community about the desirability of such a meeting. In an international dispute, however, it is usual for a meeting between the parties to be held as soon as possible in order to establish a structure for the conduct of the arbitration, particularly where the parties come from jurisdictions with different approaches to dispute resolution.

One preliminary issue which must be considered by the tribunal is which law will govern the arbitration and which law applies to the issues between the parties. The parties may also attempt to reach agreement on narrowing the issues, specifying types of evidence to be presented and any other procedural or substantive points not covered in the original arbitration agreement. This may include the language to be used during the proceedings and the place of arbitration.

Written Submissions

The first step in most international arbitrations is the exchange of written submissions, the predominant purpose of which is to define the issues to be determined. Written submissions are normally exchanged sequentially. In an ICC arbitration, the parties usually agree terms of reference in an attempt to focus upon those issues which the tribunal is specifically asked to determine.

Evidence

The arbitral tribunal is responsible for considering all relevant evidence in order to determine the disputed issues of fact between the parties.

In many international cases, one of the disputed issues may be which system of law governs the dispute. The governing law may be foreign to the nationality of the arbitral tribunal. In common law countries foreign law would usually be a question of fact and is proved by calling an expert witness from that jurisdiction. In other countries foreign law is usually a question of law and the arbitrator will be presumed to know the law, whether it is foreign or domestic, although it is often the case that an expert will provide an opinion. The distinction between whether foreign law is a matter of law or fact may be important since some jurisdictions permit appeals against arbitral awards on grounds of a mistake of law but not of a finding of fact.

Some countries provide the tribunal with specific powers in relation to foreign law issues. The Netherlands Arbitration Act 1986 enables the arbitral tribunal to request the court to intervene and obtain information on foreign law. However, in the Netherlands and so other jurisdictions the usual practice before international arbit tribunals, particularly where the members are all lawyers, is t questions of law will be the subject of argument by the parties their lawyers, in the form of written or oral submissions.

An arbitral tribunal will require each party to prove the facts up which it relies in support of its case. The method and standard proof required will vary in each case. Generally, an internatio arbitration tribunal favours documentary evidence with a lo emphasis on oral presentation and examination of witnesses t in traditional litigation in common law countries.

The rules of the various institutional arbitrations make provisi for the production of documentary evidence. Under the ICC ru for example, the party must produce all the documents upon wh it relies in its statement of case. The respondent must also prod like documents in its response. The tribunal has the power at time to summon a party to provide additional evidence. The LC rules make similar provision and grant the arbitrators express po to make discovery orders. The UNCITRAL Arbitration Ru provide that a claimant may attach all documents it deems relev and refer to documents or other evidence it will submit, in statement of claim. Under the UNCITRAL Model Law procedure by which documents are produced is left to the tribu to decide, in the absence of any agreement between the parties.

So far as evidence from witnesses and expert evidence is concern various methods may be employed depending upon wh procedural rules are adopted by the parties and whether the par and arbitrators have a bias towards the common law or civil system. In international commercial arbitration, however, it is generally considered essential that witnesses should be heard or and it is relatively common for the parties to submit writ statements of the evidence of their witnesses.

The Hearing

The rules of all the major international arbitral institutions prov for a hearing to take place at the request of either party or upon direction of the tribunal itself. The task of organising a hearing substantial one. A suitable hearing room must be provided v separate rooms and facilities for the parties including, ideally, acc to photocopying and secretarial assistance. Transcription facili are often required and can be expensive particularly if provided a day-to-day basis. Accommodation may also be required witnesses, experts and the parties and their lawyers, althoug sensible choice of the place of the hearing can reduce these c considerably.

Hearings are held in private. Under the laws of some count (Australia being a notable exception) the rule of privacy also requ the parties and the tribunal to respect confidentiality concernin matters arising during the hearing, including evidence put be the tribunal, as well as in respect of the award itself.

The procedure at the hearing will vary according to the indivi tribunal concerned. The trend is now towards shorter hearings v greater reliance on documentary evidence. In most cases each is permitted a brief opening statement followed by the evidence each party. Usually there is no examination-in-chief, since wri witness evidence will have been submitted in advance of

hearing, but it is usual for a witness to be invited to elaborate on his evidence.

The examination of witnesses will be largely dictated by the tribunal. In some civil law jurisdictions cross-examination of witnesses by the parties is not permitted although, in an international context, such opportunities tend to be given if a party requests it. English and American lawyers nearly always wish to cross-examine witnesses directly.

The Award

After all the evidence has been presented, the tribunal is required to consider the parties' cases and reach an award. The rules of the arbitral institution usually specify the time within which the tribunal must render its award, although in practice delays are frequent. In domestic arbitrations in some countries the time within which an award is to be given may be extended by the court or by the consent of the parties.

In most international arbitrations the tribunal is required to give reasons for its award and these will normally be in written form. The provision of written reasons for the award is a requirement under the laws of many countries, although there are exceptions. In Ireland and the USA, for example, there is no such general requirement (although a reasoned award may be required by agreement or institutional rules). Under Scottish law and under the Indian Arbitration and Conciliation Ordinance 1996 the parties can agree that no reasons will be given. Usually, the arbitration award will be provided to the parties once the tribunal is satisfied that it represents its considered view. In an institutional arbitration the institution itself may play a role in reviewing the tribunal's award before it is published. The ICC, for example, scrutinises the draft award to ensure that it complies with the terms of reference and may suggest modifications before it is released to the parties.

Enforcement of the Award

The effectiveness of arbitration depends ultimately upon whether or not the arbitral award can be enforced against a losing party who refuses to pay. The enforcement of awards resulting from international arbitration is regulated in many countries by an international network of multinational and bilateral conventions, the most important of which is the New York Convention. This Convention has now been ratified by all the major industrialised countries and also by the great majority of the developing countries. The mutual enforcement regime under the New York Convention provides a means by which awards can readily be enforced in other jurisdictions, in many cases more effectively and expeditiously than the enforcement of most foreign court judgments. This factor can constitute a significant reason for opting for international arbitration rather than traditional litigation in national courts.

This is not to say, however, that the theoretical right of enforcement under the New York Convention is always available in practice. China, for example, is a signatory but the protectionist attitude of its local courts has sometimes impeded attempts by foreign companies to enforce arbitration awards and has resulted in a Chinese Supreme Court ruling that all refusals of enforcement applications by lower courts should be reviewed by a higher court. Further difficulties can arise by virtue of the public policy exception in the New York Convention which has been used by the courts of a number of states as a basis for refusing enforcement. There are also doubts about the enforceability in some Arab countries of awards made by non-Muslim arbitrators.

1.2 EXPERT DETERMINATION

What is Expert Determination?

Expert Determination (ED) is a voluntary process in which a neutral third party, who is usually an expert in the field in which the dispute arises, gives a binding determination on the issues in dispute. ED is well-developed in English and Commonwealth jurisdictions and comparable procedures exist in other countries, for example, France, Germany, Italy and the Netherlands.

A dispute may be referred to ED either by means of a term in a pre-existing agreement or on an *ad hoc* basis. It is a quick, inexpensive and private method of resolving a dispute. Unlike an arbitrator, an expert has no obligation to act judicially, although he or she must act fairly. The decision an expert reaches is generally challengeable only on very limited grounds.

Who Should use ED?

The ED process is particularly well-suited to the resolution o valuation and technical disputes of fact requiring the specialise knowledge which the expert possesses. It can provide a speed method of achieving a binding decision because an expert can, an usually does, dispense with the procedural complexities ofte associated with arbitration or litigation and it does not, for example generally involve pleadings, discovery, formal hearings or the cross examination of witnesses. As such, it is a less aggressive proces than arbitration or litigation and is therefore appropriate to the resolution of factual disputes between parties with an ongoing commercial relationship. Because of its relative simplicity and speed, it can also be much less expensive than litigation and arbitration.

For reasons given below ED is usually unsuitable in cases where enforcement of an award in another country may be necessary.

The Process

The procedure can either be set out in the agreement referring the dispute to ED, or can be left to the expert himself to determine. Unlike litigation or arbitration, there is generally very little in the way of set procedures. However, many appointing institutions recognise the advantages of formulating suitable rules and some, such as the City Disputes Panel in England, set out some basic rules to be followed.

In the absence of any agreed procedural rules, it is for the expert himself to determine how the reference should be conducted, although he will usually take into consideration the suggestions of the parties to the dispute.

An institution will usually be specified by the agreement to make the appointment where parties cannot agree upon the identity of an expert. If there is no agreement, an institution can be approached for this purpose on an *ad hoc* basis. Many institutions have considerable experience in acting as appointing authorities, for example, the ICC Centre of Expertise and the British Academy of Experts.

The advantage of ED is that it is a relatively informal process. It is usual for the parties to provide the expert with a brief on the issues in dispute, defining the areas upon which they wish him to make his determination. The parties may then provide the expert with written submissions stating their case together with any documents they consider relevant. The expert will provide each party's submission to the other party. Each party may then provide the expert with a written response to the other's submission which is also made available to the other party. The expert may then seek clarification from the parties and may question them separately or together and request further written information.

Upon receipt of such information as the expert believes is necessary he will make a determination which is binding on both parties. An expert does not necessarily have to give reasons for his decision. Under English law a decision by an expert can only be challenged on a limited number of grounds, such as fraud, partiality or a particularly fundamental mistake, and in the past the courts have expressly refused appeals on legal issues. This has had the advantage of promoting finality. However, a recent decision in the House of Lords in England has cast doubt on the scope of the prohibition of challenges on legal grounds and has highlighted the need for legislation to settle the principles applied to ED.

Because there is no applicable international convention, it is not easy to enforce the award of an expert across national boundaries. For example, in England it is necessary to convert the award into a judgment of the court which may then be enforced in countries with a reciprocal enforcement treaty or elsewhere under applicable local law. This can make ED unsuitable as a procedure to be selected in cases where the ability to enforce an award internationally is likely to be necessary.

2.1 MEDIATION

What is Mediation?

Mediation is negotiation facilitated by the introduction into the dispute of a neutral intermediary. Two or more parties meet with a neutral third party, who guides the negotiation process, advising and listening to all sides, and helps the parties arrive if possible at a "win-win" settlement or at best one which the parties can live with. Unless or until encapsulated in a formal agreement, a mediated settlement is non-binding. If any party to the dispute is not satisfied with the outcome, that party may opt not to sign a settlement agreement and may proceed to another form of dispute resolution procedure.

Mediation is said to be one of the fastest growing forms of dispute resolution process in the world. It avoids the backlog of the national court systems, it is relatively quick and inexpensive, its solutions can be tailored to a specific situation, the process is private and confidential and, since the goal of mediation is problem-solving, it is often successful in preserving working relationships. These benefits are further magnified in an international context where the costs of arbitration are much higher and the logistics more complex. In general, except perhaps in the USA and some European countries, ADR is in practice equated with mediation.

Mediation is one of the most informal dispute resolution procedures. The process is completely flexible and negotiable by the parties and any party may walk out at any time. This does not mean, however, that a mediation is a free-for-all. The process is most effective w subjected to the guidance of the mediator, perhaps operatin accordance with a pre-agreed protocol.

Mediation procedures can derive from a variety of sources. parties may choose to abide by a set of rules already establishe a dispute resolution organisation such as JAMS-Endispute or (in the United States, CEDR and the ADR Group in the UK, NMI in the Netherlands, or WIPO in Switzerland. I organisations are being established as ADR assumes a wider gl acceptance. The Singapore Mediation Centre was launche August 1997 by the Singapore Academy of Law, and aim become the leading provider of international mediation service the South East Asian region. These organisations have publi model procedures for commercial mediation. Other organisat have promoted mediation in specialist areas, such as construc family disputes, securities disputes, and resolution of insur claims. In the UK, ACAS has a statutory role in employr disputes and the City Disputes Panel covers the financial ser sector. The parties to a dispute are free to amend the proced recommended by these bodies or to write their own, thus allo them a degree of influence over the process that would no available in most national courts.

The mediator remains strictly neutral throughout, although he exceptionally be asked to render an opinion based on the argum and evidence he has heard. Generally, the non-binding, threatening nature of a mediation allows each participant t more open to new ideas, more creative in their approach, and r willing to consider compromises, using the mediator as a facili for this process.

The mediation process is usually said to be voluntary, but increasingly common for those with business relationship include dispute resolution clauses in their commercial cont stipulating that mediation is to be attempted first in the event dispute. In some jurisdictions mediation is also increasingly b encouraged or mandated by the courts.

Who Should use Mediation?

Mediation is best suited to disputes in which:

- A negotiated settlement is desired
- There is no requirement to set a legal precedent or exampl
- The parties wish to keep the proceedings confidential
- Tension and emotions are impeding communication
- Time and/or costs are a concern
- The disputants desire or need to maintain on-going relatio
- There are commercial matters in issue which are more signi than the strictly legal position.

Because mediation is a process in which the parties contr outcome, it is more likely that a working relationship will su mediation than it will litigation or arbitration. Mediation can re an infinite variety of disputes, but it is not a panacea. Some are better tried in court, and litigation may be preferable wher

- An authoritative interpretation of the law is required
- No realistic prospects for settlement exist
- A public vindication or pronouncement is needed to protect the reputation of a person, organisation or product
- A party wants to use court proceedings to discourage similar actions
- There is a need for the court to supervise the conduct of a party after a judgment
- The case involves criminal, constitutional or civil rights issues
- An injunction is required.

The Decision to Mediate

The ideal time to elect for mediation is before a dispute occurs. This is why many commercial contracts with suppliers, customers, trade unions and joint venture partners include mediation clauses. Some clauses simply state that mediation will be attempted before the parties consider litigation or arbitration. Other clauses are considerably more detailed. Once hostilities have begun, it can be very difficult to find any common ground for agreement. Many business people and lawyers also express the concern that, if they propose mediation after a dispute has occurred, the proposal may be perceived as a sign of weakness by the other side. By making a pre-dispute stipulation that mediation will be used, all sides can enter the dispute resolution process on an equal footing.

The ability to enforce mediation clauses in the courts may, however, be very limited. In England and Wales, for example, there is no requirement for the courts to stay an action until ADR procedures have been exhausted, although in recent cases there has been an indication that the courts will try to support ADR clauses where possible.

Whilst the ideal time to select mediation is before a dispute occurs, mediation can be useful at any point in a dispute and can be employed at almost any stage:

- Mediation can be suggested by a party shortly after the dispute occurs, or after it has become clear that negotiations will not be fruitful
- The courts of some jurisdictions themselves require mediation for certain types of disputes
- Mediation can take place after proceedings have commenced, with a view to resolving the matter before a trial begins, and it may proceed whilst the parties are still engaged in pre-trial procedures
- Mediation can take place during, or (exceptionally) immediately after, a trial, but before a decision is announced
- Mediation can even be employed after a court judgment is given, as a way to forestall appeals, or when there is doubt over how the judgment will be enforced.

Preparing for Mediation

To prepare for mediation each party should be certain about its interests, expectations, and goals. Before the process begins each party should prioritise its needs, make sure its proposals are "reasonable" and brainstorm various solutions. Since the aim of mediation is to arrive at a mutually beneficial solution, not to create winners and losers, each side should make a good faith effort to analyse its opponent's interests.

Each side should prepare to arrive at the mediation with essential evidence and documentation necessary to support its case (but not the range of documents required for a trial). These may include exhibits, documents, graphs, photographs, charts, or any other form of evidence. The mediator can be an excellent resource to help parties prepare fully for mediation. Many mediators offer pre-mediation advice on everything from procedural rules to case preparation.

The Mediator

Choosing a mediator, where choice is an option, may be the most important decision the parties take in the mediation process. Surveys have shown that the skills of the mediator can make a significant difference to the success of the process. A mediator is a diplomat, not an advocate. A successful mediator possesses a range of innate and acquired skills, including:

- The ability to analyse complex legal issues quickly
- Good judgment
- Excellent communication and negotiation skills
- Poise and a calm demeanour
- Stamina, patience and tolerance
- A good understanding of human nature and practical psychology
- Good listening skills
- A sense of fairness
- An ability to sidestep and defuse confrontations
- A manageable ego.

To this list it is essential to add absolute impartiality. A mediator must have no interest in the outcome of the dispute and must be a "neutral" in every sense of the word.

In a relatively short time the mediator must set a tone of co-operation and civility, and win the trust and confidence of all sides. In achieving this the importance of communications skills cannot be overstated. In many cases, the parties are not nearly as far apart as they believe; they are simply "not speaking the same language". A good mediator can often listen to an argument that one side has rejected and frame it in a way that both parties can understand and are willing to consider. He or she is able to defuse emotional language so the intent is clear. In multi-party cases the mediator must be particularly sensitive to shifting alliances and the development of coalitions among the parties.

Mediators come from all walks of life. They are practising or retired lawyers, retired judges, professors, experts in professional or business fields, or lay individuals all of whom have been specifically trained in mediation skills. There are numerous dispute resolution organisations across the world that offer training. Usually, it is the mediation skills of the mediator that are critical, rather than any expertise in the subject-matter of the dispute. In certain instances, however, the background and experience of the mediator may be relevant. For example, if the problem centres on legal issues, a mediator who is a lawyer may be helpful. If the dispute is technical in nature, choosing a mediator who is an expert in a particular commercial or professional field may be preferable. Some parties, however, actually prefer a mediator who has no expertise in their field, believing he or she will have no preconceived views of the subject matter in the dispute.

In complex cases the parties or mediator may request that there be more than one neutral. Some cases have been successfully handled by two mediators, representing different areas of expertise such as medicine and law, who are able to confer about the issues and help initiate more imaginative settlement options. Others may be better handled by a neutral who has expertise in international relations or cross-cultural communication.

In all cases, parties should reach an understanding about which qualities they want in a mediator and select someone who is acceptable to all sides.

It is appropriate to ask mediators or their sponsoring agencies for credentials and references. Consideration should be given to checking references (particularly from individuals who have used the mediator to resolve a dispute in the past), to interviewing a prospective mediator, to requesting a resumé, to asking about the mediator's training, and to asking what kinds of cases he or she has handled in the past and his or her success rate. Inquiries may also be made as to whether or not the mediator carries professional indemnity insurance.

It is also important for the parties to ascertain the mediator's fees and other costs associated with the mediation process and to ensure that there is proper administration of this process. The mediator may be required at the outset to meet independently with all parties to see whether all can be persuaded to mediate, to advise on the mediation process, make the necessary logistical arrangements, provide quality control mechanisms, and generally oversee the administration. A mediator may feel the need for administrative or research assistance, and these additional costs should be openly discussed with the parties. In most cases, fees and costs are shared equally by the parties. However, if one party wants to encourage the other side to try mediation, the proposing party may offer to cover all or most of the expenses. Neutral dispute resolution organisations regularly help parties select mediators for their particular disputes. Fees vary greatly. Some mediators charge hourly fees, others prefer *per diem* fees. Court-affiliated mediators and mediators with community-based programmes often charge no fee. In addition to the mediator's fees, parties generally pay a fee to the administering organisation. Because of the crucial role played by the mediator, some organisations have developed their own programmes to ensure the competency of mediators.

Who Should Attend the Mediation?

Parties must carefully consider who should attend the mediation. It is particularly important that someone with decision-making authority be present. A written agreement is often drafted as as a settlement is reached and a person authorised to sign s document is required from each side. The presence of impc decision-makers at the proceedings also improves the scop effective negotiation and minimises the risk that a sound agree will later be rejected.

Many parties, particularly company executives, choose t represented at a mediation by lawyers. Experience in the US. shown that most mediation schemes welcome the presen lawyers since they often help to correct any imbalance of p between the parties and a neutral mediator. Some mediation ex believe a company is best represented when the executive lawyer attend as a team. The lawyer may counsel the executi the pros and cons of an offer, educate the executive about the issues, draft documents for the mediator, help draft the settle agreement, and advise the executive on effective presentation executive is often the best person to communicate the comp case directly to the other side and to help generate creative, win" business-orientated solutions.

At the parties' discretion, witnesses may be brought in to evidence, or may be asked to be available by telephone. Simila is up to the parties to decide if a neutral expert should be br in to review evidence. In personal injury or highly technical outside experts can be extremely helpful.

The parties' primary consideration should be that no one shou excluded if they can make a meaningful contribution tc negotiations. However, the parties should be sensitive tc dynamics of the situation and should be wary of having so people present that the efficiency of the meeting is sacrificed c creation of a settlement atmosphere is inhibited.

The Mediation Process

A mediation can take place in any, preferably neutral, locatior can accommodate both joint and separate meetings.

There is no set format for the actual mediation process. general rule, however, mediations involve a number of mee some with all present and some separately involving the mec and individual parties in "caucus".

The first step is usually a joint session at which all sides meet the mediator, who describes the mediation process and review ground rules for participation, behaviour and confidentiality. participants discuss such matters as the role the mediator will who will represent each side during the discussions, whc authority to sign a final settlement, and what documents w exchanged. If litigation over the matter is pending, the parties the mediator can also discuss whether or not any pre-trial such as discovery should be suspended, and whether or no court should be informed of the suspension and the mediatio this point, if either side has any doubts about the mediator's or expertise, a substitute may be requested. Either party can suggest modifications in the procedures or rules.

Mediation procedures or rules are aimed at creating an atmosp of co-operation and respect. They can deal with such matters a agenda for the mediation, limiting the scope of the negotia defining the role of the mediator (this can range from a p facilitative role to one in which the mediator may offer advice

opinions), defining the use of private meetings, agreeing what documents will be submitted to the mediator, establishing how confidentiality will be maintained and stipulating how the sides will respond to media inquiries.

This initial meeting also serves as an open forum for the parties to explain their positions and express how they believe the case should be resolved. At this stage the mediator begins to gather the facts, becomes familiar with the case, and assesses the interests and perceptions of the parties. Each party also has an opportunity to rebut the other side's arguments under the supervision of the mediator, who may ask questions.

If the mediator requests written statements from the parties and/or court briefs, pleadings or other documents that are part of pending litigation, another joint meeting may be scheduled to give each side an opportunity to prepare and gather these materials. In this case, the parties may wait until the second joint meeting to outline their positions in the dispute.

The mediation itself will begin with the mediator explaining the process, its objectives and his own role. Each side will then present its case by means of oral submissions. One major advantage of mediation is that this process allows the parties to "vent" and engage in a sort of catharsis by having their "day in court". This therapeutic interaction often helps move parties to settlement but, throughout the process, participants should remember that patience is key to a successful outcome. Detailed, sometimes lengthy presentations of the facts are crucial at the outset to educate the mediator.

The mediation then enters the problem-solving phase. During this phase, the mediator may hold one or a series of private meetings or "caucuses" with each party. The mediator shuttles between the parties, probing each side's position, asking questions, assessing the merits of each argument, narrowing the issues, by identifying what is important and what is expendable, and exploring alternative solutions. The mediator may request additional documents from participants in an effort to understand the case from each side's perspective. At the same time, he or she works to defuse any hostility, in part by reframing the issues in objective language acceptable to both sides.

The mediator will usually discuss settlement proposals with each side and may give guidance to the parties if the position taken by one or other seems unreasonable or inappropriate. If the mediation involves many parties, it is more likely that the mediator will be asked to propose a settlement. Once a "reasonable" offer is on the table, it becomes the basis for negotiation. If the parties are having difficulty coming to agreement, the mediator may request more private caucuses to help bridge the gaps.

If, at the end of a mediation, a substantial difference persists over monetary issues, mediators may try a relatively new concept originating from the USA called MEDALOA (Mediation and Last Offer Arbitration). MEDALOA can encourage the parties to make a final effort to close the gap, by allowing the mediator to choose a monetary award between the last demand of the claimant and the last offer of the respondent.

Once the case is settled in a way that is agreeable to all sides the mediator and/or the parties will draft a document spelling out the agreement and stipulating how it will be implemented. Since the mediation is non-binding a proposed settlement may be rejected b either side until agreement is confirmed. If this occurs, the sid objecting to the settlement may consent to work toward a new settlement, or it may give up and proceed to arbitration or litigation. It is often said that mediation tends to lead to a more durable agreement because the settlement has been achieved by the parties themselves.

If both sides agree to, and sign, a settlement agreement at the conclusion of the mediation, the parties are bound to honour that agreement. The settlement agreement is a contract and an action for breach of contract may be brought if it is not performed on either side. If litigation is pending, it may be possible in some legal systems for the settlement to be lodged with the court (or expressed in the future as a judgment by consent or arbitration award) so that it may be enforced without requiring a separate action for breach of contract. Under the French ADR legislation of 1996, once the parties have reached agreement, they may request that a Judge implement a process called *homologation* whereby executory status is conferred upon the agreement. The parties may choose not to inform a Judge in which case the agreement will not be *res judicata.* This contrasts with the mediation rules of the NMI where the mediator is obliged to record any agreement reached as an arbitr award under the Netherlands Civil Code.

Confidentiality

Private meetings with the mediator are considered *privileged and confidential* in many jurisdictions, so the parties are free to confide in the mediator about the strengths and weaknesses of their cases and to disclose information not communicated in joint session. Thus, as part of the caucus phase, the mediator must make clear what information he or she would like to divulge to the other side and how that information will be conveyed.

The parties may wish to execute confidentiality agreements prior to mediation. The extent to which these are effective and will ensure privilege in legal proceedings will depend on the local law. Some dispute resolution organisations have sample confidentiality agreements that parties may use for this purpose. Parties can adopt these agreements or amend them. They cover issues such as assuring confidentiality of conversations between parties, prohibiting transcription of proceedings, requiring that all documents be returned to the originating party and prohibiting the mediator from serving as a witness, consultant, expert or arbitrato in any action related to the matter. All parties, lawyers, mediators, and others privy to the mediation should agree in writing to any confidentiality rules.

In some jurisdictions it may not be possible to protect everything disclosed during a mediation from subsequent disclosure in court proceedings. Information used during a mediation can also become public if, for example, the information is subpoenaed by a third party in unrelated legal proceedings. In rare instances in the USA mediators have been compelled to disclose information from a mediation when the facts have been deemed to involve overriding public interest or health and safety. Communications can also be disclosed if the parties and the neutral agree in writing to allow disclosure or the communications have already been made public.

Finally, in spite of the importance placed on confidentiality, experts caution parties not to stipulate confidentiality terms that are so

broad and restrictive that, for example, they prevent disclosure of an agreement in subsequent civil proceedings. Such agreements may make it very difficult for a party to take action later to get the mediation settlement enforced or changed.

2.2 NEGOTIATION, FACILITATION, CONCILIATION

Negotiation

In the context of dispute resolution, negotiation is an informal process in which two or more parties seek to resolve their dispute. Despite its informality, negotiation is the means through which most commercial disputes are settled. The development of negotiating skills and the adoption of a more structured approach to negotiation is increasingly becoming viewed as of importance to business people and lawyers alike.

There are a number of theories of negotiation, notably, the "competitive" approach, in which both parties tend to take initial positions then proceed on the basis that there are limited resources available to be shared between the two parties in circumstances where more for one will mean less for the other. Alternatively, there is the "problem solving" approach, where the parties set out with objectives more akin to those of ADR processes such as mediation. Using this approach the dispute is viewed in a broad commercial context and more imaginative solutions are considered, such as one based upon a new future working relationship between the parties.

Negotiation is often also designated as a mandatory first step in multi-tiered contractual dispute resolution clauses i.e. the stage before it becomes necessary to involve a "neutral" to try to resolve the deadlock and/or to refer the matter to an adjudicative process.

Some contractual provisions require a form of "structured" negotiation in which they specify when the negotiations are to take place and how many meetings are to be held before it is accepted that there is an impasse. The clause may also specify who must attend and what information the parties will exchange in advance. Typically, mediation and/or arbitration will be specified in the event that the structured negotiation fails.

Facilitation

When a neutral third party enters the discussions to help the parties work toward consensus, the process is facilitated negotiation or facilitation. The "facilitator" does not concentrate on the substance of the issues for discussion. Rather, he or she helps the parties focus on the salient issues to improve their chances of reaching an agreement.

A facilitator may have much of the role of a mediator, but a facilitator is not necessarily trained to serve as a neutral. Additionally, negotiation, whether facilitated or non-facilitated, is far more of an *ad hoc*, informal process than mediation in which the parties, with the mediator's help, prepare and sign a written agreement to mediate, establish rules to govern the procedure and participate in a series of private caucuses and joint sessions.

Conciliation

The term "conciliation" is often used to describe a process sim to facilitated negotiation in that it involves bringing a neutral th party to the negotiation process, but it includes some key differen Additionally, the aims of conciliation differ depending on whe it is conducted in a private setting or a court setting.

When conciliation is conducted in a private setting, a neutral, ca a conciliator, helps parties reconcile differences by performing role of a go-between, communicating each side's position settlement options to the other. When conciliation is part court-based dispute resolution process, as in Switzerland example, a retired judge or neutral appointed by the court hol "conciliation conference" with litigants and their lawyers earl the litigation process. The parties may be required to sub summaries of their cases and lists of witnesses and evidenc advance of the conference to educate the neutral conciliator. conciliator's mission is not always simply to offer settlen assistance. He or she can also act as a litigation adviser, answe questions about discovery and other issues, helping each p complete the steps necessary to prepare the case for trial if atter to settle are unsuccessful.

2.3 MINI-TRIAL

What is a Mini-trial?

In a mini-trial the parties' cases are argued before a panel of se decision-makers, comprising a senior executive from each com or organisation involved in the dispute. A neutral is also somet appointed to chair and facilitate proceedings. The panel listen the presentations and seeks to negotiate a settlement.

Mini-trial is a hybrid procedure, combining characteristics of consensual and adjudicative processes. Like mediation, it is volu and non-binding; the process encourages co-operation. Mini may be terminated at any time by one or both parties. As mediation it aims where possible to conclude with a "win-v business-oriented solution and to preserve working bus relationships. However, as in adversarial, adjudicative proce such as litigation and arbitration, disputants are normally repres by lawyers who vigorously argue their clients' cases.

Parties usually try mini-trial when a dispute is already contempl or they are involved in litigation. Disputants who agree to mini-trial a chance have recognised that the dispute is actually a business than a legal problem, that an executive panel may be to expedite a settlement and that it is in their best interests to time and money that would otherwise be spent on litigation a restore business relations.

The number of mini-trials that have taken place is small com to other dispute resolution procedures, particularly arbitratio mediation, and outside the USA the process is rarely us present. It has, however, been introduced in Europe by the Z Chamber of Commerce and by the Netherlands Arbitr Institute, while in England courts are encouraged to facilitate trials. Nevertheless, mini-trials are seldom seen and this is po due to a combination of factors, including the fact that the pr is relatively new, that it is likely to be more expensive mediation, that lawyers and corporate executives are requir participate, and perhaps most importantly, the fact that min

does not lend itself to such a wide range of disputes as mediation or arbitration.

Who Should Use Mini-trial?

Whilst mini-trial is a relatively speedy process, usually taking one or two days, the dispute must be of sufficient gravity to justify the expense of the process and the involvement of high-level executives. Thus, mini-trial is not usually suited to disputes between small companies or private individuals or for disputes over small amounts of money.

Corporations and other large entities also tend to be better able than small companies to provide the panel with high-level executives who are sufficiently distanced from the dispute. In addition, companies and organisations that have working relationships are often motivated to abandon high-stakes litigation and reach a settlement. The mini-trial process, with its reliance on business-oriented decision-makers, is also well suited to legal disputes that can be viewed as business problems. It is not best suited to cases that revolve around pure legal issues, or that seek to test a point of law or set a legal precedent.

A mini-trial is often usefully employed after negotiations have broken down, mediation has been tried or rejected, and the parties already have a considerable investment in pending litigation, but are willing to try a structured, but non-binding, way to expedite a settlement.

The list of potential users of mini-trial may not be as large or varied as that for mediation and arbitration but the process has been used successfully in the USA by an impressive list of major corporations and government agencies. Mini-trial has also been used successfully in a number of large international business disputes. The process is also slowly but surely gaining favour in the global business arena, where companies are often reluctant to try cases in foreign courts.

The Decision to Use Mini-trial

The vast majority of arbitrations and many mediations occur as a result of *pre-dispute* clauses in commercial contracts to the effect that, in the event of a dispute, mediation and/or arbitration will be used. By contrast, most mini-trials in the USA are proposed and entered into after parties have begun or completed discovery for litigation and have decided that the costs of pursuing litigation outweigh the likely benefits.

If the case is already in litigation when the parties decide to attempt a mini-trial, they may consider seeking a stay of the action. Then they must draw up a mini-trial agreement. The agreement should be dispute-specific. Dispute resolution organisations such as the AAA, CPR and CEDR have sample agreements that parties can use or tailor to their needs. Parties may consult dispute resolution organisations for sample agreements and suggested model procedures even if they choose not to use a neutral facilitator during the process.

Agreements can be quite simple and can include any of the following provisions:

- The site and date of the mini-trial
- An agenda for the hearing
- A stipulation that either side may terminate the mini-trial at any time
- A stipulation that the proceedings are strictly confidential and inadmissible in any other litigation or dispute resolution proceeding
- The amount and type of discovery permitted
- A timetable for completing discovery
- The names of the executives who will serve on the panel, or the rank of the officers who will be asked to serve on the panel
- Whether technical or other experts will be used as advisers
- The name of the neutral who will guide the proceedings, or the desired selection process and qualifications for a neutral
- The role of the neutral during the proceedings and during negotiations
- The costs involved in the mini-trial and who will cover the costs, or how the costs will be divided
- What steps the parties will take should negotiations fail.

The Neutral

The use of a neutral is a matter of choice for the parties in the dispute. However, a neutral who is trained and experienced in the workings of the process can improve the chances of success.

If parties choose to use the services of a neutral, that person's role should be spelled out in the mini-trial agreement. The parties can use the neutral simply as an "umpire" who is knowledgeable about the subject-matter, enforces the agreed procedures and helps maintain a businesslike, co-operative atmosphere. However, a neutral may be authorised by the parties to play a more extensive role, the nature of which will influence his or her selection. Thus, if the neutral will be called upon to give opinions about how each side's case would fare in court, a lawyer, judge, or law professor may be the best choice. If the parties want a neutral who will suggest settlement options, it may be preferable to select a business person.

If the parties want a neutral whose primary role will be the activ guidance of negotiations, they should seek an experienced mediator According to rules suggested by CPR, the neutral should have no private communications during the mini-trial process with the disputants or their representatives, unless authorised to do so in the mini-trial agreement.

Mini-trial neutrals charge either *per diem* or hourly fees, plus expenses. These should be specified in the agreement. In addition a fee is usually paid to the administering organisation and there may be a rental fee for hearing space.

The Panel

The choice of the panel participants is crucial since they serve a both "judge and jury". Usually one senior executive from eacl organisation is selected to serve on the panel, possibly assisted b

technical, financial, or other experts, if the parties so agree. It is suggested that panel members have equal rank and stature within their respective organisations. In addition, they should have:

- No personal involvement in the dispute
- Strong negotiating skills
- Full authority to settle the dispute (when a settlement requires the approval of another body, as is likely the case with a government agency, this type of limitation on the authority of the panel member to settle should be disclosed at the outset).

The Process

The mini-trial hearing is often referred to as an "information exchange" because it revolves around the lawyer presentations to the panel.

The job of each party's lawyer is to exchange any required documents and case summaries with the other side, present his or her client's case to the panel, call witnesses and present a closing summary. The case presentation must be a concise, well-organised, "best case" presentation that condenses commercial arguments and evidence into brief, convincing statements; it can also include the lawyer's opinions, observations and conclusions.

The panel and the neutral may ask questions at any time during the lawyer's presentations. Depending on the specifics of the mini-trial agreement, the presentations may be followed by rebuttals, evidence of witnesses or experts and summaries by both sides. It is important to deliver a strong summation that pulls together the facts and strengths of the case in an easy-to-follow format.

Lawyers play a central role in the process, but the settlement is out of their hands. At the conclusion of the lawyers' presentations, the executive panel goes immediately into negotiation and the neutral (if one has been appointed) may also serve as a mediator in these negotiations. If negotiations (with or without the neutral) do not succeed in producing a settlement that both sides will accept, the panel may take a break of a day or more, and then resume negotiations, or if litigation is pending the parties may opt to return to court.

2.4 FACT-FINDING

What is Fact-Finding?

Fact-finding is a process used in an endeavour to achieve a settlement when a negotiation has reached an impasse. It is a stopgap attempt to resolve differences before the parties resort to arbitration, litigation or, in the case of collective bargaining, a strike.

The Decision to Use Fact-Finding

Fact-finding is used principally to resolve collective bargaining disputes between trade unions and management in the USA. However, it is sometimes adapted to other types of disputes. Parties in a negotiation who find themselves unable to resolve some or all of the issues on the table may voluntarily invite an independent "fact-finder" into the process to assist their effort to reach agreement.

The Process

When parties elect (or are ordered) to use fact-finding, a ne fact-finder:

- Educates himself or herself about the disagreement information supplied by the parties in the dispute
- Decides whether or not an independent investigation is nece
- Determines the causes of the disagreement
- Analyses both sides' positions
- Presents findings and recommended solutions to the parti

The fact-finder's aim, similar to that of a mediator, is to hel parties reach a resolution. However, he or she does so by sugg solutions, not by becoming actively involved in the negotiatio

All the fact-finder's conclusions and recommendations are binding; they may be rejected by either side. However, they m incorporated into the parties' continuing negotiations, and help to pave the way to an agreement.

3.1 MED-ARB

What is Med-Arb?

Med-arb is a two-step dispute resolution process involving mediation and arbitration. In med-arb, parties try to resolve differences through mediation. However, if mediation fa resolve some or all of the areas of dispute, the remaining issu automatically submitted to binding arbitration. In its trad form, med-arb uses a neutral who must be skilled in procedures, in order to guide parties through the mediation and to preside over the arbitration and render a final, b decision. The final result in a med-arb combines any terms in the mediation phase with the award in the arbitral phase.

The parties usually enter into the process voluntarily, alt some jurisdictions require med-arb in certain cases.

Med-arb arguably offers parties the best of both worlds opportunity to take control of the dispute resolution proce to design their own agreement through mediation, wi assurance that, if they do not resolve the dispute themsel arbitrator will do it for them. By the same token, knowing t process includes mandatory, binding arbitration assures the that the case will be resolved without resort to litigation. consequently been particularly popular with large infrastr projects, where disputes inevitably arise and have to be re but the parties' key concern is for work to continue.

The Decision to Use Med-Arb

Parties must execute a written agreement before commencin arb. The agreement should cover three major areas, nam precise issues to be decided, basic procedural rules and the au granted to the med-arbitrator. Among the procedural rul agreement may specify:

- Which experts will be permitted to give evidence and/or whether the neutral will be asked to select an impartial expert
- Whether or not the issues must be decided according to specific laws
- What restrictions, if any, will be placed on the type and amount of monetary awards
- How it will be determined that the mediation has failed and how the issues to be arbitrated will be identified
- The grounds on which an arbitral award may be set aside (such as a decision based on an issue not specified in the med-arb agreement).

In addition, the agreement should name or describe (as precisely as possible) the preferred qualifications of the med-arbitrator, and the process for choosing him or her. The extent of the med-arbitrator's authority should also be agreed. The agreement should state that the neutral has the authority to perform both the mediation and arbitration functions, that the assumption of the arbitration role is either automatic on conclusion of mediation or subject to a veto, that an arbitration decision must take account of any agreement reached during the mediation phase, and whether or not the neutral may be assisted by an impartial expert in the field of the dispute. Independent dispute resolution organisations can provide lists of qualified med-arbitrators.

The Process

Like all mediations, the process begins with an initial joint meeting between the parties and the mediator. The parties may be asked to bring a statement to this first meeting describing their positions on each of the issues to be resolved. The parties (who may or may not be represented by lawyers) will use this meeting to air their views and to inform the neutral about the case.

Following the initial joint meeting, the mediator holds private caucuses (if permissible within the procedure) with each party to probe their positions further, to foster an air of conciliation and to bring the sides closer to agreement. Interspersed among the private caucuses, or following the caucuses, the mediator may call joint meetings.

If all issues are resolved in mediation, an agreement is drawn up, signed by all sides, and the process is complete. If it is determined, pursuant to the agreement, that the mediation has not resolved all issues, the disputants draw up and sign an agreement that stipulates what issues have been resolved and how they have been resolved. This partial agreement is binding throughout the arbitration process and will be part of the final settlement.

An important difference from traditional mediation is that the parties may not walk away from the process at will. If mediation fails, disputants *must* proceed to binding arbitration. This serves as a compelling incentive for parties to resolve all outstanding disputes at the mediation phase.

The arbitration phase is like traditional arbitration, except that fact-finding and the education of the neutral have already been accomplished. However, before this phase actually gets underway, the parties may reiterate the precise issues to be considered during arbitration. The med-arbitrator hears arguments on all remaining issues and renders a binding decision.

The med-arb process is by no means immune from criticism, and in some jurisdictions this even extends to criticism of its legal framework. The principal criticisms are:

- The potential denial of justice where a neutral hears from parties privately, and the possibility that parties will be inhibited from frank disclosure during mediation by their knowledge of the neutral's power to make a subsequent award if mediation fails
- That the mediation phase is never likely to be as rigorous as in a pure mediation, because if one party perceives itself (rightly or wrongly) as having a stronger case, it will refuse to settle in mediation in the hope of "winning" in the arbitration phase
- That the arbitration phase may be flawed in a manner which will render any award liable to be set aside by a court; for example, the point may be taken that, in making the award, the arbitrator has used information given in private, which the other party has had no specific opportunity to rebut.

Variations on a Theme

In keeping with the flexible nature of alternative dispute resolution techniques and the potential which this offers the parties to custom-fit a method to their needs, a number of med-arb hybrids have been developed.

(a) Med-then-Arb

This process is exactly the same as med-arb, except that different neutrals are used for the mediation and arbitration. It was developed to address concerns about a neutral being empowered to hold private discussions during mediation and going on to render a decision during arbitration. However, critics of this variation argue that skilled, experienced neutrals are able to play both roles successfully, and that this process is more expensive and time-consuming than med-arb because it involves hiring and educating two neutrals.

(b) Shadow-Mediation

This process also involves separate neutrals for the mediation and arbitration phases, but the mediator continues to observe the proceedings during the arbitration phase and remains "on call" in case either party wants to stop the process and mediate a particular issue. This too, is more expensive than med-arb because of the use of two neutrals, but it has been successfully used in the USA in complex, multi-party cases.

(c) Co-Med-Arb

This process combines aspects of mediation, shadow mediation, arbitration, and mini-trial, but avoids the need to educate the two neutrals separately about the case. The arbitrator attends the initial, joint mediation session and learns about the case with the mediator. However, the arbitrator does not participate in the caucus phase of the mediation, which remains confidential between the mediator and the disputants. As in a mini-trial, senior executives representing each company in the dispute may also attend the joint mediation session. If an arbitration is necessary, the arbitrator will return to

preside, but the mediator remains on call to mediate any issues the parties choose.

(d) Med-Rec

This process does not involve an arbitration phase. Instead, the mediator is empowered by the parties to recommend settlement options.

(e) Arb-Med

Like med-arb, this process involves only one neutral. However, it begins with an arbitration hearing, in which the neutral hears arguments from both sides, but stops short of rendering a decision. After the disputants or their counsel argue their cases before the med-arbitrator, they enter mediation. This process has seldom been used because it is more time-consuming than med-arb, and some experts believe the initial, adversarial procedure can set a tone that makes it more difficult for the parties to compromise during mediation.

3.2 PRIVATE JUDGING

What is Private Judging?

Private judging is a procedure that speeds the completion of civil trials by allowing litigants to hire their own judge to try their case. The procedure is currently allowed in about half the states in the USA, although programmes vary from state to state. In England, CEDR has also established a private judging procedure.

Some forms of private judging in the USA allow litigants, with the court's approval, to hire a lawyer or retired judge to act as a private judge who presides over the trial and renders a judgment, exercising the same power and authority as sitting trial judge. The private judge's decisions are subject to review through the appellate court system. This proceeding is sometimes nicknamed "rent-a-judge".

Other forms allow the judge more limited powers. In these, a presiding neutral is appointed by the court, and is known as a "referee", "master", "special referee" or "special master". In some cases the referee simply oversees specific litigant activities. In other cases, the referee or master actually hears arguments and testimony and takes evidence in the case. Instead of rendering a verdict, however, he or she issues a report to the court, which is reviewed by a judge who may accept it as a judgment or use it to formulate another judgment. In all cases, and in all jurisdictions that allow some form of private judging, the procedure may not be used unless both parties consent to the use of a temporary judge or referee.

Private Judges, Masters and Referees

The qualifications required of private judges and referees differ, together with the level of litigant input allowed in the choice of the neutral.

Where private judges can try cases and render verdicts, it is generally specified that they be retired judges or lawyers. Litigants are often required to choose private judges from lists of candidates provided by the court or sometimes may choose their own judges, with approval of the court. Independent dispute resolution agencies can provide litigants with lists of experienced private judges. Many courts allow independent experts who are not retired judges lawyers to serve as referees and masters.

One concern about private judging is that the thoroughness of deliberations and the quality of the decision may suffer from private judge's lack of experience. Another concern is that litigant may be at a disadvantage if the other litigant is an experier user of private judging and has used the judge in the past. E potential problems may be remedied by careful, deliberate selec of the neutral. Both parties must be diligent about interviev candidates and enquiring about qualifications, experience, and past associations that might compromise the judge's neutrality.

Who Should use Private Judging?

The process is used most often in cases involving business litigat While the process can curtail waiting time and legal costs litigants in any civil trial, it does require that both litigants agre share the hourly fees and expenses of the neutral.

Many business litigants view these upfront costs as well worth benefits of:

- Hand-picking the judge who will try their case
- Selecting a judge with expertise in their specific industr practice area
- Controlling the schedule of the hearings and trial
- Being able to present motions and argue their case befor same judge, rather than appearing before different judg occurs in some court systems.

4.1 EARLY NEUTRAL EVALUATION

What is Early Neutral Evaluation?

Early neutral evaluation (ENE) is a procedure that encourages cases to settle while they are still in the early pre-trial stage. Lav and their clients meet before a neutral third party and pr summaries of their case. The neutral asks questions and c assessments of each side's position and the likely outcome o case in court. In an effort to encourage negotiation and settle the neutral also identifies areas of common ground, helps eacl understand the case from the other's perspective, and offe mediate settlement discussions. The session is comp confidential and the neutral's recommendations are non-bindi

Even in cases that do not settle, the process often serves to na the issues in dispute, giving the parties a more realistic view of chances in court and making any subsequent litigation less expe and time-consuming. In some cases, one of the parties may el go through the ENE process as a way to benefit fror independent opinion of the strengths and weaknesses of the c

Parties can engage in ENE voluntarily or, as occurs in the their cases may be referred to ENE by the court. Sometime process of evaluation by a neutral is adopted at a later stage, during the trial itself.

The Neutral

The neutral in an ENE will usually be a lawyer or retired judge with extensive litigation experience, as well as a thorough knowledge of the subject-matter in the particular case. It is also desirable that the neutral is someone who has been trained by the court or an independent dispute resolution organisation to preside over ENE sessions, since the neutral must be able to do more than predict the likely outcome of court proceedings. The neutral's additional responsibilities are much like those of a mediator. He or she encourages the parties to try to settle and must be prepared to guide the parties towards settlement, using any combination of private caucuses and joint discussions that will help the sides find common ground. The neutral should continue the dialogue until the parties have achieved an agreement or reached a final impasse.

The Process

An ENE typically takes a few hours from start to finish and is a relatively informal process. The neutral will explain the aims and details of the procedure. The plaintiff's lawyer then makes a brief presentation of the case. The client may take part in the presentation and may even choose to deliver a summary of the evidence that would be presented in court. The defendant's lawyer will then present the case. Neither side raises objections during the presentations. When both sides are finished, the neutral asks questions and allows the disputants to question each other. The neutral will then give his or her analysis of the key issues, offer an opinion of how the case would fare in court, suggest ways to bring the sides closer together, and offer to facilitate a settlement.

Regardless of the outcome, the ENE presentations, discussions and recommendations remain confidential, even from the judge if the case is eventually tried.

4.2 OTHER COURT-ANNEXED PROCESSES

These include multi-door courthouse, settlement conferences and summary jury trial, all of which exist in the USA but fall outside the scope of this directory.

5.1 PARTNERING

What is Partnering?

Partnering is not a dispute resolution procedure but a dispute *prevention* process through which business associates redefine their working relationship in the contractual documentation so that, so far as possible, they collaborate as a team rather than work solely in what they may see as their own separate interests.

This procedure is intended to help parties involved in major projects or high-stakes business relationships to establish working relations based on open communication, teamwork, shared risks and rewards and collaborative decision-making. While the goal of a partnering relationship is that business should be conducted in a way that maximises efficiency, harmony, and quality, "partners" also recognise that disputes are inevitable in any working relationship. Thus, the partnering process also encourages agreement over innovative and efficient ways to resolve conflict. Partnering seeks to resolve such conflicts as quickly, amicably and creatively as possible so that business can continue.

The Decision to Use Partnering

A partnering contract will reflect each participant's attitude to collaboration, risk sharing, incentivisation and the nature of the project. The employer should include a statement about its commitment to the details of partnering in the initial invitation for bids or proposals but should not be over-prescriptive about the nature of the collaborative relationship when inviting tenders. In the case of construction projects, it is recommended that the parties agree to partnering before or during the bidding process.

The Agreement

The partnering agreement is generally distinct and separate from the business contract although the latter may have some collaborative aspect. The partnering agreement should state:

- What the partnering relationship hopes to achieve in terms of behavioural attitudes to matters such as improved project cost, programme and quality, teamwork, and open communications
- A time-frame and process for selecting a neutral facilitator
- A dispute resolution procedure complementary to the business contract
- A site and time-frame for the partnering "retreat" and who will participate in the retreat

The Facilitator

It is not mandatory that participants in the partnering process hire a neutral facilitator, but this is usual in the USA. Since the stakes in the business relationship or construction project are extremely high, experience has shown that someone unconnected with any party, with no personal agenda or involvement in the project or relationship, is usually the best person to help build an atmosphere of trust and co-operation.

Independent dispute resolution organisations can provide lists of qualified, experienced and neutral facilitators. Like other neutrals, it is incumbent upon the facilitator to disclose any conflict of interest or prior relationship that might compromise his or her neutrality.

In addition to offering independence and neutrality, the facilitator should be an expert in group dynamics and team building, and should have knowledge of the industry involved. Therefore, in a construction project, he or she should understand the construction industry whereas in a commercial contract the facilitator should ideally have business experience.

Like a mediator, the facilitator should not express opinions on the issues being discussed or suggest solutions. He or she is there to promote respect, trust and innovative thinking so that the participants themselves can take decisions that are in the common interests of the team and that promote the goals of the project.

The Retreat

The nature of the partnering relationship should be discussed and is often agreed during the tender, evaluation and negotiation period. In addition the parties can make use of a retreat which will typically commence where a bid is being discussed but before any ground is

broken on the project and before the business contract is finally agreed.

All the parties whose decisions will impact upon the pending contractual relationship or project gather off-site, for one or more days, to explore all aspects of the relationship or project. The facilitator, if involved at this early stage, helps to ensure that this discussion is as thorough, open, and honest as possible, so that the parties emerge from the retreat having aired and agreed on all key issues and know exactly how they will support each other's efforts. The participants should emerge from the retreat as a team.

In this initial phase the facilitator also identifies his or her credentials and role in the process, explains the purpose and goals of the retreat and sets ground rules for the discussions to follow. Ground rules may state that participants will respect each other, keep open minds, be permitted to comment on any issue, not interrupt each other, and refrain from personal attacks.

These initial exercises help the facilitator initiate the next phase of the retreat, which is wide-ranging discussion. The facilitator encourages the parties to:

- Express any concerns they may have about the project and anticipate potential problems
- Brainstorm solutions
- Discuss each phase of the project
- Consider a policy of shared risks and rewards, which tends to serve as an added incentive to keep costs in check, maintain the commitment to teamwork, and encourage innovation
- Come up with a strategy for dispute resolution that involves a clear, swift step-by-step response to problems.

All participants in the retreat should feel free to comment on any aspect of the project or relationship, even if it is not within their particular sphere of responsibility. Partnering is based on a style of interaction that breaks down traditional, strictly-defined job descriptions and responsibilities.

The Charter

Participants generally conclude the retreat by writing and signing a "Project Charter" and where a retreat takes place the Charter is typically more detailed than a more basic expression of intent in a partnering agreement. However, like a partnering agreement, the charter is distinct and separate from the business contract. The charter essentially summarises the results of the retreat, including both quantitative and qualitative issues concerning the partnering relationship, agreed responses to disputes and project/business goals. It may confirm the participants' commitment to continue open communication, allow any participant to comment on any aspect of the project, air concerns immediately, respond to problems without delay and engage in joint problem-solving. It usually affirms a commitment to try dispute resolution methods that can be tailored to specific disputes and that allow all sides to avoid litigation. Project/business goals can include commitments to meet deadlines, stay on budget, and maximise savings, safety and quality. The charter concludes with a plan to monitor the partnering relationship on an ongoing basis.

Monitoring the Relationship

At periodic intervals during a project, or during the currency business relationship, a team representing the principal pl should meet to assess how things are going, to keep communication lines open and to continue to mini opportunities for conflict. The team can also make use of evalu reports to help gather feedback on the dynamics of the wo relationship and on the progress of the work. This reflect principle that the partnering relationship requires contin nurturing and monitoring to ensure that the aims of the proje business relationship are being met, that parties do not reve typical adversarial behaviour and that there is a forum in v participants can suggest ways to improve the relationship.

The facilitator can play an important role in this ongoing evalu process. He or she is familiar with the relationship betwee parties and the business at hand and can continue to lend imp guidance.

Partnering in the United Kingdom and Europe

Partnering has now evolved in Europe and particularly in th in various forms, such as "extended arm contracting". The also forms of partnering now used in Europe which are sim the partnering arrangements common in the USA. In all case crucial factors in any successful partnering arrangement app be getting the right people in place, the resolution of any pro arising as a team and the acceptance of a general duty to act in faith. As with partnering in the USA, the relationship be contractor and client will be long-term and the concept i suited to large organisations or government entities.

Current legislation in the UK has not specifically add partnering but there has been support for the principles underlie the partnering concept in the Latham Report, the I Finance Initiative and the Housing Grants, Constructio Regeneration Act 1996 (the HGCR Act). It is likely, therefo the use of partnering in the UK will increase.

Extended arm contracts are those where, following a comp tendering process, a contractor will be approved initially to d feasibility studies for client approval (usually carried out a and then to supervise and oversee their subsequent implemer The project in question will be divided up into a number of packages which are then let by the contractor to a se subcontractors. The client will retain ultimate control of the p usually approving not only the choice of the subcontract also the contractual basis and content of each works packa extended arm contractor remains solely responsible for the c of the contract.

Care needs to be taken, however, when using this and othe of partnering in Europe to ensure that EU public procu rules and EU competition law, are not breached (in pa Articles 85 and 86 of the EEC Treaty). Broadly speakin agreement alters or is capable of altering the normal flow or of trade, or causes or is capable of causing it to develop dif from the way it would have developed in the absence of agreement, then there will be a breach of EU law. It is argua where arrangements are limited to a single member state, no effect on intra-community trade. However, this wi question of degree in each case and in determining this qu

court will take into account the broad economic and legal context of the contract and its objectives and its consequences.

5.2 DISPUTE REVIEW BOARDS

What is a Dispute Review Board?

A dispute review board (DRB) is a panel, usually of three members who should have industry experience which performs the combined functions of project oversight, dispute prevention, and swift dispute resolution. The DRB is assembled at the start of a contract, typically a major construction project, to monitor the progress of the work from start to finish and to be "on call" at all times to mediate and help resolve any dispute, disagreement, or problem. Recommendations made by the DRB are usually, but not always, non-binding.

The concept of the DRB has been developed to ensure, so far as possible, that interruptions to the work are minimised, to make sure that small disputes stay small and are eliminated quickly and to keep more serious problems out of court or arbitration.

Who Should use a DRB?

Because of the costs involved, DRBs are best suited to large construction or business projects and tend still to be associated with the construction industry. However, there is potential for their use in other commercial contracts when the right conditions are present. These typically include:

- A contract which is likely to be dispute-prone
- A contract performance time of one year or more, involving multiple payments
- Contractual terms containing milestones or other components of performance
- Potential for unresolved disputes, which can disrupt relationships at the working and management level and which may lead to protractive and expensive litigation.

These features may be present in a variety of commercial contracts. Essential to the application of the process is a desire on the part of the contracting parties to eliminate disputes at an early stage and to be prepared to forego the usual mechanisms for resolving them, which will usually be long after they have arisen and the business relationship has been harmed.

To employ a DRB for the life of a project requires the acceptance of a shared investment by the principal participants in the project. In a construction project this will usually be the owner and the contractor. If the services of an outside dispute resolution organisation are used, the organisation is likely to charge each party an administrative fee based on the size of the project. In addition, the parties will incur fees for each of the DRB members. On many construction projects the contractor puts up the total cost of the DRB, as if it were any other project-related expense, and invoices the owner for its share, plus the contractor's mark-up.

The advantage of a DRB is that it will usually be established at the beginning of a project and that therefore its members will have the opportunity of gaining in-depth knowledge of technical and contractual issues and of observing problems on site as they arise. The costs of using a DRB over the life of a project may seem high, but against the background of the potential costs that disputes and delays can create, using a DRB can be very cost-effective for large, high-value projects.

Whilst the DRB concept is fairly novel outside the USA and some European countries, it is gaining increased global recognition (in the construction industry in particular). For example, the Hong Kong organisation, CMA, provides DRB services as part of its overall aim of assisting in the avoidance and resolution of disputes in the construction industry. In addition the World Bank's Sample Bidding Documents: Procurement of Works published in 1991 suggests the use of DRBs to resolve disputes instead of the engineer, as would be usual in FIDIC contracts.

The Decision to use a DRB

Ideally the parties involved in a project should take the decision to use a DRB before their business contract is concluded. The agreement to use the DRB should be included in the contract, along with the names of the individuals who have been chosen to serve on the board. If the parties choose to use an independent organisation to help assemble the board, that organisation should be named in the contract. The board should be assembled and ready to begin work when the project commences.

If one party feels that it may have difficulty convincing the other party to use a DRB, it can enlist the help of a dispute resolution organisation to make the proposal. The earlier the decision is made, the sooner the benefits of the DRB can be realised, although a DRB can be proposed and brought into a project at any stage.

The efficacy of the process is also usually enhanced when the principals' DRB agreement requires the participation of as many stakeholders in the project as possible. In a construction project this would mean, for example, that architects, engineers and subcontractors would be members of the team working with the DRB to keep the project on track.

The Board Members

A DRB usually has three members, one of whom serves as chairperson. The members can be chosen in one of two ways. They can all be selected and approved by the principal parties. Alternatively the owner and contractor, in the case of a construction project, may each choose one member, and those two members choose the third member, who acts as chairman. All DRB members should agree to serve for the life of the contract.

Where very large infrastructure projects are concerned more than three panellists may be needed. The Channel Tunnel project had a DRB of five persons, whilst the Hong Kong Airport involved six members plus a convenor for all the main projects awarded by the Airport Authority.

Independent dispute resolution organisations can provide lists of qualified individuals who have been specifically trained to serve on and chair DRBs. Members appointed by the parties should not be connected personally or professionally with the parties. Board members, whether chosen by an independent agency or by the parties, must be neutral and must disclose to the parties any

conflicts of interest or relationships that might compromise their neutrality.

Companies involved in smaller projects can enjoy the benefits of a DRB at a lower cost by using a dispute resolution specialist (DRS). A DRS is a trained neutral expert who single-handedly performs the same functions as a three-member board. Independent dispute resolution organisations can provide lists of people trained to serve as a DRS.

It is essential that all DRB members be experts in the field in question. The ability to broker rapid, equitable solutions to work-site problems requires a thorough knowledge of the business at hand. In addition to professional expertise, members must be adept at mediation and at promoting compromise, co-operation and creative problem-solving.

The Process

The job of the DRB consists of two main elements, namely regular meetings to monitor the progress of the project and more informally arranged sessions to address specific problems. At the outset of the project, or as soon as it is assembled, the DRB will call an initial meeting with the principal parties or their representatives. At that meeting:

- The parties and board members introduce themselves
- Board members explain their role, set up a regular meeting schedule and agree rules and procedures in consultation with the parties
- The parties discuss the project from their own perspectives
- The parties describe what parts of the project are expected to be completed by the time of the next scheduled meeting with the DRB.

The rules to be agreed at the initial meeting should deal with the type of evidence parties may bring to hearings in the event of a dispute, the types of experts permitted to give evidence at hearings, whether or not the parties may be represented by lawyers, the fact that the DRB's rulings will be non-binding and the fact that the DRB's written opinions will be admissible in any subsequent dispute resolution. There is usually no provision for discovery, but a claimant may be required to submit full documentary evidence to back up its claim.

At all subsequent meetings the DRB and the parties, or their representatives, review the work accomplished, discuss any problems that have occurred and how they were resolved, and the DRB helps the parties develop satisfactory responses to any unresolved conflicts or questions. The DRB members may also tour the work-site. The aim is to keep work moving, to address every issue, no matter how small, and to keep costs, schedules, and relationships under control.

Any party that cannot resolve a dispute by direct negotiation or by consultation with the DRB at a regularly scheduled meeting may request a hearing. Dispute resolution hearings do not replace or postpone the DRB's regular meetings. The party requesting the hearing submits a written summary of the problem to the board with any supporting evidence or documentation. The other participants in the dispute have a specific amount of ti determined by the board, to respond with their written stateme and evidence.

After all statements are submitted the DRB schedules a hearin which both sides are given opportunities to explain their perspecti on the dispute, present any additional evidence and introd evidence from any experts or witnesses who are directly invol in the project. DRB members ask questions and allow discuss of the issues to continue until all participants in the dispute satisfied that they have had ample opportunity to air their vie DRB hearings are informal. However, the participants in the disp may be represented by lawyers, unless they have agreed in adva not to do so.

Following the hearing and a discussion period, the DRB delibera privately and issues a written recommendation for a settlement DRB's decision is not binding. It may be accepted by the part used by the parties as a basis on which to renegotiate anot settlement, or rejected outright. If the parties choose to pur another binding or non-binding dispute resolution method, DRB's recommendations may be used as evidence during th proceedings. However, the DRB should make every attempt keep disputes contained and to help the parties arrive at their o amicable, creative solutions.

5.3 ADJUDICATION

What is Adjudication?

Adjudication is a dispute resolution process providing a spe decision by an impartial person which is not normally binding. I usually a fairly informal process and can be a useful method of e resolution of a dispute.

As a model of first tier dispute resolution it is becoming increasin common, particularly in the construction industry. Examples adjudication can be seen in several forms in certain of construction industry standard forms, for example, in Engineering and Construction Contract and in the FIDIC "Ora Book" (Conditions of Contract for Design - Build and Turnkey)

In the United Kingdom, the HGCR Act has introduced a statut right for both parties to a contract to refer any dispute adjudication in many construction contracts.

Who Should use Adjudication?

Because of the summary nature of the procedure for resolution a dispute by adjudication, the process is best suited to small dispu or disputes arising on projects of relatively low value where benefit of having a speedy decision to enable works to contir outweighs the need for a more detailed analysis of the parties' le positions.

Although the HGCR Act identifies various types of contract which its provisions will not apply, there is no limitation in ter of the size of project. The statutory adjudication period of 28 d is, however, unlikely to be sufficient for the satisfactory resoluti of complex disputes. In such cases, although there will be a statut right to refer the dispute to adjudication throughout the proje the parties may agree that the dispute may better be referred arbitration or litigation.

The Decision to use Adjudication

In cases where it is not imposed by statute, parties should decide whether or not they wish to use adjudication in advance of entering into a contract. The contract should then contain suitable provisions, including the adjudication procedure and the identity of the proposed adjudicator. Where the contract is one to which the HGCR Act applies, detailed consideration of the provisions will be required and conditions should be incorporated into each contract appropriate to the project in question. It is impossible to contract out of the adjudication scheme introduced by the Act, although the parties are not obliged to refer a dispute to adjudication.

Who will be the Adjudicator?

The parties may choose whoever they wish to be the adjudicator, and may even specify a particular adjudicator in the contract, although this may be unwise since that person may not be available at the time a dispute is referred.

The adjudicator should have industry experience. In construction contracts, for example, adjudicators should ideally be construction professionals (not necessarily lawyers) with considerable experience of the resolution of disputes. This is especially important given that disputes under the HGCR Act should be resolved by the adjudicator within 28 days of his appointment. Several organisations, such as, the Institution of Civil Engineers and Official Referees Solicitors Association (ORSA) have set up training programmes for adjudicators.

The Process

The adjudication procedure will be as agreed between the parties when entering into the contract. It should be simple and speedy.

The HGCR Act sets out certain mandatory provisions which must be included in all construction contracts to which the Act applies. If they are not included then the procedures set out in the Scheme for Construction Contracts (SCC) will apply. These will automatically be deemed part of the contract if the parties fail to incorporate adjudication provisions into it.

It is important that parties include adequate provision relating to adjudication in their construction contracts to which the Act applies, otherwise they may have procedures imposed on them by the SCC which may be unwelcome. Several organisations have published procedures for adjudication, such as ORSA, CEDR and CIMAR.

Section 108 sets out the basic right for any party to a contract to which the HGCR Act applies to refer a dispute to adjudication at any time. The contract must provide a timetable with the object of securing the appointment of the adjudicator and the referral of the dispute to him or her within 7 days of the notice. The contract must require the adjudicator to reach a decision within 28 days of the referral, with only limited possibilities for extending this period. The adjudicator must be required to act impartially and must be able to take the initiative in ascertaining the facts and law. The adjudicator's decision will be binding until the dispute is finally determined by legal proceedings, by arbitration or by agreement. The parties may agree to accept the decision of the adjudicator as finally determining the dispute. The SCC goes further and provides that the parties shall comply with the decision until the dispute is finally determined in any of the ways mentioned above and the adjudicator may order any of the parties to comply peremptorily with the decision or any part of it.

In practice, there seems to have been a degree of reluctance to refer disputes to arbitration or litigation following adjudication. Arbitration clauses in some construction contracts preclude the initiation of arbitration proceedings until after practical completion of the work contracted to be carried out. Adjudication, on the other hand, may resolve a dispute at any time during the project, and the prospect of further costs and time spent in legal proceedings acts as a real disincentive to the pursuit of further redress.

One of the main criticisms from the construction industry of the new adjudication procedures is that the time limits are very tight. Practically speaking, these time limits will lead to a necessity for speedy analysis of disputes and maintenance of adequate procedures and records to avoid the possibility of ambush by a referring party.

5.4 FILTERING OF DISPUTES

In large construction projects involving perhaps hundreds of contracts and sub-contracts for materials, design and construction management, there is considerable potential for dispute and disruption. With the huge capital investment which these projects require, it is essential that any disputes are resolved as quickly and as amicably as possible, whilst allowing the work to continue. In order for this to be possible it is highly desirable that ADR clauses should be written into the contracts. However, recourse to a single means of dispute resolution such as mediation may be inadequate in preventing delays to the project. Systems have therefore been devised which allow for parties to pass through progressively more demanding stages of ADR, in order to filter out claims before reaching the finality of arbitration or litigation.

Clauses which provide for such a filtering process have been included in the UK government's private finance initiative contracts and were used in both the Hong Kong Airport Core Programme and the Boston Central Artery/Tunnel Project, both of which are among the largest construction projects in the world. In the Hong Kong project all the government's contracts provided for a four-tier process whereby disputes would initially be submitted to a decision by an appointed engineer, but if his verdict was unacceptable they would go to mediation administered by HKIAC. Where this also proved to be unsuccessful the mediator would prepare a report and the parties would be entitled to request a DRB, again administered by HKIAC. The final stage of the process was arbitration. For the Boston Central Artery/Tunnel Project, an even more complex five-tier filter was designed, consisting in ascending order of partnering, the use of an authorised representative, a DRB and then mediation, before finally reaching arbitration or litigation.

Clearly these multi-level schemes have the potential to lead to considerable delay and extra cost but, if the process works effectively, the vast majority of disputes will be filtered out at the early stages with the minimal amount of disruption to the progress of the project.