3. Other Alternative Dispute Resolution Mechanisms(11)

1-32 Essentially there are two forms of dispute resolution: one which imposes a decision and determines issues definitively, *e.g.* expert determinations and baseball arbitrations; the other provides the basis to help the parties reach an "9"agreed solution or settlement, *i.e.* negotiation, mediation/conciliation, mini-trial, executive appraisal, neutral listener, early neutral or expert evaluation.

3.1. Definitive Determination

1-33 There are various mechanisms to achieve a final determination of the dispute by the intervention of a third party who imposes a decision. Once the mechanism is agreed upon neither party can unilaterally withdraw from the process. The parties can still settle the dispute themselves but if not, then a binding determination will be made which, in principle, is enforceable through the courts.

1-34 *Expert determination*:(12) This is the referral of a dispute to an independent third party to resolve by using his own expertise. It is particularly useful for resolving valuation disputes, *e.g.* intellectual property, technical issues, accounting disputes and earn-outs under company accounts. It can be cheaper and quicker than arbitration as the expert can conduct his own investigations without relying upon, or waiting for, information to be provided by the parties. A decision of an expert cannot be directly enforced in the same way as an arbitration award. There is no appeal from the decision of an expert. Unlike an arbitrator, an expert can be sued for negligence. The main difference between expert determination and arbitration is that the expert can use his own knowledge to reach his conclusions and is not required to give reasons for his decision.

1-35 In civil law systems experts are frequently retained to determine the subject matter of the contract such as the price of sale agreements. The Italian Civil Code(13) distinguishes two cases. First, if in the contract the parties do not specify that the third person should make his determination entirely upon his own discretion and the determination is clearly wrong or unfair, then the parties can appeal to the court for the expert's decision to be set aside. In these cases the party seeking to challenge the decision must prove, for instance, that the opinion of the expert is manifestly wrong or illogical. If the court decides that the determination is wrong or unfair then the court itself makes this determination. If, on the other hand, the parties specify expressly that they wish to rely totally on the discretion of the third person, and his decision is final, then the expert determination is binding as a contract and it can only be challenged on the "10"ground of bad faith of the third person. The contract is void if the third person cannot for some reason determine the subject matter of the agreement and the parties do not agree to substitute the third person.(14)

1-36 It is also generally recognised that the parties can agree an *expertise-arbitrage*(15) whereby they appoint an expert to determine technical disputes and to evaluate assets or damage.(16) The expert is empowered by the agreement reached by the parties and his decision is binding as a contract. It is doubtful that this expert's determination can be considered a binding decision even if the decision of the expert on the technical issue would settle the dispute.(17)

1-37 Parties can submit a dispute to the ICC's International Centre for Expertise to obtain an expert opinion as to contractual compliance or adjustments in performance in cases of great technical complexity.(18) This Centre, established in 1976, co-operates with several professional organisations to obtain advice on an *ad hoc* basis taking into consideration the specific characteristics of each case. The expert is empowered to make findings within the limits set by the request for expertise, after giving the parties an opportunity to make submissions. Article 8 of the ICC Rules for Expertise provides that “the findings or recommendations of the expert shall not be binding upon the parties.” Therefore the results of the technical expert will be binding only if the parties have made an express stipulation to that effect and in this case it is not clear if and how the determination of the expert can be challenged.

1-38 The ICC International Centre operates under the 2003 ICC Rules for Expertise. It deals with technical, financial or other questions calling for specialised knowledge. The expert's intervention can help the parties to resolve questions amicably or simply to establish certain facts. Recent cases concern assessing, for instance, the operational capacity of a product unit, the corrosion of materials, the financial audit of a company during a take-over and the revaluation of a contract price.(19)

1-39 *Adjudication*:(20) This involves the binding, but not necessarily final, resolution of disputes on an expedited basis. It acts as a form of interim dispute resolution, although its effect may often be to dispose of disputes without further proceedings. In the UK it is required by statute for all contracts involving the carrying out of construction operations.(21) However, it is also commonly included in contracts for construction or engineering work elsewhere, where it may also be referred to a Dispute Adjudication Board or a Dispute Review Board.(22)

1-40 The adjudicator is required to reach his decision in a specified, short period of time. Under UK statute this is only 28 days from the reference of the dispute to him, extendable only by agreement of the parties or by up to 14 days with the agreement only of the referring party. Frequently, in large infrastructure projects a time for adjudication is expressly provided for in the agreement. Critically, once the adjudicator has made his decision it is binding on the parties and is immediately enforceable. However, it cannot be enforced as an award but must be sued upon for enforcement.

1-41 Whether or not a decision is enforced, unless the contract expressly provides that the adjudicator's decision is also final, the parties may have the dispute re-heard in its entirety by whatever ultimate dispute resolution method they have chosen, whether arbitration or national courts. The ultimate tribunal is in no way bound by the adjudicator's decision and it re-hears the dispute afresh, rather than reviewing or hearing an appeal from the adjudicator's decision. If the ultimate tribunal comes to a different conclusion to the adjudicator's decision, its judgment or award will replace the decision, with money being repaid if necessary.

1-42 *Rent-a-judge or private judging*: This is a court-annexed or private ADR process. It is available where statutes or local court rules permit court referral of cases to neutral third parties, usually retired judges, for formal trials. The procedure followed by the retired judge or neutral is usually akin to that in a "12"common court trial. The decision of the neutral is referred to the competent court, and is considered to be a judgment of the court. Generally the parties' rights to appellate review and enforcement of the decision are the same as if the judgment had been entered into by a court. It is also possible where parties wish to expedite or avoid the delay of the courts. It is especially common in the United States and appropriate primarily for domestic matters.

1-43 *Baseball arbitration*: This is also known as final or last offer or pendulum arbitration. This process involves the parties narrowing the risk themselves by the claims and admissions made and it ties the hand of the arbitrators as to the extent of the awards they can make. Following its submission in a binding arbitration, each party also submits its best offer to the tribunal in a sealed envelope. The tribunal's responsibility is to choose the best offer which comes nearest to its own assessment. The arbitrators do not have to make assessments as to the correct level of damages, but rather which party is nearer to the mark, and that is the amount awarded. The effect of this procedure is to compel the parties to narrow their demands because an over-stated claim will almost certainly result in the award going to the other side. Final offer arbitration is potentially unfair unless all parties have essentially equal access to the basic facts. This technique is also known as “baseball” arbitration because it is used in the negotiation of professional athletes' contracts in the US.

3.2. Mechanisms Requiring Parties' Agreement for Resolution of Dispute

1-44 *Negotiation*: Straightforward negotiations between the parties or their advisors are always the most obvious but not the easiest way of reaching a consensus and to compromise the controversy. Negotiation is the most flexible, informal, and party-directed method; it is the closest to the parties' circumstances and control, and can be geared to each party's own concerns. Parties choose location, timing, agenda, subject matter and participants. Negotiation should normally be the first approach at resolution of any dispute. However, negotiations may fail because of previous poor relations, intransigent positions of the parties, neither party being prepared to “lose face” and the fact that a party cannot be pressured against its wishes from adopting an unreasonable position.

1-45 *Mediation/conciliation*: Mediation is a process whereby a mediator, *i.e.* a neutral third party, works with the parties to resolve their dispute by agreement, rather than imposing a solution. It is sometimes known as conciliation. Historically, and because of the slightly different methods applied in mediation and conciliation in public international law, they were perceived as different "13"processes. Consequently mediation sometimes refers to a method where a mediator has a more proactive role (evaluative mediation) and conciliation sometimes refers to a method where a conciliator has a more facilitating mediator role (facilitative mediation).

1-46 Mediation can be more effective than simple negotiations. This is because the mediator works with the parties to effect a compromise, either by suggesting grounds of agreement or forcing them to recognise weaknesses in their cases. The mediator may, if required, evaluate the merits of the parties' cases in a non-binding manner. However, the mediator cannot make a binding adjudicatory decision. The parties can obtain any remedy they wish; the only limits are on what they can agree. This differs from the position in litigation, arbitration and expert determination, where the court or tribunal is limited to remedies available at law.

1-47 *Mediation/arbitration* (med-arb):(23) This can happen where parties agree that if mediation does not result in a negotiated settlement, the dispute will be resolved by arbitration and the mediator is converted into an arbitrator. In this process, there is initially facilitative mediation (*i.e.* the mediator does not evaluate the strength of the parties' cases)

followed by binding arbitration. This is a normal situation in arbitrations in China. What is unique in this situation is that the mediator is converted into an arbitrator, in order to make a determinative decision if the mediation fails.

1-48 The idea of the same individual acting as both a mediator and then an arbitrator gives serious misgivings. In view of the confidential and prejudicial information relied on during the mediation process, it is generally considered that the mediator would be compromised to then convert himself into an arbitrator to make a decision on the merits. In these circumstances many parties would not be fully open and frank with the mediator for fear of being prejudiced at the arbitration stage.

1-49 *Mini-trial/executive appraisal*: In mini-trials, voluntary court-style procedures are adopted which involve the parties presenting a summarised version of their case (including calling evidence and making submissions) before a tribunal. The tribunal may ask questions and comment on evidence and arguments. The tribunal can be a neutral advisor who, following the presentation, "14"advises the parties on how he sees the strengths and weaknesses of their case. Where the tribunal consists of neutrals, it can render a non-binding decision, which is intended as an aid to the parties' further negotiation toward settlement.

1-50 Alternatively, the tribunal can consist of senior executives of the companies in dispute perhaps with a neutral chairman, who use the mini-trial as a springboard for settlement discussions (executive appraisal). Parties to a mini-trial may agree that the neutral advisor will not act as an arbitrator or mediator.

1-51 A mini-trial aims at facilitating a prompt and cost effective resolution of a complex litigation case concerning mixed questions of fact and law. Its goal is to keep the problem on a purely commercial basis, to narrow the area of controversy, to dispose of collateral issues, and to encourage a fair and equitable settlement.

1-52 *Neutral listener arrangements*: In this case, each party submits its best offer in settlement to a neutral third party. This “neutral listener” informs the parties whether their offers are either substantially similar or within a range which looks negotiable. With the agreement of the parties, the neutral listener may try to assist them to bridge the gap.

1-53 *Early neutral evaluation/expert evaluation/non-binding appraisal*: Parties present their cases in the early stages of a dispute to a neutral evaluator. The evaluator, following an oral presentation by each party, confidentially assesses the arguments and submissions. The assessment is not binding on the parties. No records of assessment are kept and the evaluation is considered “off the record”. The aim is to demonstrate to each party the strengths and weaknesses of its case. This is intended to help parties to settle their differences by subsequent negotiation or perhaps with an independent mediator.

1-54 All of the above mechanisms require the parties to conclude the settlement agreement between themselves. These procedures aim to bring the parties closer, to understand the respective position of the other side, and to help the parties see the weaknesses of their own case. This should, in principle, with or without the assistance of a third party, enable the parties to agree the terms for the settlement of their differences. If no agreement is possible, the parties can resort to arbitration or the courts for the determination of their dispute."15"

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1 *The Shorter Oxford English Dictionary* (3rd ed, 1969).
2 David, *Arbitration in International Trade*, 5.
3 Saunders (ed), *Words and Phrases Legally Defined* (3rd ed, Butterworths 1988), 105.
4 Halsbury's *Laws of England* (4th ed, Butterworths 1991), para 601, 332.
5 Domke, *Arbitration*, 1.
6 By contrast some national laws define arbitration agreements. See, *e.g.*, Model Law, Article 7.
7 See also, *e.g.*, AAA ICDR Rules Article 16(1); LCIA Article 14(2); NAI Arbitration Rules Article 23(2); UNCITRAL Arbitration Rules Article 15(1); WIPO Arbitration Rules Article 38(a).
8 See, *e.g.*, Belgium, Judicial Code Article 1693; Germany, ZPO section 1042; Italy, CCP Article 816; Netherlands, CCP Article 1036; Sweden, Arbitration Act section 21; Switzerland, PIL Article 182; Model Law Article 19.
9 See expert reports by Bond, Boyd, Lew and Smit in 11 *Arb Int* 231 (1995), in the case of *Esso Australia Resources Ltd and others v The Hon Sidney James Plowman, The Minister for Energy and Minerals and others*, 183 Commonwealth Law Reports 10 (1995). See also Collins, “Privacy and Confidentiality in Arbitration Proceedings”, 11 *Arb Int* 321 (1995); Neill, “Confidentiality in Arbitration”, 12 *Arb Int* 287 (1996); Fortier, “The Occasional Unwarranted Assumption of Confidentiality”, 15 *Arb Int* 131 (1999). See *also* Supreme Court of Sweden, 27 October 2000, *Bulgarian Foreign Trade Bank Limited v AI Trade Finance Inc*, 13(1) WTAM 147 (2001); *Associated Electric & Gas Insurance Services Ltd v European Reinsurance Company of Zurich* [2003] UKPC 11 (PC, 29 January 2003).
10 Section 33(1)(b). See also ICC Rules Article 24(1).
11 See generally Brown & Marriott, *ADR Principles and Practice* (2d ed, Sweet & Maxwell 1999); Bernstein, *Handbook*, 585-601; Stipanowich & Kneckell, *Commercial Arbitration*; Hoellering, “Comments on the Growing Inter-Action of Arbitration and Mediation”, in van den Berg, *ICCA Congress Series no 8*, 121-124; Mackie, Miles & Marsh, *Commercial Disputes Resolution – an ADR Practice Guide* (2nd ed, Butterworths 2000); Freeman, *Alternative Dispute Resolution* (Dartmouth 1995); Nolan-Haley, *Alternative Dispute Resolution in a Nutshell* (2d ed, West 2001); Carroll & Mackie, *International Mediation – The Art of Business Diplomacy* (Kluwer 2000); Mistelis, “ADR in England and Wales”, 13 *Am Rev Int'lArb* 167 (2002); de Boisseson, “Thoughts on the Future of ADR in Europe: A Critical Approach”, 15(4) *Arb Int*

349 (1999).
12 See Kendall, *Expert Determination* (3rd ed, Sweet & Maxwell 2001).
13 Article 1349.
14 See similarly France, NCPC Article 1592; Germany, BGB sections 317-319. See also Kröll, *Ergänzung und Anpassung von Verträgen durch Schiedsgerichte* (Haymanns 1998), 248 *et seq.*
15 *Schiedsgutachten* in German, *arbitraggio* in Italian, *bindend advies* in Dutch.
16 Fouchard Gaillard Goldman *on International Commercial Arbitration*, para 26. See also Berger, *International Economic Arbitration*, 73 *et seq.*
17 Fouchard Gaillard Goldman *on International Commercial Arbitration*, para 25.
18 Craig, Park, Paulsson, *ICC Arbitration*, 701-705.
19 <www.iccwbo.org.drs.english.Expertise/all_topics.asp>.
20 See Stevenson Chapman, *Construction Adjudication* (Jordan 1999); McInnis, *The New Engineering Contract* (Thomas Talford 2001), 545-552; Seppala, "The New FIDIC Provision for a Dispute Adjudication Board", 8 *RDAI/IBL* 967 (1997); Morris, "Adjudication as Operated on the Construction of the Dartford River Crossing (The Queen Elizabeth II Bridge)", 60 *Arbitration* 13 (1994).
21 Housing Grants, Construction and Regeneration Act 1996. See also Davies, "Section 9 of the English Arbitration Act 1996 and Section 108 of the Housing Grants, Construction and Regeneration Act 1996: A Conflict Waiting to be Exploited", 13 *Arb Int* 411 (1997).
22 See, *e.g., FIDIC Conditions of Contract for Construction* 1999 (1st ed), clause 20(4); *FIDIC Conditions of Contract for EPC/Turnkey Projects* 1999 (1st ed), clause 20(4).
23 See Hill, "MED-ARB: New Coke or Swatch?", 13 *Arb Int* 105 (1997); Motiwal, "Alternative Dispute Resolution in India", 15(2) *J Int'l Arb* 117 (1998).