

Contract and Procurement Management Lecture # 7

Disputes and Dispute Resolution

by

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Chapter Description

- **Aims**
 - This chapter has discussed the fundamental concepts of disputes in the project, their types and resolutions.
- **Expected Outcomes**
 - Understanding with the disputes and types
 - Advantages and limitations of dispute resolution techniques
 - Awareness with the dispute resolution clauses
- **Other related Information**
 - Study Guide: Project Management Body of Knowledge (PMBOK)
- **References**
 - Ashworth, Allan. Contractual procedures in the construction industry. Pearson Prentice Hall 2006.
 - Broome, Jon. Procurement routes for partnering: a practical guide. Thomas Telfor, 2002.
 - Bockrath, Joseph T. Contracts and the legal environment for engineers and architects. McGraw-Hill Science, 2000.



Content #1

- Disputes in the Project
- How to Reduce/Prevent Construction Disputes
- Dispute Resolution
- Dispute Resolution Clauses



DISPUTE IN THE PROJECT

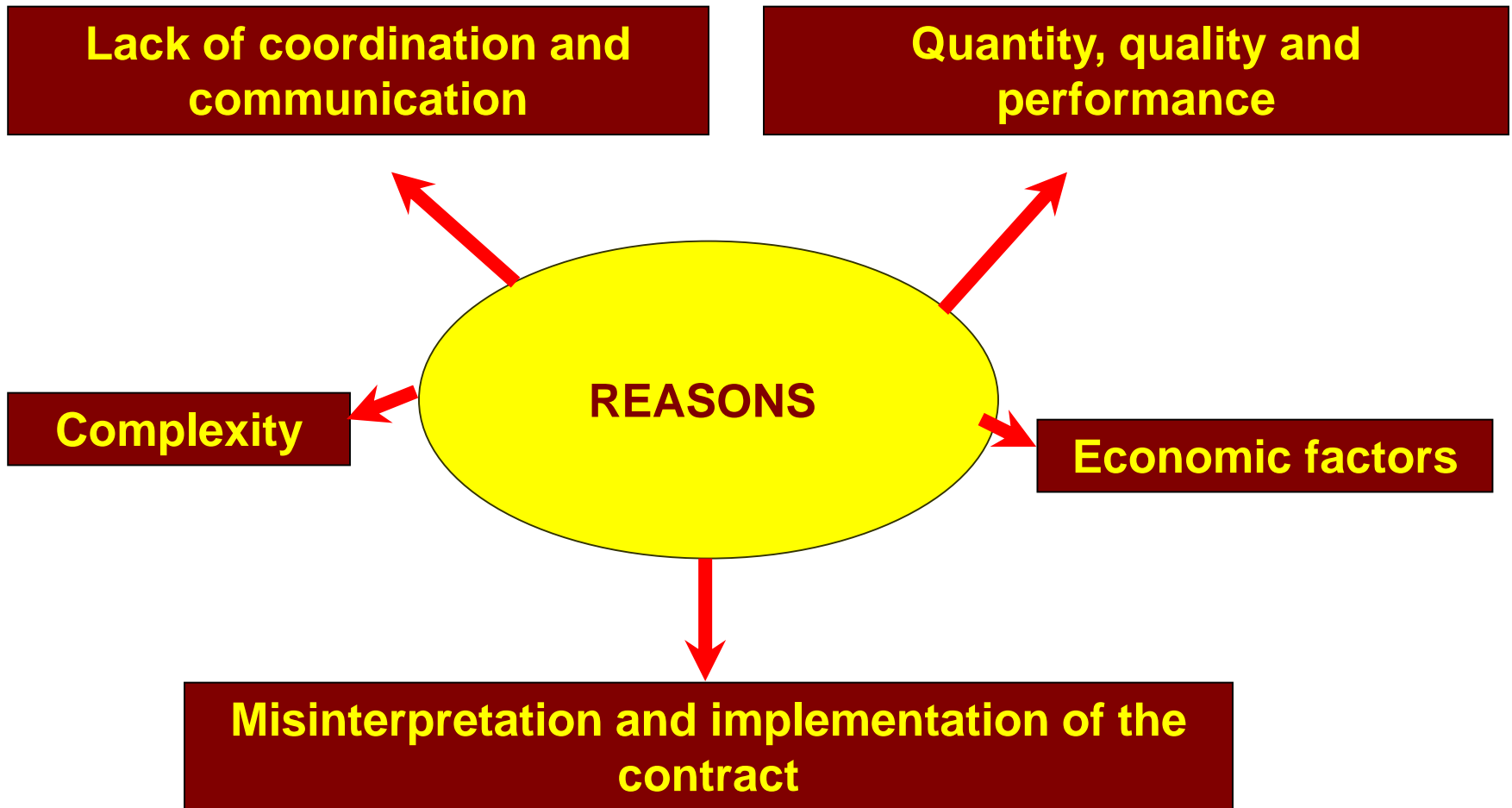
- Conflicts
 - When one party feels the fulfillment of his interests, needs etc are perceived to be incompatible with the same of the other party
- Disputes
 - when the responding party denies liability
- Common areas in the construction industry
 - Site Possession
 - Supervision
 - Payment
 - Variation
 - Time
 - Account
 - Claims
 - Etc,

DISPUTE IN THE PROJECT

Disputes – means controversy, debate, heated contention, quarrel or difference of opinion.



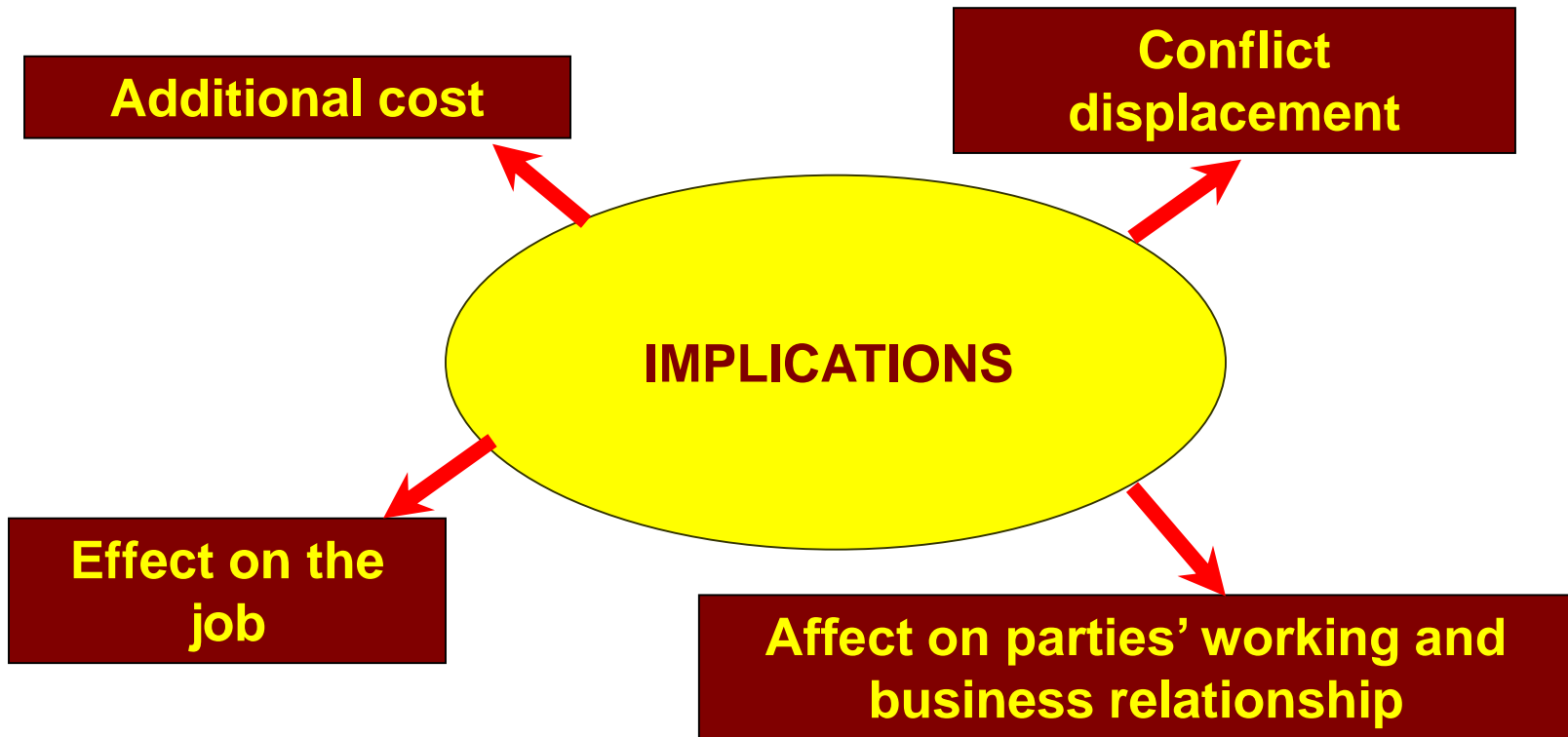
DISPUTE IN THE PROJECT



DISPUTE IN THE PROJECT

- Disputes in construction:
 - Main contractor and sub-contractor(s)
 - Main contractor and client
 - Main contractor and consultant(s)
 - Client and consultant(s)
 - Others

DISPUTE IN THE PROJECT



ISSUES FOR REDUCING DISPUTES

- Clarify responsibilities
- Proper risk allocation to those able to handle such risks
- Look for cooperative procurement systems – single point / partnering?
- Quality culture

THE IDEAL SCENARIO

- ✓ **All drawings, specifications**
- ✓ **Bills of Quantities complete;**
- ✓ **All parties appointed;**
- ✓ **All documents ready before**
- ✓ **work starts;**
- ✓ **So that everyone knows**
- ✓ **exactly what to do...**

(Sir Basil Spence, in AQUA,81)

COUNCIL OF IMPERFECTION

(a) Avoid problems

whenever possible without excessive expenditure of resources;

(b) Accommodate problems

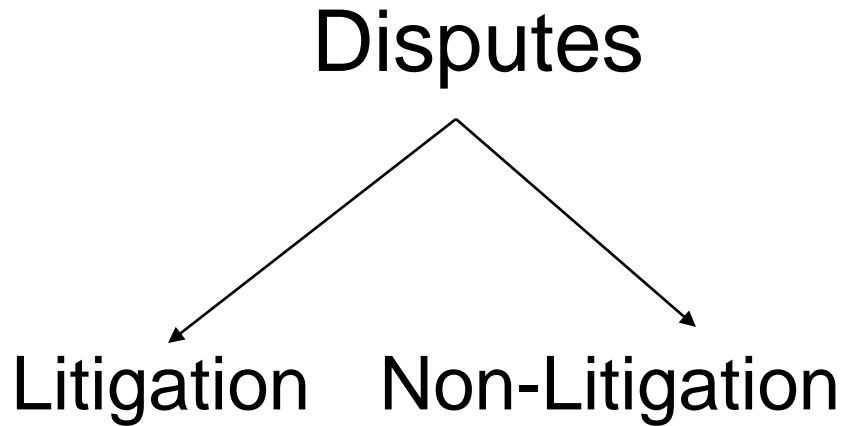
when (a) is not possible, accepting some disturbance as inevitable;

(c) Resolve any disputes

which arise out of the compromise of (b) as smoothly as possible

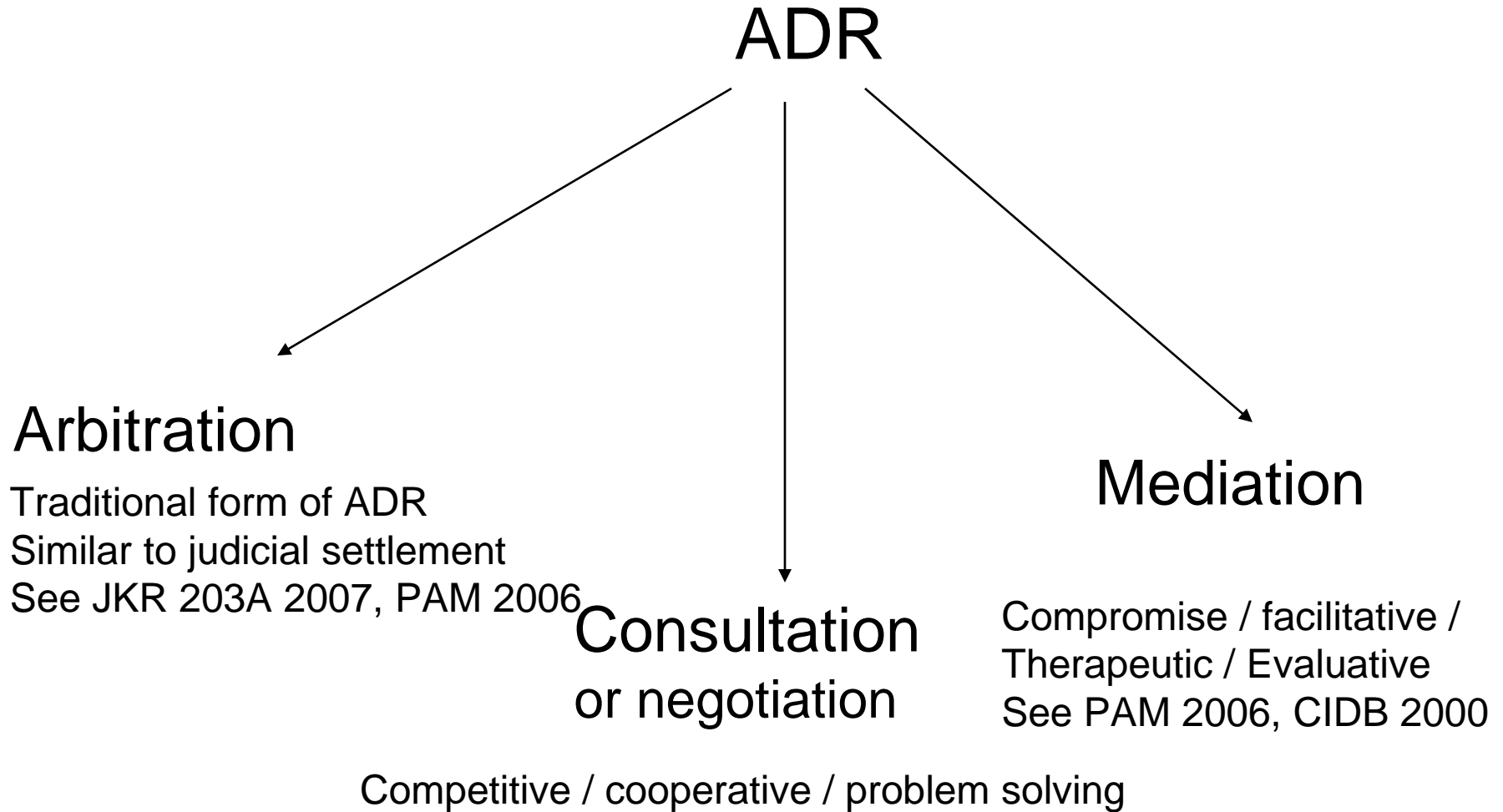
Turner & Turner (1999)

DISPUTE RESOLUTION



- Litigation
 - Judicial
 - The courts
- Non-litigation
 - Non-judicial
 - Alternative means

ALTERNATIVE DISPUTE RESOLUTION



DISPUTE RESOLUTION

DISPUTE RESOLUTION

TDR

- Litigation
- Arbitration
(with hearing)

ADR

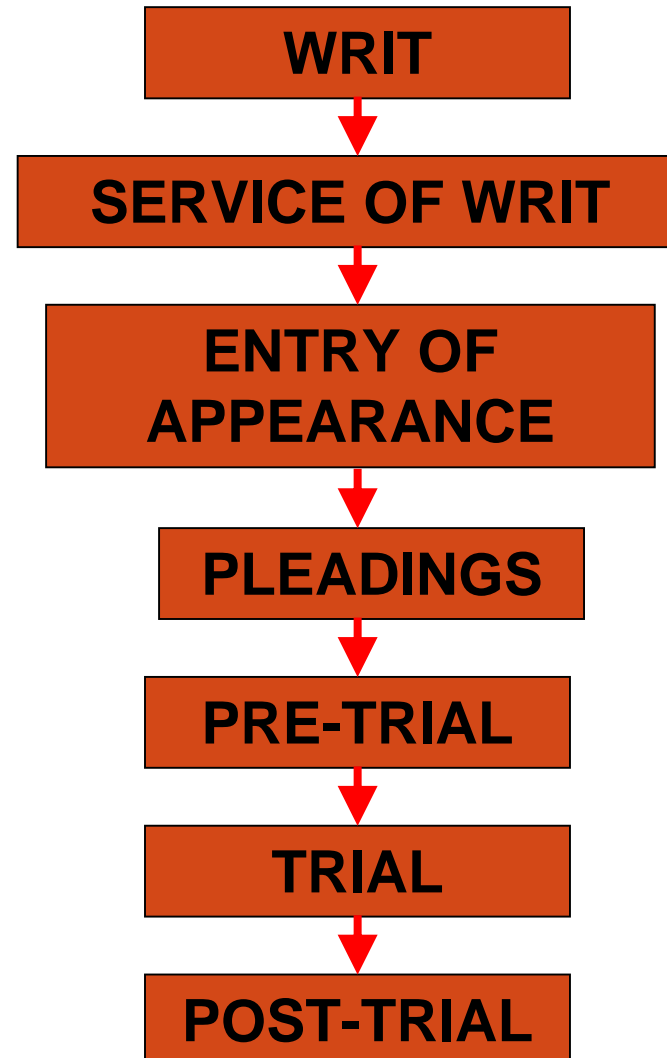
- Arbitration (without hearing)
- Conciliation / Mediation
- Negotiation
- Others

TRADITIONAL DISPUTE RESOLUTION

- Litigation

- Dispute resolution procedure govern by the statute which takes place in the courts and involves third parties and a judge. The process is carried out in public and has to follow the procedural requirements of the courts (*Ashworth, 2001; Ramus and Birchall, 1996; Singh, 2003*)
- Both disputed parties appoint/hire lawyers that will represent them in court.

LITIGATION



TRADITIONAL DISPUTE RESOLUTION

- Litigation

- Advantages:

- A legally qualified judge
- Achieve finality – secure the relief and remedy wanted
- Effective – decision is final and binding
- Judgements can be enforced through courts if necessary
- There's an appeal system

- Disadvantages:

- Adversarial in nature – damage business relationship
- Expensive and lengthy process
- Intimidated and in pressure
- Judge may be lacking detailed technical knowledge.
- Not suitable for technical issues.
- No privacy

TRADITIONAL DISPUTE RESOLUTION

Arbitration

Is the settlement of dispute by a tribunal made up of one, two or three arbitrators whose award is legally binding and enforceable by the courts

(Ref: C.H Teoh, 2000)

TRADITIONAL DISPUTE RESOLUTION

- Arbitration
 - Without hearing
 1. Submission of written statement to the other party and arbitrator
 2. Inspection by arbitrator
 3. Arbitrator may seek clarification
 4. Decision
 - With hearing
 1. After necessary inspection or clarification – oral submission to arbitrator and arbitrator may question the parties and witnesses
 2. Decision

TRADITIONAL DISPUTE RESOLUTION

- Arbitration
 - Formal pleading
 - Mirrors a court proceedings
 - Representation by lawyers is not mandatory

TRADITIONAL DISPUTE RESOLUTION

- Arbitration
 - Advantages:
 - Faster than litigation
 - Cheaper than litigation
 - Privacy
 - Flexible
 - Disadvantages:
 - Getting more procedural

For detailed procedures see PAM Arbitration Rules

TRADITIONAL DISPUTE RESOLUTION

- A various technique which are designed to help parties a negotiated settlement of their disputes
- The objective, obtain amicable solution using least:
 - Time
 - Cost
 - Resources
- Without any intervention by the court
- Generally used a independent 3rd party and non binding
- Role of 3rd party can be:
 - Bringing parties to negotiate
 - Assisting with negotiations process
 - Provide neutral assessment of situation
 - Making settlement proposals
 - Rendering the binding decision

ESSENTIAL CHARACTERISTICS OF ADR

- Consensual by both parties
- Must be agreement
- Procedure by the 3rd party must be agreed by both parties
- Solution and decision cannot impose on parties
- The dispute will resolved if everyone agrees to terms of settlement
- Conducted 'without prejudice' and confidential basis
- Not written in contract, there are no obligations to use ADR
- Is not binding on parties, if ADR not successful, they free to pursue legal remedies

ADVANTAGES OF ADR

- Speed & flexible
- Control
- Cost
- Preserving
- Outcome
- Confidential & privileged
- Provide varies options of settlement

DISADVANTAGES OF ADR

- No general disclosure of documents/evidence
- Early disclosure can be damaging
- The outcome not binding
- Prone to error and can be unfair
- Uncertainty
- Inequality
- Not appropriate:
 - When one party has no genuine interest in settlement
 - When a legal ruling/precedent from court is required
 - When one party needs a protective court order

ALTERNATIVE DISPUTE RESOLUTION

- CONCILIATION

- Neutral third party plays a role as a facilitator – no recommendation
- No private meeting
- a Conciliator must be absolutely independent of the parties to the contract, bring parties together for open discussion, do not take sides, do not make decisions or make judgement

ALTERNATIVE DISPUTE RESOLUTION

• MEDIATION

- Neutral third party listens to the representations from the disputing parties and help to formulate mutually acceptable solution to the dispute
- Private sessions (caucuses)
- *Conciliatory, not adversarial, process*
- *Win-win situation sought - Intended to achieve a lasting solution to disputes*
- *Parties appoint 3rd party to serve as a mediator*
- *Mediator can be a person with good knowledge of the business - Mediator's duty is to facilitate a solution, not to impose his decision upon the parties*
- *Provides many advantages over litigation - Relatively quicker than litigation, relatively cheaper than litigation, Private.*

For detailed procedures see PAM Mediation Rules / CIDB Mediation Rules

ADJUDICATION

- Adjudication as a concept is quite new in Malaysia.
- Parties will present disputes to a neutral individual (adjudicator) (3rd party)
- The 3rd party will give a decision which binds the parties (temporarily until finally determined by arbitration/litigation)
- Adjudicator is not a judge or arbitrator. He obtains his power from agreement between parties, where the parties agreed that the adjudicator's decision shall decide for them.
- In this area the construction industry has taken the initiative.
- The various Standard Forms in construction contracts used in Malaysia tend to have a clause that enables the Superintending Officer (S.O) to make a temporary decision binding on the parties until the works are completed.

ADJUDICATION

- Adjudication

A dispute resolution... leading to a decision by an independent person. The decision is binding... the process provides cheaper and speedy resolution... thus allowing the parties to proceed... with minimal delay and damage to relationships and the project (Riches, 2004).

START

Any type of construction dispute arises (1)

The dispute arises under the 'construction contract' (2)

Dispute Settlement Period (3)

Dispute settled?

Notice of adjudication (4)

Adjudication application (5)

Appointment of adjudicator (6)

Adjudication response (7)

Conduct of adjudication (8)

Adjudicator's decision (9)

END

ALTERNATIVE DISPUTE RESOLUTION

- Other approaches
 - Negotiation
 - Med-Arb (Hybrid Resolution)
 - Mini Trial
 - Dispute Resolution Advisor (DRA)
 - Statutory Adjudication
 - Dispute Resolution Board (DB)

ADR COMPARISON (ASHWORTH, 2001, P54)

Factor	Litigation	Arbitration	ADR
Place/conduct	Public, unilateral compulsory	Private, bilateral,	Private, bilateral
Hearing	Formal, judge	Formal, arbiter	Informal, 3 rd party
Representation	Legal	Legal	Legal if necessary
Resolution	Imposed by Judge	Imposed by arbiter	Mutual
Outcome	Win / lose	Win / lose	Satisfactory
Time / costs	High / High	Uneconomic	Economic

ADR [PAM]

- Cl 34.1, disputes under cl 30.4 (set-off) to refer to adjudication before arbitration; if after PC go to arbitration (cl34.5)
- Other disputes can also be referred to adjudication
- PAM Adjudication rules apply
- Adjudicator's decision bound up to PC (cl 34.4)...may refer to arbitration within 6 wks of the adjudicator's decision

ADR [PAM]

- Arbitration – clause 34.5 – 34.11
- Mediation – clause 35
 - Not mandatory
 - PAM Mediation rules apply

ADR [PWD]

- Officer named in the Appendix
- Arbitration – clause 65
- KLRCA rules apply

ADR CONCLUSION

- ADR is fast becoming alternative to litigation
- Provides many advantages over litigation
 - Relatively quicker than litigation
 - Relatively cheaper than litigation
 - Private
- Potential for the QSSs to play a leading role

“Avoidance is the best Option”

Conclusion of The Chapter

- **Conclusion #1**
 - Disputes are project killers. Needs to be fixed before any litigation.
- **Conclusion #2**
 - Avoid possibility of any litigation, opt ADR for better outcomes.



Author Information

Other relevant information (if any)

#author may apply your own creativity and innovation where it is appropriate