Ways to resolve disputes: similarities and contrasts

The four methods mentioned share several characteristics in common apart from being alternate ways to solve disputes outside of court. They are all characterised by being private and voluntary schemes, as well as having the potential to result in creative, win-win solutions for the disputants. Relative to most court processes, the four methods are also often faster, cheaper and involve disputing parties in controlling the process. Arbitration is singled out for being a method that can result in a final, binding and enforceable award.

Basic characteristics

Bilateral settlement negotiations are potentially the least formal of the four mentioned ADR methods. Negotiation can occur any time a dispute occurs and takes place at the behest of both parties. Negotiation can not take place if one party is unwilling to talk. Negotiation often takes place privately, but can also take place in public, for example, some WTO negotiations. Negotiations are controlled by the disputants or their agents, and third parties and generally precluded from taking part in bilateral negotiations. Depending on the situation and the strategies used by the parties, settlements can be made very quickly (as is usual in the case of two cars denting each other's bumper outside the Cross-Harbour Tunnel), or they can take longer, as in the case of determining an appropriate price per share of a company in a takeover deal. The cost involved depends on the complexity of the transaction taking place. Where negotiators involve teams of people or professionals, the cost is higher, as is the case in IPO transactions. Where negotiators are lay individuals (often the disputants themselves), the cost is lower. The amount of preparation, due diligence, and professional advice required for negotiations will also affect the cost.

Mini-trials are similar to settlement negotiations in that they are a form of facilitated business negotiation where a panel of managers or the executive team from the disputing parties hear arguments from both sides and decide on the issue with the optional assistance of a neutral advisor. Mini-trials are voluntarily undertaken. Privacy is ensured in a mini-trial because only the disputing parties are present. There is no risk of confidential information being leaked to outsiders. That said, it is important to keep in mind that a devious party may use mini-trials to gather their "opponent's" information or cause delay whilst preparing for court litigation. Timing is therefore important. Some disputants prefer to wait until pleadings have closed so both parties have obtained documents disclosed under the discovery procedure. Others prefer to start early on to avoid entrenched positions.[1] The process is also very much controlled by the parties themselves, in that the parties: allocate a timeframe; choose a time and venue; choose a neutral advisor and state his role; appoint the management panel and advocate representatives; as well as determine other issues related to the mini-trial. According to the International Institute for Conflict Prevention & Resolution (CPR), the reduced need for formal discovery of documents, frank and full information exchange, and reduced delay contribute to the reduced time needed for mini-trials with settlements occurring within 90 days. Mini-trials can be expensive as requires the engagement of an executive panel, members of which could otherwise be engaged in other profit-making activities. However, the costs may be worth the price because mini-trials are often cheaper than full-scale litigation and such a procedure becomes more cost-effective in the context of complicated business disputes involving higher stakes.

Dispute review boards (DRBs) are set up early on before litigation or arbitration with the primary objective to nip disputes in the bud before they burgeon. Forming part of a contract, especially construction contracts, dispute

[1] H. Brown & A, Marriott, "Mini-Trials and "Other ADR Forms", from *ADR Principles and Practice* (1993), p.270

resolution boards are a voluntary, and relatively low-key way to resolve disputes. DRBs are similar to mini-trials in that a panel (the Board) is involved to discuss the dispute, but the process is less formal and arises earlier.[2] Industry experts join the DRB. In the case of construction contracts, the Board would meet regularly on the construction site so Board members know the project and can spot disputes before they escalate. Disputes can be informally 'submitted' to the Board when they visit. Because the DRB decides its own procedure, control of the process is vested in the disputants. Furthermore, because there are many parties involved in a DRB, its decisions can affect multiple parties and the entire project can benefit from a consistent decision.[3] The expertise and independent determination of the DRB allows it to render decisions promptly and without delay. The costs involved in setting up and running a DRB is a comparatively small proportion of the contract price and the average cost estimated by the American Society of Engineers is about 0.17% of the project – relatively nominal compared to the amount expended in legal costs, which can reach 8 to 10%.[4] Furthermore, costs are shared between the parties, making DRBs even more attractive from a cost perspective.

Arbitration is perhaps the most formal of the four mentioned ADR methods. Although it is entered into voluntarily by the parties, usually as a term of contract, a party may, after a dispute, object to its use but remains compelled to go to arbitration because contractual arbitration clauses are enforceable by law.[5] The parties have control over the proceedings and can choose the arbitrator, the rules and place of arbitration, the powers of the arbitrator as well as applicable procedural law. The wide powers given to the parties are constrained

[2] The Hong Kong Airport Core Programme used a DRB of six members plus a convenor to cover all contracts awarded by the HK Airport Authority

[3] R.A. Shadbolt, "Resolution of Construction Disputes by Disputes Review Boards", [1999] *The International Construction Law Review* 101

[4] *ibid.* at p.106

[5] An agreement to arbitrate, if in any written form (s.2AC Arbitration Ordinance (AO)), is enforceable, see: s.3 AO and art.8 of the UNCITRAL Model Law on Commercial Arbitration as applied in Hong Kong.

by powers conferred on the arbitrator through statute.[6] Arbitration is typically the last resort in the dispute resolution process, save for court litigation. This is due to the fact that arbitration occurs late in the day and significantly more formalities (e.g. in discovery and evidentiary rules) result in high costs and lengthy proceedings.[7]

Remedies, compliance and enforcement

The four mentioned methods are all capable of delivering innovative, solutions such as increased business dealings, future discounts and other win-win solutions that traditional courts of law cannot. Dispute resolution boards can, by their presence, persuade parties to cooperate and actively reduce contentious issues from arising. The discovery and resolution of issues early on can ease cash-flow problems to various contractors. The relevant expertise of the negotiators, the executive panel in mini-trials, the industry experts in DRBs, and the arbitrators can all contribute to the speed in coming to sustainable solutions that can work for the parties in the long term.

Remedies must be discussed in terms of finality, however, and it is in this context that arbitration differs from the other three methods as it results in a final and binding arbitral award subject to very limited rights of appeal.[8] In arbitration, the parties cannot walk away at any time because arbitration clauses are enforceable by the courts.[9] Arbitral awards and even settlement agreements subsequent to arbitration are enforceable by the courts through ss.2GG and 2C of the Arbitration Ordinance respectively. The ability of Hong Kong courts to enforce international arbitration awards as well as the reciprocal enforcement of

[6] See, e.g. s2GB. The domestic provisions of the Arbitration Ordinance does not state the positive rights of the parties and so may downplay party autonomy. There have been criticisms of the legislation in this regard – see, e.g. R Morgan, The Arbitration Ordinance of Hong Kong (1997), at p.5

[7] Hong Kong acknowledges that arbitration should be speedy and without unnecessary expense – see, e.g. ss.2AA and 2GA(1)(b) of the Arbitration Ordinance. Delays are penalised in s.2GE.

[8] s.23 of the Arbitration Ordinance confers a right of appeal only where there is a question of law arising out of an award made on an arbitration agreement.

[9] See no.5 above

awards in Mainland China has made Hong Kong a popular venue for arbitration proceedings.[10] On the other hand, decisions handed down by dispute resolution boards are usually subject to be referred to arbitration, but are also temporarily binding on the parties until the contract is substantially completed. Cases have held that DRB decisions cannot be directly enforced by the courts.[11] Despite its lack of binding force, the findings of a DRB carries heavy evidential weight and are difficult to challenge in any later arbitration or litigation. Mini-trials, as a form of facilitated negotiation can result in a settlement agreement that is treated as contract and subject to breach of contract remedies if either party does not comply. Settlements are not otherwise binding or final. Parties can walk out any time during the negotiations and disputes can be referred to litigation. However, that said, because mini-trial settlements are a facilitated and informed decision of both sides to the dispute, settlement and compliance is more likely. Settlements that result from pure, un-facilitated negotiations are also subject to contractual remedies if breached. Such settlements are not final and disputes dealt with in negotiations can be referred to arbitration or litigation if the parties so wish.

Conclusion

So which one is best? There is no absolute answer because different situations call for different methods of dispute resolution. Where the parties work on the basis of goodwill and continual relationships, however, non-arbitral proceedings risk the least harm on the parties' goodwill and relationship health. DRBs, for example, rely on their members' own judgement in coming to a decision and does not impute 'blame' on either party. The overwhelming settlement rate of mini-trials is due to the parties' voluntary attitude in coming together to talk and discuss a mutually effective solution. Compliance will

[10] The Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the HKSAR, 21 June 1999, referred to by the Hong Kong International Arbitration Centre
[11] See *Cameron v John Mowlem* (1990) 25 Con LR II and Drake and *Scull Engineering v McLaughlin* and Harvey (1993) 60 BLR 102

therefore usually take place. If parties are hostile to each other, mini-trials would become a stepping stone to litigation where parties try to gather as much information on their opponent as possible. Negotiations are also premised on consensus between the parties.[12] Arbitration, however, is a different creature and disputes can be referred to it regardless of whether parties want it or not. It is usually made mandatory process by law. The arbitrator, as a neutral, experienced third party is free to judge the evidence presented before him and place as much weight as he things they deserve. Since arbitral awards are final, binding and enforceable, the voluntariness of the parties has little to do with its ultimate compliance.

It can be seen that the parties' goodwill is an essential factor to consider when choosing a resolution method for particular disputes. All the four mentioned methods have the potential to result in creative solutions and, compared to traditional litigation, are speedier and cheaper. The "judging panel" in mini-trials, arbitration and dispute resolution boards use their relevant experience to focus on the issues in dispute and render a more effective dispute resolution process. Compared to court-based litigation, parties have much control over the entire process. However, when it comes to compliance with remedies, it really depends on the parties' goodwill or, if that is non-existent, the authority initially conferred by the parties on an arbitrator panel or judge.

[12] Noted that there is a judicial tendency nowadays to order ADR if the parties agreed to it subject to ascertainable principles such as the Centre of Dispute Resolution (CEDR) rules. Reyes J of the Court of First Instance indicated in *Hyundai v Vigour* HCCT 100/2003 that the court must look at each situation and ask whether it is possible to frame objective criteria against which a party's compliance can be assessed. Reyes J considered *Cable & Wireless v IBM* [2002] All ER (D) 277 argued before the English Court of Appeal. (On appeal, it was held that the particular agreement was not enforceable for lack of certainty).