Further Options in Alternative Dispute Resolution

By Anil Changaroth

This is the third instalment in a series on alternative dispute resolution. The first instalment, "Scheme Arbitration – Efficient Dispute Resolution" can be found in the October 2013 issue of SMA News *(http://goo.gl/YCZupc). The second instalment, "Collaborative Practice – A New Alternate Dispute Resolution Method" can be found in the November 2013 issue (http://goo.gl/kpgLGF).*

Introduction

Recent articles in *SMA News* have explored alternative dispute resolution (ADR) options like mediation, documents-only arbitration and collaborative practice as more cost-effective and amicable solutions to disputes in the healthcare setting, as compared to the traditional mode of litigation.

This article will provide a basic background of other avenues of ADR, such as: neutral evaluation, expert determination, dispute resolution board and adjudication. At present, these methods of ADR are extensively utilised in industries like engineering and construction. Future articles in *SMA News* will further explore ADR modalities that could be leveraged as resolution options in healthcare disputes.

Neutral evaluation

Neutral evaluation involves a neutral third party assessing the merits of the disputing parties' respective cases, and giving a reasoned opinion based on the facts and evidence. An important aspect of this process is that it encourages parties to confront their positions systematically and objectively, at an early stage. It requires each side to identify, clarify and focus on key issues required for an objective, independent and unbiased evaluation of the merits of their cases. This provides potential litigants with the opportunity for face-to-face interaction, and figuratively, their "day in court". The neutral party provides the parties with a reality check, narrows down the issues and helps them saves costs.[1]

Traditionally, neutral evaluation is without prejudice (information brought to light during the process cannot be used in court should litigation still ensue) and non-binding. However, the trend now is for this process to be considered binding. Cases that particularly benefit from neutral evaluation include those with parties who want a neutral person with expert knowledge of the subject matter to assess the merits of their cases, where there is substantial documentary evidence, a conflict of expert evidence, and where parties are unwilling to explore settlement because they believe their cases are strong.

The Subordinate Courts' Primary Dispute Resolution Centre has been convening ADR sessions for selected civil cases (pursuant to Order 34A of the Rules of Court). It also ran a pilot programme (from 17 October 2011 to 16 April 2012) for neutral evaluation to be extended to all civil cases except non-injury motor accident claims and personal injury claims (not involving allegations of medical negligence claims).[2]

At the Singapore Mediation Centre (SMC), parties to a dispute or negotiation may request for neutral evaluation by sending an application in the prescribed form to SMC along with payment for an administrative fee.[3] The evaluation session is informal and the rules of evidence do not apply. The neutral party may conduct a site visit with the parties' consent and choose to investigate the matter further after obtaining expert advice for technical matters.

Expert determination

The Singapore Institute of Architects (SIA) launched its Expert Determination Rules and facilitated Expert Determination Procedures in March 2011 as a faster and less expensive alternative to complement the current ADR regime in Singapore. Expert determination is considered a useful and cost-effective tool for resolving certain kinds of disputes where expert technical knowledge is required. At present, it is used in specific technical engineering and construction issues or questions (such as those relating to defects or compliance with technical specifications).

Under the SIA's Expert Determination Rules, parties involved in disputes for sums between $20,000 to $7 million (involving building defects, technical specifications or drawing issues), can engage a technical expert to resolve the disputes, instead of resorting to adjudication or arbitration. Decisions should be delivered within 14 days of submission, and each party has to bear its own costs and share the cost of hiring an expert under the scheme.

Dispute resolution board

In a dispute resolution board (commonly referred to as "dispute review board", "dispute settlement panel", "dispute avoidance panel" and "dispute conciliation panel"), a group of advisors provide recommendations encouraging parties to resolve disputes before these become claims.

A dispute resolution panel well versed in that particular field is chosen, taking into account the expertise of its members. In the construction industry, such a panel proactively monitors projects and provides disputing parties an avenue for discussion with the assistance of third parties. At the same time, the panel addresses any problems head-on throughout the construction process and becomes part of the project administration and management.

The strengths of this method lie in the fact that it generally succeeds without the parties requiring recourse to law, and offers good value when compared to the potential time and administrative costs of arbitration. Parties are less inclined to send acrimonious correspondence often employed in the litigation process, which could potentially damage relationships. They are wary of the dispute resolution board's reaction to such exchanges. The parties' approaches to the dispute resolution process are thus tempered by their perception of the board's view of their behaviours, which will result in largely positive approaches as opposed to adversarial ones.

Although the dispute resolution board provides an independent assessment of the disputes and encourages parties to view disputes more objectively, it is usually used to supplement other dispute resolution mechanisms.

Adjudication

The traditional processes for enforcing the right to payment in the construction industry have been arbitration or litigation. However, in some countries, these methods have been viewed as slow, expensive and at times, inefficient as they often involve cash outflow before cash inflow.

Adjudication is described as an act of formally deciding or determining a dispute or matter via a fast-track process, which is temporarily binding on the parties pending the outcome of a full hearing of the matter in arbitration or trial. It institutes a speedy method for ensuring that interim claims are raised and payments are made promptly, while preserving the traditional roles of arbitration and litigation as the ultimate means of deciding where rights and liabilities lie.

In the UK, the Housing Grants, Construction and Regeneration Act 1996 (HGCR Act) enable claimants to secure payments quickly without incurring costs by way of legal fees in arbitration or court hearings. The adjudication process has been referred to as "an intervening provisional stage in the dispute resolution process"[4] with the central features being "the short timetable", "the scopes for inquisitorial procedure", and the "provisional nature of the decision".[5]

Within a few years after the enactment of the HGCR Act, several states in Australia and New Zealand introduced similar legislation. The New South Wales' Building and Construction Industry Security of Payment Act 1999 (NSW Act) was the first statute in Australia with respect to adjudication of progress claims in its construction industry. Similar statutes were introduced in Victoria in 2002, Queensland in 2004, and South Australia, Tasmania and Australian Capital Territory in 2009 – all referred to as "East Coast model"; and a somewhat different model in Western Australia (Construction Contracts Act 2004) and Northern Territory (Construction Contracts [Security of Payments] Act), referred to as the "West Coast model". In New Zealand, the Construction Contracts Act was enacted in 2002, based on the NSW Act.

In Singapore, the Building and Construction Industry Security of Payment Act 2004 (SOP Act) with its regulations apply to contracts in the building and

construction industry that are made in writing on or after 1 April 2005. The SOP Act is modelled in substance and structure after the NSW Act, and prescribes structure of processes relating to payment claims and payment responses which basically seek to entrench the right of a party to a progress payment. SMC is the first authorised nominating body empowered to appoint adjudicators and review adjudicators.

In Malaysia, the Construction Industry Payment and Adjudication Act 2012 was gazetted on 22 June last year and introduces an intervening provisional stage in the dispute resolution process of "pay first, argue later", with the objective of facilitating regular and timely payment. It effectively removes conditional payment provisions, deals with situations where there are no payment terms by prescribing default terms of payment, and provides a dispute resolution system that is simple and fast. The entire adjudication process takes 95 working days, subject only to extension upon consent from the parties. SMA

References

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3. *Singapore Mediation Centre. Neutral evaluation rules. Available at: http://goo.gl/fH63wm. Accessed 2 December 2013.*
4. *Macob Civil Engineering Ltd v Morrison Construction Ltd [1999] CLC 739.*
5. *Ballast Plc v The Burrell Company (Construction Management) Ltd [2001] BLR 529.*

Anil is a partner with Aequitas Law LLP, and has been in practice since 1995 after graduating as a Barrister of England and Wales (Middle Temple). Having worked as an in-house counsel and with an international law firm, his work primarily involves commercial, civil, corporate & criminal litigation and dispute resolution with a focus on construction-related adjudication and arbitration (including as an arbitrator), and represents parties in Singapore and the region. He is the Chairman of the Society of Construction Law (Singapore), and Fellow of the Chartered Institute of Arbitrators and Singapore Institute of Arbitrators (SIArb), involved with the SIArb's Scheme Arbitration committee for over four years.