Chapter 17
Contractual Use of Alternative Dispute Resolution

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Abstract Courtroom is conventionally recognised as the place for justice. Subjecting a dispute to formal processes like litigation and arbitration is thus considered as the most natural and logical by many people. However, it is virtually impossible for disputing parties who had ruined their relationships in adversarial proceedings. Evidently a better form of dispute resolution that directs problem solving shall be employed. Alternative dispute resolution (ADR) techniques have been viewed as effective means to speedily and economically resolve construction dispute. This chapter firstly reviews some of the ADR initiatives in Hong Kong. The approaches taken in several common law jurisdictions in the use of alternative dispute resolution to deal with construction disputes are compared. In addition, the voluntary mediation procedures introduced under the Civil Justice Reform in Hong Kong is outlined. Adverse cost order is used to discourage 'refusal to mediate' and 'failing to attempt to mediate'. Nonetheless, the cost sanction may make the voluntary use of mediation less voluntary.

17.1 Introduction

Courtroom is conventionally recognised as a place for justice. Subjecting a dispute to a court order is thus a natural and acceptable option to many people. Notwithstanding this legal perspective of dispute resolution, Bryan and Philips (2007) of the International Institute for Conflict Prevention and Resolution aptly reminded the importance of bringing 'business sense' back to dispute resolution. This is

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advocated in the light of the dissatisfaction of the exorbitant cost involved in litigation and arbitration as well as the draconian relationships between the disputing parties. In fact, it is virtually impossible for disputing parties who had ruined their relationships through arbitration or litigation to have further business. Evidently a better form of dispute resolution that directs problem solving shall be employed. Alternative dispute resolution (ADR) techniques have been viewed as effective means to speedily and economically resolve construction disputes. In this regard, some jurisdictions have opted to use mandatory adjudication to deal with construction, in particular payment-related disputes. Moreover, Hong Kong has opted for voluntary mediation. In his 2007–2008 Policy Address, *A New Direction for Hong Kong*, the Chief Executive of the Hong Kong Special Administrative Region (HKSAR) pledged to develop arbitration and mediation services in Hong Kong. With this policy decision, mediation will become the mainstream ADR technique to resolve civil disputes in Hong Kong. This chapter firstly reviews some of the ADR initiatives in Hong Kong. A comparison of the approaches taken in a number of common law jurisdictions to deal with construction disputes is also presented. Furthermore, voluntary mediation has also been introduced in the civil procedures rules of the High Court as part of the Civil Justice Reform launched in 2009. Adverse cost order is used to discourage 'refusal to mediate' and 'failing to attempt to mediate'.

17.2 Dispute Resolution/Settlement Provisions in Hong Kong Construction Contracts

The dispute resolution/settlement provisions of the following standard forms of construction contract are examined to identify any trend in the choice of dispute resolution method. Flow charts are used to illustrate the working process.

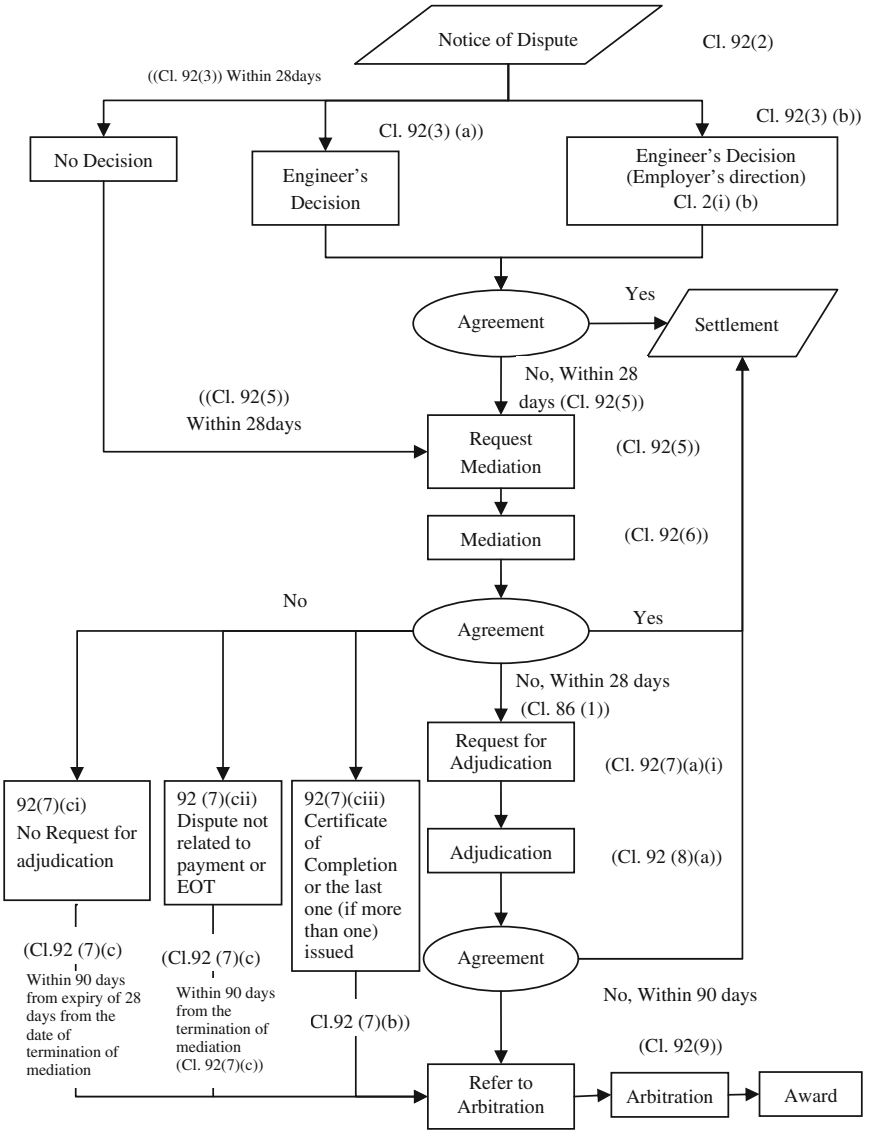
- The Government of Hong Kong, General Conditions of Contract for the Airport Core Programme Civil Engineering Works, 1992 edition.
- The Government of Hong Kong, General Conditions of Contract for Building Works, 1999 edition.
- The Agreement and Schedule of Conditions of Building Contract for use in HKSAR, 2005 edition.
- The Dispute Resolution Advisor System.

In addition, the Dispute Resolution Advisor system promoted by the Architectural Services Department of the Hong Kong Special Administration Region will also be discussed.

17.2.1 The Hong Kong Government General Conditions of Contract for Airport Core Programme (HKACP92)

The Hong Kong Government General Conditions of Contract for Airport Core Programme (HKACP92) was published in 1992 for use in the ten projects under the Airport Core Programme (ACP). The ACP is part of the Port and Airport Development Strategy (PADS). In the late 1980s, the Hong Kong Government initiated the formulation of the Metroplan to restructure the city so as to bring about a better organised, more efficient and more desirable place in which to live and work. PADS is part of this Metroplan, and is seen as the major infrastructure investment of Hong Kong. ACP consists mainly of ten infrastructure projects including the Airport at Chap Lap Kok and the associated site formation, railway and roadwork. Smooth running of these construction projects was of prime concern and disruption should be kept to the minimum, so that the airport can be opened as scheduled. The rationale behind this dispute resolution provision therefore is to encourage early resolution of any disputes. One aspect of such is the strict procedural requirement. The dispute settlement procedure is presented as a flow chart (Fig. 17.1). In principle, a three-tier dispute resolution procedure is implemented. Similar to the other Conditions of Contract discussed before, a dispute arises if either party disagrees with the decision of the supervising officer. Clause 92(5) requires the dispute to be referred to mediation. And under Clause 92(11)(a), it shall be a *condition precedent* to the commencement of any reference of a dispute to adjudication, arbitration or an action at law that the issues arising in the dispute shall have been subject of a reference under the mediation procedure. If the dispute cannot be resolved by the mediation, the dispute can then be referred to adjudication. As seen in Fig. 17.1, adjudication can be bypassed if there is no request for adjudication. This has the similar effect of the voluntary use of mediation under the HKG99 Form. Arbitration can also be commenced without going through adjudication if the dispute is not related to payment or extension of time or the certificate of completion (or the last one if more than one) has been issued. Under these circumstances, reference to arbitration can be commenced without going through the adjudication process. Under Clause 92(8)(9), the decision of the adjudicator is final and binding unless and until the dispute has been settled or an award made in a subsequent arbitration. Again arbitration can only be opened after substantial completion.

The rules for arbitration, adjudication and mediation are included in part III of the General Conditions. While mediation appears to be compulsory, however, under Clause 92(11)(b), a dispute shall be deemed to have been the subject of a reference under mediation if a period of 42 days had elapsed after the service of a request for mediation in respect of such dispute being served strictly in accordance with Clause 92(6). This seriously erodes the compulsory intent of the use of mediation.



1. ANY and ALL disputes shall be settled in accordance with Clause 92. Cl. 92(1)
2. It shall be a condition precedent to the commencement of any reference of a Dispute to adjudication, arbitration or of an action at law that the issues arising in the Dispute shall have been subject of a reference under the Mediation Procedure. Cl. 92(11)(a)
3. A dispute shall deemed to have been the subject of a reference under the Mediation Procedure if a period of 42 days has elapsed after the service of a Request for Mediation in respect of such Dispute being served strictly in accordance with Cl. 92(5) or, as the case may be, if consent to late service thereof was given in accordance with the proviso to Cl. 92(6). Cl. 92(11)(b)

Fig. 17.1 The dispute resolution procedure under the HKACP92 contract

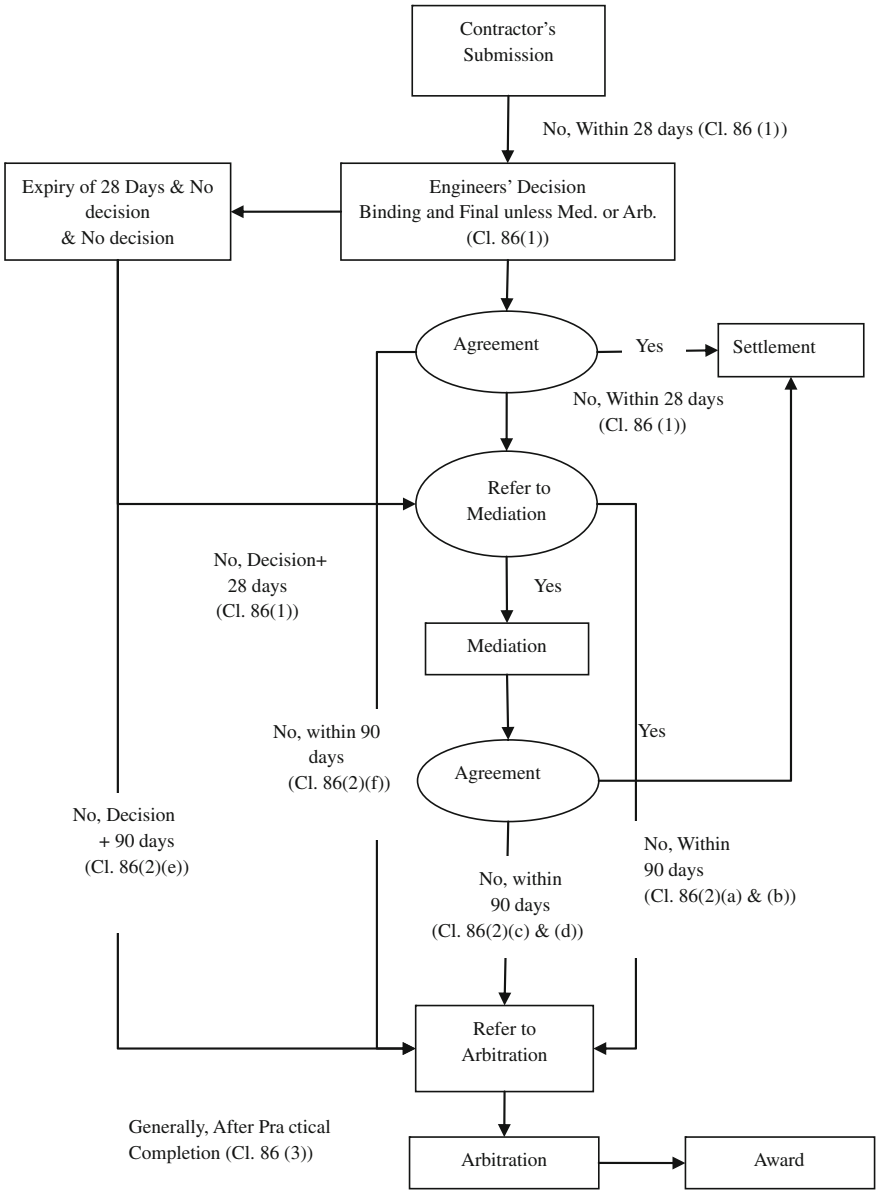


Fig. 17.2 The dispute resolution procedure under the HKG99 contract

17.2.2 The Hong Kong Government General Conditions of Contract (HKG99)

The Hong Kong Government was the pioneer in the use of alternative dispute resolution techniques in Hong Kong construction projects. The first incorporation of mediation into a standard form of contract was initiated by the Hong Kong Government in 1989. The use of mediation was further extended and is now for use in all government projects. The dispute settlement procedure under the Hong Kong Government General Conditions of Contract for both building works and civil works are the same and presented in Fig. 17.2. Mediation is availability before a dispute is referred to arbitration. Moreover, as can be noted in Fig. 17.2, it is possible to skip mediation. This may be attained if the parties refuse to use mediation. The mediation process may also be bypassed if the architect fails to make a decision within the time limit specified in the contract. The presentation in Fig. 17.2 allows easy recognition of the routes available pertinent to a particular point in time during the project duration. Typically, arbitration proceedings shall not be opened until practical completion or alleged practical completion of the works. Exceptions to this general provision proceed to arbitration immediately or the dispute is related to a question over the power of the architect to sanction remedies under forfeiture of the contract. The mediation rule for use in this contract is the Hong Kong Government Mediation rule. If arbitration is to be conducted, the Hong Kong International Arbitration Centre rule shall apply. Again arbitration will only be commenced after practical completion or alleged practical completion except where the consent of the employer and the contractor is obtained to proceed despite practical completion is not attained. The inclusion of mediation allows the introduction of a person neutral to the project to assist in resolving the dispute. One of the key success factors of mediation is the impartiality of the mediator. The suggestions, advice and/or opinions can then be more acceptable to the disputants. Although mediation is available to the parties, the use of which is totally voluntary. This is called the contractual use of mediation.

17.2.3 The Agreement and Schedule of Conditions of Building Contract for use in HKSAR, 2005 Edition (2005 Building Form)

This contract is primarily used for private building projects in Hong Kong. The contract is published jointly by the Hong Kong Institute of Architects (HKIA), the Hong Kong Institute of Construction Managers (HKICM) and the Hong Kong Institute of Surveyors (HKIS). The predecessor of this contract is the HKIA form that was modeled on the British Joint Contract Tribunal 1963 edition. The Hong Kong first ever construction industry review (CIRC 2001) called for a new conditions of contract that embraces equitable risk allocation so that claims and

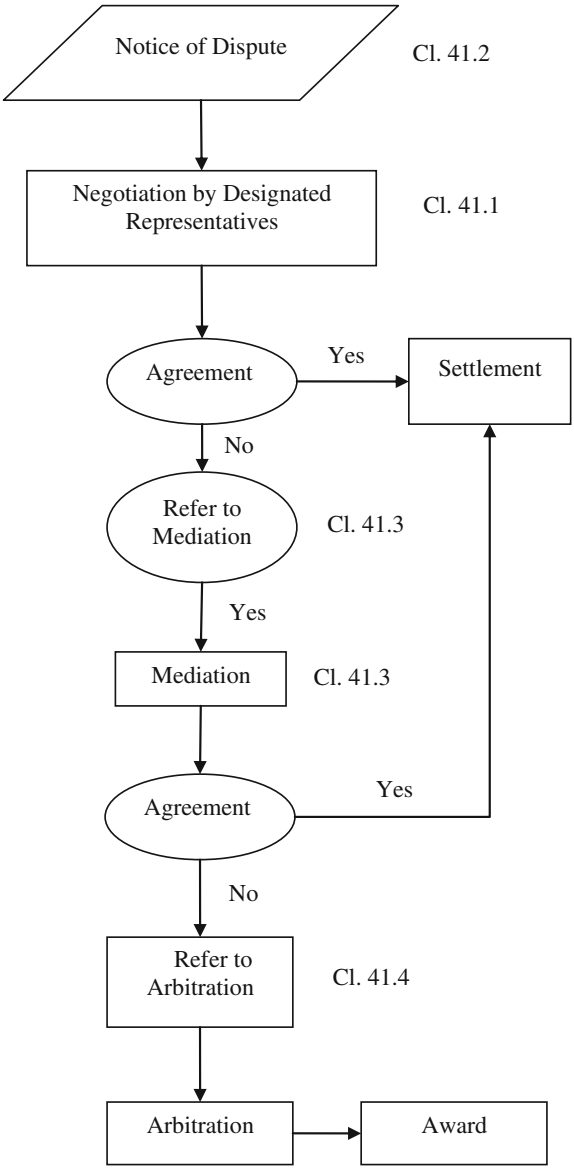


Fig. 17.3 Dispute resolution procedure under the 2005 building form

disputes can be reduced. This contract can be taken as the response to the CIRC's recommendations although its drafting had commenced long before the said recommendation. The procedure introduces the use of designated representatives who are not involved in the day-to-day administration of the contract to settle disputes that arise during the carrying out of the works. This is an admirable step in taking the settlement negotiation away from the parties directly involved in the works. Under Clause 41.2, if a dispute arises under or in connection with the contract, the

Architect shall, at the request of either party, immediately refer the dispute to the Designated Representatives who shall meet within 7 days of receipt of the Architect's notice.

If the dispute is not resolved by the Designated Representatives within 28 days, either party may refer the dispute to mediation. If the dispute is not settled by mediation within 28 days of the commencement of the mediation, either party may refer the dispute to arbitration that shall generally not commence until after Substantial Completion (Fig. 17.3).

17.3 The Dispute Resolution Advisor System

The Architectural Services Department (ASD) introduced a novel form of dispute resolution process, called the dispute resolution advisor (DRAd) system. The DRAd system was first used in the Queen Mary Hospital Extension and Renovation Project on a trial basis in 1991. The system was also used in two other hospital projects commencing in 1992 and 1993 respectively. As three projects were completed free from outstanding disputes and claims after completion. The ASD was satisfied with the system. DRAd system is a hybrid system combining elements from many positive attributes of ADR techniques (Wall 1993). This view has further been discussed in detail (Tsin 1997) claiming that the DRAd system embraces many of the features of both the preventive techniques like partnering and intervention techniques like facilitative mediation, expert determination/appraisal and mini-trial.

The principal objectives in introducing the DRAd system include (ASD 1996):

(a) Encourage co-operation and joint problem-solving so as to prevent disputes from arising;
(b) Maximise the chances that any disputes that do arise will be resolved at site level; and
(c) Resolve any dispute that is not settled at site level as expeditiously and as cost-effectively as possible so that no dispute survives the completion of the contract.

In order to achieve the aforementioned objectives, the DRAd system has the following features:

(i) Time limits;
(ii) Involvement of nominated and specialist subcontractors;
(iii) Good faith requirement in negotiation;
(iv) The Dispute Resolution Advisor;
(v) Short form Arbitration.

The working procedures of the DRAd system are outlined in Fig. 17.4.

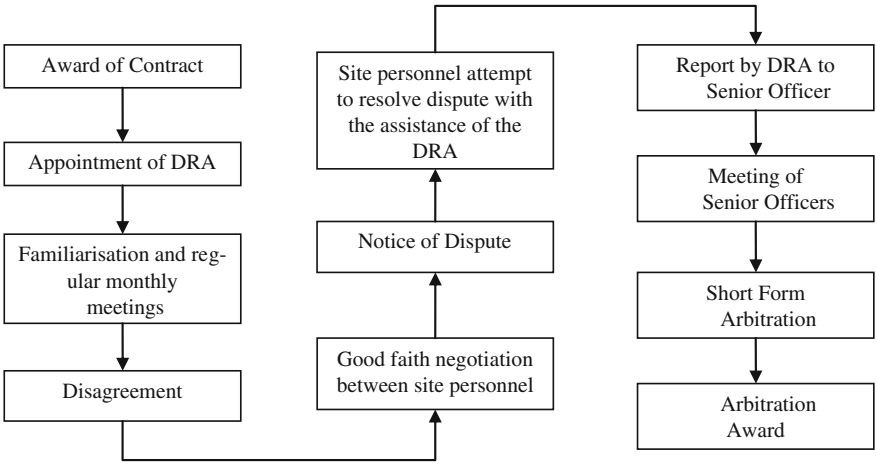


Fig. 17.4 Operation procedures of the dispute resolution advisor system

17.3.1 Time Limits

In order to avoid unattended problems escalate into disputes, the DRAd system requires timely responses from both the contractor and the contract administrator. In general, a 28 days' time limit is imposed in situation where notice has to be served or decisions have to be made. This time limit applies equally to both the contract administrator and the contractor. In the situations where further information is requested, the response time limit is 7 days.

17.3.2 Involvement of Nominated and Specialist Subcontractors

In Hong Kong, the use of nominated subcontractors to carry out specialist works is common. Experience reveals that many claims involve these specialist sub-contractors. It is believed that dispute resolutions should involve all who have an interest in the claim/dispute. The DRAd system obliges the nominated/specialist subcontractors to be represented in all forums where their interest is at issue.

17.3.3 Good Faith Requirement in Negotiation

The DRAd system requires the disputing parties to negotiate in good faith, a concept parallel to that adopted in partnering.

17.3.4 The Dispute Resolution Advisor

Unlike other alternative dispute resolution techniques where a neutral third party is to be agreed by the parties after a dispute has arisen. The DRAd system requires the appointment of a dispute resolution advisor (DRA) at the commencement of the project. The involvement of the DRA then is not only confined to holding meetings if called upon. Instead, on a monthly basis, the Employer and the Contractor, either separately or together, attempt to resolve problems that arise before they become formal disputes and to anticipate problems that may arise in the future. The contract also obliges the DRA to meet frequently with the Employer and the Contractor if either of them makes a request in writing.

Any disagreement over decision, instruction, order, direction, certificate of the Architect or valuation by the Surveyor should first attempt to be resolved through good faith negotiation. If negotiation fails, the aggrieved party may file a "Notice of Dispute" to the DRA who should promptly meet with the site level representatives of the relevant parties. The DRA has the flexibility of the choice of a dispute-resolution approach to help settle the dispute.

If the dispute cannot be resolved within 14 days of the service of "Notice of Dispute", then the DRA should submit a written report to senior officers of the disputing parties. The report also includes the DRA's non-binding recommendations or evaluation of the merits of the dispute. This report should not be admissible in any subsequent arbitration and litigation.

Upon receipt of the report from the DRA, the senior officers should meet to attempt to resolve the dispute. Furthermore, the DRA may recommend another form of dispute resolution although the employer and the contractor are not obliged to accept.

17.3.5 Short Form Arbitration

If the dispute is not settled within 14 days of the date of transmittal of the report to the senior officers, the employer and the contractor should participate in short form arbitration, a specially designed form of arbitration for use with the DRAd system.

Unlike most other arbitration provisions that require arbitration to be opened only after practical completion, short form arbitration is to be held during the currency of the contract. For single-issue dispute, a time limit of one day of hearing is imposed. For a dispute involving more than two parties or more than one distinct claim or issue, the Employer, the Contractor and the DRA shall agree upon the maximum length of time for the arbitration hearing which should be as short as possible. Failing agreement, the DRA should determine the duration of the hearing. The decision of the arbitration should be final and binding on the Employer and the Contractor.

Out of the five special features built in the DRAd system, it was found that the rigid time frame for action being critical to the success of such a system (Cheung and Yeung 1998).

17.4 Use of ADR in Construction

Disputes have been identified as epidemic in construction. Numerous attempts have been instigated to curb dispute occurrence. Notable examples include the use of partnering and equitable risk allocation. Notwithstanding, the nature of construction contracting appears to be conflict laden and dispute prone. Disputes have to be resolved and alternative dispute resolution (ADR) techniques have been introduced with the aims to alleviating the time and cost burden of the formal resolution method of litigation and arbitration. Owing to having similar legal system and industry structure, the use of ADR to resolve construction dispute in the U.K., Hong Kong, Singapore, Australia and New Zealand is compared. Based on a literature review, handling construction disputes in the five common law jurisdictions broadly falls into two approaches as presented in Fig. 17.5. Under the Type A approach, a dispute will be resolved firstly by ADR. If this fails, the dispute will then be referred to arbitration upon practical completion of the project. This approach has been embodied in a number of standard forms of contract, thus can be termed as contractual use of ADR. Take Hong Kong as an example, mediation has become an integral part of the dispute resolution clause in the major Government General Conditions of Contracts for viz.: Airport Core Program 1992 (The Government of Hong Kong 1992), Civil Engineering Works 1999 (Government of Hong Kong 1999a), Building Works 1999 (The Government of Hong Kong 1999b) and Design and Build Contracts 1999 (The Government of Hong Kong 1999c) and the latest version of the private forms of building contract published by the Joint Contract Working Committee (HKIA et al. 2005, 2006). Similarly, in the UK, mediation and adjudication have been introduced as an optional dispute resolution approach as stipulated in the Joint Contracts Tribunal (JCT) Standard Building Contract 2005 (JCT 2005a) and Standard Design and Build Contract 2005 (JCT 2005b).

It is noteworthy that, under the contractual framework, the use of ADR techniques before referring a dispute to arbitration is voluntary. If either of the contracting parties refuses, the use of the ADR techniques can be bypassed (Cheung and Yeung 1998). Furthermore, the prescribed voluntary ADR procedures typically involve appointing an independent neutral to give expert opinion. Nevertheless, in contrast to arbitration and litigation, the expert's recommendations are typically not binding on the parties (Jones 2006). Contrary to the Type A approach, a dispute is firstly be referred to statutory adjudication with the Type B approach. The arrangement has been considered effective to tackle two major deficiencies of the conventional contractual dispute resolution regime in construction: (1) the parties' right to bypass ADR before proceeding to arbitration and; (2) the enforcement of the non-binding experts' determination (Jones 2006). Through legislation, contracting parties now have the right to refer a dispute to adjudication. Furthermore, the decision of the adjudicator is binding unless and until the dispute has been settled by agreement, litigation or arbitration (Gaitskell 2007). In Hong Kong, the Type A approach has been used (Chau 2007; Leung 2007). In New

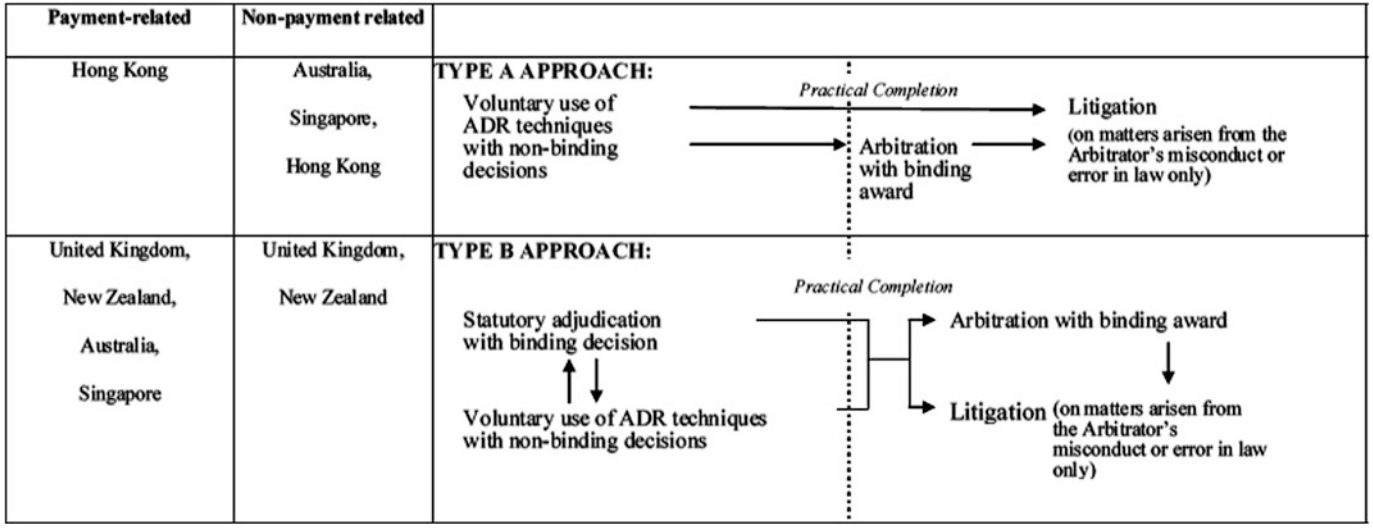


Fig. 17.5 Approaches in the use of ADR to resolve construction dispute

Zealand and the UK, in contrast, Type B approach is preferred (Gaitskell 2007). In Australia and Singapore, Type A approach applies to non-payment related disputes like the disputes about claims arisen from the extension of time, delay and disruption, personal liability, while Type B approach applies in handling payment related disputes (including progress, one-off and final payment) (Jones 2006). Furthermore, Hong Kong has taken a somewhat quite different approach from the other four jurisdictions; mediation is preferred over adjudication for all types of construction dispute.

17.5 Mediation Within the Civil Justice Reform in Hong Kong

In 2000, the Chief Justice appointed a working party to review the civil rules and procedures of the High Court and to recommend changes thereto with a view to ensuring and improving access to justice at reasonable cost and speed. ADR is considered a potentially useful process in appropriate cases as an alternative or adjunct to civil proceedings. The working party was asked to look into whether ADR should be introduced. The option of mandatory or voluntary use of ADR was also investigated. Mediation is not in law compulsory, but is at the heart of today's civil justice system, and any unjustified failure to give proper attention to the opportunities afforded by mediation, and in particular in any case where mediation affords a realistic prospect of resolution of dispute, there must be anticipated as a real possibility that adverse consequences may be attracted. The Working Party published an Interim Report and Consultative Paper in November 2001. The Interim Report included six proposals for how the Court might approach ADR. These were: (a) mandatory mediation by statutory rule for particular types of cases; (b) mediation as a condition for proceeding with the action; (c) mandatory mediation by election of one party; (d) mediation as a condition of legal aid; (e) unreasonable refusal of mediation reflected in costs; (f) encourage purely voluntary mediation.

The Final Report was published in March 2004 and recommended that courts should provide litigants with better information and support with a view to encouraging greater use of voluntary mediation. Proposal (d) suggests that the Director of Legal Aid can limit legal aid to ADR in appropriate cases. This will in effect make an attempt at ADR a condition of any further legal aid. The Final Report recommended that the Legal Aid Department should have power in suitable cases to limit its initial funding of persons who are qualified for legal aid to the funding of mediation while retaining its power to fund court proceedings where mediation is inappropriate or where mediation has failed.

Proposal (e) suggests using cost sanction to guard against unreasonable refusals of mediation. This has attracted a lively discussion since defining what 'an unreasonable refusal' is inherently difficult. After due consultation, the Working Party suggested the court should have power, after taking into account all relevant

circumstances and adopting appropriate rules and proceedings, to make adverse costs orders in cases where mediation has been unreasonably refused after a party has served a notice requesting mediation to the other party or parties; or after mediation has been recommended by the court on the application of a party or of its own motion.

However, proposals (a), (b) and (c) of the Interim Report received strong objections. The main drawback of proposal (a) was the suggestion that cases unsuitable for mediation would inevitably be caught by the inflexibility of the rule. Proposal (b) was likely to raise doubts over the Court's inherent duty of conducting litigation if it is required to suggest mediation. Proposal (c) was considered to be a recipe for abuse by parties wishing to delay proceedings and likely to worsen the relationship between the parties. Therefore these proposals were rejected by the Working Party in the Final Report. The Final Report has subsequently been endorsed and came into force on 2 April 2009. It appears that the Hong Kong Judiciary is determined to promote voluntary use of mediation to resolve disputes in Hong Kong.

As far as construction disputes are concerned, on 4 July 2006, the Judiciary issued Practice Direction 6.3 titled "*Construction and Arbitration List- Pilot Scheme for voluntary Mediation*". The pilot scheme was to run from 1 September 2006 till 31 August 2008. The purpose of the pilot scheme is to encourage parties in construction cases on the Construction and Arbitration List to consider using mediation as a possible cost-effective means of resolving disputes. Under the Practice Direction, either party to a construction action may serve a Mediation Notice that should identify the mediation rules to be applied.

The concept of "minimum amount of participation" was introduced in this pilot scheme. Another important feature of the pilot scheme is that the party who does not wish to mediate the particular dispute needs to state the reasons why mediation is considered not appropriate. There will be considered by the Judge in determining whether a party has acted unreasonably in refusing to proceed with mediation. Unreasonable refusal to mediate may lead to an adverse cost order. The Hong Kong Judiciary has also devised a reporting questionnaire to be returned by the parties or their legal representatives to the Clerk of the Construction and Arbitration List. The report seeks to record the effectiveness of the mediation process and would preferably be returned jointly by the parties. Practice Direction 6.1 came into force on 2nd April 2009 and supersedes Practice Direction 6.3 on Construction and Arbitration List Pilot Scheme for Voluntary Mediation. Part F of the practice Direction 6.1 basically affirms mediation as a possible cost-effective means of resolving construction disputes. However the use of mediation has been promoted by imposing cost sanctions where a party unreasonably refuses to attempt mediation. Thus one of the objectives of Part F is to facilitate the Court's consideration of whether or not to impose cost sanctions in relation to a refusal to go to mediation. The articles of Part F related to cost sanction are as follows:

"*41. Where a Mediation Notice has been served, an unreasonable refusal or failure to attempt mediation may expose a party to an adverse costs order.*

42. Where a party:

(1) *has engaged in mediation up to the minimum level of expected participation agreed by the parties beforehand or as determined by the Court; or*
(2) *has a reasonable explanation for non-participation,*
he should not suffer any adverse costs order.

43. What constitutes an adverse costs order will be a matter in the Court's discretion after taking into account all relevant circumstances.

44. In determining whether a party has acted unreasonably in refusing mediation, the Court will not take account of or inquire into:

(1) *what happened during the mediation;*
(2) *why the mediation failed; or*
(3) *whether any failure in the course of mediation may be ascribed to unreasonable conduct by any party.*"

Under Item 41, unreasonable refusal or failure to attempt mediation may expose a party to an adverse cost order:

17.5.1 Refusal to Mediate

In *Dunnett v. Railtrack Plc*[1] the defendant's refusal to mediate had caused an adverse cost order. This case highlights that parties who ignore the chance of resolving the dispute by ADR may have to face uncomfortable costs consequences. It is clear that litigants have a duty to consider seriously the possibility of ADR procedures being utilised for the purpose of resolving their claim or particular issues within it when encouraged by the court to do so. The question thus arises is what factors are to be considered in assessing whether a refusal to mediate is unreasonable. If a party can show good reason for refusing to mediate, that is to refuse reasonably, then it should not be penalised. In *Dunnett v. Railtrack Plc*. Lord Justice Brooke stated that the discharge of the parties' duty to help the court in active case management depends on the circumstances, including the conduct of all the parties and subject to the test of reasonableness. In *Halsey v. Milton Keynes General NHS Trust,*[2] it was held that the burden in an application to deprive a successful litigant of costs for refusal to mediate was on the unsuccessful party to show why the general rule should not be followed. Such a departure was not justified unless the unsuccessful party could show that the successful party had acted unreasonably in refusing to agree to ADR. There should not be a presumption in favor of mediation. In deciding whether the refusal was unreasonable the court would have regard to a number of factors including: (a) The nature of the

[1] *Dunnett v Railtrack Plc [2002]* EWCA Civ 303.

[2] *Halsey v. Milton Keynes General NHS Trust* [2004] EWCA Civ 576.

dispute; (b) the merits of the case; (c) whether other settlement methods had been attempted; (d) whether the costs of mediation would be disproportionately high; (e) delay in suggesting ADR; (f) whether the mediation had a reasonable prospect of success.

Whilst the Court was clear that this list of factors is not exhaustive, it does indicate that serious consideration is needed in deciding if a refusal to mediate is unreasonable, especially if the court encourages its use and cost benefits are recognisable in view of the circumstances. It remains good law that any decision to deny a successful party its costs is an exception to the general rule that the successful party gets its costs. It is anticipated that with Practice Direction 6.1 came into force on 2nd April 2009, further cases involving the interpretation of 'refusal to mediate' will increase.

17.5.2 Failure to Attempt Mediation

The concept of minimum participation lies in the heart of "*failure to attempt mediation*". Under Practice Direction 6.1, what constitutes minimum participation should be agreed between the parties in dispute. Item 34 states that where the Applicant and Respondent differ as a sufficient attempt at mediation, the judge may (either when having a stay application or at any other time) specify the applicable level of expected participation.

One central feature of mediation is its voluntary nature. Like any endeavor that needs the cooperation of participating parties, its effective use depends on their mutual effort. The requirement of mediating in 'good faith' as a means of enhancing the mutual effort is often included in contracts in Hong Kong. It is now quite common to have a contractual provision stating that the parties agree to mediate in good faith to resolve disputes.

17.6 Chapter Summary

Managing dispute has become one of the key management functions of construction managers. Amicably resolving construction dispute reduce conflict level and thereby indirectly improve productivity. The orthodox approaches to settle disputes, like arbitration and litigation, have failed to live up with the industry's expectation. Alternative dispute resolution techniques have been identified by many countries as alternatives. Through the analysis of the various standard forms of construction contract commonly used in Hong Kong, it can be observed that no real attempt has been made within the private construction sector to promote the use of alternative dispute resolution. Moreover, the main driving force on the adoption of ADR come from the public sector, in particular the Architectural Services Department, in pioneering the use of mediation and the dispute resolution

advisor system. Mediation is now an integral part of the standard dispute resolution provision for all government projects, including building, civil engineering and M&E installation works. The DRAd system is primarily used in more complex projects like hospitals and renovation works where a greater degree of changes is anticipated. The Government of Hong Kong Special Administrative Region has made a policy decision to make Hong Kong as a regional hub for arbitration and mediation services. A review of five Common Law jurisdictions having similar construction industry structure reveals that Hong Kong has preferred the use of voluntary mediation, instead of statutory adjudication as in the case of the other four jurisdictions, to improve the efficiency of construction dispute litigation. In this regard, voluntary mediation has been introduced in the Hong Kong civil procedures rules as part of the recently launched Civil Justice Reform. To give effect to voluntary use of mediation, adverse cost order is used to discourage "*unreasonable refusal to mediate*" or "*failing to attempt to mediate*". New Practice Direction in these regards came into force on 2nd April 2009. In principle, the new measures sounds sensible, but their actual impact and effectiveness are still being tested in the Court.

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