ARGY-BARGY

AN INTRODUCTION to DISPUTE RESOLUTION

#1 Resources for the business of building

This service is a valuable resource for the ever-growing group of builders who have an occupational interest in national and in neighbourhood, for New Zealand, Indonesia, China Korea and the Pacific Islands − *international* dispute settlement. Provided within **ARGY-BARGY**:

(a) a comprehensive explanation of the dispute process;

(b) a description of the procedures that are available outside the traditional court system for settling disputes

(c) a ready reference to the practical day-to-day details of dispute administration, and the rules *used in practice* to conduct dispute settlement procedures; and

(d) a collection of "current" information and news from major dispute resolution institutions and associations, that will be updated as changes occur.

Dispute solvers: the company secretary, contract negotiator and chief executive officers

ARGY-BARGY is designed chiefly for use by those engaged in business as corporate officers, accountants, financial advisers and attorneys. It is particularly useful to corporate employees who are engaged frequently in settling problems or disputes between their firm and its employees or outside parties.

Advantage of alternative procedures

In many situations, fact-finding is more important than working out the legal position once the facts are known. At these times, properly designed procedures of mediation, conciliation and arbitration will be generally cheaper and swifter than court procedures. These alternative techniques also enjoy greater confidentiality. They offer the best hope of continuing the commercial relationship.

#2 More business means more disputes to be resolved

Most disputes between individual parties have been settled over the years by the kings and courts of the nations where the conflicts occurred. However, there have always been those who thought that the people who make deals ought be the ones to settle disputes which arise out of those deals. Some business people always believed that most genuine disputes were cases which could best be resolved by an "expert" with special knowledge, and in many cases the expense and delay of the customary judicial system preferably would be avoided.

Most countries follow the increasingly modem tendency to allow parties to resolve their disputes according to procedure agreed to by those parties. The most common circumstance arises where parties to a contract specifically agree to future dispute settlement procedures. In most nations, there is also provision for the parties to resolve their commercial dispute by means of an agreement reached *after* the dispute has arisen,

Most building contracts contain contain dispute resolution clauses, sometimes termed an arbitration clause, or an expert determination, or mediation clause. It is accompanied normally by further agreement by the parties to refrain from taking any action in the courts of the land until the contract's dispute resolution procedures have been completed. This type of provision was known in British Commonwealth jurisdictions as a "*Scott v. Avery clause*". Courts in the United States, within the limits of American precedents and constitutional provision, generally acknowledge the validity of contract terms of this nature. Australian courts do not always insist that parties comply with such terms. Nowadays, many contracts specifically allow parties in urgent matters to go directly to court to obtain injunctive or declaratory relief.

There is an evergrowing variety of dispute resolution procedures. Some forms of dispute resolution – like resort to courts or to adjudication − are compulsory. Other forms of resolution may not result in binding remedies. The results they achieve cannot be imposed upon the parties until those results are registered in courts of law. Even the award of an arbitrator requires court registration for its enforcement. Save for arbitration − once the arbitrator has commenced or 'entered on the reference',− most forms of ADR employ third-party intervention whichis powerless to impose solutions on either party, of itself. Only the courts have recourse to the State run enforcement machinery called the "Sheriff" since the times of Robyn Hood.

The prime thrust of non-compulsory is to engage the parties in a search for consensus and thus re-establish fiscal harmony.

#3 The modern corporation

A modern corporation trades internationally, at a great distance from those with whom it has dealings. A corporation often has subsidiaries, commercial agents or other representatives in the regions where it trades. Modern means of communication enable corporate management in North America or Australia to conduct a dispute in Dacca, for example, as easily as a dispute "downtown". Thus the massive transmission of documents by disk and electronic transfer systems means that disputes can be managed in headquarter bureaux staffed by experienced personnel, with negotiation expertise and ready access to top management for bottom-line decision-making.

Corporate disputes in medium to large-scale corporations require involvement by many employees, for fact finding, co-ordination, checking and judgment within departments and across divisions of the corporate structure. It is wise for companies to develop and/or activate their own dispute decision systems. Spreading the work among many will speed up processes and reduce costs.

It is difficult to run corporate litigation on a model which derives from the legal methods and the law applicable to natural persons. As well as the need to involve many people in dispute procedures, corporate disputes have two significant characteristics:

- they should rarely be fought over a question of mere principle (the emotions and personal ambitions of a company's employees should not intrude upon the dispute resolution process); and
- an efficient developed dispute resolution system makes it possible to operate with candour and openness, and facilitate early recognition of the strengths and weaknesses of the

company's position in any dispute.

#4 Emergence of specialized ADR centers

In most countries judicial administrators find that it is to their legal system's advantage to minimize the costs that attend a formal courtroom determination of citizens' disputes.
ARGY-BARGY provides reliable, current information on the first-rate institutions, both private and public, which offer their dispute resolving facilities for general use. Also included is the legislation which directly supports the process of consensual dispute resolution within each country.

#5 Avenues to ADR: is your conflict covered?

ADR (mediation, conciliation, arbitration) facilities are more accessible in some parts of our States than others, but ADR will be used increasingly at home and abroad, in-state and out-of-state, to settle a wide range of disputes, including commercial, child custody and auto insurance claims. While the focus of the service is upon corporate dispute issues, other topics like family mediation have been included where procedures are established, and are permitted by local law.

#6 "Local" law background to dispute settlement

The substantive law of each state concerns those laws that apply to the different categories of human action and conduct such as contract, property law, the law of inheritance and the whole area of revenue law. **ARGY-BARGY** is designed to look at a relatively narrow field: that of resolving building disputes by recourse to the courts or other methods. But there are many areas of legal knowledge and legislation which will obviously impact on particular disputes which we do not address in this commentary.

Within each country, if other laws which govern a party's activities are relevant, it may be necessary to engage lawyers to answer queries. Although even procedural laws vary enormously, institutional centers inform parties as to the law applicable and, if requested, provide information on how legal advice may be obtained.

ALTERNATIVE DISPUTE RESOLUTION AGREEMENTS

#7 Flexibility: mediation to arbitration

There are no fixed limits to the varieties of innovative ways of seeking solutions to disagreement. *Arbitration* has been the best known method. It has been accepted for so long that a great number of discrete rules have grown up in most countries concerning its operation. The influence of Asian cultures is felt today increasingly in the widespread use of non-adversarial methods of dispute resolution such as *mediation* or *conciliation*. These practices do not have fixed or closed categories either. Just so, we see the introduction in four states this century of the English practice of construction industry adjucations (under the Security of Payment Acts).

The adversarial procedure has been utilized to find cheaper and effective answers. The "mini-trial" or "rent-a-judge" programs are examples of the creative thinking now sweeping in and around the

formal court systems, which have responded to their overloads by increasing the number of cases which are referred to arbitration or other expert assessment. The adjudication process cuts down on evidence-giving in favour of swift decision on the “papers” (and rarely, conferences and inspections). But payments thus awarded are interim only: either party can contest them in court.

#8 Adoption of institutional rules

The use of institutional alternative dispute resolution is a popular option with many advantages over ad hoc private arrangements. Dispute resolution associations and forums in each country have their own rules and governing legislation. Institutional dispute resolution makes the process of administering a dispute so much easier for the parties involved. That means speed and economy in first delineating, then detailing and finally determining the dispute.

ADR Centers administer or otherwise become involved in a dispute only where the agreement of the parties specifically nominates the use of their services. Sometimes benefiting from the receipt of public funds, sometimes maintained by the merchants and professionals with whose conduct they are involved, most centers are non-government, voluntary organizations. ANAs or Authorized Nominating Authorities are used to appoint adjudicators under the Security of Payment systems.

#9 Express agreements

Parties are able to make agreements to settle differences that may occur in their commercial relationships no matter what the nature of the event from which a dispute may arise. They may make such arrangements at any time, before or after performance of the contract has commenced and before or after the dispute is likely to, or actually, erupts.

Because one or other of the parties is inclined to make no further agreement once a dispute has arisen, many commercial operators try to ensure that a dispute resolution clause is included as part of the original written agreement between the parties. But it is not necessary that the DR agreement be made before the need arises: the parties may agree to do so later.

Where there was no written contract it will be necessary in many jurisdictions to execute a dispute resolution agreement in writing prior to entering on dispute resolution. This is because the enforceability of any arbitration award, for example, may depend upon the existence of a written agreement to arbitrate. Parties can, by agreement, waive even this requirement -- although at the risk that if the unsuccessful party is reluctant to abide by the results, the courts of law may not be able to give any effect to the result owing to legislative mandate.

The reality of commercial dispute outcomes is that in some industries, some contexts and especially cross-jurisdictional situations, enforceability is of little value. Even after a court judgment, the legal procedures for extracting money from a defaulting debtor are always cumbrous and expensive. Also, the claimant may not be able to find any assets available to satisfy a favourable judgment.

A party’s aim should always be to find the dispute resolution formula -- no matter how much compromise is involved -- which will lower the end loss for the damaged party. A further agreement with the party responsible for the wrong may be the preferred commercial option.

#10 Pre-dispute DR agreements

Most commercial contracts are written in a standard form. A standard form document is one

designed to be used in respect of the routine business of the enterprise -- irrespective of the identity or nature of any particular party with whom the contract is made. In these documents it is common to find, if not agreements for dispute resolution (the generic modem concept) then agreements to submit disputes to an arbitration. These agreements are usually in standard terms, appended as a later or last clause in the document. Consequently contracting parties sometimes can spend too little effort ensuring that these terms are appropriate.

Few parties are hard-headed enough to realize that the ambience of goodwill and general self-congratulation which crowns successful negotiations may one day fade. Relationships between parties deteriorate once differences occur, especially when these are so frequent or so extensive as to threaten the profitability or the reliability of the contract for either party. A dispute resolution clause which can provide a speedy resolution of distorted communications (and the dubious decisions which can flow from them) will repair and restore relations to their previous status.

#11 Deficiencies in standard form terms

Standard form terms used in dispute resolution agreements or clauses usually are cast broadly. Therefore they do not and cannot take into account the actual circumstances of the dispute which materializes in the future. A good practice is to adopt one of the standard clauses that are published from time to time by the various dispute resolution agencies which usually prepare several stock formulations.

These standard dispute resolution clauses, and particularly the standard arbitration clauses, are carefully phrased to ensure that an unwitting and unfortunate turn of phrase does not later render the arbitration clause inoperable. Courts in the United States have been reluctant to extend the effect of dispute resolution clauses beyond the actual wording, since this might be thought to rob one party of its constitutional right to have the matter decided by a court.

#12 Terms to initiate ADR and consolidate disputes

Unlike arbitrations which have mandatory procedures to be followed by each contracting party, mediations and conciliations can be difficult to trigger. Often without the third-party powers present in arbitrations, mediations and conciliations have no agent to initiate them. Dispute resolution agreements should have machinery provisions encouraging the prompt commencement of mediation and conciliation procedures incorporated in the contract.

The agreement must contain contractual definitions of just when a dispute, which sets in train the mediation or conciliation, will be deemed to have arisen. The first simple step of contractually notifying each of the parties usually will be identified clearly in the chosen Center's Rules.

It would be appropriate also to make certain contractual provisions for what should follow upon the giving of a notice requesting mediation or conciliation. The Center Rules incorporated in the contract may themselves contain appropriate provisions. If not, it is advisable that the contract stipulate that upon receipt of a mediation or conciliation notice the parties will exchange relevant documents in accordance with the direction of a mediator/conciliator appointed under the relevant Center's Rules.

The ability of an impartial intervenor to flush out the relevant documentation, and to direct the initial contact meeting between executives of the parties is crucial to beginning the resolution process. The terms of the DR clause are therefore critical; *what powers have the parties given to the intervenor in their agreement?*

At this stage of a dispute the parties still may be amenable to compromise. If conflicts can be resolved before each party commits substantial resources to the dispute, they are likely to decide that the dispute has never happened: “it was just a misunderstanding”.

#13 Post-dispute DR agreements

Parties should make a fresh agreement when the first agreement is ambiguous or inadequate as to the dispute resolution process to be followed. This is because obscurity and doubt in the first agreement could render any resolution challengeable in a court.

Parties to oral agreements, or to agreements which make no provision for dispute settlement can also enter new dispute resolution agreements. In arbitrations, participants may suggest such an agreement at a preliminary directions hearing. The benefit which a post-dispute agreement has is that the parties can draft a procedure for settling the dispute which takes into account the particular facts and circumstances of the dispute.

First, all the advisable procedural steps will be calculated with greater precision and some steps dispensed with altogether. Secondly, at the substantive level, the dispute resolution agreement can focus on the nature of the actual dispute. Matters in issue between the parties can be confined to the particular set of facts that gave rise to the conflict. There is greater scope for the ongoing, current relationship between the parties to be maintained with less disruption in these circumstances.

#14 The ideal DR clause

The ideal DR clause should indicate how to choose the intervenor (or intervenors), identify the intervenor’s powers and the form in which his or her conclusions will be embodied. It should allow the ordered escalation of the resolution process from one based on the consent of the parties to one based on the determination of a third party: in other words, for a progress from mediation through conciliation to arbitration. Finally, the clause should set out responsibility for costs and other arbitrators’ fees and expenses, including the times for payment and the empowering of the dispute resolution personnel to award security for costs by way of interim findings where necessary.

An ideal clause will state the laws under which the dispute will be resolved (that is, the procedural aspects including the rules of any dispute resolution organization conducting the proceeding). It will also state what body of substantive law will govern any third-party determination. Much of the grief of international disputes comes not from the distance, the language or the culture, but from the fact that neither party has considered the necessity to choose which law will be applicable to a resolution or a contractual dispute.

Most institutional dispute resolution arrangements provide that the persons appointed to assist in dispute resolution are empowered to determine the procedural steps by which ADR will take place. Potentially optimal freedom is given then to the dispute resolution personnel in the manner and conduct of the proceeding. Usually, the parties are given the opportunity by such persons to indicate their desires with respect to the preliminary steps in the process of gathering evidence as to the liability of one party or another. However, some participants feel control over the important introductory stages of the process is thus given up too early to a judge-like figure whose inevitable unfamiliarity with the precise facts of the instant dispute leads that person to make agenda decisions on the basis of past experiences, rather than the actual issues now between these parties.

Parties may well wish to amend or add to the standard institutional rules so as to dictate the procedural rules they regard as the most efficacious. For instance, the parties might agree that any

dispute resolution process be by way of documents only and that each party should make available its documents to the other side within 14 days of the dispute having arisen.

INSTITUTIONAL ALTERNATIVE DISPUTE RESOLUTION

#15 Advantages of institutional ADR

No matter how many disputes a corporate organization may have, it would be rare to find a corporation so large that it had routine conflicts in a significant number of different jurisdictions. Each country has its own dispute law to be considered when conducting a dispute. Almost always, therefore, it will be more economical to rely upon the institutional procedures established by ADR centers to settle the choice, mode of selection or appointment, and duties of intervenors.

Although *ad hoc* adjudication can be superficially appealing, there is greater opportunity for allegations of bias or prejudice to be made by an unsuccessful party when institutional constraints, criteria and *esprit de corps* are absent. Institutional dispute resolution is carried out by members who adhere to goals of neutrality, public service and high conduct that cannot be assumed to be attributes of the occasional arbitrator or dispute solver.

It is extremely difficult for any party to achieve agreement on the ground rules for conducting a dispute, particularly in an *ad hoc* situation. Dispute resolution and ultimately *settlement* of conflict is dependent upon the good offices and the sincerity of the parties to work towards their ultimate and mutual betterment. The experienced personnel of an established center are more likely than an inexperienced individual to be able to conduct preliminary proceedings in a manner conducive to a good long-term approach to a dispute.

#16 Standard clauses

Institutional dispute resolution has a number of advantages. At the basis of any ADR process are the procedural steps for setting it in motion which, in turn, can only be achieved when the dispute itself is said to have crystallized. Intervenors are appointed and soon after the times then fixed for each preliminary stage begin to run. Thus the procedures set out in institutional rules for giving notice of a dispute or for requesting mediation or conciliation are helpful. Giving effective notice in reasonable time to enable the sequential process to flow smoothly is critical to the final outcome.

#17 Routine rules

Typical institutional rules recite the following:

- the basis of their jurisdiction;
- the manner in which a mediation or an arbitration may be initiated;
- the ingredients of claims and counter-claims;
- the fixing of locales and impartial intervenors;
- the detailed rules for the form which any session may take (including whether legal representation is allowed and who may attend);
- and whether or not the proceedings will be conducted under oath.

Detailed guidelines as to the order of proceedings, the nature and types of evidence, the discovery and inspection of documents and property are then stipulated.

Where the rules relate to an *arbitration*, the rules dealing with the arbitration hearing itself and the timing, form and delivery of the award are described, together with expenses and fees that may be applicable.

#18 Bars on court litigation

Strategy and tactics in dispute resolution have many levels and disguises. A party cannot be confident that its opponent abides by the spirit as well as the letter of the ADR agreement. Thus an important rule for any ADR process is the mutual agreement of the parties that they will not resort to the slower, more public and more expensive dispute resolution procedures of national or local courts. The ideal ADR clause includes a prohibition against either party resorting to the courts. It is particularly important that parties to international transactions are not able to avail themselves of the relative advantage of using local legal forums. But you should not that you cannot contract out of the Security of Payment adjudication systems: the claiming party cannot bargain away its right to seek an adjudication of any payment claim.

#19 Disputes as part of normal company life

Far too often disputes are perceived as being dysfunctions of the normally operating system of business relations: regarded as aberrant or exceptional, they are often treated by damage control measures.

A more modern view of disputes, and consequently of their resolution, sees disputes as an integral part of business operations. Resolving disputes in a functional fashion is as important as resolving them at all. One of the disadvantages of conventional legal and formal judicial means of determining this agreement between parties is that the inclusion of the law and its profession increases the distance between the dispute resolution personnel and those responsible for the creation of the dispute in the first place. The feedback from dispute resolution professionals is often attenuated and rarely reinforced. An ideal dispute resolution system has the outcome of improving on-going directives on resolving future disputes.

#20 Priority of speed

Disputes are as varied as the fact situations in which they occur. A company's ADR manual should cover the myriad dimensions of disputes. Disputes differ by the amount at stake; by the importance of the consequences for future events; the amount of factual material which must be analyzed before a determination can be seen to be fair; and the relationship, past, present and continuing (if any), between the parties to the dispute. Subsidiary questions, like the technological complexity of the factual situation; the difficulty of the legal concepts involved; the number of the parties; the time since the dispute occurred; and the distance of the locus of the dispute from the forum which will hear the dispute, are secondary dimensions of the conflict. But, above all, there is a trade-off in the most general terms between achieving a result which is perceived to be accurate, reliable and fair, and a result which is quick and fair, but which is oriented more to the importance of the parties' future conduct than to the allocation of blame for previous conduct on behalf of one or other of the parties. It is rare for a dispute to be able to maximize both the thoroughness of the truth-seeking episode and the speed with which a decision is delivered. And this is always true of construction

adjudications.

COSTS OF RESOLVING DISPUTES

#21 Minimize costs by efficient corporate planning

Modem corporations owe it to their shareholders to develop sophisticated models of dispute settlement which will enable them to save on legal and other costs associated with disputes. Disputes can be accurately characterized so that the crucial matter is singled out and defined. It is then possible to limit the amount of evidence and research that will be required, thus restricting costs. The time taken for resolution will be proportionately abbreviated in consequence.

Every corporation should know from its history which types of dispute create costs which can be averaged (as part of overheads), and which disputes must be costed to the particular project, or department, or annual budget. Beyond that, corporations need to aggregate the costs of any case. Once the costs are totalled it is easier to see that the incidence of those costs at times, or stages during the dispute resolution process, can be more or less elective depending upon the stance adopted. The initiating or plaintiff party is especially well placed to dictate how swiftly the dispute resolution takes form.

Since sound empirical evidence is not available one may only speculate whether disputes which settle early have less fees and costs than those which settle late. Certainly early settlement holds substantial savings in terms of opportunities foregone and holding charges. Preparation for a dispute resolution process in terms of the allocation of resources and personnel will result in lower settlement or resolution costs. If the preparation is early, so, normally, will be the resolution of the dispute and so, normally, will be the incidence of the costs incurred by the dispute.

Often the initiation of a formal dispute resolution stage is delayed in order to avoid dispute costs but it is likely, at best, that such costs are merely deferred. Quite possibly those costs could well be increased -- as with other time-dependent costs -- if it later becomes necessary to pay a premium for professional input together with the travel and other expense involved in meeting urgent demands for witness and document analysis.

#22 Disputes over “principles”

The costs of resolving any dispute should be integrally associated with the quantum which is at stake. The amount of money able to be recovered by a successful party must be balanced against the costs of reaching that desired conclusion. For few participants are the costs of the process itself important at the time when the conflict is raging. While some persons might not fight over a principle, they can come to believe in the equally fruitless, even if less righteous, goal of “winning”.

The futility of lighting cases about principles, as these topics are often misdescribed, is that it is very difficult to resolve any single factual dispute in such a way as to lay down a principle that will endure thereafter. Most dispute resolution processes are about singular sets of facts which occurred in the past. In the nature of that exercise, it is almost impossible to make a highly rule-bound, precedental system decide in a way which will settle the outcome of potential disputes on these issues in the future.

Although it is important on occasions to run what is sometimes called “test cases”, it must be

remembered that the circumstances which favor this course are rare. Any outcome which appears to have that effect can probably be attributed to the attendant publicity which quite often surrounds these rare and extraordinary incidents.

Perhaps there is no point which requires greater emphasis than this: that dispute resolution processes, short of formal court litigation, are *never designed to set a precedent*. Therefore there is little value in the ascertainment of principle from these dispute resolution processes. An arbitral award cannot establish the principle fought for, because a *confidential private and secret* award cannot act as a binding decision on future disputes.

#23 Calculation of costs

A dispute's cost can be calculated in the same way as one calculates other costs: in labor time, capital contribution and opportunity costs foregone. Few companies accurately cost and budget for the expenses of resolving disputes. The man-hours involved alone could have settled many disputes had their costs been known in advance. If known in advance, the costs of providing, not merely staff time, but a range of ancillary expenses and equipment would make continuance of the dispute unacceptable.

When the direct financial disbursements of disputing is coupled with the commercial loss of having the company's business enterprise tied up in maintaining a particular stance in a unique dispute, it is likely that an alternative solution should have been found. After all the company may have been free to negotiate or arrive at other agreements with new parties, for better tariffs, with profit.

Nevertheless, in practice some disputes must go through the final stages of the dispute resolution process. The time and insight required to resolve the dispute and the will of the parties that the dispute be resolved cannot be assumed in every case. There are six main costs in resolving a dispute:

1. labor costs;
2. costs allocatable to capital;
3. disruption costs to the enterprise;
4. overtime and other like costs;
5. employment of external dispute resolvers such as attorneys and accountants;
6. costs of expert witnesses.

Subsidiary expenses include:

- typing, photocopying and other presentation of materials;
- fees paid to any mediator, conciliator or arbitrator;
- costs of the dispute forum; and
- costs for facsimile, telephone and telex facilities.

#24 Dispute management and the legal professional

In their enthusiasm for the expanding horizons of ADR brought about by the creation of an interlocking world-wide network of reputable ADR centers, some commentators appear to denigrate the services which lawyers provide. The involvement of lawyers is a sensible protection in cases where large amounts of money or future business could be at risk. The lawyer's craftsmanship should not be discounted in ADR.

Some disputes require significant legal input from lawyers both inside and outside the firm. The

principles which have been addressed above nevertheless remain true: profound preparation within the firm is the best strategy for containment of disputes. Independent counsel's advices should be structured in such a way that there is a regular reporting from counsel to the firm as to the tactics and strategies to be employed in securing the corporate goal. The firm should dictate that program to counsel so management control of the dispute is not lost.

In appropriate cases a number of dispute resolution strategies could be utilized simultaneously. The company executive should ensure that all possible options are explored and positively pursued by lawyers in achieving a resolution. Both informal and formal processes of ADR may need to be undertaken in conjunction with the issue of court procedures in matters where complex issues of law and fact are unable to be fruitfully discussed by the parties.

Additionally, a principal benefit of arbitration as an ADR process is that it is the only extra-curial method which gives direction and finality to the dispute resolution procedure. If the other side is proving or is likely to prove intractable, it may be appropriate to have these mandatory proceedings contemplated or on foot.

#25 Lawyers -- expert legal draftsmen

Lawyers have techniques which set them apart in the dispute resolution process. They are expert and practiced draftsmen of concepts, word formulas, and clauses in agreements which are cut and tailored to meet the needs of the client. Both as a preventative in contractual disputes and as designers of the forms which dispute settlement may take, legal draftsmen have a distinct role to play. In these areas the employment of external counsel can be most cost-effective. For example, the time charges for drafting dispute resolution clauses to be included in a company standard form contract are very moderate indeed when compared with some two or three hours of the same attorney's management of the hearing of an arbitration or a trial.

Relatively speaking, the ability of a lawyer to settle the basic framework of a compromise is cost-effective. The right phrasing can avoid unnecessary and expensive oversights on the part of the disputing parties who may be in agreement on matters they were unaware could have been resolved at the same time. This is particularly the case where revenue or taxation considerations are concerned. Resources spent having attorneys -- perhaps from two or three firms -- check a firm's standard agreement is highly cost-effective.

#26 Is court litigation cheaper?

Litigation is generally more expensive than alternative means of dispute resolution. There are a number of reasons for this, the chief of which is the inability of parties to set their own pre-trial procedural stages for the litigation. Those litigation stages are mandated in statute, regulation and ancillary rules.

Court litigation must provide for all types of potential disputes. Its stages are therefore quite likely to be less than optimal for the resolution of a particular dispute. Unless the alternative dispute resolution process takes advantage of specifying the most efficient interlocutory procedures, the ability of the parties to reduce the issues to be decided to a minimum in terms of both time and scope, the potential savings cannot be realized. In a secondary sense, since dispute resolution usually means the intervention of an expert third party, that expertise may induce parties to settle, especially once the issues have been defined.

#27 The amount in dispute

Ideally, just as the costs of any dispute should be assessed immediately the dispute appears to be in the offing, so too the quantum or the amount that will be recoverable by either party should be immediately estimated. Only by estimating what the best outcome of the dispute can be for each party will the dispute's technicians be able to properly assess the likelihood of the dispute running its full course, the likelihood of settlement and, ultimately therefore, the costs that will be involved in any of the dispute resolution alternatives. It is very important that the quantum in dispute be calculated as early as possible.

Often in disputes, parties believe that they will be entitled to arrive at a successful outcome whereby they will be more than compensated by way of damages for the injury they believe themselves to have suffered. However, at some stage in the process of either mediation, conciliation, arbitration or litigation, a party may be told that the damages, which they believed at first glance to have flowed from the actions of the party against whom they are aggrieved, cannot be seen to have flowed *directly* from that party's actions. Frequently it takes time to see why, although there had been some default on the part of another party, the aggrieved party has not taken timely action (within its power) to mitigate the losses suffered. Moreover, often the assessment of the damages is low, since it does not take into account all the interest that will have been paid on moneys which have had to be borrowed or loan funds which have had to be raised or prolonged because the dispute has arisen. Extra costs may be recoverable from the other party, but this is possible only if *the cause* and *effect of the loss is sufficiently direct*. Forgetting these issues will mean inevitably that the true size and context of the dispute only becomes apparent much later in its course, by which time the aggrieved party may have failed to take the necessary research upon its case, and much of the recoverable damages or alternative procedures that might have been claimed against the wronging party are now no longer quantifiable.

#28 Disputes -- a function of business life

In folklore a dispute is something to be feared and avoided. Common sense indicates the reasons for this attitude. However, modern social science shows that disputes are a function of the complexity of communications and transaction risk. Disputes must arise, given the vast communications/transaction needs of the consumer society. That economy -- unlike the subsistence economy -- maximizes transactions. There are ethical parallels. Disputes should not be thought of as grave attacks upon the moral credit and profitability of the firm, but as occasions where the firm's actual operations exhibit weaknesses, and inadequate planning and preparation is discovered. Analysis of the physical and emotional resources available for dispute investment in these terms dictates that a company must make an investment in understanding where its disputes start and why they finish as they do. What characteristic of the company's operations increases its propensity to attract disputes?

#29 Resources for investment in the dispute process

Disputes give rise to interruptions to the cash flow and potentially to declines in overall profitability. Whether one likes it or not, disputes -- however they may be described or defined -- strike every reputable company. They are not merely a statistical incident or accident. Disputes provide the opportunity to learn more about the firm amid more about how the company is perceived in the eyes of its clients and the general public. If conflict is endemic in commercial life, so, too, is the possibility that reward can be gained for the company, by learning not merely how to survive, but how to avoid the occasions on which disputes occur.

Any firm must have a commitment to dispute resolution whether it is a commitment found in attorneys' fees and court costs, or whether it is found similarly in the uncounted cost of middle and upper management's time devoted to the conduct of these disputes. Every firm, small or large, has the physical resources to spend in dispute resolution and does in fact, presently, spend them. Many company officers are reluctant to let news of disputes and their progress travel up the corporate hierarchy until the task of settlement can no longer be accomplished at their level of the firm. The result is that the involvement of top management comes too late. Top management and upper middle management time is frequently involved in "trouble shooting" or other expressions of attending to non-routine interruptions to work and cash flow. It is possible that the emotional resources that are being drawn upon in terms of managers' concentration and time pre-occupation is too great. It need not be so. The usual remedies of specialization, the division of labor, the allocation of responsibility for particular tasks can be applied once again to dispute resolution.

There are people whose studies and whose personalities fit them for resolving disputes. There can be little doubt that many companies nowadays do have dispute resolvers on their staff at middle management level. Whether they be described as contract negotiators, paralegals or dispute negotiators, they probably all serve the identical important function. However, limited by the nature of the firm, and the relatively low incidence of dispute, the dispute resolution team in a particular company usually lacks the resources to deal with major disputes which present difficult questions of law and fact. In these circumstances any company is well advised to hire-in outside experts or lawyers to make sure that the resources allocated to disputes prove to be sound investments for the firm. This sort of budgetary analysis gives rise to considerations of whether representation (and what kind of representation) in dispute resolution forums is required by corporations.

#30 Choosing the dispute representative

Representation involves certain skills which are developed by experience. Although many dispute resolution centers now run courses to train conciliators, mediators and arbitrators in the skills which attend their functions, there can be little doubt that the requisite knowledge of human motivations and the capacity to communicate in the face of a confrontation grow like many other personal traits. By constant repetition, experience, observing reactions to strategies and tactics, good advocates convert their listeners. Dispute resolution, as a specialist activity, has developed sub-rules of its own. Many persons confuse the issues involved in whether legal representation should be retained by the company. Many considerations inhibit persons from seeking the expensive and time-consuming services of lawyers and distract them, moreover, in their choice of advocate.

The advocate or advisor best suited for the task in hand should be carefully chosen. People choosing an advocate mistakenly can prefer a cheaper outlay. This clouds intelligent consideration of the skills of representation, and of the economies of freeing mainline staff for their usual functions. It is good practice to employ specialists whose task is to seek to resolve conflict so the overall aims and objectives of the company can be morn profitably achieved. The quality of detachment that every good advocate has is a function of that person's character. The choice can become a question of representation suitable for the type of conflict.

#31 Categorizing a dispute

It may not be important to know the law or the legal system if one is to participate in dispute resolution. It is vital, though, to be able to recognize the *character* of the dispute which has arisen.

Conflicts in commercial context generally fall into three varieties: disputes over facts, calculations

or definitions. The first two varieties of dispute usually do not need legal knowledge for their assessments. They may profit from or need legal skills and technique on the part of the representative if a successful conclusion is to be achieved.

The third variety of conflict -- defining words and terms in commercial agreements -- at first glance is primarily the lawyer's field. But on closer examination it will be seem that the lawyer has no monopoly of special qualifications or knowledge. The tribunal or impartial intervenor may be qualified to resolve differences in definitions if the appropriate suggestions and arguments are made to it by a member of the industry with considerable experience.

The skill of the legal representative is particularly located in his or her ability to unravel and outlay the facts, as revealed by witnesses through what is called *direct* examination of the party's own witnesses or through *cross-examination* (a process by which the representative seeks to show the inconsistencies or the incredibility of the witness). Where commercial disputes are concerned, extensive oral examination of witnesses may not be necessary, and may not he helpful. In circumstances where -- for one reason or another -- witness examination does not figure prominently, the dispute may be amenable to representation of the party by itself or by other non-lawyers. Experts may be able to contribute uniquely to their party's representation from their own knowledge and experience.

#32 The expert as advocate

There are many circumstances in which it is preferable for the company to be represented by an independent expert in the subject matter of the conflict rather than for the company officers to be involved (or alternatively to brief external legal counsel). Very often experts carry their own authority and can make their own independent assessment of the facts as they are revealed during the course of the dispute resolution process. Experts can be persuasive and plausible in bringing to bear their own knowledge upon their calculation of what a fair settlement would be.

In some disputes the facts are not in issue. What is in issue is the degree to which it is reasonable for a particular party to bear what percentage of what losses, attributable to events which have not been foreseen and which perhaps were not foreseeable by either of the parties when they entered the contract, or indeed, before the occurrence of the events giving rise to the loss. The trade of loss adjustment is a good working model for reviewing what representation would be best in disputes where definitions and calculations abound, especially where the *apportionment* of liability for an unexpected outcome is really at the nub of the dispute.

#33 Fees -- dimensions and perspectives

One of the advantages of institutional dispute resolution is in costs of the process. The institutions generally are able to arrange appropriately equipped meeting rooms and hearing rooms at moderate cost. The dispute resolution centers also keep lists of persons who are willing and able to assist as mediators or arbitrators. It generally will be found that the persons on these lists have agreed to provide their services at a lower rate than the rate normally charged for their respective professional duties. Fees normally charged by the centers and by the various mediators, conciliators or arbitrators under their aegis vary considerably. Arbitrations conducted under the International Chamber of Commerce (ICC) Rules are an exception, as that organization usually charges a percentage of the quantum in dispute.

As well as providing services for reasonable fees, the provision of *curricula vitae* for dispute resolution personnel is another important service offered by institutions.

There is growing use of a procedure by which "documents only" arbitrations are made available to disputing parties by dispute resolution centers. In these cases the costs of the hearing and of witness attendance are eliminated. As in most cases, the smallest -- cost will be that of the neutral intervenor, and typically it is insignificant when compared to the amount of money at stake.

#34 Reciprocal agreements of dispute centers

Many of the dispute centers have reciprocal agreements which propose standard arbitration clauses for inclusion in the contracts of their national traders. The effect of this, save where otherwise agreed, is to provide that the rules of the local DR center will be used for the conduct of the arbitration. There are advantages and disadvantages of including such clauses. One of the disadvantages is that some of these agreements were executed many years ago, and so provide only for arbitration and not for other forms of dispute resolution.

Furthermore, in Asia and the Americas there is increasing recognition of the need for "documents only" dispute resolution to save the costs and expense of representation and travel. In a clear case the resolution of a dispute "on paper" is the most speedy and cost-effective of all. However, it is limited to cases where it would be prudent for a decision to be made on available documents, without inspection or testing of commodities, and without the necessity of examining witnesses as to facts or credit.

PRACTICE — THOROUGH PREPARATION WITHIN THE MODERN CORPORATION

#35 Dispute resolution as company business

Dispute resolution is a process requiring its own aptitude skills. These skills must be sought, trained and promoted in every organization. The disputing process from the vantage point of someone inside the firm is a distinct task-field. But the importance of those familiar corporate goals such as increased productivity or market share can deflect attention from the significance of those who *solve problems*.

The company is also in the dispute resolution business. As early as possible, disputes should be flagged and subjected to the skills of the dispute resolution personnel. A dispute exists the moment goods or services are alleged to be (or found to be) defective, or when payment is denied, or the contract threatened with rejection or repudiation. It is at that point (and equivalent points in other disputes) that dispute resolution personnel should become involved in checking the chain of correspondence and setting up the trajectory of what will ultimately be a settlement in the case.

#36 Budgeting the disputes division

The saying "justice delayed is justice denied" is a criticism which can often be levelled at the disputing parties themselves. Because the costs of dispute resolution are not sufficiently known to executives in the corporate sector, the absence of balance sheet recognition of conflict resolution work frequently means that resources am not allocated to the prosecution and effective completion of disputes -- at least until the matter can be delayed no longer.

Sizeable corporations should prepare an annual budget of disputes resolved, disputes in process, and disputes *pending* for the current year. If the funds necessary to prepare such a budget were allocated, a more close-grained analysis of disputes would enable conflict resolution to be properly managed by the firm (with an examination being made of the most likely outcomes and the up-scale and down-scale of risks attendant to each part of the corporation's current claims and counterclaims).

#37 Modelling the dispute system

Recently social scientists have systematized theories about disputes, seeking concepts which are appropriate to all industries, from those "retailing" money, such as banking and insurance, to those warehousing capital assets, such as heavy engineering. Various models examine the differences between disputes in which both parties are frequently in dispute, such as insurance companies, and compare those with disputes where only one of the parties is a repeat player. Analysis is made of the optimal strategies which companies should prefer, since in different fields of activity they will be professional disputants while in other areas of business they will have rare or infrequent disputes.

Perhaps the most important contribution of social scientists has been to illustrate how many different social practices are in fact the occasion for resolving disputes while, equally, disputes are resolved by a multitude of means. Contemporary work dealing with the transaction costs of a dispute, and the difficulty of calculating how expensive poor dispute resolution can be for the individual company, highlight this new field of business specialization. Yet it is still common to find even professional pleaders like attorneys underestimate the degree to which good representation is based upon extensive preparation.

#38 Maintaining a dispute file

Aside from allocating properly trained personnel to dispute resolution, it is necessary to develop what might be described as *a dispute file*. In major corporations this contains material copied and culled from a wide range of original files used throughout the organization. This poo1 of information should be collated, analyzed and placed upon a proper data-base (with the advantages of machine retrieval of perhaps vast amounts of information). Corporations which have their own trained litigation support teams can reap attorney fee savings even if a dispute does end up in court. The personnel who undertake the compilation of a dispute's documentation must have an easy familiarity with the dimensions of a dispute and its likely course.

There are facts which must be ascertained and proven by evidence. Some of that evidence is oral testimony received from witnesses. Statements from those witnesses must be taken as early as possible. Other evidence is in the form of documents which are shown to intervenors and finally, perhaps, used in litigation. If the basic research is done early, oral and written evidence is collected, analyzed and summarized soon enough for the decision-makers to work out the terms of settlement in time to develop strategies designed to achieve them.

#39 Documents: the vital records

Businesspeople and corporate executives are sometimes not aware of the significance of documentation until far too late in the dispute resolution process. Very often a matter will be part-heard at trial before corporate managers properly understand the extent to which bad corporate

records or inadequate compilation of corporate information have prejudiced their case. Where disputes take place at great distance and over long periods, sophisticated recording and retrieval information systems make for success, but it all requires foresight and forethought.

A first stage in preventative disputes work is to develop a system to process dispute documents within the firm so that there are routine intra-company requests for the orderly production of certain information, chiefly documents, from the various personnel and departments within the company charged with the custody of this information. A documentary control system should be easily administered, word-processed, and computerized in such a way as to enable disputes personnel to monitor the timely progress of the dispute resolution procedures.

#40 The dispute resolution team

Even small companies with a staff of no more than 15 can form their own dispute resolution specialists and gain the advantages of experience and economy in the management of the firm's dispute resolution. The dispute resolution team can oversee the processing of disputes and build up sufficient expertise to enable the optimum dispute resolution economies to be achieved, so that external legal assistance is sought when it is required and used efficiently. Although a dispute resolution team might work, as it were, casually, being comprised of persons who are concerned with a range of other functions within the company, they can still be effective. Rather than placing an additional burden on corporate overheads, it should be remembered that the cost of dispute settlement presently borne by the company may be larger than expected, as it will include lawyers' fees, court costs and other disbursements. Yet the costs of settlements that are less favourable than they may otherwise have been must be brought into the calculation.

#41 Controlling a dispute file

Controlling a dispute file involves a much more complex checking system than would characterize other corporate files. Systems must be set up to control certain documents so that, for example, the originals are always carefully preserved. Procedures need to be established for the copying of original documents, the copying of documents that may be requisitioned or supplied from the other disputing party and the re-allocation of these documents to their original source in order to preserve the integrity of the files from which they are originally sought. So often disputes are settled only because either or both of the parties has lost control of the documentation, and for that reason alone seeks to settle the dispute on the best terms then available. Had a system for copying, noting and transmittal of information been established early, then not merely would the information and the responses that are being sent to the opposite party be consistent and serve to deepen the position of the corporation, but they would have allowed full value to be obtained from the set of dispute resolution precedents which have been developed by the company.

Corporations operate in limited fields. Most disputes can be and should be forced into similar moulds from the perspective of preparation. Maintaining and updating a set of precedents, developing dispute/conflict manuals for the assistance of staff and consistent, clear internal rules for monitoring acceptable settlement outcomes as they develop are basic ingredients. Mastheads, file numbers, dates, headings and consistent referencing systems are not put in place by accident. One of the advantages of using dispute resolution personnel is that they become skilled in systematizing often discordant and inconsistent materials into an orderly dispute resolution package. Order, if it can be achieved, is the first element in successful conflict resolution. The trajectory of any dispute's resolution process is inherently unpredictable, involving as it does the coming together of two incompatible views of reality.

The file may increase imperceptibly yet, the admission contained in the item omitted in the opponent's last letter may be crucial to the outcome. Then again, at various stages, huge volumes of paperwork may be delivered by the other party and regarded as mostly irrelevant by the experienced eye. An on-line monitoring of the trajectory permits adequate control of the file by senior staff. In pre-ordained and consistent timeframes the nominated member of the dispute resolution team should re-assess (perhaps every two weeks) the status of the dispute and the currency of any proposals from either side which exist for its settlement.

#42 Changing personnel in modern corporate disputes

Where the size of the corporation allows, there is an advantage in treating dispute resolution as a separate segmental contributor to corporate post-tax profits. Therefore, as with other aspects of corporate organization, the advantages of specialization and uniformity of this element of profitability should be evident. Moreover, changing the company officers from those involved when the dispute crystallized to the specialists who resolve disputes -- with all due co-ordination arrangements in place -- accelerates reconciliation by removing elements of ego and vested interest preventing prompt resolution.

While natural aptitude is clearly important, the right preparation is imperative. Preparing for a dispute involves an understanding of what the dispute's resolution may ultimately require and accepting the principle that the cost of what may prove to be greater preparation than was necessary is very small when compared with the risks of under-preparation and consequent loss or delay in achieving ultimate settlement.

#43 Early preparation

Profound preparation achieved as early as possible is the key to the successful resolution of disputes. As soon as the dispute is recognized and referred to dispute resolution personnel within the organization, a summary of the dispute and its history should be prepared. Immediately afterwards, the three or four significant issues which appear to lie at the heart of the dispute should be ascertained, the company personnel identified and the salient facts listed. Although mediation and conciliation need not follow the rather more formal and time-honored procedures (of a claim followed by a defence followed by a further response from the claimant), there is no reason why the dispute resolution preparation should not follow this approach. Standard procedural forms reproduced in the appendix below, illustrate just how simple the process of preparing the dispute documents can be.

Although there are different rules used by each dispute resolution center, and sometimes different names for the same Rules or documents, at the heart of these processes are the documents of the two parties summarized as the *claim documents* and the *defence documents*. A mediator or conciliator may wish to avoid using confrontationist terms such as "claims" or "grievances". But the names are not as important as the concepts that lie behind them. In every disputation the originating party states what it believes are the essential facts, and provides a short general statement of the grievance for which the party seeks redress. In every response or defense to such a claim there must lie the facts upon which the responding party says remedies ought be refused, or why part only of the claim should be allowed. On so many occasions the statement of a counterclaim by the responding party against the original claimant will be its effective defence to the claim.

#44 Interpreting dispute documents

Each of the documents that form part of the claim or part of the response should be expressed simply and as succinctly as possible. At the same time, however, they should be phrased in general language where possible so that they do not require constant addition, subtraction or amendment to ensure clarity of meaning. The role of standard dispute documents is to *summarize* the claims of each party against the other. These documents are not, nor do they need to be, technical papers. Provided they set out the basic issues in conflict between the parties they are capable of commencing and maintaining the dispute resolution process.

As the dispute process unfolds, it may happen that claims are deleted or abandoned, counterclaims are added and perhaps further claims discovered by the originating party. If each of the timeframes within which claims are proposed and/or responded to are met by all parties, then the procedural technicalities can be unravelled before they produce irresolvable problems. Win, lose or draw, each party profits, if the dispute resolution process proceeds at the greatest speed in accordance with the agreed schedule for the discovery and production of documents, or the exchange of expert's or other witness statements.

#45 Third parties

One issue easily forgotten when nursing a grievance is "third parties". Are there parties, other than the parties to the contract, who have had a role to play in causing the dispute? Are those parties likely to consent to participate in the dispute-solving process? (As third parties no dispute resolution clause applies directly to them.) If the third parties will not agree to participate it may be necessary to litigate the matter in court. Where there are multiple ADR procedures in train, enquiry should be made to see whether consolidating these procedures is likely to assist in resolution.

However, the question of quantum is important precisely because if the parties are effectively limited in the amount each can recoup, but large in number, then the costs in relation to the amount at stake become proportionately higher for the individual parties. Each party to the dispute is likely to have a different dispute facility ratio as a part of their own internal structure. Multi-party dispute situations are treacherous. A multi-party dispute must have a substantial quantum to properly justify the costs of any of the processes of dispute resolution unless it is certain settlement can be reached in a relatively short period of time.

DISPUTES AND DEAL MAKING

#46 The disputes continuum

Disputes extend from a client's innocent request for more information concerning a product to the final stages of appeal in a court system. Corporate life must go on, around and about and during the process. And yet disputes are also the beginnings of better client relationships, longer and renewed contracts and business expansion. Moreover, disputes on some items may become rolled over into new agreements on wider issues. Disputes are, in almost every corporate situation, merely extended occasions for negotiations between a corporation and its environment. All of the skills of the negotiating process should therefore be common to every stage of the dispute resolution process.

#47 Classifying each dispute

Traditionally, commercial men and women have classified disputes by their subject matter and particularly by their repetitive characteristics, so that in the sale of goods, for example, the plaintiff very often seeks payment while the defending party alleges that full payment is not due because of defects in the goods. Every industry has typical disputes which recur and where only the names of the parties and the amounts in issue differ. Since no corporation wishes to embroil itself in disputes, it can be said that disputes are randomly distributed as a function of accidents or mistakes in the risk of opportunities or information processes which give rise to them. Thinking about disputes in this way facilitates a salvage approach and diverts the parties from blame seeking (which in many cases is inappropriate, and in almost all cases costly). However such an approach swiftly indicates that some information systems are routinely troublesome and that their actors are constantly involved in conflict adjustment.

#48 Negotiations

Because disputes always have a transaction cost which can never be fully calculated and therefore can never be fully recovered even if the dispute is resolved favourably, there will always be some value in attempting to negotiate a dispute. By "negotiated" is meant "give and take" participation in the dispute resolution process. Almost every dispute resolution process involves participation by the parties, but when the dispute process reaches the stage where a third party actually determines the nature of the resolution then, and only then, does negotiation stop.

While it is becoming accepted that arbitrators may act as mediators or conciliators upon their own initiative or that of the parties, arbitral and court procedures -- in their formal character -- do not allow overt negotiation by the parties during sessions. Even so, until the process of law is ultimately taken to the extent of seizing property or persons to give effect to a third party's decision, there is still significant room for the parties to manoeuvre. Commercial disputes of the worst sort where questions of liquidity, bankruptcy, insolvency and preference may be involved often require negotiation with many parties even after an arbitration or court hearing has ceased and the award or judgment been made the subject of enforcement procedures.

There is a sense in which dispute resolution and negotiation are just different ways to refer to the same sort of processes. All disputes are capable of negotiation, and all negotiations are incipient disputes since the parties have not yet agreed. However, the words are used often in different senses because some dispute resolution procedures, particularly those involving litigation, have timeframes and formal steps which fix in writing the position of the parties to a much greater extent than need occur where the parties were merely negotiating. Certainly the existence of formal dispute resolution procedures with their schedules and documentary obligations must be taken into account in any of the negotiations that happen over this time in an endeavor to resolve the dispute. It stands to reason that the best negotiators will be those who understand the unfolding nature of the dispute resolution process itself and who can accurately position their offers and bids in relation to that ongoing process.

#49 Bargaining tactics

Bargaining tactics in participatory dispute resolution begin with understanding that, like the making of many bargains, settlement deals are reached frequently through the endeavours of an impartial intervenor. Unlike the deal-making phase, however, the same broker acts in accordance with the wishes of both parties as long as it is possible to do so. Modern social science in its applied variety

has developed extensive analyses of bargaining tactics from those as theoretical as today's physics to those not far removed from folklore and anecdote. Superior bargaining tactics may be effective in negotiation if one assumes the strengths of each party's case to be otherwise equal. However, without merits and preparation, the best tactics are likely to look threadbare and unsophisticated. A strong case, equally, is less affected by the skills of the negotiators. But when, as is often the case, the strength or weakness of a company's case is still to be revealed, then the skills of the negotiators throughout the dispute resolution process are of great importance.

#50 Protecting corporate information and profile

Sociologists argue that there are technical difficulties in speaking of something as secret where more than two parties are privy to the information. As an extension to that theorem it can be said that disputes can be resolved by negotiation, and negotiations succeed -- to the extent that the crucial issues for each of the parties are able to be resolved -- without exposing that resolution to the assessment of parties outside the negotiation.

The prime motive for resolving disputes without the imposition of a judge-made court order is the protection of corporate information and profile. Any saving of face, by any diminution in the number of persons who understands the concessions made by the company, or any protection from the public of information which would lessen the standing of the company in its eyes, has a value beyond the specific dispute. To state these ultimate goals is to underline their importance to the ongoing corporate image.

#51 Negotiation skills

Patience

Never precipitately break off talking: negotiations can only be successful if they continue until settlement. Continuity of the dispute resolution process is imperative. Incremental processes allow information recently come to hand to be used to re-evaluate the global position of each of the parties to the dispute. The possibilities of total or cataclysmic loss can therefore be more finely related to the state of information the parties possess about the facts in dispute.

Dispute settlements almost exclusively negotiated

Personnel involved in resolving disputes on behalf of their company are often perplexed by the many approaches to the subject taken by popular commentators. It is truly said that negotiating skills are essential to dispute resolution. In fact the overwhelming majority of all disputes of whatever variety, in court and out of court, are ultimately settled -- with or without the help of some third-party intervention -- by agreement. Parties reach those agreements at many different times and stages, and before, or even after a court judgment or arbitration award has been handed down in favour of one of the parties.

Experience teaches that even after a binding legal order has been obtained from a court or tribunal, the processes by which finds are actually received by the successful party are tedious and time consuming. Ranging from forced sales of assets to repatriation of funds between one country and another according to prevailing currency regulations, executing against an unsecured debtor is a painful, unrewarding, bitter end.

Negotiation is agreement seeking

Businesspeople are constantly addressed by advertisers, counsellors and authors who promise to reveal the secrets of negotiation which are universally sought. The professional negotiator is happy to add to his repertoire of approaches, tactics and strategies wherever possible. But those who have yet to build the most important foundation for negotiation -- commercial experience -- can acquit themselves effectively if they understand that the context of all negotiation is that of the making of a new agreement. A genuine agreement centering on, but not necessarily limited to, the resolution of the current conflict, should leave every party with guarantees as to its enforcement or implementation.

Negotiation's basic: acceptance

Catch phrases, slogans and short advices on "do it yourself" dispute resolution ultimately must depend, if they are to be successful, upon an acceptance by both parties that resolving the dispute is important: that a major part of any ongoing, legitimate corporate activity is solving crises. Stopped payment or defective goods are crises in the making.

Many professionals who see themselves as deal makers oddly enough do not understand that an adaptation of their persuasive skills will make them effective dispute resolvers. Whereas deal making is full of hope, dispute solving is about salvage. Deal making thinks globally, while a dispute settlement must be haggled, delayed and detailed. The parties need time to achieve progress by reconsidering the issues and their implications, by lateral thinking and the development of new formulae. Because dispute resolution occurs in an atmosphere of distrust and rancor, the highly intelligent, rational endeavor to draft, refine and formulate acceptable compromises is often forgotten by the participants.

#52 Cheap dispute resolution

Unfortunately, participants in dispute resolution procedures which are described as alternatives to litigation in the courts expect far too much far too quickly. They have misunderstood the negotiated nature of much litigation (where the negotiations usually take place in a series of standard, formal documents) and they have also misunderstood the need for preparation and perseverance in whatever dispute resolution mode is chosen.

If dispute resolution is approached from the point of view that it will be a complex and labor-intensive exercise over a considerable period of time, then the process as a whole will become more intelligible and therefore more predictable. The bargaining and counter-offers, the allegations and denials, the opposition of experts and parties' documents will all appear as routine and thus can be measured on an appropriate scale. It is almost always helpful in resolving the dispute to have worked out at the commencement of the process what result the party may ultimately accept if nothing better can be agreed. Attempting to reach unrealistic resolutions can force parties to more expensive dispute resolution forums and increases vastly the irrationality of the process.

INTERVENORS

#53 Types of intervenors

There are many kinds of intervenors and many degrees of intervention. It must not be forgotten that, according to the civil law of almost every jurisdiction that is dealt with, an intervenor has lawful status only by virtue of the parties' agreement. The parties must, at the very least, have reached agreement about dispute resolution outside the court system (specifically, agreement about intervenors such as mediators, conciliators and, more commonly, arbitrators), before the law will prevent either party taking the matter into the court system. Similarly, unless there is some contractual agreement, it will be difficult to enforce any of the settlements that these intervenors facilitate or arrive at.

There are many types of intervention, ranging from those which attempt to facilitate the parties finding their own solution to their dispute to those which impose a resolution of the dispute upon both of the parties, perhaps pleasing neither of them. Intervenors can be single or multiple, expert or experienced, or both. In this Service the focus is upon the intervenors provided by the institutions whose Rules are reproduced. Most of the organizations set up for the resolution of disputes will go to great pains to assist parties in obtaining an intervenor of their choice. For most of the time the interventions provided for by the Rules of these organizations should be sufficient to meet the needs of almost every set of contractual disputants, and most others.

#54 Institutional intervenors

While *ad hoc* intervention may always be obtained by the agreement of the parties (in some special circumstances particular expertise or particular multi-lingual skills may be necessary), in the main the best intervenors are those who have both training and experience. Therefore they will be those who are associated with dispute resolution centers.

Most dispute resolution centers are involved in training and continuing education programs for their members. Some institutions like the Australian Institute of Arbitration, for example, have graded exams with three levels of arbitral competence. Almost all the institutions are able to organize mediators and conciliators from amongst their members even though these institutions may have historically operated as arbitration institutes. Frequently an experienced arbitrator will prove to be an effective mediator or conciliator, if only because he or she is able to overcome some of the limitations and frustrations of arbitration by becoming involved in the discussions that take place always between parties and their advisors. In any event, each dispute resolution organization included in this Service is able to provide disputants with a list of persons who are thought to be suitable intervenors.

According to the rules of some of the associations, the organization itself will nominate the intervenor according to the terms of its rules and the contractual agreement between the parties. While agreement is the basis of alternative dispute resolution, it must be remembered that the dispute resolution clause in the agreement is usually -- even if of the standard form -- brief and general in its outline. It is generally found that parties are happy to agree on many of the details of the procedure by which the arbitrators, mediators or conciliators are chosen or appointed, even after the dispute has arisen. Similarly, dispute resolution organizations, in accordance with their aims and goals, will facilitate the parties to reach the best method of settling their dispute. Consequently they are usually open to suggestions and *ad hoc* amendment to some of their rules (with the consent of the parties). In particular, most centers will advise in detail the qualifications and experience of the intervenors who may be obtained by the offices of the center.

#55 Mediator, Conciliator or Arbitrator

There is no fixed definition of mediator, conciliator or arbitrator which would meet universal approval, nor even common legislative enactments which governs dispute resolution in the various nations of this Service.

Within this publication the terms refer to dispute intervenors who are on a continuum form the mediator (who is concerned to play as small a role as possible in the actual resolution of the dispute), to the arbitrator (who ultimately will play the decisive role in the determination of the dispute through the handing down of his or her award).

The conciliator on the other hand is somewhere between the two in terms of the relative degree of input, and in terms of the relative weight which the conciliator's own opinion of the merits of the dispute will bear in relation to its outcome. A conciliator may well have more impact upon a settlement of a dispute than an arbitrator because, although the conciliator does not have the arbitrator's ultimate authority, he or she is nevertheless able to influence the way in which both parties see their own position in the debate. Where an arbitrator, although having the authority to make a determination, is powerless to do very much to change the terms of the dispute, a conciliator, who is perhaps an expert in the field of the dispute or who is very experienced in disputes of this nature, will have on many occasions an opportunity to change the agenda of the dispute, to change the way in which the fault is conceived by either party and to change the context in which the reality of the parties' claims against each other are appreciated.

Mediators and conciliators provide a reality test for the parties who, by the time they have reached a formalized resolution of their dispute, have usually become rigid in their thinking and both suffer from tunnel vision. The impartial intervenor approaching the dispute from a different time point, usually long after the events and their antagonisms occurred, can very often deduce what optimal settlements will look like. It must be said that the optimal dispute settlement is one which places both parties in a position equal to or better than that which would have obtained had either of their claims been met. Technical conflict theorists describe this as the zero non-sum game situation. It is not always the case that "win-win" positions can be established for the competing claims, but more often than not this is a failure of the imagination of the parties and, to a lesser extent, of the impartial intervenors whom they have consulted.

#56 Adjudicators

One of the elements of the average dispute is time. The parties are usually anxious that, as soon as possible, the dispute should be concluded. This has two aspects. First, the dispute resolution process itself must happen swiftly. Second, and perhaps even more important, the possibility of the matter being re-examined (either by appeal from an arbitrator's award or from the decision of the judge of first instance), must be limited as much as possible. Because parties want a final, speedy outcome, they often fail to give attention to the inherent logical progression in the continuum from mediation to arbitration (and possibly thereafter litigation).

Provided the dispute concerns the provision of construction services or materials, and does not involve home-owners, mines and mining, you will not find a speedier resolution of the dispute. Within 40-45 days in most cases you will be able to register a court judgment and enforce the adjudicator's determination (assuming you were successful).

Otherwise, If negotiation/mediation fails, then either arbitration or litigation will result. Though that may happen, the discussion at mediation stage or in the course of an attempted conciliation will prove valuable in the long run, even if not in settling the dispute in those stages. It is therefore advisable that the parties carefully consider the consequences that can result if a mediator or conciliator is later (under the terms of the contract, or under the terms of a dispute resolution

agreement) going to be asked to act as an arbitrator.

Parties may commit themselves to positions prematurely, in an attempt to either settle quickly or flush out the real position of the opposite party. If the mediator or conciliator, having heard the party adopt those positions, later relies on the knowledge that those positions were adopted, then a party may be prejudiced. One party may have chosen to be more open or frank than the other. One party may simply be wishing to delay the evil day when payment must be made or reputation (or worse) lost. That party is rarely candid or sincere in the formulations that it puts forward and some countervailing claim is regularly raised against the wronged party.

An attack makes a fine smokescreen for a weak defence. More commonly, one or other of the parties has a claim which will require greater discovery or greater preparation than the other if the claim is to be aired fairly, answered and adjudicated upon. The party whose case requires the longest preparation inevitably will be better prepared after the matter has received the attention of a mediator or a conciliator and has reached the stage of an arbitration hearing. In choosing at what point to enter the dispute resolution procedures, a party should give some attention to these four basic matters:

- the nature of the dispute,
- the nature of the party's case,
- the time and wort required to place it in its best light, and
- the timeframe in which any dispute resolution is sought to be achieved.

#57 Is mediation mandatory?

Whether mediation is mandatory depends on what the parties have agreed concerning the procedure to be followed in case of dispute. Since mediators, like conciliators, lack power to impose their solution on the parties, strictly speaking, these more voluntary forms of resolution cannot be compelled. As is now clear, mediation and conciliation are distinguished from arbitration because they are types of third-party intervention where the parties have agreed that the third party has no power to force the parties to come to a particular agreement, nor any power in *itself* to reach that agreement for them or on their behalf. In these circumstances parties are often confused as to the function that mediation or conciliation ought to play. That misconception of mediation or conciliation is particularly common amongst small businessmen who do not average enough disputes to make dispute resolution the significant factor in year-round profitability that it may be for the larger corporation.

Moreover, for the small business person a vast proportion of disputes arise in circumstances where there has been a refusal to pay or the delivery of grossly defective goods or services. In such cases, the respective contractual wrong-doer usually has decided, for one reason or another, that it cannot do anything else but avoid the obligations of the contract. Paradoxically, small business persons usually have the greatest scope to change their business partners, and consequently have less concern in falling out with a previous contracting party.

Medium to larger business usually has longer term contracts, and long-term commitment to brand identification advertising and trade relationships. Businesses of this size are therefore not likely to look upon the existence of disputes or conflicts as suitable for abrupt conclusion. In other words, whereas small-business disputes may arise from the failure of one of the partners to honour its obligations -- in the pursuit of naked self-interest -- it is less likely that the larger corporations' disputes will originate from the same source. It is more likely that a series of cumulative misunderstandings, misapprehensions and mistakes will have given rise to the dispute which is, or

shall prove to be, more capable of settlement in the case of the larger corporation than it is in the case of the small business. Thus the fact that mediation has no external compulsion is, as it were, almost irrelevant.

The larger corporation knows that agreement needs to be present at all stages. Furthermore, the parties to the agreements must be solvent. The benefits of ultimate recovery, even at the end of the extreme form of external legal compulsion (the execution of a civil judgment) are able, then, to be achieved.

#58 Dispute solving

In due course it may prove that mediation or conciliation fails to resolve a particular dispute. It may be that the interests of parties not directly connected to the dispute, such as financiers or insurers, mean that one party is forced to push on until a decision by an independent tribunal renders further resistance impossible. If the dispute is heard by the intervenor with decision-making power (an arbitrator), it will be necessary to look at the legislation governing the powers and appointments of arbitrators and the rules of the respective dispute resolution center to establish the extent of the powers the arbitrators will have.

#59 What type of dispute intervenor is best?

From the viewpoint of the parties, faced with the suggestions for impartial intervenors which will be given by any of the dispute resolution centers, the question arises: what qualities make the best intervenor and how may we discover them?

It will not be possible to determine from the particulars supplied by one of these organizations what sort of person or operator a particular nominee will be (in many cases). However, it should be possible for a disputing party to know well in advance what it will expect from such a person.

A mediator is a person who is able, by adroit questioning and comparative analysis of a situation of distorted communications, to allow the parties themselves to see what the facts really are and therefore what form the settlement for this dispute should take.

A conciliator is a person who can be likened in many ways to the jointly hired third party independent expert who will contribute an objective, perhaps novel, suggestion for the resolution of the dispute. A conciliator is of more use in circumstances where the facts are complex or a particular expertise is desirable in evaluating the truth, or relative truth, or the extent of the truth of either party's claims.

An arbitrator is a person who allows each party to put its claim in turn so that, in the end, he can rationally make the decisive elections that are required to put a stop to the argumentation between the parties.

If a sense of humor is a great thing for a mediator, a sense of dignity and decorum is often part and parcel of the good arbitrator. The enthusiasm of the conciliator for assisting the parties to avoid the costs of arbitration, or possibly litigation, very often accompanies the conciliator's own deep knowledge of the subject matter surrounding the dispute. It follows then that a mediator will have to get along with both parties; toleration is not enough, there must be a positive relationship for success between the mediator and both parties. Because in most cases a mediator does not contribute his or her own opinion to the parties, the mediator's personal role is very limited to facilitating the contact between the parties' representatives themselves which will bring about settlement.

The mediator needs to be a charming, unassuming, retiring intervenor. A conciliator on the other hand might well be described as a catalyst, an ideas person who can dissipate some of the antipathy the disputing pathos have about the conflict and each other's claims. The arbitrator needs always to have an abiding sense of how fairness may be seen to have been achieved. It is likely that the arbitrator's role, because it has been historically spelt out as quasi-judicial, is more limited to the application and interpretation of the law and therefore more formalised. The less stylized and more ubiquitous assets of character which go to make the ideal mediator or conciliator on the other hand are unlikely to benefit from experience of past successful or unsuccessful mediations or conciliations to the extent that the person playing the role of arbitrator might enjoy. But agencies supplying information on potential intervenors should be asked for experience where it is felt that arbitration is required and for other qualities of character where mediation or conciliation is felt to be the first step.

#60 Personal character of problem solvers

Care needs to be given to the characterization of the most appropriate dispute resolution method and thereafter concern need be had for the person who is to occupy the selected role. The intervenor can only be changed with difficulty once the process has commenced. Indeed it is unlikely that the process can survive without substantial delay and inconvenience if, for one reason or another, the intervenor is changed after his or her appointment.

Because mediation and conciliation require a continuing basis of agreement by the parties, the disappearance of the ring keeper or referee would almost inevitably mean the end of the process and hardly ever the end of the conflict. The process would probably have to start again afresh. While mediations, once they have proved apparently fruitless, cease quite quickly and while conciliators must often give up their hopes, an arbitrator, by contrast, will continue to the handing down of an award.

Given the powers placed in the hands of arbitrators by law, and given their diminished reliance upon the maintenance of a consensual environment between the parties, the arbitrator can only be changed in most jurisdictions if it can be shown that he or she is morally or legally defective. If the arbitrator can be shown to be biased or prejudiced in favor of either party or inclined overwhelmingly to a particular view of the outcome, irrespective of the facts which are produced, or if the arbitrator is shown to be corrupt, then he or she may be removed by application in most instances to a civil court. Civil courts are naturally reluctant to allow parties, fearful of an arbitrator's imminent award going against them, having recourse to another system of justice in order to delay the fateful day when they must pay damages or meet their dues. Thus it is that, though parties may have great power to initially select their intervenor (in a case of arbitration the arbitrator) that power, once exercised, is usually spent.

Because arbitration or court litigation takes control of the dispute out of the hands of both parties, there is an incentive for contending parties to opt for mediation or conciliation as a first step. Such a tactic allows the parties to monitor the strength of the opposing case and the significance or relevance of the dispute to the global enterprise which the firm conducts. It allows an extended period of time in which more information can be exchanged concerning the conflict before a decision has to be made on committing a potentially uncapped fund of resources to achieve adjudication, the course of which adjudication the party cannot control. In losing control of the course of the adjudication the party loses control of both costs and time. Nevertheless, although it may appear at first glance simple to commence with mediation or conciliation and then proceed to arbitration, there are some cases where it would be better to proceed immediately to arbitration and those cases must be identified as early as possible.

PROCEEDINGS AND POWERS

#61 Intervenor's power to direct proceedings

All intervenors are able to have powers conferred upon them by contractual arrangements between the pasties. The rules of the various organizations give all three types of intervenors certain procedural powers. The most extensive of those are given to the arbitrator, but a mediator or a conciliator will also have procedural power to call the parties together and to make arrangements for the conduct of the dispute resolution process.

There are presently very few Rules which ordain how a mediator will conduct the mediation, and similarly the role of the conciliator is not as circumscribed as the arbitrator.

An arbitrator is expected to adjudicate between the parties on the basis of reason and the evidence, and to conduct deliberations in such a way that either party can make all due appeals to the evidence and the inferences that an arbitrator may draw from it. To this end it is often said that an arbitrator must act in accordance with the principles of natural justice. While the principles of natural justice are not fixed or determined or exhaustively laid down, they are obvious and can be described in some senses as merely the common sense of fairness. For the present, however, note that most arbitrations should be conducted in the presence of both parties and both parties have an opportunity to speak. Usually those opportunities to speak are organized in such a way that each party is enabled to establish or state its case in full before a response is called for from the other party and vice versa.

In a mediation or a conciliation it may well be that the mediator will spend more time with one of the parties than with another. It is almost always the case that the mediator will speak to both parties in private at least some of the time. A conciliator may well approach the issue in dispute from a completely different viewpoint from that of either of the parties and, in doing so, his or her relationship to the parties and to their joint audience before the conciliator -- if such there be at all -- will be one which depends very much on the subject matter of the dispute. If the parties have given the mediator and/or the conciliator the right to compel the attendance of the parties or the cooperation of the parties up to a certain point in matters of detail or, alternatively, notify the parties, their employees or agents, of his of her desire to speak with them then, under the terms of that enforceable agreement, tire mediator or conciliator would proceed without the presence of the other party. However, such is the tenuousness and fragile nature of the mediator or conciliator's role, it will be found he or she cannot continue for long if one or both of the parties evinces a clear intention to obstruct or, at the very least, not cooperate with the dispute resolution endeavor.

An arbitrator on the other hand is usually empowered by the State to call evidence, administer oaths and generally compel the parties to participate in the proceedings, or not to participate at their own risk, prior to giving the final award.

The arbitrator will have a general power to do justice and to be informed of those facts considered necessary to establish in order to determine the issue in dispute between the parties. Sometimes it is said that an arbitrator must act according to the principles of natural justice; in other cases the arbitrator may act *ex aequo et bono*. Both maxims mean that an arbitrator must give rational consideration to the evidence that is placed before him or her and decide, as closely as possible on the basis of that evidence, which of the parties are to prevail. 'The principles of natural justice can be reduced to, first, that the tribunal -- the arbitrator or arbitrators -- must be without bias to one party or another; most have an open mind as to the issue before it; must not be prejudiced in favor

of one outcome or another, and must not be in league with, paid by or otherwise under undue influence or pressure from either party whether directly or indirectly.

The second principle is that each of the parties to the dispute must be given the right to be heard and, within reason, an equal rigid to represent the party's viewpoint at any and all of the stages of the tribunal's deliberations, including being present when the other party is present before the tribunal, being privy to any communication between the other party and the tribunal, being in attendance at any inspection or view or taking of sample (unless the rules of the dispute resolution center otherwise provide) and being able to call such witness and produce such evidence as the party feels fit and is reasonable, considering the relevance and time to be taken in the airing of such evidence.

An Adjudicator's powers to direct proceedings are extremely limited, He cannot but deliver his determination within 10 days of receiving the appointment. He can request an extension of time but such an extension can only be granted with the consent of both parties. The Adjudicator can however request a conference with the parties, or request further submissions from the parties. But the Adjudicator cannot compel compliance with those requests. Moreover the Adjudicator is usually directed by the Statute as to what matters he can taken into consideration in reaching his determination.

#62 Dispute venues

Dispute resolution venues are meetings at which the participants, including the impartial intervenors, interact to a greater or lesser degree with the conflicting parties. The court hearing and the conference between the mediator and individual parties is different, and significantly so, but the difference is only one of degree. The company preparing to resolve a dispute should conceive of disputes as if they were a unitary phenomenon and look to see where, on that continuum, different types of dispute resolution procedures, including litigation itself in a court room setting, deviate from the norm.

These are the common characteristics of the dispute resolution venue. The foremost characteristic of the venue is that it places human actors in direct face-to-face, audio-visual contact. For the first time the parties are in the presence of an outsider to the dispute. Perhaps again for the first time external interruptions or distractions are positively discouraged, or actively prevented, by the fact that in order to obtain suitably neutral territory -- or simply accommodation large enough to take all of the participants -- the location of the dispute resolution venue is usually outside each participant's usual workplace.

Whether it is an adjudication, mediation, conciliation, arbitration or court hearing there are common elements in how modern cultures process disputes. They are summarized below.

1. It usually falls to the third party to actually initiate the proceedings at the venue.

2. One of the parties usually commences to outline its case and claim. It is usually the case that each party should not be interrupted during the course of its story. But the degree of interruption, the degree of questioning that may occur, whether from the opposing party or from the impartial intervenor, is a matter which can vary from the situation of the mediation to the situation of the court room, and within each of those situations substantial variation from time to time will also occur, irrespective of whether the proceeding is conducted under the Anglo-American rules of procedure or the Continental so-called inquisitorial system.

3. Similarly, it will be found that perhaps after some clarificatory questions from the intervenor it is common to have the opposing party -- the person who is responding rather than bringing

the claim -- reply. Thereafter the parties, perhaps in the same order, will commence to bring forward what they regard as the evidence which proves the claim which they have previously stated.

4. Ultimately , except for adjudications, this may involve the leading of evidence in accordance with the appropriate mules for the admissibility of evidence in the case of the formal court room situation, but at any stage it usually involves referring to those items of fact which each party believes go towards establishing the truth of their case and the merit of their claim.

5. So at each of these stages there are opening claims, opening rejections of these claims, evidence referred to or shown in respect of these claims and their rebuttal; and whether at mediation, before the conciliator, at arbitration or at the end of the trial, the parties usually summarize their position in relation to the evidence that has been demonstrated, heard or referred to during the course of the dispute resolution meeting.

#63 Structured Intervention

There is much to be said in complex disputes for structuring the way in which the parties sort through the precise items in dispute. Again there are a number of different labels given to the same pattern of disputation: mini-trials, med/arbs, advisory arbitrations and non-binding neutral report programs are terms used by the American Arbitration Association for process formulas from which parties may choose in an effort to bring an order and sequence into the way one begins to talk about the matters which underlie the conflict.

The advantage of adopting some restriction on the way in which the APR process is undertaken is that parties can actually prepare detailed cases in advance, rather than haphazardly exchange ambit claims which do net allow reason a chance to work on the facts from which these claims have originated. Where there are many documentary analyses required to ascertain the amount at stake, it is helpful to have both parties oriented towards the same items and calculations during the ADR session and, to achieve this, some turn-taking rules are useful. The ordering rules adopted should be of an administrative rather than substantial nature. Debate over the rules of debate should not subvert the great assets of APR, being the fluid forms leading to the shortest settlement strategy.

#64 Conducting the dispute process

The first challenge is confirming one's own story. That challenge can be met by preparation, thoroughness and veracity to the known evidence and the documents. Clear reference to the issues in dispute, which isolates the exact points of difference between one's own claim and that of the opposing party, is essential

The task of exposition and clarification is the first task. If that task is achieved, the second challenge, that of convincing the opposition party of the weakness of its claim, is almost achieved. Convincing the opposing party that its claim is too weak or, alternatively, that one's own claim is the stronger, involves an analysis of the opposing claim or defence which shows that you have not merely understood its case but understood the weaknesses within it. Sometimes a few well-chosen questions on the key issues will expose honest witnesses to the defects in theft memory or recall and to the possibility that they are mistaken. Obtaining truthful evidence from the dishonest is sometimes beyond the ability of even the best lawyers.

Finally there is the challenge of handling the intervention of the third party adjudicator, mediator, conciliator, arbitrator or judge during the course of a dispute resolution session, and particularly during the course of a formal arbitration or trial. It is being able to respond evenly and intelligently

to a third party's queries which perhaps distinguishes the professional from the amateur advocate. Lawyers are experienced in anticipating where likely interjections and interruptions to the flow of their argument may occur. They are also experienced in their ability to project a uniform temperament and an accommodating and confident mien at these times.

While it is possible in almost every jurisdiction for a person or a company via its director or senior officer to present an argument in court without the assistance of lawyers, it is almost always better to engage competent legal counsel in circumstances where the ability to confirm one's story and convince the opposition must be achieved while responding to the third party's interjections.

#65 Detailed provisions of dispute resolution clauses

Where once the standard form company contract may have contained a reference of disputes to arbitration, a sophisticated dispute resolution clause should now include relatively detailed provision for such things as success of mediation, conciliation and arbitration; empowerment of each of the impartial intervenors to conduct their respective roles in accordance with the procedural directions they may determine appropriate, and the establishment of fees and the pre-payment of those fees by the parties.

In addition, a dispute resolution clause in an agreement should contain accurate and comprehensive provisions dealing with the misuse of any information obtained by a party during the process of attempting to resolve the dispute without a determination by a court or arbitrator. It would be desirable if the clause specified that agreement be registered by consent forthwith as a compromise with the relevant court system.

Additionally, a stipulation should be included that interest and the costs and fees of the dispute resolution process be payable by the losing party in the event that the matter is ultimately determined by a judge or arbitrator.

It is well to remember that by agreement the way in which an appointed adjudicator conducts his determination can be substantially extended, expanded and varied without imperilling the outcome of the determination which ultimately results.

#66 Appeal from an award/adjudication

When disputing parties have not and cannot come to their own formulation of compromise and have had to resort to the independent determination of the dispute by third parties such as judges or arbitrators, almost every national jurisdiction allows appeals, to a greater or lesser extent, to the courts or superior courts of that nation.

Very often appeals will be limited to circumstances where the third party decider can be shown to have misunderstood or misapplied the legal principles which affected his decision in the matter. Sometimes, appeals will be possible where there has been procedural irregularity, and almost always corruption or misconduct on the part of the judge or arbitrator will enable the losing party to appeal. However, appeals are usually followed by further appeals and for the minutely small band of parties who engage in this exercise the costs, including opportunity costs forgone, must inevitably mar the outcome. One of the great achievements of dispute settlement is finality.