CHAPTER 5
ALTERNATIVE DISPUTE RESOLUTION IN
ENERGY SECTOR

5.1 Alternative Dispute Resolution in the International Energy Sector

The international energy sector, together with the related construction industry, has been noted as forming “the largest portfolio of international commercial and state investment disputes in the world”.¹ Given that energy projects generally involve a variety of stakeholders (both private and government), significant investment and programmes that span years, if not decades, it is unsurprising that they present unique challenges when it comes to dispute resolution, and that parties are increasingly seeking alternatives to more formal dispute resolution mechanisms such as litigation or arbitration. Energy sector participants commonly provide in their contracts for methods of dispute management that promote the continuation of amicable business relationships and enable the project to continue unimpeded and without delay through any dispute process.² This chapter introduced the concept of alternative dispute resolution (ADR) as a set of procedures that are particularly suited to the types of long-term contracts that are common in the energy industry. This chapter considers ADR procedures in greater detail, looking at the applicability and suitability of particular processes in the resolution of energy disputes.

5.2 What is Alternative Dispute Resolution (ADR)?

ADR is the label generally given to dispute resolution procedures that do not involve traditional court processes. While there is some debate as to which forms of dispute resolution fall within the ambit of ADR processes, commonly accepted examples include negotiation, mediation, early neutral evaluation and dispute review boards, as well as a number of others that are examined later in this chapter. There are differing views as to whether arbitration and expert determination can be considered to fall within the broader spectrum of ADR processes.³

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² Ibid.
Expert determination and arbitration are generally part of a more binding, rather than consensual, process. While ADR processes can be binding or non-binding, the ADR processes focused on in this chapter are generally non-binding. Further, arbitration is now increasingly considered to be a more formal dispute method, and references to ADR are often intended to exclude both litigation and arbitration.\(^4\)

ADR mechanisms are generally employed in one of the following three scenarios:

- As a part of an ad hoc process;
- Pursuant to a contractual process; or
- As a result of a compulsory (court-ordered or legislated) process.\(^5\)

### 5.2.1 Ad hoc Alternative Dispute Resolution

Regardless of their contractual arrangements, parties can agree, at any stage of a project or a dispute that they would like to participate in some form of ADR in an effort to resolve issues between them without resort to more formal and potentially expensive methods. In some circumstances, the contract between the parties may provide expressly for ad hoc ADR. In this regard, although provided for in the contract, the actual choice of process and participation in that process is entirely consensual.\(^6\)

#### Figure 1

An example of ad hoc ADR is contained in the CRINE/Logic 2003 General Conditions of Contract for Services (On and Offshore), a standard form contract for the UK offshore oil and gas industry which provides, in circumstances where negotiations fail to resolve a dispute, that “the parties may attempt to settle the dispute by a form of Alternative Dispute Resolution to be agreed between the parties” (Clause 30.2).

### 5.2.2 Contractual ADR

The principle of freedom of contract gives parties the right to agree to any method of dispute resolution that they consider appropriate in the circumstances. Courts will generally

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\(^4\) \textit{Ibid.}

\(^5\) \textit{Id.}, at 52.

\(^6\) \textit{Ibid.}
enforce contractual dispute resolution terms provided that it is not against public policy or contrary to applicable legislation to do so.\textsuperscript{7}

In comparison to consensual processes that are agreed to by the parties at the time when a dispute arises, contractual ADR mechanisms can often, by their nature (having been agreed at the outset of a project), be less flexible and may not be as well suited to the resolution of specific disputes as they arise in the course of the project. Nevertheless, their inclusion in a contractual dispute resolution mechanism can act as an impetus to early resolution and may assist in alleviating any potential concerns with regard to being the first party to propose an alternate method of resolving a dispute (and any related perception of weakness in doing so).\textsuperscript{8}

As noted elsewhere, ADR commonly forms a part of multi-tiered dispute resolution clauses in energy contracts. Different standard form contracts employ different ADR mechanisms for dispute resolution, although there are some common features. Three examples are provided in Figure 2.

In each of the cases set out in Figure 2, ADR constitutes a contractual dispute resolution mechanism, agreed by the parties as the best way in which to deal with disputes arising under the contract. Contractual ADR is to be contrasted with court-ordered ADR, an area that has seen significant growth in usage over recent years as courts have sought to improve their case management techniques.\textsuperscript{9}

\textsuperscript{7} Ibid.
\textsuperscript{8} Ibid.
\textsuperscript{9} Ibid.
### Figure 2 — Table of ADR mechanisms in three different standard form contracts

<table>
<thead>
<tr>
<th>Industry</th>
<th>Standard form contract</th>
<th>Structure of ADR mechanism.</th>
</tr>
</thead>
</table>
| Oil and gas projects | Conditions of Contract for Engineering, Procurement and Construction Turnkey Projects (the Silver Book), published by the International Federation of Consulting Engineers (FIDIC). | - Disputes are referred to an ad hoc dispute adjudication board (which is expressly held not to be acting as arbitrator).  
- Disputes are referred to an ad hoc dispute adjudication board (which is expressly held not to be acting as arbitrator).  
- If this step is unsuccessful, the matter is referred to international arbitration under the International Chamber of Commerce (ICC) rules. |
- Mediation (optional provision).  
- ICC pre-arbitral referee procedure (optional provision).  
- Arbitration  
- Expert determination (optional provision for specified disputes). |
| Mining Services   | Model Mining Services Contract produced by the Australian Resources and Energy Law Association. | - Three initial levels of negotiations culminating in good-faith negotiations between the chief executive officers of both parties.  
- If negotiations fail, the dispute must be referred to mediation.  
- Once the agreed period for mediation expires, a party may refer the matter to expert determination (where the contract permits) or commence court proceedings. |

### 5.2.3 Compulsory ADR

A focus on improving active case management techniques has seen an increased use of ADR mechanisms in pre-action requirements and as a part of court processes. This has been
recognised both in legislative amendments to pre-action protocols in the United Kingdom\textsuperscript{10} and Australia,\textsuperscript{11} and in the increased use of court-ordered ADR.

Pre-litigation requirements generally oblige parties to take genuine and reasonable steps to resolve the dispute by agreement (ie, before commencing proceedings) or to narrow the issues in dispute. The use of an appropriate form of ADR is encouraged. In Australia, once proceedings have commenced, some courts have the power to make an order, if it is deemed appropriate, referring the matter to ADR (usually mediation), with or without the consent of the parties.\textsuperscript{12} In many jurisdictions ADR is a required step in particular types of dispute, such as labour or family-related matters. Recently, by way of example, Italy introduced mandatory mediation for finance disputes (including disputes concerning insurance, banking and financial contracts).\textsuperscript{13}

The scope and application of compulsory ADR are jurisdiction specific and thus have not been considered in great detail. Parties should consider the potential application of such processes when agreeing to submit disputes to the jurisdiction of a particular court system.

\subsection*{5.3 Common ADR Mechanisms}

The majority of ADR methods involve a third-party neutral. Negotiation is the obvious exception to this. The precise role of a neutral in the resolution process depends on the method chosen by the parties and any other agreement that has been reached between them with respect to the applicable procedure to be followed. Where a neutral is involved, he or she will be required, in all circumstances, to be impartial and independent of both parties in order to ensure party confidence in the process.\textsuperscript{14}

In contrast to court proceedings, parties seeking to resolve a dispute by way of ADR have the ability to select the most appropriate neutral to facilitate resolution of the particular dispute. It

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{10} In the United Kingdom, there are specific pre-action protocols for particular types of claim, including Construction and engineering matters. The Civil Procedure Rules, Practice Direction: Pre-action Conduct (UK) applies to matters where no specific pre-action protocol is in place.
\item \textsuperscript{11} Pre-litigation requirements were introduced in the Federal Court of Australia in 2011 pursuant to the Civil Dispute Resolution Act 2011 (Cth). The introduction of similar requirements has been postponed in New South Wales. In Victoria, pre-litigation requirements introduced in 2010 were subsequently repealed in 2011.
\item \textsuperscript{13} Legislative Decree 28/2010 (Italy).
\item \textsuperscript{14} \textit{Supra} note 3 at 54.
\end{itemize}
\end{footnotesize}
may be that the issues in dispute require a neutral with specific expertise, be it legal or technical. As the parties may find reaching an agreement as to the identity of the neutral difficult once a dispute arises, it is sensible to ensure that there is an agreed method set out in the contract by which the neutral can be appointed in the absence of agreement by the parties. Energy contracts commonly specify a particular professional institution to undertake the nomination of the neutral on behalf of the parties. Parties should take care in choosing a nominating institution and ensure that that institution will in fact undertake a nominating role. The inclusion in a contract of a body as a nominating authority that does not make appointments could render the relevant contractual clause inoperable.¹⁵

It is common practice, once the third-party neutral has been appointed, for the parties and the neutral to execute an agreement (usually in the form of a tripartite agreement) to govern the relationship between them. This agreement usually:

- identifies the boundaries of the neutral’s role and responsibilities;
- defines the issues requiring resolution; and
- sets out the compensation payable by the parties for the services to be rendered by the appointed neutral.¹⁶

¹⁶ *Id.*, at 55.
<table>
<thead>
<tr>
<th>Dispute Resolution Process</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Negotiation</td>
<td>May be a precursor to other forms of dispute resolution in a tiered resolution process</td>
</tr>
<tr>
<td>Mediation</td>
<td>Facilitated negotiation, non-adjudicative, but can be court ordered</td>
</tr>
<tr>
<td>Facilitation</td>
<td>Similar to mediation, often adopted where there are two or more parties</td>
</tr>
<tr>
<td>Mediation</td>
<td>Facilitated negotiation, non-adjudicative, but can be court ordered</td>
</tr>
<tr>
<td>Conciliation</td>
<td>More evaluative process, conciliator can be required to provide parties with advice</td>
</tr>
<tr>
<td>Mini-trial</td>
<td>Structured dispute resolution process, combines conciliation with executive negotiations</td>
</tr>
<tr>
<td>Early neutral evaluation and expert appraisal</td>
<td>Evaluative ADR processes, aid the parties in assessing the risks where the matter cannot be settled</td>
</tr>
<tr>
<td>Dispute review boards</td>
<td>Panel of impartial experts (typically between one and three) appointed by the parties under their contract</td>
</tr>
<tr>
<td>Adjudication</td>
<td>Contractual adjudication/expert determination, statutory adjudication of disputes arising out of &quot;construction contracts&quot; exists in the United Kingdom and Australia</td>
</tr>
<tr>
<td>Med-arb</td>
<td>Where mediation has not resulted in settlement, mediator assumes role of arbitrator and determines dispute</td>
</tr>
</tbody>
</table>

The agreement will also often contain an agreed confidentiality regime to apply to the (sometimes referred to as facilitative, evaluative and advisory ADR processes). The role of the third-party neutral in these processes is to assist the parties towards finding a mutually acceptable resolution to the issues in dispute. The neutral has no power to impose a solution on the parties,
though in some processes he or she may be given the power to provide a non-binding view which may be highly persuasive. An illustration of a range of ADR methods is given on the previous page, from the least adjudicative/binding method (negotiation) to the most adjudicative/ binding method (adjudication). The process of mediation-arbitration (med-arb), which is discussed further below as a follow-on from mediation, has been included as a slightly separate ADR process, which combines mediation with arbitration to resolve disputes.\footnote{Id., at 56.} In contrast, arbitration and expert determination (also referred to as contractual adjudication) are considered to be binding or determinative forms of ADR. Statutory adjudication, a method of ADR that is at first instance binding on the parties, is considered later in this chapter.

5.3.1 Facilitative, Evaluative and Advisory ADR Processes

The advantage of non-binding ADR is that, ultimately, the solution reached is not imposed on the parties. Therefore, the parties are more likely to assume ownership of the process. In consequence, there is a significantly greater likelihood that the agreed solution will be implemented in practice. While the outcome of ADR processes generally represents a compromise between the parties, a mutually negotiated and agreed solution is less likely to result in either party perceiving that it was the ‘loser’ in the process.\footnote{Ibid.}

More broadly, consensus-based processes are seen by some as a tool for societal preservation. For example, in China, there exists a general preference for processes such as mediation, based on the emphasis in Confucian philosophy on the need to preserve harmony in society which, in the context of disputes, means “compromise, yielding, and non-litigiousness”.\footnote{AFM Maniruzzaman, “Resolving International Business and Energy Disputes in Asia Traditions and Trends”, \textit{Transnational Dispute Management}, 6 (March 2011).} Furthermore, despite challenges implicit in investor-state disputes in the oil and gas industry in Asia, mediation, for example, is increasingly preferred as a method to settle disputes.\footnote{A Jennings, \textit{Oil and Gas Exploration Contracts}, 22 (Sweet & Maxwell, London, 2002).}

Some common examples of non-binding ADR processes are explored below.

\footnote{17 Id., at 56.} \footnote{18 Ibid.} \footnote{19 AFM Maniruzzaman, “Resolving International Business and Energy Disputes in Asia Traditions and Trends”, \textit{Transnational Dispute Management}, 6 (March 2011).} \footnote{20 A Jennings, \textit{Oil and Gas Exploration Contracts}, 22 (Sweet & Maxwell, London, 2002).}
5.3.2 Negotiation

(a) Key Features and Issues

Direct negotiation between the parties is most often used as a first step in an escalating dispute resolution clause and is a common feature in energy contracts. It consists of the referral of disputes either to specified senior management representatives of each party as a single-step process (failing which the dispute escalated to the next ADR process), or on through to higher levels of management initial discussions fail to reach a resolution.\(^{21}\)

The utility of including a contractual requirement to negotiate can be questioned on the basis that it is a step that is likely to be taken, on a consensual basis, in an event. However, as noted elsewhere in this thesis, including negotiation as prerequisite to more formal dispute resolution processes can act to circumvent a sensitivity that a party may have to proposing it as an option, due to concerns as how that may reflect on the party’s confidence in its case. In addition, there is an increasingly greater expectation on parties, reflected in the development of preaction protocols and court processes, to attempt to resolve disputes before initiating proceedings. However, it should be kept in mind that including an obligation undertake negotiation in a dispute resolution clause will result in some delay to the commencement of more formal dispute resolution steps.\(^{22}\)

The advantage of structured negotiation is that it takes the dispute out of the hands of those who have been intimately involved “at the coal face” and who, as a result, may have entrenched positions with regard to the issues in dispute. As six the objective of negotiations undertaken at higher levels within the relevant organisations is to facilitate the separation of disputed issues from any emotion attached to them, in order to enable the parties to focus on their mutual interest resolving the dispute and continuing their business relationship. In order to achieve this purpose, the obligation to negotiate should be a non-delegable one.\(^{23}\)

Negotiation ensures that the existence and content of a dispute remain privy and is a relatively inexpensive form of dispute management in comparison with other ADR processes, with suitable levels of flexibility being provided for in structured clause. However, in order to achieve

\(^{21}\) Supra note 3 at 57.

\(^{22}\) Ibid.

\(^{23}\) Ibid.
a result, negotiation requires the full cooperation and commitment of both parties to the resolution of the dispute.²⁴

Negotiation is not in and of itself a binding form of dispute resolution, although it may result in the execution of a binding agreement to reflect the outcome of the parties’ discussions. In order to ensure that an agreement to negotiate is contractually binding, there must be no uncertainty as to when the negotiations should be taken, to have failed — that is, the clause should provide a set timeframe for negotiations occur and a clear indication of when the parties will have the right to pursue the next dispute resolution step.²⁵

(b) Appropriate use of Negotiation

Negotiation should be kept in mind at all stages of a dispute. However, it is likely be most effective either at the time when the issue first arises (before the parties ha formed entrenched views on the matter, so making a commercial settlement potentially easier) or following a mediation or other structured ADR process, which, provides the parties with an opportunity to understand better their respective positions (without having been put to the expense of court proceedings). Going through this process can often expose case strengths and weaknesses and provide greater impetus for settlement. At this time it can also be beneficial, from a strategic perspective, to move the negotiations to senior personnel who have not been involved in the matter previously and who can view the relevant facts and positions dispassionately.²⁶

5.3.3 Mediation

(a) Key Features and Issues

Mediation is considered to be the ADR “method of choice in the business community” (as an alternative to both litigation and arbitration).” It is an informal dispute resolution process in which an intermediary is appointed to assist the parties objectively in understanding and evaluating their positions, with the aim of reaching a negotiated settlement. In mediation, the focus is on the parties’ interests and objectives, rather than on their strict legal entitlements.²⁷ Mediation affords

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²⁴ Ibid.
²⁵ Ibid
²⁶ Ibid.
parties a high level of control and flexibility of process, which can be adapted to suit the circumstances of the parties and the dispute.  

Mediators each have their own approach and no mediation will be the same. In this regard, it is important to select the appropriate mediator for a particular matter. For example, a mediation may take place in a day or over the course of several weeks; it may involve joint and separate sessions, expert conclaves (where both parties’ experts may meet with the mediator in the absence of the parties); and parties’ legal representatives may be involved. Nevertheless, in general, mediation is a more consensual, less evaluative process than either facilitation or conciliation. The mediator is not usually required to express an opinion as to the issues in dispute; rather, the mediator aids the parties in reaching their own resolution. Although the parties control the process, in some circumstances they may wish the mediator to take on a greater evaluative role. Evaluative mediation — employing a mediator with specific technical expertise to make recommendations (which are not binding, but may provide guidance) — can be an appropriate technique in the context of energy project disputes.

Mediation is used extensively, on a domestic level, in many jurisdictions. It is employed less at an international level — principally as a result of the unregulated nature of the process, which consists, to a large extent, of ad hoc procedures that are not globally recognised. In practice, there can be a cultural disconnect between parties to international contracts in their perception and understanding of mediation processes. Some authors have identified a clash between East and West—while Western societal norms are principally individualistic, Eastern societies tend to adopt a collectivist approach to life and society. In practical terms, this may play out in the status afforded to, and the use of, ADR at an international level. For example, consensus-based ADR is the preferred method of resolving disputes in many countries in the Middle and Far East and the Asia-Pacific region; and in China, mediation has been a primary

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28 Supra note 3 at 58.
29 Ibid.
30 Ibid.
32 AFM Maniruzzaman, Supra not 19 at 5-6.
method for dispute resolution for centuries, rather than an ‘alternative’ to litigation.’ This is reflected in the incorporation of mediation and other forms of ADR in international contractual dispute resolution clauses in these jurisdictions. In addition, mediation does not share some of the other features of arbitration that make it so popular on an international level, including having in place applicable infrastructure to ensure enforceability of decisions on an international level. As progress is achieved in these areas, mediation is expected to grow at an international level. An example of recent movement in this direction was the approval by the European Parliament of the EU Directive on Certain Aspects of Mediation in Civil and Commercial Matters in 2008, which was aimed at harmonising the framework for, and promoting the use of, ADR within the European Union.

A number of institutions provide model mediation clauses and guidance, including recommended rules, on mediation procedures, as well as administering mediations. Some well-known examples include:

- the Centre for Effective Dispute Resolution and the London Court of International Arbitration in the United Kingdom;
- the ICC in France;
- the International Centre for Dispute Resolution in the United States; and
- the Australian Commercial Dispute Centre (ACDC) and the Australian Centre for International Commercial Arbitration, both based in Sydney.

These institutions also offer support and administrative facilities for domestic and international mediation. Any outcome achieved through mediation will not be binding unless and until the parties have recorded their agreement in an executed settlement document which can then be enforced if required.

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33 Legislative instruments providing for med-arb have been enacted in a significant number of jurisdictions across Asia.


35 Supra note 3 at 59.

36 Ibid.
(b) Appropriate use of Mediation

Mediation is a useful method of dispute management and resolution at any stage throughout the life of a dispute, whether incorporated in a stepped contractual dispute process or agreed to by the parties once a dispute arises. Generally conducted on a without prejudice or confidential basis (noting that privilege is not a recognised concept worldwide), mediation allows the parties to have a free and open dialogue on the issues.\(^{37}\) It should be considered as an option particularly in circumstances where the monetary value of a dispute does not justify the time and expense of more formal proceedings, or where the parties put a high value on the maintenance of their relationship. When dealing with a counterparty from an Asian or Middle Eastern background, it may also be a culturally sensitive consideration.\(^{38}\)

In general, mediation is used as a fairly early step in a multi-tiered dispute resolution clause. As such, mediation can often occur before the parties have fully explored and defined the issues in dispute. Similarly, in circumstances of court-ordered mediation, a reference to mediation is likely to occur at the beginning of the dispute resolution process. While mediation can be a useful resolution mechanism at this early stage (particularly in relation to less complex disputes), consideration should also be given to the use of mediation at the later stages of a dispute once the parties have a better understanding of their respective positions and the strengths and weaknesses of their case. This can be a strong impetus for settlement.\(^{39}\)

Mediation may not be suitable for very complex or technical disputes (often arising in the energy sector) which require both expert technical and legal analysis.\(^{40}\) While it is possible, as mentioned above, to have a mediator adopt an evaluative role, parties should consider at the outset whether this is likely to be required in order to ensure that they appoint a mediator with the right expertise. More complex, matters may require greater involvement by the neutral and parties should consider whether an alternative process (eg, conciliation, expert determination or arbitration) is more appropriate in the circumstances.\(^{41}\)

\(^{37}\) Ibid.
\(^{38}\) Supra note 3 at 60.
\(^{39}\) Ibid.
\(^{40}\) Ibid.
\(^{41}\) Ibid.
5.3.4 Med-arb

(a) Key Features and Issues

Med-arb is a process by which the parties agree that in circumstances where mediation proceedings have not resulted in settlement of the issues, the mediator is permitted to assume the role of arbitrator and determine the dispute. This has the advantage of certain procedural and time-related efficiencies, in that it removes any requirement to engage a separate arbitrator in circumstances where the mediation is unsuccessful.

This process can work the other way: parties to an arbitration may wish to suspend proceedings to allow for a mediation to take place in relation to all or only particular issues. In these circumstances, if the parties agree, the arbitrator can adopt the role of mediator (referred to as ‘arb-med’).

Med-arb and arb-med are employed extensively in China and across other parts of Asia for example, they are contemplated in arbitration legislation in Hong Kong,\(^{42}\) “China,\(^{43}\) Singapore,\(^{44}\) Japan\(^{45}\) and India,\(^{46}\) and also in the procedural rules of some of the arbitration and mediation centres in these jurisdictions.\(^{47}\) The process has also found some traction in consumer, labour and administrative tribunals in, for example, Australia\(^{48}\) and Canada.\(^{49}\) However, adoption of the process for the resolution of commercial disputes, including in the energy sector, in common law jurisdictions has been significantly less concerted. This is mainly due to concern: relating to potential bias on the part of the arbitrator who, acting as mediator, may have previously held private sessions with the parties and could be in possession of confidential information as a result.

\(^{42}\) Arbitration Ordinance (Hong Kong) cap 609, Sections 32 and 33.
\(^{44}\) International Arbitration Act (Singapore, cap 143A, 2002 rev ed), Section 17.
\(^{45}\) Arbitration Law (Japan) Law 138/2003, Section 38(4).
\(^{46}\) Arbitration and Conciliation Act 1996 (India), Section 30(1).
\(^{47}\) See, for example, Article 40 of the China International Economic and Trade Arbitration Commission Arbitration Rules and Rule 8 of the Japan Commercial Arbitration Association international Commercial Mediation Rules.
\(^{48}\) See, for example, the Commercial Arbitration Act 2010 (NSW) Section 27D.
\(^{49}\) Arbitration Act, RSA 2000, Section 35.
The potential for issues of bias to arise in the context of med-arb or arb-med was highlighted in the recent case of Gao Hai Yon v Keeneye Holdings Ltd.\textsuperscript{50} While at arbitration award rendered following a mediation process conducted by the arbitrator was ultimately upheld, certain mediation meetings were called into question and resulted in various rounds of appeal.

The uniform domestic arbitration legislation that is currently being implemented in Australian states\textsuperscript{51} attempts to deal with the potential issue of apparent (and actual) bias by permitting an arbitrator to act as a mediator only in circumstance; where provision has been made in the arbitration agreement or where the parties subsequently consent in writing. In addition, an arbitrator who has previously acted as a mediator is not permitted to conduct subsequent arbitration proceedings in relation to the same dispute unless all parties consent in writing, either when the mediation comes to a close or afterwards.\textsuperscript{52}

Further, the model legislation provides that the arbitrator (previously the mediator) is under an obligation to disclose to all other parties, before the arbitration proceedings commence, all confidential information that the arbitrator considers to be material and which was obtained from one party during mediation proceedings. These provisions are mirrored in the arbitration rules of the ACDC.\textsuperscript{53}

While legislative amendments of this nature assist with alleviating concerns of bias, there remains apprehension that parties to a med-arb or arb-med process may withhold important information from the mediator for fear that it be used against them in any arbitral proceedings. This has the unfortunate result of rendering the mediation process itself much less effective. It is also recognised that participation in these processes can provide unsuccessful parties with a potential opportunity to challenge any award on the basis of apprehension of bias or public policy grounds.\textsuperscript{54}

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\textsuperscript{50} HKCA 459 (2011).
\textsuperscript{51} Commercial Arbitration Act 2010 (NSW), Commercial Arbitration Act 2011 (Vic), Commercial Arbitration Act 2011 (SA). Tasmania and the Northern Territory have passed legislation which is yet to come into force. Western Australia currently has a Commercial Arbitration Bill before Parliament Queensland introduced a Commercial Arbitration Bill in 2011; however, it lapsed on February 19 2014. The Australian Capital Territory has yet to introduce a bill.
\textsuperscript{52} Supra note 3 at 61.
\textsuperscript{53} Ibid.
\textsuperscript{54} Ibid.
\end{flushleft}
(b) Appropriate use of med-arb

For the reasons outlined above, the use of med-arb is likely to meet with some resistance by clients (and their lawyers) from common law backgrounds, who are more likely to prefer the engagement of a different arbitrator if a mediation is unsuccessful. Nevertheless, med-arb does provide a number of advantages to participants and may be considered appropriate in a complex dispute if mediation is unsuccessful.\(^{55}\)

5.3.5 Facilitation

(a) Key Features and Issues

The process of facilitation is in many ways fairly similar to mediation; however, it is characterised by greater flexibility and arguably allows for the facilitator to assume a broader role than is customary for a mediator. While a facilitator, like a mediator, must remain impartial, the level of facilitator intervention in the process may depend on the approach adopted by the particular neutral. Nonetheless, the roles of both facilitators and mediators remain limited to advising on or determining the process, rather than the content, of the discussion.\(^{56}\)

Some believe that a facilitator has a “much wider contributory role than that permitted to a mediator because of the different dynamics and procedures that apply” to a facilitation.\(^{57}\) In this regard, facilitation frequently involves more than two parties (such that the requirements of a great number of stakeholders must be considered), and can be employed in a number of different circumstances to identify and define issues for resolution, at which point the facilitation may conclude, or alternatively continue further to explore options for reaching a solution.\(^{58}\) Whereas the intended outcome of a mediation is most often the resolution of a dispute, the goals of a facilitation may be the resolution of specific problems or the need to accomplish certain tasks.\(^{59}\) A facilitator’s role can extend to setting a programme for fact finding and the holding of meetings,

\(^{55}\) Ibid.

\(^{56}\) Supra note 3 at 62.

\(^{57}\) R Charlton, Dispute Resolution Guidebook, Law Book, 265 (Sydney, LBC Information Services, 2000).


\(^{59}\) Australian Commercial Disputes Centre, op cit.
focusing the participants on agreed objectives and, where appropriate, making suggestions as to alternative ways to approach an issue.\(^{60}\)

**(b) Appropriate use of Facilitation**

Facilitation should be considered in more complex matters, where several stakeholders are involved and/or a number of steps need to be taken (with guidance provided as to those steps and a timetable for completion), in order for the parties to progress to resolution. It may be appropriate in circumstances where significant fact finding is required to be undertaken in order for the parties to fully appreciate their respective positions and be capable of reaching a settlement.\(^{61}\)

This form of ADR is less suitable for simple disputes that do not require the time input or more extensive intervention of the appointed neutral.

**5.3.6 Conciliation**

**(a) Key Features and Issues**

In contrast to mediation, conciliation is more often regarded as an evaluative process,\(^{62}\) in that a conciliator is generally required to provide the parties with advice as to potential options for resolution, their view on the issues in dispute and possible terms of settlement. It is not unusual for a conciliator to possess legal qualifications or have expertise that is relevant to the dispute between the parties.

The role of a conciliator has been described broadly to encompass, among other things, the identification of issues giving rise to disputation, the power to issue recommendations and directions, the assessment of the parties’ genuine attempt at settlement and the facilitation of a mutually acceptable agreement.\(^{63}\)

The process of conciliation is often considered to be less formal than the classical mediation model.\(^{64}\) The process need not necessarily be governed by a particular set of rules;

\(^{60}\) R Charlton, op cit, pp 265-266.

\(^{61}\) Supra note 3 at 62.


however, a number of international institutions offer comprehensive procedural rules to assist parties in managing a conciliation. Examples include:

- the UNCITRAL Model Law on International Commercial Conciliation 2002;
- the Institute of Civil Engineers Conciliation Procedure 1999;
- the ICC ADR Rules 2001 (which may be used for “whatever settlement technique” the parties consider appropriate); and
- the Institute of Arbitrators and Mediators Australia’s Mediation and Conciliation Rules (the last of which are also applicable to mediation procedures).  

There are discrepancies among the rules as to whether the decision of a conciliator will be binding on the parties (which is a relevant consideration when choosing a set of rules to adopt). For example, under the UNCITRAL Conciliation Rules, a conciliation is non-binding; in contrast, the ICE Conciliation Procedure provides that the conciliator’s recommendation is binding on the parties, subject to an appeal to an arbitrator or adjudicator, which must be commenced within one month of the conciliation to avoid the recommendation being binding.  

Significant inconsistencies between the definitions applied to conciliation across jurisdictions, as illustrated above, has led one critic to complain that “nobody is sure what it means”. Further, there are differing views as to whether conciliation is becoming an irrelevant or outdated form of ADR.

(b) Appropriate use of Conciliation

Parties may choose to adopt conciliation in circumstances where it is considered that greater input from the neutral is required. In particular, it may be appropriate in circumstances

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65 Supra note 3 at 63.
66 Ibid.
where the parties consider that a non-binding view expressed by a qualified expert (either technical or legal) neutral would be beneficial in the settlement of the dispute.\(^{68}\)

It is important, however, that the parties carefully consider the appointment of a conciliator and ensure that they are satisfied with the relevance and level of that person’s expertise. Even in circumstances where any opinion or recommendations expressed by the conciliator are non-binding, it will be difficult for a party to resile from the expressed position in any ongoing conciliation or negotiations.\(^{69}\)

In circumstances where the parties are of the view that a binding outcome is preferable, consideration should also be given to other ADR methods that may be more suitable.

5.3.7 Mini-trial

(a) Key Features and Issues

The mini-trial or ‘information exchange’ is a structured dispute resolution process which combines a form of conciliation with executive negotiations. The purpose of a mini-trial is to expose senior executives to the strengths and the flaws in their cases, such that they have an understanding of their likely position should the dispute escalate to litigation.\(^{70}\)

During a short hearing, the party’s lawyers present a truncated version of their client’s cases to senior representatives of both parties. A third-party neutral chairs the hearing and subsequently assists the party representatives in negotiations to resolve the dispute. The extent of the neutral’s role in the process can differ depending on the agreement of the parties. In addition to facilitating the negotiations and encouraging resolution, the neutral may be required to advise on substantive legal issues or to provide the parties with a non-binding opinion as to the likely result should the case go to court. In this respect, the neutral’s role is akin to that of a conciliator.\(^{71}\)

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\(^{68}\) *Supra* note 3 at 63.

\(^{69}\) *Id.*, at 64.

\(^{70}\) *Ibid.*

\(^{71}\) *Ibid.*
In the main, mini-trial clauses are brief and make reference to a particular procedure by which the parties agree to be bound. Although there is some variation between the specificity of requirements, mini-trial procedures generally provide for the following:

- appointment of a neutral adviser or umpire by agreement;
- exchange of documents before the information exchange session, including:
  - written statements summarising the issues;
  - briefs and documents or other exhibits on which the parties intend to rely (and which are also provided to the neutral adviser); and discovery between the parties (the scope of which may be prescribed by the relevant procedure), pursuant to which documents discovered may by agreement be used in subsequent litigation;
- exclusion of the rules of evidence (some rules of privilege may apply);
- neutral adviser’s opinion to address issues of facts and law; and
- legal counsel to present the best case for their side at the settlement session.

Figure 3: American Arbitration Association model Mini-trial Clause

If a dispute arises out of or relates to this contract, or the breach thereof, the parties agree first to subject their dispute to a neutral advisor pursuant to the American Arbitration Association’s MiniTrial Procedures administered by the American Arbitration Association before resorting to arbitration, litigation or some other dispute resolution procedure.

Mini-trials are utilised primarily in the United States and Canada, and are not yet common in the energy sector.

The most significant advantage of the mini-trial, compared to other forms of ADR, is the degree of preparation required, which becomes useful if a resolution is not reached. Parties also retain a greater degree of involvement and control over the outcome than in more adjudicative...
processes, and the hearing affords both parties the opportunity to hear the other’s position and to assess the relative strengths and weaknesses of their positions.\textsuperscript{77}

However, there are a number of perceived disadvantages of engaging in the mini-trial process.\textsuperscript{78} First, the relatively high costs involved mean that expenditure has been wasted if the parties could have resolved the dispute through mediation. Furthermore, the process of preparation is similar to preparing for a trial, and is not focused on cooperation, which may further polarise the parties’ positions. Finally, active participation by senior management is often required, which can be a time-consuming and wasteful use of management time in circumstances where progress is slow or commitment by the parties is lacking.\textsuperscript{79}

(b) \textbf{Appropriate use of Mini-trials}

Parties may wish to make use of the mini-trial process in circumstances where substantive legal issues are involved or extensive evidence is required to be presented, but they do not wish to undertake a more formal process such as arbitration or litigation. It may also be appropriate in circumstances where limited discovery would be of assistance to the parties in properly understanding their respective cases. As noted, this process exposes the parties’ senior executives to the respective strengths and weaknesses of their cases, which can encourage settlement.\textsuperscript{80}

However, mini-trials are an expensive and time-consuming method of ADR and may not be appropriate in many cases where parties either do not require or do not wish to be put to the expense of extensive documentary evidence or discovery. It may be that a form of mediation or facilitation is sufficient to resolve the issues in dispute.\textsuperscript{81}

\begin{flushleft}
\textsuperscript{77} Supra note 3 at 65.  
\textsuperscript{78} Supra not 76.  
\textsuperscript{79} Supra note 3 at 65.  
\textsuperscript{80} Ibid.  
\textsuperscript{81} Ibid.
\end{flushleft}
5.3.8 Early Neutral Evaluation and Expert Appraisal

(a) Key Features and Issues

Early neutral evaluation and expert appraisal are both evaluative ADR processes. While they differ in application, both aid the parties in assessing the risks to which they may be exposed in circumstances where the matter cannot be settled.\(^\text{82}\)

Early neutral evaluation provides for the parties to present their cases, including evidence on which they rely, to a neutral dispute resolution practitioner in an attempt to resolve the dispute before further escalation of the issues. The neutral’s role is to evaluate the respective strengths and weaknesses of the parties’ positions and provide an initial non-binding assessment of the potential outcome should the matter become the subject of litigation. The neutral may then assist the parties in formulating a sensible approach to resolution.\(^\text{83}\)

Expert appraisal involves a primarily factual investigation by an expert with particular knowledge of the issues in dispute, following which the expert produces an opinion as to the likely position and advises the parties as to the manner by which a desirable outcome might be achieved.\(^\text{84}\) It differs from neutral evaluation in that the opinion provided is usually focused on specified issues within the expertise of the practitioner, rather than the entirety of the dispute.\(^\text{85}\) The process is similar to an expert determination; however, the opinion expressed by the expert is not binding on the parties.\(^\text{86}\)

(b) Appropriate use of Neutral Evaluation or Expert Appraisal

The effectiveness of these processes depends heavily on thorough preparation by the parties before presenting their cases, so that the neutral or expert has the information required to ensure that any assessment of the likely outcome is meaningful and reflects the actual issues in dispute. As such, neutral evaluation and expert appraisal can be costly methods of ADR (eg, in comparison to mediation).\(^\text{87}\)

\(^\text{82}\) Id., at 66.
\(^\text{83}\) Ibid.
\(^\text{85}\) 39 R Charlton, Dispute Resolution Guidebook, 348(LBC Information Services, 2000).
\(^\text{86}\) Supra note 3 at 66.
\(^\text{87}\) Ibid.
They may, however, prove useful in circumstances where the parties are deadlocked in relation to a particular issue or dispute. In that case, the provision of an evaluation of the merits from a highly regarded neutral practitioner or expert can be extremely persuasive and may provide a basis on which the parties can move towards resolution.

5.3.9 Dispute Review Boards

(a) Features & Issues to be Aware of

Dispute review boards (DRBs), originally a US concept, consist of a panel of impartial experts (typically between one and three experts) appointed by the parties under their contract. The DRB operates from the time that the project commences, undertaking a dual dispute avoidance and dispute resolution role. Depending on the agreement reached between the DRB and the parties, the functions of the DRB can extend to making regular site visits, holding meetings (both before any dispute arises and in the event of a dispute), establishing procedures, conducting informal hearings and making recommendations for the settlement of disputes. DRBs are employed, with some success, in the international construction industry, but have not yet been widely adopted in the energy sector. However, it has been suggested that they could be quite effective in the construction of large energy infrastructure projects.

The advantages of the DRB mechanism lie in the technical expertise of board members, their ‘on-the-ground’ familiarity with the project and the speed at which the DRB can address any issues or disputes that arise. Recommendations made by a DRB are non-binding on the parties; however, organisations responsible for promotion of the process note that: “the DRB process is most effective if the contract language includes a provision for the admissibility of a DRB recommendation into any subsequent arbitration or legal proceeding.¹¹

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Given the DRB’s expertise and ongoing involvement in the project, any recommendations it makes may be of significant evidential value in proceedings and may provide some assistance to the arbitral tribunal or the court in reaching a determination of the issues.

However, there are certain disadvantages to DRBs as a dispute avoidance tool. The retention of the expert panel, by way of retainer, over a considerable period is costly. In addition, over time, the panel’s involvement in the project may also give rise to concerns relating to impartiality.

DRBs should be distinguished from dispute adjudication boards (DABs) that are, for example, employed in the FIDIC suite of contracts. In contrast to DRBs, DABs operate in a manner akin to an expert determination or adjudicative process, whereby the DAB makes decisions that are binding on the parties, at least until overturned by the final dispute resolution process provided for in the parties’ contract. For example, the ICC Dispute Board Rules distinguish between a recommendation made by a DRB, which parties may comply with voluntarily, but are not required to do so; and a decision made by a DAB, which is binding on the parties and with which parties must comply without delay.

(b) Appropriate use of DRBs

As noted above, DRBs are most effectively used in long-term projects, where the cost of retaining the DRB is proportionate to the project value, as a dispute avoidance tool. They can be applied successfully to resolve technical disputes quickly and efficiently, which allows the project to continue unimpeded. DRBs are generally not appropriate for the resolution of disputes that involve significant legal issues or low-value projects.

5.3.10 Determinative ADR: Adjudication

Expert determination or adjudication, one of the most prominent forms of ADR in the energy sector. These processes involve the preparation of relatively brief submissions and a determination by a neutral third party. Statutory adjudication of disputes arising out of a ‘construction contract’, as defined in the relevant legislation, is in place in both Australia and the

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92 Supra not 88 at 314.
94 Supra note 3 at 68.
United Kingdom,\textsuperscript{95} and is therefore of relevance to energy projects, which frequently involve a construction phase. However, certain construction contracts are excluded from the statutory regime (eg, contracts for drilling for or extracting oil or natural gas or extraction of minerals).\textsuperscript{96}

The aim of Australia’s security of payment legislation (and its UK equivalent) is to provide statutory rights of adjudication to contractors and subcontractors in relation to disputes relating to non-payment by principals. The policy rationale for the process is the transfer of payment risk up the chain and the alleviation of contractor cash-flow concerns.\textsuperscript{97}

The relevant statutory processes are highly detailed and, in contrast to contractual adjudication or expert determination, are in no way flexible, in that prescribed timeframes and processes must be complied with. The nature and application of the legislation are outside the scope of this chapter. However, given the potential applicability to the construction phase of certain energy projects undertaken in these jurisdictions, brief mention has been made. Advice should be obtained if parties intend operating in these regions.\textsuperscript{98}

\textbf{5.3.11 ADR clauses: Enforceable or not?}

There is some debate as to the enforceability of ADR processes as a part of contractual dispute resolution — that is, whether agreed ADR processes in a multi-tiered dispute resolution clause can be conditions precedent to the taking of the next step. The enforceability of an agreement to participate in ADR will depend on the terms of the contract in question. Courts will not enforce an agreement referring disputes to resolution by way of ADR if the terms of the agreement are insufficiently certain. The issue of whether an agreement to participate in ADR procedures is binding on the parties has arisen in the context of applications to stay proceedings

\textsuperscript{95} See, the Housing Grants, Construction and Regeneration Act 1996 (UK); the Building and Construction Industry Security of Payment Act 1999 (NSW); the Building and Construction Industry Security of Payment Act 2002 (Vic); the Building and Construction Industry Payments Act 2004 (Qld); the Building and Construction Industry Security of Payment Act 2009 (Tas); the Building and Construction Industry (Security of Payment) Act 2009 (ACT); and the Building and Construction Industry Security of Payment Act 2009 (SA).

\textsuperscript{96} See, for example, Section 105 of the Housing Grants, Construction and Regeneration Act 1996 (UK) and Section 5(2) of the Building and Construction Industry Security of Payment Act 1999 (NSW).


\textsuperscript{98} \textit{Supra} note 3 at 68.
on the basis that the condition precedent to commencing those proceedings had not been achieved.  

In Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd the House of Lords granted a stay of proceedings that were brought, according to the court, in breach of an agreed method of resolving disputes. Lord Mustill considered that the parties, having negotiated a carefully drafted dispute resolution clause (which provided that, in the first instance, any dispute or difference arising would be referred to a panel of experts before arbitration), should be held to their bargain. The agreed ADR procedure should be followed, no matter whether the parties now found “their chosen method too slow to suit their purpose”.  

In Aiton Australia Pty Ltd v Transfield Pty Ltd, referring to an Australian Law Reform Commission review, the court noted that it considered the following to be applicable to all stages of a dispute resolution clause: “The process established by the clause must be certain. There cannot be stages in the process where agreement is needed on some course of action before the process can proceed because if the parties cannot agree, the clause will amount to an agreement to agree and will not be enforceable due to this inherent uncertainty.”  

In this case, the court considered that the absence of a mechanism for apportioning the mediator’s costs (mediation being only the first step in the dispute resolution clause) caused particular difficulties in this regard.  

As previously mentioned, the courts may also refuse enforcement of an ADR provision in circumstances where it is found to be against public policy. A dispute resolution clause may be considered to be against public policy in circumstances where it is found to oust the jurisdiction of the court. This issue was considered, in the context of an expert determination clause, in Baulderstone Hornibrook Engineering Pty Ltd v Kayah Holding Pty Ltd.” However, the findings regarding ouster were the subject of subsequent criticism in Straits Exploration (Australia) Pty Ltd v Murchison United NL, where the clause under consideration was ultimately distinguished.

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99 Ibid.
100 [1993] AC 334.
101 Id., at 353.
102 (1999) 153 FLR 239.
103 Id., at 252.
from that in Baulderstone, in that it preserved and potentially widened the court’s jurisdiction to review any expert determination.

In addition to the above, the inclusion in project contracts of a requirement to participate in ADR processes “in good faith” is quite common. The content of such an obligation is the topic of much debate; nevertheless, good faith as a concept is reflected in the legal norms of many countries, including in Europe, the Middle East and the United States. It has been the subject of recent judicial consideration in Australia. Previously, courts in Australia had refused to enforce such an obligation, given its inherent uncertainty; more recent authority has been to the effect that a good-faith obligation is enforceable. However, the remedy for the breach of such an obligation is unlikely to be more than procedural (ie, an order requiring the parties to attend a meeting) and therefore may be of little value.

The above reinforces the need to ensure absolute clarity in the drafting of multi-tiered dispute resolution clauses in order to ensure both that the parties’ intentions are properly reflected and that the clauses are enforceable.

5.4 Conclusion

Increasingly, trends in the energy and resources sector are shaping global economies. The scarcity of resources worldwide, combined with exponential growth in energy consumption, only highlights the importance of current energy projects. These projects are not conducted in a vacuum; they impact on a variety of different stakeholders, each with their own interests and agendas, and are frequently of significant political import. In consequence, disputes arising from such projects are many and varied in nature.

Given the complex and highly technical nature of most energy disputes, court proceedings can be lengthy, expensive and disruptive — not only to the progression of the project, but also to the underlying business relationships upon which the success of the project lies. In addition, court proceedings expose the parties to public scrutiny and can cause concerns with respect to the

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105 See, Laing O’Rourke (BMC) Pty Ltd v Transport Infrastructure Development Corp [2007] NSWSC 723.

disclosure of confidential commercial information. In comparison to litigation in common law jurisdictions, ADR processes also avoid the risk of a potentially adverse precedent resulting from proceedings between parties.

As a result, ADR as a dispute management and resolution tool is a particularly crucial consideration for energy sector participants. Among the benefits that ADR can provide are increased privacy, greater control over the process and flexibility of procedure, and the ability to choose an ADR mechanism that is relevant to the particular circumstance and the issues in dispute. ADR also provides the parties with an opportunity to select a neutral with relevant energy sector expertise to guide the dispute resolution process. Further, the parties determine the scope of the neutral’s role and the extent to which any recommendations or determinations of the neutral will be binding on the parties.

ADR provides participants with the opportunity to manage and resolve disputes before they escalate. This has significant time and cost implications, and can assist parties with the maintenance of critical business relationships without delay to project timelines.