

# ECRI Sponsors' Meeting

## PINSENT MASONS LLP

9 December 2010

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# PINSENT MASONS LLP : AN INTERNATIONAL LAW FIRM

- **Over 1,100 lawyers** and more than 1,700 staff worldwide
- Offices in the **UK, UAE, Hong Kong, Shanghai, Beijing and Singapore**
- Elsewhere, we operate a **network of alliances and relationships with other law firms** to provide a homogenous service combining international expertise with local knowledge
- We handle challenging and complex legal business needs across a wide variety of market sectors and jurisdictions in a way that makes legal matters more straightforward and ultimately less stressful

# A DEDICATED CONSTRUCTION PRACTICE

- Over 270 Construction specialists including over 50 lawyers involved in Projects
- Construction Lawyers in offices in UK, Dubai, Singapore, China and an alliance with Salans covering most European jurisdictions
- Closed more PPP projects than any other firm
- No 1 for Construction in Legal 500 and Chambers & Partners
- Construction Law Firm of the Year 2006, 2008, 2009, 2010
- Advise over half the world's top 100 international Contractors

# WE'VE MADE IT OUR BUSINESS TO FIND OUT ABOUT YOUR BUSINESS

- Construction is one of the core sectors around which we have based our business and we have a specialist team of Construction lawyers are first rate in this area and combine legal excellence and technical understanding with an awareness of the commercial parameters affecting the industry.
- This experience and awareness enables us to advise clients on risk management and best practice from procurement, including being alive to the various approaches adopted by those procuring and funding major infrastructure projects, to completion of the project.

# CONTACT

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# Best Practice for International Construction Dispute Resolution

Mark Roe

9 December 2010

Head of international Arbitration

# Introduction: Structure

- International Construction Dispute Resolution
  - Best Practice
- Alternative Dispute Resolution
  - Dispute Boards
  - Mediation
  - Adjudication
- International Arbitration
- Conclusion

# Dispute Resolution: Best Practice

## – Avoidance

- Client Selection
- Ensure Implementation Team understand their obligations
- Effective Risk Management
- Compliance with Formalities

## – Control of the Dispute Process

- Set Realistic Objectives
- Timetable
- Cost Control

## – Enforcement

- **No point in pursuing an arbitration if you cannot enforce the award**

# Alternative Dispute Resolution

## Dispute Boards

# Alternative Dispute Resolution: Disputes Boards – Best Practice

- Dispute Advisory Boards / Dispute Review Boards
  - Introduced by FIDIC in mid 1990s – Clause 20
  - DAB's decision only binds if no one objects within 28 days
- Best Practice to set up DAB at start – but more expensive
- 1 or 3 members who give an opinion on how to resolve issues in dispute

# Alternative Dispute Resolution: Dispute Boards

- Contractor's claim's procedure Clause 20.1
- Short Notice Provisions
  - Claim notice within 28 days of event
  - Detailed claim within 42 days of event
  - No entitlement to claim if Notice is late
    - **Good Practice is to ensure compliance with Notice Provision**
- Long Decision Making Provisions
  - 42 Days for Engineer to Respond under Clause 3.5
  - DAB decides disputes within 84 days of reference
  - 28 Days to give notice of objection
- And how long to Enforce ?

# Alternative Dispute Resolution

## Mediation

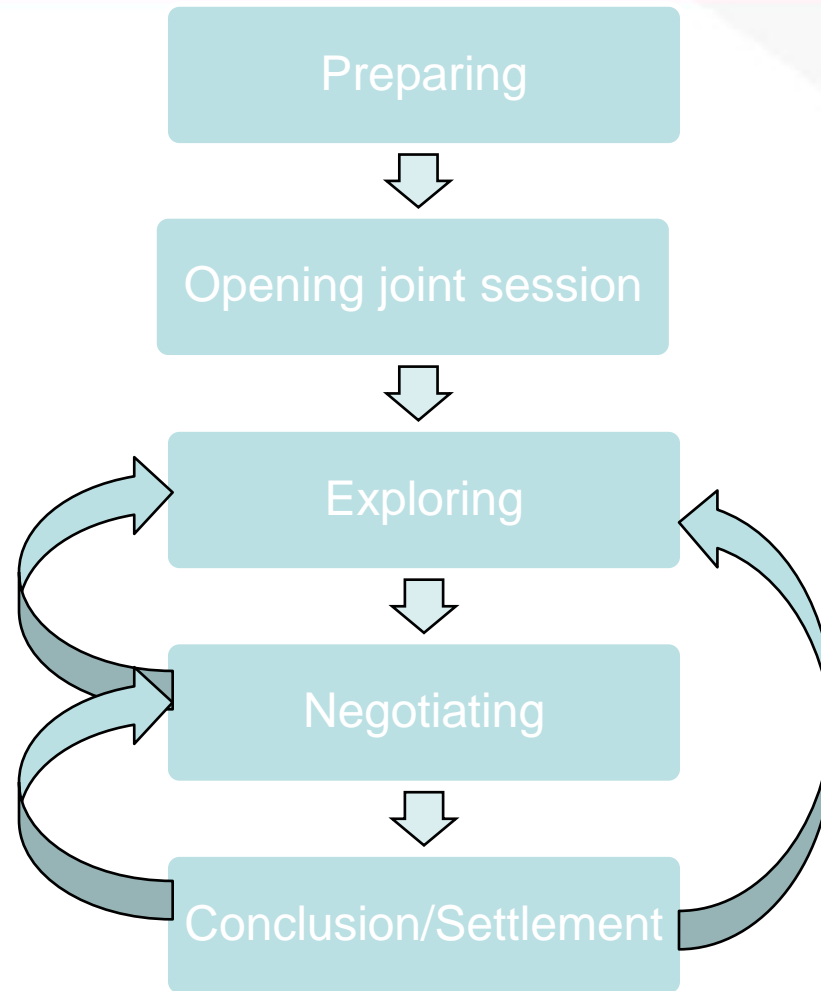
# Alternative Dispute Resolution: Mediation

- Mediation - **voluntary, non binding, confidential ,consensual**
- Part of Best Practice in Achieving Quicker and Cheaper Solutions
  - **Good**, if there is a real desire to compromise.
    - Ideal for Resolving Genuine differences
  - **Bad**, if there is no desire or ability to compromise.
    - Rarely works with Civil Servants
  - **Ugly** if provisions allow Defendants to use resolution.
    - Avoid Game players and Fraudsters
    - Ponderous Contract Procedures may allow Defendants to delay

# Alternative Dispute Resolution: Mediation

- **Best Practice**
- **When**
  - Best before Parties become too committed to a particular position
  - Before Arbitration has started
  - Best when enough information available for parties to assess the merits of the claim.
- **How**
  - What do you want the mediator to do?
    - Evaluate / Give an opinion on the Merits
    - Facilitate / Encourage Settlement above a “just result”

# Alternative Dispute Resolution: Mediation



# Alternative Dispute Resolution: Mediation

- Mediation Agreement
- Position Statement - aimed at the opposing CEO
  - Short and Sharp
  - Brief history
  - Identify Key issues & why you are going to win
- Attendees - Representatives with knowledge and authority
- Process
  - Information Gathering
  - Positioning
  - Caucusing
  - Negotiating
  - Settling

# Alternative Dispute Resolution

## Adjudication

# Alternative Dispute Resolution: Adjudication

- **Statutory Adjudication Exists in UK, HK & Australia**
  - Contractors can ask Adjudicator for an Interim Decision.
  - Decision within 28 days of Adjudicator's appointment
  - Fast Track Enforcement by Courts
  - Parties can Arbitrate if they do not like the Decision
    - But – in over 95 % of cases they do not bother
    - Reduces disputes by removing Cash Flow from the Dispute
    - Sometimes called – “*pay now argue later*”
- **Adjudication or something similar should be more widespread**

# International Arbitration

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# Best Practice in International Arbitration

- What you want from International Arbitration?
  - Independence
  - Expertise
  - Confidentiality
  - Speed
  - Cost
  - Ease of Enforcement
  - Freedom from Local Interference
- **BUT , how do you get it ?**

# International Arbitration contd.

- Getting What You Want:
  - Good Results require Good Foundations
  - Set up Dispute Resolution Rules when you Contract
  - Too late to do it when the Disputes Start
  - Consider the following **6 steps** to achieve Good Practice

# International Arbitration: Parties & Enforcement

- **First - Parties & Enforcement: Consider**
  - Is the Owner good for the money?
  - Or are you a de facto investor in the Project?
  - Is the Owner a State Entity?
  - What you would do if they did not pay you - where are their assets?
  - Are the courts where assets situated independent and efficient?
  - New York Convention - very effective against multi nationals
  - May be much less effective in dealing with “domestic” entities
    - Russia
    - India

# International Arbitration: Parties & Enforcement cont.

- Grounds for refusing enforcement (Article V of the New York Convention):
  - Incapacity
  - Invalidity
  - Lack of notice / party unable to present its case
  - Lack of Jurisdiction
  - Invalid procedure
  - Award subject to Appeal
  - Dispute not Arbitrable under the law of that state
  - Public policy.
- Applicable Law is that of State where enforcement is sought
- **Even where Award complies with New York Convention Enforcement may be difficult / impossible in local courts.**

# International Arbitration: Agreement

- **Second - Is Arbitration Agreement valid under national laws and treaties?**
  - Usually needs to be in writing
    - Yes – Article II (1) & (2) NYC 1958
    - Yes – Article I (1) UNCITRAL Rules 1976
    - Yes – Article 7 (1) Model Law 1985
    - Yes – s.5 of English 1996 Arbitration Act
    - No – Revised Model Law 2006 - Can be oral (risk)
- But also Check local issues
- Check on relevant corporate law e.g. Turkey
  - Can Government departments / SOE s Submit to Arbitration ?
- **Best Practice: Ensure you have a valid arbitration agreement when you contract**

# International Arbitration: Seat

- **Third – Seat of Arbitration**
  - Much more important than often realised, determines:
    - Procedural Rules / Evidence
    - Privilege
    - Safety
    - Legal Infrastructure
    - Appeals e.g. Paris
    - Court Interference e.g. India
- **Good Practice –Seat must be Safe, Independent, Legally mature, and have effective Court Support**

# International Arbitration: Contract Dispute Resolution Structures

- **Fourth - Contract Dispute Resolution Structures:**
  - Tiered Dispute Resolution Procedures
  - Standard Timetables can make Process too slow
    - Engineer's decision 42 Days
    - DRB 84 Days
    - Mediation 90 Days
    - Appointment of Arbitrators 90 Days
    - TOTAL 306 Days
- **Best Practice – Reduce Tiers or Reduce Time Scales**

# International Arbitration: Procedural Rules & Appointing Bodies

- **Fifth - Procedural Rules & Appointing Bodies:**
- Administered – Expensive and Slow
  - ICC
  - LCIA
  - SIAC
  - CIETAC
- Non Administered – Cheaper and Faster
  - Uncitral
  - Ad Hoc
- **Best Practice – Choose a Uncitral + IBA Rules + Seat where Courts support Arbitration effectively.**

# International Arbitration: Law and Language

- **Six - Law and Language**
  - Substantive law of the Contract
    - Important & Often underestimated
    - FIDIC wrongly sell forms as multi jurisdictional
    - Major differences include rules on
      - Good Faith
      - Penalties
      - Interest &
      - Notices
- **Best Practice**
  - Very important to Select Language of Arbitration

# International Arbitration: Formalities

- **The Arbitration Itself**
- Set Up:
  - Formalities are critical
    - Names of Parties – Mergers, name changes etc
    - Powers of Attorney
    - Check Limitation Periods
    - Check local procedural rules
- **Best Practice - Do due diligence before the Arbitration Notice is served**

# International Arbitration

## Best Practice

Based on Guide to International Construction  
Arbitrations issued by the ICC

# Composition of Tribunal

- **Tribunal**
  - Arbitrators experienced in construction disputes
  - Three or One ?
  - One if :
    - Project worth less than US\$20 M
    - Low value claim
  - Three if :
    - Project worth more than US\$20 M
    - Complex dispute?
    - High value claim arising within the life cycle of project
- **Best Practice: Ensure arbitration agreement is flexible**

# Terms of Reference / Timetable

- Terms of Reference
  - A Feature of ICC Procedures
  - Can delay process and increase costs
  - Does not add much value
- **Best Practice**
  - Avoid Terms of Reference and ICC, or
  - Use broad terms – to avoid later Jurisdiction issues
- Timetable
  - Good Arbitrators are busy people
  - Fix hearing dates as soon as possible

# Split Hearing

- Often suggested that Arbitration should be split (1) Liability and (2) Quantum
  - Tends to delay Final Award & increase costs
  - Tendency in practice is for split hearing to simply entrench Parties
  - Often better to deal with all issues at once
- **Best Practice**
  - Avoid Preliminary Issues unless
    - Pure point of law, and
    - Determinative
  - Consider Separating liability and quantum:
    - if it genuinely saves time and money
    - Do not separate expecting to settle after liability

# Presentation

- Construction arbitrations nearly always involve resolution of multiple claims
- **Best Practice**
  - Avoid Repetition of:
    - Underlying Facts
    - Contract Clauses
    - Arguments
  - Make use of:
    - Introductory Explanations
    - Graphics
    - Schedules which record the essence of each party's case
    - Definitions
    - Talking Sub Headings

# Hearings

- **Best Practice**
- Limit documents presented to the Arbitrators
- Witnesses
  - Use Witness evidence sparingly
  - Civil Code Lawyers will give less weight to oral evidence
  - Prepare Witnesses properly for cross examination
- Agree a Chess Clock approach to presentations and cross examination
- Using video conferencing for minor witnesses
- Witness conferencing for Experts may save time and money

# Conclusion

## **Consider Dispute Resolution before you sign the Contract, not when the problems start**

- Key issues are:
  - Enforcement
    - Identity of owner
    - Location of assets
    - Capacity
  - Structured Alternatives to Arbitration
  - Seat of Arbitration
  - Law & Language
- **Best Practice: Because they determine Cost, Speed and Enforcement**

- *Pinsent Masons LLP would be delighted to give individual seminars to sponsors on how to manage legal risk throughout the lifecycle of the project and would not charge for its time in doing so.*
- *If you are interested please click on the link to [mark.roe@pinsentmasons.com](mailto:mark.roe@pinsentmasons.com)*

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