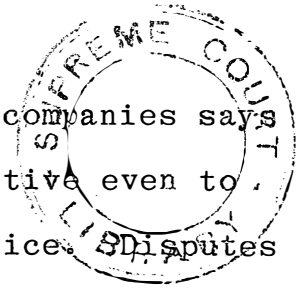
# METHODS OF COMMERCIAL DISPUTE RESOLUTION

by Justice Andrew Rogers

a Judge of the Supreme Court of New South Wales




When a director of one of Australia's largest companies says that the cost of litigation has become prohibitive even to large companies, it is appropriate to take notice. Disputes are an inevitable concomitant of a busy commercial community. In order to ensure that commercial life continues to function satisfactorily it is essential that there be available suitable methods and vehicles for the resolution of such disputes. If the dispute-resolving mechanisms become too expensive, or too slow, or otherwise fail to meet the legitimate requirements of businessmen, commercial life will stagnate and the business taken elsewhere. Thus there is a strong community interest in the maintenance of satisfactory dispute-resolving mechanisms.

Not surprisingly the problem has received most detailed attention in the United States. There, also, the impetus for investigation of the existing system came from business and to a considerable extent from the corporate general counsel working for many of the largest American companies. They, together with forwardlooking nmembers of law firms and law schools, were alarmed by the ever-increasing cost of litigation in the courts.

One of the problems is that the trial process is inherently wasteful. As one commentator remarked, "One secret to good practice is to reduce the unexpected to the absolute minimum

through good preparation. Perhaps only five percent or less of the preparation will be used, but the balance is necessary and economically justified because the identity of the precise five percent cannot be determined." This means that settlement just before trial, as frequently happens, is much too late.

The costs involved are not only lawyers' fees but, also, managerial time which is required to be devoted to the preparation and conduct of litigation. The answer was perceived to lie in methods of Alternative Dispute Resolution, customarily referred to as ADR both by supporters and detractors. ADR has spawned university courses, amongst others at Harvard and Columbia Law Schools, companies offering facilities for ADR dispute resolutions, governmental studies and schemes and at least one foundation in the Centre for Public Resources in New York.

The most obvious and long recognised alternative to litigation in the courts is offered by arbitration. That is so well known a procedure that no time needs to be spent on explaining its features. In contra-distinction to other methods of ADR, it shares with litigation that it is a solution arrived at by a third party and may be compulsorily enforced. Generally speaking, ADR practises consensual solutions to problems.

The Attorney General of Victoria deserves the thanks of the

commercial community for his whole-hearted support for arbitration. The Commercial Arbitration Act 1984, first introduced in the Victorian Parliament, dramatically placed Australia in the forefront of those providing a hospitable climate for this method of dispute resolution. Victoria has now established the Australian Centre for International Commercial Arbitration located at the World Trade Centre in Melbourne. A number of Victorian experts, including Professor Baxt from Monash University, have explored developments overseas in connection with the setting up of the Centre. The Premier of New South Wales has announced that this State is setting up a Commercial Disputes Centre. An Advisory Committee has secured the services of Mr Michael Ahrens, a prominent commercial lawyer with both Australian and overseas practice, as a short term Consultant/ Director to assist in the structuring of a facility which will meet the needs of the commercial community not only in the sphere of arbitration but also providing facilities for mediation and conciliation. It is envisaged that the Centre will provide hearing rooms, document preparation and secretarial services for arbitrators resolving commercial disputes both local and international. The newly formed Commercial Division of the Supreme Court will, of course, provide all appropriate judicial assistance to the Centre.

It is a matter for some dismay to note how little understood are non-adversarial methods of dispute settlement. Thus, in an article "Dispute Settlement in Commercial Law Matters"

7 Canadian Business Law Journal 197, Mr Paul Davidson, a Canadian academic, sought to describe the difference between mediation and conciliation. He thought (page 199) that a conciliator had the more active role in helping to resolve a dispute. According to him, a conciliator not only investigated the facts in dispute but also formulated proposals for settlement. On the other hand, a United States lawyer, in an article "Alternatives for Resolving Business Transaction Disputes" (1983) 58 St John's Law Review 69, thought that a conciliator merely brings the parties together whereas a mediator makes suggestions for settlement when appropriate.

One of the most interesting alternatives to litigation that has been devised and used successfully particularly in the United States, although I notice that the Zurich Chamber of Commerce has recently established such a facility, is a variant on mediation and goes by the name of "mini trial". The appellation is something of a misnomer. In truth, it is not a trial at all but a highly structured "information exchange" and settlement negotiation. Its essential feature is the presentation of the case of each of the disputants to a meeting of senior executives from both sides. The rationale which underlies the process is that a reasonable solution to most problems can be structured by businessmen but only if they are in full possession of the facts. The initial problem which corporate counsel frequently encounter is a disinterest in disputes on the part of top management

until it is too late to settle on reasonable terms. A mini trial engages the attention of top management at a point when bitterness has not yet set in. More importantly, it makes executives on each side realise not only that the other disputant has an arguable point of view, but it familiarises the executives on each side with some of the weaknesses in their own case. As litigation progresses there is an altogether human fallibility to become convinced by one's own case until it is exposed to hostile examination in a court room. Successful negotiation is difficult, to say the least, when each side has an unrealistically rosy expectation of success.

There is a host of variables that may be employed in the conduct of a mini trial. Should lawyers be allowed? It may be argued that, in the absence of lawyers, the parties may fail to bring out some of their best points or to highlight the weakness of the other. On the other hand, a film I have seen of a mini trial, conducted by the University of California Law School gave me the impression that the lawyers created too legalistic an atmosphere which inhibited a frank discussion between executives. Should the presentation be by way of "evidence" from witnesses or merely a narration? If witnesses are called, should cross examination be allowed? Here again, there are arguments both ways. What has to be rigorously kept in mind is the "mini" in a mini trial. Each side has a limited time for its presentation in order to make the exercise useful.

Hardly ever should the mini trial take longer than a day. Every minute in the presentation has to be made to count.

One of the most important questions to consider is whether there should be an independent chairperson or negotiator or facilitator. The decision is readily made in a dispute involving only a small sum of money. However, let it be assumed that the stakes are high. A facilitator may discharge precisely the function that the name denotes with great advantage to the parties. After the conclusion of the presentation the parties will confer in an attempt to settle. It has been found of great assistance to have available an independent third party who may be asked for an impression on any given point that one party or the other may have some doubt about. Some retired judges have been of great assistance to the parties as independent sounding boards. One of the side benefits of having a retired judge as chairperson is that he or she operates as a brake on over-enthusiasm on the part of the lawyers in the presentation of their cases. If he or she is there to ask questions, the truth will more readily emerge.

There are many other questions and problems. Should there be discovery prior to a mini trial? That undoubtedly will increase the costs. How can confidentiality be conferred on the mini trial against the possibility that negotations fail and the dispute has to go to trial? In the United States, but only at trial level, judges have excluded evidence of

what was said at mini trials. A recent decision of the English courts has denied absolute privilege to what was said in a conciliation conference and held that an action for defamation could be brought (cf Tadd v Eastwood 1985 1 CR 132).

Another fear, frequently manifested, is that an invitation to a mini trial, or for that matter, any other form of ADR, will be construed as a sign of weakness by the other side. The Centre for Public Resources is sponsoring an imaginitive answer to this problem. It is suggesting to its members, many of them Fortune 500 companies, that they execute an ADR pledge, in essence undertaking that they will attempt the use of ADR in every case before resorting to litigation. There has been much interest in whether it was appropriate to ask law firms to sign a pledge to attempt to induce clients to practise ADR. On balance, the view is against the suggestion.

Notwithstanding many questions and some problems, I believe that mini trials do offer substantial scope for amicable resolution of many types of commercial disputes. As will have been clear from what I have said earlier, if negotiations fail, the parties will still be able to litigate their differences. Further, much of the cost of the mini trial will be for work which will be necessary in the court proceedings should the mini trial prove abortive. However, most mini trials have resulted in settlement and

participants speak on glowing ternms of dramatic cost reductions. Participants have included major companies in the oil, chemical and electronic fields. Perhaps the most important feature of successful mini trials has been the ability of the executives to structure settlements which a judge simply cannot provide. A striking instance is given by Joan Hall in an account of the mini trial of a dispute between Texaco and Borden (cf Anti-Trust Law Journal Volume 53 page 296). That, incidentally, was a mini trial without a neutral adviser. The parties renegotiated another gas supply contract that had not been an issue in the litigation. There were advantages on both sides and both felt that something had been won. Courts lack both the power and the expertise to create this type of settlement. But the mini trial took place against a backdrop of litigation and was structured by businessmen who had been intensively schooled in the particulars of the dispute. The example illustrates another advantage of ADR. The business relationship may continue between the parties without the acrimony arising from one side have won and the other having lost. The disputes which are the most suitable candidates for ADR are ones where the parties have an on-going business relationship.

Mini trials now have a respectable track record in the United States. It should not be thought that the disputes resolved have been simply minor ones. Successes include disputes involving millions of dollars and major

contestants. Chief Justice Burger of the Supreme Court of the United States, in his year end report for 1984, referred to a two hour mini trial which resolved a dispute between a German and American company involving $1.5million and one between two other companies resolved an $800million contract dispute.

The most interesting endeavour in the field of ADR, at the present time, is by Dean Wellington of Yale Law School. He is the moderator of a group formed by insurers, producers and claimants' lawyers seeking to settle disputes arising from alleged asbestos related injuries. The group is seeking to achieve, first, a global resolution of disputes between insurers and policy holders and, second, the establishment of an asbestos claims facility to be financed by insurers and producers. The facility will provide for ADR for claimants instead of litigation. Time does not permit of an explanation of the issues that divided insurers and producers. There is, however, a significant statistic that should not go without mention and which in a large measure prompted the exercise. A study by Rand Corporation is said to have shown that in contested litigation $2.71 is needed to be be expended to get $1.00 into the hands of the asbestos claimants.

There are many other ADR techniques. Some of them combine court proceedings with other methods. Thus Judge Weinstein used Special Masters with great effect in the Agent Orange

litigation to bring the parties to the settlement. The only restriction is the creative imagination of the lawyers and the parties.

It may be appropriate to mention that ADR is being practised in many fields. Environmental disputes, toxic waste disputes, product liability disputes have all lent themselves to resolution by ADR methods.

I propose that there be established an organisation to foster ADR in Australia. For a reason I will mention, it might with advantage be called the Pacific Asia Centre for Alternative Dispute Disposition (PACADD). The Centre should conduct research into, study, encourage and develop means of dispute resolution. The concept seems to me to be of particular relevance to Australia for two reasons in addition to and unrelated to what I have been saying.

First, two of the country's major trading partners, Japan and China, have a traditional and cultural dislike of court conducted litigation. It is, therefore, appropriate that Australia provide other means of dispute resolution to Chinese and Japanese traders who encounter difficulty in their trade with Australia. Second, in light of its geographical location, it would be advantageous for Australia, in its relations with its neighbours, to provide a neutral forum for resolution of disputes between residents or corporations located in countries in the region, or

between residents of, or companies, in one country in the region, for example, China and those in another country outside the region, say, the United States. The Government of New South Wales has announced its intention of making Sydney an international financial centre. In light of my experience in the United States during my recent sabatical, I consider that establishment of the proposed Centre is an essential ingredient in the achievement of the goal of making Sydney an international commercial centre. I might mention that, when I foreshadowed my proposal to representatives of the Asian-African Consultative Committee and of the Foreign Economic and Trade Arbitration Commission of China they expressed interest and I have forwarded drafts of the paper I am delivering to you both to the Secretary General of the AALCC and the Legal Affairs Department of FETAC.

The Centre for Public Resources in New York could serve as a sound model. Its activities include an educational programme, task forces, a judicial panel and research and experimentation. The educational programme involves conferences, workshops and seminars. The Centre produces a range of publications, including a monthly newsletter which reports on ADR activities across the country, and an annual volume detailing innovative ADR techniques. The task forces address specific problems and currently devote time to Government Contract, Transnational and Toxic Tort issues. The Centre provides dispute resolution services through the

judicial panel which consists of twenty-eight attorneys who include former judges, academics, such as Dean Wellington, and practising attorneys of considerable distinction. Members of the panel act as special masters, third party members and mini trial advisers.

The proposed Centre would require a small permanent executive and research staff and would need the advice and support, both moral and financial, of the leading corporations and law firms. You are in an ideal position to ensure that such suport is forthcoming. Subject to changes that might be made to the Income Tax Act, subscriptions to the Centre might be made deductible for income tax purposes and its receipts should also be tax exempt provided that it is appropriately structured. I have approached a number of leading businessmen and they have expressed a willingness to assist the venture. Mr Harry Coombs, a recently retired partner in Stephen Jaques Stone James and a man with a wealth of commercial experience, is willing to devote some of his time to the establishment of PACADD.

As well, one or more of the university law schools should establish courses, similar to the ones at Harvard and Columbia, teaching techniques of alternative methods of dispute resolution both on an undergraduate basis and as part of continuing legal education.

I commend the proposal to you, as concerned citizens, lawyers and business people.

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