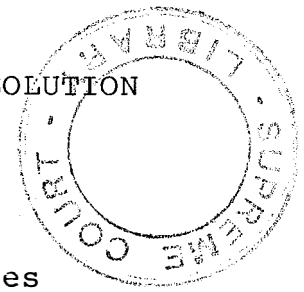

DEVELOPMENTS OVERSEAS IN ALTERNATIVE DISPUTE RESOLUTION

by

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The topic cannot be sensibly discussed without first asking, why do we need alternative dispute resolution ("ADR")? Professor Rosenberg of Columbia University suggests that the answer is not in a need to save the courts from being overwhelmed. "Rather it is to spare the citizenry avoidable stress, excessive expense, inappropriate processes, inadequate remedies and inaccessible institutions." In response, the first point usually made by opponents of ADR is that, at present, something over 90% of disputes are settled without actual adjudication by a court. Why, then, are present procedures not sufficient? The answer, I suggest, is that even where disputes are settled the process is inefficient. As W Brazil in "Settling Civil Suits" says:

> "The process through which the parties eventually reach agreement often is difficult to launch, then can be awkward, expensive, time consuming and stressful. The route to resolution can be tortuously indirect and travel over it can be obstructed by emotion, posturing and interpersonal friction."

In the 19 September 1986 issue of Business Review Weekly, the writers qoted an unnamed corporate director of legal services to the effect that there would be little scope for his office using ADR:

> "Generally, if there are strong differences among the parties, attempts are made to reach an amicable or negotiated settlement, whether the contract requires it or not. It is only as a last resort that our companies go to arbitration or the courts.

> I would suggest that in those circumstances the use of alternative resolution would not have enhanced the ability to resolve parties [sic] any more than can be done by direct negotiation among the parties."

With all due respect to this anonymous authority, his comment is typical of the ignorance of the business world of the working of ADR. For example, claims and counterclaims in a pending arbitration in the US totalled $6million. Settlement negotiations had taken place and failed. According to our commentator, that would have been the end of attempts at settlement. Instead, a mini-trial was suggested by the American Arbitration Association ("AAA") as a final effort to avoid a four to six week hearing. A settlement was achieved. India Johnson of the AAA says:

> "The most interesting thing about the mini-trial is seeing two top corporate executives sitting at the head of the table, listening, questioning, and trying to be objective. It was very important for these two executives to get personally involved and solve this problem. A dispute of this magnitude is as much a business issue as it is a legal matter."

Robert Coulson, AAA President, points out:

> "A presentation by an adversary's counsel can have a sobering effect upon a corporate executive. As one would expect, the mini-trial exchange encourages serious settlement discussions. It provides an opportunity for the lawyers to demonstrate their knowledge of the case and their enthusiasm for their client's position to their client's top executive who sits as a member of the tribunal. Settlements worked out by such executives tend to be more creative than any outsider could have devised."

The mini-trial is an ideal illustration of the enrichment

that ADR adds to the dispute resolving mechanism. The intervention of a neutral can substantially enhance negotiation. Parties may well be willing to reveal to a neutral their minimum requirements and weaknesses in their position which they would not be willing to reveal to the other side in the course of negotiation. The most celebrated instance of a successful intervention by a neutral is the role played by President Carter at Camp David which resulted in the Egyptian/Israeli peace treaty. Anybody reading President Carter's account of that eventful week at Camp David must be struck by the fact that the negotiations would have got nowhere had it not been for the intervention of a trusted neutral. The attitude of mind revealed by this unnamed corporate lawyer is undoubtedly widespread in the community and if ADR is to be successful substantial re-education is needed.

Mr Newton will explain something about methods of ADR and, in what follows, I will assume that basic knowledge.

The outstanding development in the United States in the last few years has been described as the institutionalisation of ADR. ADR mechanisms have been accepted by, and to a considerable extent integrated into, traditional judicial institutions. This was possible because judges have become much more activist as case managers. They have used their rule-making powers to provide for new programmes with minimal or no legislative guidance. In the result, judges

have put into place court annexed arbitration; they have acted as mediators; they devised schemes for early neutral evaluation, summary jury trials and even appellate case settlement programmes.

COURT ANNEXED ARBITRATION

Probably, this method of ADR has been the subject of the most detailed scientific study. Since 1979, the Institute for Civil Justice at the Rand Corporation has been engaged in a programme of research in this field. It monitored the evolution of court administered arbitration programmes, evaluated the effects of implementing programmes and studied the implications of alternative programme designs.

Ten United States Federal District Courts and over fifteen States use this method as an alternative to normal court process. If an action is of a kind considered appropriate for arbitration, it is compulsorily diverted to volunteer arbitrators. The criterion for selection is usually a monetary limit. The court simply looks at the amount claimed by the plaintiff. Because, naturally enough, plaintiffs claim more than they realistically can hope to get, many cases may evade the programme. Unlike private commercial arbitration, court administered arbitration is neither voluntary nor binding.

In most programmes, 25-50% of the cases sent to arbitration settle before the hearing date. Others go through the

process to a decision. Then, if either party desires, the dispute can be returned to the court and proceed in the usual way to an adjudication with no reference whatsoever to the arbitration. It is interesting to note how substantially such rates for rehearing vary from programme to programme. In California, the rate has been running at around 50%. In Pennsylvania, it is only between 15% and 25% of all cases heard and some court administrators elsewhere report even lower rates.

Even where there is a rehearing, the majority of cases in all jurisdictions settle without trial. In California, a sample of four Superior Courts found that the rate of trial after arbitration was only about 7%.

In many programmes, parties who request trials after arbitration are required to reimburse the court for the arbitrator's fees. Such fees are intended to discourage frivolous appeals. One of the big questions is whether there should be sole arbitrators or a panel for hearing the arbitral dispute. It is thought that attorneys may be more inclined to question the decision of a single arbitrator leading to a higher rate of appeals.

One of the frequent criticisms made of ADR is that it delivers second class justice. Attention is drawn by critics to abbreviated procedures and rapidly decided outcomes. However, the Rand research programme examined

what litigants obtained from court annexed arbitration and how they felt about it. The conclusion was that court administered arbitration delivers generally acceptable outcomes and is viewed by most individual litigants as a fair way of resolving civil disputes. Attorneys sometimes demur at arbitration's departure from traditional trial norms but most view arbitration as an acceptable procedure for resolving smaller civil damage suits. Most individual litigants have a simple definition of what constitutes a fair dispute resolution procedure. They want an opportunity to have their cases heard and decided by an impartial third party.

MEDIATION

One of the essential features and that which serves to differentiate this procedure from party to party negotiation is the separate meeting the mediator holds with each of the parties. In the course of it, information may be obtained which a party would not disclose in the presence of the other. Thereafter, in a joint session, the mediator summarises areas of agreement or disagreement. The mediator then employs two fundamental principles of effective mediation, creating doubts in the minds of the parties as to the validity of their positions on issues and suggesting alternative approaches which may facilitate agreement. These are functions which parties to disputes are very often unable to perform by themselves. The mediator produces alternatives or options, discusses the workability of each

option, encourages the parties by noting the probability of success where appropriate and suggests alternatives not raised by the parties.

THE JUDGE AS MEDIATOR

For the last fifty years, during which pre-trial conferences have been held in the United States, there has been an uneasy tension between those who saw its function as restricted to defining and eliminating issues, facilitating proof and disposing of preliminary matters, with settlement playing a secondary role, and those who actively pursued the possibilites of settlement.

It was in the State courts that settlement oriented pre-trial with active judicial participation really took off. Frequently, the judge enquired from counsel what they considered a case to be worth then expressed an opinion what the settlement figure should be. If that was not acceptable, the case was reassigned to another judge.

The next development in the words of a Federal District judge who told a 1977 seminar for newly appointed judges:

> "I urge that you see your role not only as a home plate umpire in the courtroom calling balls and strikes. Even more important are your functions as a mediator and judicial administrator."

Active promotion of settlements is now unmistakably the position in the Federal judiciary. The virtue of active judicial participation in settling civil cases is part of

the perceived wisdom. As has been said: "Judicial activism in the settlement process appears to have received quasi-official sanction within the judicial family." This shift to judicial activism received formal ratification in 1983 when Rule 16 of the Federal Rules of Civil Procedure was amended to allow judges to "consider and take action with respect to ... the possibility of settlement or the use of extra judicial procedures to resolve the dispute" during the pre-trial conference. In the result, judges do participate actively in arranging settlements. They are more aggressive and inventive and they regard it as an integral part of their judicial work. Interestly, research has not so far confirmed that more judicial intervention produces more settlements (Church, Carlson, Lee and Tan, "Justice Delayed; The Place of Litigation in Urban Trial Courts"; Flanders, "Case Management and Court Management in United States District Courts"). As Professor Galanter of the University of Wisconsin, Maddison, remarked, "We have moved from dyadic to mediated bargaining." The hallmark of change is that mediation is not regarded as radically separate from adjudication but as part of the same process. Litigation and negotiation are not viewed as distinct but as continuous. Mediation has been firmly incorporated into the image of adjudication and into the judicial repertoire.

The experience of the AAA has been that trial attorneys when selecting between binding arbitration and professional mediation select mediation more than 75% of the time. If a

similar preference becomes reflected in court administered programmes, where attorneys are offered the choice between arbitration or mediation, the courts may be persuaded to provide mediation as an option. The advantage of mediation is said to be that parties have an opportunity to discuss the issues at their leisure and reach an agreement that reflects a mutually acceptable compromise. The clients themselves are more involved in mediation than they would be in an arbitration hearing.

EARLY NEUTRAL EVALUATION

This programme is the brain child of Judge Peckham, Chief Judge of the Federal District Court for the Northern District of California. He established a committee which sought to achieve a reduction in cost of litigation by identifying features in the litigious process which made an early disposition difficult. First, the committee pointed out that usually pleadings fail to give sufficient details of the case of the parties. Second, in order to preserve options, parties tend to rely on multiple causes of action and defences, a practice that makes it difficult to locate the true centre of their dispute. Third, some lawyers and litigants find it difficult to develop, at the outset, a coherent theory of their own case. Sometimes clients are not prepared to be realistic about their situations. The most frequent difficulty, however, is that litigants sometimes, and lawyers always, are so busy with other matters that they fail to systematically analyse a case and

do so only when some external event forces them to do so. The programme is designed to help attack these difficulties.

The basic design is to:

1 encourage each party at the outset to confront and analyse its own situation;
2 provide each litigant and lawyer at an early time with an opportunity to hear the other side present its case;
3 help the parties isolate the centre of their dispute and identify the factual and legal matters which will not be seriously contested;
4 offer all counsel and litigants a confidential, frank assessment of the relative strength of the parties' positions and the overall value of the case;
5 after receiving the neutral assessment, provide the parties with an opportunity to try and negotiate a settlement.

In 1985, the procedure was tested on ten different kinds of case. The results were encouraging and thereupon a broader based experiment involving abuot 100 cases over a one year period was developed. It is hoped that the experiment will embrace two sets of control group cases. One set would be cases sent through the court annexed arbitration programme. The second set of cases would be involved in neither the arbitration nor the early neutral evaluation programme. If the experiment is scientifically conducted it will be a first.

The central feature of the programme is a confidential two hour case evaluation session hosted by a neutral, experienced, highly respected, private lawyer appointed by the court under its inherent power to appoint special masters. Some time before the date fixed for the evaluation session, each party is required to deliver a written evaluation statement no longer than ten pages. Anything that is thought to be helpful in achieving the ends of the programme may be included. The rules require the statements to identify any legal or factual issues whose early resolution might reduce the scope of the dispute or contibute significantly to the productivity of settlement discussions. At this session there are four major orders of business:

1 Each party makes a fifteen to thirty minute presentation of its position focussing on the apparently disputed areas. The parties are asked to explain their views of the facts and describe the evidence that will support their views. Opposing parties are not permitted to ask questions or make comments while a presentation is being made.

2 The evaluator works with counsel to reduce the scope of the dispute by identifying areas of agreement or in which substantial agreement seems possible with a little coaxing and by urging the lawyers to postpone doubtful propositions until settlement possibilities have been thoroughly explored. Next, he or she identifies,with the help of the parties, the key unestablished facts on which

resolution of the dispute might turn. These are divided into two categories: those which are simply unknown to the parties, and those which are affirmatively disputed. The evaluator attempts to identify the most efficient way to establish potentially important but nearly unknown facts. Where appropriate, joint fact finding is encouraged. With respect to facts which are affirmatively in dispute, the evaluator probes why the parties disagree. The evaluator explores the nature and probitive power of the evidence each party says it could muster in support of its views.

3 The evaluator candidly assesses the relative strength and weaknesses of arguments and evidence and offers an opinion on the likelihood of liability and the probable amount of damages, if any.

4 The evaluator helps the litigants to devise a plan for exchange of information that will enable serious settlement negotiations to be put in place as expeditiously as possible.

Next, the evaluator might ask the parties if they would be interested in exploring possibilities of settlement.

The advantage of the process is that it compels counsel and clients to confront, early in the proceedings, a systematic presentation of their opponent's position and to examine systematically the strengths and weaknesses of their own case. This forced confrontation with their overall

situation might inspire parties to make the difficult decisions about the case that they otherwise would postpone. The evaluator's assessments serve as a reality check for parties or lawyers, bringing some frivolous matters to an abrupt halt, or, short of that, fundamentally altering some party's expectations. The mere prospect of a neutral and frank evaluation could induce some parties to dismiss their claims or to make the kind of offers that could result in prompt settlement. The process increases client involvement in law suits and in making basic decisions about how litigation is handled. In contrast, in some situations, clients feel alienated from the litigation process, cut off from it and bewildered and intimidated.

Finally, the evaluator is in a position to introduce a fresh, creative perspective to the litigation, helping parties to rethink or recast their objectives and search for alternative solutions to their problems. An evaluator might have experience of disputes where mergers or buyouts worked as more sensible solutions than combat and he or she may explain the advantages to the parties or show how this kind of solution can represent a net gain for both sides.

In another first, the Court for the Northern District of California is establishing a programme to train lawyers in the skills necessary to serve effectively as evaluators.

A threshold question is, what kind of cases shoudl be given

this sort of treatment? In smaller, less complex actions, it may be that the most useful part of the programme will be an assessment of quantum. In larger, more complicated matters, by contrast, the parties might find more valuable the evaluator's critiques of specific theories of action or suggestions about the most efficient ways to exchange information. There may be parts of cases in which the most useful contributions by the evaluator will be creative suggestions that encourage parties to rethink their basic objective or to consider innovative dispute resolution mechanisms that take the case at least temporarily out of the traditional litigation mould.

It will be noticed that the procedure bears a close resemblance to mini-trials but is more closely tied into the court process context.

SUMMARY JURY TRIAL

This procedure was evolved by another innovative Federal judge, Judge Lambros. Some sixty-five Federal judges have now adopted the system. A jury is empannelled to hear a much abbreviated presentation of the case. The answer or verdict which it returns has an advisory and non-binding quality only. The whole concept which underlies it is to let the litigants know how the jurors react to the scaled down version of the case in the expectation that the parties will then reach a settlement. They often do, guided by the jury's perception of what is appropriate.

The theory that underlies this method of dispute resolution is that no amount of theorising or abstract discussion between attorney and client can correct an inaccurate perception of a case. The client must be shown the way his or her case will appear at trial. The procedure is normally concluded in a half day and seldom lasts longer than a full day.

The summary jury trial is intended primarily for cases that will not settle using more traditional methods. Types of cases where it has been shown to be beneficial include the following:

1 Where there is a substantial difference of opinion among the lawyers as to the jury's likely evaluation of unliquidated damages such as pain and suffering;

2 Where there is an irreconcilable difference of opinion over the jury's expected perception of the application of the facts to legal concepts such as reasonable care;

3 Where one or more of the parties or their counsel appear to have an unrealistic view of the merits of the case when confronted with a reasonable presentation of the argument made by their opponent;

4 Where one or more of the parties is reluctant to reach any settlement agreement because of the desire to have their day in court and to have the case evaluated by an impartial jury.

Summary jury trial has been used in a wide range of cases

from relatively simple negligence and contract actions to complex mass tort and anti-trust cases. Obviously, if a case is only expected to take a day or two, there is little advantage in conducting a summary jury trial. In the result, the court should generally assume that the longer the likely trial, the greater the potential value of the summary jury proceeding. Indeed, complex anti-trust cases have been effectively presented and resolved through this process. In 1984, the Judicial Conference of the United States adopted a resolution favouring the experimental use of summary jury trial in potentially lengthy civil jury trial cases. The summary jury trial provides a forum in which the litigant can get a taste of the trial ahead and thereby more logically evaluate his or her position.

In making their presentations, counsel are permitted to mingle representations of fact with legal argument. The jury is informed of what matters a witness will be able to say. Physical evidence, including documents, may be exhibited and submitted for the jury's examination during their deliberations. Objections are strongly discouraged. At the conclusion of the summary jury trial presentation, the jury is given an abbreviated summing up dealing primarily with the applicable principles of law and, to a lesser extent, with concepts such as the burden of proof and credibility. The jury is normally given a verdict form containing specific questions. If, after diligent efforts, the jury is unable to return a unanimous verdict, each juror

is given a verdict form and instructed to return a separate verdict. These separate views will be of value to the lawyers in exploring settlement. Once the jury has been excused to deliberate, the judge may participate in settlement negotiations. The negotiations are assisted by the information gained in the course of the summary jury trial.

When the jurors complete their deliberations, a unique procedure may take place. The judge may ask the jurors a broad variety of questions ranging from the general reason for the decision to their perception of each party's presentation. Counsel may also enquire of the jurors both as to their perspective on the merits of the case and their responses to the attorneys' presentations. This dialogue may serve as a further springboard for meaningful settlement negotiations.

The procedure yields to a number of adjustments. As available alternatives:

1 The judge may permit certain key witnesses to testify in an abbbreviated form, especially when a case turns upon the credibility of a witness's testimony on one or two key facts.

2 Video tape presentation may effectively summarise a litigant's position as well as provide the jury with a view of the actual witness and evidence involved in the case. In one case, a film included an animated

reconstruction of the accident scene, pictures showing the plaintiff's injuries and their effect on his everyday life and pictures of each of the plaintiff's lay and expert witnesses with summaries of their probable testimony dubbed in by the plaintiff's attorney.

Judge Lambros' experience is that virtually all of more than one hundred suits handled through this method concluded without the need for a full trial.

There is absolutely no reason why this procedure should not be introduced in New South Wales. One possibility may be that if a dispute looks like not being reached by, say, 12.00 on a particular day when it is listed for hearing, it should be brought before a jury and a senior counsel. The hearing should be restricted to, say, one hour for each party and the jury directed on relevant principles by the senior counsel. The views of the jurors could then be sought in the same way as in the US.

Indeed such a procedure should not be restricted to jury cases. In motor vehicle accident cases a senior counsel could be asked to look at the medical reports, hear a short presentation by both sides and then give his views on what he considers would be the likely result which would be achieved in court. That again could be utilised as a basis for settlement. It could well avoid many of the complaints and difficulties associated with matters being not reached.

APPEALS SETTLEMENT PROGRAMME

Several US Circuit Courts of Appeals have established pre-argument conference programmes. As well, many State appellate courts throughout the US have established mediation programmes designed to settle appeals. The Second Circuit programme, established in 1974, entails mandatory personal conferences with attorneys in almost all private civil cases. The Sixth Circuit conducts such conferences on the telephone.

The Eighth Circuit programme differs from some others in that participation is completely voluntary. The programme concentrates on settlement although there is the concurrent purpose of simplifying, clarifying and reducing by agreement the issues presented. The director attempts to develop offers from each side without determining a bottom line before attempting to arrange a conference. The absence of any or little movement by either side usually indicates no interest in settlement and those cases generally are not set for conference. The director is the avenue of effective communication and parties are able to express themselves in an open and free atmosphere without becoming defensive. Approximately one hundred appeals are settled each year as a direct result of the Circuit programme.

MINI-TRIAL

This method of dispute resolution has yielded excellent results and is perhaps the best known. It may best be

described as a highly structured information exchange and settlement negotiation. Each of the disputants presents its best case to a negotiating panel representing both sides, generally assisted by a neutral advisor. It is very similar to the neutral evaluation programme but does not necessarily have the same connexion with a court or with court proceedings. Following the presentation, the negotiating panel meets to attempt to reach a pragmatic settlement. The rationale which underlies the process is that a reasonable solution to most problems can be structured by the disputants themselves if they are in full possession of the facts. The method is speedy and cost effective. The savings in executive time and legal costs may be quite staggering. The business executives making up the negotiating panel will understand the technical issues without elaborate explanations. Avoiding the acrimony of litigation serves to preserve business and other relationships.

The process is completely flexible. It is entirely at the discretion of the parties what parameters they agree on for the conduct of the mini trial or what solution they devise for the disposition of the dispute.

An agreement for mini-trial will have to provide for a considerable number of matters. The parties are free to prescribe the rules they wish to adopt for the conduct of the mini trial but, once agreed on, are required to adhere

to them. One provision is crucial. The parties need to ensure that the neutral advisor, if there is to be one, is diaqualified as a future witness for either party, any advisory opinions are inadmissible and that the parties will treat the whole of the mini-trial proceedings as confidential. Even if the mini-trial is unsuccessful, much of the cost will not have been wasted because most of the work done in preparation will be required for the trial in any event.

The information exchange requires the parties to present their best case because each has only a limited time. That limitation converts what had grown into a lawyers' dispute back into a businessmen's problem by removing many of the collateral legal issues.

The presentation by the parties of their respective cases and the challenges to the case of the other disputant serve to distinguish a mini-trial from the usual negotiation which may take place between party and party or their lawyers. The disputants have a better opportunity to understand the strength of the opponent's arguments and the weaknesses of their own. This serves to counterbalance the natural and usual tendency to convince oneself of the absolute correctness of one's own views.

The neutral advisor may sum up at the conclusion of the presentation. Alternatively, or in addition, the neutral

advisor may give his views and opinions as to the likely outcome of any particular issue to either of the parties which may call on him or to both the parties together if so desired.

In a settlement arrived at as an outcome of a mini trial the parties may resort to rearranging the entirety of their relationship and may seal the settlement of the particular dispute by restructuring some existing arrangement quite unrelated to the matter in dispute. For example, in the Texaco-Borden Mini Trial which involved a $200million anti-trust and breach of contract claim concerning a natural gas contract, the companies renegotiated a supply contract that had not been at issue in the case at all. They also created a new arrangement for transporting gas to Borden at prices favourable to it. The result made both sides feel that they had won a victory. Similarly, in a construction dispute, not only did the settlement involve payment of several million dollars to the owner, but the contractor and architect agreed to replace the outside of the building with a new technology over a period of three years at their own cost. Interestingly, an executive of the owner subsequently said that the company would consider using the same contractors and architect again.

The other striking development overseas has been the development of academic interest in ADR. All the leading universities now offer courses. Some universities have set

up centres designed to carry on research and teaching in the field. Academic writing has entered the field and, just recently, the first major textbook "Dispute Resolution" has been published, written by the three pioneers in the field, Professors Goldberg, Green and Sander.

Again, private enterprise has entered the field. There are at least two profit-making companies providing the services of neutrals and assisting in the formulation of methods to resolve disputes by ADR.

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