ALTERNATIVE DISPUTE RESOLUTION

by

JUSTICE ANDREW ROGERS

A Judge of the Supreme Court of New South Wales

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Should lawyers support the development of alternative dispute resolution ("ADR")? Should ADR be mandatory before a hearing in the courts is permitted?

Such questions cannot be sensibly discussed without first asking, why do we need 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 made by opponents of ADR is that over 90% of disputes are settled without adjudication by a court. Why, then, it is asked, are present methods insufficient or inappropriate? Brazil in "Settling Civil Suits" answers:

> "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 contrast, ADR considerably enlarges the reach of the negotiating process thereby increasing the chances of settlement. By way of illustration, settlement negotiations had taken place and failed in a dispute involving

$US6million. The hearing was estimated to last four to six weeks. A mini-trial was suggested by the American Arbitration Association ("AAA"). A settlement was achieved. India Johnson of the AAA described it:

> "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, made the point that:

> "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. ... Settlements worked out by executives tend to be more creative than any outsider could have devised."

The last point he makes is what Professor Rosenberg meant when he referred to inadequate remedies. Consensually, disputes may be resolved with solutions more satisfactory to the parties than any remedy the courts are able to give. By agreement, the parties are able to treat the fundamental disagreement rather than receive court awarded remedies for its manifestations. As well, the United States experience is that ADR makes settlement easier and cheaper.

The mini-trial is an ideal illustration of the enrichment that ADR adds to party and party negotiation. The intervention of a neutral can substantially enhance the process. Parties may reveal to a neutral their minimum

requirements and weaknesses in their position which they would not be willing to disclose 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. Reading President Carter's account makes clear that the negotiations would have got nowhere but for the intervention of a trusted neutral.

It is useful to consider the advantages claimed for ADR in the context of some of the criticisms that are commonly levelled at curial proceedings.

First is cost. Dispute resolution cannot be made inexpensive. On the other hand, litigation in court tends to be very expensive. The trial process is inherently wasteful. As a commentator remarked, "Perhaps only 5% or less of the preparation will be used, but the balance is necessary and economically justified because the identity of the precise 5% cannot be determined." ADR reduces wastage.

Second, litigation removes the handling of the dispute from the parties into the hands of experts. Disputants get the feeling of having lost all control over the proceedings. The proceedings grind to a conclusion with the parties feeling that they are unable to make an effective input or otherwise influence the outcome. A good, if incorrectly perceived, example is a dispute I heard some years ago.

Residents of adjoining properties objected to the use of the Showground by a rock band. Numerous affidavits were read on behalf of the objectors. Counsel did not cross examine and, accordingly, none of them went into the witness box. The objectors felt that they did not get a chance to put their case in court. That their affidavits had been read was insufficient to satisfy the felt need for making their grievance known from the witness box. Because ADR aims at arriving at a consensual agreement, the involvement of the parties is close and determinative of the disposition of the dispute.

Third, a court may be unable to deal with the underlying and fundamental causes of the dispute between the parties. At times, lawyers may have to reframe the issues separating the parties to fit a particular legal doctrine and, thus, may change the nature of the dispute. The court is not permitted to endeavour to identify or implement solutions which involve matters outside the strict confines of the contest. In ADR the parties are restricted in the range of remedies only by their own creativity.

Fourth, the bitterness of formal adversarial contest may be finally destructive of an existing relationship between the parties. Be it a business, a family or an industrial relationship, generally speaking litigation will destroy it. Consensual resolution should preserve the relationship and, in many cases, renew elements of trust and confidence.

Fifth, litigation in court is usually technical. The wearing of wigs and gowns aside, the laws of evidence often lend an air of artificiality to the presentation of the cases. However, if the dispute were to be considered by the parties themselves in an endeavor to arrive at consensual resolution, they would focus on the real issues.

Although ADR in the United States is closely identified with the disposition of commercial disputes, it is incorrect to suggest that its utility and advantages are restricted to such disputes. ADR has been practised in the field of environmental disputes, family law, industrial disputes, toxic torts and, indeed, every aspect of life and conduct which may give rise to disputes. Thus, Massachusetts, New Jersey, Wisconsin and Alaska have established mediation programmes to provide forums for resolving a broad range of multiparty community, environmental, and other public policy disputes. In Columbus, Ohio, 3000 criminal misdemeanours are referred to mediation each month by the prosecutors' officers.

Mr Newton will explain something about extra-curial methods of ADR and, in what follows, I will assume that basic knowledge. I will concentrate on the relationship of ADR and the courts.

Some commentators have suggested that in the ideal dispute resolution system there should be a Dispute Resolution

Centre which will provide a variety of processes according to the needs of the particular dispute. This suggestion was first made by Professor Sander at the Pound Conference in 1976. Since then, US commentators have dubbed the concept "the multi-door courthouse". Three experimental projects have been mounted and are described by Finkelstein in (1986) 69 Judicature 305. A person involved in a dispute goes to an Intake Centre. There the disputant is made aware of options and a suggestion is made as to the best approach for the resolution of the particular dispute. Depending on the available mechanisms in the particular community, the possibilities for referral range from mediation through to litigation in court. When we were discussing the establishment of the Australian Commercial Disputes Centre (ACDC) in Sydney, the Chief Justice suggested that it take the form of such a facility. I take the responsibility for dissuading him. First, we did not have the superperson who would act as advisor or referral clerk. Second, I believed that adequate ADR facilities were required to be in place to ensure that proper alternatives were available before arousing inappropriate expectations.

The outstanding development in the United States in the last few years has been described as the institutionalisation of ADR. Not only have ADR mechanisms been accepted by, but also to a considerable extent incorporated in, the curial process, sometimes by rules of court, sometimes by directions. Judges have put into place court annexed

arbitration; they have acted as mediators; they devised schemes for early neutral evaluation and summary jury trials.

The Federal Rules of Civil Procedure, as amended in August 1983, by rule 16(c)(7), authorise the participants in a pretrial conference to discuss "the possibility of settlement or the use of extrajudicial procedures to resolve the dispute". The notes of the Advisory Committee on Rules explain:

> "In addition to settlement, Rule 16(c)(7) refers to exploring the use of procedures other than litigation to resolve the dispute. This includes urging the litigants to employ adjudicatory techniques outside the courthouse." (my emphasis)

Some courts in the United States have gone beyond this rather generalised encouragement. In 1984, a pilot project for use of ADR was developed in the Federal District Court for the Southern District of New York. A judge evaluates a case for suitability and, if appropriate, orders the parties to attend within thirty days a conference to explore the possibility of ADR. Attendance is mandatory. The parties are free to reject ADR or they may choose among five possible ADR methods. Before the conference, counsel for the parties receive a memorandum explaining the programme, and the types of dispute resolution methods available. If the parties select mediation, fact-finding, arbitration (binding or advisory), or mini-trial, they sign an appropriate agreement. The confidentiality of the

conference is protected. When the ADR process is completed, a final report is issued to the court by the AAA, informing the court of the outcome. The report is brief and does not breach the confidentiality of the process. In approximately half of the cases in which a conference has been held, the parties agreed that some form of ADR would be appropriate. Of these, most were submitted to binding arbitration.

Matters referred by the court involved automobile accidents, claims for commissions or fees, sale of goods, patent and trademark issues, and employment contracts. Amounts claimed ranged from $US25,000 to $US200,000. Disputes have moved swiftly through the process. Average time from court order to report was only 50.2 days.

More recently, the US Claims Court announced that it will utilise two ADR techniques: settlement judges and mini-trials. Participation is voluntary. Where appropriate, a settlement judge will act as a neutral adviser, giving an assessment from the judicial perspective of the parties' settlement positions, without jeopardising their ability to go to trial should settlement not be reached. Mini-trials will be used only in factual disputes governed by well-established principles of law. In the mini-trial, each party will present an abbreviated version of its case to a neutral adviser - a judge who will not be involved in any subsequent hearing that may become necessary - who will then assist the parties in negotiating a settlement. Each party

is required to be represented by an individual with settlement authority. Any discovery will be expedited and limited in scope. In most circumstances the entire process should conclude within one to three months. At a prehearing conference the parties will exchange brief written submissions summarising their positions and narrowing the issues. Hearings will be informal - the rules of evidence and procedure will not apply - and should generally not exceed one day.

Beginning 8 May 1987, civil cases in the US Court of Appeals for the District of Columbia will be selected at random for assignment to mediation. A key component is confidentiality in the mediation process. The court's programme will stress case settlement, although partial settlement of some issues or procedural streamlining of cases will also be considered successful outcomes. Counsel is required to prepare a short "position paper" describing the case and to attend the initial mediation session. A person with authority to enter into a settlement agreement must be present at the session. The scheme is only a refinement and elaboration of schemes other circuits have had in operation for some time.

I have referred to experiments within the United States court structure but of course such experiments are replicated in other countries, although, perhaps, not to the same extent. Thus, remission of cases to arbitration is practised in many countries.

COURT ANNEXED ARBITRATION

The Institute for Civil Justice at the Rand Corporation has conducted a research programme into this method of ADR since 1979. It monitored the evolution of court administered arbitration programmes, evaluated the effects of implementing programmes and studied the implications of alternative programme designs.

Many federal and state courts accept this procedure as an alternative to normal court process. If an action is considered appropriate for arbitration, it is compulsorily diverted to volunteer arbitrators. The principal criterion for selection is usually a monetary limit. The court has regard only to the amount claimed by the plaintiff.

Because, naturally enough, plaintiffs claim more than they realistically can hope to get, many cases evade the programme. Unlike private arbitration, court administered arbitration is neither voluntary nor binding.

Of the cases sent to arbitration, 25-50% 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. Rates for rehearing vary substantially from programme to programme. In California, the rate was around 50%; in Pennsylvania, only between 15% and 25%. Some court administrators

elsewhere report even lower rates. Even where there is a call for 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 trials 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. This is intended to discourage frivolous appeals. A major question 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. 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 litigants as a fair way of resolving civil disputes. They simply want to have their cases heard and decided by an impartial third party. 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.

The Federal Judicial Centre in the United States and the ABA Action Commission to Reduce Court Costs and Delays have made extensive study of the use of court annexed arbitration as an alternative method of dispute resolution. Both bodies favoured the programmes.

In New South Wales, the Supreme Court has not power to remit matters to arbitration. Lower courts may (Court (Arbitration of Civil Actions) Act 1983). The Supreme Court does have a very useful power. Under the Rules, a judge may send to a referee or arbitrator the whole of a case or selected issues. The court may act on the request of one of the parties or on its own motion. By utilising the provision, the best features of curial and arbitral decision making may be combined. Issues suitable for determination by the court, such as questions of law and construction of contracts, may be dealt with by a judge, whilst highly complex and technical issues involving, say, the merchantability of computer software may be remitted to a suitable expert. The report of the referee or arbitrator comes back to the judge for consideration and it may be adopted or varied or even rejected.

MEDIATION

An essential feature of this procedure 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 are often unable to perform by themselves. The mediator produces 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.

Mediation by judges has been a natural evolution in the United States from pre-trial hearings. The temptation to attempt to dispose of the whole of the dispute proved irresistible to activist judges. It was in the State courts that settlement oriented pre-trial with active judicial participation really took off. Initially, 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 lay in the words of a Federal District judge:

> "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."

Today, the virtue of active judicial participation in settling civil cases is part of the received wisdom. As has been said: "Judicial activism in the settlement process appears to have received quasi-official sanction within the judicial family." Rule 16 of the Federal Rules of Civil Procedure in a sense merely served to confirm an existing practice. Judges are more aggressive and inventive in pursuing settlement and they regard it as an integral part of their judicial work. As Professor Galanter of the University of Wisconsin-Madison, 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. Interestingly, research has not so far confirmed that more judicial intervention produces more settlements.

In contrast with the experience in the pilot project in New York where, as I have said, the choice is between arbitration and mini-trial resulting chiefly in choice of arbitration, the experience of the AAA has been that, as between binding arbitration and professional mediation, trial attorneys 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 parties themselves are more involved in mediation than they would be in an arbitration hearing. They may devise their own solution.

EARLY NEUTRAL EVALUATION

For the account of this programme, I am indebted to Brazil, Kahn et al in (1986) 69 Judicature 279. Judge Peckham 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, 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 procedure devised to respond to these problems bears a close resemblance to mini-trial but is more closely tied into the court process context.

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

The central feature is a confidential two hour case evaluation session by a neutral appointed by the court under its inherent power to appoint special masters. Each party delivers a short written evaluation statement identifying any legal or factual issues whose early resolution might reduce the scope of the dispute or contibute significantly to the productivity of settlement discussions. Each party makes a short presentation of the facts and the evidence relied on. During it, opposing parties are not permitted to ask questions or make comments.

The evaluator seeks to reduce the area of the dispute by identifying areas of agreement or in which substantial agreement seems possible. Doubtful propositions are postponed until settlement possibilities have been

thoroughly explored. The key facts in dispute are identified. The evaluator probes why the parties disagree. The evaluator explores the nature and probative value of the evidence of each party.

The evaluator then 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. The evaluator's assessments serve as a reality check for parties or lawyers. The process increases client involvement in law suits and in making basic decisions about how litigation is handled. The evaluator introduces a fresh, creative perspective to the litigation, helping parties to rethink or recast their objectives and search for alternative solutions to their problems.

In another first, Judge Peckham's court is establishing a programme to train lawyers in the skills necessary to serve effectively as evaluators.

SUMMARY JURY TRIAL

This procedure was evolved by another innovative Federal judge. A jury is empannelled to hear a much abbreviated presentation of the case. The answer it returns has an advisory and non-binding quality only. The litigants learn how 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.

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 the case will appear at trial. The procedure is normally concluded in a half day and seldom lasts longer than a full day.

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.

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. The jury is given an abbreviated summing up. Whilst the jury is out, the judge may participate in settlement negotiations.

When the jurors return, the judge may ask 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 any number of adjustments. Virtually all of more than one hundred suits handled by

Judge Lambros through this method concluded without the need for a full trial.

The United States experience suggests that there are considerable advantages to be had from selective adoption by courts of ADR as part of their process. Of course, there are dangers and difficulties in an uncritical acceptance of ADR procedures. Some of the very advantages of the ADR process may argue for it rejection in particular cases. For example, Judge Edwards in "Alternative Dispute Resolution; Panacea or Anathema" (99 Harv L Rev 668) pointed out that the public interest may be overlooked in the consensual settlement of environmental disputes. It is put that, in mediation, disadvantaged persons or groups may be coerced into an unfavourable settlement by more powerful opponents (Fiss, "Against Settlement" (1984) 93 Yale L J 1987). Another criticism is that lower income users of alternatives are relegated to "second class" justice. These criticisms are examined and rejected in an article in (1986) 69 Judicature p 293. Nonetheless they point to the fact that there can be no uncritical acceptance of ADR.

Probably the most important question to arise is the ascertainment of what disputes are suitable for disposition by ADR. In their authoritative book, Dispute Resolution, Professors Goldberg, Green and Sander can give no definitive answer. They do give a number of indicia but their introduction is significant. The authors say:

> "The following outline, albeit not empirically tested, draws on the experience of many dispute resolution practitioners, and may be helpful in systemmatically evaluating cases for their dispute resolution potential."

As Professor Sander pointed out to me when I raised the point with him, if they had been able to provide definitive criteria whereby to allocate appropriate cases to appropriate mechanisms, their book would have been worth its weight in gold. Yet, if ADR is to succeed, it is precisely that task that lies ahead.

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