CHINESE NATIONAL JUDGES' COLLEGE

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ADR – AN INTRODUCTION

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The need for ADR

As the standard of living in western communities has risen the unit cost of labour for any task has also risen. This is as true of litigation as it is of manufacturing or agriculture. The consequence has been an increasing demand for efficiency of process to ensure that the cost of the ultimate product remains affordable. Although the price of a refrigerator, motor car, or bottle of wine has, in real terms, reduced over the last 30 years the same is not true of our system of justice. The result, as the former Chief Justice of the Australian High Court, Sir Anthony Mason commented, has been an "erosion of faith" in the adversarial system. In a paper titled "The Future of Adversarial Justice" Sir Anthony commented:

> "The rigidities and complexity of court adjudication, the length of time it takes and the expense (both to government and the parties) has long been the subject of critical notice."

More than 30 years ago it was recognised that if the adversary system was to continue to meet the community's needs judges would have to take greater control of

the process. In almost every common law jurisdiction a detailed and critical examination of the civil justice processes has been undertaken. Although other issues have been addressed and responses developed, case management by courts is now universal. At the same time Alternative Dispute Resolution ("ADR"), of which mediation is of fundamental importance, has developed as an alternative to a contested trial followed by a judgment from the court. It has many advantages which I will discuss in the second lecture later today.

Different forms of ADR

The appropriate form of any dispute resolution process is largely determined by the nature of the dispute, the attitudes of the parties and the prevailing community expectations. Over recent years as our attitudes towards ADR have developed the forms and processes of ADR have also changed. ADR does not refer to one set of processes nor does it provide a "formula" for dispute resolution.

ADR now takes many forms. These include: mediation, co-mediation, shuttle mediation, expert mediation, conciliation, facilitation, arbitration, early neutral evaluation, med-arb, and statutory ADR schemes.[1] However, the essential element in mediation is the utilisation of a neutral third party to assist the parties to a dispute to identify the issues between them and work to resolve them. The mediator does not determine the outcome but instead aids the parties to achieve common ground.

Co-mediation is a form of mediation where two or more mediators are required to mediate a dispute. It is often used when it is perceived that there may be a power

[1] Spencer D and Altobelli T, *Dispute Resolution in Australia. Case, Commentary and Materials.* LawBook Co. 2005 at 15

imbalance between parties as a result of gender or cultural differences. Shuttle mediation is used where parties are not able to meet face to face and the mediator effectively 'shuttles' between them relaying each parties' position as it develops. Expert mediation contemplates a mediator with sufficient expertise in an area related to the issue in dispute to have input into the content of the discussions at mediation. It is particularly useful in complex disputes that involve a large body of assumed industry knowledge.

Conciliation describes the process used to resolve the situation where one party to a dispute is aggrieved and one party is not. The process is firstly directed to determining whether a conflict does exist. If it does, steps are taken towards its resolution. The latter part of the process mirrors the processes of mediation.

Facilitation may take many forms. Generally it involves a neutral facilitator who has neither an advisory or determinative role. The facilitator may assist parties by suggesting options for the parties to consider. However, the parties are not bound to follow the suggestions of the facilitator. As described by Spencer and Altobelli a facilitator is not strictly a 'dispute resolver but acts more as a 'wheel oiler' to promote interaction from the audience and minimise any tendency to dominance by particular participants.'[2]

Arbitration is the closest form to judicial determination of all the processes of ADR. The arbitrator, not the parties themselves, reaches the decision at the end of

[2] Spencer D and Altobelli T, *Dispute Resolution in Australia. Case, Commentary and Materials.* LawBook Co. 2005 at 18

discussions and that decision is binding. Arbitration processes are often formal and may require the rules of evidence to be applied.

Early neutral evaluation involves a specialist in the area of law that is in dispute. It is the role of this specialist to encourage the parties to settle upon consensual lines. If settlement does not occur, the specialist may produce their own ‘evaluation’ of the dispute containing an assessment on how it should be resolved. Each party will have the opportunity to present their case to the specialist who, in most cases, is a legal practitioner.

Med-arb is a hybrid process, which involves both the elements of mediation and arbitration in one session. Generally discussions will begin as they would with an ordinary mediation session, however, if no resolution is reached by the parties, the mediator is then given the power of an arbitrator and may impose an order to resolve the dispute. For this reason med-arb is sometime referred to as ‘speediation’.

Finally, statutory ADR schemes are those which have been provided by legislation. They have increased in number in recent years reflecting the acceptance that ADR processes are receiving from both the legal sector and the general community.

The development of ADR

Although, of course, not labelled mediation, similar methods for resolving disputes have existed throughout history. Dispute resolution processes utilising third parties were moulded by local cultural and social norms providing the means of resolving disputes within families, clans, tribes and villages. Mediation emphasises the social

goals of reconciliation and compromise and places less emphasis on retribution which may be the primary concern of the individual involved in the dispute.

While ADR might sound like a relatively modern concept, its origins have been traced back to somewhere within the region of 40,000 and 100,000 years.[3] With its emphasis on collective dispute management, modern ADR processes have more recently developed largely out of the methods used in England for the resolution of disputes between workers and employers known as industrial relations disputes. The Australia Constitution, which was enacted in 1900, includes, at s 51, a reference to the processes of conciliation and arbitration for the resolution of industrial disputes.

Today ADR is taught in almost every law and business school in Australasia, England and America, as well as being entrenched in business practices and the legal system. ADR processes have also been included in a number of legislative schemes as well as appearing in the practise notes and guidelines for most courts and tribunals. On a global level ADR has an important place in the negotiations between trading nations.

In 1985 the then Chief Justice of the Supreme Court of New South Wales, Sir Laurence Street AC, KCMG, QC initiated consideration of ADR and established an ADR planning committee. Some ten years later, a statute was passed by the Parliament which introduced mediation into New South Wales courts, tribunals and commissions.[4] While initially there was some hostility in the legal profession, this changed, particularly when it was realised that ADR could be effective in reducing

[3] See n 1.
[4] *Courts Legislation (Mediation and Evaluation) Amendment Act* 1994 (NSW)

the backlog of cases before the court. Although lawyers took time to adjust, ADR has created a new specialisation within the law. A number of colleges and associations have been created to educate and accredit members who have the necessary training in ADR. LEADR (Lawyers Engaged in Alternate Dispute Resolution) was opened in 1993 and in 1995 NADRAC (National Alternative Dispute Resolution Advisory Council) was formed to advise the Attorney-General on issues relating to ADR. ADR is now recognised as a significant method for resolving disputes and has been adopted by government departments, community justice centres and other tribunals. Rather than being an "alternate" method of dispute resolution ADR has become an "additional" method of addressing conflicts in the justice system.[5]

ADR is used to resolve disputes of different types including disputes arising from neighbourhood problems, workplace and family disputes, retail and rent disputes as well as business, commercial and industrial transactions. ADR has also proved helpful in cases involving environmental issues where there may be a number of different interests, which must be taken into consideration. Since 1979, section 34 of the *Land and Environment Court Act* 1979 (NSW) has required that certain cases must be subject to a preliminary discussion and conference period between the parties. It is a form of statutory enforced mediation.

The commercial sector has welcomed ADR. It provides a cost effective and efficient means of dealing with disputes as well as offering privacy and control of the process to the parties. Quicker resolution of cases in the commercial world provides reduced costs for business and increased satisfaction with the legal system.

[5] Sir Laurence Street as quoted by Bergin J Mediation in Kong Kong: The Way Forward – Perspectives from Australia (2008) 82 *ALJ* 196 at 196.

Mediation

Mediation is the most commonly used method of ADR. It can be initiated at any time and may occur even before litigation has commenced. A reference to mediation can also be made at any time during the proceedings. It is common for parties to consent to mediation, but even if they do not consent they may be ordered by a court to participate.[6] Most courts now have court annexed mediation schemes incorporated into their general case management procedures. In New South Wales this is enshrined in legislation in Part 4 of the *Civil Procedure Act* 2005 which allows courts to refer a matter to mediation.

The Law Council of Australia has recently been reviewing the concept of "Online Dispute Resolution" (ODR) and has put its energies towards a trial of an online mediation facility, the 'Online Mediation Platform'.[7] This will make the process of mediation more accessible and cost effective for the general public, particularly those in remote or regional areas. Online mediation is not likely to be suitable for complex or highly contentious cases. However, for smaller disputes, such as those between consumers and traders, landlord and tenants, it may provide an effective solution.[8]

The mediator must be impartial without an allegiance to or interest in any party to the dispute and have no interest in the outcome. Their first task is to assist the parties to

[6] For example, referral of matters to mediation without the consent of the parties is provided for by the *Supreme Court Amendment (Referral of Proceedings) Act* 2000 (NSW) amended s110K of the *Supreme Court Act* 1970 (NSW).
[7] See n 5.
[8] See n 5.

identify the issues in dispute. Once this has happened they assist the parties to an understanding of their position and identify areas of appropriate compromise. They often move between the parties, identifying strengths and weaknesses, and communicate offers of settlement. If the parties reach agreement it may be later embodied in court orders. Even if this does not occur, the agreement will be enforceable by any party in the same manner as any contract may be enforced.

Mediation and the courts

The New South Wales Supreme Court Registrars, although not judges, are qualified lawyers. Many parties, particularly in complex litigation, prefer to appoint a private mediator at their own cost. This allows them to select a person who they believe has the skills and experience relevant to their case. Many private mediators are retired judges or other experienced lawyers. Some are professionals in the field of expertise most closely involved in the dispute. However, experience in the New South Wales Supreme Court indicates that the settlement rate for court-annexed mediation is 21% higher than those that are referred to private mediation.[9] This may, at least in part, be due to the nature of the disputes mediated by private mediators which are often complex and may prove difficult to settle.

Mediation can be ordered by a court whether or not it is desired by the parties. This may seem to involve a contradiction – a mediated settlement requires agreement. However Chief Justice Spigelman has pointed out that "reluctant starters" may become "willing participants." Parties are sometimes reluctant to suggest mediation

[9] See n 5.

as they believe that this could be seen as a sign of weakness.[10] Where parties make it clear in advance that they are not minded to settle their differences, mediation will most likely fail. When considering whether to refer a case to mediation, a judge must pay particular regard to the nature of the case. Mediation is often not effective where there is a history of violence between parties, or where there has been an act involving criminal fraud or embezzlement. Factors, which may affect whether or not a case should be referred to mediation, include the relationship between the parties (i.e. whether the relationship is commercial or family and the likelihood that the parties will continue the relationship after the dispute), the complexity of the issues to be resolved, the nature of the issues, the amount of money at stake and prior unsuccessful attempts at mediation. A judge must have a good sense about when the parties will be ready for their case to be referred to mediation. An early referral may be met by hostility in some cases but in others it may prove to be the most efficient way to resolve a dispute.

In her paper *Mediation in Hong Kong: The way forward- Perspectives from Australia* Bergin J, the judge in charge of commercial litigation in the New South Wales Supreme Court, indicated that in her experience there is not an optimum or 'ripe' time for a case to be referred to mediation. However, there is some suggestion that greater success has been found with cases that have been referred to mediation earlier, rather than later.[11]

In the Supreme Court of New South Wales in 2006, 487 cases were referred to mediation. 286 were referred to court annexed mediation conducted by the Court's

[10] Spigelman CJ, Address to the LEADR Dinner – University and Schools' Club Sydney (speech delivered at Lawyers Engaged in Alternative Dispute Resolution Dinner, Sydney, 9 November 2000.
[11] See n 5.

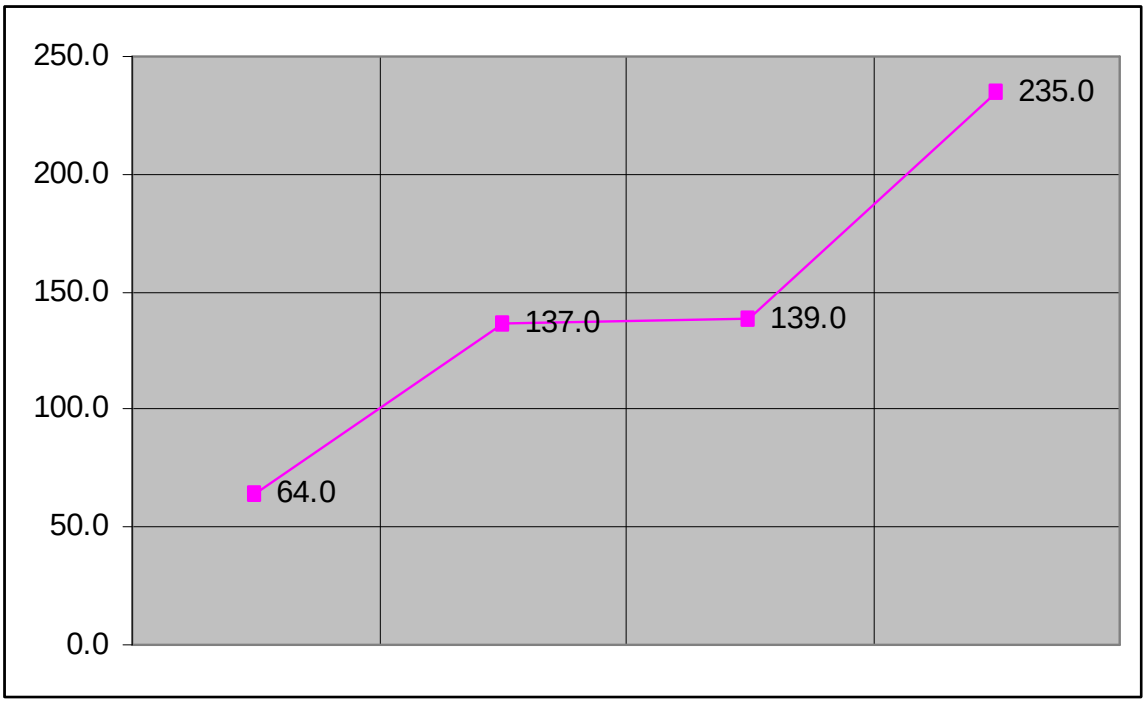
Registrars.[12] Only one case was referred to arbitration. The highest number of cases referred to ADR were court-annexed mediation referrals from the equity division of the court. These may be property, contractual or trust disputes. Cases referred to mediation from the common law division mainly relate to matters from the professional negligence list. That list includes cases where doctors and lawyers are sued because they have allegedly failed to adequately perform their professional task causing a person to be injured or lose money.

There were 593 matters disposed of in the Professional Negligence List in the period between 1 March 2003 and 31 August 2005. 95 cases were referred to mediation by the court. Of the 95, 80 were discontinued or settled.

From the general common law list, which may involve a great variety of disputes only 19 matters were referred to mediation. Of the 19 that were referred 18 were settled or discontinued. During the relevant period there were 1787 cases disposed of in the common law division. A total of 114 were referred to mediation, of which 98 were settled or discontinued.

The recent trend has been an increasing number of cases being referred to mediation. This is demonstrated in the following graph:

[12] Supreme Court of New South Wales, Annual Review 2006 (2006) at 25.



In her paper Justice Bergin broke down the matters referred to mediation from the Commercial List and the Technology and Construction List for which her Honour has responsibility. Her Honour said of the period 1 January 2006 to 1 June 2007.[13]

> "During the Period there were 98 matters referred to mediation; 65 matters to the Commercial List and 33 matters in the Technology & Construction List. Only two of those matters were referred without the consent of both parties. Only 37 of the matters referred settled at mediation, which equates to as settlement rate of approximately 38%….
>
> …Of the 37 matters that settled at mediation:
>
> - 8 (22%) matters were referred to mediation at a preliminary stage
> - 11 (30%) matters were referred to mediation at an intermediate stage; and
> - 18 (48%) matters were referred to mediation at an advanced stage.

[13] See n 5 at 209.

An analysis of the total cases that were referred to mediation (98) at each if the stages is also instructive:

- 30 matters were referred at a preliminary stage and 8 (27%) settled;
- 38 matters were referred at an intermediate stage and 11 (29%) settled; and
- 30 matters were referred at an advanced stage and 18(60%) settled.

In respect of the cases that did not settle at mediation (61):

- 22 (36%) had been referred to mediation at a preliminary stage;
- 27 (44%) had been referred to mediation at an intermediate stage; and
- 12 (20%) had been referred to mediation at an advanced stage.

An analysis of the progression of cases that did not settle at mediation suggests that the vast majority (72%) go to trial with only 15% settling within six months of the mediation and the balance (13%) settling more than six months after mediation."

Arbitration

Many parties to commercial contracts are required to arbitrate their disputes rather than litigate in the courts. As I have previously indicated, arbitration differs from mediation in that an arbitrator may impose a solution upon the parties. The award of the arbitrator becomes the final judgment subject to review of legal questions by the court. New South Wales courts have the power to refer matters to an arbitrator. In this case the arbitrator will hear the dispute and make an award which is binding on the parties. However, a party may seek to have the decision reviewed and may ask for a rehearing by the court.

Many commercial agreements and major building contracts also include a clause requiring the parties to have made reasonable attempts at resolving their conflicts through ADR methods, before they bring any dispute before the courts. There is some doubt as to the enforceability of these clauses as well as there being some difficulty in determining whether parties have indeed acted in good faith in their attempts at ADR. However, on many occasions the parties readily accept that the dispute should be mediated or resolved through arbitration rather than by the courts.

Conclusion

In the latter part of the 20th century a number of aspects of the adversarial system of justice have been questioned. Given the cost of conventional civil litigation, the emergence of informal dispute resolution processes has been both inevitable and necessary. Mediation is provided by Court Registrars and by private mediators and arbitrators. Its frequency of use is increasing and is encouraged by the courts. Arbitration is also used extensively to resolve commercial disputes and disputes arising from building contract projects.