ALTERNATIVE DISPUTE RESOLUTION IN AUSTRALIAN COMMERCIAL DISPUTES: QUO VADIS?(1)

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I. The Background

Introduction

Like many Western countries, Australia has in recent years been swept by a wave of interest in the range of processes collectively referred to as "alternative dispute resolution" or "ADR". The rubric "ADR" is unfortunate because it assumes the existence of a mainstream model of dispute resolution to which it is an alternative. For some the word "alternative" has negative connotations, possibly derived from its monopolisation by fringe movements of one kind or another. These factors have contributed to an image of ADR as an inferior form of dispute resolution, practised by those who are too timid or eccentric to engage in the real and effective, tried and tested, form of dispute resolution - litigation. Unfortunately, no one has yet come up with a suitable substitute generic term to describe the portfolio of processes so, for the time being, ADR seems likely to remain the most acceptable umbrella title.

Although lawyer interest in ADR as an alternative to litigation is a relatively recent phenomenon, forms of ADR, especially mediation and arbitration, have a long and respectable history. Mediation was, and is, the preferred form of dispute resolution in some Eastern societies, especially China and Japan. (2) It is found also in African customary law. Forms of mediation were, and are, practised by certain religious groups, including Jews (3) and Quakers. In Christian tradition support for mediation can be traced back to St Paul's advice to the Corinthians that they should avoid using the courts for the settlement of disputes and should rather appoint members of their own community as arbiters. (4) Abraham Lincoln, himself a lawyer, urged his fellow lawyers to:

> "Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often a real loser: in fees, expenses and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man." (5)

Turning to the field of commercial law, we find that one of the legal controversies of nineteenth-century England concerned the use of arbitration for the determination of commercial disputes. The preference of businessmen for arbitration over litigation earned them some well-turned abuse from the courts. Yet, as a contemporary legal journalist remarked in The Law Times:

> "The legal and the commercial notions of justice are distinct, and the real complaint of the man of business against the lawyer proceeds upon a sense of this opposition. Justice in the lawyer's sense is adherence to a rule .... Justice in the sense of the man of business is the attainment of a result satisfactory to the feelings of a benevolent bystander who takes an interest in both parties."(6)

As we shall see later, commercial need for a private dispute resolution outcome which is fair to all parties and yet also consistent with current commercial practice (probably best exemplified by the internal rules and procedures of the London Stock Exchange) is one of the most powerful arguments in favour of ADR.

Terminology

Because the term "ADR" means different things to different people, it is necessary to define how it will be used in this article. For some, ADR embraces all forms of dispute resolution other than litigation. For them it would include problem-solving exercises, discussion, negotiation, mediation, conciliation, mini-trials, fact-finding (including expert determination) and arbitration. For others, it should only be applied to those processes which leave the form and content of the final settlement (if any) to the disputing parties themselves. Yet others would apply the term only to those non-litigious processes which involve the intervention of an outside third party.

In this article, the term ADR will be used in the third sense, that is, it will describe all non-litigious forms of third party intervention. Problem-solving, discussion and negotiation will not be treated as substantive forms of ADR. First, they can be used by disputants without third party intervention. Secondly, when they are used in third party interventions, they are not discrete ADR processes but rather some of the tools of trade of the mediator, the conciliator and other third party neutrals.

There is some debate as to whether arbitration is an ADR process in the true sense. This controversy arises out of the adverse experience of some arbitration users who have found few points of distinction between conventional arbitration and litigation. There is no doubt that, used inappropriately, arbitration can reproduce all the disadvantages of adversarial litigation, including formalism, delay, expense and impairment of commercial relationships. (7) But that is not necessarily so, particularly where the parties and their arbitrator make creative use of the enhanced procedures and powers contained in the uniform Commercial Arbitration Acts. Arbitration will be treated as a form of ADR in this article.

There is also some controversy over the nature and scope of the various forms of ADR. The concepts of mediation and conciliation are prime examples. By some they are treated as synonymous. Some use the term "mediation" to describe a process known by others as "conciliation" and vice versa. The principal terms will be briefly defined for the purpose of this article.

Definitions

Mediation

Mediation is a process by which the disputants, assisted by a mutually acceptable neutral person (or persons), systematically isolate disputed issues in order to

develop options, consider alternatives, and reach a consensual agreement that will accommodate their needs.(8) The mediator is a process facilitator and does not express opinions or offer advice to the disputants, although she/he will usually probe their positions by playing the role of devil's advocate. The mediator will usually have specialist knowledge of the field environment and this will often promote the development of creative, yet pragmatic, solutions.

Conciliation

In current Australian usage, "conciliation" is something of a portmanteau term. In some forms of conciliation, for example, that offered by the Institute of Arbitrators, (9) the conciliator may be given a very wide mandate, which would include the power to issue a non-binding "determination".

Although it may be convenient to describe conciliation as a half-way house between mediation and arbitration, it has much more in common with the former than the latter. It is a process through which two or more disputants use the negotiation and facilitation skills and expert advice and/or opinions of a trusted third party to arrive at an informed, consensual agreement. It is the role of the third party which distinguishes mediation from conciliation. The conciliator is expected to contribute her/his own views and opinions during the process. The advisory role may range from the counsel of a respected eminence grise of a particular profession to the mandated, normative role of a conciliator under some statues, for example, the Victorian Equal Opportunity Act 1984. Entry into private conciliation is normally voluntary, but entry into public forms of conciliation, conducted by administrative agencies, may be compulsory for one or both parties.

The Mini-trial

The inaccurately named mini-trial is not a trial at all but a structured exchange of information to facilitate informed, realistic negotiation. (10) It has three essential stages: the discovery phase, the presentation phase and the negotiation phase. Limited, expedited discovery is followed by the presentation of each party's "best case" to a panel consisting of a senior executive or decision-maker from each party to the dispute and (optionally) a neutral adviser, who may be asked for an expert assessment on the merits of the case. The executives then adjourn to try to negotiate a settlement of the dispute in the light of their fuller knowledge and understanding of the dispute, especially the opposing case.

Arbitration

Of the ADR techniques arbitration is the most familiar to most lawyers. It has been defined as:

> "The reference of a dispute or difference between not less than two persons, for determination by another person or persons other than a court.... after hearing both sides in a judicial manner." (11)

Although this definition accurately describes arbitration under the previous State legislation, it gives rise to some unease with the current uniform Commercial Arbitration Acts. Under these Acts, the arbitrator's powers and duties may range well beyond the duty to determine the issue after a "judicial" hearing. (12)

A preferable definition might be:

> "Arbitration is a species of adjudication which entails the voluntary submission of a dispute by the disputants to a neutral third party who must ultimately determine it by making an award if it cannot be settled by other means. The arbitrator's award, which normally binds the parties, must be made in accordance with law unless the parties agree that it should be based upon equitable considerations."(13)

II. ADR Usage In Australian Commercial Disputes

The History

Australian interest in ADR techniques seems to have been stimulated by three main factors; the influence of international trade practice through bodies like UNCITRAL; the growing economic significance of Australian trade with the People's Republic of China (14) and Japan; and information exchange with ADR practitioners in the United States.

Interest in promoting Australia as an international arbitration/ADR centre led to the establishment of the Australian Centre for International Commercial Arbitration (ACICA) in Melbourne. Interest in promoting non-litigious resolution of domestic commercial disputes gave rise to the Australian Commercial Disputes Centre (ACDC) in Sydney. The former has historically concentrated on arbitration and the form of conciliation endorsed by the Institute of Arbitrators, (15) while the latter has been responsible for the promotion of mediation, mini-trials and others forms of ADR.

The precise extent of commercial ADR in Australia is very much a matter for conjecture. A number of protagonists of commercial ADR have expressed disappointment that so little commercial ADR takes place in Australia, despite the overwhelming support for the concept by commerce and industry reported in a survey on commercial dispute resolution conducted for the Attorney-General of New South Wales (the Ahrens Report). One difficulty is self-evident: if a dispute is settled by ADR, few people outside the immediate parties would know of this fact.

Does ADR Work in Commercial Disputes?

The Monash University's Centre for Commercial Law set up a one-year research project in an attempt to answer the above question. (16)

One of the strongest arguments in favour of the intelligent use of ADR in commercial disputes, is that the great majority of commercial lawsuits are settled, not litigated to finality. Given that reality, is it not good sense to argue that, in most cases, the settlement should be effected as quickly as possible and by the most efficient means? If the Damoclesian sword of pending litigation is required to

concentrate minds on the task, then one could use it on a "twin track" but not without the awareness that it, like many other swords, is two-edged and can cut both ways.

The most difficult choices facing the disputants and their legal advisers are:

(a) in which disputes should ADR be deployed;
(b) which form of ADR is most appropriate for a given dispute; and
(c) when is the most appropriate time to embark upon ADR in the course of a dispute?

These vexed questions were also the subject of the Monash ADR Project's research based on a series of detailed interviews with 12 managers and 20 solicitors in Melbourne and Sydney. Very little work has been done in this area, although the three Multi-Door Courthouse projects in the United States are likely to produce some answers since their primary function is to allocate disputes to the most appropriate resolution resource. (17)

Given the relative conservatism of the legal profession and the business community, it would be astonishing if ADR swept into vogue overnight. Many less drastic innovations have taken decades to come into common use. However, at least four Australian law schools will be introducing ADR courses into their curricula in the next two years and future generations of lawyers are likely to be trained in ADR as well as conventional civil procedure.

The Evidence of the Monash ADR Project

By whatever criteria one chooses to measure it, the evidence of usage of non-litigious methods of dispute resolution is very slight. One has no way of measuring the extent of informal negotiated settlements of disputes, other than to note that over 80 per cent of commercial litigation initiated in all Australian superior courts is reportedly resolved by means other than formal trial. This impressive statistic tends to lend support to the views of those practising lawyers who argue that negotiated settlement has always been the primary means of resolving commercial disputes and that ADR protagonists are merely attempting to dress up mundane, pragmatic practices in sociological jargon. Other commentators have suggested that if the parties are competent negotiators they have no need for processes involving third party neutrals. (18)

One can glean an inkling of a national ADR perspective from the figures which have been provided for the purposes of the Monash Report by the ACDC and the Institute of Arbitrators Australia (IOAA).

The statistics provided by the ACDC show that 150 third party interventions have taken place under its auspices since its establishment in 1986. It currently has about 250 cases under consideration.

The IOAA figures show that approximately 750 arbitrations were conducted under IOAA auspices during the 1988-1989 financial year. This figure includes 150 statutory retail tenancy cases. It does not include 30 international disputes which were conducted under the auspices of the ACICA.

These figures can be placed in context by comparing the IOAA and ACDC figures with the numbers of commercial matters which are heard by the courts each year. (19) For example, 537 new commercial matters were entered into the Supreme Court commercial list during 1987 in Victoria alone. (20)

The Project interviews with corporate managers who had experienced some form of ADR offered a tantalising hint that there might be more ADR taking place behind closed doors than would otherwise appear to be the case. A number of the managers interviewed knew of other companies in their sector which were rumoured to have experimented with ADR. But this information was often based upon hearsay and the extent of the rumoured "invisible" ADR was not possible to measure. In only one case could the truth of the rumour be confirmed.

Who is Using ADR to Resolve Commercial Disputes?

The answer to this question seems very clear. More than 85 per cent of identifiable ADR is taking place within the construction/civil engineering industry. This does not seem surprising since the standard form contracts which abound in the civil engineering and construction industries have contained dispute resolution clauses providing for mediation and arbitration for many years.

There was very limited evidence of ADR usage in insurance, shipping, and banking disputes. (21) Two areas in which ADR seemed to be becoming more common toward the end of the research period were professional partnership and computer/information technology disputes, especially software.

Which Types of ADR are Being Used?

The answer to this question is closely linked with the two main umbrella organisations which facilitate ADR usage. The IOAA is almost entirely a facilitator of arbitration. The ACDC is almost entirely a facilitator of mediation/conciliation. Although these stereotypes are currently undergoing some change (for example, the ADR training currently being offered by the IOAA to its members) they remain generally valid at the time of writing.

There was some evidence that other forms of ADR were also being employed, for example, the use of independent expert appraisal in the construction industry.

In the Monash Project sample none of the cases involved arbitration. They all involved consensual processes, termed either "conciliation" or "mediation" by the parties, with the exception of one mini-trial. The content of the processes varied quite considerably, ranging from mediation in the form defined above to negotiation by proxy.

This underscores the fact that the nomenclature of the processes is unimportant and that matching process to problem is the lynchpin of successful ADR. However, the result of the "mediation" case mentioned below, in which the mediator inappropriately offered an independent appraisal, suggests that it is essential that the parties should understand precisely what form of intervention is being offered.

Despite visits to Australia by some of the United States

protagonists of the mini-trial, only one instance of its deployment could be identified. The dispute involved the distribution of research and development resources between internal operating divisions of the company concerned, and the managers interviewed professed themselves to be very satisfied with the negotiated result.

In Which Disputes is ADR Being Deployed?

From the very small sample of ADR users identified it is impossible to offer accurate generalisations. However, the majority of ADR users seem to have resorted to ADR in order to resolve questions which they had not contemplated at the time that they formalised the commercial relationship in question. Most of them seemed to have resorted to ADR to resolve such questions as variations and extensions of contractual terms. If this could be established for a larger and more representative sample, then it would seem that ADR is predominantly seen as a useful way of renegotiating commercial contractual arrangements to take account of factors which were not within the parties' contemplation at the time of their formation or which had supervened after execution of the contract.

The disputes in the construction and engineering sector centred on two main issues: alleged defective performance by subcontractors and liability for added contract cost caused by altered circumstances. All of them were resolved by means of consensual ADR techniques, principally mediation.

There was considerable variation in the amounts in dispute. The ACDC reported amounts ranging from a low figure of $2,000 to a high of $100,000,000, with a majority falling in the range $500,00 to $1,000,000.

A select sample of 336 arbitrations conducted over a three-year period and analysed by Mr A A de Fina (22) of the IOAA (and President of the ACICA) showed disputed amounts ranging from $200,000 to $43,000,000 with a 90 per cent median range of approximately $1,030,000.

In the sample of corporate managers formally interviewed during the Monash Project, the range of amounts in dispute was $250,000 to $5,500,000. Twelve of the 14 disputes reported by 12 corporations involved amounts between $500,000 and $750,000.

What are the Attitudes of Users to the Experience of ADR?

The attitudes of the ADR users interviewed were overwhelmingly positive. Indeed, amongst the 12 managers in the sample only one expressed any dissatisfaction with ADR. This was because the third party neutral had been asked to act as a mediator and had gone outside that role by offering an independent valuation of the cost of additional work necessitated by a variation in circumstances. Although the valuation favoured the party interviewed, it was felt that the other party to the "mediation" would find the determination onerous and would be unlikely to abide by it or to use mediation again.

This one unfavourable experience of ADR underscored a factor which was identified in other aspects of the survey. There was a very close coincidence between perception of the third party neutral and perception of the ADR process concerned. This was as true of mediation as it was of arbitration. This would suggest that during these early years of marketing ADR in Australia great care should be taken to ensure that highly credible neutrals are fielded by the agencies concerned. (23) The very high value attached to competent, credible third party neutrals suggests that quality of personnel will be the most effective route to credibility of facilitation agencies and to greater deployment of ADR processes, particularly for the vital "word of mouth" or "grapevine" propagation of the concept.

All of the parties interviewed cited the preservation, or even improvement, of valued commercial relationships as one of the most positive features of employing ADR to resolve commercial disputes.

One of the parties interviewed was initially hostile to the use of ADR. This party had been engaged in commercial litigation in the Supreme Court of New South Wales. The trial judge had made a finding on liability for defective materials and workmanship but had then required the parties to resort to mediation in order to reach agreement on quantum and apportionment. This party expressed the view that he was, in effect, being denied constitutionally-guaranteed access to the courts. When interviewed eight months later, his view was very positive and he felt that he and his company had benefited from the experience of negotiating to agreement on the disputed issues. He also cited an improved business relationship with two other opposing parties as an unexpected spin-off from the process.

All parties believed that ADR had offered them a quicker and cheaper way of resolving their dispute. The longest intervention reported lasted for three days, the shortest four hours. The norm was about one day. The highest "all-in" cost was $32,500, the lowest $1,400. The average was about $4,000.

Who are the Third Party Neutrals?

It is difficult from a small sample like that of the Monash Project to generalise about the characteristics of the people who are being employed as third party neutrals in Australian commercial disputes. The Project interviews revealed that in all but two of the construction disputes the third parties were senior engineers with a background in arbitration. The facilitators in the other two construction disputes were a retired judge and a solicitor.

The choice of the solicitor was interesting because, as a general rule, parties favoured the use of a third party neutral with good standing in the industry concerned and personally known to them. In this one case, based in Victoria, the parties had agreed to use a Sydney solicitor as their mediator, for the express reason that he would not be party to the Melbourne "grapevine" and could therefore be relied upon to come to the dispute without preconceptions and not to divulge information about the dispute to others in the Melbourne industry.

In the other cases all of the mediators were solicitors.

Although solicitors are traditionally believed to be reluctant to refer clients out to other firms, two of the non-construction mediations had been referred by one firm of solicitors to a practitioner in another firm who had established a reputation as a competent mediator.

All of the mediators were male and only one was under 50 years of age. All of them had undergone some form of training in consensual dispute resolution.

It is interesting to speculate on the reasons for the fact that retired judges were reportedly the most acceptable persons to act as third party neutrals, even in cases where consensual ADR techniques were to be employed. The reasons for selecting retired judges to perform an adjudicative function, like arbitration, would seem to be clear but it is less obvious why they would be a popular choice for other forms of ADR which had not, by and large, been a part of their education or experience.

Where will Future Growth in Commercial ADR Occur?

It is trite to state that certain areas of economic activity are more likely to give rise to agreements which have a high risk for disputation. This might be for any number of reasons, ranging from complexity of subject-matter in computer-related contracts through unanticipated future circumstances in joint venture contracts to inter-personal dynamics in professional partnerships. It is not possible to undertake a detailed analysis of all such "danger areas" here, but a brief consideration of each of the above three areas may provide a basis for further analysis and discussion.

Computer-related disputes

Michael Ahrens (24) has identified a number of factors which are likely to promote disputes in the computer industry. These include:

(a) the writing of incomplete or too-general technical specifications;
(b) inadequate design briefs provided by the customer leading to disputes over liability for the cost of implementing change orders;
(c) inability to assess the functional capacity of new software until the full system design is complete and commissioned;
(d) vague or incomplete "acceptance tests" or benchmark standards;
(e) incompatibility between software and hardware or inadequate specification of hardware requirements by a software developer or supplier.

He has also identified a range of factors which would militate against litigating in such cases. These might include indispensability of the computer system to the purchaser; symbiotic interdependence of supplier and user; lack of familiarity of legal practitioners and courts with technical matter involved and difficulty of precise problem detection and definition. To these one might wish to add the highly confidential nature of the intellectual property in both hardware and software cases.

There are other factors which are common to most disputes including the production of hostility between parties caused by an adversarial "win/lose" approach; loss of management time in preparing for litigation; adverse publicity; cost and delay.

The Monash study turned up a good example of a dispute concerning computer software development which was resolved by mediation. The companies concerned were a computer software supply firm and a large professional firm. The software company had contracted to supply a custom-designed software system which would provide a large range of accounting and financial services on the client firm's mini-computer.

During the commissioning of the software a number of problems were thrown up. One of these was particularly serious and the software company was experiencing great difficulty in remedying it. The client firm had a member of staff with a programming background. This person (who had been closely involved during the installation of the software) put in a great deal of time, some of it without the knowledge or acquiescence of the supplying firm, in trying to remedy the problem. He finally succeeded in resolving it, but his solution was incompatible with another function of the software. This promptly malfunctioned, drawing his intervention to the notice of the suppliers. His changes to the software were in breach of the software supply contract.

A dispute then developed over liability for the cost of remedying the original and the consequential "bugs". After direct negotiations had failed, a mediator was called in although this was not provided for in the contract, which contained only an arbitration clause.

In a single day, a compromise solution was negotiated. The client would pay for the remedying of the consequential fault. The supplier would bear the cost of remedying the original fault. In addition, the supplier negotiated a licence to employ the in-house programmer's modification of its software in subsequent installations and agreed to pay royalties for each such use. This last aspect is a typical example of how ADR can offer constructive "lateral thinking" solutions which may be beyond the jurisdictional competence of judges or arbitrators.

Joint venture disputes

Although there is still some debate about the juristic nature of a joint venture (25) it is clear that many joint ventures display certain common features. Those which are particularly significant for ADR are the relatively large sums of capital involved; the co-operative nature of the inter-party relationships; the requirement of good faith between the parties (which may extend to reciprocal fiduciary duties) and the long-term nature of the parties' mutual expectations.

Although there is very little published information on the "prophylactic" use of ADR during the negotiations leading up to the formalisation of a joint venture agreement, it would seem that it can play a major role in removing obstacles to agreement.

The best documented case is that of a proposed joint venture between General Motors (GM) and Toyota to establish a vehicle manufacturing plant at Fremont, California. (26) The joint venturers were able to reach relatively quick and painless agreement on the principle of the joint venture. They issued a "Memorandum of Understanding" concerning their agreement on the joint venture on 17 February 1983. Yet two seemingly insurmountable obstacles stood in the way:

(a) the opposition of the local chapter of the United Auto Workers (UAW) union to any arrangement which reopened the plant (previously operated and then shut down by GM) without reviving the previous UAW/GM labour contract; and
(b) Toyota's requirement that it should have almost complete freedom to run the plant in the most efficient way possible.

This problem had been glossed over during the negotiations and GM had led Toyota to believe that it would be "relatively easy" to achieve the labour dispensation it desired. It proved otherwise and neither Toyota nor the UAW was prepared to compromise. The parties' solution was to appoint a mediator, a former United States Secretary of Labor, to attempt to bring Toyota and the UAW to consensus on the proposed labour regime at the Fremont plant. This feat was achieved on 21 September 1983 after seven months of intensive mediation.

The detailed account of the development of options during the mediation (27) demonstrates the extraordinary power of mediation to break impasses when the mediator is competent and respected by all parties concerned. It also demonstrates the vital importance of sensitive timing of the ADR intervention.

The intended long-term duration of the parties' relationship in most joint venture arrangements gives rise to special difficulties for the legal draftsmen who prepare the joint venture agreement. (28) These problems arise from two main sources:

(a) it is virtually impossible to anticipate all the circumstances which may arise during the currency of long-term agreements and to provide for every such contingency in the written agreement;
(b) the longer the term of the proposed relationship, the more likely it is that disagreement will arise between two or more parties over the interpretation of the agreement or its application.

The conventional approach to these problems is to draft very carefully conceived and carefully worded contracts which make detailed and specific provision for all foreseeable contingencies and then to provide for deadlock-breaking mechanisms and, sometimes, a contingency clause for relief from undue hardship. The mechanisms for giving effect to these catch-all provisions vary from arbitration through provision for "swing man" directors, event options and sale of interest clauses to winding-up. (29) The spectre of litigation to interpret and enforce rights is always present. Very few agreements make provision for ADR as a way of arriving at a negotiated solution to any disagreement and yet the factors listed above would all suggest this as a realistic alternative. Litigation or other drastic techniques may jeopardise the financing of a joint venture by reducing investor and financier confidence in the stability of the project. They will almost certainly damage the trust and goodwill between the joint venturers and may precipitate dissolution of an otherwise viable and profitable project.

Partnership disputes

Professional partnerships are notorious breeding grounds for disputes, many of which involve inter-personal factors. These are sometimes so serious that dissolution of the partnership takes place.

One would expect to find that the propensity for disputation in such enterprises would have given rise to the development of fairly sophisticated dispute resolution clauses in partnership agreements and yet this does not seem to be the case. The norm would appear to be a simple arbitration clause and there seems to be no recognition of the desirability of assisted negotiation aimed at restoring harmony by consensus.

Because of the close inter-personal relationships which usually exist in small partnerships, third party interventions can often balance competing interests in a constructive way.

In a case discovered during the Monash study, a firm of four professionals, practising in a downtown city location, had purchased the building in which they worked. Five years later the partnership was offered a substantial sum of money for the building by a property developer who owned the adjoining properties on all three sides.

A division emerged between the partners, two of whom wished to accept the offer and two who did not. The dispute over this issue spread into other arenas with time, and when the mediator was called in, on the suggestion of the parties' lawyers, the two factions were only communicating with one another via letters drafted by their respective solicitors.

It emerged during the mediation that the two partners who wished to sell the property were conspicuously younger than the pair who wished to retain it. They needed the money the sale would realise to provide for family commitments and enhancement of their (relatively modest) homes. The two partners who wished to retain the property were older and financially well established. They did not wish to give up their downtown location because it suited both them and their clients.

The mediator rapidly identified their respective interests. Armed with a mandate obtained separately from each group, he entered provisional negotiations with the property developer. Because his research had identified that the acquisition of the partners' building was crucial to the developer's plans he was able to negotiate a very much higher price for the building than had been offered. He was

also able to negotiate a long-term lease of a professional suite in the new development on extremely favourable terms and for occupancy of the new premises to be engineered in a way which eliminated any disruption of the partners' professional practice.

Armed with this prospective agreement he was able to restore harmony to the partnership almost immediately. The profitable partnership remained in existence, contrary to what would almost certainly have been the result of an adjudicated settlement. The interests of all parties were fully met.

Of course the parties could have achieved this result themselves. But they did not, perhaps because their personal involvement in an escalating dispute and their strong conviction that the "opponents" were being unreasonable in refusing to meet their respective needs, prevented them from identifying their respective underlying interests.

Although this case could not be characterised as a mediation in the strict sense, it provides a useful insight into how inventive "lateral" thinking and appropriate design of process can resolve even hotly contested disputes.

Other areas

There are probably many other areas in which ADR processes would serve disputants' interests better than litigation, for example, in the area of franchising. Businesses who fortunes depend in the main upon their client images, like banks and insurance companies, (30) might also gain considerable advantage from the sue of ADR processes.

From the Ahrens Report and from the responses of interviewees in the Monash ADR Project, it is clear that one of the principal advantages to commercial management in using ADR processes is the confidentiality that they offer. There are certain other factors arising out of the nature of the ADR processes which may act as indicators for ADR suitability, including the desire for a continuing business relationship and the need to retain control over the outcome of the dispute.

The future progress of commercial ADR depends upon a combination of factors, some of which have been identified in the Monash ADR Report. One thing seems certain. If overseas precedents hold good for Australia - and there is no reason for believing that they do not - commercial ADR is here to stay.

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11. Sharkey and Dorter, op cit, n 9, at p 11.
12. Sections 22(2) and 27 of the Victorian Commercial Arbitration Act 1984 (and their counterparts in the other States) are the source

of these new considerations. The former permits the arbitrator to decide an issue, not according to law, but as an amiable compositeur or ex aequo et bono provided the parties agree. The latter gives the arbitrator sweeping powers to attempt to settle the dispute otherwise than by arbitration, unless the parties have otherwise agreed. The fact that an arbitrator has conducted a pre-hearing conference in order to attempt the resolution of the dispute is not a ground of proper objection to her/his conduct unless, of course, the parties have agreed to exclude these powers. The unease of the conventional arbitrator with such provisions and powers is demonstrated by the comments of Sharkey and Dorter, op cit, n 9, at pp 86-88 and 207-208.

13. This distinction between law and equity is one which is significant for those who seek the kind of result described by the Law Times journalist, n 4, supra.
14. It is significant that the provisions which encourage alternative dispute resolution have been added to the Australia/China Trade Agreement of 1973. For the history of this development, see I Govey, "Dispute Resolution in the Context of Australia/China Trade", Australia-China Trade and Investment Law Conference Vol 1 (AGPS, 1986), pp 141, 171.
15. See n 9, supra.
16. The published Report of this Project will be available from the Centre for Commercial Law and Applied Legal Research at Monash University early in 1990.
17. LJ Finkelstein, "The D C Multi-Door Courthouse" (1986) 69 Judicature 305; L Ray and AL Clare, "The Multi-Door Courthouse Idea: Building the Courthouse of the Future, Today" (1985) 1 Ohio State Journal on Dispute Resolution 7. Useful guidance may be found in R G Collins "Alternative Dispute Resolution - Choosing the Best Settlement Option" (1989) 8 Australian Construction Law Newsletter 17.
18. See, for example, SJC Wise, "Business and the Resolution of Commercial Disputes", Dispute Resolution in Commercial Matters [papers presented at a Colloquium at the Australian Academy of Science, Canberra, on 6 June 1986] (AGPS, 1986), p 7. Edward de Bono offers some compelling arguments why even competent negotiators can benefit from the perspectives of a third party neutral. See Ch 14, "The Third Party Role in Conflict Thinking", in Conflicts: A Better Way to Resolve Them (Penguin, 1986).
19. The official statistics show that less than 20% (59) of the 322 cases disposed of in the Victorian Supreme Court in the 1987 year were tried to judgment.
20. Some 15,104 civil summonses were issued in the Victorian County Court during the 1987 statistical year.
21. It is interesting that the Australian Banking Association and a major insurance company (the Victorian State Insurance Office) have recently announced the appointment of internal "ombudsmen" to deal with disputes with clients.
22. I am indebted to Mr de Fina for making a draft of his analysis available to me before it was released to the media.
23. This inevitably raises questions concerning State or national standards for training and accreditation of third party neutrals. The New South Wales Law Society considered this matter but then dropped it, opting instead for the publication of a set of mediator guidelines. The NSW Law Reform Commission is currently considering the question of mediator accreditation and the maintenance of professional standards of third party neutrals.

    In another context the accreditation of third party neutrals has added fuel to the controversy between the IOAA and the ACDC through the former's involvement in the establishment of the Disputes Resolution Council of Australia.
24. I am indebted to Michael Ahrens for making available to me an advance copy of the text of his chapter "Resolution Options for Disputes Involving Computer Technology" which will appear in a forthcoming Longmans publication.
25. See, for example, RL Pritchard, "Unincorporated Joint Ventures" in RP Austin and R Vann (eds), The Law of Public company Finance (Law Book Company, 1986), at pp 494-503; the Hon Mr Justice BH McPherson, "Joint Ventures" in PD Finn (ed), Equity and Commercial Relationships (Law Book Company, 1987), pp 19 et seq and the comment on that paper by RA Ladbury at pp 37 et seq.
26. D Henne, MJ Levine, WJ Usery and H Fishgold, "A Case Study in Cross-Cultural Mediation: The General Motors-Toyota Joint Venture: (1986) 41 [No3] The Arbitration Journal 5.
27. See n 26, supra.
28 These are usefully discussed by RMB Reynolds, "Problems with Long-term Contracts: Alternative Methods of Resolving Disputes" (1986) AMPLA Year-book 451.
29. See MC Ahrens, "Incorporated Joint Ventures", in RP Austin and R Vann (eds), The Law of Public Company Finance (Law Book Company, 1986), at pp 465-466.

30. An interesting experiment is under way in Queensland where the ACDC has joined forces with the two licensed insurers in that State, Suncorp Insurance and the FAI Insurance Group, to introduce voluntary mediation of all personal injury claims arising out of motor vehicle accidents. This project, if successful (and from the insurers' perspective, cost-effective), might well pave the way for similar developments in other States.

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TRAINING AND ACCREDITATION OF MEDIATORS - NEW SOUTH WALES LAW REFORM COMMISSION DISCUSSION PAPER

Mediation and other forms of alternative dispute resolution processes have been used with some success in recent years to resolve construction industry disputes. Both the Australian Commercial Disputes Centre and The Institute of Arbitrators, Australia train mediators and conciliators and will assist disputants select appropriate persons to facilitate the resolution of construction industry disputes. Consequently, the New South Wales Law Reform Commission's Discussion Paper, entitled Alternative Dispute Resolution - Training and Accreditation of Mediators, should be of interest to many in the industry, particularly disputants, mediators and conciliators. The purpose of the Paper is to promote discussion of the views presented. The Commission invites submissions and comments on the issues raised in the Discussion Paper. All enquiries and comments should be directed to:

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Terms of Reference

In November 1987 the Attorney General of New South Wales, the Hon R Mulock LLB, MP made the following reference to the Commission:

> To inquire into and report on:
>
> (a) the need for training and accreditation of mediators;
>
> (b) any related matter.

Purpose of the Discussion Paper

The purpose of this Paper is to encourage debate on the general question of 'the need for training and accreditation of mediators'. The Paper does not contain any proposals for the regulation of mediators but rather puts forward a series of questions. The responses the Commission receives to these questions will greatly assist it to engage in further consultation on the issues raised by the reference and also to formulate its recommendations to the Attorney General.

Dispute Resolution Processes

Classification

The Law Reform Commission's Discussion Paper makes the following comments about classification of dispute resolution processes:

> "Dispute resolution processes defy neat classification. In theory they range along a continuum from private negotiation between the parties to formal adjudication by a court. The control of the resolu-