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# ADR: IN SEARCH OF THE EMPEROR'S NEW CLOTHES

ALLAN E. MORGAN\*

## I. COMMERCIAL DISPUTES AND ADR

Commercial disputes have a tradition of settlement by means other than trial. Merchants in this country have long recognized that their disputes were neither one-sided affairs, nor particularly conducive to determination by non-merchants. Furthermore the remedy ought to be more flexible than that available in court; one molded to fit the situation. Reputation of the disputants in the community and the maintenance of a working relationship between the parties were also deemed significant concerns. Yet seldom were these concerns addressed in litigation. The commercial sector opted instead for a mechanism that would supplement the litigation process: arbitration.

Arbitration stands as the touchstone of ADR. Historically it was conceived as the final stage in the negotiation process, rather than as a substitute for trial. Arbitration was intended to be a forum where disputants could discuss grievances in the presence and with the aid of a mutually respected fellow merchant.<sup>1</sup> The objective of the discussion would be the search for a mutually acceptable solution to the problem. One that would satisfy short and long term needs of both parties.

Merchants preferred speedy resolution of disputes, but it was not just speed that motivated the use of arbitration. Frequently disputing parties anticipated continuation of the business relationship and therefore desired a forum where bitterness

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1. Jones, *Three Centuries of Commercial Arbitration in New York: A Brief Survey*, WASH.U.L.Q. 193, 209-10,218-19 (1956).

would be held to a minimum. From this perspective the courts were considered generally ill-equipped.

During the 20th century the commercial sector expanded and disputes became more complex. Society became more litigious. As a result business found itself increasingly drawn into the litigation process and reliant upon lawyers. Nonetheless the commercial sector continued to show its preference for arbitration. Organizations, such as the American Arbitration Association, came into existence facilitating the arbitration process. These organizations established a standing administrative structure for the arrangement of arbitration hearings and maintained a list of qualified arbitrators. Today commercial contracts characteristically contain a provision for the use of arbitration. Over time, however, arbitration has become formalized. With standardized rules of procedure, the presentation of evidence, and the keeping of a record, arbitration has taken on many of the characteristics of litigation. Two notable distinctions remain. One is the public versus private nature of the proceedings. The other is the specialized knowledge or experience of the arbitrator matched with the matter in dispute. While these distinctions continue to be of value, in general arbitration has become ever more costly and delays persist.

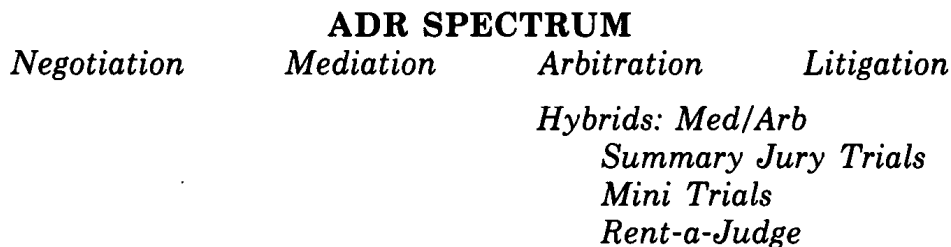
As a result less structured processes, like mediation, have gained favor. It is not at all surprising that the commercial sector would favor mediation, since it holds the potential of coming closest to satisfying the original intent that merchants had for arbitration. Emphasis must be placed on the "potential", because there appears to be considerable misunderstanding both in the legal profession and in the public about what mediation actually is. The commercial sector can be a pivotal force in changing that potential into reality.

The remainder of this essay proposes a structure of ADR consistent with the early vision of the commercial sector towards arbitration. ADR as practiced today does not satisfy that vision. Examining current methods of dispute resolution suggests that ADR is a bit like the Emperor's new clothes. The "alternatives" are illusory at best! Finally we go in search of the Emperor's new clothes and conclude that the key to meaningful alternatives hangs in the problem solving closet.

## A. DEFINING ADR

ADR is commonly defined as alternatives to litigation. For many this signifies such things as arbitration, mediation, and more recent hybrids (summary jury trials, mini trials, and rent-a-judge). Excluding mediation for the moment, the primary distinction between litigation and the others rests on the public nature of litigation versus the private nature of the others. Nevertheless all of these methods rely on the same basic format—a third-party decision maker called upon to select a winner after hearing opposing arguments by each side.<sup>2</sup> Not only is a winner chosen, but the remedy is narrowly confined to monetary damages. Not to be overlooked is negotiation. Most commentators agree that over 90% of all court cases are resolved through out-of-court settlements. Negotiation clearly stands opposite litigation. Mediation is an extension of the negotiation process. Other recent hybrids in the ADR spectrum offer the means to incorporate a third-party into an adversarial negotiation process.

The current ADR spectrum can then be graphically configured in the following manner.



In this configuration all of the methods are grounded in the adversarial approach to problem solving. In the final analysis they are not really “alternative” means of resolving disputes, but only variations on the same theme—adjudication. The Emperor has no clothes!

This need not be the case. With emphasis on substance rather than form, the ADR spectrum can take on a new configuration.

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2. For a more detailed discussion of each of these forms *see generally*, S. GOLDBERG, E. GREEN & F. SANDER, *DISPUTE RESOLUTION* (1985).

**ADR PROBLEM SOLVING SPECTRUM**  
*CONSENSUS BUILDING*                      *ADVERSARY*  
Negotiation & Mediation                      Adjudication:  
Litigation, Arbitration, & Hybrids

From this perspective ADR means alternative methods of problem solving. Two alternatives presently exist: consensus building and adversary approaches. The focal point hinges on negotiation and mediation. Both are intended to be a search for mutual agreement: consensus.<sup>3</sup> An adversary approach to negotiation or mediation is a contradiction in terms, since an adversarial style places the parties in opposition to one another.

## II. IMPLICATIONS OF ADVERSARY PROBLEM SOLVING

To begin the process of redefining ADR, envision adjudication as the alternative to a negotiated settlement. Legal actions are characterized by the filing of complaints, answers, motions, discovery, and trials. From the first day in law school we are taught to shape our thought process and actions along adversarial lines. Issues are defined in terms of the plaintiff's theory of recovery and the defendant's opposing response. Every step is conceivably a battle ground between opposing views. At any stage a third-party may be called upon to settle a conflicting point: one side wins, while the other loses. The implicit message is that the best, if not only, way to treat a client's problem is to take an adversary position on their behalf.

The result of this indoctrination is that lawyers lose sight of what it means to be creative problem solvers. Instead of confronting the underlying problem the disputing parties would like to solve, lawyers listen to their clients with an ear toward fashioning a legal theory in support of their position. Granted lawyers have an obligation to advise clients regarding their legal rights and responsibilities, but must the underlying problem be neglected in the process? Can lawyers honestly say they have acted in the client's best interest if they fail to consider the underlying problem?

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3. From the Latin "consentire": con (together) sentire (to feel, think).

What's more, the adversarial mind set carries over into the negotiation and mediation processes. As litigation progresses positions are regularly exchanged between the lawyers. At some point, routinely late, in the course of events after considerable bitterness, emotional stress, time, and substantial expense have been incurred, one party makes a demand upon the other.

Still negotiation stands as the primary method by which disputes are settled. Proceeding without the involvement of a third-party and with the flexibility to fashion whatever remedy they wish, lawyers and their clients hold the power to be creative problem solvers. Unfortunately, when negotiators employ an adversarial style much of the flexibility of negotiation as an alternative to adjudication is lost.

Mediation, as an extension of the negotiation process, involves a third-party (mediator). Many inside the legal profession and outside believe the mediator's function is that of a decision maker similar to an arbitrator. The distinction is made that the mediator's decision is non-binding or advisory, whereas the arbitrator's decision is binding. Such is not actually the case.

Mediators of commercial cases report that the mediation session consistently unfolds with the lawyers for the disputing parties directing legal arguments at the mediator in support of their positions. This occurs despite having been advised that the mediator will not be deciding between the parties. Mediation is an assisted negotiation process. Parties should not feel co-opted or strong-armed into agreement. Whether ultimate agreement is achieved remains their decision.

### III. COOPERATIVE/ADVERSARY PROBLEM SOLVING

Characteristic of the adversarial style, an offer or so-called demand letter expresses the client's position in terms intended to motivate the other party to roll over and accept it rather than proceed to trial. The other party, equally heavily invested in the process seldom, if ever, accepts the demand. If the parties were to stick with this adversarial stance, then stalemate would inevitably result and trials flourish.

Obviously this is not the case. In the experience of some

mediators, lawyers consistently attempt to turn the negotiation or mediation process into another adversarial battleground. This despite the fact that lawyers know they must be advocates on their client's behalf, and therefore it is fantasy to expect one lawyer to surrender in the face of another lawyer's argument.

Since this is so well-known, then making these demands can not really be done with the expectation of continuing the adversarial battle. Rather it must be viewed as the opening shot of what will become a series of volleys back and forth. This is considered by many to be the definition of the cooperative approach to problem solving.

In this approach, offers are exchanged with the expectation that a zone of compromise exists from which to produce an agreement.<sup>4</sup> The negotiation process seeks to identify it. An operating assumption of this approach is the expectation that concessions will have to be made and that if one side does so the other side will reciprocate. But when an offer is made, the receiving party has no idea what the intention actually is.

Critics of this approach view the party making the first concession as weak and therefore subject to considerable loss of face. That in itself makes the first concession emotionally painful. It also renders the party making the concession extremely vulnerable to a competitive opponent.

On the other hand, should both sides happen to be equally motivated by the cooperative approach, then agreements frequently result very quickly, but not without placing a heavy reliance on trust. Analysis of these agreements reveals that they are usually made on less than optimal terms. Undisclosed joint gains are probably left on the table. Even more disconcerting is the nagging thought that one side may have been taken advantage of by the other.

The cooperative style is nothing more than the "hard", "competitive", or "positional" style gone soft. Cooperative or competitive becomes a matter of degree. Both are forms of ad-

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4. See, G. WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* (1983) (empirical study which suggests lawyers prefer the cooperative approach to problem solving).

versarial bargaining.

#### IV. PROBLEM SOLVING BY CONSENSUS

Without question adversarial approaches produce agreements. Conducting negotiations in this manner, however, extracts a great price from the parties. In the view of some mediators, too high a price. Another approach, consensus building, is more likely to produce an agreement that actually addresses the best interests of the client.

The consensus approach is driven by the underlying interests of the parties. Fisher and Ury have popularized this approach under the name "principled."<sup>5</sup> While occasionally classed along with the cooperative approach, consensus building in a principled manner is nothing of the sort. Through this approach the parties' interests are explicitly identified with solution options created to remedy the underlying problem by satisfying those interests.

Interests are those things that drive one's position. Every agreement must satisfy the parties' interests at some level. This approach postulates that by making those interests explicit the level of agreement will be higher. In so doing the underlying problem becomes the shared focus of attention. Likewise finding the solution becomes a joint exercise explicitly directed at both parties' interests.

In contrast, the adversarial approach leaves the parties to rationalize the outcome in terms of their own stated positions without ever considering how well their interests have actually been met.

The adversarial approach to the settlement of legal disputes usually centers around a single issue—money. Plaintiff wants X, while defendant will give Y. Eventually they may agree on Z, representing a sum somewhere in between. By contrast, the consensus approach focuses on what precipitated the legal action. What are the individual needs that must be met in order for agreement to result? What is it that an exchange of money

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5. R. FISHER & W. URY, *GETTING TO YES* (1981).



would represent? Are there ways other than money to satisfy each parties' needs? Money may be part of the solution, but it may just as easily include such things as a simple apology, arrangements for future risk sharing, conditional plans based on identifiable events, or provisions for dealing with subsequent unforeseen circumstances.<sup>6</sup>

There is nothing weak about this approach. It does not imply the need to prioritize or judge the quality of each parties' interests, nor does it anticipate that concessions will be made. If all interests of the parties can not be addressed in the present agreement, then removing some interests from the table may be an option. Whether final agreement is ultimately reached depends upon how well the proposed agreement actually addresses the interests each side has identified when compared with the alternative of not reaching an agreement. In sum this approach encourages creative problem solving.

## V. LOWERING THE BARRIERS

This essay is not intended to be a treatise on negotiation. Others have done that in far greater detail. What is suggested is that to treat ADR in an exclusively adversarial manner regardless of what label is given to it (and that includes negotiation and mediation) is to place form over substance.

It is understandable how we got this way. When commercial clients bring their grievances to lawyers, lawyers tend to listen without really hearing. In taking action lawyers either make a demand framed around a legal position or file a complaint. And so it goes.

If lawyers would take off the blinders and think of problem solving in terms of both consensus building and adversarial approaches, then ADR will consist of meaningful alternatives. Negotiation and mediation are the appropriate forums for consensus building. Litigation, arbitration, and other forms of adjudication are the appropriate forums for the adversarial approach.

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6. See, D. LAX & J. SEBENIUS, *THE MANAGER AS NEGOTIATOR* (1986), 29-45, 88-116 (where suggestions are made for creative problem solving by business managers).

Lawyers can learn consensus building skills.<sup>7</sup> This should be done not to the exclusion of adversary skills, but in conjunction with them. The accepted standard for competent practice of law today should encompass the proper use of both approaches to problem solving.<sup>8</sup> The Code of Professional Responsibility<sup>9</sup> directs lawyers to act in their clients' best interests. Consensus building concentrates explicit attention upon those interests and seeks to come up with solutions aimed directly at them. Without doing this have we failed to meet that responsibility?

## VI. COMMERCIAL DISPUTES AND THE FUTURE OF ADR

Those in the commercial sector can do a great deal to hasten the growth of meaningful alternative dispute resolution. They must recall those needs that motivated the creation of the arbitration process. One factor was the desire for a process that encouraged self-settlement of disputes. A setting in which the disputants themselves would be able to participate in the speedy and efficient search for a solution to the underlying problem. That search was intended to be done jointly by the disputants either with or without help from a knowledgeable third-party, and should leave the working relationship and reputation of the participants intact.

By complying with the demands of legal counsel, the interests of those in the commercial sector have been neglected. They should instead insist that their interests be attended to. They must encourage their legal counsel to adopt a consensus building approach to negotiation and mediation. They must show their

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7. I have taught this approach for several years to law students, lawyers, and non-lawyers. The response from these students has satisfied me that lawyers desire to be creative problem solvers and they welcome knowledge of the skills enabling them to do so.

8. Rule 1.1 Model Rules of Professional Conduct provides: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

9. See, MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 6-4 (1980) which provides, "Having undertaken representation, a lawyer should use proper care to safe-guard the interests of his[her] client . . . .", and MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-9 (1980), "In the exercise of his[her] professional judgment on those decisions which are for his[her] determination in the handling of a legal matter, a lawyer should always act in a manner consistent with the best interests of his[her] client. . . ."

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counsel that they understand the adjudicatory process and the adversarial approach it requires. They must let them know that it is permissible to follow parallel courses of action using both approaches. In the long run, their interests will be better served.<sup>10</sup>

Taking this action will help reshape the definition of ADR. Dispute resolution should focus on problem solving in the broadest sense. Lawyers really want to be creative problem solvers. They need the encouragement of merchants to learn the necessary skills and then to use them.

Once the adversarial chains are removed from the ADR closet door, the consensus building suit can be taken out of the closet. Only then will the Emperor really have new clothes. Clothes for every occasion.

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10. MODEL RULES OF PROFESSIONAL CONDUCT (1983) Rule 1.2 "(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, . . . , and shall consult with the client as to the means by which they are to be pursued. . . ."