

THE FLEXIBILITY OF ADR

By John Marshall

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I have chosen this topic because the more ADR work I do the more I appreciate the advantages of its flexibility, both in the process which can be adopted and – especially in negotiation and mediation – flexibility in the way the dispute is resolved.

I have grown up in the law with the relative rigidity of the court system. There are rules of procedure which must be followed. There are prescribed forms for different applications. There are rules of evidence. It is all very formal. And while some attempts have been made to modernise the system and make it more user friendly – such as the use of telephone conferences with Judges in interlocutory matters – it is still essentially bound up by rules and formality, delays and expense which tend to obstruct rather than assist people to obtain justice.

The right of access to the courts is a basic constitutional right, and nothing I say in this paper is intended to detract from the vitally important role which the courts have of protecting our fundamental rights and freedoms, and delivering justice independently and impartially. However, it is a fact that courts are being seen increasingly as a “last resort”. The number of civil proceedings filed in the courts has shown a significant decline over recent years. In the High Court in the year ended 30 June 1990 there were 2,334 general civil proceedings filed and 3608 summary judgment applications. Ten years later, for the year ended 30 June 2000 there were 1421 civil proceedings and only 320 summary judgment applications filed. Figures for that ten year period are not available for the District Court but I have obtained figures for the last five years which show a similar trend. For the year ended 30 June 1995 there were 44,779 civil proceedings and 3,953 summary judgment applications commenced in the District Court. Five years later the figures were 37,167 and 3,104. Obviously there are fluctuations from year to year but there is a clear trend.

Against this background of rules and formality ADR comes as a breath of fresh air. For instead of having forms and precedents imposed on them the parties can make their own rules, and design their own process for the resolution of their dispute. Lawyers can help by being creative and suggesting processes which are fair, but user friendly. They can also help by working with their clients to find ways of resolving disputes which may be quite different from the way the dispute would be resolved if it went to court.

ADR is inherently flexible

I want to talk today about some of the different models of ADR which are in common use to illustrate the point, and then give some examples from my own experience to show how mediation and arbitration processes can be adapted in particular cases. I will also refer to some Bills which are currently before Parliament which show that

Parliament is increasingly looking to ADR to provide an alternative process of dispute resolution.

The different forms of ADR

Perhaps the easiest way of illustrating the various processes available is by showing them as a continuum of options. In any particular dispute the parties may choose one or more of these options. I summarise them as follows:

- (i) Negotiation
- (ii) Mediation
- (iii) Expert determination of facts, or legal or technical issues on a binding or non binding basis
- (iv) Early neutral evaluation – the parties seek an advisory opinion as to the likely outcome if the dispute went to court
- (v) Mini trial – lawyers present their arguments to senior representatives of parties, and sometimes a neutral person as well, and those persons then discuss and hopefully resolve the dispute
- (vi) Arbitration.

These different forms of ADR may overlap. In some cases more than one may be used. For example the process of resolving a commercial dispute may start with negotiations between the parties at a middle management level, may move to discussions between chief executives and then on to mediation. At the mediation there may be a technical or legal question which the parties decide to send off to an expert to give them a binding or non-binding opinion. And if the mediation is unsuccessful, or resolves some issues only, the parties can proceed to arbitration.

Getting the right ADR process for the particular problem

In many disputes mediation will be an appropriate method of ADR. The beauty of mediation, as I will discuss later on, is that it is inherently flexible and can be adapted to the circumstances of the particular dispute. However there will be cases where one or more of the other processes (or variations of them) would be best used. It all depends on the circumstances – the nature of the dispute and the attitude and approach of the people who are involved.

Some practical examples of the flexible nature of ADR

Mediations

There is a basic structure to the mediation process which is usually followed – e.g. the mediator first sees the parties together, and then meets with each separately. But sometimes it may be desirable for the mediator to start by meeting with each party separately, for example to discuss with each party a particularly difficult and sensitive issue which has been raised in pleadings or correspondence, or to discuss an appropriate process.

I took this approach in a mediation involving a family dispute over an estate. Allegations of incest some 50 years earlier between a brother and a sister had been made, and it was obvious that this was an issue which needed to be addressed before going on to sort out a fair division of the estate. So I saw each of the brothers and sisters on their own and discussed the incest issue. I then saw the brother and sister concerned, together. After that I met with all members of the family together, and after further discussions the parties reached agreement on a division of the assets in the estate. Had we tried to resolve the division of the estate without first giving the parties the opportunity to focus on the major underlying issue it is less likely that an agreement would have been reached.

Modern communications also provide opportunities for a more flexible approach to mediation. I once mediated a dispute where I sat in my office with one of the parties, and we conducted the mediation with the other party, who was overseas, by telephone and fax. It could equally have been conducted by telephone and email. And our Ministry of Consumer Affairs is currently investigating the use of an on-line ADR service to resolve cross border disputes resulting from e-commerce transactions.

Another recent mediation illustrates the flexibility which exists in the role of the mediator after the parties have reached an agreement. In this case there was a dispute involving the construction of a house in the early stages of the work. The parties resolved that dispute at the mediation. However they agreed that in the event that any dispute should arise in the future as to the application or interpretation of the agreement reached at the mediation, or in relation to the contract works, that matter would be referred to me for determination, effectively as an arbitrator. The benefit to the parties was that I was familiar with the original dispute, and any further disputes (there have been two to date) could be resolved quickly and without the parties having to go to the expense of filing court proceedings.

Arbitrations

This leads conveniently on to a discussion of arbitration. Traditionally in New Zealand arbitrations have often been run like a private court hearing, less formal, but with the same general approach. However, with the growth in interest of ADR, and with a more modern Arbitration Act, there is a trend towards less formality in arbitrations. In my view that is a good trend. For what many people want is a forum in which their disputes can be resolved, in private, fairly and speedily, and in

accordance with the law, but in an environment where they feel comfortable, with a process and in a time frame over which they have some control.

One of the first arbitrations I did after going to the Bar was a dispute between a company and a former employee of the company. The main issue was whether the employee had breached the duty of fidelity which he owed to the company. The parties asked me if I would see them and resolve their dispute. They did not want to have legal representation. So we sat around my table and I suggested an informal procedure for the hearing which met the requirements of natural justice. They each gave their evidence, asked each other questions, tabled some papers and told me what their respective views about the dispute were. Two days later I made my award. Although one party was more satisfied about the result than the other I think they both appreciated the ability to have their dispute resolved, with a minimum of expense, without having to file pleadings, and inside three days.

Next week I am acting as arbitrator in another matter which illustrates the flexibility of ADR. Once again there are no pleadings but the parties have agreed on a list of five questions which they wish me to answer. The first is a question of statutory interpretation, and the others are questions which flow from the answer to that first question. As I understand it the parties have agreed that they will make submissions to me and refer to correspondence and documents.

To get these issues determined by a court would require formal pleadings, payment of court fees, delays in waiting for a hearing, and no choice as to which Judge would hear the case.

Two Bills currently before Parliament

Te Ture Whenua Maori Amendment (Maori Land Amendment) Bill

Over the last ten years there have been a number of disputes between Maori involving representation and mandate issues. Some of these have been over fishing quota allocations, others have related to claim settlements. The Te Ture Whenua Maori Amendment Bill amends the 1993 Act and includes provisions designed to enable disputes between Maori over representation and mandate issues to be resolved by court supervised mediation. Clause 30D of the Bill provides that when a Judge decides to refer such matters to a mediator the court must consult the applicant and other affected persons about who to appoint, and the parties have the opportunity to agree on a mediator “with the skills and experience to undertake mediation on issues of representation for a class or group of Maori”.

This is a refreshing approach. For in this difficult area I believe that mediation can bring the parties together and help them focus on their common interests, compared with the adversarial court system which can polarise the parties’ views and widen the divisions between them. Other disputes between Maori relating to the new assets created as the result of the Waitangi Tribunal process could also benefit from the application of ADR processes. I note that in a recent lecture on the Maori Land Court by Chief Judge Joe Williams, the Chief Judge concluded by saying:

“It seems to me therefore that there is a real argument for a new form Maori Land Court – a Judge sitting with two or more pukenga or experts – adjudicating, facilitating and mediating – through issues confronting the new tribal organisations in respect of the new tribal asset. What is genuinely exciting is that the Court will be applying and developing a separate system of law – a system which is a mix of those aspects of tikanga Maori which continue to inform the lives of Maori today and those principles of the common law which have stood the test of time. A system which, as the Treaty directed, draws on the best of both worlds.”

Whether or not a “new form Maori Land Court” emerges I think that a unique process of mediation or facilitated negotiation could be designed for the specific purpose of resolving the kind of disputes the Chief Judge was referring to. The process could draw on the best of both worlds – aspects of tikanga Maori, and some of the established mediation processes, adapted as necessary. The parties would set the agenda. There would perhaps be two independent facilitators or mediators, one Maori and one non Maori, and the parties could have the opportunity to refer issues to an expert of their choice for a binding or non binding opinion. The court itself may need to adjudicate as a last resort, and the parties could refer issues to it to rule on during the course of the negotiations/mediation.

Whatever system is designed it is refreshing to see Parliament and the Chief Judge looking at options other than the established system for the resolution of disputes between Maori.

Construction Contracts Bill

The explanatory note to this Bill describes it as a Bill which

“is intended to facilitate prompt and regular payments within the construction industry”,

and to provide for the resolution of disputes under construction contracts. The explanatory note goes on to say that this objective is achieved by

“establishing a quick and inexpensive adjudication process for resolving disputes that allows a binding (but not final) determination to be made in relation to, among other things, whether any of the parties to a construction contract are liable to pay an amount under the contract.”

The adjudicator has power to

“conduct the adjudication in any manner that he or she thinks fit” (clause 34(1)(a)),

and the matters which or she can take into account are listed in clause 35.

While there may be some nervousness about procedural fairness, the decision of the adjudicator is subject to judicial review (clause 40), and the adjudication does not affect any civil proceedings arising under the contract (clause 25). And while there

may be other aspects of the Bill which could be improved, for present purposes the point is that Parliament is looking at a new way of dispute resolution in an industry where contractors have suffered under the present system.

In conclusion

I think we will see different variations of ADR increasingly used both in the government and private sectors. The design of appropriate ADR processes to resolve disputes in commerce, in government and in the community will assume increasing importance. The legal profession must be ready for the challenge.

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