

JUDGEMENT DAY

The Case for Alternative Dispute Resolution

Judgement Day
The Case for Alternative Dispute Resolution
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"Justice... is the main pillar which holds up the entire edifice. If it is removed, the great, the immense fabric of human society... must in a moment crumble into atoms."

Adam Smith, *The Theory of Moral Sentiments*

1. WHAT IS ADR?

ADR, or alternative dispute resolution, is a relatively new method of out-of-court, civil case arbitration, which has found wide-spread acceptance in the United States, but is just beginning to catch on here in Britain. Alternative dispute resolution has gained momentum in the US over the past decade by accomplishing several of the goals it set out to accomplish. The basic goals of ADR include:

1. To create a speedier and more efficient forum in which to resolve civil disputes;
2. To lower the costs of the arbitration process, which continue to rise under the present system;
3. To reduce overcrowding in the public courts;
4. To allow the parties involved in the dispute greater control over the resolution process;
5. To provide a more confidential forum of debate;
6. And, to allow the mediator and the parties involved to work more closely together toward a satisfactory resolution.

Obviously, this list is not all-inclusive, but it provides a basic framework of what exactly alternative dispute resolution seeks to accomplish.

The Need for Reform

ADR organizations began to gain increasing popularity in the United States in the late 1970's and early 1980's partially due to the rising dissatisfaction with the state of civil court litigation. A dramatic increase in the overall number of lawyers in the country was paradoxically met by an increase in the costs of civil dispute resolution as well as an increase in the number of litigants attempting to use the overcrowded system.

The Wall Street Journal in November of 1988 said that the total number of cases reaching the United States Court of Appeals rose by almost 50% since 1980. "Cases entering the federal trial courts through one avenue -- 'diversity jurisdiction', where the parties hail from different states and more than \$10,000 is at stake -- rose from 39,315 in 1980 to a high of 67,071 in 1987. Such cases constituted almost one-third of the nearly quarter of a million cases these courts handled in 1987."

The United States-based National Institute for Dispute Resolution says, "America has the highest concentration of lawyers on the earth, their numbers having doubled - to at least 600,000- in the past 20 years. The United States devotes some 30 billion dollars a

year -- at least 1.5% of the GNP -- to paying them." Yet, "Disputes under \$75 and between \$750 and \$5,000... lack any realistic courtroom forum," and, "Even for larger disputes, the courts provide an inefficient processing mechanism, with legal fees being a high percentage of the amount at issue."

In the UK, the problem is has aptly been summarized by the sentiments of the National Consumer Council when they say, "people find the experience of using the court system an unpleasant, daunting and frightening one; many people take no part in the court process by either not returning forms, or not turning up to court and are at risk of not enforcing their rights as a result."

Angered by the red tape of the public courts, prospective litigants began searching for alternative forums in which to resolve their disputes. Retired Judges and distraught lawyers were only too glad to answer their call. The need for reform, not being met by the government, was answered by private sector organizations who saw alternative dispute resolution as a way to provide relief to the ills of an unhealthy public court system in a less expensive, more efficient and overall satisfactory fashion

Although the ADR field in the US began as a minute handful of organizations that handled minor business and personal disputes, it rapidly blossomed to incorporate cases in the industrial, commercial, entertainment, environmental and even international sectors. Californian-based organizations led the way in implementing ADR techniques, but the trend rapidly began to spread across the country.

Organizations such as the American Arbitration Association in Chicago, EnDispute, Inc. in Washington, Judicate in Philadelphia, Civicourt in Phoenix, and Judicial Arbitration and Mediation Services, Inc. in Los Angeles, have established ADR as a countrywide phenomenon.

In the UK, the Centre for Dispute Resolution, the Family Mediators Association, the National Family Conciliation Council, the Chartered Institute of Arbitrators and the Advisory Conciliation and Arbitration Service, represent the rising trend of private ADR domestically.

But alternative dispute resolution has not been without its critics, especially in the US. The American Bar Association, the State Bar of California, The Los Angeles Times and The New York Times are among ADR's greatest enemies. These antagonists usually attempt to cast ADR in the worst possible light, referring to it as "Cadillac justice" since it will apparently favour the rich, or imply it will create a two-tier system of justice, which will lead to a caste-like system of legal authority.

Although the arguments against ADR are numerous, they are easily refutable when weighed against the benefits. Indeed, most of the arguments appear to be sensationalized and without factual justification. The ADR system appears a highly feasible alternative for disputants who seek to opt of the public courts in the US and it would prove to be a successful option if applied in greater measure here in the UK.

2. THE ADR PROCESS

THE PRIVATE SYSTEM

Most private ADR organizations follow a fairly simple structure when attempting to arrive at a decision in a dispute between disputants. The following basic framework is derived from the ADR outlines of two UK-based (Centre for Dispute Resolution & The Chartered Institute of Arbitrators) and two US-based (American Arbitration Association & the National Institute for Dispute Resolution) organizations.

1. **The litigants contact each other and decide to work through an ADR to settle their dispute.** If they are not on speaking terms, one litigant may contact the ADR and attempt to arrange the process. If the other litigant agrees, the two parties obtain and sign an agreement to work through the ADR toward a resolution.
2. **The litigants choose a procedure.** The procedures are usually broken down into one of three basic models: **Conciliation, Mediation or the 'Mini-trial'.**

Conciliation: Litigants meet and discuss their case in the presence of an ADR representative, but the representative only makes suggestions to the parties on how to improve their arguments and what the possible result of their stance might be. The representative does not formulate terms of the final settlement.

Mediation: Follows the conciliation model except the ADR representative formulates terms for settlement. But, the mediator does not make these terms mandatory for settlement.

Mini-trial: (Often referred to as an "executive tribunal" or "supervised settlement procedure" or "adjudication") Litigants follow a much more formal procedure using private lawyers or ADR senior representatives to further their arguments. Usually invoked in cases with more serious division between the parties over the terms of settlement or monetary stakes. Mock juries could also be set up to render a hypothetical decision, but they are rarely used.

(Note: Although disputants will usually choose one of the processes immediately, often they will start in one and move to another if it has a better possibility of success.) All three of these methods then invoke a variation of the following mediation procedures:

- a) **Document-only submission/Mail order or "paper litigation":** Litigants submit their cases and evidence to the ADR (often via the mail) and allow the ADR to arrive at a resolution without actually ever meeting face-to-face with the arbitrator or the other litigant. Usually these cases involve smaller amounts of money and little need for interplay between the litigants. (This system is catching on in California where Judicial

Arbitration and Mediation Services, Inc. (JAMS) has established a successful, \$300 per case by mail arbitration service. The service provides crucial ADR services for parties who are not able meet personally because of geographic distance.)

- b) Informal oral hearings: Litigants meet face-to-face only to discuss their problems in a more relaxed fashion.
 - c) Private meetings/ADR Go-between: Litigants meet separately with a go-between who relays messages between the parties.
 - d) Group meetings: Litigants meet together, most often with ADR mediator present, to work out problems in a one-on-one fashion.
3. They formulate a confidential agreement: After settling upon the procedure, the litigants must sign a document which ensures the content of the case will not be divulged by the mediator. The mediator is then prevented from presenting evidence in future cases involving the litigants if the preliminary process fails. This helps ensure that the maximum amount of information is divulged by the litigants during the preliminary process while taking the fear of future indictment away for the mediator.
 4. The litigants choose an objective neutral: Each party submits their choice of a desirable mediator and then agrees to one who has no personal or financial stake in the case. If, during the course of the case, a mediator is thought to be biased, they may be replaced with another representative from the ADR organization.
 5. The litigants co-ordinate the process: The neutral and the litigants decides on a timetable, date(s) and setting for the meetings.
 6. The litigants arrange the fees: The parties must agree to bear all costs equally for the use of the ADR service before the process begins.
 7. A settlement is struck: If the parties chose a process of conciliation, they must together draw up the terms of settlement. If they chose mediation, the parties can agree to the terms of settlement suggested by the mediator. If they chose a mini-trial, the parties must agree to the decision of the mediator. (Of course, the parties may choose to exit the process at any step of the proceedings. But if they do formulate an agreement, in most cases they will be bound by that settlement upon future appeals.)

Who Judges?

The private ADR representatives tend to be retired judges or lawyers who have had some experience in arbitration procedures previously, but not all are. Many private ADR organizations run training programs for potential ADR mediators.

Most private ADR organizations have established rules of conduct and good practice which provide guidelines for their mediators. Regardless of which ADR organization or process is chosen, disputants should enquire about the qualifications of that body and its practitioners.

There have been calls by the critics of ADR to provide an accreditation program for ADR practitioners. But, this movement could easily lead to attempts by the public courts to exert pressure over the private ADR organizations. This problem, which will be focused on in greater depth later, basically boils down to the question of how autonomous the private ADR industry should remain.

What rules?

What laws support private ADR techniques here in the UK? For England and Wales, the Arbitration Acts of 1950, 1975 and 1979 establish guidelines for the administration, enforcement and legitimation of the process. The National Consumer Council (NCC) lists the following basic guidelines as set out by the Acts:

- arbitration is binding; the settlement can be enforced through the public courts (Note: usually this is the case because an explicit contract was signed by both parties binding them to the settlement. But quite often, especially in conciliatory ADR, the settlement may be voluntary and not binding due to its less serious nature);
- the appeal process is limited; binding agreements made through a private ADR will be considered enforceable in almost every case;
- the process must apply a recognised system of law; and
- the arbitrator must only decide legal rights, not what is "fair" or "good practice."

The NCC also points out that Scotland and Ireland share a similar system of arbitration laws and merely differ in the terminology by which the process is referred to.

In the US, public court arbitration can be traced back to the late 1700s. But in 1925, Congress passed the United States

Arbitration Act, which sparked the growth of private ADR. The very next year, the American Arbitration Association was born of humble origins but at present has grown to handle 60,000 cases per year through the work of its 50,000 arbitrators.

Private arbitration gained great steam in the early 1970's with the backing of such legal giants as Chief Justice Warren Burger who predicted, "we may well be on our way to a society overrun by hordes of lawyers, hungry as locusts." Burger has also stated that, "The obligation of our profession is... to serve as healers of human conflicts. To fulfil our traditional obligation means that we should provide mechanisms that can produce an

acceptable result in the shortest possible time, with the least possible expense and with a minimum of stress on the participants. That is what justice is all about."

Additionally, the American Bar Association sponsored the 1976 Roscoe Pound Conference, which helped push ADR forward. The conference leaders recommended that court-annexed arbitration should be implemented in three U.S. District Courts on an experimental basis. They cited the success of court-annexed arbitration in several states as the reasoning behind their recommendations.

Late in the 1980's, the Pennsylvania Supreme Court in *Ridley Arms v. Ridley Township* said, "If the government cannot provide services at least of a quality and at a cost commensurate with similar services provided by private enterprise, it is by definition, unreasonable to utilise tax dollars for that purpose. That many have lost sight of that patently obvious idea is as unfortunate as it is surprising." Although this decision has been used more as a defence of privatization in general, the implications it has on the legal system are obvious; it provides a precedent for the private ADR industry if the process were ever to face a legal challenge.

Other Private ADR Options

In addition to process laid out here, most private ADR organizations offer related arbitration services to their customers. The two most common services offered by most private ADR organizations are **training** and **subscriber services**.

- 1) **Training:** Private ADR institutions organize training sessions where lawyers, ex-judges or interested third parties are able to learn how private ADR works. Often they will be training to undertake employment with the organization, but the service is also offered as a way to orient prospective users with the actual mechanisms of the system for future utilisation.
- 2) **Subscriber Services:** Many private ADR organizations offer exclusive services for annual subscribers. Most subscribers are organizations which constantly use ADR services to resolve business disputes. For a varied fee (which depends upon the amount and type of services that are required) the subscriber:
 - has their fees waived when a dispute arises;
 - receives a monthly newsletter with ADR updates;
 - can attend meetings and seminars free of charge;
 - receive publications at reduced rates; and
 - are provided with access to the organization's library.

This list is not all-inclusive, indeed, each private ADR organization offers its own smorgasbord of benefits. But, most larger ADR organizations such as the American

Arbitration Association, EnDispute, and Judicate in the US and the Centre for Dispute Resolution and the Family Mediators Association in the UK, all offer some variety of these services.

ADR IN THE PUBLIC COURTS

The alternative dispute resolution model presented above is the basic structure most private ADR organizations use to resolve conflicts successfully. But, fragments of this process have also become accepted in the public court system. Yet public court ADR is an almost exclusive American phenomenon; the British public courts have not yet begun to fully utilize the following ADR methods. Lesser forms of mediation are used in the British courts, but their prominence is not as widespread as in America.

Inevitably, with increased concerns about costs, overcrowding, etc., and the growing challenge of private arbitration, the US public court system has sought more efficient means of dispute resolution. Hence, several ADR-inspired ideas have emerged in the US public courts. The two most popular models are **court-annexed arbitration** and the **summary Jury trial**. (Note: Quite often, the term "court-annexed arbitration" is used to describe both of these methods.)

- 1) **Court-annexed arbitration:** In this process, the courts mandate the use of out-of-court arbitration before scheduling a trial date. The process is non-binding, and public. The court usually will assign (often with the mutual consent of the litigants) a neutral third party, with specialised training in the field, to help the litigants reach a compromise. Settlements are binding only if agreed to by the litigants. If not, the litigants are encouraged to attempt to resolve their dispute in a civil manner or be faced with the possibility of working toward a resolution in the public system. (Divorce and child custody cases are the most commonly court-annexed cases.)
- 2) **Summary Jury Trial:** Similar to above process except a mock jury is set up by the court to act as the third party. The mock jury will hear the arguments and present feasible outcomes and suggestions. This model is usually applied in more formal matters than those above. The process is usually non-binding and public.

It must be stressed that these court-annexed processes can vary greatly in style depending upon the disposition of the judge and disputants as to which format they think best. For example, the settlement sought through the court-annexed process may be binding or non-binding (Most often, the process will be binding unless the litigants and the judge attempt to first work out a voluntary, non-contractual agreement. But, the process can become binding if neither party seeks a continuance.) The judge may also make the process mandatory or leave it up to the litigants to volunteer to use such means. Likewise, the judge may decide who the third party will be, or might leave it up to the litigants to choose. Finally, the judge and litigants must decide on how formal they wish the proceedings to be.

Two popular court-annexed ADR scenarios can be used to exemplify the different styles which may be adapted. First, in a child custody case, the judge may decide voluntarily to allow the parents to attempt an out-of-court settlement. The case is annexed to a third party agreed to by the judge and parents, (for example, a marriage councillor or another judge who specialises in this field.) The proceedings could be very informal with the parents meeting very freely and as often as they wish with the third party they have chosen. The settlement they reach may be non-binding in its nature. That is, the parents may agree to plan what they feel is a fair timetable for visitation rights, and so on. The judge would then have to approve these terms.

Alternatively, in a serious business dispute, the judge may enforce mandatory terms of arbitration. The judge may opt to use a summary jury trial operating under highly formalised rules to push for a settlement. The settlement will more than likely be binding due to the technical terms of the dispute. (This may also be the case when there are high monetary terms at stake.)

Obviously, the more relaxed and informal the process, the greater chance of success. Yet, both processes at least attempt to get litigants to work out problems on their own terms before scheduling a trial to do so.

In their 1990-91 annual report, the Institute for Civil Justice, a branch of the California-based Rand Corporation, say, "The findings support the use of court-annexed arbitration in large as well as small cases, in contract as well as tort litigation, and in disputes among both corporations and individuals. Indeed, the bulk of the federal court's caseload comprises cases that might be appropriate for arbitration." Their study of a US District Court, which used court-annexed arbitration, concluded:

- "The program gave litigants greater access to the justice system. Many who would otherwise have settled without such hearings received their 'day in court.' Cases in the arbitration program were more than twice as likely as cases in the control group to receive a hearing;
- Private costs were lower in arbitration cases. Total fees and costs were 20 percent lower- a reduction of \$5075 per case;
- No evidence emerged that arbitration shifted case outcomes to favour one side or the other;
- Litigants and attorneys alike expressed satisfaction with the program;

[But,]

- Public costs were not significantly lower in arbitration cases;
- Arbitration cases required the same amount of court time as control group cases."

But, despite these two last findings, the benefits appear to easily outweigh the drawbacks, if indeed they can even be called drawbacks. They are, after all, merely two areas where courtannexed arbitration appears only to be on par with the regular public system. The other findings clearly show court–annexed ADR to be a step in the right direction.

OTHER MODELS OF ADR

Although private and court–annexed methods of ADR dominate the world of dispute resolution, there are countless variations of ADR to be found elsewhere. They range from minor, neighbourhood–based dispute resolution to major, professional and technically–based cases. These models can be utilised in both the private and public sectors, but most often are private. Examples include:

1. **Mediation by part-time lay persons:** Usually invoked in neighbourhood disputes between members of a community or even a certain family. So-called "community boards" have gained widespread appeal on the American West coast where an ever increasing amount of people are not only queuing up to use the system but also to play an active part in the resolution of these cases. Each board hears local disputes and suggests possible resolutions to the disputants. Most often, the cases involve very minor disputes between neighbours who usually do not seek any monetary reimbursement for their ills. "Reason", a California–based magazine published by the Reason Foundation, points out that training for a position on one of San Francisco's Community Boards demands 26 hours of initial training and the devotion of 125 hours annually to the project. The three to five sitting members in each community are selected from a wide variety of backgrounds. The only reimbursement the volunteers receive for their duty is the sense that they are producing a less contentious community.
2. **Mediation by human relations experts:** Lawyers, retired judges, or professionals within the field of human relations, assist individuals in problematic areas such as divorce, child custody, and family disputes. These experts may be used by a private ADR or in a public court–annexed situation, but are often for hire on a purely private basis. An example of a human relations–oriented ADR is the UK's Family Mediators Association. The FMA mediates divorce and child custody disputes using two mediators working as a team. One is an experienced family solicitor and the other a human relations expert. Together they work through 3 to 6 sessions (about 1 1/2 hours long each) with the couple to achieve a reasonable settlement. The FMA also offers training in this area.
3. **Mediation by professionals in specific, technical decisions:** This type of dispute resolution focuses on highly detailed analysis of very technical issues such as the environment, land, energy or trade sectors. The ADR representative(s) would be highly skilled mediators in their respective fields. For example, the American Arbitration Association (AAA) operates an arbitration branch devoted specifically to the textile and apparel industry. The General Arbitration Council of the Textile and Apparel Industries (GAC), holds an autonomous authority of its own to operate under a specific set of guidelines established specifically for

the industry's purposes. Prospective litigants may chose to operate under these specific guidelines or under a less formal apparatus set up by the AAA.

4. **Ombudsman:** This similar to he above model in its highly technical nature, but different in depth of investigation and solutions. The private ADR ombudsmen may be hired to compile a thorough investigative report for the litigants. The information is privately compiled and the results of the study are nonbinding. Ombudsmen have much greater flexibility than other ADR bodies because their job allows for a greater breadth of investigatory procedures and final recommendations. Often the ombudsman is able to recommend immediate, informal resolution possibilities so that the study will not be needed. Ombudsmen are usually employed in disputes of a very technical nature; very often the cases are government related.

These models only represent a few of the many hybrids of the ADR processes. The field of alternative dispute resolution is one in which there is constant metamorphosis. New methods of dispute resolution have evolved, and will continue to evolve as the needs of the judicial consumer request. This is not to say justice is a commodity to be bought and sold, rather, that prospective disputants will demand a certain quality of justice which they will be prepared to seek in the private sector if it is only available there.

3. ADR IN ACTION: THE BENEFITS

The process of alternative dispute resolution, as we have seen, is quite varied. There is an amazing array of ADR services, and as mentioned before, the list is not all-inclusive; there can be many hybrids of the ADR models listed. Because of this fact, the benefits of ADR are not only quite varied in their nature, but also widely disputed. Yet, this chapter will be devoted to establishing the most commonly listed benefits of the ADR process.

BENEFITS FOR THE DISPUTANTS/LITIGANTS

The most obvious point to start a list of benefits would be from the perspective of those who actually use ADR– the disputants. Those benefits include:

Monetary Savings

Probably the most difficult decision individuals have to make before taking their case to court is 'Is it worth it?' ADR emphasizes cost-saving as one of its greatest benefits.

In the August, 1986 "Public Affairs Report", published by State Farm Insurance of the US, the agency states, "that an average civil trial in federal court lasts about four days and costs the court about \$2,700 a day; the average arbitration proceeding in Eastern District (Pennsylvania) courts costs only \$47 (a day). Judge Lambros, inventor of the summary jury trial, reports the one series of 49 such trials in his district saved about \$1,504 per case in juror fees alone."

Tom R. Tyler writes in the Denver University Law Review of cost saving ADR measures:

"The results of the evaluations outlined suggest that modest cost savings can occur in alternative dispute resolution programs. The important point, however, is that both traditional court procedures and alternative procedures offer tremendous opportunities for cost savings, provided court officials and lawyers want to use those alternatives. It would be possible to save money in many ways that do not involve alternative dispute resolution programs. Similarly, it would be possible to save money through the use of an alternative dispute resolution procedure is implemented appropriately. Lowering costs depends on the desire of those involved to do so." ("The Quality of Dispute Resolution Procedures and Outcomes: Measurement Problems and Possibilities"; Denver University Law Review; Vol. 66; No. 3; 1989; p. 426)

Time efficiency

Another commonly mentioned benefit of ADR is speed at which settlements are reached. With the public court system caught in a quagmire of red tape, prospective litigants have turned to ADR as a more efficient means of settling their disputes.

In 1989, the Reason Foundation reported that there were 80,000 cases pending in the US Tax Court which involved \$20 billion in disputed Federal income taxes. In addition to the high cost of processing such cases, they said that it took 24 months to resolve the cases, but estimated it would only take six months in the hands of private ADR organizations.

A dispute between two large American corporations in the mid-1980's dramatically illustrates these first two benefits of ADR. Borden, Inc. and Texaco, Inc. faced the possibility of a long, expensive trial in the public courts. Bearing this in mind, the two organizations decided to use a mini-trial to resolve their differences. A trial that could have taken several years and millions of dollars was settled through three months of negotiations and one four-hour meeting! Exact monetary savings are not available, but it is obvious that millions were saved.

The Rand Corporation's 1990–1991 Annual Report says, "Arbitration offers a decidedly speedier alternative to trial. The average of 8.6 months to dispose of an arbitration case is about half the estimated time necessary to dispose of cases that go to trial." Quite obviously, speed of resolution appears to be ADR's greatest strength.

Privacy

Confidentiality is also stressed as one ADR's greatest benefits. The ADR process operates largely in a private setting so that the litigants feel free to 'lay all their cards on the table' so as to produce the best possible chance of a positive resolution. This private atmosphere attracts a great number of litigants who fear disclosure of the information which the trial may expose in the public court system. This strength of ADR is often one of its most criticised aspects and will be discussed in the next chapter.

Your 'day in court'

Central to both the American and British systems of justice is the notion that each individual is entitled to their 'day in court' if they require legal services. But, as mentioned previously, the backlogged public courts have not been able in recent years to adequately fulfil this promise.

The National Institute for Dispute Resolution in the US notes that the Los Angeles County Superior Court has a 72,000 case backlog, which is growing at a rate of a 1,000 more per year equating to an average five year gap between filing a case and the opportunity for a trial. The result of such overcrowding, says the NIDR, is "assembly-line justice" since the courts must attempt to push through the massive caseload without taking adequate time to examine the cases.

Private ADR organizations, therefore, fill the gap which the public courts leave open. They provide a realistic alternative which will offer litigants more benefits at a decreased cost. This ADR benefit is one of many which can be applied not only to individual litigants, but the community as a whole as well.

Control Over Proceedings

The participants in an ADR case also have a much greater amount of control over the proceedings than they would in the majority of public court cases. Litigants, especially in the case of conciliatory ADR cases, play a very active role in the resolution of their conflict. They are able move at their own pace and are not intimidated by an overbearing judge or the complexity of the law.

Improved quality of resolutions

Owing to the factors listed here, there is one remaining benefit of private ADR which arises. With the decreased costs, the time-efficient procedure, the high degree of privacy, the increased access, and the fairly relaxed nature of proceedings, the litigants are able to achieve superior resolutions. But, to see the bigger picture of just how beneficial ADR is, the public sector's viewpoint must be taken into account.

BENEFITS FOR THE PUBLIC COURTS

The process of public, court-annexed arbitration, although not as diverse as the private ADR sector, is nonetheless, increasingly providing great benefits to litigants. It should be noted here that it is very difficult to measure the benefits of any legal phenomenon since there is no single definitive answer to the question "what is justice?" Therefore, criticisms (especially concerning the public judicial system) and/or kudos for ADR will be shaped by what sort of attitude one takes towards jurisprudence

Reduced processing costs

By utilizing alternative dispute resolution processes, the public courts can dispose of an increasing number of cases before a trial date is scheduled. This will, in turn, lead to diminished processing costs, since the bulk of all court costs accumulate during the trial period.

Reduced overcrowding

By drawing an increasing number of litigants away from the public system, private ADR organizations are providing disputants with a wider array of options and opportunities. But, a beneficial side effect of this process is the increased access others will then have to the public system.

Although the degree to which overcrowding has been reduced is greatly disputed (due to the difficulty in measuring the phenomenon), there tends to be a general consensus that the rise in the use of private ADR has contributed to a freeing-up of the public courts.

The Denver Law Review (Vol. 66, No. 3, 1989) states, "there are often economic gains associated with the introduction of alternative dispute resolution programs. These gains are typically modest. While the impetus for many alternative dispute resolution programs lies in the belief that they will lower the costs of dispute resolution, such gains appear to be small. The greatest gains from such programs fall in the area of disputant satisfaction."

Despite the discrepancy in benefits, most research tends to point to significant decreases in overcrowding. Even where there are claims of only minor gains from ADR (as above), the burden of proof lies squarely upon the shoulders of those groups to establish a justification why disputants should not choose ADR when it is available.

Increased procedural options

Quite obviously, by offering court-annexed arbitration options, public courts increase the opportunity for litigants to utilise a wider array of the tools of justice. The public courts, like private ADR organizations, may initiate the use of several varying types of dispute resolution. Although the most commonly utilised are basic court-annexed mediation and the summary jury trial, the choice of what system to use is largely left to the judge's discretion; any hybrid of ADR services may be used.

This ideal, of what is coming to be called the "multi-door courthouse", would provide litigants who seek to use the public system many of the same options they would receive under private ADR. As recently as August of 1991, US Vice-President Dan Quayle has endorsed the idea in a speech to the American Bar Association saying, "This idea will, of course, empower people with disputes, and it will help unclog the courts." (California Journal, October 1991)

These increased procedural options obviously benefit litigants by offering a wider array of services. But, a greater point to note here is the psychological benefits gained from diverting trials to the ADR process. By eliminating the imposing figure of the judge, sitting high above the litigants, using a legal vocabulary the litigants are not acquainted with, the disputants are more likely to work together toward a more equitable settlement for both parties. Quite often the courtroom atmosphere increases the antagonism between the disputants making such resolutions impossible to achieve.

Increased legitimization

Hence, the resulting compilation of ADR benefits for the public courts increases the legitimization of the system in general. By improving the quality of justice within the public sector, ADR not only adds respectability to legal sector, but also provides the community with a realization of their goal of a more equitable system of justice.

THE BIG PICTURE

With the combination of increasing legitimization of private alternative dispute resolution, coupled with the expanding public "multi-door" courthouse, the quality of justice attainable within in the UK and the US will undoubtedly increase over time.

It may appear difficult to believe that there are serious reservations with ADR, yet the system has suffered repeated attacks from within the legal community, which must be overcome if ADR is to remain a legitimate alternative to the present system of justice in the US and the UK.

4. PROBLEMS WITH ADR

Although alternative dispute resolution has warranted great respect from the majority of legal authorities and the disputants who have benefited from it, concerns have been raised over its extension. Just how far can ADR be extended? Is it already overextended? Is it just?

As mentioned in the previous chapter, the answers to these questions could vary greatly depending upon the spectacles the critics are wearing. For example, in the early 1980's, The New York Times said ADR worked contrary to the ideals of America's "egalitarian society." But, in what respect is the US an "egalitarian society?" Such is the nature of the debate over quality in dispute resolution.

WILL ADR WORK FOR EVERYONE?

Without taking anything away from its overall effectiveness, there is no doubt ADR will not work for everyone. There are many dispute scenarios which do not lend themselves well to the ADR process.

ADR Works Best When...

1. **The issues of the dispute are well defined:** Disputants using ADR will usually be able to formulate a more equitable agreement if they are not radically divided upon what is at stake. Although not all legal disputes are clearly defined, litigants who submit their cases to a private ADR must both volunteer to do so. Therefore, most disputes which involve a highly technical legal matter will automatically come to trial within the public court system.
2. **Each side has relatively equal bargaining power:** The ADR process requires some degree of equality concerning the scope of the disputant's strengths. For example, if a young entrepreneur with limited capital wanted to pursue a case against an established multinational corporation with exuberant wealth, the entrepreneur would be wise to pursue the case in the public court system.
3. **Both parties want to seek an agreement:** ADR, by its very nature, depends upon compromise by its users. The disputants must both desire some sort of settlement in order for the process to be effective. If one of the litigants is highly resistant to reach a compromise, the chances of the ADR process being effective in this case, are very slim.
4. **Both parties want to preserve a relationship:** Be it a family or business relationship, many disputants choose to work through ADR in order to maintain a civil relationship after the case is settled. If the parties maintained a solid relationship

prior to the dispute, and seek to maintain it afterward, then ADR has a very good chance of being successful.

5. **A private setting is required:** As mentioned previously, alternative dispute resolution offers privacy as one of its greatest benefits. If the disputants both seek to maintain a degree of confidentiality, ADR will offer them a superior forum than the private courts.
6. **Parties are more concerned with purely business or civil interests rather than legal results:** ADR focuses are resolutions of problems that usually involve a simple dispute. If the case involves a highly complex legal issue, or one of the disputants is looking to establish a legal precedent via the case, then ADR will not be effective in resolving the dispute.
7. **In multiparty disputes:** Quite often, disputes involve more than one party. When such cases arise ADR can provide a very effective means for resolution of their dispute.

ADR Will Not Work...

Therefore, ADR will not be effective in the opposite of all the above cases. It will not work when:

- the issues are vaguely defined;
- the disputants have very unequal power;
- one or both of the disputants does not seek a settlement;
- the disputants are hostile toward the chance of preserving a relationship (if one existed before the case);
- a public setting is sought;
- one or both of the parties seek a legal precedent;
- an immediate court injunction is sought to stop a process or action from continuing.

It is fairly obvious why, in each of these cases, private ADR will be ineffective. But these drawbacks do not diminish the overall effectiveness of private ADR to resolve disputes in an inexpensive, efficient and satisfactory fashion. However, more serious criticisms follow.

DEEPER, MORE THEORETICAL CONCERNS

The above areas in which ADR will not work effectively do not account for ADR's greatest criticisms. ADR's greatest antagonists tend to point to much deeper and theoretical concerns about the ADR process.

"Cadillac Justice?" or "A Two-Tier System of Justice?"

Probably the greatest criticism of ADR concerns the division many feel it will create between the rich and the poor. Critics argue that by allowing an alternative forum for dispute resolution to develop (outside of the public domain), a new judicial system will be created: one for the rich and one for the poor.

Alternative dispute resolution is often referred to as "Cadillac justice" by its critics for its supposed tendency to favour wealthy litigants.

The Los Angeles Times (November 1989) notes American Bar Association President Robert Raven's fear that ADR will develop into, "a private justice system for those who can afford it, and an even more crippled system for the poor and those charged with crimes." The LA Times also noted State Bar of California President Alan Rothenberg's fear that the rising popularity and profitability of the private ADR industry among judges, could create a "brain drain" of quality talent from the public to private domain.

But, the same LA Times story notes a study by the National Center for State Courts which showed no increase in the number of judges retiring over the 1980s to enter the private sector. The story also notes the head of Judicial Arbitration and Mediation Services (a private Californian ADR) John K. Trotter's refutation of anti-ADR critics. Trotter notes that private arbitration is nothing new to America. Rather, it has been utilized widely over the past century to resolve disputes for school districts, labour unions, and medical providers. "If all these other forms of private, consensual, paid-for dispute resolution processes do not demean the courts, it is difficult to assume the existence of private judging will," he says.

US Supreme Court Justice Anthony Kennedy has recently criticized ADR for its possible harmful side effects. "If a whole class of cases in a frontier area of the law is suddenly removed from a judicial system, there is at least the possibility that we will pay the systematic costs of being unable to develop needed guidelines." (Los Angeles Daily Journal, August 1990)

But, it is questionable what exactly constitutes these "systematic costs" and why, also, have none of those "needed guidelines" been developed earlier? ADR is really only filling a hole that has been dug by years of judicial reluctance to reform the overcrowded and costly system. Why, when suddenly there is an opportunity to remedy the situation, do fears arise of its expansion? Indeed, the public courts should thank the defenders of ADR for pin-pointing the problem and formulating an attractive options to the present system. It is now up to the public courts to establish more effective and efficient mechanisms for dealing with their problems.

A recent report by the Advisory Committee to the Judicial Council, a panel established in 1990 by the California public courts to study ADR and recommend how the public courts should deal with it, made the following recommendations:

- allow the private ADR industry to continue. (There were calls by many, apparently, to abolish the system altogether);
- continue to research the private industry's practices;
- increase the total number of authorized and funded public judicial authorities; and
- provide financial incentives to public judges to remain within the public system after retirement.

These guidelines provide an excellent framework for reform of the public system, but the panel, like many ADR critics, did not stop at simply recommending how the public court system could be improved. They also stressed the "public's right to know" as a facet of the public judicial system which is not present in the private sector.

The Public's Right To Know

A widely debated feature of the private ADR system is the great degree of confidentiality it provides to its users. Obviously, this feature is very attractive to many disputants who hope to keep the proceedings out of the public arena.

But, the same Advisory Committee to the Judicial Council in California, which made recommendations on how the public system might be improved, sought strong restrictions on the ability of ADR to retain its confidential nature. The panel recommended:

- adopt rules on how the records of private ADR cases are to be maintained by the public courts;
- make public courtrooms available to private ADR's and offer to organize a jury to hear trials if needed, which would be paid for by the disputants;
- make proceedings open to the public-with adequate prior notice to attend if they so wish; and
- appoint a committee to research a possible code of ethics and disciplinary authority for the private ADR industry.

There were other minor recommendations but these main points illustrate part of the problem the private ADR industry faces. While the first recommendations quite appropriately suggested possible reforms of the public system, the panel's attention quickly turned to how to legislate over the private industry.

Their greatest concern being privacy, or the public's "right to know," the panel (which is in many ways representative of all ADR critics) sought ways to modify the private ADR industry to their liking. Tom Tyler in the Denver University Law Review states:

"...alternative dispute resolution threatens the ongoing process of establishing legal precedents and dealing with issues of public policy. Alternative dispute resolution procedures typically privatize a dispute by resolving it in a private agreement reached outside of a public forum. Consequently, the reasons for the decisions made are not articulated and no public record is available. As a result, the public airing of disputes occurs only to the extent that cases currently end up in court."

But, does the secretive nature of the private ADR industry warrant such fears? Why, in a dispute between two parties, must the public be made aware of the proceedings? Is the public interest really being abused by private ADR's non-public proceedings?

First, it must be said that most private ADR cases are not as secretive as some critics might think. Many of the cases in the private ADR industry receive widespread newspaper coverage or information of the trial is freely released by the disputants.

Secondly, most of the cases which take place in the private ADR sector are of a minor legal nature; there usually are not legal issues of great consequence on the line. Therefore, it is questionable how beneficial the information in those cases will be to the public. When a divorce, child custody case, neighbourhood dispute or business conflict is brought to a private ADR, do the proceedings really merit release to the general public?

And if the possibility of a major legal precedent exists within a case, it is unlikely it will go to trial in the private ADR sector, since one of the parties will realize this and insist upon a public court settlement to establish that precedent. The very fact that the possibility exists within a case for a major precedent to be set, usually means the two parties will be very reluctant to seek a private forum of resolution in the first place since the gulf between their viewpoints is so large.

Yet critics maintain private ADR must be responsive and accountable to some type of higher authority. The obvious problem here is, at what point does a private industry, with fully-functioning, autonomous organizations at work, cease to be private? By not calling for the abolition of the entire private ADR industry, the panel (like many critics of ADR) seek to legitimize calls for alternative reforms, which would strengthen governmental control over the private ADR industry. Like any private business seeking to free itself of the wrath of governmental restrictions and regulations, the private ADR industry can only hope such calls for reform are not heeded.

The Appeal Process

Another criticism of ADR is its seeming lack of any appeal process. ADR decisions are binding most often, but only by the mutual consent of the disputants to do so. It is vital to remember that private ADR is not forced upon disputants. They voluntarily elect to

use the technique and they must voluntarily sign an agreement binding them to any decisions.

Additionally, the disputants may exit the private ADR process at any time. If they feel the process is not working and that the public route may be better, they may opt out and pursue an alternative path.

The disputants may also elect to bring a new mediator into the process at any time if they feel their current mediator is inadequate or possibly biased in one direction.

The lack of an appeals process is really not a drawback at all since both parties voluntarily agree to attempt to reach a settlement. The disputants would not elect to use ADR if they thought all their hard work would only result in unenforceable agreement. Only those disputants who elect to use conciliatory measures to reach a non-binding agreement are exceptions to this rule. In many cases, even conciliatory ADR results in binding agreements.

THE UNFOUNDED FEAR

Again, it cannot be stressed strongly enough that these criticisms are largely based upon how the critic views what the ends of justice actually are. The diversity of views on this subject will range across the entire spectrum of jurisprudential theory.

ADR appears, to many, a radical system. Indeed, the idea of legitimate private alternative avenues of justice is so new that it could be called radical. But these fears of a radical, runaway system of justice are largely unfounded both in theory and fact.

The practical reality of alternative dispute resolution is that while its critics endlessly debate its worth, ADR is currently providing the public with a service which the public courts have failed to fulfil. Perhaps ADR's critics need to realize the difference between radicalism and realism and to accept alternative dispute resolution as an effective companion to the current public court system.

5. CONCLUSION

THE STATE OF ADR IN THE UK

Private ADR has made inroads here in Britain. Several private organizations have succeeded in carrying the banner of ADR forward. They include:

- **Family Mediators Association:** Specializes in family mediation, including divorce, child issues and property settlements. They have several country-wide branches and also offer training programs.
- **National Family Conciliation Council:** Also specializes in family dispute resolution; stressing conciliatory ADR practices. Several branches and many publications offered.
- **ACAS, The Advisory, Conciliation and Arbitration Service:** A very prominent ADR which specializes in industrial dispute resolution, including employment matters. ACAS provides conciliation, mediation and arbitration services in several regions across the country. ACAS also offers a wide array of booklets and reports on ADR practices.
- **Mediation UK:** ADR organization offering mediation training and referral services. Promotes the use of ADR through a newsletter and an ADR directory of services in the UK.
- **The Chartered Institute of Arbitrators:** Offers extensive ADR services including conciliation, mediation and mini-trial services.
- **IDR Europe Limited:** Private ADR offering mediation services and ADR training.
- **British Academy of Experts:** Offers mediation referral service and training. Also promotes ADR through reports and conferences.
- **Centre for Dispute Resolution:** Offers extensive ADR commercial and civil services including conciliation, mediation and mini-trials. CEDR also offers training services, a newsletter, seminars and several publications on ADR.

There are several other ADR organizations in the UK which offer a wide array of similar services. But the above lists fails to capture the complete scope of the services these organizations offer.

First, the cost to use the services these organizations offer varies greatly. Many ADR organizations are able to offer their services free of charge to users via donations and grants by other organizations.

Additionally, the ADR organization may have a subscriber service in which members pay a certain annual fee and then have case costs waived (regardless of usage.) Alternatively, the ADR may ask for a small donation or assign a flat fee for services rendered. Again, the diversity of the organizations is reflected in the scale of their prices; there is no meaningful average cost for the use of ADR services.

Finally, the above list fails to present the vast array of fields ADR can cover disputes for. From family disputes to business relations to international concerns, private ADR offers a range of services tailored to almost any disputant's needs. Many of these UK ADR organizations have also established overseas contacts which they can work through to resolve international disputes.

The field remains ripe for expansion, however.

RECOMMENDATIONS

Support for ADR has been growing. In November 1990, the Confederation of British Industry threw its support behind alternative dispute resolution as an effective way of resolving business disputes, both domestically and internationally. (Financial Times, 12 November 1990). Additionally, the Law Society in a July 1991 report prepared by Henry Brown, called for extensive research into ADR techniques and practices. Finally, the General Council of the Bar, chaired by Rt Hon Lord Justice Beldam, recently came out with a report supporting the extension of ADR techniques within the public court system.

Yet if ADR is to become an accepted alternative to the public court system it must quite obviously gain the respect of the general population. To gain that respect by its actions alone, it would take the private ADR industry years of established success to prove its worth as an acceptable alternative to the public courts.

The process could be allowed to continue as it now does, fighting for acceptance via its proven successes; or the government could shorten the time required for acceptance by backing the ADR process. In order to eliminate the fallacy that ADR and the public courts cannot peacefully co-exist, the government should take steps to ensure the private ADR industry is an accepted and endorsed alternative to the present system.

The steps to be taken might include a Home Office recommendation of ADR for both the public and private system. This recommendation would include the extension of legal aid in certain cases to cover those disputants who wish to take the private path. There can be little justification of restricting aid merely to public court litigants if the government accepts private ADR as an acceptable counterpart to the public courts. If legal aid is not extended, a financial disincentive would be created against the use of the private ADR system. The purpose of legal aid should be to assist the disputants in

resolving their difficulties by providing greater access to a system of justice, be it public or private.

The government, in its recommendation of ADR, should also encourage the extension of public information on the process. This is not to say the government should undertake a massive drive to educate the public on the ADR process, rather, it should merely instruct the public courts to provide prospective litigants with private ADR information if the situation is appropriate. A short pamphlet, which weighed the advantages and disadvantages of both systems, could be provided to disputants when they about to undertake legal proceedings.

The public courts should then also take steps to introduce alternative dispute resolution procedures into the public arena. An increase in the number of options available to disputants who do seek to remain within the public courts could only add to the credibility of the traditional system of dispute resolution.

Finally, in order to erode one of the greatest criticisms of ADR, that is its secretive nature, disputants who use private ADR are recommended, when appropriate, to release the content of the proceedings. As mentioned previously, the majority of private ADR cases do not involve serious legal questions upon which future decisions might be based. Nevertheless, when the disputants are able and willing to release the content of their case, they are recommended to do so. The public courts should then create a classification system and data base for cases resolved in the private sphere, which could provide future precedents for the public courts.

CONCLUSION

The judicial arena has historically been held to be inseparable from governmental legislation and regulation. Because ADR's foundations rest upon a private sector base, there will obviously be cries of judicial mutiny by officials whose livelihood depend upon the existence of the public system.

But when, over the long course of a nation's history, impediments develop which restrict the ability of the citizenry to gain access to, and satisfaction from, the courts of justice, something must give.

Alternative dispute resolution offers a choice, not an echo. Realizing that people are not satisfied merely by the rhetoric of the overcrowded, inefficient, and unsatisfactory public court resolution system, ADR has sought to offer individuals the opportunity to expand the horizons of justice in order to fulfil the wants and needs of the disenfranchised public.

ADR does not seek to initiate an anarchic judicial system, with private organizations offering 'justice for sale.' Rather, ADR seeks merely to provide an effective backup; complementing the current public court system by picking up the slack. For the public courts, the integration of ADR techniques into the fold would provide those litigants wishing to remain within the public sphere, an adequate and effective means of resolving their disputes in a 'multi-door courthouse.'

Alternative dispute resolution should be seen not as a threat, but a challenge. It provides a challenge to the public courts to change their practices and to fill the gap they have left open through years of neglect. The courts can adopt ADR techniques to effectively offer disputants the same quality resolutions which are currently available in the private sector, or they can accept the status quo and continue to offer litigants only the rhetoric of a once great, but now over-costly and time-consuming system.

The choice lies in the government's hands. But the choice seems clear; alternative dispute resolution is an idea which can solve pressing problems in an effective and satisfactory way.

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