Chapter 10

"What's the Problem?": Choosing an Optimal ADR Process for Resolution of Conflict

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It is possible to conceive conflict as not necessarily a wasteful outbreak of incompatibilities, but a normal process by which socially valuable differences register themselves for the enrichment of all concerned. – Mary Parker Follett

Introduction

The phenomenon of (ADR) is changing the nature of our legal and administrative systems. If someone unfamiliar with the acronym asks 'What is ADR?', they are likely to be told that the phrase originally meant *alternative* dispute resolution, but is now better understood as *appropriate* dispute resolution. These semantics are symptomatic of a typical shift in many social movements. Pressure for change begins with *reaction* (to perceived bad things). The emphasis then shifts to *prevention* (of bad things). As more comes to be understood about a given field, proponents gradually also emphasise *promotion* (of good things).

In health, for instance, emphasis has shifted beyond treating sick individuals, through preventing disease, to measuring and promoting wellbeing in individuals and communities. We can trace a similar shift in law. *Alternative* dispute resolution may be more efficient than courts for addressing some matters. It may prevent or reduce interpersonal or intergroup conflict. *Appropriate* dispute resolution should also produce optimal decisions and these, in turn, should make it less likely that new disputes will emerge. Instead of a vicious cycle of poorly resolved disputes, we have a virtuous circle of mutually reinforcing adaptations. To get there requires that we choose the decision-making process most suitable for the situation. That means analysing situations accurately — which in turn means asking the

right questions.[1] A virtuous circle is even more likely if we have a system for analysing all the disputes that occur in a particular context. A systemic approach helps identify patterns, and enables organisational learning.[2]

ADR is used in a wide variety of situations and for many reasons. It can be: a risk management tool to settle an individual dispute without litigation or publicity; a case management tool to reduce the workload of a court or the number of complaints within an organisation or across an industry; or a management tool to gauge what is generating conflict and how to create a conflict resilient organisation. In this chapter, the range of ADR interventions and how to choose between them is explored. The chapter also outlines some examples of a systemic approach to dispute handling.

Historical

All cultures need mechanisms for dealing with disputes. Historically, dispute resolution in many cultures has been decentralised. Designated individuals have helped resolve disputes within the communal settings of families or villages, or the commercial settings of manufacturing and trading.[3] With the development of larger, centralised states, there has been a tendency to centralise dispute resolution.[4]

In jurisdictions operating with the rule of law, and with adequate separation of legislative, executive and judiciary, resolving significant disputes tends to become the domain of courts. The courts in countries governed by some variant of the British legal system have favoured adversarial, rather than inquisitorial, methods for addressing disputes. The advantages of an adversarial system include an official commitment to principles such as impartiality, consistency and equity. The presiding decision-maker is removed from the context where the dispute has occurred. By applying a set of principles with neutrality and independence, a judge should be able to make a decision that resolves the dispute as fairly as possible. But this system has disadvantages.

Most obviously, a centralised court system is resource-intensive. So there are concerns about its *efficiency*. But there are also concerns about the *effectiveness* of decisions made within that system. A decision may seem legally sound and objectively fair, yet the outcome may seem neither practical nor satisfactory to the parties. What makes for consistent legal *decisions* doesn't necessarily produce sustainable *resolutions* in the medium- to longer-term.

1. Early examples in the ADR literature of matching disputes processes include: F Sander, 'Varieties of Dispute Processing' (1976) 70 *FRD* 79 at 132; F Sander and S Goldberg, 'Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure' (1994) 10 *Negotiation Journal* 49; C Menkel-Meadow, 'Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)' (1995) 83 *Georgetown Law Journal* 2663 at 2665.
2. B Mayer, *Beyond Neutrality: Confronting the Crisis in Conflict Resolution*, Jossey-Bass, San Francisco 2004,pp 244–247; C Costantino and C Merchant *Designing Conflict management Systems,* Jossey Bass, San Francisco, 1996, p 33.
3. See, for example, J Baker, *An Introduction to English Legal History,* 4th ed, LexisNexis, Sydney, 2002, Ch 1.
4. This is, of course, a vast, complex and often controversial topic. It may be more accurate to see the basis for modern states in the development of 'military-coinage-slave complexes' during the Axial Age. See D Graeber, *Debt: the first 5000 years,* Melville House, New York, 2011.

Two primary problematic areas here concern '*content*' and '*process*'. The *content* problem concerns how information is used. In an adversarial process, information is not used primarily to seek an optimal outcome for all parties. Each side uses information to construct their own persuasive argument while seeking to demolish the argument of the other side. The rules of the game can mean that relevant information is excluded from the decision-making process.

A related *process* problem is that adversarial debate encourages 'position-bargaining' rather than strategic negotiation. Problems are generally best resolved by distinguishing *what* one is trying to achieve from *how*: various possible courses of action that might achieve the desired result. Yet an adversarial process encourages each party to argue for *one* particular course of action. Yet *neither* party's one proposed course of action may be optimal. Furthermore, the adversarial approach may support a decision about the dispute, but generate interpersonal conflict in the process, and by ceding decision-making power to a judge, the parties lose control over their own issues.[5]

Widening the Range of Options

Over the last two decades there has been a move to address some of these *efficiency* and *effectiveness* concerns by widening the range of processes available for dispute resolution. In Australia, this movement has manifested in a number of places simultaneously. The judicial system itself has introduced alternative processes in an attempt to reduce costs and the delays caused by congested court lists. There has also been a proliferation of agencies that offer citizens further pathways to justice. These include complaint departments, agencies of accountability, such as ombudsmen's offices, commissions of equal opportunity, human rights and the like. These agencies are necessarily concerned with procedural justice, and thus *appropriate dispute resolution*. Their proliferation has, in turn, led to more systematic thinking about how to match processes and problems.

The National Alternative Dispute Resolution Advisory Council (NADRAC) was established to advise the federal Attorney-General about the various approaches to ADR. One of their early tasks was to try to simplify the national conversation on this topic by promoting consistent definitions. NADRAC makes a distinction between *determinative, advisory* and *facilitative* processes.[6] This is essentially a distinction between an expert who:

- makes a decision (or *determination*); or
- provides *advice* on process options or prospects of technical arguments and thereby assists others to make a decision; or
- *facilitates* a process and thereby assists others to make a decision.[7]

5. On the dispute–conflict distinction as it applies in ADR, see D Moore, *David Williamson's Jack Manning Trilogy: A Study Guide*, Currency Press, Sydney, 2003, pp 18–19. N Christie, 'Conflicts as Property' (1977) 17 (1) *British Journal of Criminology* 1, is probably the single most cited statement of the case that social conflicts have been monopolised by the professionals who handle them.
6. National Alternative Dispute Resolution Advisory Council, *Alternative Dispute Resolution Definitions,* Canberra, 1997, <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/r106bib>.
7. National Alternative Dispute Resolution Advisory Council, *A Framework for ADR Standards*, Canberra, April 2001, <http://www.nadrac.gov.au/publications/PublicationsByDate/Documents/AppendixA.pdf>.

Determination

In *determinative* processes, the parties provide information to a neutral third party who makes a determination based on the facts. The courts are exemplars of determinative process. Some of the alternatives to the court are also determinative processes — such as arbitration and expert determination.

Arbitration gives disputing parties access to the independent rigour that a court would apply to a dispute, but with the advantage that the determining expert shares cultural, commercial or contextual expertise. Arbitration may involve multiple arbitrators, with different areas of subject matter expertise.

Example: Two trading partners who live in different jurisdictions, and who are negotiating an international agreement, may not wish to be subject to the court of either country. They may also feel more confident with a panel that understands their local context and offers a balance of representation from each jurisdiction.

Expert determination tends to be focused on specific questions or points of law, or on other expertise that does not require extensive testing of evidence. This allows the determination to be based primarily on an interpretation of the expert material presented.

Example: There is a dispute about who should pay when a mining company requests the upgrade of a power facility: the company, or the entire local community. All parties agree that they will benefit from the upgrade and that National Electricity Rules apply on the question of costs. But the parties don't agree on how the Rules apply to this case. This is a question of how to interpret the Rules and of market design, not a question of evidence.

Advice

There is also a need for expert processes that provide advice rather than a binding determination. The advice may be about what *process* to adopt but is frequently about *content*: the subject matter of the dispute. A subject matter expert expresses a view that is not binding on the parties. 'Non-binding expert evaluation' can be used to break a deadlock on a specific issue, during the course of a broader negotiation. It can also be used to influence decision-making. The evaluator may control the overall process, or just be one input into a larger process:

Example: Two siblings are contesting a parent's Will. One option explored is for a 50% split. For tax reasons they prefer not to liquidate the estate. One asset is a house and the other a small commercial shop, so there is deadlock about how a 50/50 split can be achieved in reality. A property valuer is asked to provide informal advice about the relative value of each property and its income potential and so help determine whether the split, without liquidation of assets is achievable. The non-binding evaluation can assist the parties to explore more fully the principle and save the costs of a more formal valuation process until it is clear whether a deal along those lines is practicable.

Example: Litigation commenced by a regulatory arm of government seeking a civil penalty against a corporation for misleading conduct. A retired judge, engaged by the parties jointly, may provide a non-binding view about the prospects of the claim. This can help the parties decide whether to pursue a negotiated settlement prior to trial, before all the expenses of a hearing are incurred. The approach provides greater certainty and minimises costs and delay.

Facilitation

The third ADR process mode is *facilitative*. A basic definition of facilitation is acting in a way that makes easier the tasks of others. In dispute resolution, facilitative processes are those in which the third party is an expert in *process*. The role of the third party is to assist communication and provide the parties with a regular 'reality test'. In commercial and most other dispute-type contexts, the most common type of facilitated dispute resolution process is mediation.[8]

Mediation Options

As the use of ADR processes has increased, so has the range of ADR process options. There are also more subtle variations within each process category. This is reflected in the number of mediation options available and has resulted in an ongoing dialogue about how to classify mediator orientation in a way that provides for a more meaningful selection of process and practitioner.[9]

Mediation forms or types may be classified as follows:

- problem-solving;
- transformative; or
- expert mediation.[10]

Each has as its core the same standard mediation process. However, the process may be applied so as to emphasise different focuses. Problem-solving mediation addresses a *specific*, tangible *problem* and seeks elegant options to resolve that problem. Transformative mediation emphasises transforming the *general relationship* between the parties, rather than focusing on the problem at hand.[11]

> An example of a problem-solving focus: *A high-profile Sydney restaurant is owned 50/50 by two partners with equal voting power. They are given the option of a free fit out to open a second restaurant in a premier location in Melbourne. One partner wants to proceed and the other fears that an expansion will put strain on the existing business and says no. The decision is pivotal in their strategy and the vote is deadlocked. The mediation will examine the elements of this issue and resolve it. It may also assist the parties in exploring mechanisms for similar decisions in the future.*
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> An example of a transformative focus: *The CEO of a company that is in the middle of a merger has received five complaints by company HR professionals about the Head of HR, who has been promoted after moving from a small subsidiary. The complaints all relate to her style and their inability to trust her. But they all have similar complaints about each other. The CEO calls in a mediator hoping to 'make the HR department more effective'. This is not about solving any one*

8. NADRAC, above n 6.
9. L Riskin, 'Decision-making in Mediation: The New Old Grid and the New New Grid System' (2003) 79(1) *Notre Dame Law Review* 1.
10. This chapter does not address the substantive or ethical value of evaluation by a mediator but merely notes its existence. See Riskin, above n 9, at 6–7.
11. J Folger and R Baruch Bush, 'Transformative Mediation and Third-Party Intervention: Ten Hallmarks of a Transformative Approach to Practice' (1996) 13(4) *Mediation Quarterly* 263.

specific problem, but about working on the general relationship issues, and improving the culture of communication.

Choosing the Appropriate ADR Process/Person

The selection of the most appropriate ADR process often also requires careful consideration of who is the appropriate person to conduct the process as that person's approach and skill set will be influential, perhaps even outcome-determinative, in relation to the process that is actually employed.

The skill set required for an expert making a determination (or providing an evaluation) is often simple to assess in that it is usually determined by the subject matter of the dispute. The outstanding question in determination often becomes how many experts and what is the mechanism for selecting them fairly.

In non-binding expert evaluation the pivotal question is often whether the expert undertaking the evaluation controls the process, or whether they are just brought into an existing process to assist the parties.[12]

Selection of the person is more difficult for facilitative processes. This is because the choice requires a consideration of what *process orientation* is preferable rather than a consideration of substantive knowledge.[13] Process understanding comes from experience of multiple processes in a variety of settings. This requires either specific consideration from someone skilled in process, or a system for making the selection.

Irrespective of how the decision on facilitator orientation is made, or by whom, it is useful to have a set of questions to consider when making the selection. Below are the types of questions that may assist.

1. <u>What is the nature of the relationship between the parties?</u>

1.1. Has the relationship ended?

In the event that the relationship between disputants has ended, the matter may be in litigation, or may be pre-litigation. It is worth thinking about what kind of expertise might help with 'cleaning up the mess'. Notwithstanding that facilitation is chosen so the parties themselves are responsible for making decisions, the lens through which the facilitator views the situation, can raise questions that might be useful in framing the approach. Legal, accountancy, or other technical expertise might be helpful.[14] The decision must also be made as to the extent to which the facilitator uses their skills as an expert to assist the parties. The level of influence increases where the facilitator is using an expert-type facilitation.[15]

Example: In a wholefood business with a turnover of $80 million, the relationship between the two owners has ended after a failed love affair and other interpersonal issues. The owners no longer talk or wish to work together, but the company is still turning over well and the customer base is

12. See the two examples under 'Advisory Process' above.
13. Riskin, above n 9.
14. B Mayer, *Beyond Neutrality: Confronting the Crisis in Conflict Resolution,* Jossey-Bass, San Francisco, 2004, p 265. It articulates lessons from different types of advocates, which is also useful to consider in selecting an evaluator.
15. Ibid, at 10.

strong. The owners are willing to mediate to split their assets. It would be possible to have a facilitator with no content expertise and advisers to the parties on the substantive business questions. It is also possible to have a facilitator who is an expert mediator with a good accountancy/insolvency understanding and who is able assist in the discussions about the business operation and options for terminating the partnership.

Example: A property development organisation has allegedly contravened its disclosure obligations under the ASX Listing Rules, resulting in a multi–million-dollar class action suit by shareholders. The matter is in litigation and may set precedents — which means that anyone could win or lose. It is too complex to resolve without a process manager. No one wants to be seen to engage a facilitator but everyone would like the certainty that settlement brings. Since the relationship has ended, there is no need to rebuild trust between people. Someone who could broker a deal in a way that could be circumventing deadlocks over who pays and who owns the process would be useful. What is needed is a proactive, astute dealmaker.

1.2. Is the relationship ongoing?

When the relationship is ongoing, the choice of facilitator is equally important. Is the facilitator there to:

- mediate issues from the past;
- mediate to enhance working relations in the present; or
- build capacity for the future.

Again, it is important to be clear on the goal of the process and the scope of the role of the facilitator:

Example: A bullying complaint was filed by a female office manager against the most senior man in the office. At the time of the complaint she was 20 weeks pregnant, about to take leave for a year and then return to a restructured workplace. In this scenario, the job of the facilitator is as a mediator. It is to resolve the issues of the past, and see whether the relationship between the pair can be resolved and trust rebuilt. This includes the trust between the parties, the complainant and the organisation and the manager and the organisation.

Example: In a land rights negotiation between two traditional owner groups, both of which are just beginning a series of negotiations, it may be useful to have a facilitator to assist coaching to build the groups' decision-making capacity. The capacity may need to be built within the process itself[16] *or external to the process supported by a series of parallel processes: expert advice, capacity building or dialogue* within *one or both groups.*

Additional questions take account of the parties' expectations. In addition to subject matter expertise and process orientation, other factors that are relevant include expectations set by culture.

2. <u>What cultural norms shaped the parties' expectations?</u>

Culture can be defined pragmatically as 'how we do things around here'. It can influence relations among people from the same nation, profession or organisation. The culture of the disputants will influence their expectations of the facilitator. There are a number of models that can be used to think about the types of cultural questions to ask. An example is the set of cultural dimensions, identified by Geert Hofstede and colleagues as a

16. R Schwarz, *The Skilled Facilitator*, Jossey-Bass, San Francisco, 1994.

framework for analysing the cultural paradigms of any particular nation group.[17] Like any such set of analytical categories, this provides a way of looking at a situation — and has its detractors. It must also be adapted with extreme care when being used in contexts outside the comparison of national groups. Another useful framework identifies six apparently universal 'foundations of morality'. They can help articulate value differences that are generating or maintaining disputes.[18]

Below are some examples of factors that are culturally shaped and can be considered in selecting the appropriate facilitator. They include norms about status and about decision-making.

2.1. Status

How important is status to the clients and their advisers? A process facilitated by somebody who does not conform to the parties' expectations of status will be unlikely to succeed.

Example: For a workplace issue in a rank-based organisation like the armed services, some personnel may not appreciate or respect a mediator who is of a lower rank/status than the parties in dispute. The problem can be exacerbated if the mediator's rank is lower than that of the senior officer in an interpersonal dispute between that officer and a more junior officer.

2.2. Decision-making norms

Facilitation often assumes that there is equal commitment by the parties to decision-making being left to the parties to proceed in a participative manner. This is not always the case.

Example: An Australian facilitator was working with a group of customs officials from a non-democratic country on making a decision on operational issues within the department that have deadlocked. The meeting has gone well, and it is time to decide on one of two options for a project. The facilitator calls for a vote. There is dead silence — followed by more silence. The facilitator takes the senior official aside for a break to ask what had gone wrong. The official seems amazed. First, he tells the facilitator that 'you, as the leader, need to make decisions, not defer'. Second, he says that 'if you must show weakness and defer, do so to the most senior person in the room; do not insult us by asking everyone!'

The cultural decision-making norms assumed by the facilitator in this example were incorrect and undermined the process.

2.3. What is the communication style of each party?

In general terms certain cultures and individuals favour direct and detailed communication. Legal firms and armed services are good examples. Large community groups working on community issues might prefer a less formal, more discursive type approach.

Example: A team of Western mediators was working internationally, addressing a dispute over land access. The parties were talking over each other with raised voices. One of the mediators called for order, asking for people to lower their voices and talk one at a time, in a regular tone. There was silence. Finally one of the leaders pulled the mediator aside and explained that their raised voices signalled passion and not disrespect. He expressed his concern that to talk one at a time, in a normal tone, could signal a lack of appreciation for the seriousness of the matter and would be

17. G Hofstede, G J Hofstede and M Minkov, *Cultures and Organizations: Software of the Mind*, 3rd ed, McGraw-Hill, New York, 2010. This has been used as a framework in the cross-cultural training of international mediators by International Mediation Institute which is seeking to set International standards for mediation, <http://imimediation.org/about-imi>.
18. J Haidt, *The Righteous Mind: Why good people are divided by religion and politics*, Pantheon, New York, 2012.

both uncomfortable for all in the group and inappropriate. The mediators put this contention to the other group for their view, in private session. They agreed to have it discussed in joint session. The full group then discussed the communication request made by the mediator and took a vote on the mode of interaction — and continued the meeting with raised voices and gesticulation.

In this case a facilitator who operated in a formal and directive orientation may have escalated the situation. This demonstrates the importance of a choice of facilitator who is either 'in sync' with the style of the group, or has the skills to adapt to the style of the group.

A Systematic Approach to Process Selection

The above examples of choosing the right process and particularly the right person in a facilitation context suggest the value of a detailed, nuanced approach. Successful triage requires a specific understanding of the type of processes involved. Process knowledge comes from experience of multiple processes in a variety of settings.

One of the challenges with an ad hoc approach to dispute resolution is that the person charged with choosing a process is often the client, a party to the dispute, or their adviser. Typically, these people will have an in-depth understanding of the substance of the dispute, but not a detailed understanding of all the processes available. People in disputes typically find themselves in need of professional assistance only rarely, perhaps only once. Even those who deal repeatedly with disputes, such as lawyers and insurers, may have frequent exposure to many iterations of the same process, rather than to different processes. In an ad hoc intervention, this is where a non-binding evaluation of the dispute, by an expert in process, is useful. That can provide a recommendation on which process(es) to use and the suggestions on the experts/facilitators who may be appropriate.

A systemic approach is also useful. This tends to be adopted where there have been repeated disputes, where there is perceived merit in having it confined to an industry as a result of a government initiative, or a convincing business case that such an approach would save time and resources. There are a multitude of jurisdictions that offer dispute systems for resolving wholesale (business-to-business) or consumer complaints.[19] There has also been a move in places such as the United States to managing equal opportunity issues and other workplace disputes in this way.[20]

Integrated dispute systems can provide a consistent mechanism for choosing processes and people. They may also provide feedback for improvement. For instance, the wholesale national electricity market and wholesale gas market in Australia both have industry dispute

19. See, for example. Office of the Franchising Mediation Advisor which assists franchisees and franchisors to resolve disputes in accordance with the Franchising Code of Conduct prescribed under the Competition and Consumer Act 2010 (Cth) and the Telecommunication Industry Ombudsman which resolves telecommunications and internet complaints under the Telecommunications (Consumer Protection and Service Standards) Act 1999 (Cth).
20. Mayer, above n 2, at 72. This has been less prevalent in Australia due to the centralised nature of our industrial Relations system, which has provided mechanisms for state dispute resolution. A good background can be found in: B Wolski 'The Model Dispute Resolution Procedure for Australian Workplace Agreements: A Dispute Systems Design Perspective' (1998) 10 *Bond Law Review* 7.

systems.[21] These are legislatively based.[22] Disputes in a wholesale market are infrequent, but when they do occur they tend to be technical in nature, involve multiple parties and cost millions of dollars. The dispute system is fully integrated and uses the jurisdiction of the court only on appeals regarding questions of law.[23]

A dispute resolution adviser, an independent process expert, runs the system. Selection of the experts is made by the adviser who has power under the rules to do so. A pool of resolvers is maintained by the adviser. This allows for a consideration of both technical skills and cultural fit to be made in determining the selection of the pool, narrowing down the selection process in any given dispute.

Most disputes in these markets are resolved through determinative processes — either expert determination or arbitral-type proceedings. The case management arrangements between the parties are done by a non-binding advisory process facilitated by the adviser.

The aim of this system is not solely to resolve individual disputes, but also to improve the process itself and input into market design issues. It is also to use data from disputes to identify patterns, recommend improvements and thereby prevent future disputes:

Example: Over a period of three years in the gas market it became clear that most disputes involved an allegation of an unexpected scheduling outcome (USO) on the part of the system operator. Analysis showed that proving the USO was the difficult and expensive part of the dispute process. The analysis enabled the system to be refined to distinguish between matters where the USO was agreed to or in dispute. Those in dispute went to expert determination. When the system operator had agreed there was a USO, the matter was triaged into an 'administrative' process whereby submissions were made in writing using a standardised format and a technical expert simply reviewed the matter to avoid error or fraud.

The Potential

Matching of the process to the problem finetunes the mechanisms for resolving problems. The above examples show that *dispute metrics* can be used to improve risk management.

A feedback loop from disputes can create conflict-resilient organisations. At its core, conflict prevention means taking the skills from the facilitative resolution process and having them available earlier in the dispute cycle. This involves consciously building skills in all levels of communication, from feedback through strategic negotiation to group level decision-making.[24]

ADR is used in a wide variety of situations and for a range of reasons. It can be used for risk management by settling an individual dispute without the risks of litigation or publicity. It can be used for case management by reducing the load in a court or the number

21. National Electricity Rules 2012 Ch 8; National Gas Rules 2012 Pt 15C.
22. National Electricity (South Australia) Act 1996 *(SA)* Div 2A; National Gas (South Australia) Act 2008 (SA) Pt 5A.
23. Ibid.
24. States Services Authority, *Developing Conflict Resilient Workplaces: A Guide for Victorian Public Sector Leaders,* Melbourne, 2010, <http://www.ssa.vic.gov.au/images/stories/product_files/293_Resilient_workplaces_guide.pdf>.

of organisational or industry complaints. It can also be used by management to gauge where conflicts exist and to respond to or prevent unconstructive interactions and create conflict-resilient organisations. Law is a profession at an exciting stage of development as lawyers can use ADR to help meet the demands of individuals and organisations in an interconnected planet.