ALTERNATIVE DISPUTE RESOLUTION

Encyclopedia of Legal History

KATHERINE V.W. STONE

Research Paper No. 04-30

Alternative Dispute Resolution

Encyclopedia of Legal History

Katherine V.W. Stone
Professor of Law, UCLA School of Law

Alternative dispute resolution or "ADR" refers to a wide range of dispute resolution mechanisms or techniques that share one essential characteristic: They all differ from the dispute mechanism of litigation in a federal or a state court. In the past two decades, ADR has become a major aspect of legal practice in the United States. Parties and their lawyers increasingly seek means to resolve their differences without resorting to litigation, and thus they increasingly turn to alternative mechanisms to attempt to resolve differences. As a result, arbitration, mediation, and other alternative dispute resolution mechanisms are commonly utilized today in such disparate fields as securities regulation, commercial law, employment law, domestic relations, labor law, medical malpractice, construction law, international private law, and many other areas.

Description of Alternative Dispute Resolution Mechanisms

There are many types of ADR mechanisms in use today. Each has distinctive values and is useful in certain types of disputes. Some of the most common ADR mechanisms can be described as follows:

• Arbitration is a system whereby parties agree to submit their dispute to a third party, who holds an evidentiary hearing and issues a final and binding decision. Parties select the arbitrator and design the hearing procedures themselves. There are many types of arbitration systems because parties can design them however they choose. Some procedures are informal in which parties have an opportunity to present any evidence they wish. Others apply rules of evidence, permit motion practice, and include other judicial procedures. Some permit discovery and some do not. Some arbitrators are a single decision-maker, while some are a panel of three or even five. Decisions of an arbitrator can only be appealed to a court on narrow grounds, such as fraud or misconduct by the arbitrator. Errors of fact or law by an arbitrator cannot be appealed.

• Mediation is a process by which parties utilize a third party, known as a mediator, to help them resolve a dispute. Some mediators meet with parties together and attempt to get them to agree to a settlement. Some mediators meet with the parties separately and ferry information back and forth in an effort to achieve a settlement. The goal of mediation is for the parties to reach a voluntary settlement which is then reduced to writing and becomes an enforceable contract.

• Conciliation is a process by which as third party attempts to induce parties to resolve a dispute by improving communications and providing technical assistance. It is generally less formal than mediation.

• Fact-Finding is a process by which a neutral expert, or group of experts, is asked to resolve a

factual dispute. The fact-finder relies upon information provided by the parties as well as information he collects himself. He analyzes the facts bearing on the dispute, and issues a fact-finding report. The report is non-binding and used as an aid to settlement negotiations. Fact-finding is often ordered in disputes that arise in the public sector.

• Mini-trial is a voluntary procedure in which parties engage in a truncated, non-binding trial before a neutral they select to be their judge. The attorneys for each side present documentary evidence and summarize the testimony they would present at trial. The mini-trial is usually used by corporate defendants to give executives an opportunity to assess the strength of their own case and that of their opponent. The goal of a mini-trial is to induce the parties to settle their dispute.

• Summary Jury Trials are mini-trials in which parties present a summary of their evidence to a jury drawn from the regular jury pool. A judge presides and charges the jury with the relevant law and asks the jury to answer specific questions about liability and damages. Summary jury trials are ordered by a court to encourage the parties to settle their dispute with a full-blown civil trial.

• Court-ordered arbitration is a form of dispute resolution in which parties are required to present their cases to a neutral, court-appointed arbitrator before they can proceed to trial. It is used in many states and federal district courts for civil cases. In court-ordered arbitration, the arbitrator hears the evidence and issues a decision, and either side may appeal for a trial de novo. Some states impose fee-shifting so that a party who appeals an arbitration award to a civil trial and fails to better his position at trial must pay a portion of the other side's costs.

• Ombudsman is an individual hired by an organization to attempt to resolve disputes of staff, clients or other constituents. Sometimes the ombudsman brings the parties to a dispute together for a mediation session; sometimes the ombudsman brings complaints to the attention of high level officials. The ombudsman has authority to investigate complaints and talk to all relevant parties.

• Med-Arb is a combination of mediation and arbitration in which a third party neutral first attempts to achieve a mediated settlement of a dispute. If mediation fails, the same neutral then becomes an arbitrator conducts a hearing and renders a final decision.

• Small Claims Courts are public tribunals that hold trials, but with informal procedures in which parties generally represent themselves. They were established in many states in the early 20th century in response to concerns by legal reformers that the civil justice system, with its hefty fees, long delays, and technical procedures, did not serve the poor. By the 1990s it was found that more than twenty-five per cent of all civil cases in state courts were filed in small claims courts.

• Rent-a-Judge is a procedure whereby parties agree to refer a pending lawsuit to a neutral party, often a retired judge, to try their case. Parties do this to avoid long delays awaiting trial. The

trial replicates a civil justice trial and the verdict in the case can be appealed through the regular appellate channels. At present, only a few states authorize this procedure.

As the list demonstrates, some ADR mechanisms operate within the current litigation system and are public tribunals that have added non-judge-centered means to resolve what is otherwise an ordinary litigation. Others, such as arbitration, involve a completely privatized form of dispute resolution that takes parties out of judicial purview altogether. Indeed, alternative dispute resolution processes can be seen as existing along a continuium according to how far they move parties away from the legal and judicial system into a world of privatized justice.

Alternatively, one can distinguish the various ADR mechanisms according to the degree of formality they employ in their procedures. Some utilize formal rules of evidence, discovery, motion practice, and the like, while others entirely dispense with procedural formality and encourage participants to simply "tell their stories." Similarly, some involve decision-makers who are constrained by legalistic notions of precedent and stare decisis, while others permit decisions simply on the facts and equities of each case.

One can also distinguish ADR mechanisms on the basis of whether they culminate in a consensual resolution of a dispute or whether a settlement is imposed. Mediation and other settlement-enhancing processes result, if successful, in a consensual settlement of the dispute. On the other hand, arbitration and some of the other processes result in a third party decision, comparable to a judgment by a court.

The History of Alternative Dispute Resolution in the United States

Since colonial times, religious groups, voluntary associations and other small sub-communities have eschewed the formal judicial system and established their own dispute resolution mechanisms to resolve disputes between members. However, the recent popularity and proliferation of alternative dispute resolution is to a large extent a response to widespread dissatisfaction with the civil justice system. Since the 1970s, there has been widespread public talk of a crisis in the civil justice system, a crisis caused by excessive delay, expense, inflexibility, and technicality. These factors, many have claimed, undermine the ability of the legal system to provide justice, and instead offer parties a judicial process that is too little, too late, and at too much expense. For example, it is claimed that court congestion and expansive discovery rules make litigation excessively time-consuming, arduous and expensive for the parties. Some also argue that litigation involves excessive technicality which relegates law to the experts and makes it impossible for ordinary citizens to know their rights or to conduct their affairs. Social progressives argue that the excessive expense of litigation, due to excessive technicality and high lawyer fees, makes the judicial system inaccessible to the poor. They also claim that the legal process dehumanizes participants, terminates human relationships instead of affirming them, and therefore destroys families and undermines sources of community.

High ranking members of the legal profession and corporate bar have also expressed a

critique of the civil justice system in recent decades. They claim there is a "litigation explosion" in which plaintiffs attorneys win excessively large jury verdicts in tort litigation at the expense of the corporate welfare. Chief Justice Warren Burger pointed to rapidly expanding case filings and swelling judicial caseloads that, he contends, were indicia of the excessive litigation that was harming society, distracting individuals from their normal pursuits and diverting businesses from productive activities.[1] Many others expressed the view that ours is an overly litigious society. They point to the vast private resources that are spent on lawyers and vast public resources that are spent on judges, clerks, stenographers, jurors, and the other personnel who staff the burgeoning "lawsuit industry." These critics see ADR as a way for courts to reduce their dockets. Both private and court -mandated ADR take cases away from judges and place them before alternate decision-makers. If ADR expands and we are able to de-legalize many of our disputes, they claim, all of society would be better off.

In 1976, Chief Justice Warren Burger convened the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, known as the Pound Conference[2] to commemorate the 70th anniversary of Roscoe Pound's 1906 speech to the American Bar Association in which Pound made a powerful plea for judicial reform. The Pound conference is considered the founding moment of the modern ADR movement.[3] In his 1976 Keynote Address, Chief Justice Burger discussed the problems with the judicial system, particularly the problems of delay, high costs, and unnecessarily technicality, stating that "Inefficient courts cause delay and expenses, and diminish the value of the judgment. Small litigants, who cannot manipulate the system, are often exploited . . . by the litigant 'with the longest purse.'"[4] The Chief Justice made several suggestions for reform, including giving a greater role to ADR. For minor disputes involving consumer complaints and the like, he suggested that:

> "[W]e could consider the value of a tribunal consisting of three representative citizens, or two nonlawyer citizens and one specially trained lawyer or paralegal, and vest in them final unreviewable authority to decide certain kinds of minor claims. Flexibility and informality should be the keynote in such tribunals and they should be available at a neighborhood or community level and during some evening hours."[5]

---

[1] W. Burger, *Isn't there A Better Way?* ANNUAL REPORT ON THE STATE OF THE JUDICIARY (1982).

[2] The papers from the conference, known as the Pound Conference, are reported at 70 F.R.D. 79 (1976).

[3] See Carrie Menkel-Meadow, *What Will We Do When Adjudication Ends? A Brief Intellectual History of ADR*, 44 UCLA L. REV. 1613 (1997).

[4] Warren E. Burger, Agenda for 2000 A.D. -- A Need for Systemic Anticipation, 70 F.R.D. 83, 92 (1976).

[5] Id. At 93-94.

For larger cases, Chief Justice Burger urged that we "divert litigation to other channels," particularly the channel of arbitration.[6] He also recommended that we devise an expedited system similar to the worker' compensation system to deal with accident and injury claims.[7]

The other speakers at the conference echoed the Chief Justice's call for increased use of alternative dispute resolution mechanisms to resolve legal disputes. Harvard Law Professor Frank E. A. Sander proposed that courts be transformed into "Dispute Resolution Centers, "[8] in which "the grievant would first be channeled through a screening clerk who would then direct him to the process (or sequence of processes) most appropriate to his type of case." The Dispute Resolution Centers would have a separate room for screening, mediation, arbitration, fact finding, malpractice, a civil court, and an ombudsman. Sander contended that his proposal for a "multi-door courthouse" would inject greater flexibility, efficiency and fairness into our legal system.

In the immediate aftermath of the Pound Conference, the American Bar Association Committee on Dispute Resolution recommended that three jurisdictions set up pilot multi-door courthouse programs. These have since been expanded to over 100 state and federal courthouses that now offer multi-door options. In addition, since the 1970s, many state and federal courts began to experiment with court-annexed arbitration systems in which litigants were offered, or in some cases required, to take their claims to an arbitrator before getting a hearing before a judge. The practice has spread rapidly so that, as of 1998, one-quarter of the 94 federal district courts and one-half of all state courts have either mandatory or voluntary arbitration programs as part of their judicial process. In addition, 51 federal district courts have court-annexed mediation, and 48 report that they offer summary jury trials as an ADR option. And 14 federal districts have early neutral evaluation programs. In all, three-quarters of federal district courts now authorize one or more forms of ADR, as compared to a small handful in the late 1970s.

The use of ADR has also grown dramatically in the private domain. The American Arbitration Association had 92,000 arbitration requests filed in 1998, an increase of 21 % over those filed in 1994. The Center for Public Resources, an organization formed by the general counsels of 500 major corporations and law firms to promote the use of alternative dispute resolution, obtained pledges from 4000 corporations to explore ADR options before resorting to litigation. JAMS, a for-profit ADR provider that utilizes primarily retired judges to hear arbitration cases, has offices in 30 cities and handled over 20,000 cases in 1996. The use of industry-specific arbitration systems and international arbitration systems has also expanded dramatically. For smaller disputes, over 350 neighborhood justice centers have been established to offer mediation services for such matters as landlord-tenant, consumer-merchant or neighbor-neighbor disputes. In addition, numerous federal and state agencies now utilize ADR procedures

---

[6] Id. At 94.

[7] Id. At 95.

[8] Frank E. A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111, 131 (1976).

to handle their caseloads. The Equal Employment Opportunity Commission, the U.S. Department of Labor, state human rights departments, and local consumer protection departments are some of the government agencies that have begun to utilize mediation and arbitration to resolve claims. In 1990, Congress enacted the Administrative Dispute Resolution Act, which requires federal agencies to consider ADR in settling disputes.

In the 1980s, the U.S. Supreme Court held that arbitration agreements applied not only to parties' contractual disputes but also to their statutory disputes. In a series of cases, it held that disputes concerning violations of the Sherman Anti-Trust Act,[9] the Racketeer Influenced and Corrupt Organizations Act (RICO),[10] the 1933 and 1934 Securities Acts,[11] and the Age Discrimination in Employment Act[12] were all amenable to arbitration. The result of these decisions is that arbitration clauses are now frequently found in contracts between consumers and corporations and between nonunion workers and their employers. When disputes in these cases arise, parties do not have access to the civil justice system but instead are required to take their cases to private tribunals that have often been designed by the stronger party and imposed on the weaker one.

Along with the proponents of ADR, there are a substantial number of critics who question whether alternative dispute resolution provides better justice than the civil justice system. Critics contend that while the expansion of ADR has given some an opportunity to resolve their disputes in an inexpensive fashion, some uses of ADR that have proven to be a tool to disenfranchise vulnerable parties.[13] Courts occasionally have refused to enforce the results of ADR proceedings that were so one-sided or unfair as to be unconscionable or inconsistent with fundamental due process. The challenge today is to determine which types of procedures are appropriate for different types of disputes and to design informal procedures that retain the essential attributes of due process that our civil justice has developed over the past many hundreds of years.

---

[9] Mitsubishi Motors Corp. V. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).

[10] Shearson/ American Express, Inc. V. McMahon, 482 U.S. 220 (1987).

[11] Shearson/ American Express, supra. (1934) (Securities Exchange Act of 1934); Rodriguez De Quijas v. Shearson/ American Express, Inc, 490 U.S. 477 (1989) (Securities Act of 1933).

[12] Gilmer v. Interstate/ Johnson Lane Corp., 500 U.S. 20 (1991).

[13] See Katherine V.W. Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act,* 77 U. N.Car. L.Rev. 991 (1999) (arguing that courts should impose higher scrutiny before enforcing arbitral awards when they arise from parties in unequal power relationships).