DISPUTE RESOLUTION IN THE 20TH CENTURY

by Professor Jennifer David, Professor of Dispute Resolution, Centre for Dispute Resolution, University of Technology, Sydney

Text of Address to the Institute's Conference in Melbourne 29 May 1995.

The title of my talk is *Dispute Resolution in the 20th Century.* I meant it to be Dispute Resolution in the 21st Century – to look forward rather than back – so I'll look back a little and then forward!

This paper looks briefly at *Dispute Resolution* (DR) – at what it is. This is done even though most people in this room at this conference know what Alternative Dispute Resolution (ADR) and DR is – because the paper argues that DR is *more* than the processes which are encompassed by the term. It is argued it is also an *approach* resolving disputes that has an underlying philosophy.

The paper then looks at DR's development into *Dispute Management* and at the applicability of the whole approach and the processes to business in the 21st Century. Examples in this section are taken from the construction industry because most people at the conference come from, or are familiar with, that industry.

Lastly a some what wider picture is drawn of Dispute Management for business.

WHAT IS DR?

DR in Australia was firstly known as ADR – Alternative Dispute Resolution – because it grew mainly in relation to the legal system, as an alternative to having a case heard before a judge in court. It was an alternative to the litigation. Later DR was defined as alterative to arbitration as well because arbitration, both domestic and international, has tended to become as formal, expensive, lengthy and procedurally complex as litigation. Whilst arbitration was developed initially to overcome the problems with litigation, arbitration unfortunately developed many of the problems it was created to overcome.

Then the words "appropriate", "assisted" and "additional" were suggested as alternatives for the "A" to signify that the processes covered by the acronym "ADR" were not only alternatives to litigation and arbitration but were useable apart from both these systems.

Later still the "A" was dropped entirely.

These linguistic changes signified the widening use of the processes and a shift in the basis for using them.

Lastly, the whole movement is in the process of being renamed *Dispute Management* (DM) (or Conflict Management as it is referred to in the

social sciences) because Dispute Resolution (DR) is now recognised as having too narrow a focus – the *management and prevention* of disputes being recognised as of at least equal importance to their resolution.

This latter renaming has signified the migration of the concepts and processes from the purely legal/arbitral systems into the business and corporate world. [For example, the Department of Industry, Science and Technology (DIST) has funded a major research project at the Centre for Dispute Resolution at the University of Technology, Sydney to research and make recommendations on how to migrate ADR in its widest sense to small and medium-sized enterprises (SMEs) in Australia.]

THE PROCESSES

DR – involves processes that are usually *less formal* than adjudication or formal arbitration, in which an independent, neutral person *assists* the parties in dispute to agree on a solution that they can live with.

The most well known of the processes is *mediation.* Other processes are case presentation (the mini-trial), expert appraisal (fact-finding) or opinion (early neutral evaluation when used in court programs) and conciliation. There are other processes, these are the most usual ones in Australia. The processes are all *non-binding* unless a contract is entered into between the parties embodying the agreed terms of settlement. Usually the processes are entered into *voluntarily* – though increasingly there is a contractual obligation to undertake the processes and legislation is gradually expanding the requirement to mediate before a tribunal or court will hear a dispute.

In each of these processes the independent person is there to provide assistance and facilitate the parties sorting out their *own* solution to their dispute. A commercial (not a legal) solution is usually sought. The independent person does not impose a decision on the parties and usually will *not* give advice on what the parties *should* agree to, particularly where the independent person is appointed on an ongoing basis for more than one dispute.

The processes are being used increasingly within the legal system and outside it – for example mediation is provided for under the recent NSW Retail Tenancies and Farm Debt legislation.

So theses are the most usual *processes* of DR. There are an *infinite variety* of processes. The challenge is to craft the most appropriate process for each individual dispute and for the parties to it.

THE APPROACH

Another fundamental part of DR is the *co-operative approach* which underlies it. In the cooperative approach the aim is to find a solution all parties to the dispute can live with – that as far as possible meets the needs of each party rather than one side wining and other side losing as in litigation and formal arbitration.

Too often compromise (or settling for $^1/_2$ each) is not the *best* solution possible, other solutions that better meet the needs of both parties can be crafted.

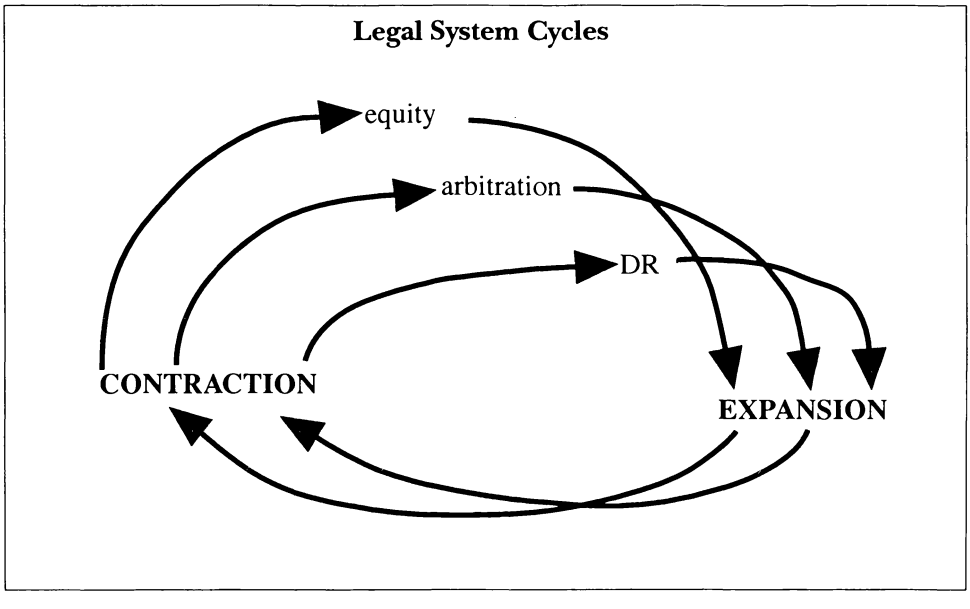
Without the co-operation approach, the process can too easily revert to a confrontational, adversarial type of DR. The processes themselves cannot change *how* parties resolve disputes. There needs to be an *attitude* shift and the co-operative *approach*, if supported and maintained, will achieve this.

THE PHILOSOPHY

The third part of DR is the *philosophy* which underlies it. This is the philosophy of *empowering* the parties to resolve their *own* dispute, not solving it for them by making and imposing a decision *for* or on them.

DISPUTE MANAGEMENT

As define, DR fits into the *cycles* that occur in the *legal system* of which arbitration is also an example (see below) . But DR also is much under/broader than that. *Dispute Management* (DM), the newest development, covers the prevention of disputes, their management and resolution.



Effective and efficient DM can increase productivity for business and will result in less time spent in disputing by all in the business, from senior management to front line staff. Effective DM is even more necessary now that businesses are often involved in long term joint ventures, in networking groups and in so called "strategic alliance partnering" relationships. Modern businesses increasingly collaborate to remain

competitive. Also rapid technological and organisational change is occurring at the same time as globalisation of our business markets. All these changes necessitate more collaborative relationships which need effective management and resolution of disputes to sustain them. Businesses are now more interdependent and this requires disputes to be resolved rapidly in ways that maintain profitability, that enable businesses to keep progressing and in ways that enable long term harmonious business relationships to be maintained.

DM needs *early* resolution close to the origin of the dispute. The longer a dispute lasts the more it expands in the *number of people* involved, *time lost* through attending to the dispute and in the *issues* involved.

Two examples of *dispute management* in the construction industry are Dispute Review Boards and Dispute Resolution Advisers. There are many others, for example Issue Resolution, Periodic Contract Review and Partnering to name a few. I have not used partnering as an example as that processes have been promoted widely by the Master Builders Association over the last few years.

DISPUTE REVIEW BOARDS[1].

Dispute Review Boards (DRB) are independent panels which give non-binding recommendations on how disputes can be best resolved. Usually the panels comprise three experts, one nominated by each party and a Chairman nominated by the other two panellists. (For large, complex construction projects panels of five or even seven experts have been appointed For small projects a single independent expert could be given the same role).

The DRB is appointed after the construction contract is signed, which is usually provided for in the construction contract itself. A further agreement is then entered into between the members of the DRB and the parties to the construction contract setting out the terms of reference, the fees and terms of appointment.

The DRB members pay regular visits to the site and are kept informed of progress through regular progress reports. The DRB members become very knowledgable about the project and can actually observe the problems on site as they arise. This can enable the DRB members to give quicker responses from an intimate knowledge of the project.

DRBs operate on two (2) levels – an informal and a formal level. The *formal* level is activated when a dispute is referred to the DRB by one of the parties. Then the DRB holds a "hearing" which is less formal than either adjudication or arbitration. Both parties are present throughout – no recordings or minutes of the discussions are taken. Each party presents their position paper (which has been delivered to the DRB members and exchanged prior to the "hearing"), the DRB can raise questions and may ask each party to respond. The DRB will then give written recommendation as quickly as possible (even within a day or two). Their recommendations can be based on commercial considerations and on merit (rather than only on legal considerations).

The recommendations are *non-binding* although often parties accept them and adopt them as settlement terms.

The *informal* level of DRBs occurs where matters of concern and potential dispute are brought to the DRB's attention during their regular visits to the site. The DRB here can act akin to a mediator and enable grievances to be explored and informal discussions held. Apparently these informal discussions are often successful in finding a solution to the problem. The DRB can even *flag* aspects of the work which *may* turn into disputes.

Peter Chapman in his paper states[2] that the use of DRBs is increasing and by 1994, 67 DRB projects had been completed, 93 DRB projects were in progress and 193 DRB projects were in the planning stage. He stated "over US$22 billion of work has been or is being procured under contracts utilising DRBs" and "the number of disputes which have gone to arbitration or the courts is very low". In a recent survey in the USA, "out of 78 disputes for which DRB recommendations were given, not one dispute was taken to arbitration or litigation"[3].

This very positive response obviously hinges on the panel members being experts who have the confidence and trust of the parties to the construction site. Also, a proactive communication environment must be established early and actively supported over the project's life to assist the workings and effect of the panel.

The existence of the DRB panel is also said to have a dampening effect on any litigious tendencies of the parties who usually try to resolve disputes *before* referring them to the panel. Also the panel facilitates decisions near to the coal face where the best, most detailed information exists.

In the Channel Tunnel project the recommendations of the DRB were binding unless and until overturned by binding arbitration requested by either party. So one party on their own could not overturn the recommendation, only the arbitrator could do so. Apparently this tended to create a more *formal* hearing with lawyers present and an adversarial atmosphere was created[4].

DISPUTE RESOLUTION ADVISER[5]

This procedure has been used and developed in Hong Kong with great success. The model has also been incorporated into the Electricity Industry Code in Australia and is now being used by the Hong Kong government for major construction projects.

The Dispute Resolution Adviser (DRA) combines a number of processes and is the *most flexible* process for DM that has been implemented and found very effective.

The DRA is provided for in the construction contract and is appointed within fourteen (14) days of the contract being signed. The DRA needs to have general construction knowledge and good dispute resolution skills. He or she should be neutral and independent and is appointed for the life of the project.

After appointment, the DRA holds a series of meetings with all parties to encourage a cooperative approach, and good, clear communication on the project. In fact these meetings are similar to an initial partnering meeting even to signing a non-contractual Charter enshrining cooperative principles.

The DRA visits the site monthly, facilitating (or mediating) any disagreements or disputes and can be proactive in identifying potential problems and facilitating planning to overcome them.

Under the contract the parties have twenty eight (28) days to challenge any decisions, certificate or evaluation made under the contract. If not challenged the decision, certificate, or evaluation, become final and binding. If a challenge is made the DRA steps back and leaves site representatives to negotiate for twenty-eight (28) days. If no agreement is reached then the challenging party gives formal written notice of dispute or the right to dispute is deemed waived.

After the formal written notice, the DRA and site representatives have a further fourteen (14) days to attempt to resolve the dispute.

The DRA can choose *any* DR technique to assist in resolving the dispute. If no resolution is achieved, the DRA makes a formal report, containing an analysis of the dispute, to the senior management of each party. The report is not admissible in subsequent arbitration or litigation (except as to costs *after* any arbitration award is published).

The senior managers have fourteen (14) days in which to resolve the dispute or the DRA convenes a short form arbitration or the parties accept the DRA's recommendation of another process. The short form arbitration is to take place within twenty eight (28) days. The arbitrator has seven (7) days to make a written award with reasons. The award is final and binding.

For *quantum* issues, a final offer arbitration processes is laid down as the process to be used. The arbitrator chooses the offer he considers most reasonable in the circumstances.

CONCLUSIONS

For a DM process to work most effectively the parties to the construction contract *must* be committed to co-operative working relationships. Effective and proactive communication channels must be established as early as possible even before the contract is entered into and actively supported during the project. A climate of trust is then created. All parties must be kept informed of all developments in an environment which is supportive or any process will become a watered down version of an adversarial approach which, whilst better than major arbitration or litigation *after* the project is finished, does not provide the remarkable benefits DM is capable of providing.

DM procedures or systems are most effective if developed for individual projects because if the parties are involved in the *development* of the process and approach they are more committed to it because they helped create it.

Lastly it is stressed or emphasised that DM is relevant for business for

more than the prevention and management of disputes on a construction site. DM is also relevant to employee grievance handling, to enterprise bargaining and to resolving disputes *within* a business between staff, managers, divisions and subsidiary businesses. Already businesses are developing DM systems to implement similar procedures to DRB's and DRA's *within* companies.

Also DM is relevant for customer complaints handling, to industry self regulation (eg. the Electricity Industry Code and Franchising Industry Code to name two using DM), to industrial relations, to development applications and to international joint ventures. In fact, DM is applicable to prevent, manage and resolve disputes in any business relationship.

I commend DM to you as *the* way in the 21st Century to prevent, manage and resolve disputes.

FOOTNOTES

1 This overview is based on an unpublished paper entitled "The Operation of Dispute Review Boards" by Peter Chapman delivered at a seminar on Dispute Review Boards held at the Hong Kong International .Arbitration Centre 11 March 1995.
2 Ibid, p4.
3 Ibid.
4 J Lemley "The Dispute Review Board and the Channel Tunnel – A Case Study", an unpublished paper delivered at a seminar on Dispute Review Boards held at the Hong Kong International Arbitration Centre, 11 March, 1995.
5 This overview is based on "Dispute System Design in Hong Kong" by Colin Wall in 1994)1 *Commercial Dispute Resolution Journal*, 3.

INTERNATIONAL NOTES

Singapore and Bahrain have both adopted the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration.

CONFIDENTIALITY IN ARBITRATIONS

The High Court of Australia decision in *Esso Australia Resources & Ors v Plowman & Ors (1995)* 69 ALJR 404 (HC) see *The Arbitrator* Vol 14 No. 2 August 1995 at page 99, has been widely reported in overseas publications. In some instances the decision of the Court has been reported in full. The decision has aroused world wide interest. Whilst in Melbourne Dr Gerold Herrmann, Secretary General of UNCITRAL commented that the subject of confidentiality in international commercial arbitrations was probably the most important and complex issue to be addressed in the foreseeable future.