Hybrid Processes

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Introduction

The following aspects of hybrid processes will be covered in this article.

1. Definition of the term hybrid process.
2. Range of hybrid processes including Independent Expert Appraisal, Early Neutral Evaluation, Fact-finding or Fact-based Mediation, Mini-Trials and Senior Expert Expert Appraisal, Partnering, Med-Arb and Concilio-Arbitration.
3. Comfort Levels when Performing the Role of Conciliator, Mediator or Arbitrator.
4. The Application of Facilitative Skills and Techniques during the Arbitration Phase.
5. Historical Perspective.
6. The Future of Hybrid Processes.

It is relevant at this stage of the development of Alternative Dispute Resolution (ADR), ie alternatives to litigation, to concentrate on experimenting with different ways of dealing with disputes.

The purpose of this article is to delineate a variety of ADR hybrid processes in order to offer disputants and their legal representatives a wide range of alternatives to litigation to choose from and not just mediation or arbitration.

Insufficient follow-up research has been carried out in Australia to determine the extent to which any of the hybrid processes have been applied and what the users of such processes have thought of them.

Definition of the term hybrid process and range of processes.

The term "hybrid process" according to Astor and Chinkin[2] has been used to describe a dispute resolution process developed by combining certain features of the primary processes of ADR ie mediation, conciliation and arbitration.

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2 Hilary Astor & Christine Chinkin. *Dispute Resolution in Australia.* LexisNexis. Butterworths. 2nd edition p 91.

3. Linda R Singer. *Settling Disputes. Conflict Resolution in Business, Families and the Legal System.* Westview Press. 1990 pp 25-27.

Linda Singer[3] refers to the fact that much of the development in the US prior to 1990, has been focused on processes combining some sort of mediation with other techniques. The aim of the other processes is to stimulate parties to settle if mediation fails to produce an agreement. These hybrid processes in the US have been erroneously described as "mediation". They often include the mediator's recommendations for settlement which in effect are a kind of 'non-binding evaluation' of competing claims or even a binding decision if mediation does not settle the dispute which in effect are a kind of non-binding evaluation of competing claims or even a binding decision if mediation does not settle the dispute.

Neutral experts

When referring to neutral experts, there are two processes to be considered:

(a) Independent expert appraisal.
(b) Early neutral evaluation which is in effect a form of independent expert appraisal.

Independent expert appraisal

An independent expert is appointed by the parties in dispute to give them an objective, independent and impartial appraisal of facts or issues in dispute. The disputants decide whether the expert's determination will be final and binding. Alternatively they may just use it as a basis for their ensuing negotiations. One form of independent expert appraisal is early neutral evaluation.

Independent expert appraisal is administered by the Australian Commercial Disputes Centre (ACDC) before proceeding to litigation. ACDC provides a list of appropriately qualified experts.

Early Neutral Evaluation (ENE)[4]

Early neutral evaluation was established in the US District Court in the Northern District of California in 1986 and was extended to the Eastern District. In 1990 a pilot program was set up for the District of Columbia. I am uncertain about the degree to which it has been applied in the United States. It has been defined by McLaren and Sanderson as "…the fashioning of an advisory opinion, by a respected neutral, that the parties can use or reject as they prefer".

Astor & Chinkin[5] observe that like so many other ADR processes, ENE was pioneered in the United States but has been adopted in Australia and the United Kingdom. However, the authors do not indicate whether it has been popular.

4 Richard McLaren and John Sanderson. *Innovative Dispute Resolution. The Alternative.* 1994. Carswell Thomson Professional Publishing. Toronto @ 3.1 cited by astor & Chinkin.

5 Astor & Chinkin op cit p 91.

6 Linda R Singer op cit p. 26.

Fact-finding or Fact-based Mediation[6]

Fact-based mediation was developed in the construction industry in the US The mediator is provided with submissions, dates, schedules and charts. Parties are interviewed separately by the mediator who then prepares for each party a summary of the perceived differences of that party's case and provides an opinion of the likely outcome. The report is then distributed to each party prior to the mediation. Neither party receives the mediator's report prepared for the other party. Fact-finding uses a third party to give the disputants, or a decision-maker, neutral findings of fact. It is sometimes called "advisory" or non-binding arbitration.

Mini-trials and Senior Executive Appraisal

The mediator can serve as the neutral chairperson in a mini-trial. A mini-trial is often used in disputes between corporate entitities.

Astor and Chinkin[7] describe the process as a hybrid between negotiation, possible mediation and fact-finding. The authors make a legitimate claim that the term "mini-trial" is a misnomer – as it is not in any sense a trial process but rather "a structured exchange of information to facilitate informed, realistic negotiation".

Gregory Tillett[8] refers to a mini-trial as generally being a process in which the parties to a conflict (or more often their advocates) argue their respective cases in the conflict before an impartial third party.

The term mini-trial is sometimes referred to in Australia as "case-appraisal". If the mini-trial does not result in a resolution, mediation or another ADR process may be used.[9] However, "case-appraisal" in the Queensland legislation refers to the role of someone who makes a non-binding decision in relation to a dispute.[10]

Astor & Chinkin refer to Sir Lawrence Street, former Chief Justice of New South Wales, adapting the mini-trial to develop a "less adversarial, more consensus oriented" process for commercial dispute resolution. He called the adapted process "Senior Executive Appraisal". This comprises meeting in conference to make an appraisal of the dispute and attempting to formulate a possible basis for settlement. The executives choose a neutral consultant to chair the conference. The executives may request the neutral consultant to give an opinion on the legal or factual merits of the dispute or the likely outcome if the matter were to be litigated. The consultant aims to facilitate in every way possible the settlement of the dispute or failing this, the resolution of some of the issues.[11]

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7 Astor & Chinkin op cit p 94.

8 Gregory Tillett. "*Resolving Conflict. A Practical Approach*". Oxford University Presss 2nd edition 1994.

9 Astor & Chinkin op cit p 95.

10 Sue Duncombe and Judith Heap. "Australasian Dispute Resolution". 1995 loose-leaf service. Law Book Company. Sydney. para 2.450. *Supreme Court of Queensland Act 1991* (Qld) s 97.

11 Sir Lawrence Street. "Senior Executive Appraisal" (1989) (6) *Australian Construction Law Newsletter* 9. Richard Collins. 'Alternative Dispute Resolution – Choosing the Best Settlement Option'. 1989.

12 M. Dewdney. Macquarie University Workshop Paper. 1995. Quoted Marcus Jacobs. *Commercial Arbitration Law and Practice*. Vol 1A p 6494.

Partnering[12]

Partnering is a far more informal process applied in the building and construction industry involving the parties in the process.. The parties agree in advance to a process enabling the early resolution of disputes and an agreement in principle to adopt practical steps to avoid disputes. It is not strictly a structured process. It is an informal process which predates the dispute in accordance with the mediation concepts of maintaining good faith and adopting a consensual problem-solving approach within their relationship.[13]

Med-arb[14]

Med-arb seems to have been more widely used in the US than in Australia. It is hybrid process whereby mediation is attempted first and if it fails, it is followed by arbitration. Either the mediator takes on the role of the arbitrator or a different arbitrator is appointed. The latter option has been favoured to preserve neutrality.

Concilio-arbitration

Definitions of ADR terms are important as they reflect principles and processes.

As noted in the Australasian Dispute Resolution Service[15] there is little agreement on the meaning of the word "conciliation". In fact, in the early days of ADR practice in the U.S. the term "conciliation" was used as a synonym for "mediation". The U.S. Federal Mediation and Conciliation Service got its name when one House of Congress wanted a mediation service and the other House wanted a conciliation service.[16]

Linda Singer points out that the term "conciliation" fell out of favour in the U.S. This was because separated couples were sometimes forced into reconciliation by court-sponsored efforts. The connotation of reconciliation was disliked. Moreover, during the civil rights movement the term "conciliation" was too similar to the idea of minimizing conflict rather than resolving underlying issues. Thus the term "conciliation" in the U.S. was replaced by the term "mediation".

13 Idem P 6471.

14 M Dewdney. *Alternative Dispute Resolution. Developments in Australia, the United States And the United Kingdom.* 1986-7. Macarthur Institute of Higher Education pp 2-5.

15 Page 2-251.

16 Linda R Singer. *Settling Disputes. Conflict Resolution in Business, Families and the Legal System.* Westview Press. 1990 pp 24-25.

17 Curle A *Making Peace.* London Tavistock 1971 p.177. Quoted by Christopher Moore *The Mediation Process. Practical Strategies for Resolving Conflicts.* 2nd edition Jossey-Bass Inc 1996 p 161.

Definition of conciliation

The term "conciliation" is defined by A Curle (and cited by Christopher Moore[17] as follows: "Conciliation is essentially an applied psychological tactic aimed at connecting perceptions, reducing unreasonable fears and improving communication to an extent that permits reasonable discussion to take place and in fact, makes rational bargaining possible".

In some Australian programs, eg the Health Conciliation Registry in New South Wales, the process can barely be differentiated from mediation as the conciliator has no advisory or determinative role. The conciliator does, however, need to recommend to the Registry which is then conveyed to the Health Care Complaints Commission, whether or not an investigation is necessary.

Ruth Charlton[18] draws attention to the fact that other conciliation programs in NSW have different processes eg the Aged Care Dispute Resolution Scheme, the Equal Opportunity Commission and the Financial Services Complaints Resolution Scheme. In fact some of these processes do not involve a face-to-face meeting or even the opportunity for parties to speak directly to each other.

In 1994 in the UK Andrew Acland in his down to earth book *A Sudden Outbreak of Common Sense. Managing Conflict through Mediation*[19] states that the distinction between mediation and conciliation is seldom clear even to those using them although in the UK in divorce cases, the term "conciliation" is often used to refer to issues of custody and access where children are involved. Acland is wary of the term "conciliation" because it has a connotation of placating and appeasing.

The most explicit definition of conciliation is provided by Astor and Chinkin:[20] "Conciliation is a process in which the parties to a dispute, with the assistance of a neutral third party (the conciliator) identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, but not a determinative role. The conciliator may advise on or determine the process of conciliation whereby resolution is attempted, and may make suggestions for terms of settlement, give expert advice on likely settlement terms, and may actively encourage the participants to reach an agreement". However, even though the conciliator can adopt an interventionist role, the process remains consensual as whatever the conciliator does ultimately require the parties' agreement.

Definition of arbitration

Arbitration has been described by Goldberg et al[21] as a form of private adjudication. It is less formal than adjudication and involves intervention by an arbitrator who hears evidence and arguments on both sides and imposes a decision on the disputants. The definition according to the authors assumes that the third party may have specialist knowledge and expertise in the subject matter of the dispute.

18 Ruth Charlton. *Dispute Resolution Guidebook*. LBC Information Services 2000 pp 7-8.

19 Hutchinson Business Books 1990 p 18.

20 Hilary Astor and Christine Chinkin. *Dispute Resolution in Australia.* 2nd edition. LexisNexis Butterworths 2002 p 86.

21 Goldberg, Sander & Rogers. *Dispute Resolution, Negotiation, Mediation and other Processes.* 2nd edition. Little Brown & Co pp 199-200.

Definition of concilio-arbitration

Astor and Chinkin[22] describe concilio-arbitration as a hybrid process which combines conciliation and arbitration. In the first edition of their book they define the objective of the hybrid process as the facilitation of subsequent negotiations between the parties. They see the process as combining the benefits of informal conciliation with the more formal arbitral process. In the second edition of their book, they describe concilio-arbitration as a example of a multi-tiered approach to dispute resolution.

Naturally definitions of concilio-arbitration vary as for all ADR processes. For example, Justice Sheehan, President of the Workers Compensation Commission, describes the concilio-arbitration process as follows and stresses that the process is reviewed on an ongoing basis.[23] "The process is described as a continuous, informal process whereby parties at all times are encouraged to an agreed resolution of their dispute. If they cannot reach agreement, the same arbitrator moves from the conciliation to the arbitration phase of the process. The parties are involved in all stages of the process and the Commission is proactive in its dealings with unrepresented parties to ensure that they fully understand legal and procedural issues and implications. Arbitrators have a statutory obligation and power to attempt to bring the parties to a settlement, yet determine the matter if settlement is not possible". Caucusing, ie conducting private and confidential sessions with each of the parties and their representatives, is inappropriate during Commission proceedings.

Comfort levels when performing the role of conciliator, mediator or arbitrator

With all the training in the world, unless you feel comfortable in your role as a conciliator or mediator or as an arbitrator, you will not perform your role effectively. Parties will quickly become aware of this and it will often jeopardise the potential of settlement.

Comfort levels in conciliation or mediation

- Being at ease with not playing an active or predominant role at all stages of a session.
- Feeling comfortable at not having to constantly focus on solutions.
- Being patient with parties especially when they become emotional, irrational and go "round and round in circles".
- Possessing good passive and active listening skills.
- Being able to summarise, paraphrase and reframe.
- Being able to facilitate direct communication between the parties.

Comfort levels in arbitration

- Being at ease in having to make a determination rather than performing a facilitative role at all times.
- Being prepared to make use of some facilitative skills.

22 *Dispute Resolution in Australia*. Butterworths 1992 p 144.

23 Justice Terry Sheehan. NSW Young Lawyers Continuing Education Seminar Papers.p 7.

The concilio-arbitration process: the application of facilitative skills during the arbitration phase

The application of the concilio-arbitration phases requires the use of facilitative skills throughout the entire process not just during the determination phase – in particular:

- Listening skills without being tempted to offer premature opinions or advice.
- Providing parties with opportunities to express their opinion even if they are legally represented.
- Summarising and paraphrasing skills to ensure that you have heard them correctly.
- Reframing skills to create a constructive rather than an adversarial atmosphere.

Historical Perspective: "Plus ca change, plus c'est la meme chose" (The more things change, the more they remain the same)

In the area of industrial disputes[24] before mediation emerged in Australia, conciliation and arbitration were applied and legal qualifications were not prerequisites. The arbitrators and conciliators came from the trade unions, industrial officers of employing companies and government industrial departments. Conciliation Commissioners were appointed in 1927and they were given arbitral power by the Labor Government in 1930. However, it was during World War II that the use of commissioners for conciliation and arbitration became common. The Commonwealth Act (*The Conciliation and Arbitration Act 1904*), provided for the obligation of the Commissioner to try to get agreement on matters before them and arbitration applied only when conciliation failed. The Commissioner had to try to get agreement on matters before them and arbitration only applied when conciliation failed.

Settlement could occur in a number of ways eg referral to conference, with or without a member of the Commission being involved.

In 1958, the Act was amended to provide for an officer who had no power to compel arbitration to make parties feel more comfortable rather than facing a member of the Commission who would arbitrate if conciliation failed and nothing could be disclosed without the parties' consent.

After the arbitration had begun, the arbitrator could broadly indicate his opinion on some issues and suggest further conferences to settle the matter. Portus points out in his monograph on Australian Compulsory Arbitration[25] that the majority of matters which came before the Commission were settled by agreement.

24 JH Portus. *Australian Compusory Arbitration* 1990-1970. WEA Mongraphs. Hicks Smith and Sons 1971 pp.72, 82-85.
25 Idem.

Conclusion

Clearly, insufficient research has been carried out in all areas of Alternative Dispute Resolution, including hybrid processes. It is essential to continue to experiment in all areas of hybrid processes, but unless follow-up evaluative research is conducted concurrently over the next few years we will remain uninformed about relative advantages and disadvantages of any ADR process, let alone hybrid processes.