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Alternative Dispute Resolution Mechanisms: Experience in the United States

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The objective of this portion of our conference on judicial reform is to discuss means to promote swift and fair resolution of disputes. Although much of our discussion will center on reform of basic court systems and civil procedure in various countries, my particular focus is on alternatives to traditional institutions and techniques. These alternatives include a variety of what we might call "court-annexed" procedures, that is, procedures that occur during the course of traditional litigation. I will also consider, however, other procedures that might better be characterized as purely "private" techniques for resolving disputes—those that occur before or at least without any special relation to litigation in court. The most traditional of these involve various forms of negotiation, including negotiations assisted by a third party, such as mediation. If successful, these procedures result in an agreement—a contract to be enforced by the courts if necessary like any other agreement. These private techniques also include arbitration, a procedure where the parties, either in advance, at the time of making a deal, or at the time a dispute arises, agree to resolve their dispute by giving it over for decision by a third party. Even though this is a "private" procedure, because its essence is a binding final decision, enforcement may still be required; indeed, over the years various aspects of participation in the arbitration process and interaction with the courts with regard to compelling arbitration and enforcement of the third party's "award" have become regulated extensively by law, as well as by the rules of various agencies chosen to administer the arbitration.

Court-Annexed Procedures

In the United States in recent years we have experimented with a variety of court-annexed innovations as alternatives to traditional procedures, due in large part to the creativeness of our judges. I propose to describe a number of these briefly. [1] I have observed few other techniques outside the United States that can provide helpful models, for, in general, efforts to reconcile parties are not viewed as "alternatives," but as part of normal court procedures. (For example, see the Japanese experience referred to below.)

Court-Annexed Arbitration

Although there is some variety in the form court-annexed arbitration has taken in the state systems and federal districts where it has been adopted, this term generally refers to a proceeding held after a case has been filed with the court. An arbitrator (or in some jurisdictions, three arbitrators) is designated (not picked by the parties) from a list, usually consisting of lawyers who have certain qualifications and have agreed to serve as arbitrators for a modest fee.

In most systems, for example in California, the parties must go through this procedure before having a right to trial in almost all cases asking for money relief up to a certain amount. In other jurisdictions, for example in some of the experimental federal districts, cases involving any amount of money relief may be put into this system by the judge. In most systems, after a limited period for discovery, the parties present an abbreviated version of their case to an arbitrator (or arbitrators), who gives a decision. As to the nature of this decision, even though some of these systems have been in operation for more than ten years, it is still not clear whether arbitrators in these decisions are intending to predict what they think a jury or judge would award if this case were to be tried, or are giving their view of what would be a reasonable settlement figure. In my interviews with people who have served as court-annexed arbitrators, many have said that they give a reasonable setdement figure. Their practical insight tells them that even if they think a plaintiff would or should not recover anything if the case went to court, that decision will stand

in the way of settlement. If they give nothing, the plaintiff's lawyer will receive no fee, assuming he or she is retained on a contingent basis, and thus will not support the settlement. They normally, therefore, come up with a decision of a few thousand dollars for the plaintiff.

If the parties do not object, this amount is entered as a non-appealable judgment of the court. If either party objects, the case proceeds to trial in the normal way, but in many systems if the party who takes the case to trial does not improve its position by more than 10 percent by so doing, that party must pay all the additional cost the other party sustained in going to trial. For example, a plaintiff who rejects an arbitration award of US$80,000 must recover more than US$88,000 in the trial de novo or pay all of the defendant's costs for the trial. A full review of the more than twenty-five jurisdictions that have court. annexed systems of this type would reveal a number of significant variations in the details of this type of proceeding, as well as an unfortunate variety in nomenclature. For example, one of the earliest and most discussed introductions of this type of proceeding was in the state of Michigan, where the proceeding was called a "mediation," even though the lawyer mediators generally simply gave an arbitration decision of the sort described above.

Mediation

In a number of state and federal jurisdictions, judges can suggest or require parties to attempt to settle a pending civil case with the help of a mediator. The goal of the procedure is to assist the parties in their negotiation of an agreed resolution. This is entered as an agreed-settlement judgment approved by the court, or is put into contract form and signed by the parties, who agree to dismiss the pending suit. (Mediation in certain types of family law disputes has been a regular part of court proceedings for some time.)

There is a wide variety in these programs. Some operate with volunteer, unpaid lawyers. Others have training programs of various lengths that lawyers (and sometimes nonlawyers) must complete before being assigned cases. Compensation is sometimes provided from public funds, or often must be paid by the parties involved. In some jurisdictions cases handled under the court-annexed arbitration procedures described above are excluded from mediation. In at least one jurisdiction, if the mediation is not successful, the mediator turns into an arbitrator and gives a court-annexed arbitration decision. [2]

Early Neutral Evaluation

Other techniques have been used to give an evaluation of a pending case by a neutral party. One federal district began an informal program in which parties and their attorneys came together for a conference with an attorney with expertise in the type of case involved. A court-appointed task force of lawyers proposed this confidential system as a means of early evaluation to help parties in the settlement of their cases. Its success and permanent adoption in that district led to its use elsewhere. Similar early evaluation conferences are also conducted by federal magistrates for cases pending in their courts. This type of evaluation is by persons who are by definition neutral, since their normal role is that of a judge with limited powers, and their unique contribution to the negotiation process may be to help parties see how the case might appear to a judge if it were to go to trial.

Summary Jury Trial

Another innovation, a summary jury trial, was designed to help parties see how a case might look to a jury if it were to go to trial, since the hopes of each party for a favorable verdict may be keeping the parties from settlement. A creative federal judge called a jury from the regular panel of his court to sit for an abbreviated trial of a case. The attorneys, with the parties present, argued the case, and the jury gave its verdict, without knowing that they were not actually deciding the case. Other judges have adopted variations of this technique, including splitting the jury for its deliberations into two smaller juries so that the parties get two possible decisions—sometimes in conflict with one another. Sometimes the judge also gives his or her view of the case. In many cases where this technique has been used, the parties have then proceeded to settle without going to trial. Often judges decide that a summary jury trial would be advisable, and a reluctant party is under a good deal of pressure to comply. At least two federal circuit courts have held in such a case that an unwilling party cannot be forced to participate in settlement proceedings such as summary jury trials: Strandell v. Jackson County, 838 E2d 884 (7th Cir. 1987); and In re NLO, Inc. et al., 5 F.3d 154 (6th Cir. 1993). Although this technique is not relevant to reform proposals for legal systems without juries, it emphasizes the need to inform the parties as well and as early as possible of what they can realistically expect if the case goes to final decision. In Argentina, for example, it may be important to evaluate how the secretary to the judge will view the case, since he or she appears to be an important part of the decisionmaking process.

Other Court-Related Procedures

The most traditional procedure for facilitating voluntary settlement of a case is a settlement conference presided

over by the judge who is hearing the case or by a magistrate or other designated "settlement judge." Depending on the judge, such a conference may be mostly a formality before proceeding to trial, or it may be a rather elaborate mediation. Some judges include in this process individual meetings with the parties and counsel, while other judges feel it would be inappropriate ever to meet alone with a party in a case pending before them. Also, in some of our appellate courts, prehearing conferences or mediation sessions have been introduced and have in fact facilitated settlement prior to the scheduled oral hearing. [3]

Private Dispute Resolution Procedures

On the private side, in the area of arbitration we have simply continued—perhaps somewhat behind many other countries in the world—in improving the legal framework that supports its use. Experienced lawyers would hope to find in a "modern" arbitration law the basic provisions of the United Nations Commission on International Trade Law (UNCITRAL) Model Arbitration Act, as well as a number of other provisions contained in new laws that are being enacted today, (as, for example, in Spain). The United States has moved away from its former hostility to arbitration through establish. ment of a federal statute and state statutes, but its legislation at present is still not "state of the art."[4]

The more important area of U.S. experience, however, is in connection with more novel techniques of structured negotiation, mediation, minitrials, and so on. It is in this area of private alternative dispute resolution that the U.S. experience is unique. These are all techniques that encourage control by the parties of the procedures for dispute resolution; in fact, they also emphasize party control of the substantive result. I will describe these private techniques, even though our emphasis is on reform of the formal legal system, because they have been one of the sources on which judges and lawyers in the United States have drawn in devising court-annexed procedures. I will also comment on statutes to be considered in creating a legal framework that supports these private procedures. I will then discuss these various alternatives from the perspective of the parties, the judges, and the general public, trying in each case to raise points for law reformers to consider. Although I will include a few comments and suggestions, the attempt will be to establish an agenda, a checklist for those working with any particular system who may be looking to the United States for ideas.

Negotiation

The most common technique for settling disputes remains negotiation between the parties concerned. Our law schools and continuing legal education programs have begun to teach lawyers how to participate more effectively in this process. Dispute clauses in contracts now often provide for some kind of structured negotiation pattern, designed to walk the parties through a procedure that, it is hoped, will produce an agreed resolution. For example, a clause might provide for a written notice to the other party raising some performance problem, with a response to be given within a certain number of days. If that does not solve the problem, meetings between representatives of the parties, and eventually between representatives with authority to settle, may be provided for. We have also come to recognize the special problems that economic or cultural differences in the parties' backgrounds may present in reaching negotiated solutions, and courses and seminars on alternative dispute resolution often provide training to prepare lawyers to deal with these problems.

Minitrial

One of the new techniques created is in effect an elaborate, structured negotiation. Lawyers representing parties in a large, complicated dispute designed a procedure that focused on a formal session in which each lawyer would present his or her party's argument to the two chief officers of the parties. A neutral person was appointed to preside, but the aim of the proceeding was to give the businessmen a better understanding of each party's case and of the impressions that the lawyers' arguments would make at a trial. The businessmen then retired to negotiate a business solution to the problem. Many successful settlements have been reached using some variation of this minitrial form. Some did not use any neutral presider, while in others, the role of the neutral presider was enhanced to include giving an opinion before the negotiation phase, or even acting as a mediator during the negotiation. It should be pointed out that the name of this device is misleading. There is no "trial" and no "jury," but rather a presentation directed to the businessmen. The reporter who gave it its name when reporting the first successful case simply assumed that a "trial" was the way all disputes were normally settled.

Mediation

Mediation in various forms continues to be the principal vehicle used to help parties settle disputes. Sometimes the mediator is provided by an organization, sometimes selected independently by the parties. Usually the mediator

meets with both parties together to establish his or her role as a knowledgeable and caring neutral, and then meets separately with each party. In these meetings some mediators emphasize helping each party to see its own case more realistically; others, who view their role as one of shuttle diplomacy, simply convey and explain a series of offers back and forth in a move toward settlement. In all cases the voluntary nature of the proceedings is stressed—the third party does not impose any binding solution on the parties. It might be desirable, however, to put a provision in a disputes clause that would require parties to go through a mediation process, even though they would not be bound to reach a result, for experience has shown that minds are changed by this technique.

The hoped-for result of a mediation is an agreed solution to the problem, which is then reduced to a formal agreement and is enforceable like any other contract. The only special legal support desirable for encouraging mediation is protection of the confidentiality of the mediation process, so that the parties will feel free to speak frankly in joint and private sessions without fear that such statements, or the views of the mediator, will become part of any subsequent court proceeding if the mediation is not successful. Although the requirement of confidentiality has been recognized in a number of cases by courts that have analogized mediation to other settlement discussions, statutes have been enacted in some jurisdictions to reassure the parties. [5]

There has been some talk about requiring professional qualifications for mediators, but many observers point out that in commercial disputes, professional expertise seems to be the most important factor in inducing the parties to participate with confidence. Of course, in areas where mediation has become very popular and successful, such as in construction disputes, a substantial number of mediators that have backgrounds in construction disputes, as well as mediation skills gained through experience, are now available, thanks in part to the efforts of the American Arbitration Association to train mediators and promote mediation in cases where formerly parties might have gone directly to arbitration.

Arbitration and Other Third-Party Adjudication

Arbitration continues to grow in importance as a private dispute resolution technique. Many types of disputes, from consumer complaints to technology infringements, have been subjected to special arbitration regimes, many administered by the American Arbitration Association. Other third-party adjudicators are institutionalized forums of trade associations, professional organizations, and the like. They have in common the requirement that the disputing parties surrender to a third party control over the result of the dispute resolution process. Although in a pure ad hoc arbitration, and even in some institutionalized arbitrations, parties retain a certain amount of control over the process, including selection of the decisionmaker, in most cases it is the role of the arbitrator to decide the result based on an assessment of legal issues, unless the parties expressly instruct him or her (or them) to reach what they personally would consider a "fair" result. In that event, the lawyer's role is somewhat reduced, for his or her expertise principally relates to what result the rules of law would dictate. In any case, the general U.S. law is that the arbitrator's award is not subject to review because of any substantive error of fact or law, so whether or not such an instruction is given or followed is in the last analysis often not crucial. (It might be noted that many important arbitrations, for example shipbuilding or construction arbitrations, are often conducted with a panel of three arbitrators, only one of which is a lawyer, and interviews with such arbitrators give the impression that often in such cases the technical experts are not greatly influenced by the technical legal arguments, preferring to rely instead on their understanding of the facts and knowledge of practices in the industry.)

There are other varieties of alternative dispute resolution procedures that are more or less similar to arbitration. The various private adjudication services in effect usually rely on arbitration law to enforce the decisions they provide, even though they usually do not call their process arbitration. Sometimes parties agree to be bound by facts as found by a third party, as in the event of valuation of property. Some of our states provide for the parties to agree to select a retired judge to hear the trial of their case, much as in an arbitration proceeding, but that judge's decision may be entered directly as a judgment instead of being enforced as an arbitral award. Various permutations of the normal arbitration procedure may be agreed on also, as, for example, the possibility of review by a court of the arbitrator's application of the law to the facts as found. Specialized arbitration formats have also become popular in certain fields, such as using an arbitrator for the limited purpose of choosing between two final settlement offers of the parties. This technique encourages each party to make as reasonable a final offer as possible, rather than continue to exaggerate its demands, as is commonly done right up to the end in litigation or in standard arbitration.

To some extent, all processes described that result in an enforceable award can be described as operating "in the shadow of the law." The fact that the arbitrators are often looking to substantive rules of law for guidance was mentioned above, but the law also provides the broader

procedural framework within which the arbitration is carried out. Courts will compel a party who has agreed to do so to arbitrate, and they may provide other assistance to promote the process, such as appointing an arbitrator for a party who declines to act in accordance with the arbitration agreement. In the last analysis, of course, enforcement of the award depends on the courts, but they are required by statute, and by international agreement in the case of foreign awards, to enforce awards without reexamining the substance of the award.

The legal framework within which arbitration occurs and arbitration awards are enforced is very complicated in U.S. law. Although we have both federal and state laws dealing with various aspects of arbitration questions, and although there have been numerous court decisions relating to these matters, many issues remain unresolved. As is often the case, our American experience provides ample illustrations of problems likely to arise, as well as a variety of imaginative solutions, but those who are drafting reform legislation will have to make difficult choices. What our experience with our very incomplete federal arbitration act does show clearly is the need for rather comprehensive legislation to support arbitration, including coverage of a number of questions that in U.S. practice are covered only by AAA rules or by provisions drafted by parties in a carefully thought out disputes clause in their contract. [6]

Discussion of Alternatives

The need for more prompt and affordable resolution of disputes has been repeatedly emphasized in recent years in the United States, not only by the consumers of legal services, but by judges at every level up to the chief justice of the U.S. Supreme Court. Chief Justice Rehnquist recently noted that the future may require dramatic changes in the way disputes are resolved. As William W. Schwarzer, a federal district court judge from the Northern District of California who is now the director of the Federal Judicial Center in Washington, D.C., recently said in his keynote address to the federal judiciary, "We must ask: 'What is the proper balance between public and private interests, between enabling the courts to provide justice in all cases and meeting the needs of individual litigants for timely and just resolution?'" (*Alternatives* 1994, p. 6).

There is wide acceptance in the United States of the need for both utilization of innovative private dispute resolution techniques and introduction of additional dispute resolution institutions into the existing legal framework. Over the past twenty years developments have been so rapid and varied that any attempt to describe them is likely to be incomplete, but even a superficial summary will show that the creative energies of judges and lawyers have come up with an impressive variety of techniques that can serve as a stimulus for creative work by reformers in other jurisdictions. The development of new alternatives has been aided by a legal climate that has allowed strong judges a great deal of leeway in innovating, and their experiments have been valuable even in cases where they have subsequently been reined in by a higher court. (See the cases cited above in connection with the summary jury trial.) In the nonjudicial area, lawyers have sometimes led the way and sometimes been pushed by restless clients in finding imaginative ways to create better procedures and allow parties to shape results, which are often more satisfying than outcomes dictated by legal rules.

As we approach the task of reform of the dispute resolution systems in other countries—hopefully with a good deal of caution and respect for existing traditions and attitudes—it seems to me important to emphasize the intellectual climate in the United States within which these reforms and innovations have taken place. And to the extent that these attitudes differ from those in a country considering reforms, there might be a need for careful selection and adaptation of ideas, or even the need to prepare the intellectual ground very carefully before attempting to make any transplants at all. First, Americans have a healthy skepticism about authority in general, and are not particularly bound to tradition. Less government is better, and anything that secures a desired result without official acts is likely to be viewed as desirable. Formalities are not favored, and oral proceedings are preferred over documentary techniques. In addition, judges are viewed as having substantial inherent powers, not set forth in any statutory provision, to get on with the work entrusted to them, and they will be praised, not criticized, for striking out on a new path. (The judges who developed the innovative techniques described above have been kept busy in recent years as invited speakers all over the country.) We do not have any preoccupation with uniformity, but rather stress the need for the best possible substantive solution in each case, assuming that our judges are constantly participating in a process of salutary reform of the law as well as of procedures.[7]

Finally, as has been pointed out above, our fifty states all have different legal systems that have responded in radically different ways to perceived needs. Some have adopted statewide comprehensive "dispute resolution systems," creating new multidoor courthouses offering all kinds of services at public expense, while their neighbors have failed to respond at all. Perhaps even more surprising is the fact that a similar pattern of non-uniformity prevails in our federal court system. Each district has a

high degree of autonomy in determining its rules and procedures, and the innovators referred to above were able to introduce substantial reform and innovation without interference from any supervisory body. Even now that we have reached the stage of federal legislation authorizing the development of a comprehensive plan of alternative dispute resolution procedure in each federal district, it is still left to each district to create its own system, which may or may not include certain techniques, be mandatory for parties, and so on.

As we turn now to look at the U.S. reforms and innovations from the point of view of the various persons concerned, we might keep in mind the questions raised by Judge Schwarzer in his address to the federal judiciary (see *Alternatives* 1994, p. 6):

• Does alternative dispute resolution lead to speedier, more satisfactory, and less expensive outcomes, or does it simply create another layer of litigation, increasing rather than decreasing costs?

• Does alternative dispute resolution improve access to justice for those who are not well endowed and cannot afford the costs of litigation, or is it a device that provides second-class justice for cases the courts consider unimportant?

• What are the tradeoffs between the advantages of alternative dispute resolution—such as privacy, speed, and reduced adversariness—and the advantages of adjudication—such as judicial resolution, vindication, comprehensive relief, and precedent?

• Does alternative dispute resolution lessen the burdens on the jury system and thereby improve access, or does it obstruct access to jury trials and diminish opportunities for adjudication?

• Does alternative dispute resolution lighten the burdens on the courts, or does it divert judicial and court staff resources from more useful or productive activities?

I will consider these questions from several different perspectives—that of the parties to the dispute, that of the judges to whom we have traditionally entrusted the resolution of disputes, and that of the general public interested in supporting an effective and efficient governmental institution. In a final section we will look at prospects and problems with the use of alternative dispute resolution techniques by those elaborating proposals for reform in other countries.

What Parties Want

Parties to a dispute can get from their lawyers, although often at some considerable cost, a general answer as to what result the rules of law dictate in a particular case. (There may be an initial, difficult question as to which state's law will apply, and what the chances are for change in that law.) A really precise prediction is often difficult, however, until a great deal of effort is spent determining how the facts of the case will appear if the case is brought to a court. In other words, the result of applying an existing rule of law to facts supplied by a party is not the same as predicting the eventual result in litigation—particularly in the United States! The existence in the United States of complicated rules of evidence makes this a more difficult task than in some other jurisdictions, and the possible intervention of a jury as fact finder and applier of the rules of law as given by the court also injects a considerable degree of uncertainty into the process of prediction. Perhaps this has helped to make the United States particularly fertile ground for alternatives to the normal judicial process for resolving commercial disputes. The parties would like to avoid not just the expense, but also the uncertainty, inherent in the judicial process in the United States.

Court-annexed arbitration is a way to give a rough dollar value to a claim after a partial investigation of the facts using our rather expensive techniques of discovery. As mentioned above, there is some ambiguity as to the nature of this valuation. Some arbitrators view it as merely a prediction of a trial result; others give a fair settlement figure. Perhaps either way of reaching an amount would reflect the uncertainties of the trial procedures and, in particular, the rules of evidence that may prevent complete proof of the facts. It would also reflect the uncertainties in predicting which law the trial judges will decide should be applied—or even whether a clear rule might be modified by the judge in this case—and how a jury might understand the law and apply it to the facts as proven. Obviously, the key to the success of this procedure is the quality of the professional who is giving his or her opinion. As the procedure has developed, it has had as its focus a professional, a lawyer with experience in cases of this type, who has been willing to contribute his or her time to assist the parties in getting a clearer idea of what is a reasonable settlement figure. (Although some compensation is usually given, it is typical to pay $100 for the case to a lawyer who normally charges $300 or more an hour. It is important, in other words, to note that we have been able to create this very highly qualified lower level of jurisdiction without any substantial increase in court funding—and that our thinking is that any modest costs are more than offset by a reduction in the number of trials.) If the arbitrator's prediction accurately reflects the view a jury might take of the facts and which law a judge is likely to apply, then going ahead with the expensive process of preparing for trial, not to mention the trial

itself, seems futile, and sensible parties should be able to withdraw the case from litigation and reach a settlement.

The *summary jury trial* provides a relatively low-cost preview of what the jury might decide. The lawyers present a summary of the case to a real jury, before the real judge, using their ingenuity to make the prediction as accurate as possible—for example, using a witnesses or photographs, reading to the jury portions of a potential witness's deposition, and so on. An important incidental benefit of this proceeding might be an opportunity to get the judge's view of the law that will be applied, for he or she must instruct the jury as part of the proceeding. (Something like this might be conceived for nonjury systems.) Armed with more information than each party could obtain from its attorney initially—a clearer view of how facts might appear to a jury at the trial, some insight into which rule of law this judge will apply, and an indication of the likely result when this law is applied to the facts—settlement without going on to trial seems logical.

The summary jury trial may move parties toward settlement for another reason. It might be that a party feels strongly a need to have "a day in court," that is, a chance to tell his or her story to an impartial person and get a reaction. It is possible that this need can be met in part by the techniques referred to, and this should certainly be kept in mind as a case is reviewed. In fact, it may be the party with the worst case who finds the greatest satisfaction through the alternative process and is thereby able to move on to settlement. I spent a day observing a three-lawyer, court-annexed panel in the federal court in San Francisco hear a woman's claim of racial discrimination in an employment situation. It seemed clear to the panel very early in the woman's presentation (she had been assisted by pro bono counsel in filing the claim, but appeared without counsel at the hearing) that the claim was without much foundation, but she was given a thoughtful hearing by the panel, and expressed her satisfaction with the procedure. I wonder whether the federal judge would have been willing to spend the same amount of time, or whether the more formal court procedures would have produced the same satisfaction. The case illustrates the beneficial effect of spending time to produce satisfaction, but it also shows the costs involved. Perhaps $4,000 of billable time was contributed here—half a day of the time of three successful lawyers—to make the plaintiff feel good about the resolution of what was technically a groundless claim, and of course the expense to the corporate employer defendant was very large, for its lawyer appeared together with its president and two other witnesses ready to testify!

In our analysis of alternative versus traditional dispute resolution techniques we should probably note particularly the significance of the substantive result that may be negotiated as the result of the alternative processes. To the extent alternative dispute resolution techniques accurately predict what might happen in court, they may show both parties that the legal result is not the best outcome for either of them. To the extent that they emphasize the uncertainty inherent in our system, they may provide an incentive for the parties to craft their own solution. For example, in one summary jury trial in a pollution case, the jury was split in two to give individual verdicts after hearing a very creative presentation of the facts regarding causation and possible effects on the health of a group of plaintiffs. One jury allowed each plaintiff a substantial recovery, resulting in a total recovery of about $20 million, while the other jury, having just heard the same presentation, allowed no recovery at all! For the first time each side had to confront a realistic possibility that it might lose entirely on the money claim, and settlement was in fact arrived at immediately following the summary jury trial (with the help of additional pressure from the judge who was handling the case). In such a case a negotiated result might include apologies, setting up a program to assist others similarly situated, taking measures to avoid such problems in the future, and the like, all satisfying to the plaintiffs, but unobtainable as part of a litigated result of their original suit for damages.

The whole idea of *mediation* should be to empower the parties in their efforts to find a solution they will be satisfied with, in part because they will "own" it psychologically. Some mediators lead the parties through their own arguments to help them discover weak points they have glossed over. Some help in communicating information the other side had been unable to get a party to consider previously, though it takes considerable skill on the part of the mediator to do this without being viewed as an advocate for the other party. A mediator may help the parties see the disadvantages—and not just financial—of pursuing a case to a final judgment in court. Perhaps the most important function of a mediator is what we often call "enlarging the pie"—that is, looking for a creative range of alternative solutions that do more than simply divide a limited good between the parties. In an ideal mediation the mediator reinforces for the parties the idea that they have been able to find a solution for the dispute, without appearing to have imposed his or her will on them. In fact, the satisfaction level, and therefore the likelihood of voluntary compliance, should be very high with all negotiated results—including those reached following a minitrial or negotiated with the assistance of a mediator.

Instead of satisfaction, parties may simply feel resignation when accepting the results of alternative dispute

resolution techniques that employ decisionmaking by a third party. For example, the decision of a court-annexed arbitrator or the verdict of a summary jury may be accept. ed as a basis for settlement, but not really accepted psychologically as fair. Probably the least satisfactory tech. nique from this point of view is traditional arbitration. Although some parties may feel that the same or as satisfactory a result has been reached as would have been reached in court—but reached more quickly and at lower cost in the arbitration—my in-depth interviews with parties and attorneys over many years concerning their arbitration experiences lead me to think that even in those cases they have complaints about the arbitral process. The formal atmosphere created by some litigator lawyers who conduct arbitrations, and the delays in arbitrations caused by recourse to the courts, often as a delaying tactic, tend to leave a negative impression about the process, perhaps because its advantages were oversold at the time of signing the arbitration agreement. This dissatisfaction is often heightened for the losing party by the absence of the possibility of appeal—and, in the case of ordinary arbitrations under AAA auspices, the absence of any opinion of the arbitrator(s) explaining the result reached.

In fact, in both court-annexed procedures and traditional arbitration, there can be meaningful participation by the parties. Instead of casting them in the role of mere observers of the lawyers in action, as is commonly the case in regular court proceedings, it is standard practice to order attendance of the parties at court-annexed alternative dispute resolution sessions. Judges often observe that it is helpful to be able to speak directly to the parties whenever possible, and in the private minitrial or in the summary jury trial a party sometimes for the first time gets a true picture of the weaknesses of his or her case. Arbitration can be conducted in a more informal way than a court proceeding, so that a party can have the satisfaction of giving a coherent, spontaneous account of his or her side of the dispute. Both my observation and parties' comments, however, attest to the fact that litigator lawyers often opt for rather formal procedures, and that the lawyers tend to be the main participants. (Even the training videotapes of the AAA do not stress the possibilities for informality, perhaps because they are aimed in part at promoting to lawyers the use of arbitration.)

The Judge's Perspective

From the judge's perspective what are the advantages and disadvantages of the various dispute resolution alternatives? Certainly the traditional attitude of U.S. courts has been a degree of jealousness about their jurisdiction and power. U.S. judges today, however, unlike the early English judges, are not out looking for business—their problem is rather being overwhelmed with more cases than they can handle in the way they would like. My observations in Buenos Aires suggest the same is true there. One judge may have thousands of open files to deal with—in one judge's chambers they were constructing an upper level of shelving to hold the ever-increasing bulk of files. The contrast with the United States was striking, for we are rapidly computerizing records, and in some courts even allowing filings with the court to be done by fax.

Perhaps there is even some awareness in the United States that party-negotiated, business-driven solutions are in many cases fairer than the all-or-nothing approach dictated by many of our rules of contract law, and this helps create a positive climate for alternative dispute resolution. In fact, the process of reform of those rules through the greater use of principles of good faith and reliance may be a manifestation of this malaise with regard to traditional contract doctrine. In a well-known case in the 1980s the court chided the parties for failure to negotiate a business solution, and then made an unsuccessful attempt to introduce into our contract law a major change based on good faith (Aluminum Company of America v. Essex Group, Inc., 499 F. Supp. 33, [W.D. Penn. 1980]). (In fact, that case was settled by the parties after an alternative dispute resolution proceeding held under the auspices of the circuit court during the appeal process. A structured dispute resolution clause that could have been included in the original contract—designed to facilitate settlement by the parties of disputes without litigation—is attached as appendix A.)

Looking first at the court-related alternative dispute resolution procedures that do not involve a judge, one might guess that court-annexed arbitration would be viewed favorably by the judges. It is, in effect, adding a lower level of highly qualified professional decisionmakers, from whom the judge only gets a kind of appellate case load; furthermore, the cases he or she gets when a dissatisfied party asks for trial de novo have had the benefit of extensive pretrial attention. Other court-annexed procedures look more like variations on techniques that might traditionally have happened with the involvement of the judge. For example, some of the mediation and early neutral evaluation looks like what many judges did in differing amounts and with differing levels of skill in traditional pretrial conferences or in cases he or she heard involving the use of magistrates.

Perhaps here is the place to note that some judges are reluctant to turn over functions to trained mediators, feeling that they have developed the skill to do this effectively themselves. It does seem, however, that one of the

advantages of mediation is lost when it is the judge who performs this function. The possibility that the judge will use confidential information parties have communicated if the mediation proves unsuccessful and the case goes to court may inhibit the parties at the mediation stage. Still, we should note that this successive function of mediator then adjudicator has been institutionalized on the fully private side, where so-called med-arb has been introduced. In both public and private dispute mediation, the advantage of being in early, direct, informal communication with the eventual decisionmaker is probably viewed as outweighing the disadvantage mentioned.

It would be unfair to our judges, however, to view their principal reason for supporting alternative dispute resolution procedures as relief from work, for many judges have been actively and creatively involved in developing supplementary techniques in which they play a considerable role. The summary jury trial is an obvious example, but the case management systems mandated by some judges, their involvement in committees planning other techniques and rules, and so on, all indicate that they are willing to take on new and different duties if they feel the result justifies the effort. It is clearly essential to keep the judges involved in any reform and supplementation of the traditional systems. I spent a day in the state courts in San Francisco with the judge who supervised the docket of court-annexed arbitrations, and it seemed clear that his thoughtful input to the process through talking with the parties and choosing particular arbitrators suited to the cases contributed greatly to the substantial degree of success the system was enjoying. (At that time almost 80 percent of the arbitration decisions in his district were accepted by the parties, whereas I was told that in a district in Southern California, where the scheduling of cases for arbitration and the assignments to arbitrators were made with less individual input, the success rate was only about 50 percent.)

The Public's Point of View

From the public's point of view, that is, the perspective of the taxpayer and citizen interested in living in a society where friction from disputes is reduced, the development of various alternatives is generally considered a good thing. Some people might question whether there should be public funding of what might be called private procedures. If the parties to a commercial dispute want the assistance of a mediator, or if they eventually go to arbitration, why should the public pay for those procedures? One answer to this question lies in the financial costs of the alternatives. If it is possible to settle early a matter that would otherwise come before a judge, it makes sense to spend a small amount of public money to facilitate settlement in order to avoid whenever possible the cost to the public of a full trial. It also seems unfair to have good alternatives available only to those with funds to pay for them—as though they were some kind of luxury.

These considerations have led to proposals for a new way of looking at public justice systems. Reformers see a multidoor courthouse as the ideal, a place where professionals (and perhaps qualified volunteers as well) are busy not just dispensing justice but actively helping parties to resolve their disputes—that is, to reach results that are truly satisfying to them—all at public expense or at a fee schedule proportionately lower than the amount for litigation. (In the United States court costs are nominal, and the basic cost of judge, courtroom, court staff, and the like is borne by the public and not paid for by user fees.)

Lawyers may be somewhat apprehensive about the long-term effects of alternative dispute resolution reforms, but it would seem that for the foreseeable future there would even be increased work for lawyers who got into the new spirit and developed their skills as participants in these dispute resolution techniques. In fact, the availability of dispute resolution procedures that are relatively lower in cost than traditional legal processes and that involve lawyer participation should ultimately bring more disputes into lawyers' hands and, incidentally, improve the image of those lawyers who get involved. There is much we could say on this point, but we should at least note that many of the important innovations in this field have been the work of lawyers, and that we have a generation of young lawyers who are looking for professional roles in which they can see themselves as making a positive contribution to society in general.

Summary

What can we conclude from this analysis? U.S. experiences with reform or supplementation of traditional civil procedure through the development of alternative dispute resolution techniques, as well as the extensive development of private alternative dispute resolution techniques and their support by the courts, give us some insights into how to begin the same process in other legal systems.

First, we should not try to introduce strange birds into any environment. Except for the ombudsman, our alternative dispute resolution innovations were invented from native material by those caught up in the day-to-day problems of our legal and commercial society. A country

should build on existing strengths and deal with those who are skeptical by publicizing successful local experiments. Identifying foreign imports as such may make them easy targets for those whose resistance is really to the substance of the ideas. If some members of a skilled, professional judiciary can be enlisted in the cause, they should know best how to win over others who are in their own way frustrated with the existing system. If there is skepticism about the use of mediators in court, perhaps we should let private mediation lead the way and, at the same time, introduce controlled experimental programs in the courts whose successes can be publicized to create a demand for more.

We should educate the new generation of law students and reeducate lawyers to see a positive role for themselves in dispute resolution, whether it is in the new improved pattern of litigation—court-annexed alternative dispute resolution—or in dispute resolution that keeps cases away from the courts and makes their clients happier. Our discussions concerning "access to justice" bring to our attention the additional problem of past cases of conflict in which we have not provided adequate assistance or an adequate forum. Low-level, justice-of-the-peace jurisdictions or small-claims courts may be viewed as alternative dispute resolution or an extension of existing institutions. Either way, deciding what should be the character of the rules applied and the role of counsel in such institutions presents additional challenging questions that should be resolved in accordance with local conditions, and certainly with the input of legal professionals of all kinds.

On the basis of this overview of the institutional possibilities, we might tentatively respond to Judge Schwarzer's questions set out above as follows:

• *Does alternative dispute resolution lead to speedier, more satisfactory, and less expensive outcomes, or does it simply create another layer of litigation, increasing rather than decreasing costs?* If this "other layer" is in fact a lower layer, as in court-annexed arbitration, and a substantial number of parties accept the result, this is good. Even for the parties who go on to trial, it seems that in most cases going through this procedure is likely to reduce the time and cost, and probably improve the result. At the very least, in the United States it has been a way of getting a very capable segment of our bar to contribute their time to solving the problems of people who are not their clients. In view of the reluctance in all countries to devote substantial additional resources to the processing of disputes, this is perhaps our most important innovation. In other countries it may mean that reformers who find this idea attractive will have to find a way to get their lawyers to make this kind of contribution.

• *Does alternative dispute resolution improve access to justice for those who are not well endowed and cannot afford the costs of litigation, or is it a device that provides second-class justice for cases the courts consider unimportant?* What is second-class justice? Having an experienced attorney contribute to the parties' basis for settlement by providing at low cost an informed opinion as to the value of the case seems better described as first-class treatment. Should we ever characterize as second-class a negotiated solution—that is, an alternative that informed parties have chosen in preference to continuing with the normal civil procedure? It is probably important not to contrast alternative dispute resolution with some idealized view of what civil procedure might be, but rather with the prospects for a litigated result. A party who has settled in any given case has declined to litigate, no doubt after taking into account possible delay, higher transaction costs, and a possibly less satisfactory substantive result dictated by the strict legal rule—and above all, the difficulty of trying to predict all three of these variables with any certainty.

• *What are the tradeoffs between the advantages of alternative dispute resolution—such as privacy, speed, and reduced adversariness—and the advantages of adjudication—such as judicial resolution, vindication, comprehensive relief, and precedent?* Comprehensive relief may in fact be more available through alternative means. For example, judges have enforced some specific measures ordered by an arbitrator even though they would not give that relief themselves in ordinary legal proceedings. Precedential effect of alternative dispute resolution decisions is simply a matter of providing for publicity while preserving the confidentiality of the parties, a possible combination since it is the method used for reporting ordinary court decisions in many other legal systems. In fact, alternative dispute resolution results are already well documented in such publications as *Alternatives,* a house organ of the Center for Public Resources in New York.

• *Does alternative dispute resolution lessen the burdens on the jury system and thereby improve access, or does it obstruct access to jury trials and diminish opportunities for adjudication?* In fact, the summary jury trial permits a popular input into the negotiation process at a fraction of the cost of a regular jury trial. One is reminded of the advisory juries sometimes utilized by equity courts to provide the judge with a popular perspective even though they were not part of the required procedures.

• *Does alternative dispute resolution lighten the burdens on the courts, or does it divert judicial and court staff resources from more useful or productive activities?* Our best evidence comes from busy judges and magistrates who have thought that their successes to date have justified a continual expansion of the court-annexed programs.

Although some judges seem opposed to certain alternative dispute resolution procedures on philosophical grounds, even many of those judges would not deny that alternative dispute resolution procedures to date have resulted in substantial savings of judges' time that they have been able to devote to other work.

As a closing note, I raise one lesson from our U.S. experience that I know is difficult for dedicated reformers to accept. We in the United States feel that we are still in the early stages of our own reforms. We feel we lack final, uniform answers as to what are the best forms of alternative dispute resolution procedures and which procedures work best for particular disputes. Our overall answer to date appears to be that keeping the system in a constant state of experimentation—remaining open to new ideas and refining existing ideas—is the best way for us to proceed for the present. Our world of alternative dispute resolution mechanisms remains a moving target, not ready for systematization. For example, when I read recent attempts of American writers to describe our alternative dispute resolution institutions, I am constantly struck by the inadequacy—in effect, the inaccuracy—of what they say. They emphasize common characteristics instead of creative differences and suggest that certain named devices have fixed characteristics. For example, some say the minitrial uses a third-party neutral, even though some practitioners have had success without one.

In a recent article, an in-house lawyer for a company that has been extremely active in alternative dispute resolution commented on the practice of developing standard forms and models for dispute resolution procedures. He feels that if parties are too influenced by set criteria, "the ad hoc spontaneity and creativity that has produced such splendid alternative dispute resolution success in the past might be lost," and that "if parties rely too heavily on off-the-shelf or canned procedures, they lose a valuable opportunity to tailor a process most suitable to the dispute at hand" (Madoorian 1994).

Perhaps in part because of this constantly evolving nature of the alternative dispute resolution devices, we have had trouble developing uniform terminology for them. For example, lawyers and sometimes legislators use the term "nonbinding arbitration," trying to use existing terms to describe a new idea, namely, a device where a third party gives a decision but the parties are free to reject it. It seems unfortunate to use the term "arbitration" in this context, however, for it has been used for years to refer to a *binding* dispute resolution process—and we have a large, uniform body of statute and case law using the term in that sense. Perhaps this disorderly terminology is a price we pay in the United States for a system that is slow to arrive at final forms and create uniform legal theory.

So, are we likely to have comprehensive statutes soon in the United States? I don't think so. For example, some people think that med-arb is a bad idea unless the mediator asks the parties for a new agreement to accept him or her as arbitrator if the proceeding passes to that stage. Should that be made a "rule" in a statute drafted to introduce alternative dispute resolution techniques into a jurisdiction? Are there nuances in the role a third party plays when helping parties reach an agreement that are best conveyed using two terms, mediation and conciliation? In a system built of careful definitions in tightly drafted statutes, such distinctions may be made; but in the United States I think we will struggle along without these refinements. We will no doubt be learning from you in the field of codification of these techniques.

Appendix A—
Suggested Clause for Alcoa-Essex (Section 5)

Adjustment in Processing Charge Due to Unforeseen Circumstances

5(a). It is the intention of the parties that the charge made by Alcoa for processing shall be sufficient to provide a reasonable profit for Alcoa over the life of this Agreement, and to that end they have agreed on the formula for annual adjustment of the processing charge contained in Par. III of the Agreement. If, due to circumstances which the parties did not take into account in arriving at the agreed adjustment formula, Alcoa feels that it is no longer able to make a fair profit at the price arrived at by application of the formula, or Essex feels that the formula price is producing an excessive profit for Alcoa, then the complaining party shall give written notice of that fact to the other, setting forth the basis for its complaint, and naming a representative authorized to negotiate in regard to this matter on its behalf. Within thirty days from the receipt of that notice, the recipient shall send a reply responding to the matters given as the basis for the complaint, and naming a representative authorized to negotiate on its behalf.

5 (b). The two named persons shall make themselves available to meet at convenient times, and a meeting shall be held within thirty days to attempt to resolve any differences. If no agreement is reached at that meeting, each of the parties shall designate an economist, who shall within sixty days prepare and submit a written argument on behalf of that party regarding the points in dispute. The two representatives shall meet again within thirty days from the exchange of these arguments, and if they are unable to reach agreement, shall set a date with-in sixty days for a further hearing of the matter in the

presence of the two chief executive officers of the two companies. Before setting that date, they shall also agree on a neutral advisor to preside at that meeting, and if they are unable to agree on any person who will accept such appointment, such a person shall be appointed by the Center for Public Resources in New York City. The parties agree that any outside costs, including any fees of CPR and the fee and all expenses of the neutral advisor, shall be borne equally by them.

5(c). At the hearing each party may be represented by an attorney if it so chooses, and may have three hours or such time as may be agreed to present its case in any manner it chooses. The neutral advisor shall establish any other rules he thinks appropriate for the conduct of the proceedings. At the conclusion of that hearing, the executive officers of each company shall attempt in good faith to resolve the disagreement over whether Alcoa is making a reasonable profit at the current price arrived at by application of the formula.

[The following are two alternatives which might be used to round out the clause:]

Alternative A: 5(d) Substantial compliance, or an attempt in good faith to comply, with each step in the procedure described above shall be an express condition to the right of any party to assert any right under this contract based on a contention that Alcoa's profit under the formula price is either excessive or insufficient, including any claims based on changed circumstances, failure or presupposed conditions, impracticability, impossibility, mistake or unconscionability.

Alternative B: 5 (d) In the event the parties are unable to reach agreement on the complaint within fifteen days after the end of the hearing described above, then the two economists named by the parties as part of the procedure described above shall agree on an economist who shall finally resolve the controversy as an arbitrator. If the two economists are unable to reach an agreement, the economist to act as arbitrator shall be appointed by the American Arbitration Association. The arbitration shall be held under the rules of the American Arbitration Association at a place to be agreed on by the partners, or if they fail to agree, a place designated by the American Arbitration Association. The parties agree to compensate each of the economists for selecting the arbitrator and the economist who serves as arbitrator at their regular rates for consultation, and to bear these and all other costs of the arbitration equally. The parties agree that the arbitrator shall decide whether the current price arrived at under the formula is unreasonable as asserted by the complaining party, and if he finds that it is, he shall set the current price so as to approximate as closely as possible the level of profitability the parties intended to establish under the original agreement. In making this determination, he shall take into account the following factors that the parties used in arriving at the original formula: . . . The parties agree that the price set by the arbitrator shall be substituted for all purposes in the contract as of a date ninety days following the original notice of complaint.

Notes

1. For a more detailed description, a very helpful publication is *Judge's Deskbook on Court ADR* (New York: Center for Public Resources, 1993). For a broad, insightful look at the general subject of procedural reform in the United States from a continental point of view, see E. Stiefel and J. Maxeiner, "Civil Justice Reform in the United States," *Festschrift for Karl Bensch,* (Berlin: De Gruyter, 1993, pp. 853–69).

2. A particularly helpful guide evaluating and describing the details of the court-annexed mediation programs in the various states is *National Standards for Court-Connected Mediation Programs* (Washington, D.C.: State Justice Institute/Institute of Judicial Administration). For a comparative perspective on court-annexed programs, see K. Iwasaki, "ADR: Japanese Experience with Conciliation," *Arbitration International,* vol. 10, no. 1, 1994, pp. 91–97. In Japan mediation is conducted by a committee appointed by the judge, and its purpose, according to Article 1 of the 1951 Civil Conciliation Act, is, Iwasaki writes, "to settle amicably a civil or commercial dispute not by strictly applying law but by applying the general principles of justice and fairness as befitting the actual circumstances of the dispute."

3. A summary of a recent symposium dealing with the full range of court-annexed procedures is available from the National Center for State Courts, Box 8798, Williamsburg, VA 23187, USA.

4. See the thorough comparative study by A. Garro, cited in greater detail in note 6 below, which discusses the UNCITRAL Model Act and the legislation of Spain and several Latin American countries.

5. See, for example, California Civil Procedure Code § 1297.432. Statutes also often provide immunity for mediators for acts within the scope of their duties. (These and other statutes are discussed and cited in detail in *National Standards for Court-Connected Mediation Programs,* cited in note 2.)

6. An article analyzing foreign arbitration law gives some perspective on the range of problems to be considered: J. Meyer, "Recent Mexican Arbitration Reform," *University of Miami Law Review,* vol. 47, no. 913, 1993. In "Changing Attitudes toward Dispute Resolution in Latin America" (*Journal of International Arbitration,* vol. 10, 1993, pp. 123–131, Robert Layton describes how to use arbitration in Latin America during the transition to a better statutory framework.

7. Generally this is viewed as desirable, but judges are sometimes criticized for failing to take the doctrine of *stare deci-*

sis seriously enough. For example, a local bar group recently evaluated the U.S. Seventh Circuit Court of Appeals and said about one of its leading figures, "Although Chief Judge Posner is unquestionably one of the most influential legal thinkers in the country, he refuses to accept existing circuit and Supreme Court precedent as controlling" (*National Law Journal,* February 28, 1994, p. 3).

References

Alternatives (Center for Public Resources, New York). 1994. "Open Questions about ADR." 12(1):6.

Madoorian, H. N. 1994. "Some Guidelines for System Design." *Alternatives* (Center for Public Resources, New York) 12(4):45.