U.S. Systems of Court-based ADR, Including Rent-a-Judge

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May I commence by quoting from a recent article[1] written by a legal affairs reporter for the *New York Times*:

> Imagine a civil legal system in which the parties choose their judge, decide their rules, regulate discovery, replace live testimony with a lawyer narrative, reduce cross-examination and discourage objections. Add speed, reduce attorney fees and keep the entire matter entirely confidential and you might just have created the perfect justice system, right? Well, here it is. Rent-a-Judge has come to the Big Apple.
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> There is a certain irony as to the timing. Just as television cameras return to New York courts and just as a new policy requiring a presumption of openness in civil court records attempts to take hold, a new private civil system has emerged that will undoubtedly see some of the state's major cases withdrawn into the unseen world of private law.

As this commentator added, the indications of a totally private system of law is no mere trend. It has been active on the West Coast for more than a decade: now through a variety of 'upscale' companies, the new system has finally entered New York where, it is said, a private system will compete with the 'hard pressed' state courts.

How could such a radical change occur? In attempting to answer this question, we must accept that there are fundamental differences between the legal traditions of this country and those of the United States. It may be no exaggeration to claim that the two systems are similar only in

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1 Marcia Chambers, *The National Law Journal*, 15 June 1992, Vol. 14, No. 41, pp. 15–16.

superficial respects. Some would contend that the American legal system is closer to political science than law as we know it.[2] So that when we speak of an alternative system of dispute resolution (ADR), we must be clear about the characteristics of the system to which an alternative is offered.[3] In the United States, features of the 'mainstream' legal system include a strong ideological commitment on the part of the judiciary, the absence of any doctrine of precedent, elected judges (in the case of state courts), massive (in many instances) contingency fees and the absence of a specialised Bar as we know it.

It is also necessary, for present purposes, to appreciate how strong regional cultures can be in some parts of the United States. For instance, there are powerful community pressures at work in Hawaii which mean that it is perceived to be 'bad form' to litigate a dispute to finality: Hawaiians are expected by their community, and in accordance with ancient tradition, to settle their disputes amicably, even disputes in environmental and other public contexts. This underpins the frequent resort there to mediation in preference to the court system in many cases.

Yet another distinctive feature of the American culture which has been influential in the growth of ADR in that country is the emphasis on the role of business in their community. In short, they are seen by many as a nation of negotiators and deal makers. Also, Americans, on the whole, are willing to discuss their personal problems quite openly with others. All these national characteristics have combined to create a good climate for the reception of systems of ADR.

The two main forms of court-annexed ADR in the United States are mediation and arbitration. Whilst different in form, in their practical application, they are similar in many respects. Mediation often involves an evaluation expressed at an early stage by a third party neutral which is also often found in their arbitration process. Moreover, U.S.-style arbitration, unlike the Anglo-Australian version, rarely requires the arbitrator to give reasons; so that, although a fresh hearing before a court may be available (e.g. in the Philadelphia system), judicial review of the arbitration on a question of law is rare in America. Also, it is common for an arbitrator, in an appropriate case, to act as a facilitator in settlement negotiations. Whether acting as mediator or arbitrator, an American 'neutral' can usually be expected to show a good deal of pragmatism and commonsense. Certainly, questions of legal principle are not prominent in these exercises. In this respect, the American type of arbitration is quite different from most Anglo-Australian arbitrations.

American judges are themselves also interventionist and activist to a degree rarely seen elsewhere. For instance, Judge Milton Pollack, a senior

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[2] See, for example, Mr Justice F.C. Hutley, 'The Legal Traditions of Australia as Contrasted with those of the United States' (1981) 55 ALJ 63.

[3] William Twining, 'Alternative to What? Theories of Litigation, Procedure and Dispute Settlement in Anglo-American Jurisprudence: Some Neglected Classics' (1993) 56 *Modern Law Review* 380.

judge of the U.S. District Court, Southern District of New York, is well known as an experienced judge with a high 'strike rate' in the settlement of complex cases. It is reported,[4] I think accurately, that an American Bankruptcy Judge once observed: 'I always knew how to twist arms. Pollack knows how to break them.'

A feature of court-annexed ADR which is only found in the United States is an appellate mediations program. The most celebrated is the Civil Appeals Management Plan (CAMP) of the U.S. Court of Appeals for the Second Circuit. According to a report in the *New York Law Journal*[5] the program, conducted by two very experienced trial lawyers, who act as staff counsel, disposes of about half the cases referred,[6] 'mostly by pointing out the non-viability of the appeal'. Having seen the process, I can say that, again, these mediators adopt a totally pragmatic approach and openly promote possible formulas for compromise.

A major centre for court-annexed ADR in the United States is the 'multi-door' dispute resolution division of the Superior Court of the District of Columbia, Washington. The multi-door concept was conceived by Professor Frank Sander of the Harvard Law School, an internationally recognised expert in the field. It should be understood that the Washington court has some special features which make it suitable for a court-annexed ADR program. It is a court of general jurisdiction in a special, non-commercial, area of the United States with a relatively small population accustomed, rather atypically for that country, to a measure of bureaucratic intervention. Much of the litigation involves small amounts. Depending upon their nature, cases are referred out, on a mandatory basis, for litigation (rarely), conciliation, mediation, arbitration (usually non-binding) or social services. Small claims are usually mediated.

Another common form of mediation in the Washington D.C. court is early neutral evaluation (ENE). This procedure originated in California in the 1970s on a rights-based footing — that is, an exercise where the neutral attempts an assessment of the prospective outcome of the litigation based on a legal analysis of the merits of the dispute. Nowadays, both in California and elsewhere, ENE is more likely to be conducted on an interests-based footing — that is, where the neutral facilitates a settlement on the basis that it is in the mutual interests of the parties to arrive at a particular compromise, usually for pragmatic or purely commercial reasons, irrespective of the legalities.

It has not proved easy to make an informed judgment of the quality of the many ADR processes used in America. Because most forms of ADR, especially mediation, are conducted in confidential session, it has been difficult to carry out any thorough evaluation of ADR. One useful study is Oakes'[7] analysis of ENE in the U.S. District Court for the Eastern

[4] *New York Times*, 25 March 1992.
[5] December 1991, at 33.
[6] 519 out of 1,062 (1987); 541 out of 1,018 (1988).
[7] California State University, Sacramento — 1991.

District of California. Oakes' detailed study concluded that insufficient time was committed by participants in preparation for ENE sessions and in the session itself. Another weakness in the process was seen to be the need to improve the style and skill of the evaluators.

There have been other procedural justice research projects which have studied a range of dispute resolution procedures in America. Thibaut and Walker[8] have carried out experiments to determine what individuals want from dispute resolution processes and, in particular, which attributes of dispute resolution procedures lead individuals to believe that they have been treated fairly or unfairly. Ironically, the research showed that both parties who are relatively naive about legal procedures, as well as those with considerable legal experience — for instance, institutional litigants — care equally about the attributes of dispute resolution procedures. The studies indicated that disputants want their cases to be heard by a neutral third party where the process is one over which they themselves feel they have some control. In other words, what lay litigants want most from the dispute resolution process, mainstream or alternative, is a hearing, conducted in a dignified and careful fashion, before an impartial third party. As Deborah Hensler has pointed out:[9]

> Contrary to some of the propositions put forward by ADR enthusiasts, lay litigants do not consistently prefer informality over formality. Nor do they care, generally, whether hearings are public or private.
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> Institutional litigants share most of these views of the lay litigants, but they have a preference for more formal hearings. Both lay and institutional litigants are more likely to believe they have been treated fairly when their cases receive a hearing, and they are more likely to express satisfaction with the litigation process when they believe they have been treated fairly, regardless of whether they won or lost.
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> Surveys of litigants whose cases received an arbitration hearing show that court-ordered arbitration satisfies these definitions of procedural justice. In fact, the desire to be heard perhaps explains why arbitration sometimes delays case disposition: litigants apparently are willing to spend a little more time in the litigation process in order to obtain a hearing for their case, in preference to settling without any hearing.

Although Americans have, on the whole, reacted positively to most court-annexed ADR programs, a number of difficult questions remain unresolved. The following questions at least still remain controversial in the United States:

1. Should mediation, in any kind of case, be voluntary or mandatory?
2. Is mediation appropriate where complex legal questions are raised in litigation which has been instituted by experienced practitioners who

[8] See Deborah R. Hensler, 'Court Ordered Arbitration: An Alternative View' (1993) *The University of Chicago Legal Forum* 399, 415.

[9] *Id.* 416–17.

may be taken to be well aware of the existence of voluntary mediation as an alternative?

3. If mediation is to be court-annexed, should public funds be used to pay for it at a time of severe restraint in public spending, especially if the mediator is a private lawyer with the expectation of substantial remuneration for acting as a mediator?
4. What measures of quality control, including ethics, should be adopted? (No consensus has yet emerged on standards or accreditation.)
5. What sanctions, if any, should be imposed upon a party for failure to proceed properly with an ADR process? (In some U.S. jurisdictions, a costs penalty may be imposed if a party is perceived not to have mediated 'in good faith'.)
6. What court supervision of the mediation process is required? (Accepting that the mediator is neutral and has no power to make a decision, effective mediation will usually facilitate the process of 'principled' negotiation. Often this will indicate that the mediator has exercised some influence on one or both parties. Because this is a real power which is exercised in a confidential session, the background and personality of the mediator may need to be taken into account, even if training has been undertaken. This raises the question of what supervision, if any, should the court provide in respect of the process of mediation and of its outcome. This, in turn, raises the question whether the court has resources available for this purpose. Moreover, it is one thing for a court to supervise the possibility of legal error; it is a different thing altogether to expect a court to supervise the conduct of 'principled' negotiations.)
7. Are there perceptions of authoritarianism in the mandatory process? (There is a contradiction here. Mediation should promote the freedom of the parties to act in their own beliefs of where their interests lie. Yet they are being compelled to abandon their choice, usually made on professional advice, to have a court decide the issue.)

I turn now to the question I posed at the beginning of this article — that is, why is there a trend towards the 'Rent-a-Judge' process in the United States? The answer appears to be that in the United States, despite the existence of the 'blame and claim' phenomenon, governments have failed to provide adequate resources to enable the court system to cope with an increasing workload. Perhaps this is a good example of Galbraith's notions of 'public squalor' contrasted with 'private affluence'.[10] As Deborah Shannon put it,[11] '[o]ur courts are so incredibly clogged that cases can take five years to get to trial. The answer? Buy yourself a judge.' She added:[12]

[10] See, for example, *The Affluent Society* (Pelican, 1969), 133–4, 266.
[11] *American Way*, 1 February 1990, 33.
[12] *Ibid.*

> In an age of privatization, when there's more than one phone company and the U.S. Postal Service isn't the only outfit delivering parcels, Americans are discovering that public courthouses are no longer the only places for meting out justice. The new outlet: retired jurists who can be hired to settle beefs in private. In effect, 'rent-a-judge.'
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> Some people take their cases to a rent-a-judge to avoid public scrutiny, especially in an ugly corporate falling-out or an acrimonious divorce. But by far, more find private judging attractive for another reason. It's faster. *Years* faster, says Belli, who accelerates perhaps 10 percent of his cases by removing them from public courts. 'People can't afford to wait four or five years for a trial,' grouses Belli, 82. 'I think the courts are broken down when they make you wait like this.'

Private judging had its origins in California and, in particular, Los Angeles. Yet the country's largest rent-a-judge company, Judicate, is now based in Philadelphia.[13] Judicate has 500 jurists on its national register. Although retired judges and law professors have for many years assisted in the resolution of disputes, what private-judge agencies have done since the 1970s is to institutionalise the practice by hiring retired judges and giving the public access to them at a price.[14]

In some regions, the courts have actively encouraged this process. The Californian courts, for instance, frequently refer cases to retired judges, conferring upon them the powers of a superior court judge. Moreover, the outcome of a privately judged case may be challenged in a public court of appeals.[15] There is a perception in the United States that, by 'hand-picking' a private judge for his or her expertise, there is a prospect that the parties will benefit from having a decision made 'of higher quality and less often based on misunderstandings of fact or misinterpretation of the law.'[16]

But some critics argue that private justice inhibits social change. According to one contemporary critic:

> ... the wealthy will lose incentive to reform the legal system if they can hire a private judge whose decision is valid and binding and can be appealed in a public court. Anyone who wonders what happens when the 'power elite' abandon a public system might look at schools.... 'Inner-city schools are the worst for that reason. Why change them when you can send your children to a private school?'[17]

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[13] *Id.* 34.
[14] *Ibid.*
[15] *Ibid.* The history, in California, of the court's power to appoint a referee is described by Fred Herron, 'Rent-a-Judge — ADR à la USA' *NSW Law Society Journal*, June 1987, 51, 52.
[16] Herron, *supra*, n. 15 at 53.
[17] See Shannon, *supra*, n. 11 at 36.
[18] *Supra*, n. 10 at 133–4.

Of course, we have heard all this before. Writing 25 years ago, Galbraith[18] reminded Americans that they were 'curiously unreasonable' in the distinctions they make between different kinds of goods and services:

> We view the production of some of the most frivolous goods with pride. We regard the production of some of the most significant and civilizing services with regret.
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> Cars have an importance greater than the roads on which they are driven.... We set great store by the increase in private wealth but regret the added outlay for the police force by which it is protected. Vacuum cleaners to ensure clean houses are praiseworthy and essential in our standard of living. Street cleaners to ensure clean streets are an unfortunate expense. Partly as a result, our houses are generally clean and our streets generally filthy....

Reaganomics only served to reinforce this. Is it too much to expect that the Clinton administration's commitment to 'infrastructure spending' will reverse the trend?

Note

The phenomenon of the 'private judge' has not been confined to the United States: the idea of 'judicial appraisal' of a dispute in its early stages has some support in the United Kingdom also. According to a recent report,[19] the Centre for Dispute Resolution, which has a program for resolving commercial disputes through mediation, has now launched a 'judicial appraisal' scheme. Litigants and businesses in dispute in the UK can have access to a 'private judicial service' staffed by senior counsel and former High Court judges. Two of the former High Court judges on the panel are Sir Michael Kerr and Sir Peter Webster, both of whom were appointed recently to review the litigation actions in the Maxwell pension fund and Lloyd's cases.

19 *The Times*, 3 August 1993.