

ENHANCING THE USE OF ADR IN ADMINISTRATIVE LITIGATION: SOME ENCOURAGEMENT FROM AFAR

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At the outset, I wish to express my appreciation for having been invited to share in this landmark consideration of the use of ADR in increasing the effectiveness of administrative litigation. But I also wish to express my profound regrets that I was not able to overcome a prior speaking commitment to permit me to be there in person to share directly in the meeting to hear the results of the Survey on the use of ADR within the jurisdiction of the Jiangsu Provisional High Court.

The meeting to discuss the Survey is very timely and very promising. First, it comes as a recognition of the effectiveness of mediation², a recognition that disputants prefer to resolve their disputes through negotiation rather than submit them to the decision of the courts. Second it comes as a recognition that mediation can be an ally of the administrative courts in diverting cases that can be settled, leaving the court to resolve the more intractable disputes, and those in which the government needs to establish new law and guidance for the future. And third, it comes at a time when the government is reassessing a broad scope of legislation to meet the needs of an ever expanding economic development and increasing visibility in the markets of the world.

Simplicity of Mediation

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² For convenience I will use the term mediation but the term conciliation could readily be substituted (without going into the arcane differences between the terms)

Although we try to classify ADR as some sort of alternative legal system, it need not be so ornately structured. It is a varied effort to help people more efficiently resolve their disputes. Clearly nothing stops two people from sitting and reconsidering their positions and reaching agreement on their own. Likewise nothing stops the disputants in a case before an administrative agency from reconsidering their positions and likewise voluntarily reaching accommodation to eliminate their conflict. Certainly our society and our legal system encourages participants to do just that, to avoid escalating hostility between individuals or between individuals and administrative agencies. Why then does it become so different when one or both agree to have a facilitator come in to help them in their direct discussions to resolve their impasse? Sometimes the dispute requires a third party to merely restore what would be expected through direct communication between knowing and thinking combatants. They can't talk or perhaps even stand being in the same room with their adversary, but they would both be willing to express their views (and hostility) to a sympathetic and listening third party who becomes their communicator. In other disputes the parties may be able to communicate but have reached deadlock in their direct discussions, with neither party willing or able to alter their set position. In that context, a third party might be effective to suggest new ideas to get both parties off their rigid positions in an effort to get them closer together and eventually, hopefully to settlement. In still other disputes one or both of the parties may need, or even seek, a neutral outsiders assessment that their long held position is not reasonable and should be revised, a vital step in bring the parties closer together toward settlement.

Whether the third person be called a facilitator, mutual friend, or mediator, that person is the embodiment of ADR, working to bring both disputants back from the brink of surrendering their control over the outcome by submitting to the court to render a decision that the court

deems required under the law, but that may be far from the better joint result the parties could have reached had they negotiated more conscientiously or had they had the assistance of a neutral to help them reach that mutually acceptable accommodation. The result may not be enshrined or even recognized by law, but disputants do resolve their own conflict, even if one party is an administrative agency, and it seems logical that they should be encouraged to do so, particularly, if the administrative agency believes the voluntary resolution is consistent with the law and acceptable as a matter of policy. Certainly the administrative agency has its responsibility under the law, but if the agency and the defendant are agreeable to a resolution, why should they submit the dispute to the court where the decision is risky, unknown, and certainly unlikely to be the same as that which the agency and defendant might be willing to develop and accept on their own?

If the parties can resolve disputes on their own, even when one of the parties is an administrative agency, isn't that better than forcing them to go to a less sympathetic court? And, indeed shouldn't it be the policy of the court and the administrative agency to help the parties work out such conflict in either direct negotiations, and if that doesn't work, by encouraging them to find a helper, a facilitator, a mediator, a conciliator to assist in doing what they should have been able to do on their own, i.e. reach agreement? At the very least the courts should keep out of the way, and not stop them from settling.

Mediation is Beneficial

Mediation is beneficial to all concerned. Not only is it a logical route to assist the disputants even when one is an administrative agency and the other a defendant, to reach a settlement that they could clearly, legally do on their own, it is a preferable outcome for the society as well. First,

unlike in the courts, even in administrative courts, mediation provides a vehicle for disputants to focus on their future relationship rather than having a court decide that there was in the past some legal wrongdoing. Such a holding can chill the prospects of future accommodation and thus tend to destroy rather than encourage an ongoing relationship. Second, through mediation there is emphasis on the interest of the parties including the administrative agency and the defendant, rather than enforcement of any right arising from prior dealings. This protection of the ongoing relationship, even when an administrative agency is a party, is crucial for economic and social advancement, demonstrating the effectiveness of direct dealings while minimizing resort to litigations. Third, mediation is certainly more expeditious; resolving in hours a dispute which in litigation might drag on for months or years, with prospects of legal appeals looming in the distance. Fourth, as a consequence of mediation the cost to the disputants, including the administrative agency and the court, is substantially reduced for the same reason of simple expedition. Fifth, for the inarticulate and under educated defendant who is likely to be dragged into and through the courts, it may also provide an additional assurance of fairness. The mediator, with no stake in the outcome, can provide valuable procedural advice as to how to best settle the claim to avoid the cost, and time and potential inequity of a court proceeding where the defendant may lack counsel, may lack sophistication and may be subject to intimidation and over bearing power by an adversary or agency. With greater legal competence and power on the part of the agency or court, focusing on legal and procedural details, the defendant's interests may be ignored and prospects of compromise not considered. Sixth, the provision of mediation, even if not successful, is beneficial in demonstrating the government's concern for the problems of people under the umbrella of administrative agencies, and who are required to come before administrative tribunals. Offering the prospect of mediation shows a governmental empathy for those caught up in the

administrative network by offering a non confrontational process for resolving their problems, a welcome alternative to those concerned with tribunals as focusing on punishment rather than legal compliance.

Seventh for the Courts, making mediation available also brings rewards. It avoids the cost of extensive case preparation and manpower to be assigned to case processing and appeals thereafter. As noted above, few hours spent in mediation may save weeks or months of manpower and personnel time to be devoted to legal research and case processing.

Eighth, the courts are particularly victim to the increasing pressures of urbanization and individuals running for the first time into the morass of administrative law, all contributing to ever more clogged dockets.

Mediation provides a welcome relief against such buildup of case load and back log, permitting the courts to focus on the more difficult, more intractable cases, for the benefit of government and society as a whole.

Ninth, by encouraging mediation, the courts, agencies and government gain enhanced credibility by being viewed by the public and those subject to administrative agencies as being oriented to peaceful resolution of issues involving legal compliance instead of having defendants assume the negative perspective of the government being out to hound or punish them. Tenth, encouragement of the process also assures the

administrative agency or court of a role in what is sure to be an ever expanding role for ADR and in particular mediation as a way of resolving the myriad of problems that are bound to beset an expanding economy and administrative network in a growing economy.

Examples of Mediation in Administrative litigation

The thrust of my message is that reliance on ADR in the realm of administrative law enforcement is not wishful thinking. Mediation can work in disputes involving administrative agencies, both as a means for avoiding resort to litigation by administrative agencies and as a tool to be

utilized in seeking agreement even in parallel to the adjudicatory role of the administrative tribunal. And the evidence shows that the role is expanding. I offer three examples from my own experience to show how this concept may be introduced.

In the first setting, as an addendum to administrative tribunals, Labor Courts throughout the world have adopted and encouraged the role of mediation/conciliation as a valued instrument made available either before a case is submitted to the labor court, or once the case is accepted within the labor court. In a study of 18 labor court systems from Australia to Iceland, done at the request of the Presidents of the European Labor Courts, and published in the *Comparative Labor Law and Policy Journal* in 2005³ I found that compared to 9 years earlier when I had first discussed the concept with Labor Court Presidents, there had been a surprising adoption of the practice of deferring to, permitting, encouraging or indeed requiring mediation of a case prior to, or on entry into the governments labor court system. And the reaction of the judges who assessed the programs for my study was universally positive, concluding that the availability of the mediation function as an implement of the administrative tribunal handling employment litigation issues is helpful. The conclusion was that it was helpful for the parties in seeking their own solutions, and was helpful to the court in minimizing the cases requiring litigation and court decision, permitting the courts to focus on the more difficult cases or those where the court felt that the issuance of a decision was preferable for the development of the law.

A second example of the use of mediation in administrative law litigation occurred in a study done of mediation of employment law disputes at the

³ 'Conciliation of Labor Court Disputes', Zack, Arnold M. *Comparative Labor Law and Policy Journal*, Vol 26 401, 2005, www.law.harvard.edu/programs/lwp/ZackArticle 26-3,med%labor%20cts.pdf

office of the Solicitor of Labor of the US Department of Labor⁴ and later at the office of the General Counsel of the Equal Employment Opportunities Commission⁵. In those two programs, which I helped develop as Chair of the Alliance for Education in Dispute Resolution (a consortium of 20 or so universities, professional organizations and government agencies⁶)we trained some 200 professional arbitrators and mediators in the legal issues confronting the Department of Labor and the EEOC. Thereafter, under a grant from the Department of Labor we negotiated an arrangement with the Solicitor of Labor to use roster mediators to resolve disputes which were already scheduled to go to litigation. The Solicitor said he thought it worth while because if the mediators could resolve an Employee Retirement Income Security Act (ERISA) entitlement case it could save his office a year's worth of attorney time preparing for an actual trial. An evaluation of the first three years of the program showed a settlement rate of 84 %. The success of the program there, led the EEOC to undertake a comparable program involving litigation of discrimination claims.

The third area of my experience where efforts at mediation have been used successfully to deter appeal to administrative law litigation is in the dispute resolution structures created by the 200 or so international agencies which create their own laws, since they and their employees are immune from the jurisdiction of national legislation and courts due to Privilege and Immunity Treaties which recognize the legal independence of such institutions. All have laws and regulations. All have thousands of employees who are covered by these laws, and all have had to create their own private judicial machinery. All have Administrative Tribunals of their own⁷ or provide appeal to the Tribunals of the ILO or the UN. But all

⁴ www.eeoc.gov/federal/adr/resolvehandbook.html,doi.wiley.com/10.1002/crq.96

⁵ Bna.com/bnabooks/ababna/adr/2001/fallnews.doc

⁶ www.ilr.cornell.edu/alliance.org

⁷ As a note of disclosure, I am a Judge on the Asian Development Bank Administrative Tribunal

also have preliminary procedures to settle disputes to deter appeal to the Tribunals. In a study of internal dispute resolution in several international agencies conducted by a team which I chaired while reexamining the internal structure of the International Monetary Fund⁸, it was clear that through relying on such procedures, whether they be preliminary arbitration, peer review, conciliation, or a combination of Ombudsman and mediator, the agencies have made a concerted and effective effort to deter appeal of disputes to their Tribunals in favor of internal voluntary machinery. As a result, the cases appealed are but a small fraction of what would be litigated were it not for such preliminary steps.

What I think is important for this audience is that these procedures are adaptable to disputes over any form of statute or regulation enforcement and not just to those in the employment field, which happens to be my area of focus. Thus in discussions with officials from the US Department of Transportation there was interest in using the mediation process to resolve the multitude of claims against trucking companies for having been caught with overweight loads, or requiring excessive hours of drivers or driving on bald tires. There are even more cases pending against the long distance drivers who work beyond the statutory hours, or who fail driving or sobriety tests or who otherwise brush up against the law. My proposal to the Department was to recruit a comparable group of mediator-wannabes from among lawyers, retired government officials, academics etc., give them training in the process of mediation and in the laws of trucking regulation and then offer the procedure to the enforcing agency and the defendants who would otherwise be forced to court and hiring of lawyers and potentially long and costly litigation, litigation where compromise was foreclosed but where they might lose their entire case.

⁸ www.internationalmonetaryfund.com/external/hd041502.pdf

Because of my focus on employment and labor relations, I have not pursued the transfer of the procedure into other fields of administrative law, but the glove certainly fits. It is up to those working in the other specialized areas to develop the cadres of qualified mediators and then craft a procedure for using them to cut down the volume of unnecessary administrative law litigation.

How to Get There

The experience of these other institutions suggests that the following components should be developed and put into place.

1. A commitment by the government and the courts to respect, if not encourage, the concept of voluntary dispute resolution of cases that if unresolved would be subject to administrative litigation. Legal endorsement of the process with assurances of protection of confidentiality of the proceedings, and including the immunity of the mediators from testifying as to what transpired, would all contribute to the viability of the undertaking.
2. The establishment of an independent managing institution beyond control of the courts, the administrative agencies and those under their jurisdiction to serve as honest brokers in developing and administering the procedures. Such an institution could be based at a university, be free standing, be tied to an NGO or be funded by independent source, foundation or perhaps even the government if its independence can be protected. It should also develop procedures for designating mediators, including the right to appoint if the parties fail to select on their own, standards of disclosure and ethical behavior and rules for the conduct of the mediation.
3. The staffing of the managing institution by respected professionals familiar with the processes of ADR, particularly mediation and of the legal jurisprudence of the administrative law involved.

- 4. The recruitment by the managing institution of individuals respected in the community, currently unaffiliated with the disputing parties or administrative agency involved, with experience in the areas of litigation and hopefully in the process of mediation. Such mediators-to-be could come from the ranks of academics teaching in the field, law school faculty, retired agency personnel, retired judges and others with experience in dispute resolution. One procedure I used in the Philippines in helping to establish a cadre of acceptable arbitrators was to develop a roster of those whom each side (here the administering agency and the regulated industry or groups) thought would be acceptable to the sponsoring side as well as the other group.**
- 5. Development of a training program including training in the laws and regulations involved and in the process of mediation**
- 6. Providing training of some 40 hours to those recruited, in groups of no more than 25, with some of the training being provided by the representative of the parties whose disputes will be subject to mediation.**
- 7. Training should also be made available to attorneys and representatives on their role in the mediation process to educate them to the benefits of mediation and to assure the highest levels of civility and due process once they enter the mediation step.**
- 8. Developing a roster of the mediators, with their biographies, (fees if applicable) and access information on the managing institution's web site so that those entering mediation may voluntarily agree on their selected mediator.**
- 9. In the event the disputants do not voluntarily agree upon a mediator from the posted roster, the managing institution shall entertain requests for a mediator, cull the names of three or five from its roster of those experienced in the nature of the dispute and provide an opportunity for the disputants (after a coin toss to see who**

10. The managing institution should officially designate the selected mediator and secure the assent of the disputants to the mediator's role, and arrange the time and place of the mediation at a facility or facilities it arranges within reasonable access to the disputants, and handle any charges and costs associated with the mediation, hopefully on a mutually paid basis. Although equity in payment may be difficult to secure, arrangement should be made, perhaps through external, or government or foundation, subsidy to permit the process to go forward. As an initial venture the mediators might serve pro bono, but the goal should be to secure compensation for those so serving. It should also establish procedures for reducing to writing any resolution achieved, so that the settlement agreements may be readily enforced in court.
11. Arrangements should be made to retain copies of the settlement agreements, and to conduct a program of evaluation to assure the program is subject to criticism, improvement and refinement. A complaint process should also be instituted to record reaction of the participants so that performance is subject to constant scrutiny and improvement. Mediators should be subject to periodic retraining on the basis of the evaluation procedure. They should be legally protected against having to testify as to what transpired in the confidentiality of the mediation.
12. Reports on the effectiveness of the procedure should be developed and publicized (while preserving necessary confidentiality) so that the experience is written up and promulgated for adoption in other geographical areas and for other judicial fora.

Conclusion

Other nations are already developing such programs at a rapidly increasing rate. It is my belief that those that have put such procedures in place are ahead of the curve. It is clear that administrative litigation is so cumbersome, costly, time consuming and distrusted by those who enter it, that a voluntary procedure for resolving administrative law disputes should be a top priority for every nation, particularly those embarked on rapid economic development where the pressures on the society for administrative litigation are bound to skyrocket. The Province appears to be starting down a desirable path, and should be encouraged in its efforts. Society deserves no less. Let's begin. If not now, when? If not us undertaking it, who will?