ARBITRATION AND ADR IN PRODUCT LIABILITY DISPUTES

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Between 1976 and 1986 federal court product liability filings increased fourfold.[1] The increase was apparently for two reasons. First, product liability cases in the mass tort arena, such as the DES[2] and asbestos[3] litigations, have proliferated.[4] Second, the number of different manufacturers and products involved in product liability cases has increased, albeit at a much slower pace than the statistics would otherwise indicate.[5] These statistics demonstrate two important points: (1) the threat of major totally destructive "bet your company" litigation is in large part due to the enormous litigation costs associated with many cases or claims arising in connection with a single product; and (2) the likelihood of a given company's products becoming the target of product liability suits is ever increasing, albeit at a much slower rate.

Given the increase in product liability litigation in the United States and in the European Community, more attention is being paid now than ever before to the reduction of litigation costs in such cases. The use of alternative dispute resolution ("ADR"), which in the parlance of United States lawyers includes

arbitration, has been one principal way in which insurers, manufacturers and other potential defendants have attempted to meet this challenge.

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This paper identifies the major ADR methods currently being employed in the United States and elsewhere. It then reviews arguments in favor of ADR, and potential impediments to ADR. Finally, the utility of ADR in foreign venues is considered.

I. MAJOR ADR METHODS

The following explores the major types of ADR techniques currently employed in the United States and in other parts of the world today. These are mediation or conciliation, arbitration, mediation-arbitration, mini-trials, private judges, contract-mandated negotiation, and claims facilities.

A. Mediation and Conciliation

The term "mediation" has been defined as the "intervention between conflicting parties to promote reconciliation, settlement, or compromise."[6] Conciliation is similarly defined. These two terms are typically used synonymously.

Mediation involves at least one person unrelated to the parties who assists the parties in resolving their differences. The mediator generally does not have authority to make any binding decisions on the merits. Instead, her or his purpose is to bring reason and good judgment to the controversy, and to offer proposed solutions and an independent, neutral view of the dispute to each party.

There has been a tendency among commentators to treat mediation as the province of professional mediators.[7] While many judges and other fact-finders do feel that they cannot act as pure mediators, there is little question but that many judges are among the best mediators that exist. After all, they have substantial incentives for a settlement to be reached before a case goes to trial. Moreover, many judges perceive their roles to include mediation.[8]

Many mediators do not meet with the parties at the same time. The mediator may travel from room to room, or location to location, attempting to explore alternatives and seek solutions to the dispute. Separating the parties decreases the parties' tensions and antagonisms.

The ICC's recently revised Rules of Optional Conciliation provide a formal means for the parties to engage in conciliation. A place for conciliation proceedings is set by the conciliator.[9] The parties appear before the conciliator, who "shall conduct the conciliation process as he thinks fit, guided by the principles of impartiality, equity and justice."[10] The AAA's Commercial Mediation Rules also provide for scheduled mediation sessions.[11]

Mediation is usually much cheaper than litigation or arbitration. The parties may stay at their home bases and allow the private mediator to travel between the locations, often saving travel and lodging expenses typically experienced in other dispute resolution methods. There is less need to prepare for mediation in a formal way. The mediator may insist that presentations be oral, that there be no witnesses, and that each party should refrain from arguing extensively from the existing precedents.

The private mediator also usually does not feel restrained to remain neutral, as a judge should even in jury cases. This is one of many advantages that a mediator has over his

fact-finding counterparts. Others include the ability to take into account and advocate each party's understanding of non-material and legally irrelevant factors, and the ability to expand and contract issues without formal restraints from doing so.

A newer form of conciliation, called "joint conciliation" has been created by the Chinese Foreign Economic and Trade Arbitration Commission[12]

"If a civil case...can be conciliated, the People's Court shall...conduct conciliation and urge the parties to reach mutual understanding and compromise." and the American Arbitration

Association. Joint conciliation involves the appointment of one conciliator for each side, with the conciliation first based upon negotiations among the conciliators and their resolution subcommittees to the parties for approval.

B. Arbitration

Arbitration has traditionally involved the voluntary decision by potential litigants that one or more persons other than a judge or jury can make a binding decision regarding their disputes. As the use of arbitration has increased, so has the extension of the term to many different forms of ADR techniques. Among the many techniques used are "binding" and "non-binding"

arbitration, "agreed" and "forced" or "mandatory" arbitration, and court-ordered and statutory arbitration. These forms of "arbitration" are in fact different ADR techniques. The other forms of ADR are couched as arbitration because of the formal enforcement mechanisms that exist at national and international levels for arbitration, but do not exist for the other ADR methods. (See pp. ___-___, infra.)

Arbitration in its most typical form involves the following methodology. The parties have entered into an agreement to arbitrate any disputes that arise concerning the subject matter of a commercial contract. The contract itself typically provides for arbitration under an arbitral body's rules. The number of arbitrators may be specified, together with the substutive and procedural law to be applied.

Parties may agree on the persons who will serve as arbitrators. An arbitration association or court may also make the final selection. Finally, the selection of one arbitrator by each party may be provided for in the arbitration agreement, with the final arbitrator selected by the two arbitrators selected by the parties.

The use of arbitration has advantages and disadvantages. An arbitrator being paid her or his normal billing rate will be less likely to assist the parties in seeking settlement than are not being paid this amount of money. An arbitrator's participation in settlement discussions may be inhibited by the arbitral body's rules. Thus, for the arbitrator, there may be a monetary incentive or an institutional requirement that settlement be avoided and arbitration fees increased. One way to avoid this problem would be to reimburse the arbitrator at the outset through a lump sum payment, or to put a cap on fees. It may then be to the arbitrator's advantage to settle the dispute as quickly as possible. Institutional rules can be avoided by contractually allowing arbitrators to engage in mediation and settlement discussions.

The absence of strict, formal rules often allows an arbitration to progress more swiftly than a trial. However, the informality also permits more extensive discussion of wide-ranging issues, which may make the process somewhat more tedious while at the same time encouraging greater understanding of both sides' positions by each party to the arbitration. Also, the parties may be able to maintain complete secrecy and anonymity in an arbitration, including the existence of the dispute

itself, something not available in litigation. Particularly where trade secrets and confidential business information are concerned, arbitration may be a preferred method of ADR. This does not mean, however, that materials produced and the proceeding itself will be protected from discovery during a subsequent litigation brought by a person or entity who did not participate in the arbitration.

The permutations of arbitration can easily be included in a contract, and should be considered before agreeing to turn the process entirely over to an arbitrator. These permutations place limits on the award that can be given by the arbitrators.

Sometimes called "last-best offer arbitration,"[13] one permutation limits the arbitrator's award to choosing between the last offers made by each of the parties. This ADR is employed by Major League Baseball™, and has been employed in commercial contexts as well.

Another arbitration permutation is for the two sides to agree to maximum recoveries. This typically is merely an arbitration over damages, with a minimum damage award also set by the parties. However, the arbitrators are not usually told

about these limits, and the proceedings and findings are identical to those in any other arbitration.

C. Mediation-Arbitration

As the name suggests, a hybrid form of arbitration called mediation-arbitration exists. The mediator is given the charge to mediate the dispute until some point in time, when the proceeding is changed to arbitration. The mediator then becomes an arbitrator. The concept here is to create a stronger incentive to settle than in pure meditation.

D. Mini-Trial

Despite its relative youth, the mini-trial method of resolving disputes has had a significant following in recent years. Its use, however, appears considerably less significant than the amount of discussion which it has generated.

A mini-trial can be shaped by agreement of the parties in whatever fashion felt desirable. It is in essence a structured settlement negotiation. In its most typical form, the clients' chief executives or other high ranking employees hear factual

and legal presentations made by lawyers after a minimal exchange of documents. A neutral may be present and may be asked her or his views of the merits of the dispute. Periodic settlement discussions may occur during or after the mini-trial in an effort to achieve settlement. Further, there is no reason why a mini-trial which uses a neutral cannot be binding if resolution is not reached within a given time frame, becoming a form of ad hoc arbitration.

Mini-trials provide disputants with a more informal way to exchange materials and to obtain views concerning legal issues that await the parties should trial or arbitration ultimately occur. Typically used for complex commercial situations, the most significant advantage, however, is the ability to determine what the other side will argue and to analyze the more significant issues in a controversy so that, in the absence of settlement, both sides will be better prepared at trial.

Although several corporations have used mini-trials, they do not appear to be the panacea many lawyers once thought they were. In fact, some general counsel will not use mini-trials because they feel that they will result in added and unnecessary costs to the disputants.

E. Private Judge

In some jurisdictions in the United States, parties may transfer a pending case to court-appointed referees who render decisions after performing arbitration for pay.[14] The parties pay a proportionate share of the arbitration's costs and obtain a decision on the merits. One difference between this technique and arbitration is that the referee's decision can usually be appealed as a final judgment to an appellate court in the jurisdiction, which can review the merits of the referee's decision.

More recent versions of this technique resemble court proceedings, but result in a decision similar to arbitration. Thus, various organizations in the United States have constructed courtrooms presided over by private judges who conduct formal proceedings much like pre-trial and trial in a United States court. The parties agree to abide by the judge's or a paid jury's decision, and often engage in discovery. Given the lengthy delays in receiving a verdict in federal court, this technique allows the parties to resolve the controversy in much less time and typically much less expense while preserving

strong similarities to a normal state or federal court decision. However, these methods may not be subject to later appeal in a state or federal court.

F. Contract-Mandated Negotiation

Contract-mandated negotiation is another method of resolving disputes that is often overlooked by those who discuss ADR. Like some other ADR methods, parties may be able to accept the outcome or reject it. It also has the advantage of maintaining privacy regarding the existence and outcome of a dispute. And, unlike most other ADR techniques, it does not have the complications and costs of an intermediary or independent forum.

Various contractual provisions among parties with an interest in settlement rather than the more public litigation may be used to achieve resolution of important issues outside of arbitration. Although more typically used in joint ventures, these methods may be useful when other contractual relationships are involved, including insurance contracts.

The most typical contractual provisions here are the creation of boards composed of upper management personnel from the parties involved. These persons must confer to seek resolution of disputes before seeking a decision from a fact-finder. The framework can include different levels of review, so that the most senior executives only become involved if others cannot resolve the controversy.

G. Claims Facilities

Multi-party disputes are commonplace today. Insurers dispute coverage, and participants in the chain of distribution contest liability and create substantial uncertainties. Other claims, such as automobile accidents, are too small to warrant heavy expenditures of time and money. Claims facilities have been designed to expediently process these disputes, using one or more forms of ADR. Over the past five years, five or more such facilities have been established either for specific claims or for more general claims of a common and recurring nature. Such facilities have also been established as part of standard corporate policies for corporations.

II. ADR USE IN PRODUCT LIABILITY DISPUTES

The use of ADR has been especially helpful in product liability "mass tort" disputes. Many of the techniques have proven exceptionally helpful in resolving such claims. Although less substantial in number and nature, other product liability claims have also been resolved through ADR. The following reviews some of the disputes in which ADR has been particularly effective.

A. Asbestos ADR

Almost exactly five years ago, one of the most significant and historic ADR actions ever occurred. On June 19, 1985, the Agreement Concerning Asbestos Bodily Injury Claims was signed by fifty asbestos producers and insurers.[15] Although an extreme example in the number of participants, claims and total exposure, the process of reaching this agreement, and its effectiveness, shows that ADR might be most useful for multiple party controversies.

The asbestos litigation raised enormous problems for insurers and producers. By late 1982, between 15,000 to 20,000 asbestos personal injury cases were pending against over one

hundred companies.[16] These suits were filed throughout the United States, and were increasing in number each month. The pressure to file these suits was increasing as time passed, in part because when physiological change was found with no impairment on the individual's health it was not clear when the applicable limitations period would commence. Further, insurers, including those with primary and excess levels, were fighting coverage issues with the products. Among the more important issues were various policy exclusions, "trigger of coverage" questions, and duties to defend claims.[17] Given the latency period often in excess of twenty years, and the number of companies involved, the average suit named twenty defendants. Also, coverage questions for each defendant over this span of time usually included several insurers.[18] The insurance coverage questions in one instance required a trial of nearly one year between five asbestos producers and sixty-five insurers in an auditorium designed for the proceeding.[19]

The Center for Public Resources[20] stepped into this in October 1982. At a meeting in CPR's offices, insurers, producers and certain plaintiffs' counsel discussed the creation of an alternative to asbestos litigation.

The process begun in 1982 had three states.

The first stage involved identification of the problems and concerns facing each group, insurers, producers and plaintiffs. After initial group sessions, it became clear that insurers and producers had to first resolve their differences.

The second stage was negotiaiton among the producers and insurers. These two sides appointed an executive resolution group whose function was to follow general directions of their respective constituents in reaching agreement on the issues. Subcommittees worked on discrete issues. Finally, the parties were assisted by CPR and Professor Harvey H. Wellington, then Dean of Yale Law School.

The third stage was the creation of a mechanism for dealing with plaintiffs' claims. The Wellington Agreement resolved, or established, an ADR mechanism for resolving, all coverage questions. Punitive damage claims and insurance defenses were dropped, with sharing formulas created in lieu of indemnities and defenses. Finally a claims facility was created.

The claims facility permitted plaintiff's to achieve settlement with all participating defendants on their claims.

It also allowed plaintiffs to protect themselves from the running of the statute of limitations.

III. <u>THE UTILITY OF ADR FOR TRANSNATIONAL DISPUTES</u>

Although ADR methods other than arbitration and conciliation are not currently prevalent outside of the United States, increasing transnational commerce could result in greater demand for more specialized ADR techniques and devices. This is likely given rapidly increasing transnational arbitration costs. Coupling these trends with the increasing number of transnational business disputes could result in greater use of the newer transnational ADR mechanisms over the next several years.

Transnational ADR other than arbitration has not and will not develop as quickly as has occurred in the United States, however. This slower pace will be principally due to the following factors:

1. The growing encroachment of US counsel on traditional overseas counsel practice has stimulated resistance from some quarters within foreign bars.

2. Professional international arbitrators fear that the competition of ADR will reduce their role in handling disputes.

3. The relative novelty of many of the mechanisms has and will continue to inhibit growth of transnational ADR.

4. The absence of any substantial ADR agencies apart from arbitration centers (although new ones are emerging) necessarily has limited foreign companies' ability to use certain alternative ADR techniques in foreign countries.

5. There is a general feeling that arbitration has satisfactorily handled most transnational disputes in the past. However, disenchantment with arbitration due to increasing costs and slower speed has been growing.

Despite these views, transnational ADR will continue to grow in popularity. There are many reasons that informal and nontraditional transnational ADR may be successful:

1. Already, those of us who practice transnational ADR have been contacted to handle or provide assistance for what are essentially non-US disputes. Foreign practitioners will ultimately be forced to develop alternatives to costly arbitration or litigation.

2. The less formal methods of resolution provide the parties with an opportunity to obtain decisions from designated persons. Qualified experts may have a better grasp of the special qualities of a technology problem, and be better suited for resolving the problems. Further, language requirements for the decision-makers can be established, and other qualifications required.

3. The number of transnational disputes will increase in the next few years, placing greater pressure on existing ADR systems and encouraging the more extensive use of transnational ADR. With recession looming, currencies changing dramatically, and world-wide interdependence growing, businesses will look increasingly to foreign markets for their goods. Bad business conditions traditionally harken more business disputes. Increasing competition will also result in a growing number of

transnational business disputes requiring greater resources than disputes which are purely domestic in nature, providing further stimulus for transnational ADR.

4. Some transnational businesses have already begun to establish substantial ADR procedures for handling their disputes. These activities will increase exponentially in the next few years due to greater pressures from management to economize during the next downturn, just as they did during the last recession.

5. Social and political change will also increase the need for transnational ADR. We see the beginning of this trend in the Canadian-US trade bill. The impact of 1992 will increase the need for such trade ADR in Europe, and will also foment greater conflict for a period of years after EC trade barriers are largely removed. by 1992.

6. ADR opens disputes to world-wide competition among private practitioners, a boon to clients leading to an even more outstanding international bar and lower legal fees.

7. Couple these factors with companies engaged in international commerce who are exhibiting more willingness than in the past to dispute issues rather than concede them and it is easy to see why transnational ADR should go through considerable development in the next five years based on demand and necessity.

For all of these reasons, a substantial increase in demand for transnational ADR during the rest of this century is likely.

1. T. Dungston, "Product Liability and the Business Sector," Rand Study No. R-3668-ICJ (1989).

2. To be added.

3. To be added.

4. To be added.

5. To be added.

6. Webster's International Dictionary, at --- (---ed. 198-).

7. See, e.g., Resolving Disputes Without Litigation 14-17 (BNA 1985)(hereafter "Resolving Disputes").

8. See Title, The Lawyer's Role in Settlement Conferences, 67 ABA Journal 592 (1981).

9. ICC Rules of Optional Conciliation, Art. ___.

10. Id., Article 5.

11. AAA Commercial Mediation Rules, Article 8.

12. In the People's Republic of China, even the civil code contains an emphasis on conciliation, a process strongly favored throughout Asia. Thus, under Article 97 of the Chinese Civil Code:

13. See Supra, at 18, Resolving Disputes.

14. See, e.g., Cal. Civ. Proc. Code §§ 638 et seq.; Conn. Gen. Stat. Ann. §§52-425 et seq.; Fla. R. Civ. P. §1.830; Kan. R. Civ. P. §§60-253 et seq.; Neb. Rev. Stat. §§25-1129 et seq.; N.Y. Civ. Prac. L. & R. §4317.

15. See Center for Public Resources, Containing Legal Costs - ADR Strategies for Corporations, Law Firms, and Government at 339 (Butterworth 1988) (hereafter "CPR 1988").

16. CPR 1988, at 340.

17. CPR 1988, at 340, 350.

18. Id.

19. In re Asbestos Insurance Coverage Cases, Ind. Council Coord. Proc. No. 10721 No. 765 226 (S.F. Sup. Ct.); CPR 1988, at 340.

20. The Center for Public Resources is an organization dedicated to the reduction of legal costs involved in dispute resolution. For further information, contact Mr. James F. Henry, President, Center for Public Resources, 366 Madison Avenue, New York, NY 10017, (212) 949-6490.