

**The 5 C's of Alternative Dispute Resolution:
Collaboration, Communication, Consensus, Cooperation and Conclusion
An International Conference Overview
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I am a Barrister at Crown Office Row in Brighton called in 2009 practicing predominantly in Family Law. I was very fortunate to have been given funding from the FLBA and Bar Council to attend an international conference in Singapore on Alternative Dispute Resolution (ADR) in October 2012. I am very interested in ADR and how use of ADR may improve the resolution of family disputes but I have not yet undertaken any training in this area.

I confess that I have always been a little sceptical of ADR and how it can be used effectively given how so many of my clients seem so incapable of resolution so this conference was the ideal opportunity to gain more insight into how ADR works in practice. I was particularly keen to find out details about the benefits of ADR as opposed to litigation and to see how mediation was conducted in other parts of the world.

The conference was held at the Supreme Court of Singapore. The Court itself was extremely impressive and is housed in a stunningly modern building with a viewing gallery on the 8th floor overlooking Singapore's famous skyline.

The conference had attracted a wide range of speakers from all over the world and there were approximately 600 delegates from over 15 different countries including Malaysia, Thailand, Dubai, China, Fiji, Hong Kong, Philippines, Australia and the UK.

There were a number of speakers giving presentations on different areas but this article will concentrate on the areas most relevant to family practitioners.

CONFERENCE OPENING

The conference was opened by the Vice President of the Singapore Law Society, Wong Meng Meng SC, whose message was that mediation is a "simple and sensitive choice" and that within the legal profession in many countries there are business opportunities for collaborative law. The vice president felt that ADR would "continue to play a decisive part in settling civil cases" and described ADR as being a tool that when used was "very satisfying as a practitioner."

The Chief Justice of Singapore, Chan Sek Keong, then addressed the conference and was of the view that mediation needs only good will and a willingness to negotiate by the disputed parties. The Chief Justice pointed out that in less developed countries mediation may be the only way to settle disputes and that in developed countries long delays to litigation has lead to an increase in ADR.

He talked about the terminology used and felt that instead of using 'Alternative' dispute resolution it should be considered as 'appropriate' or 'amicable' dispute resolution and that the terminology should reflect the aim of encouraging mediation as opposed to litigation.

The challenge for mediation, the Chief Justice said, was to develop common ethical professional standards internationally.

THE FUTURE OF ADR

Michael Leathes, who is the Honorary Chair of the International Mediation Institute, spoke of the future of ADR and spoke about what he described as "the deadening drag of status quoism" which he saw as a particularly prominent characteristic of the legal profession. He felt that attitudes towards ADR needed to change before it could become more widely successful.

In terms of the negatives Michael Leathes highlighted the point that anybody can call themselves a mediator as there are no national professional bodies anywhere in the world. He stressed that training standards vary and few result in qualifications. He talked of needing a 'springboard to enable the "field" of mediation to leap forward' the springboard being to create a national professional body for mediation in every major country.

If this happens then he believes we will achieve a high quality of ethical standards, attract funding, and we will help to develop diversity of practitioners. He also believes that Australia is where we must look for inspiration for the future. He spoke about the fact that companies and organisations are under increasing pressure to reduce risk, increase efficiency and certainty and he is of the view that increased litigation is unlikely to meet such needs. According to this talk, ADR can step in to help address such issues.

If this approach is adopted by 2020 then Michael Leathes' view is that it will likely achieve widespread recognition that ADR is a true independent profession which will then lead, he says, to an increase in quality and value with people spontaneously turning to ADR which will in turn lead to an increase in other forms of collaborative law.

During the panel discussion that followed Mr Leathes' talk there was wide-spread agreement that lawyers perceive mediation as "fluffy". To combat this the message from the panel was that by 2020 there should be professionalism, accountability and transparency. There needs to be a change in attitude as currently the starting point is that litigation is time consuming and wasteful. A change needs to take place within the profession and for lawyers to realise that times are changing and new ways of practicing law need to be considered. The panel identified that there seems to be a perception if you do go into mediation there will be less work and income will be affected. The panel were of the view that lawyers need to get the message that they can be lawyers and mediators and that income can be generated from this.

COMPARATIVE ADR ASIA-PACIFIC REGION

The message from Australia

Mr Campbell-Bridge - senior counsel Maurice Bryers Chambers Australia - gave a very interesting talk from the Australian perspective. He said that twenty years ago in Australia almost no case settled prior to trial whereas now virtually all matters in the Superior Courts resolve prior to trial. In Australia the preferred method is Mediation not Arbitration. He said that it is impossible to

avoid mediation. From the client's perspective the research indicated that clients got sick of not being able to run their own cases. Mr Bridge pointed out that mediation is attractive to many clients because it is economical, fast, confidential, and infinitely flexible. Furthermore, parties perceive the process to be fair which minimises financial risks. In addition, the Court's view is that it will not allow the court system, a public resource, to be used ineffectively and the Courts can order mediation even if parties do not consent. Almost all mediations in Australia are private with costs shared between the parties and most mediators in major litigation are well-known senior lawyers (often senior counsel) or ex-judges.

Mr Campbell-Bridge explained that ultimately, those who did not want to do it were dragged kicking and screaming with financial pressures. Mr Bridge felt that If Australians can do it then so can the rest of the world.

Hong Kong

From the Hong Kong perspective Sou Chiam, a prominent Barrister said that in Hong Kong there are too many litigants in person. Sou Chiam pointed out that many people were too rich for legal aid but too poor to afford lawyers and that the courts found it very difficult to deal with litigants in person.

In response to that, the judiciary in Hong Kong decided that the proper case management of court resources was necessary such that all lawyers have to file a mediation certificate which had to record the outcome of pre-proceedings mediation attempts that had costs implications if the matter then proceeds to court.

Singapore

Mr Loong Seng Onn of the Singapore Mediation Centre said that in Singapore at the directions stage the court will refer the parties to the most appropriate form of ADR. In a Personal Injury case a settlement judge gives early neutral evaluation to help parties realise the strengths and weaknesses of the case which is aimed at helping the parties to negotiate. In Singapore the Judge gives the parties a non-binding assessment of the case at an early stage. The parties have an option to make that opinion binding by way of a 'consent judgment'.

Mr Loong Seng Onn then described that there is an automatic referral of all civil cases for ADR. Parties can be exempted based on certain grounds and some cases are considered unsuitable. But if a party opts out of mediation for an unsatisfactory reason then there may be costs implications.

AMICABLE ADR – THE BENEFITS

Speakers:

Judge Tan Siong Thye, Chief District Judge, Subordinate Courts of Singapore

Assoc Prof Ho Peng Kee, National University of Singapore Law School

Ellen Lee, Honourable Member of Parliament

Lok Vi Ming SC

Judge Tan Siong Thye, Chief District Judge of Singapore spoke about litigation and ADR and said that disputes are part of life but that if disputes can be resolved in faster and cheaper ways that is beneficial to everyone. He was of the view that the legal process is entrenched in formal inflexible procedures to ensure a fair trial for all parties. He felt that many lay parties are alienated from a

process that is to deliver justice to them. He opined that the legal process involves analysis of who has the right. It is a clinical process with strict legal procedure. With mediation there is regard to emotions and feelings and that the individual is empowered to determine the outcome of their dispute. In the legal process you have one loser and one winner and the loser pays the cost to the winner to ensure fairness and equity in the resolution of a dispute. Alternatively, mediation is controlled by the individuals and individuals do not have to wash their dirty linen in public.

Speaking of the benefits of mediation he felt that not only does it help to reduce the caseloads for the courts but there is a greater interest to society to help deliver a more harmonious, caring and forgiving society. He felt that the system should operate a multi-door court house where parties can choose the door they use with the court there to guide parties as to the benefits of the door they choose.

Mr Lok Vi Ming, SC of the Law Society of Singapore highlighted that one of the main benefits of mediation is the financial costs. He pointed out that parties are not always aware of the costs of litigation that is the financial costs, time costs and emotional costs. From his experience he felt that nobody likes to talk about losing. People get too deep into litigation to pull out. He felt that parties were worried about losing face and as a result the costs become very high. His experience has shown him that sometimes parties are not at all interested in resolution instead wishing to inflict suffering on the other party. Sometimes people are interested in vengeance and to make life miserable for the other person.

He then spoke of the need for lawyers to foster a culture that frowns on parties rejecting mediation. He felt that attitudes needed to be changed so that the party proposing mediation is not seen as weak and that if mediation is seen as the norm then it is more likely to succeed.

COLLABORATIVE LAW

Ms Catherine Gale President Law Council Australia gave a presentation on collaborative law in Australia. She said that in family law most states have lawyers who are collaboratively trained. She said that in her experience family clients are often left feeling disempowered and unsatisfied with outcomes that are ordered in court.

She stressed, however, that collaborative practice is not right for every client and that it would not replace courts. There will always be cases that are not suitable such as cases involving drug use, mental health issues power imbalances within relationships and domestic violence. For a collaborative matter to be successful clients need to be capable of sitting across the table from one another.

In collaborative law, if the process breaks down then those lawyers cannot then continue to act and the parties would be forced to instruct a new legal team. Ms Gale said that collaborative practice has a 93-97% success rate. In her view, in mediation where there is an impasse there is a tendency to then go to court. If there is an impasse in collaborative law there is the threat of having to start all over again with a new legal team and this, she says, encourages further negotiations.

Overall the collaborative process focuses on problem solving. It's a team approach between lawyers and clients and other professionals. All participants sign a contract at the outset that they

agree not to go to court which is binding on the professionals rather than the clients. There is no negotiation in the absence of the clients which is markedly different to how negotiations take place at court.

In the collaborative law model clients are encouraged to explore their positions in more depth with the goal being to reach a voluntary settlement.

If further professional input is necessary then the parties have the option to involve a family consultant, financial professional or child psychologist. This can assist with working out a parenting agreement, finalising financial provision or to support the clients with parenting or budgeting issues following separation.

The process operates in a series of two hour meetings that are run like a business meeting with an agenda being drawn up with all parties and lawyers prepared beforehand. Legal advice is given to parties by their lawyers at the outset and the advice is also disclosed during discussions with parties being able to take further legal advice at any time. Ms Gale highlighted that most cases resolve within 4-6 two hour meetings. Compared to litigation in Australia a family matter takes between six to eighteen months to complete.

In terms of the costs this is agreed between the parties. Sometimes parties will pay fifty percent each, sometimes the costs will come from joint fund or credit cards. In other cases one party may be prepared to pay the full amount if it is recognised at the end of the process and taken into account in any financial settlement.

FAMILY LAW ARBITRATION IN ENGLAND

The final session of conference focussed on Family Arbitration in the UK and was presided over by Sir Peter Singer, a retired UK High Court Judge. Sir Peter described the UK family justice system as being in a state of disarray and reported that mediation had not really taken off. He was of the view that there were many advantages for parties opting for arbitration not least of which the speed in which it can be conducted compared to the time a case would take to proceed through the courts (6-18 months). Sir Peter stressed that the advantage of arbitration from the English perspective is litigants can save huge amounts of time and costs.

Ann Thomas, from Family Law Arbitration then gave a presentation on Arbitration and the UK experience. Her view was that family law arbitration is needed as mediation cannot recommend a solution to clients. She said it arose as a result of couples asking judges and senior lawyers to hold private mediations

Her view is that family law arbitration is needed as mediation cannot recommend a solution. She outlined that family arbitration arose from couples asking judges and senior lawyers to hold private mediations. In her view mediation was not solving the more difficult cases with the more difficult clients. Currently family arbitration is only an option for financial remedy cases and cannot at present deal with children matters.

The UK family law arbitration scheme came into force in January 2012 and by the end of 2012 over 200 lawyers will have been trained.

Some of the advantages include clients being able to choose the identify of the arbitrator according to their specific skills and experience. Clients can be assured that the arbitrator has read all the papers fully in advance and will have continuity, flexibility (hearings can be held anywhere and at any time including internationally or electronically) and parties are able to agree the scope of the arbitration for example, by deciding the matter should be dealt with on the papers only. Another advantage is that clients can maintain complete confidentiality and are at liberty to make their own arrangements as to costs.

Mediation can take place alongside arbitration and overall arbitration can reduce the burden on the courts. All arbitrators are experienced family solicitors, barristers and judges and there is a regulatory body to oversee the profession.

An arbitration agreement is drawn up at the outset with parties agreeing how it is to be conducted, for example, by agreeing on any witnesses, documentary evidence and costs. At the end of the arbitration the 'award' is very similar to a judgment. Awards are consensual and parties agree to be bound by the decision. Any breach of the award is therefore a breach of contract. The arbitrator has wide powers and in the absence of agreement can make interim awards, give directions, recommend mediation and determine case management issues. Arbitrators now have power to bind third parties. Some issues can only be resolved by a court order but flexibility in the court system can mean that proceedings can be stayed in order to take up arbitration and arbitrators can turn to the courts if necessary. Awards can be enforced by applying to the courts.

CONCLUSIONS

The overwhelming message from the majority of speakers at this conference was that there needs to be a change in litigation culture. We should be moving away from hotly contested litigation to a solution where each party has input. There are various methods being implemented internationally and we can do well to learn from each other's experiences.

There is a lot of talk about multi-door court systems offering parties choice in the way in which their dispute is dealt with and I am of the view there would be merit in this type of system. This could be by negotiation, mediation, collaboration or arbitration and it seems to me that at least in the UK there remains a very large and important role for the courts to play.

Collaborative law has not yet taken off in the UK as fast as it has in Australia but may offer viable alternatives to privately paying clients when going through divorce and separation. In terms of finances Arbitration in the UK is in its infancy but promises to offer another viable alternative to going to court.

It seems as though there is ample room for more innovative and forward-thinking ways of dispute resolution to flourish in the UK. The Bar is changing, especially with the advent of direct access. One of the positives to take from this conference is that there is most certainly a role for lawyers and specifically barristers, who possess wide-ranging skills to help settle disputes, to excel in offering alternatives to litigation. We just need to grasp the nettle.

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