

MEDIATION ARBITRATION - A BETTER WAY TO JUSTICE?

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"..... we may say that the movement of the progressive societies has hitherto been a movement from Status to Contract."

Henry Maine, Ancient Law (1917) 100.

PREFACE

I wish to record my gratitude to my Supervisor, Professor E Newman, for his gentle but firm guidance which has largely contributed to the completion of this work.

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CHAPTER ONE

INTRODUCTION

An attempt has been made in this project to investigate some of the experiments and innovations which are taking place in the United States and elsewhere which offer alternative or adjunct processes to those of the ordinary courts of law. In the course of my research it became clear to me that we are living through a period of socio-legal revolution in which the established rules and procedures, unchallenged two decades ago, are being questioned, and alternatives for them are being sought, either to complement traditional processes or to open entirely new avenues.

I found it necessary to look hard at what is happening in the United States, for there I found the most dynamic and courageous attempts at innovative procedures. In his state of the judiciary address at the 1970 annual meeting of the American Bar Association, Chief Justice Burger's opening remarks were:

"When President Segal and the Board of Governors of this Association invited me to discuss the problem of the Federal courts

with you, as leaders of the legal profession, my mind at once turned to one of the great statements on the problems of the administration of justice. That was Dean Roscoe Pound's famous speech to this Association at its meeting sixty-four years ago this summer. He said then that the work of the courts in the twentieth century could not be carried on with the methods and machinery of the nineteenth century. If you read Pound's speech, you will see at once that we did not heed this warning, and today, in the final third of this century, we are still trying to operate the courts with fundamentally the same methods, the same procedures and the same machinery he said were not good enough in 1906. In the super-market age we are trying to operate the courts with cracker-barrel corner-grocer methods and equipment - vintage 1900". 1)

We in South Africa in 1984, have, I think, still to realise the full import social change is having on law and the administration of justice.

1. "Roscoe Pound kindles the Spark of Reform"
57 American Bar Association Journal (1971) 348.

The ordinary man is aware, more or less, that litigation is a luxury he simply cannot afford, and lawyers themselves are advising clients to settle whenever possible. This inevitably breeds contempt for the law and is a state of affairs which no society can tolerate.

The advent of the small-claims courts in South Africa on the recommendations of the Hoexter Commission has been hailed by the Minister of Justice, Mr H J Coetsee as "a landmark in our search for swift and expeditious justice, and may herald a new era", 1) and speakers in the House of Assembly, on the second reading of the Small-Claims Bill, described it as an "important and historic advance in the administration of justice in South Africa". 2)

Before we get too carried away by our euphoria in establishing what is, after all, a minor advance in a general access to justice campaign, we should remember that the first small claims court was established in the United States in Kansas as early as 1912, and the conciliation branch of the Cleveland municipal court opened in 1913. By 1923, five states had small claims

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1. Address to the 11th South African Law Conference in Port Elizabeth, 23rd April (1984).
 2. Natal Daily News, 12th April (1984).

systems, and three, state-wide conciliation tribunals. 1) There was, at that time, a mood of general optimism and satisfaction with the courts and the administration of civil litigation. In 1920, Herbert Harley, the secretary of the American Judicature Society wrote that "these new courts represent the only new and promising advance in the administration of justice in this country in seventy years. They are the laboratories in which the new procedure is being evolved. On these depend the future of our jurisprudence". 2) These words have a familiar ring to them!

After the first heady notes of optimism had died down, it was found that matters were not that simple. The assumption that a small claim is a straightforward claim and is therefore quickly disposed of is not always correct. 3) Furthermore, as the years went by, small claims courts were accused of becoming battlegrounds, bargaining chips, or collection agencies, often not without cause. They have since become crowded, and, as their jurisdictions have been increased, devices such as arbitration and mediation are being employed to alleviate the log-jams in the courts' rolls.

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1. B Yngvesson and P Hennessey "Small Claims-Complex Disputes A Review of Small Claims Literature" 9 Law and Society Review (1975) 219 at 224.
 2. ibid.
 3. op cit 226; 121 New Law Journal (1971) 965.

There is a growing school of thought in the United States which supports the use of arbitration and mediation as alternative, or at least complementary processes, for a wide range of dispute settlement. This thinking has the support of the Chief Justice of the Supreme Court. Mr Justice Burger, in his annual report on the state of the judiciary, delivered on the 24th January, 1982 to the American Bar Association, 1) again called for a "better way", and strongly supported extra-judicial processes such as mediation and arbitration to relieve the heavy burden which is being placed on the administration of justice. He quoted Charles Halpern, dean of the Law School of the City University of New York, who is a strong advocate of non-adversarial methods:

"The idea of training a lawyer as a vigorous adversary to function in the court-room is anachronistic. With court congestion and excessive litigiousness drawing increasing criticism, it is clear that lawyers in the future will have to be trained to explore non-judicial routes to resolving disputes"2)

The strong motivation on the part of thinking lawyers towards negotiating and settling disputes is based on

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1. "Isn't There a Better Way" 68 American Bar Association Journal (1982) 274.
 2. op cit 275.

some disquieting statistics. In spite of the increasing costs and delays in bringing a matter to trial, litigation is on the increase. In 1975, Professor John Barton of Stanford University projected that

"... as implausible as it may appear ... increases over the last decade suggest that by the early 21st century, the Federal Appellate courts alone will decide approximately one million cases each year. That bench would include 5000 active judges, and the Federal Reporter would expand by more than 1000 volumes each year". 1)

Mr Justice Burger has suggested a reason for the heavy case-loads in the courts:

"Americans are increasingly turning to the courts for relief from a range of personal anxieties and distresses. Remedies for personal wrongs that once were considered the responsibility of institutions other than the courts are now boldly asserted as legal 'entitlements!'. The courts have been expected to fill the void created by the

1. ibid.

decline of the church, family and neighbourhood unity". 1)

If the courts are now unwillingly and inappropriately being used to fulfil the functions of other social institutions to the detriment of both the litigants and the courts, then the call for a "better way " is well made. If the law is being used as a relief from personal anxieties and distresses, then the delay, expense and frustration of litigation must be cold comfort indeed.

With the decline of the unity of the church, the family and community cohesion, and the encroachment of government fiat into all aspects of our everyday life, we see, perhaps, the courts as a refuge for self-expression. A forum where our personal views, rights and entitlements will be protected and satisfied; where we, as individuals, will be recognised and given our true measure. This places a burden on the courts and affects the working of the administration of justice.

Judge Burger calls for inventiveness and ingenuity in order to overcome the problem, and makes the point that

1. ibid.

there are some very good tools and techniques waiting for imaginative lawyers to use.

"We need to consider moving some cases from the adversary system to administrative process, like workman's compensation, or to mediation, conciliation and especially arbitration. Divorce, child custody, adoptions, personal injury, landlord and tenant cases, and probate of estates are prime candidates for some form of administrative or arbitration processes". 1)

He focuses on arbitration, tracing its history back more than twenty-five centuries; to Homer, the Phoenicians and the desert caravan of Marco Polo's day; to England when guilds and trade fairs adopted arbitration ordinances. Arbitration, and its cousin mediation, are old processes ante-dating formal justice systems by many centuries. 2) They have the advantage of being able to involve one's neighbour and the community as opposed to the formal court, which is set apart, and distinguished by its separateness; and to approach it one must be prepared to wager high stakes, suffer the inherent delays in its system and undergo the attendant frustrations. One hears of the complaint

1. op cit 276.

2. J A Cohen "Chinese Mediation on the Eve of Modernization" 54 California Law Review (1966) 1201, 1206.

that the doors of the court were closed to the plaintiff through lack of money. An indictment indeed!

There is some irony that these hoary processes, mediation and arbitration, are being called upon today to serve as complementary avenues of justice. Perhaps there is a very real need today to seek for more informal processes, which are more humane, more sensitive to the individual's requirements. Judge Burger is well aware of the destructive aspect of litigation:

"We, as lawyers, know that litigation is not only stressful and frustrating, but expensive and frequently unrewarding for litigants. A personal injury can, for example, divert the claimant and entire families from their normal pursuits. Physicians increasingly take note of 'litigation neurosis' in otherwise normal, well-adjusted people. This negative impact is not confined to litigants and lawyers. Lay and professional witnesses, chiefly doctors who testify, are also adversely affected. The plaintive cry of many frustrated

litigants echoes what Learned Hand implied:
'There must be a better way'. 1)

In this work, I have looked at the institutions of mediation and arbitration, and have attempted to show their potential as modern extra-curial devices for not only relieving the pressure on the courts but also for becoming institutions capable of assisting disputing parties to settle their differences satisfactorily and amicably. With the successful development of mediation in the industrial field, this process has been re-examined and applied in areas which, until a few years ago, would have been unthinkable.

I have considered some aspects of commercial arbitration as it is practised to-day. It seems that it has developed a rigidity and formalisation which is robbing it of much of its vitality. It is also becoming expensive. Its basic principles, however, remain the same, and these are being applied in the arbitration small claims before adjudication in the United States to relieve the heavy case-loads in the small claims courts, where in some jurisdictions submission to arbitration of both tort and contract cases

1. Burger op cit 276.

for money damages of less than \$50,000, is compulsory.¹⁾

In chapter four, I have looked at the mediation of small claims experiments in the state of Maine, where the process is being used to achieve settlements between the parties before resorting to court adjudication.

I have attempted to show that mediation and arbitration are viable adjuncts or even alternatives to adjudication in areas which have hitherto been under the exclusive purview of the courts. Some of the ideas may seem totally unacceptable to traditionalists who fear that the restraints of formal justice will be lost in these processes. But in my research, I have noticed a continuous and familiar thread, too persistent to be ignored: that many present day thinkers are turning to the idea of settling disputes informally, and are searching for ways of avoiding the courts. It is not only the expense and delay of the courts which is leading thinking along these lines. It is the wider concept of a greater freedom in the conduct of the individual's affairs, the concepts of mutuality and

1. "Bell Pushes Arbitration Plan" 64 American Bar Association Journal (1978) 824-6.

consent which create greater harmony and compliance in the business of everyday life.

In chapter five, I have given a brief account of the use of arbitration in those jurisdictions in America where it is being used together with mediation as an adjunct to the judicial process in small claims. I have also pointed out that arbitration was employed as a small claims process in England since the early seventies; not only as a means of assisting the county court, but as a small claims process in its own right. In a quest to find viable and accessible justice in the small claims area, private arbitration schemes were set up in England to this end.

Perhaps one of the most interesting and innovative experiments with arbitration and mediation currently in use in some states in America, is in the field of the criminal law. There is a direction in thinking towards decriminalising certain conduct which involves persons with close continuing relationships. The idea includes suspending the criminal charge and allowing the parties to agree to take the dispute before an arbitrator who makes an award for compensatory damages suffered by the

victim. By converting the criminal complaint into a civil action, it is felt that a more positive and useful outcome will be achieved. Closely allied to this thinking are the developments which involve mediation in the case of minor complaints. Neighbourhood Justice Centres have, in some areas, been given official permission for certain criminal complaints which involve members of the community to be referred to them for mediation. The idea is to bring the parties involved together, and through mediation, not only arrive at a mutually acceptable solution, but to discover the underlying causes of the dispute. This has the effect of not only decriminalising conduct which would otherwise become a criminal court matter, but also of helping those involved to resolve the issues which led to the offence in the first place.

The developments of mediation and arbitration in the divorce field are also of interest. I have considered some of the developments in private divorce mediation in the United States as well as in England, where in both countries mediation is seen as an integral part of a new approach in helping divorcing spouses reach constructive and amicable settlements. Mediation in

divorce has been introduced into South Africa via the recommendations of the Hoexter Commission, and it is therefore useful, in my opinion, to explore what has happened in this area abroad. In the United States mediation is being used by attorneys who claim that it is part of their non-adversarial law practice. Also, privately-funded mediation centres have emerged in the United States and in Britain where divorcing couples submit their marital problems for mediation by a team of trained mediators.

It is still too soon to say what the outcome of this almost universal interest in mediation will be, but it is certainly important to take note of it.

I hope that as a result of this study, the reader's interest in mediation and arbitration will be quickened. The concept of informal justice is receiving attention from both academic writers and the legal profession. Chief Justice Warren Burger makes repeated references to mediation and arbitration as new avenues to be explored. 1) I have found it interesting to look at some of the practical applications.

1. W Burger "State of Justice" 70 American Bar Association Journal (April) (1984) 62 at 64.

COMMERCIAL ARBITRATION

"An arbitration is the reference of a dispute or difference between not less than two parties capable of entering into contract for determination, after hearing both sides in a judicial manner, by a person or persons other than a court of competent jurisdiction. 1)

It is a process whereby the parties to a dispute are, with the approval and encouragement of the law, able to arrange to take their dispute before a selected person or persons of their own choosing instead of having their matter heard in the established courts of law. The court is excluded in the first instance, but the award, however, cannot be enforced without its aid 2) and the court has the power to set aside the award. 3) The essence of arbitration is that some dispute is referred by the parties for settlement to a tribunal of their own choosing instead of a court.

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1. G. Davis Law & Practice of Arbitration in South Africa (1966) 1.
 2. Davies v South British Insurance Co (1885) 3 SC 416.
 3. South African Arbitration Act 42 of 1965 S 33.

The word "arbitration" is normally applied to all extra-judicial determinations of controversies by arbiters chosen by the parties to the dispute, and that process may cover international disputes (international arbitration), industrial disputes (labour arbitration) and commercial disputes (commercial arbitration).

Merton C Bernstein emphasizes that although it has been common to broadly differentiate between labour and commercial arbitration there is in fact infinite variety within each of the categories. Arbitration, he says is not unitary:

"The great variety of disputes and the differing forms of arbitral machinery raise the caution that in the formulation of any arbitration rule, account should be taken of the different contexts in which it may apply. It also raises the question as to whether any rules should be applied across-the-board". 1)

There is the tendency in modern society for particular groups, trades and commercial units to refer internal disputes to arbitration.

1. M C Bernstein Private Dispute Settlement (1968) 2.

In South Africa, for example, it has become standard practice to incorporate an arbitration clause in written building contracts. 1)

Trade disputes among members of specialised trade groups prefer arbitration to litigation. The preference among these groups for arbitration illustrates a factor said to be common to all arbitrations, and that is the desire of the parties to ensure a specialised hearing and adjudication. Also, as Bernstein points out:

"..... contracts often declare standards that may not be observed in the day to day conduct of affairs but are invoked when disputes arise. In the subsequent adjudication, the court consults the more or less fictitious standard in deciding the dispute. The great commercial judges, such as Mansfield, attempted to minimize the fictional element and to stir in as large a measure of realism as possible

1. H S McKenzie The Law of Building Contracts and Arbitration in South Africa 3 ed 1977 137.

by using commercial men as jurymen and by consulting experienced business-men. But the common law tries to resolve individual disputes in terms of fairly general propositions, although many cases are explicable only in terms of their peculiarities," 1)

In many instances the courts have difficulty in adjudicating disputes arising from the interpretation of highly technical matters.

The evidence of expert witnesses may not be as effective as having an expert deciding on the principal issues.

A basic concept therefore, seems to be that of arbitration as specialised adjudication. We shall see later that this aspect has, in America, become refined, with institutionalised machinery available to private persons and trade members who wish to have

1. Bernstein op cit 2.

their disputes settled quickly, and by persons specially capable of understanding the technology involved. In the latter part of the 20th century with commerce increasingly controlled by a technocracy, the essence of this concept makes sense.

As Bernstein says:

".... the most important attribute of arbitration is that it can and often does involve dispute resolution with great emphasis upon the realities of the relationships and a result that is just in terms of the expectation of the parties or the standards of their groups, which often are unarticulated but nonetheless form the context of their contract or relationship." 1)

1. Ibid.

It may be of use to consider some of the broadly accepted advantages of arbitration. Some are very real, but others, as we shall see, have a reputation more apocryphal than real. The simplest form of arbitration takes place when two parties to a contract agree to settle any dispute which may arise by resort to arbitration before named arbitrators or persons to be named at the time of the dispute. The parties have complete freedom to choose who the arbitrator shall be and these persons or person usually have some technical expertise with regard to the practical problems of the dispute involved.

The traditional advantages of arbitration are listed in the treatises and text-book writings on arbitration. Voet 1) lists them uncritically and despite the lengthy period of intervening years, they re-appear unchallenged in most works on the subject in South Africa. 2) A summary of the text-book advantages of arbitration may be appropriate. Broadly, they may be categorised under the following heads: Speed, Economy, Expertise, Privacy, and Finality.

1. Voet Commentarius ad Pandectas (Gane's Translation) (1955)4.8
2. Davis op cit 2; McKenzie op cit 137.

An advantage postulated by almost all text-books on arbitration is that of "speed". Arbitration proceedings, it is stated, are quicker than court proceedings. D V Cowan, has the following to say:

"Arguments along these lines in favour of arbitration have been advanced since the 17th century. And it must, I think, be conceded that this criticism about delay in getting cases set down for trial has in some cases very real substance. Indeed, I have been informed by the Deputy Town Clerk of Cape Town that the main reason why arbitration was chosen in preference to litigation when the Cape Municipal Ordinance was amended in 1971, was precisely fear of delay in getting the issue of disputed compensation set down for trial." 1)

However, Cowan tells us that in modern arbitrations involving expropriation proceedings, delays of up to 15 months and 45 sessions before an arbitrator, had to be endured before finality had been reached. 2) In the United States there are also some strong critics of the view that speed is an advantage of arbitration.

1. D.V. Cowan "Expropriation and the Arbitration Process" 34 THRHR (1972) 146 at 151.

2. Ibid.

Edward N Costikyan has the following to say:

"Are arbitrations speedier than court proceedings? I doubt it. First of all there is the preliminary skirmishing as to whether there should be arbitration at all. And an adversary who wishes to delay an adjudication finds a ready obstacle to throw in the path of adjudication by arbitrators. For example, in one case involving the manufacture of explosives that blew up a good part of a town in New Jersey, it was two years before there was a final determination that there should be arbitration". 1)

S 23 of the South African Arbitration Act 42 of 1965 lays down that the arbitrator must give his award within 4 months of the start of the hearing, but the

1. Bernstein op cit 17.

the court may, on application, on good cause shown, extend the time for making the award whether the time for making the award has expired or not. 1) Also, says Cowan, there can be other delays:

"Experience shows that the stronger the case on the one side, the more reluctant is the opposition to cooperate in a speedy decision. And once the will on both sides to get on with the job is absent, the machinery of arbitration offers opportunities for delay beyond anything that would be allowed in the courts". 2)

Furthermore, in Cowan's experience, delays are caused in choosing an arbitrator. Parties, jealous of the element of privacy in the proceedings, are unwilling to apply to court in terms of S 12 (2) of the Act and have the court appoint an arbitrator, and they would rather deal with the matter themselves. 3) Also S 13 (2) gives either party the right to object to the arbitrator "on good cause shown". One of the grounds upon which an objection may be based is whether a reasonable person in the position

1. S 23 (b).
2. Cowan op cit 152.
3. op cit 153.

of the applicant might think he will not get a fair hearing. "Even where the court is satisfied that there is no possibility of an unfair hearing it will not countenance the appointment of an arbitrator where the circumstances are such that a reasonable disputant might fear that he will be at a disadvantage". 1)

The relative informality of arbitration proceedings has been accused of being a potential for delay. Written pleadings, so essential in trials in courts of law, are only ordered by the tribunal in terms of the Act if a party to a reference applies therefor, and only then if the arbitration agreement does not otherwise provide.²⁾ Again, the possibility of one of the parties switching his claim at the last minute and thereby causing delay has been reported. Cowan relates one instance:

"In one arbitration within my knowledge the expropriatee began by putting forward a case for compensation for land potential based on a plan for an industrial township; but at the eleventh hour

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1. Joubert The Law of South Africa 264 para 470. Appel v Leo 1947 (4) SA 766 (W) at 775.
 2. S 14 (a) (ii) Act 42 of 1965; M Jacobs The Law of Arbitration In South Africa (1977) 79.

he switched his case to one based on potential commercial user, of which written particulars were not given in advance. In another arbitration the expropriatee presented no fewer than three different cases during the arbitration. As each of his key witnesses was demolished, adjournments were asked for and new witnesses were found to present new versions. This sort of thing would not be allowed by a judge in a court trial, yet one cannot blame the arbitrator for allowing the matter to drag along. The fault is inherent in the very process of arbitration." 1)

Another potential for delay in arbitration is the tendency of the arbitrator to hear all the evidence the parties are likely to adduce, because one of the grounds for setting aside an award is refusal to hear all relevant evidence. 2)

1. Cowan op cit 154.
2. Ibid.

One argument to counter this possibility is that proceedings should be heard before arbitrators who are lawyers and who would speed up proceedings through stricter adherence to form and relevance.

Catherine Smith asserts that "it is usual and proper to appoint advocates to act as arbitrators", 1) but where the arbitration process is especially chosen by the parties so that the matter will be heard before an expert decider, the advocate will have to decide the matter in terms of the "general propositions."

There seems to be a conflict on this issue; one of the benefits of arbitration is to have technical matter adjudicated upon by an expert.

This seems to be fundamental to arbitration, especially where technical issues are at stake. Corbett, J., in Dipenta Construction (Pty) Ltd., v Cape Provincial Administration, had the following to say:

1. The Law of South Africa (ed. W A Joubert) para 470
264.

"This decision, as I see it, turns largely upon an assessment of the technical complexities of the case. This is an area, at this stage, of very great uncertainty. If these complexities and difficulties are under-estimated and an advocate appointed, the disadvantages flowing from that are in my view likely to be greater than if these complexities and difficulties are over-estimated and an engineer be appointed. The general balance of utility and convenience would therefore seem to favour an engineer appointment in this particular case." 1)

But again, non-lawyers, by their ignorance in the conduct of legal disputes may run the risk of contributing to the delay in the proceedings. The use of lawyers as arbitrators and representatives as a cure for delays in proceedings does not seem to enjoy universal approval. In commercial arbitration there are the following possible situations:

1. 1973 (1)SA 666 (C) at 672.

First, the straightforward situation where the parties to a business transaction agree to settle any disputes that may arise by resort to arbitration before a named arbitrator or persons to be named at the time of the dispute.

Second, a trade association, comprising of members of a particular trade, establishes its own arbitration procedure and rules in order to settle disputes among its members on a voluntary or compulsory basis. The association may join with other related associations to organise a single system whereby members of those trades make use of a consolidated procedure.

Third, administrative groups such as chambers of commerce provide facilities and arbitrators for those wishing to make use of the process. In the United States, for example, the American Arbitration Association was founded in 1926, as a non-profit membership association to encourage and promote arbitration.

It has branches throughout the United States and assists industries and trades to design arbitration procedures and systems. The American Arbitration Association has panels of arbitrators which include engineers, business consultants, accountants and other experts, including attorneys from whom those wishing to proceed to arbitration can draw. 1)

The trade associations apply economic and business sanctions for non-observance of awards. In theory, there are advantages in such machinery. Members know in advance what procedures are likely to be applied, they are aware of the standards and norms expected of them, the aspect of privacy is satisfied, expert deciders experienced in the particular trade disputes are available, written precedents of previous similar disputes can be obtained and economic and business sanctions are enforced for non-compliance with awards.

1. R Coulson Business Arbitration - What You Need to Know (1982) 7.

In spite of the sophistication of trade association arbitration, there was found to be a need in the United States for the third possible situation, namely the American Arbitration Association. "The American Arbitration Association was the American response to the delays and difficulties that could result from procedural defects in the arbitration process in situations where economic sanctions of some of the trade groups were not available". 1)

The American Arbitration Association holds great store by the enforceability of its awards and goes out of its way to ensure that they are not vulnerable to being set aside by the courts. Procedure and form are strictly observed and the use of lawyers is encouraged.

However, unlike the trade association, the American Arbitration Association discourages the use of precedent and "the Association puts enormous pressure on its arbitrators not to write opinions but to merely state the award in dollar amounts". 2)

In the case of arbitrations within the trade association machinery, decisions have precedent value and opinions are written and circulated to members. There is also a continuity in the membership of

1. Bernstein op cit 11,
2. ibid.

adjudicators which ensures that a system of precedent will operate. Whereas the American Arbitration Association encourages the participation of lawyers in arbitration proceedings, in the self-contained trade association groups, the use of lawyers is discouraged or actually forbidden. "This difference reflects the basic proposition that in the self contained trade groups, the norms and standards of the group itself are being brought to bear by the arbitrators, and the incursion of lawyers with their potential emphasis on general legal norms and standards is viewed as a factor deflecting expeditious hearing and wise decision". 1)

The main argument against lawyer-participation is the lawyers' lack of understanding of business issues and usages and practices and that they make proceedings unduly technical and tend to create unnecessary delays.

Soi Mentschikoff says that an analysis of the records of the American Arbitration Association tend to support this complaint.

"Both delays in selection of arbitrators and postponements between hearings occur more frequently in cases in which the parties are represented by attorneys ...

... Personal observation at the

1. op cit 12.

Association leads me to the reluctant conclusion that in the great majority of cases observed, lawyer participation not only failed to facilitate a decision but was so inadequate as to materially lengthen and complicate the presentation of cases". 1)

We have therefore two approaches. The trade association relying on precedent and discouraging lawyer participation, and the American Arbitration Association eschewing precedent and encouraging lawyer participation as arbitrators and counsel. On the one hand we have the advantages of "house rules", written precedents, and expert deciders on the spot, and private economic and business sanctions for non-observance awards. On the other we have lawyer participation, adherence to substantive law rules of procedure and no precedent. The trade association process is said to get the arbitration over quicker and more effectively; the American Arbitration Association maintains that there is very little likelihood of its decisions being upset by the courts. The alternatives with which we appear to be faced with be the following:

1. op cit 12.

where arbitrations are too informal and are without the guiding and restraining hand of the lawyer, procedural difficulties and mistakes render the award vulnerable. Where lawyers participate there is an over-emphasis on form and procedure which can and does cause delay. Where the arbitration is handled by private institutionalised machinery there may be less regard for procedure but the parties are being, as it were, "heard by their peers". The sanction of the trade association arbitration is a disciplinary proceeding and so potential legal problems with respect to procedure do not present a difficulty.

The American Arbitration Association was established to avoid delays and difficulties and to supply a need where the trade group was unable to provide adequate sanctions. It claims that its greatest advantage is that its awards are not easily set aside by the courts, and to maintain this claim it has set up rules and regulations with the primary aim of rendering stable awards.

In spite of a strong guiding hand with regard to procedural safe-guards in the American Arbitration Association process, Hal M. Smith tells us that delays are nevertheless present. But, he says, they are caused by the parties themselves by requesting postponements and causing difficulties in choosing arbitrators. He lays the blame on lawyer-participation:

"Where both parties were represented by attorneys, 43% of the cases were decided in less than 90 days and 21% in less than 60 days. Where neither party brought an attorney, 78% of the cases were decided in less than 90 days and 49% in less than 60 days". 1)

It does not seem, therefore, that there can be a hard and fast rule that speed is an inevitable advantage of arbitration. Hand in hand with the informality of the proceedings there must be a willingness on the part of the parties to get the matter over as quickly as possible. After all, the parties presumably resorted to arbitration in the first place to get a quick hearing and decision, and to save money. It is a sad indictment of the process if they fail on account of obstructionism and procedural cavilling.

1. op cit 16.

The trade association hearing with its private procedures and sanctions is a good forum for arbitration; where those parties guilty of dilatory tactics can be dealt with in terms of the private rules of the association.

The second advantage claimed for arbitration is that of economy. 1)

"... the reason is that resort is commonly made to such persons (arbitrators) by those who are frightened of the too heavy expenses of law suits". 2)

The above statement has been questioned by modern writers. It is true that the parties may embark upon arbitration because they think that it is cheaper than litigation, but, say the writers, this is not so. Writers in both America and South Africa come to some very similar conclusions. Edward N. Costikyan states categorically:

"In our experience, by and large, the cost of arbitration has been substantially higher than the cost of proceeding in court. The reasons are

1. Voet 4.8.1; Davis op cit 2; Smith op cit para 453; Dutch Reformed Church v Town Council of Cape Town (1898) 15 SC 14 at 20.
2. Voet op cit.

the direct result of the informality of arbitration proceedings and the general tendency of arbitrators to hear every scrap of evidence "for what it is worth". The result is to permit arbitration proceedings to be drawn out interminably. And since arbitrators cannot be expected to sit from day to day, the cost of preparation for trial is multiplied immeasurably what should have been no more than a week's trial continued for twenty-six sessions..." 1)

Cowan has some similar comments to make. He asserts that arbitration is in fact more expensive than litigation and gives the same reasons. He also quotes figures:

"... costs may, and often do, accumulate at the rate of between R3,000 and R4,000 per day. The fee for the arbitrator, alone, may be in the region of R400 or more per day: and if there are three of them - I leave the arithmetic to you". 2)

1. Bernstein op cit 18.
2. Cowan op cit 155.

Cowan then gives an example:

"In one case the expropriatee claimed R3 million. He was offered R500,000. After a long arbitration he was awarded R975,000 and costs. His costs for attorneys, counsel and qualifying fees for expert witnesses were approximately R200,000 of which only R80,000 was allowed on taxation.... The qualifying fee for one expert witness alone was R15,000 of which R12,000 was taxed off.... The single arbitrator's fees for a day hearing were in excess of a judge's annual salary". 1)

These figures must daunt the heart of the most brave and question the traditional advantage of arbitration of its being cheaper than litigation.

We may find that very simple claims in limited areas of commerce are appropriate for arbitration in modern times, and that complicated, large-scale arbitrations, to be effective may require special legislation with regard to costs and procedure.

1. ibid.

CHARACTERISING COMMERCIAL ARBITRATION:

Davis 1) asserts that one of the benefits of arbitration as compared with an action in a court of law is that the parties to a dispute can choose their own arbitrator, whereas in litigation no party can choose his own judge. "Where highly technical skill is required it is probably much better to call in a technical man If a judge had to decide technical cases he might call a technical assessor to assist him or it is particularly certain that expert evidence would have to be given to assist the court". 2)

This view seems to have support in Dipenta's case and among most text-book writers. 3) Where the parties have agreed that the hearing shall be before an arbitrator having special qualifications, the award of a non-qualified person will be void. 4) Cowan 5) is ambivalent.

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1. G Davis Law & Practice of Arbitration in South Africa (1966) 2.
 2. ibid.
 3. J F Coaker & D T Zeffertt Wille & Millin's Mercantile Law of South Africa 18th ed 643; R L Britton Arbitration Guide Prenlice Hall, New Jersey 3; A Walton Russell on Arbitration 17th ed 115; The Law of South Africa (ed W A Joubert) Vol 1 para 470.
 4. M Jacobs The Law of Arbitration in South Africa (1977) 58.
 5. D V Cowan "Expropriation & the Arbitration Process" 34 THRHR (1972) 155.

He agrees that expertise is helpful in expropriation cases if the adjudicator is familiar with the finer points of valuation techniques and with the law and practice relating to township establishment, and that the adjudicator should have acquired from practical experience "an almost intuitive feeling for the reasonable business expectations of the parties." 1) But Cowan adds that "if the arbitrator is not a lawyer the advantage of his expertise may be more than off-set by his lack of knowledge of procedure and inexperience in sifting and weighing evidence". 2) Perhaps Cowan is putting too fine a point on this; we must remember that he is writing specifically on expropriation. If a starting point is to be made, it must be made with the view of the use of arbitration in the simple contract, between two legal subjects in the market-place. But here again, as technology progresses, where engineering, computer, building and other skills become more and more complex, the question inevitably arises: are there any longer any simple contracts in these fields? The simple contract of purchase and sale or the lease of moveables may be fraught with complexities which require highly technical skills to resolve. In the United States, Mentschikoff point out 3) that in

1. Cowan op cit 155.

2. op cit 156.

3. M C Bernstein Private Dispute Settlement (1968) 12.

almost all self-contained trade associations and exchanges, lawyer participation in arbitration proceedings is either forbidden or discouraged and very few of the arbitrators are lawyers or law-trained. This is for directly opposing reasons put forward by Cowan.

- "(i) lawyers did not understand the business usages and practices that were typically involved in adjudicating the dispute and were therefore not helpful; and
- (ii) lawyers made the proceedings unduly technical and tended to create unnecessary delays".

Mentschikoff says that in an analysis of the American Arbitration Association's records, it appeared that delays both in the selection of arbitrators and postponements between hearings occurred more frequently in cases in which the parties were represented by lawyers. 1) Nevertheless the Association espouses lawyer-participation, whereas the trade association, on the whole, does not. It is submitted that no hard and fast rule should be applied to the question of expertise and that in spite of the invariable reference

1. ibid.

in text-books to the arbitration process and the use of expert deciders, it does not follow that the arbitrator should be an expert or should be a lawyer. Clearly, where the problem to be adjudicated upon requires an expert, the parties in their good sense will agree to refer only to an expert, but one should, I think, avoid associating, inevitably, the arbitral process and the use of experts. The call of the American Arbitration Association, namely: Speed, Economy. Justice must be heard and, after all, is this not what the text-book writers say arbitration is all about?

Mentschikoff points out that more than one thing is meant by "expertise" in the arbitration context:

- "(i) It may mean technical competence required for a proper understanding of the evidence and issues in a specialized subject (such as accounting and various kinds of engineering) or
- (ii) a familiarity with the methods of a particular trade or industry or group, including technical matters and business practice and mores" 1)

1. op cit 14.

Thus where an issue cannot be decided by an arbitrator who is not a technical expert, the parties will agree that the reference must go before a technical expert; the alternative being recourse to the ordinary courts and the use of expert witnesses. In other words, the issue simply cannot be considered by a decider who is not a technical expert. On the other hand, the situation may arise where it is desirable that the adjudicator is familiar with the methods and mores of a particular trade or industry. Such an adjudicator is not an expert in the absolute sense, but knows the business of the parties and has had experience in the particular trade or business activity. Trade associations appoint the arbitrators and draw up their own rules, the parties agreeing to abide by such rules and the decisions of the duly appointed arbitrators. This process and procedure is well-established in the United States. William C. Jones 1) says that the existence of the practice of extensive arbitration tends to show that:

"..... arbitration is not really a substitute for court adjudication as something that is

1. op. cit 15.

cheaper or faster or whatever, but is rather a means of dispute-settling quite as ancient - for all practical purposes anyway - as court adjudication and that it has traditionally fulfilled quite a different function. The primary function of arbitration is to provide for merchant's fora where mercantile disputes will be settled by merchants".

Does this mean that merchants have formed a separate and to some extent self-governing community, independent of the larger unit? Jones 1) says that:

"For law, this means that courts may perform, in the commercial field at least, a different function from that which we usually assign to them. In many cases, they may not be the primary fora for adjudication. If this be true, when they are called upon to decide a commercial case in one of these areas, it will be either after another adjudicatory agency has acted or because the other system cannot or will not cope with the case Insofar as this area, in

1. ibid .

which arbitration is, and most importantly, has always been the primary dispute-settling agency... it cannot really be said that one has studied commercial law, in the sense of the rules that actually guide the settlement of disputes involving commercial matters, if he has studied only the reports of the courts and legislation".

It may be concluded that as far as expertise and the use of expert deciders are concerned the situation is as follows: those arbitrations for which it is essential that the arbitrator possesses a highly technical skill, and who would have been called as an expert witness if the matter were to have been adjudicated in a court of law, the parties would be advised to agree to an arbitrator possessing that skill; but those matters, which do not require such a high degree of technical skill, but rather knowledge of the workings of a particular trade or industry, can be decided by an arbitrator appointed by the trade association or guild to which the parties belong. Such association would have rules by which the reference is conducted expeditiously and economically. For example in South Africa interested parties have formed the

Association of Arbitrators, one of whose principal objectives was to formulate a set of simple rules to enable parties to arbitrate without employing professional legal advice. This set of rules has now been published in both official languages under the English title: Rules for the conduct of Arbitration.

One of the advantages of arbitration referred to by Voet 1) is the avoidance of the "din of legal proceedings". In other words, the publicity attendant on trials in the courts. Arbitrations, in the main, are private, unless the parties agree that they should be otherwise, and not open to the public. There does not appear to be any authority for the above proposition, but from the very nature of the arbitration agreement as such, it seems fair to submit that the privacy of the contract itself offers the best reason for the proposition. Indeed inherent in Voet's phrase is the implication that the arbitration proceedings will be held away from public clamour. This practice has drawn criticism from Cowan. 2) He concedes that privacy may be relevant in cases, for example, where trade secrets are involved or "where it

1. Voet 4.8.1.

2. Cowan op cit 156.

is sought to create a climate favourable to the continuance of business relations after a particular dispute has been resolved". 1) But he feels that where a governmental authority expropriates private property in the public interest and uses money obtained from the public to pay for it, a public hearing should take place. But it follows from the context in which Cowan is writing, namely, expropriation arbitrations, that a public hearing is not necessarily a good thing in all cases. As has been said earlier, arbitration, by its very nature, is not unitary. Cowan may well be right, that arbitrations which affect the public generally and the use of public money by a governmental agency, such arbitrations should fall under the scrutiny of outsiders; but it might be going too far to require all private disputes to be subject to a public hearing. While one cannot quarrel with Cowan's statement: " one of the chief safeguards of the impartial administration of justice in the ordinary courts of law is the common law right of the public, including the press, to be present and to publish accurate reports of and fair comments on, the proceedings," 2) it is submitted that such a criterion should not be applied to arbitrations generally.

1. op cit 156.

2. Ibid.

In ordinary commercial arbitration, an open hearing may inhibit the parties for simple business reasons, and indeed, the whole process from the start. It may prevent the parties from agreeing to arbitrate in the first place. It must be remembered that commercial arbitration is a private dispute settlement based upon and created by agreement. The parties choose the procedure because it is private and not attended by the glare of publicity; also, that the whole matter does not rest on the agreement and the hearing alone. If one of the parties feels that there is good cause why the agreement to arbitrate should be set aside, the Act 1) makes provision for such a party to apply to court to have the agreement set aside. Once the dispute has been heard, any party to the reference who feels aggrieved by an irregularity or impropriety can apply to court to have the award set aside. 2) It is submitted, therefore, that ultimately justice will be seen to be done, and the court cannot be excluded or its jurisdiction ousted. 3)

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1. South African Arbitration Act 42 of 1965 S 3(2).
 2. Op cit S 33.
 3. Davies v South British Insurance Co 1885 3 SC 416 421; Yenapergasam and Another v Naidoo and Another 1932 NLR 96 99; Russell on Arbitration 65.

A point well made by Cowan 1) and supported by Professor Wiechers 2) again in the same context, is that an arbitrator should be required to give reasons for his decision which could be published in the law reports, and that these could serve as a guide to valuers, property owners and other tribunals. It is settled law and practice that an arbitrator or arbitration tribunal is not required to give reasons for their decision 3) and, it is submitted, that in particular instances and types of submissions such as those referred to by Cowan, the requirement that an arbitrator should give reasons would be of practical value. But in ordinary commercial arbitrations the airing of the dispute in the form of a publishable document may be precisely what the parties to the dispute do not want. The ordinary businessman resorts to arbitration because he believes it is cheaper than litigation; he wants fairness and finality and he is not always concerned with the reasons for a decision. If the commercial arbitrator was required to give a detailed ratio decidendi in his award, this could adversely affect the cost of the arbitration as well as slowing it down - exactly what the businessman sought to avoid in the first place.

1. Cowan op cit 157.

2. ibid.

3. Jacobs op cit 104 128; Pasquali Cigarette Co. Ltd v Diacomcolas & Capsopolous 1905 TS 472 at 486 and 489.

Davis lists as another advantage of arbitration the assertion that "better feelings are likely to be created in arbitration than in a lawsuit." 1) This, at first blush, appears to be an odd assumption, bearing in mind that the process of arbitration was set in motion as a result of a dispute in the first place. When one canvasses this point, however, one finds that the writers both here and overseas are not altogether in agreement. Davis continues:

"The parties are brought together less formally and it (the arbitration) is often conducted with the express purpose of trying to get each of the parties to see reason and the other man's point of view. Many settlements result from an arbitration and better relations are often created which make it easier for the parties to work together in future". 2)

It seems inherent in the above statement that an element of compromise is present and this may seem at odds with the "judicial manner" required in the definition of arbitration. 3) Mentschikoff, 4) writing on role attitudes, tells us that in arbitrations conducted

1. Davis op cit 2.

2. Op cit 3.

3. Jacobs op cit 1; Davis op cit 1.

4. Bernstein op cit 13.

by the American Arbitration Association, the Association expressly urges its arbitrators to adopt a judicial attitude that will lead to a decision on the merits rather than a compromise award. The word compromise being used in the sense of arriving at a decision by "giving a little and taking a little". Cowan criticizes what he calls "halfway house decisions." 1) He says that arbitrator's awards tend to be less predictable than court decisions, due in large measure to the fact that arbitral awards are very often due to a compromise. He quotes Hudson on building contracts:

"The instinct for compromise and of reluctance to hold a claim wholly valid or invalid, is perhaps the most serious fault of non-legal arbitrators; it can work great injustice." 2)

Cowan compounds the criticism from his own experience in expropriation arbitrations: ".... the almost invariable pattern is that the expropriatee tends to get something more than he was offered, yet something less than he claimed". 3) This, in spite of the fact that arbitrators in expropriation arbitrations are for the most part practising lawyers.

1. Cowan op cit 158.

2. Hudson Building and Engineering Contracts 10 ed 856.

3. Cowan op cit 158.

This is not the experience of the American Arbitration Association. The efforts of the Association in encouraging a judicial attitude are apparently successful. In fifty per cent of the cases decided, the award was in full either for the plaintiff or for the defendant. In Mentschikoff's study, more than two thirds of the arbitrators disagreed with the proposition that " arbitrators are expected to find a way of satisfying both parties in a dispute by finding compromising solutions " 1) Raymond Britton 2) tends to agree with Davis:

"The procedures followed in the normal hearing (of an employee grievance) are more responsive to the needs of both parties than alternative forms of dispute settlement other advantages of arbitration relate to the informality of the proceedings. The rules of evidence may be followed as stringently or as loosely as the parties wish the informality of the proceedings may also tend to avoid the hostility and discord that often accompany a formal judicial proceeding".

It seems, therefore, that there is both criticism and

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1. Bernstein op cit 13.
 2. Britton op cit 4.

praise for the informality of the arbitration. The parties to a submission cannot have it both ways. If they submit their dispute to an arbitrator then their matter will be heard informally with all the attendant advantages and disadvantages. They do not go to court for what they believe to be good reasons: they expect something different in an arbitration.

Davis 1) states as one of the advantages of arbitration is that the process has more finality than a lawsuit. Indeed, he says, the whole object of an arbitration is to get finality, and a finding is not usually appealable unless there is some serious irregularity, whereas a lawsuit may go from one court to another in a series of appeals. This idea seems to be generally accepted. 2)

"...where an arbitration is properly conducted, and an award is given bona fide, there is no right of appeal against the decision of the arbitrators ... there may be causes for setting aside an award altogether or for

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1. Davis op cit 3.
 2. Russell op cit 275; Jacobs op cit 128; Joubert et al op cit para 453; Huber Heedensdaegse Rechtsgeleertheyt chap 21 SS 16 17.

rectifying error, but there is no jurisdiction given to the court of the nature of an appeal or rehearing" 1)

This is an important and fundamental element of the arbitration process. The parties come to the hearing expecting a final award and unless there has been misconduct on the part of the tribunal or that tribunal has committed a gross irregularity in the proceedings²⁾ they can expect the award to stand. However Cowan³⁾ makes two points worth noting. Firstly, he says that finality need not necessarily be the sole prerogative of arbitration; Section 82 of the Magistrates' Courts Act offers the following:

"No appeal shall lie from the decision of a court if, before the hearing is commenced, the parties lodge with the court an agreement in writing that the decision of the court shall be final",

and he sees no reason, in principle, why " a similar agreement or even an oral agreement would not be valid and effective in Supreme Court proceedings ".

The problem here seems to be that many arbitrations fall outside the jurisdiction in respect of causes of action of the Magistrates' Courts, 4) and so the very

1. Dutch Reformed Church v Town Council of Cape Town 1898 15 SC 14 27; Goldschmidt & Another v Folb and another 1974(3) SA 778(T).
2. The Arbitration Act S 33.
3. Cowan op cit 157.
4. The Magistrates' Courts Act No 32 1944 S 29.

reason the parties submit to arbitration may be to avoid a Supreme Court action with its attendant costs. Even if Cowan is right and a similar agreement to that embodied in Section 82 of the Magistrates' Courts Act were to be valid and effective in Supreme Court proceedings, this would not make such proceedings any cheaper. It only affects the finality of the issue, in the event of an appeal to a higher court. Cowan's view also loses sight of the other aspects of arbitration which are inherent in the process and are the very reasons the parties choose to submit their dispute in the first place, for example, where a highly technical matter is at issue.

Cowan's other point of criticism is that: " (Secondly) while it is true that in some situations the finality of an arbitrator's award may well be an advantage, the cost, in terms of risk which the parties pay for it is high, and may often be too high. If a magistrate is in error his decision may be corrected on appeal; but if an arbitrator's decision is unsound, even blatantly so, you are stuck with it." 1)

1. Cowan op cit 158.

While it is true that a valid award on a voluntary reference operates between the parties as a final and conclusive judgment, this should not, it is submitted, be seen to be necessarily a disadvantage. Indeed, there may be a certain risk involved in submitting a case to an arbitrator, in the sense that there may be a possibility of a non-rectifiable oversight or mistake and that the award may fall short of the expectation of the parties, which expectation cannot be satisfied as in the case of litigation through the process of appeal; but Cowan may be over-emphasising this risk factor in relation to the process as a whole. The parties, by agreeing to submit a dispute to arbitration accept a package deal. They believe, rightly or wrongly, that by referring their dispute to an arbitrator they will have the dispute settled more quickly, less expensively and as fairly as in a court of law.

The businessman himself has certain expectations of the tribunal, and if the outcome of the hearing falls more or less within the ambit of these expectations he will be satisfied, provided that these expectations include a speedier and cheaper hearing than he would otherwise

have got from a court of law. If this "risk" about which Cowan speaks is indeed a factor in ordinary commercial arbitrations, how great is it in fact, and can it be said to outweigh the advantages of the process as a whole?

It may be useful, I think, to attempt to characterise and identify arbitration, and in so doing ask ourselves whether or not we are inclined to make odious comparisons between the arbitration tribunal and the court of law. Do they both set out to reach the same goal? Wesley A Sturges ¹⁾ writing on the characterization of arbitration has the following to say:

"Sometimes arbitration is cited as being a "quasi-judicial tribunal" and arbitrators as being "judges" of the parties choosing, "judicial officers" or officers exercising "judicial functions". Here again the presentation of arbitration or arbitrators in the role of courts or judiciary is necessarily based on remote resemblances....
.....Arbitrators, as distinguished from judges are not appointed by the sovereign, are not paid by it, nor are they sworn to

1. Bernstein op cit 23.

any allegiance. Arbitrators exercise no constitutional jurisdiction or like role in the judicial systems state or national..... they are generally not bound to follow the law unless the parties so prescribe and, as likely as not, they are laymen technically unqualified (and not disposed) to exercise the office of the professional judge ".

In our common law Voet 1) makes the distinction:

"It is however not to be doubted that there is a great correspondence between arbitrations and judicial proceedings. Submissions are said to be given a resemblance to judicial proceedings in so far as they put an end to cases; that an interruption of prescription takes place on both sides; that a decision has not been given a holiday; that there is the same sequence of proceeding and proof; that summonses are issued, postponements granted, admissions of the parties given credence, exceptions to be suffered and judgment given for costs, just as though a suit had been set in motion before a judge.

There are many common features, which will appear in our remarks below.

And yet it should not be passed over that in many things arbitration proceedings differ from judicial. I say this because a state of lis pendens is not brought about by the former; nor is reconvention allowed, since a submission has its own limits, beyond which the arbitrator settles nothing, and therefore does not settle the matter of reconvention, since it was never embraced in the submission Nor are arbitrators furnished with public authority, so that they can neither compel litigants nor force witnesses to give evidence "

We have discussed arbitration in the light of being speedier and cheaper than litigation and considered the merits of these claims. But what of justice? Cowan is emphatic that the "risk" factor in arbitration proceedings affects the "justice" factor, and it would seem that if there is to be a vanishing-point of the two parallel processes it must be in the concept of justice. Simple economy and expediency alone cannot justify a process such as arbitration.

E.N. Costikayan 1) has sentiments similar to those of Cowan. He says:

"I happen to believe that professionals tend to be better at their jobs than amateurs. I tend to believe that those who spend their lives judging tend to be better at it than those who are occasional part-time amateurs. I tend to believe that a trial before a jury with a professional judge determining what is proper and what is not proper evidence is better than such a trial conducted with an amateur calling the shots. It may be that the end result of arbitration is as good as the end result of a litigation in court, but I doubt it, for it seems to me that professional adjudication must inherently be preferable to adjudication by amateurs ".

The question must be asked whether Costikayan is not comparing apples with oranges. Is arbitration a poor country cousin of court litigation or are the processes distinct each with their advantages and disadvantages and separate identity?

1. Bernstein op cit 18.

Wesley A Sturges 1) has made some helpful comments in this regard. He points out that there have been numerous cases in American law reports where the judges have come to refer to arbitration as a substitute for litigation:

"Arbitration is the submission of some disputed matter to selected persons, and the substitute of their decision or award for the judgment of the established tribunals of justice", 2) but, as Sturges makes clear, the substitute bears little resemblance to the litigation process; this is so because the arbitration proceeding can be initiated and carried out without traditional pleadings:

"Traditional presumptions and burdens of proof of the law of pleading and of the law of evidence do not govern. Unless the parties require otherwise, the arbitrator generally may disregard (or estimate and follow) what might be the law of the case were it to be established in litigation; and distinctions between 'issues of fact' and 'issues of law' as conceived in the law of civil procedure have no comparable role in arbitrations. In short unless the parties require otherwise in the given case, arbitration displaces all significant aspects of civil litigation except the right of hearing." 3)

1. op cit 19.
2. ibid.
3. op cit 20.

It would seem in the light of the above remarks that it is perhaps inaccurate to characterise arbitration as a substitute for litigation. There are safeguards both at common law and in the Act, whereby the parties to an arbitration are protected from a partial or negligent decision. It is perhaps the risk of a bona fide mistake 1) of law in the hearing itself that Cowan sees as such a potential disadvantage in the process. It is the very finality of the decision of the arbitrator that Cowan fears, and yet that finality itself is regarded as an advantage. But, as Judge Learned Hand said: 2)

" Arbitration may or may not be a desirable substitute for trials in courts; as to that the parties must decide in each instance. But when they have adopted it, they must be content with its informalities ... They must content themselves with looser approximations to the enforcement of their rights than those that the law accords them, when they resort to its machinery ".

Perhaps what the advantage really is, is the finality

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1. Dickenson & Brown v Fisher's Executors 1915 AD 166.
 2. American Almond Products Co v Consolidated Pecan Sales Co 144 2d 448, 451 (2d Cir 1944).

in the adjudication of a specialised matter by an impartial person with appropriate technical knowledge. Perhaps the nature of arbitration must be reviewed. Perhaps it is vain to compare arbitration with court proceedings and compare the advantages of the one process with the other. It might be better to try and establish whether arbitration has an expanding role in modern society, and whether its role in the modern mercantile world should expand at a time when litigation, and indeed even legal counsel, is becoming out of the reach, economically, of the ordinary man.

Arbitration has always had a place in society:

"One of the oldest methods used to settle disputes between individuals is the procedure referred to as arbitration (it) was used many centuries before the evolution of the English Common law ... the process of arbitration, while bearing some resemblance to a judicial proceeding, is usually much less formal and costly. It is rapidly becoming a desirable alternative to expensive, time-consuming litigation ". 1)

1. Britton op cit 1.

The process, it is submitted, must be seen and studied as an institution in its own right. Sturgess 1) is correct when he says

" As further litigation centres upon arbitration and awards, so may the usages of analogy, metaphor and the making of classifications in the course of the judicial process confound and complicate the role of the arbitral process as presently conceived in legal tradition ".

The idea of arbitration as an informal process whereby persons take their dispute before an independent third person for a decision is sufficiently wide to include a variant, mediation. In mediation the third party is not an adjudicator and has no power to give a decision or make an award; his task is to investigate the dispute between the parties and, through a process of communication and involvement assists the parties to reach an understanding of their common problems and, hopefully, a mutual and consensual resolution. The decision taken at a mediation is essentially the decision of the parties themselves, the idea being that the presence and involvement of an independent third

1. Bernstein op cit 24.

party will help those in dispute to achieve a better perspective of their problem and will, as a result, be more likely to arrive at an amicable solution.

Mediation has gained popularity as a means of dispute resolution, and in the following chapter we shall see how it is being used in the United States to assist the parties in small claims matters.

CHAPTER FOUR

SMALL CLAIMS MEDIATION

During the nineteen seventies several states in the United States took a hard look at their judicial processes and searched for programs that would not only alleviate the pressure on the courts, but also contribute to a speedier and cheaper means of settling disputes. We, through the Hoexter Commission, are only in 1984, considering new means to facilitate the dispensing of justice, but innovative programs have for over 3 decades been a feature of the United States access to justice crusade.

It might be useful to examine some of the experiments which have been initiated in the United States and consider how useful and relevant they might be to the South African judicial system in the future.

In 1976, in the Ninth District Court of Portland, Maine, an experiment began which involved what was called the mediation of small claims cases before adjudication. It was originally funded by private grants, and then expanded into a program which is now supported by the judiciary budget. The originators of the program considered that certain kinds of disputes were better resolved if the parties were able to get together prior

to adjudication and try to work out differences instead of proceeding directly to trial. "Individuals appearing in small-claims courts began to anticipate mediation, lawyers with divorce cases began asking for mediation and judges requesting that mediators be assigned to their courts". 1) When the program began the mediators were drawn from the Maine Labour Relations Board and college teachers, supported by the University of Maine Law School. The mediators received a small fee and re-imburements for their expenses. The mediators originally consulted with judges and kept records of their cases. The program began on a weekly basis in the Portland's Small Claims Court when the mediators would hear the judge explain the new procedure. 2) In 1980, legislation was passed giving the district court power to require the parties to avail themselves of mediation before having their case formally adjudicated. 3) Before the court begins to hear the matter, the judge opens the proceedings by informing the parties that mediation is available to them:

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1. A.L. Greason "Humanists as Mediators" 66 American Bar Association Journal (1980) 576.
 2. ibid.
 3. C A McEwen and R J Maiman "Small Claims Mediation in Maine: An Empirical Assessment" 33 Maine Law Review (1981) 237 at 242.

"There is currently available to you a special service called mediation. If both parties in a dispute agree to mediation, they will meet with a mediator to see whether a resolution agreeable to both parties can be worked out. If the mediation is successful, the arrangements agreed on will usually be acceptable to the court. If the parties do not agree, then the case will be heard by the court later to-day. In hearing cases, the judge will give priority to those cases that have tried mediation. You will, therefore, not lose time by trying mediation. Mediation entails no obligation you do not agree to. It sometimes leads to mutually agreeable resolutions not always available in court". 1)

In the above explanation given by the court, one can see that the courts are anxious to encourage mediation by the fact that they will "give priority" to those cases that have tried mediation. After the disputants have met with the mediator, they return to the courtroom where the mediator explains to the judge the results of the mediation, whether it has been successful or not, and requests the court to confirm the outcome.

1. Greason op cit 577.

The court will then make such an order as it sees fit. During the first year of the experiment, "the mediators had resolved about sixty-five per cent of their cases and they had expanded their cases to involve motions to amend, divorce decrees as well as small claims". 1) Although originally, the services of lawyers were used and the lawyers consulted with the mediators on legal matters, to-day the mediators are non-lawyers, and they are drawn from those whose experience is essentially that of working with people.

These include teachers in the humanities and business people. What is looked for in mediators are "the ingredients that make insight, sympathy and compromise possible". 2)

One of the cornerstones of mediation is informality, with the parties on a first-name basis and, according to Greason, the most frequent comment heard after mediation is the expression of relief that an appearance before a judge has been avoided. The tension of the court-room, which was referred to by Chief Justice Burger as "litigation neurosis," has been avoided.

1. ibid.

2. ibid.

The mediator "reminds the parties that they are in mediation only for as long as they wish to be, but as long as they are, each in a sense has a veto; each, in a sense is in charge". 1)

In small-claims cases, the mediator invites the plaintiff and defendant to put forward their respective views. The discussion then proceeds informally until a resolution is reached. "In the case of divorce matters matters legal counsel is usually present and the mediator requests the lawyer for the plaintiff to sum up the areas of disagreement, not in the marriage, for divorce cases go to mediation only after the court is convinced that the grounds for divorce are adequate, but in settlement of ancilliary questions of property and custody". 2) In this informal atmosphere the mediator attempts to establish the order of the parties' priorities and this "prepares the way for give and take approach to the differences". 3) What the task of the mediator appears essentially to be is to remove the adversarial atmosphere which would otherwise prevail in a lawyer-controlled settlement.

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1. ibid.
 2. op cit 578.
 3. ibid.

This very informality of the mediation process "offers a flexibility in service to the clients that is not available in a courtroom hearing". 1) But, as Greason points out, there are certain situations where mediation runs into difficulties, for example where one party by sheer force of personality has bullied or threatened the other party into an inequitable resolution. At this point the mediator stops the mediation, the judge informed, and the matter sent for trial. But on the whole it is said that successful mediation can save the court money by avoiding continuations and appeals. Also, it can save the parties money in small claims courts "by sending them back to their jobs sooner with both a settlement and a method of payment agreed upon; and in mediated divorce settlements the parties avoid the cost of a full trial as well as the wait for a trial date". 2)

Mediation differs from arbitration in that the latter is part of the adjudicatory process, with the arbitrator hearing the dispute "in a judicial manner", but there are some points of similarity. Firstly, there is the element of agreement to take the dispute before an independent, impartial third party, who listens to the arguments of both sides.

1. ibid.

2. op cit 579.

Secondly, the state is not involved in the first instance, and the parties are free to negotiate between themselves. There is no binding award as in arbitration, for the parties can at any stage abandon the mediation process and go directly to trial. This is where mediation fails. As has been pointed out above, the mediator himself can call a halt to the mediation and send the parties to trial where he feels that the purpose of the exercise has failed, as in the case where one party tries to intimidate the other into an unfair resolution.

There appears to be definite indications that there is both a need and a desire on the part of disputants to approach their problems, at least in the first instance, through extra-curial means; and the fact that the procedure not only has the blessing of the courts themselves, but also the state legislature, indicate that there may be developing a new element in the approach to settling disputes of a minor nature. The fact that arbitration and mediation are being called upon increasingly to assist the administration of justice is a significant phenomenon of the late twentieth century. It has been suggested that the

humane emphasis which mediation offers, apart from offering another avenue to justice, has a beneficial influence on the society which practises it. The parties to a dispute achieve a sense of community involvement, for they are in the first instance, taking their problem to their peers. It is contended that if "mediation is to work in societies such as ours, it will do best in cases where the parties are locked together in continuing relationships, as are management and labour, neighbours and spouses. The desire to live or work together amiably in the future provides an incentive to settle and later abide by the agreement".¹⁾ But McEwen and Maiman's investigation, however, indicates that this is not necessarily the case: "Parties choose or are forced to compromise for many reasons besides mutual commitment to peaceful relationships in the future. The heavy reliance on negotiation to achieve settlements outside of court in all kinds of legal cases attests to these pressures. Some of these pressures arise from the ambiguous nature of fault in the disputes themselves, and others arise from the anticipation of uncertain results and delay in adjudication".²⁾

1. McEwen & Maiman op cit 267.

2. ibid.

But it seems that the parties, in addition, achieve a sense of responsibility by the fact that they are to a large extent involved in their own fate, and it will be their sense of justice and fair play in the first instance which will assist the resolution. From the mediator's point of view, he finds fulfilment and satisfaction in being able to serve the community in a constructive way and a greater sense of social involvement all round is the result.

It may seem ironic that in an age in which the most sophisticated developments of technology and education have taken place, in one of the most essential areas of human enterprise, namely the administration of justice, basic human needs are being re-examined. In an age when legal science is highly refined, the very foundation of the administration of justice is felt as being threatened; to such an extent that in a society such as the United States other avenues, with the direct assistance of the state, are being explored. Mediation may seem an elementary and somewhat crude means of approaching the quest for justice, but the indications are that it is successful; and is not this success indicative that a society, no matter how sophisticated, cannot ignore a basic human approach to

one of its essential needs? Perhaps it might be said that when a society feels that one of its essential needs is being threatened, a return to a simple approach is indicated.

If mediation is still in an elementary form, and more of a community service, peripherally assisting the administration of justice, perhaps there is a need to ascertain whether it can be developed further and expand from a brave experiment into an institution in its own right. In the Maine experiment there are indications that there is a preference for mediation. McEwen and Maiman 1) report that where mediation was offered as an alternative, it was chosen in three quarters of the cases.

Where mediation was refused, the plaintiff usually believed that he had a clear cut case and was only interested in claiming the amount owed. 2) In the sample of the small claims cases that were mediated, sixty six per cent ended in agreement. They describe the types of cases which have the highest settlement rates:

"The highest settlement rates were found in cases involving unpaid bills and private sales, where 85% and 83%, respectively, of these cases were resolved through mediation.

1. op cit 248.
2. op cit 249.

Such cases appear to be particularly appropriate for mediation for two quite opposite reasons: either the defendant admits the debt but pleads inability to pay, in which case the agreement usually involves establishment of a time-payment plan: or the defendant denies the debt by justifying his failure to pay with a claim of his own (typically, that the plaintiff misrepresented his goods or service), which creates a situation conducive to compromise. Traffic accident cases, on the other hand, had the lowest settlement rate among mediated cases (41%) ... Closer to the overall mean rate of settlement were landlord-tenant disputes (64% successfully mediated), contracts (65%) personal loans (62%), consumer complaints about services (57%), and consumer complaints about products (55%)" 1)

1. op cit 250.

It seems that the motivation to mediate does not necessarily depend on whether the relationship between the parties is a continuing one or not. McEwen and Maiman found that mediation was just as likely to be successful where the parties had no continuing relationship. 1) In mediated cases there was also a greater likelihood that some form of payment plan would be agreed upon. 2) The privacy, informality and consensual character of mediation are the advantages said to create a better climate for settlement. Also, the mediator is in a position to probe into past relationships and histories which might have an indirect bearing on the disputed claim. This information, elicited at the time of the mediation, assists the parties to see each others' point of view and there is consequently more likelihood of compromise. 3) There may be more to a claim than purely legal issues. In a landlord and tenant dispute, for example, the dispute may have involved a past personal relationship which has soured, and consequently the dispute may involve subjective elements on both sides; during mediation, these elements are revealed, and the parties may see that the actual legal issue involved is proportionately small in regard to the dispute as a whole.

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1. op cit 267.
 2. op cit 262.
 3. op cit 255.

Such issues are easily compromised. It is this aspect of mediation which has, for its proponents, its major attraction. Parties who are locked into a dispute may find that there are issues which have clouded their vision as to their real entitlements, and the matter is not worth continuing. Court time and expense is saved, and the bonus is an intact relationship.

The informality of mediation also allows the parties wider scope to express their feelings. It is often found that emotive issues are as likely to have brought them to file claims as the legal ones. Once these issues are exposed and dealt with by the mediator, the parties are on better ground to reach a settlement. By bringing the parties together informally, they discover incidental issues which may influence the outcome.

McEwen and Maiman tell of an incident where:

"After a half an hour the mediation ended unsuccessfully because the parties failed to agree about who was responsible for an automobile accident; the elderly male plaintiff decided to drop his case on the

way back to the court-room. Having learned that the female defendant received welfare, he had concluded that it would be wrong to take money from her". 1)

It is this type of outcome which, makes mediation more attractive than adjudication. The parties themselves, after reaching their own decision, view the process itself as fairer and more satisfactory, and this results in a greater compliance with the terms of the settlement:

" ... data suggest that the higher compliance rates found in mediated cases probably result in large part from the experience of entering into - literally, signing - an agreement to end the dispute on certain specified terms. This appears to affect both plaintiff's and defendant's perceptions of the debt. People are more likely to feel bound by an obligation they have undertaken voluntarily or more or less publically, than one imposed upon them by a court of law. It also seems likely that the mediator

1. op cit 256.

contributes to the disputant's sense that this obligation should be taken seriously - a marked contrast to the message of pessimism or, perhaps even worse, indifference about collection of the debt which was communicated by some of the judges. Finally, the fact that defendants who took part in unsuccessful mediations had a substantially better compliance record than those who had not participated in mediation at all suggests that the negotiation process itself - independent of its outcome - helps to inculcate a sense of responsibility about payment. Perhaps merely facing one's opponent for a time, having the opportunity to speak with and to hear him or her, humanizes and personalizes the process enough to affect the defendant's attitude toward payment". 1)

Has mediation or the idea of mediation any relevance in the South African setting? It is submitted that it has. The Hoexter Commission has underplayed the notion of commissioners in the small claims courts acting as mediators. Their primary function is to adjudicate the issue. 2) This presents the likelihood that the small claims courts in South Africa will be little more than what Felstiner 3) called "watered-down versions of real courts".

1. op cit 263-4.

2. Hoexter Commission 4th Interim Report 179.

3. W. Felstiner & L. Williams "Mediation as an alternative to Criminal Prosecution" 2 Law & Human Behaviour No 3 (1978) 223.

The commissioners are to be drawn from the ranks of the legal profession who are trained and skilled in the adversarial process, and since their primary function is to adjudicate, although an inquisitorial approach is recommended, little attempt will be made at mediation. Although the courts will be less formal than the ordinary courts, the atmosphere and general approach is likely to be strongly reminiscent of them. The small claims courts are to adjudicate on law and fact, and in spite of the recommendation that the proceedings are to lean more towards that of arbitration, 1) it is doubtful if lawyers will attempt to mediate. It is submitted that if there is to be any purposeful change in the small claims approach, weight should be given to the idea of mediation, for it does have a place in the small claims context both to relieve court congestion and to create better relations between the parties. Society can only benefit from any out of court settlements, whether they be small claims or otherwise. We may be advised to look at the American experiments and consider them for future use. The small claims courts in South Africa must not become faint copies of the higher courts. They must be fundamentally different from them both in approach and structure.

1. Hoexter Report op cit 178.

Terence Ison makes the point:

"The trouble with small claims court is that although they use a procedure that is simpler than in the high courts, they still operate on basically the same principles. The small claims judge tends to imitate his superiors in the adversary system. If justice is ever to be done in small claims, the approach must be more iconoclastic. Indeed, almost every principle that a common lawyer has cherished must be abandoned. The adversary system, the rules of evidence, the dignity of the court room, the concept of a trial; all must go. And we must brace ourselves for such innovations as a judge speaking on a telephone to one of the parties in the absence of the other. Above all, the judge's function must be recognised as first and foremost the task of investigation, with adjudication being an ancillary role". 1)

Ison's view has all the elements of an informal procedure such as mediation. It is submitted that mediation has a place in a society such as ours where

there are not only disparities of wealth and poverty, but also ethnic, language and cultural differences. A process whereby disputes can be settled without resorting to formalised procedures and external controls would have the effect of stabilising cross-cultural differences. Members of different cultures would be able to settle their differences in an atmosphere of mutual understanding and respect. In small claims in South Africa there are going to be many instances involving cross-cultural disputes.

Furthermore, where the majority of the population already has traditional and cultural methods of resolving disputes, it would be useful to consider mediation especially in the rural areas. The Hoexter Commission has taken note of the fact that the bulk of the population in South Africa is concentrated in a few metropolitan centres, and that our rural districts are large and sparsely populated. It envisages operating the small claims courts on an ad hoc circuit basis in the rural areas from time to time based on the Australian model. 1) It would be useful to have a mediation process in anticipation of these ad hoc circuits. The mediators can be drawn from local

1. Hoexter Report op cit 201.

headmen, businessmen, teachers and other professionals, all of whom would have some background of the nature of the problem. These persons could mediate the disputes prior to the arrival of the circuit court which may very well find that the matters have been disposed of. It is, after all, in the less technologically advanced societies that mediation operates most successfully. The result of the mediations, should they be successful, would then be made an order of the small claims court.

Mediation procedure would be especially salutary in small community areas where litigation rankles long after it is over. In rural communities, the essence of getting along together is the ability to sort out disputes in a consensual manner. Such a community is used to resolving disputes informally, and it would not be too great a step from sorting out matters personally, to having unresolved disputes heard by a familiar and respected third party.

Once a matter goes before a court where the adjudicator is unknown, no matter how relatively informal the procedure might be, the parties will still regard it, correctly, as a court trial and feeling will run accordingly.

The parties are very likely to reach an agreement during a mediation in rural areas, and what is more, the consensual nature of the process will ensure the minimum of ill-feeling and resentment later. This is more important in the rural setting than it would be, say, in a populated urban area where the parties are less likely to have a continuing relationship.

We may find in South Africa, as has been found in the United States, that mediation is a short step forward from small claims litigation; and where small claims courts find their rolls congested and unmanageable, as we might very well find in future, mediation has a practical use apart from its general social advantages. 1)

1. See Appendix.

CHAPTER FIVE

ARBITRATION AND SMALL CLAIMS

In South Africa the institution of commercial arbitration has been criticised as expensive, dilatory and not effecting the justice which it traditionally sets out to offer, 1) with businessmen who have used that process turning in hope to the recommended small claims courts for expected relief. But it will be seen that in the United States mediation and arbitration are used conjointly with small claims issues either with the purpose of achieving a settlement before adjudication in small claims courts or with the purpose of achieving a full settlement and avoiding a court trial altogether by a process of compulsory non-binding arbitration of small claims, as well as voluntary binding arbitration.

In 1952 the state legislature of Pennsylvania enacted a statute which permitted the court of common pleas in each county to provide by rule of court for compulsory non-binding arbitration in cases involving no more than \$1000 in claimed damages.

1. Natal Mercury Property News 7th April, (1984) 20, Where Pieter Rautenbach, Director of the Natal Master Builders' and Allied Trade Associations, welcomed the proposal of small claims courts. He is reported to have said that arbitration was becoming too expensive, and that such courts would be an ideal vehicle for minor claims in building disputes.

In 1957 the statute was amended to include claims up to \$2000. In 1961 the Pennsylvania plan was reviewed by Rosenberg and Schubin 1) and they were tentatively optimistic. They reported that the arbitrated cases were being disposed of more quickly and easily than in pre-arbitration days. Cases that had to wait twenty four to thirty months for trial in the municipal court now waited only five months or less for a hearing before the arbitrators. They reported that only a comparatively few cases were appealed after an arbitration in the majority of small claim cases. (The process gave either party an inherent right of appeal as a matter of course, in that the appellant may receive a trial de novo in court). Where there is an appeal the final result must await the conclusion of both proceedings.

The system of compulsory arbitration in Pennsylvania 2) is administered by a deputy court administrator who appoints arbitrators from lists of attorneys who are willing to serve. His work is to assign the cases to the arbitrators. "Each panel of arbitrators is composed of three members of the bar association ... The chairman of the panel arranges a place for the

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1. M Rosenberg and M Schubin "Trial by Lawyer Compulsory Arbitration of Small Claims in Pennsylvania" 74 Harvard Law Review (1961) 448.
 2. Josephine King "Arbitration in Philadelphia and Rochester" 58 American Bar Association Journal (1972) 712.

hearing and fixes a time not fewer than fifteen and no more than thirty days from the date of the assignment. The parties are entitled to ten days notice of the hearing. Any case that has been continued twice after assignment to two panels must be referred to the court for an appropriate order. The arbitrators must file a report and an award within twenty days of the completion of the hearing In conducting the hearing, the arbitrators may exercise the general powers of the court to subpoena witnesses and papers, administer oaths, determine the admissibility of evidence and decide issues of law and of fact". 1)

There is a general rule that testimony may be offered by deposition, and medical and property damage bills in an unlimited amount may be presented.

No record of the proceedings is required, but a party who wants a record must pay for it. The decision of the arbitrators is final unless a party appeals within twenty days' of the filing of the award. The appellant must then repay the arbitrators' fees. 2)

1. Josephine King op cit 713.
2. ibid.

The parties now appear before the court for a new trial. The case is heard de novo but the arbitrators may not be called as witnesses and their report and award is not admissible as evidence. The arbitrator's fees may not be recovered by the appellant even if the appeal is successful. 1)

Although compulsory arbitration began in Pennsylvania as an experiment over three decades ago, momentum has been gained and jurisdictions increased. In 1978 Attorney General Bell made a plea for increased use of arbitration and for higher jurisdictions, 2) and this is fair testimony to the success of the Pennsylvania experiment.

In 1971 the jurisdiction limit for compulsory arbitration in Pennsylvania was increased to \$10,000 for Philadelphia and \$5000 elsewhere in the state. 3) Prior to 1971, Pennsylvania had a system of compulsory arbitration of small claims for those matters involving disputes of \$3000 or under. In spite of this the courts continued to experience pressure in their courts.

1. Josephine King op cit 713.

2. 64 ABA Journal (1978) 824. (Where money damages are less than \$50,000).

3. Josephine King op cit 712.

Looking at the experiments which have taken place during the past decade in the United States, particularly with regard to the small claims courts, a factor which at once becomes clear is that there has been alarm in that the courts are finding it increasingly difficult to cope with increased rolls. This in itself is grounds to search for relief and re-examine the institution in relation to the community it serves. It follows that where access to the courts, small claims courts no less, becomes more and more difficult, there will be corollaries which have a detrimental effect not only to the dispensing of justice but to the well-being of the community. Heavy trial calendars in the United States have not always been the reason which has prompted certain states and counties to adopt alternative procedures to trial. There seems to be a desire to use alternative

procedures such as negotiation, arbitration and mediation. For example, in Pennsylvania in pre-arbitration days (ie prior to 1952) eighteen counties which adopted the original arbitration program (of small claims) had experienced relatively little delay in having cases brought to court trial, and yet they chose for the program. 1) It has been suggested that the counties were motivated by the simple desire to ease the lot of the claimants in small claims cases, and by "easing their lot" is meant presumably easing any frustrations and costs of a trial in court. But there may be other motives underlying the reasons for the widespread desire in the United States for getting parties to settle outside the court and these will be dealt with later.

Referring to Mr Justice Burger's 1982 Annual address to the American Bar Association, Raymond J Broderick reports that the District Court for the Eastern District of Pennsylvania has indeed found a "better way". Encouraged by positive results in many states that had established compulsory non-binding arbitration programs, including the state court in Philadelphia, the Eastern District Court instituted an arbitration experiment in 1978.

"Our program has now passed the experimental stage.

1. Rosenberg & Schubin op cit 454.

It has been in operation for almost five years, and is expected to continue as an alternative means of relieving some of the heavy burdens of our constantly increasing case-load ... 'This program has provided litigants with a prompt and less expensive alternative for resolution of disputes and has provided our judges substantial relief at a time when our filings have been increasing' . 1)

From February, 1978 to June, 1982, 22038 civil cases were filed in the District Court, and 4010 were placed in the compulsory arbitration program. In terms of a local rule for civil cases, arbitration is compulsory where money damages under \$50,000, are being claimed. (It will be remembered that in 1978 the then Attorney General Griffin Bell called for compulsory non-binding arbitration schemes in cases where money damages were less than \$50,000.) 2) Of the 4010 cases placed in arbitration during the experimental period, 3271 were terminated. Of the 3271 cases terminated, 1610 were settled, 1183 by motion, 144 by default judgement and 274 by judgement on the arbitration award. 3)

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1. R J Broderick "Compulsory Arbitration: One Better Way" 69 American Bar Association Journal (1983) 64.
 2. 64 American Bar Association Journal (1978) 824.
 3. R J Broderick op cit 64.

Significantly only sixty were terminated by a trial de novo.

"The bottom line statistic that the judges in the court found most convincing about the effectiveness of the program in that during the 53 month period only 60 of the 4010 cases have so far required a trial de novo. Although there is no readily available statistic concerning the time expended by judges in handling pre-trial motions, pre-trial conferences and settlement conferences, the experience of our judges indicates that the cases in the arbitration program, because of their early listing for the arbitration hearing, consumes far less pre-trial judicial time than the cases that are not eligible for arbitration". 1)

The period for cases terminated in the compulsory arbitration program was on average six months from date of issue to the date of the award, whereas the average for all civil trials over the same period was 13 months. 2) Compulsory arbitration is not new to Pennsylvania where it has been in use in the State Court in Philadelphia

1. op cit 65.
2. ibid.

since 1958. Approximately 1200 cases each year are terminated in the compulsory arbitration program in that court.

In the Eastern District Court there are approximately 800 lawyers who are certified as arbitrators and in order to be appointed, must have been admitted to practice for at least five years. The arbitrators receive \$75 for each case arbitrated, i.e. only \$25 more than originally suggested by Bell in 1978. During the 53 month period of the compulsory arbitration \$179150 was paid to arbitrators which amounts to \$54.77 per case terminated. 1)

In his 1982 address, Chief Justice Burger pointed out that to operate a District Court costs \$350 per hour. A saving of court costs, indeed!

"The arbitrators are randomly selected by the clerk's office from the list of those certified, and each panel is composed of one arbitrator whose practice is primarily representing defendants, one whose practice is primarily representing plaintiffs, and one whose practice does not fit either category. It is the present practice to assign three cases to a panel of three arbitrators...(where) a party files a motion for judgement on the pleadings, summary judgement, or

1. ibid.

similar relief, the case may not be arbitrated until the court has ruled on the motion. 1)

The rules of evidence are used only as a guide at the arbitration hearing, and a party may pay for any recording or a transcript of the arbitration hearing himself. The award becomes a final judgement unless within 20 days of the filing of the award a party demands a trial de novo. "At the trial de novo neither the fact that the case was arbitrated nor the award is admissible as evidence....If a party who demands a trial de novo fails to obtain a judgement at the de novo trial more favourable than the arbitrators award, the arbitration fees (\$225) are assessed against that party". 2)

There is consequently a penalty attached to demanding a de novo trial which does not improve upon the arbitration award. This is in accord with the views of Chief Justice Burger: 3)

1. ibid.

2. ibid.

3. 68 American Bar Association Journal (1982) 274 at 277.

"We must, however, be cautious in setting up arbitration procedures to make sure they become realistic alternatives rather than an additional step in an already prolonged process. For this reason, if a system of voluntary 1) arbitration is to be truly effective, it should be final and binding, without a provision for de novo trial or review Anything less than final and binding arbitration should be accompanied by some sanction to discourage further conflict. For example, if the claimant fails to increase the award by 15% or more over the original award, he should be charged with the costs of the proceedings plus the opponents' attorney's fees". 2)

In 1970, no doubt encouraged by the Pennsylvania experiment, a similar program of increased jurisdiction of compulsory small claims arbitration was begun in the city court of Rochester, New York. 3) Here the program was less adventurous than its Pennsylvania counterpart with a jurisdictional limit set at \$3000, later increased to \$4000. The rules governing the procedure

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1. Ibid. The use of "voluntary" is perhaps incorrect here, as only compulsory arbitrations have a provision for a trial de novo.
 2. ibid.
 3. Josephine King op cit 714.

are the same as in Pennsylvania with the difference that in New York the parties may stipulate a hearing before a single arbitrator. After the first year of its inception, it was reported that there had been a considerable saving of court time, and that parties outside the compulsory limit had elected to enter arbitration instead of a court trial. An indication of the success of the program was that only six per cent of the arbitrated cases were appealed and tried de novo. 1) It would seem that litigants are eager to choose extra-curial means for settling disputes and that it is not only the institution of the administration of justice imposing a system upon the parties for expedient reasons. Furthermore, with jurisdictional limits being set as high as they are, it cannot be said that the claims are truly "small" in the traditional sense. These experiments in Pennsylvania and Rochester are clearly designed to offer an alternative to the courts; a way of settling relatively large claim disputes without the intervention of the court. The low number of appeals suggests that the parties regard resort to arbitration as acceptable even when the amount involved is not

1. ibid.

within the mandated small-claim limit and where, by electing to arbitrate, they are faced with a final award.

Again, arbitration is not the exclusive terrain of experimental areas such as Rochester and Pennsylvania which admittedly have higher jurisdictional limits in their "small-claims" courts. Many small claims courts in the United States resort to the arbitration alternative, but it is a non-compulsory, voluntary non-appealable process.

In the small-claims court in Manhattan, New York City, the jurisdictional limit is now set at \$1500 making it a small claims court in the typical sense. According to the language of its authorization, the court conducts its business "in a manner best suited to disclose the facts and determine the justice of the case". 1) The court may only hear individuals and excludes business partnerships and companies. This is important as one of the chief criticisms of small claims courts in America is that they have been used as collection agencies for corporate interests and thereby have defeated their purpose. 2) The procedure of instituting a claim is as follows:

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1. Austin Sarat "Alternatives in Dispute Processing: Litigation in a Small Claims Court" 10 Law and Society Review (1976) 339 at 344.
 2. "Small Claims as Collection Agencies" 4 Stanford Law Review (1952) 237 at 242.

The claimant must appear in person at the court and fill out one form with his name and address, the name and address of the prospective defendant, the amount of money in dispute and details of the cause of action. At the time the case is filed it is set down for trial. 1) Sarat makes the point that "some litigants appear to use the filing itself as a tactical device in the process of conflict management". 2) This is an interesting observation for here we see the first stage of the procedure being used as an inducement itself to settle. One third of all the cases filed in the small claims court are dismissed because neither party appears on trial date. Sarat analysed this group by means of questionnaire 3) and reports that more than one half of the non-appearance litigants had reached an out of court settlement before trial date. Within this group almost two thirds had tried some form of settlement activity before filing suit but had failed. Once claims had been filed, however, they had reached a settlement. The prospect, presumably, of appearing in court was a factor in inducing a settlement. The other half of the non-appearance group had obtained a settlement after filing. Thus the filing of the claim began a process which led to settlement and made a court appearance unnecessary. 4)

1. op cit 344.

2. ibid.

3. Sarat obtained 351 responses from both the plaintiff and defendant in questionnaires sent to non-appearing parties. He uses this number in his analysis.

4. op cit 346.

These observations of Sarat give credence to the view that prospective litigants do indeed want to settle and a means is grasped at and used gratefully. A number of plaintiffs failed to appear even though no settlement was attempted or reached. This group appeared to use the process as a "letting off steam" situation. They would file a claim in the heat of the moment against someone who had offended them, but after a cooling-off period had thought twice about it and had decided to abandon it.

Here we see the small claims court being used in four contexts. Firstly, as an adjudicatory forum, where legitimate claims are decided upon. Secondly, we see it as a device to ripen a settlement which had been considered prior to filing a claim; thirdly, it is used as an inducement to settlement which had failed to materialize but which filing had encouraged, no doubt by the prospect of an appearance, and fourthly, as a means of "getting something done" about a real or imagined grievance and then promptly forgotten about after filing. "By declaring his grievance in a public forum he (the plaintiff) derived enough psychic satisfaction so that following through with his lawsuit seemed to him as unnecessary as it appeared futile". 1)

1. Sarat op cit 346.

Another aspect of using the small claims process as a device for settling a dispute is the situation of the experienced and unexperienced litigant. It has been found that the experienced litigant uses his experience to give him an advantage over the novice not only in the court itself during trial, but also to be "more effective in using litigation either to facilitate on-going settlement efforts where none has occurred". 1) In other words, the experienced small claims litigant begins to learn a few tricks which he uses over his less experienced opponent and is more likely to obtain a resolution outside the court. 2)

A feature of many of the small claims courts in the United States including the Manhattan one, is the right to retain counsel, in spite of the fact that experience has shown that the use of lawyers inevitably formalises and prolongs the proceedings. 3) Sarat, however, points at some advantages at having such representation. 4) He says that the expertise of lawyers is useful in out of court negotiations, and retaining an attorney, especially in small claims matters, indicates seriousness of purpose which should motivate settlement. He says that seventy per cent of non-appearance

1. op cit 347.

2. M Galanter "Why the Haves' Come Out Ahead: Speculations on the Limits of Legal Change"⁹ Law and Society Review (1974) 95 at 98.

3. In California, for example, litigants may not be represented by attorneys. C R Pagter, R McCloskey & M Reinis "Small Claims" 52 California Law Review (1964) 876 878.

4. Sarat op cit 361.

plaintiffs who had retained counsel before filing suit had obtained some type of settlement as compared with forty per cent of those unrepresented. 1)

The small claims court in Manhattan allows an arbitration option instead of adjudication. At the beginning of each session the parties are told that their cases will be dealt with immediately if they opt for arbitration, the only difference being that they will not be able to appeal as the award is final. 2) In this court there is no question of compulsory arbitration with a possible appeal within twenty days as in Rochester and Philadelphia. The arbitration option is voluntary.

There are distinct differences between the adjudication in court and the arbitration. Sarat lists these as "differences in the setting in which the proceedings occur, the procedure employed, and the style of decision making". 3) One of the criticisms of having a judge as adjudicator in small claims matters is that he retains the traditional style of adjudication:

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1. op cit 350.
 2. op cit 352.
 3. ibid.

"The small claims judge was to be active and inquisitorial; in search of substantive justice, he was to abandon to the traditional passive, detached umpire role. In New York as elsewhere this ideal of a small claims judge is rarely approximated. Judges in the courts rotate; they regularly serve in the Civil Courts where the style of judging is more traditional both in theory and practice. When they sit as small claims judges they seldom abandon the traditional style; when they do they become actively engaged in questioning the parties and suggesting possible settlements, they do so in an awkward halting manner. Most of the time the judge merely sits back, listens to the litigants tell their story and then makes a decision. The reluctance of the judge to perform in a more active fashion, while it is at odds with the intention of the reforms, it makes the availability of arbitration especially meaningful in the small claims context". 1)

1. Sarat op cit 353.

Since their inception, the small claims courts have used judges trained and experienced in the adjudicatory process and who employ the traditional decision-making style with counsel being allowed in many courts. This, it is claimed, causes difficulties. Firstly, the courts were intended originally to make justice accessible to those who could not afford ordinary litigation. They have been described inter alia as peoples' courts and courts for the "redress of poor men's causes". 1) The ordinary working man's inability to obtain justice was the primary aim of establishing the small claims courts. By lowering the traditional amount it was felt that most problems would be solved. The courts were to be different, serving a different purpose. Secondly, the small claims movement was primarily a movement of reform where the old institutions would be changed and a new concept evolved.

"Experiments with conciliation, based on the Norwegian and Danish model conciliation tribunals, a compulsory first step in all civil litigation in Norway and Denmark, were praised for simplicity, effectiveness and low cost. 'The attorney is eliminated

1. B Yngvesson & P. Hennessey "Small Claims - Complex Disputes - A Review of Small Claims Literature" 9 Law and Society Review (1975) 219 at 223.

because conciliation depends for its effect on bringing the parties together, on smoothing out irrelevancies and to proceed to a direct, businesslike personal adjustment of the real issue'... Small claim procedure was conceived along these lines". 1)

In the Manhattan Court, where the parties elect to arbitrate, the arbitrators are selected by the administrative judge of the civil court from lists of volunteers submitted by the City Bar Association who serve once a month without pay. The arbitrations are heard informally, usually in private with only the parties and witnesses present. The hearings are held in offices adjacent to the courtrooms where the participants sit around a table. 2) The hearing contrasts markedly with adjudication in court where the whole procedure is formalised and the relationship between the parties set at a distance.

The arbitrators have full authority to make final awards but their approach to the dispute indicates that they go to a great deal of trouble "to try to work out mutually acceptable compromise solutions". 3)

1. B Yngvesson & P Hennessey op cit 222.
2. Sarat op cit 353-4.
3. ibid.

Their work is, in the first instance, an admixture of mediation and arbitration. As with mediation the parties are encouraged to express their feelings as well as describing the facts of the matter in dispute. If the parties are unable to reach a satisfactory compromise solution through the efforts of initial mediation then the arbitrators shift the emphasis to their authority as arbitrators and decide the case on the basis of this authority. It is said that this causes some confusion among the parties who cannot understand why the final judgement differs from what the arbitrator suggested would be an appropriate compromise in the first place. 1) This dual role has been criticized for other reasons. The Hoexter Report 2) quotes G D S Taylor as follows:

"The merger of conciliation and adjudication places a referee in a difficult situation, for his suggestions or indications in the course of conciliation may be read as indicating his views as to who will succeed if he adjudicates ... where a referee suggests a compromise, it is difficult, if not impossible, for him to divorce this from his current state of mind as to the order he eventually might make". 3)

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1. op cit 354.
 2. G G Hoexter Commission of Inquiry into the Structure and Functioning of the Courts Fourth Interim Report 56.
 3. Access to Justice Vol 11 Book 11 "Special Procedures Governing Small Claims in Australia" 656.

Where the arbitrators perform the dual role, they are in the first instance mediators and attempt to take the parties along the lines of agreement and compromise, even to the extent of using the threat of judgement to induce the settlement; 1) and where they find that no solution can be reached, they switch roles from mediator to arbitrator and impose the judgement which may be very unlike the original compromise settlement suggested by them.

The Hoexter Commission 2) quotes Cappelletti and Garth:

"Most obvious is the problem that the decision-maker may, by confusing the roles of adjudicator and conciliator, fail to fulfil either role satisfactorily. As conciliator, he may unwittingly impose a 'settlement' by the implicit threat of his ultimate power to decide. As adjudicator, he may let his conciliation subvert his mandate to apply the law. The New York study in fact, lends empirical support to these criticisms..." 3)

But in the New York Court it seems that the main emphasis of the procedure is to get the parties to settle the dispute and the arbitrators accept the dual

1. Sarat op cit 354.

2. Hoexter op cit 56.

3. Access to Justice Vol 1 Book 1 General Report 81-82.

role, involving themselves with the parties and their dispute. This approach of initial involvement with the parties, not as an umpire but as a participant searching for a solution is understandable only in terms of a deep social commitment. They serve without pay and they see themselves as performing a social duty.

The parties themselves seem to prefer the more informal procedure to trial. According to Sarat's findings, arbitration was employed by 65 per cent of the parties to 35% who chose court trial. 1) He suggests that the distribution of choice between arbitration and adjudication lies in the needs and attitudes of the people using the small claims court and also in the nature of the relationship between the parties. For example, whether it is a continuing one or not:

"Those whose relations are longstanding, and those who expect to continue their interaction, will I believe, seek informal alternatives which allow them to deal with the present trouble without damaging the entire relationship". 2)

1. Sarat op cit 356.
2. op cit 357.

But in research carried out by McEwen and Maiman in the litigants' selection of mediation they noted that "litigants reporting a lengthy past relationship or one continuing beyond the dispute were no more likely to choose mediation than were parties without past or continuing ties". 1) There is some doubt whether the relationship itself has any distinct bearing on the selection of informal procedures, but rather that there is some preference for out of court procedures where the parties are in doubt as to the outcome of their dispute.

It emerges that there is a need for an institution like arbitration, quite apart from the practical relief that extra-curial settlements may afford the administration of justice. Although large commercial arbitrations today are expensive and conducted very much like a trial affording the parties only the minimum of the benefits of arbitration, the process can be adapted not only to relieve court rolls, but also to advance the personal interests of the parties themselves. It is also evident that arbitration provides a viable alternative to the ordinary courts especially where small claims are concerned.

1. McEwen & Maiman "Small Claims Mediation in Maine - An Empirical Assessment" 33 Maine Law Review (1981) 249.

In England, since 1973, arbitration has been employed and developed as a small claims procedure. Prior to 1973, small claims formed part of the mainstream courts' judicial process.

"In the process of small claims, the county court functioned essentially as a debt collection agency (there being a conspicuous absence of claims brought by private individuals) and placed scant emphasis on adjudication. There was required a speedier, more straightforward and accessible procedure ... The official response became manifest with the establishment of the small claims procedure in the county court, (heralded by many as offering a genuine people's court) and the introduction of arbitration." 1)

In 1972 officialdom was still struggling with small claims. This led to reforms in the county court procedure which began with the introduction of amendments to the County Court Rules which were designed to accommodate the growing need to expand small claims matters. A system of pre-trial review was instituted whereby the registrars of the court met the

1. Michael Haley "Televised Arbitration: Small Claims on the Small Screen" 134 New Law Journal (1984) 307.

parties in their chambers where an attempt was made to reach a settlement in a relaxed and informal atmosphere. The purpose of this procedure was to reduce the number of cases proceeding to trial. 1)

The first major attempt at reform in small claims disputes took place in 1973, with the introduction of the Small Claims Procedure, which provided for the arbitration of small claims. 2) The procedure was for the registrar to follow a Practice Direction issued by the Lord Chancellor which included a schedule of terms to be referred to by the registrars in the course of conducting the arbitrations. The essence of the Direction was to place an emphasis on informality where the strict rules of evidence would not apply; the arbitrations would be held in private and the arbitrator was able to adopt any method of procedure he considered convenient and apposite and which would afford a fair and equal opportunity for each party to present his case. Referral to arbitration usually took place upon application by one of the parties. We see, therefore, that in the United Kingdom direct use was made of arbitration in dealing with small claims. In 1981, new rules for determining small claims in the

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1. N J Turner "Small Claims in England: Some recent Developments" 48 Australian Law Journal (1974) 345 at 347.
 2. ibid.

county courts were put into operation. 1) The main thrust of the new rules is that the small claims limit has been increased to £500, and provision is made for automatic referral of claims below this amount to arbitration. Hence all small claims are referred to arbitration subject to the registrar's right to rescind such a referral where in his opinion the subject matter of the claim is either too complex, or where a difficult question of law was involved. 2) Once the award has been made there is no appeal, except that the award is vulnerable where there is an error in law on the face of the award, or where there has been a breach of the rules of natural justice on the part of the arbitrator.

About the same time as the arbitration procedures were introduced into the main justice system, two unofficial voluntary arbitration schemes were created in London and Manchester. 3) In Manchester, the arbitrators were appointed by the president of the Manchester Law Society, and included local solicitors and barristers. Where the claim involved technical matters, professional experts were called upon. The arbitrators were paid a small fee for their services and were given a wide discretion in the conduct of the arbitration.

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1. R Thomas "Small Claims - The New Arrangements" 131 New Law Journal (1981) 429.
 2. op cit 430
 3. Turner op cit 347.

No legal representation was allowed, and costs were limited to the reimbursement of expenses incurred in the course of the arbitration up to a maximum of £10. The emphasis in the proceedings was on informality and the strict rules of evidence were not applied.

The London voluntary Small Claims Court was established by the Westminster Solicitors' Trust, which also operated independently. 1) The arbitrators were appointed from the ranks of solicitors and barristers of the Westminster Law Society who gave their services without charge.

It is this sort of spontaneous approach which contributes to social cohesion and gives arbitration the wide innovative scope it needs to serve the administration of justice generally.

The success of the Westminster and Manchester arbitration schemes, and the fact that official small claims matters in the United Kingdom are dealt with by arbitration give a further indication that inevitably arbitration and small claims are linked. Arbitration is the logical vehicle for small claims.

1. Turner op cit 348.

It has a flexibility and adaptability to which the small claims litigant can relate. What the ordinary man really wants is a quick, sympathetic, efficient and inexpensive means of disposing of his case. He is not really concerned with the esoteric intricacies of legal procedure. He wants to feel that his case has been given a fair hearing, and in most instances he will be satisfied with the judgement of a responsible third party. The third party need not even be legally qualified, 1) provided that he gives an honest and fair decision to the best of his ability. As has been shown, it is important for the litigant to be able to express himself unhampered by formal procedures; he should be allowed to "get things off his chest", and once this has been done he is more likely to derive satisfaction from the resolution of his dispute.

It is submitted that our small claims procedures as envisaged by the Hoexter Commission are too formal, and the atmosphere of our new small claims court will not be very unlike that of an ordinary Magistrate's Court. Furthermore, small claims courts have a tendency to feed upon themselves, and soon are over-crowded. We have seen that in the United States courts dealing

1. For example, in New South Wales the referee in Small Claims Tribunals need not be a lawyer. See Hoexter Commission 4th Interim Report 54.

with small claims have had to increase their jurisdictions and call upon arbitration to relieve congestion, to the extent that some are no longer small claims courts in the accepted sense.

If the limit of our small claims jurisdiction is to remain as low as R1000, then there seems to be no reason why these claims cannot be heard by arbitration tribunals controlled by Law Societies.

Community-minded attorneys, advocates and other professionals could give of their time to hear matters on a more informal basis than the prospective court. Emphasis could be placed on mediating the dispute in the first instance, with resort to adjudication only where this fails. Mediation not only contributes to the informality principle, but encourages and makes more meaningful the idea that "active investigation of the facts of the dispute" is undertaken.

The seeds of such a small claims court are evident in the recommendations of the Commission:

"The Commission is convinced that the successful functioning of a small claims court hinges largely on the personality of the

adjudicator. While combining the roles of mediator, counsel for the plaintiff, counsel for the defendant and presiding judicial officer, the chief duty of the adjudicator will be the active investigation of the facts of the dispute". 1)

The recommendation clearly envisages a mediation and arbitration procedure. In fact, the Commission states further that:

"... the procedure to be adopted at the trial in a small claims court (is) to be an arbitration conducted in an informal atmosphere by the adjudicator who will assume an active, inquisitorial role". 2)

It is somewhat difficult to imagine that our small claims commissioners who have to be experienced and trained in the adversarial process will be able, initially at any rate, to change their attitudes; especially presiding over a tribunal which has, to all intents and purpose, the atmosphere of an ordinary court.

1. op cit 179.
2. op cit 178.

It is perhaps indicative of present attitudes in the United Kingdom that a proposal to establish a voluntary arbitration of small claims scheme by Yorkshire Television on television, has received support from academic writer Michael Haley: 1)

"... the present writer ... does not believe that difficulties in determining the truth or controlling the behaviour of litigants are necessarily exacerbated by the presence of TV cameras ... In addition, there can be few who advocate that valid experimentation and innovation can only arise under the auspices of parliament, especially when the official alternative does not match the expectations once held of it." 2)

There is perhaps some nostalgia for the now defunct Westminster and Manchester type schemes and the promise they held for experimentation and innovation. There is surely some significance in the proposed TV series even though the idea may present a field-day for cynics.

"Following what YTV describe as ' ... a successful pilot programme ...', a batch of 20, half-hour programmes is scheduled for

1. 134 New Law Journal (1984) 307.
2. op cit 308.

televising on Channel 4 from May 1984. The design of the show is to record 'arbitration hearings of real disputes between real litigants and televising those which appear to be most likely to be of public interest and thereby educate.' In accordance with this aim YTV has devised (under the terms of the Arbitration Acts) its own arbitration scheme which is to operate under the supervision of an experienced arbitrator (appointed by YTV and aided by the Company's legal advisers): Judge King-Hamilton QC.

The jurisdiction of the service is limited to matters involving sums less than £500 (the plaintiff releases any claim from an excess sum) and is dependant upon the contractual agreement of the parties". 1)

With regard to misgivings about the program having to be entertaining, Haley says:

"This raises the fear that the producer, in order to boost viewing figures, may court controversy, encourage conflict and,

1. op cit 307.

thereby, trivialise the proceedings. Were this found to be the case the show would, undoubtedly, be tasteless, offensive, scurrilous and potentially defamatory; in fact not too dissimilar from some exchanges that this writer has witnessed in the magistrate's court! Yorkshire Television is, not suprisingly, alert to this danger and has several built-in precautions to avoid such a spectacle. First, the producer of Case on Camera (Mr Paul Dunstan of current affairs, not light entertainment) admits that he is not preoccupied with programme ratings and is concerned with promoting the television show on the basis that it provides an alternative institution and process to what is on offer in the mainstream courts".(my italics) 1)

We, in South Africa, need a bolder and more innovative approach to small claims. Once the idea that a more available form of justice in small claims has been received by the public, other avenues of satisfying small claims litigants should be explored.

1. op cit 308.

The Hoexter recommendations make it clear that the plaintiff can always retain the choice of whether to sue in a small claims court or in the conventional court. 1) It would not be such a great step to encourage experimentation by unofficial tribunals, something on the lines of the Westminster and Manchester Tribunals. Community-minded individuals and groups could set up mediation and arbitration programmes for resolving disputes of, say, not more than R500, and a great deal of pressure would be taken away from the official small claims court. Furthermore, these unofficial tribunals, making direct use of mediation, will encourage an attitude of resolving disputes through a more consensual approach. By consenting to submit minor disputes to a third party who is not necessarily an authority figure, and who will take an interest in the problems of the parties, litigants will come to accept and be more satisfied with the new approach towards informal justice.

It is submitted that we are now committed to explore wider horizons with regard to minor disputes between ordinary men. Our small claims courts as they stand are only the beginning.

1. Hoexter Commission 4th Interim Report 198 para (i).

CHAPTER SIX

ARBITRATION AND MEDIATION AND THE CRIMINAL LAW

Joseph B. Stulberg, Director of the Rochester, New York, office of the National Center for Dispute Settlement is of the view that "there must be a 'better way' to resolve private criminal complaints of a misdemeanour nature than the usual prosecutorial system." He refers to a project which has been in effect in Rochester, New York, since September, 1973.

"The target of the system is the myriad disputes of day to day life in which one of the parties resorts to a criminal complaint". 1)

This is a program whereby minor criminal charges are converted into civil actions which are then submitted by the parties to arbitration. The rationale for the project is that not only are the courts relieved of a host of private minor complaints, but the disputes themselves are resolved in a more effective and positive way.

1. "A Popular Shortcut Around the Court" 61 American Bar Association Journal (1975) 1277.

The first inquiry is whether the parties have a continuing relationship with one another, such as neighbour or landlord and tenant, and whether the complaint is over conduct of a minor criminal nature. If the court complainant clerk is satisfied that this is so he advises the complainant of the arbitration option. Should the latter agree to the option the matter is then referred to the district attorney who must also agree. Once he has, the case goes to arbitration and the accused is advised. If the accused does not agree, then the complainant prosecutes the charge in the ordinary way.

"The arbitrator's first duty is to mediate the dispute and work out a consent agreement. Lacking a successful mediation, the arbitrator has the authority to render his decision. The award can include civil damages and injunctive relief, but not the assessment of criminal penalties ...

... 'the premise for the program is that in a neighbourhood squabble one party is seldom the only one 'at fault'. Furthermore even an irrefutable proof of wrongdoing, with its attendant criminal penalties oftentimes does

little to advance a resolution to the parties' concerns". 1)

It will be noted that the arbitrator's first duty is to mediate the dispute. The arbitrators again, therefore, have a dual role; first mediator then arbitrator. It is only when mediation fails that he uses his authority to render a decision. This approach can be related to those arbitrators in the Manhattan Small Claims civil court where their role is an admixture of mediation and arbitration. Again the emphasis is on settling the disputes. It will be remembered that petty criminal complaints are referred to arbitrators where there is a continuing relationship between the parties. This is one of the conditions for a referral to arbitration. In the process, if the dispute is settled, the relationship has a better chance of remaining intact, and probably, there is a less likelihood of a similar situation recurring in the future. As McEwen and Maiman put it:

"The fact established by our data that defendants in mediation cases are considerably more likely to feel bound by their settlement does not rest solely on informal or

1. op cit 278.

formal controls ... Instead, the sense of obligation derives in large part from the power of internal controls, peoples' desire to act consistently and to live up to commitments that they themselves have made voluntarily and more or less publically". 1)

But apart from the social benefits, there are practical ones for the administration of justice.

"...a case reaches the arbitration hearing about three weeks from the date of the complainant's submission of it to the program. In Rochester, of 1000 cases referred to the arbitration center, arbitration hearings were held in 340, and two thirds of those arbitrated resulted in consent agreements. Of 600 cases in which one party did not agree to arbitrate, in only 30 did the complainant proceed to press the original charge. The net result to date, then, is a diversion of 900 cases from the criminal docket. The arbitration center uses about fifty Rochester residents as arbitrators. These are not only lawyers, but also

1. McEwen & Maiman "Small Claims Mediation in Maine" op cit 267.

businessmen, professors and other community-minded citizens". 1)

It will be seen from the above that arbitration and mediation are being used inter-relatedly. In fact in the review of the mediation program it will be seen that the two processes become almost merged. They are being dynamically used in the United States as alternatives to litigation and prosecution and from these experiments we may find a new process evolving. Neither arbitration in the traditional sense and something more than mediation in the conciliation sense.

It is not only the cost, delay and expense in terms of human relationships that are encouraging extra-curial programs in the United States. There is a move to what may be described as more humane alternatives to court. It is too soon to point a definitive direction or eventual result, but there are indications that certain areas of traditional jurisprudence will give way to a more sociological approach. Dean Charles Halpern of the City University of New York was quoted earlier as saying that lawyers in the future would have to be trained to explore non-judicial routes to resolving

1. 61 American Bar Association Journal op cit 1278.

disputes; he does not identify the routes but they must surely embrace arbitration and mediation. In a fragmented social structure as is found in many western industrialised societies, a regrouping at levels where there is dispute through mutual assistance can do much to assist cohesion. The administration of justice is often seen as an establishment-created institution of which many communities are not part, and processes such as mediation and arbitration by non-establishment figures are seen to be more acceptable.

The Americans have been concerned with procedural reform since the first decade of this century:

" ... the basic problem was identified as being due to cumbersome judicial machinery, it was the unequal ability of rich and poor to use this machinery itself which was the focus of the reform action. Smith 1) noted that the cause of the unrest and dissatisfaction (as against the roots of the problem which he identified as delay and expense) was 'the wide disparity between the ability of the richer and poorer classes to utilize the machinery of the law'". 2)

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1. R H Smith Justice and the Poor Chicago (1919).
 2. B Yngvesson & P Hennessy "Small Claims-Complex Disputes A Review of Small Claims Literature" 9 Law and Society Review (1975) 221.

Today, unrest and dissatisfaction may well be due to political and sociological causes, which might justify a new approach. In both civil and criminal matters there is a concern for the individual in the dispute process and his place in the social structure before and after the attempt at settlement. Programmes making available mediation and/or arbitration have been officially encouraged:

" ... mediation contrasts most sharply with adjudication and, in theory, promises much by way of decreasing the alienation of citizens when it is made an adjunct to the formal judicial process. The contrast and promise stem largely from the participatory and consensual character of the mediation process". 1)

Mediation may have had its roots in the early conciliation courts, but mediation today appears to go further; a third party to a dispute - the mediator - actively encourages the parties to find a mutually agreeable settlement. The mediator becomes involved in the causes of the dispute and assists the parties in analysing them.

1. "Small Claims Mediation in Maine" op cit 238.

The Rochester project of arbitration of minor criminal offences is not unique. William L F Felstiner and Lynn A Williams 1) have conducted research into a mediation project which is replacing minor criminal prosecution in cases where the defendant and victim have been engaged in a prior relationship. The process is not unlike the Rochester arbitration project in the sense that the intention is to remove cases involving parties whose relationship is continuing from the criminal courts and attempt, through a process of private investigation, to discover the underlying causes of the conflict, and in so doing create in the community a greater cohesion by avoiding the criminalising of persons for minor misdemeanours of a non-predatory nature.

" ... now in use in the United States which is not only an alternative to legal proceedings, but is also anti-legal in the sense that the precipitating incident is assigned limited importance and formal rules are generally ignored. This ahistorical technique in which the disputants' values are more important than society's norms is labelled mediation; but it is a much more

1. "Mediation as an Alternative to Criminal Prosecution" 2 Law and Human Behaviour Vol 2 No 3 (1978) 223.

structured procedure than the mediation we are accustomed to reading about in anthropological literature ... Unlike small claims courts and housing courts, these programs are not watered-down versions of real courts. Their roots are not in Anglo-American jurisprudence but in African moots, in socialist comrades' courts, in psychotherapy and in labour mediation". 1)

The project relies for its support on a team of laymen drawn from the ranks of local residents who undergo training in mediation by the Institute for Mediation and Conflict Management in New York. The mediators are called community mediators and they are not necessarily professionally trained and qualified. They consist of housewives, students and social and community workers. The main attributes looked for in mediators are "listening ability, responsiveness, verbal skills and the capacity to be neutral about values." 2)

The premise upon which such mediation is based is that many petty offences are the outcome of an incident not

1. Ibid 223.

2. op cit 226.

necessarily criminal in itself but which has served to trigger a reaction.

"Many defendants accused of crimes like assault and battery or breaking and entering had actually been engaged in a domestic, neighbourhood or housing squabble which, almost coincidentally, constituted criminal behaviour. After arrest and arraignment the court is confined to the narrow issue of whether or not an assault or a breaking and entering occurred. The context - the jealousy, substance use, unemployment, misunderstanding or whatever - out of which the criminal behaviour arose is irrelevant to the court's inquiry. The court transforms the victim into a witness whose real needs are no more heeded than those of the defendant. In most cases there is not even a trial or a conviction; after a continuance or two the case is dismissed. The disputants have been inconvenienced, the tax-payers have been imposed upon and the underlying causes of the dispute have been ignored. Mediation was viewed as a means of

confronting underlying causes and the extra dividend was to be fewer court cases and, therefore substantial court cost savings" 1)

It is to be noted that the writers regard the saving of court time and money as an "extra dividend" and not one of the reasons why projects like the mediation program was instituted. The concern of the project is not whether rules of substantive law have been transgressed or not. The concern is primarily with the disputants as members of the community. It is assumed that through mediation of such disputes, the parties, and a fortiori, the community will benefit in two ways: firstly, the defendant will not be criminalised for an offence which taken in the social context arises coincidentally from an otherwise innocent dispute, and secondly, the interpersonal, underlying cause of the dispute will be identified and once identified will inhibit a recurrence of the criminal act. The community benefits from the resolving of the disputes to which, it is felt, the courts have a limited ability to respond.

The mediation procedure is reminiscent of the Rochester

1. "Mediation as an Alternative to Criminal Prosecution" op cit 225.

arbitration procedure in that

- (i) the authority decides which case is appropriate for mediation and defers the hearing until the outcome of the mediation,
- (ii) the complainant and defendant must agree to submit their problem to mediation, and
- (iii) a prior relationship must have existed between the victim and the defendant.

"If a judge who is conducting an arraignment believes that a case is appropriate for mediation, he makes a referral, and the parties are contacted by a representative of the project either in court or by mail. If the complainant and the defendant agree to submit the problem to mediation, a stipulation is signed and the court case is continued. The assent of the prosecutor is not required. If an agreement is reached at the mediation session, the court case is continued for three months. If at the end of three months, the complainant does not allege that the defendant has failed to live up to the agreement, the complaint is dismissed.

Mediation takes place in about 60% of the cases in which referrals are made. Agreements are reached 89% of the time and apparently survive the three months period in 83% of the cases". 1)

Paul R Rice 2) has described the criminal justice system as:

" ... cumbersome, arcane and myopic. It is frustrating to those who work within it and inadequate for those served by it. Fundamental changes are required to correct the deficiencies that plague the system. Among the most promising alternatives are pre-trial diversion programs that are designed to reach the underlying problems that result in criminal behaviour".

Rice focuses his attention on mediation and arbitration programs with particular emphasis on dispute resolution. These programmes seek to obviate, inter alia, heavy court rolls and the ills that result from them. "Mediation programs provide a neutral person to assist the accused and the alleged victim in arriving at a mutually agreeable solution to their dispute. Arbitration programs contain an additional element;

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1. Ibid.
 2. "Mediation and Arbitration as a Civil Alternative to the Criminal Justice System" 29 American University Law Review (1979) 17.

If the parties fail to reach a settlement, the arbitrator has the authority, consented to beforehand by the parties, to impose a solution upon them." 1)

The use of arbitration and mediation have been employed not only to reduce caseloads but also to attempt to remedy some inherent defects in the criminal justice system.

"Defendants often avoid conviction because of procedural technicalities. Similarly culpable "victims" often escape prosecution entirely because their conduct is ignored. Even when prosecution and conviction result, the desires of the victim relative to the charge and punishment usually are not respected. Victims feel abused and betrayed by the system when the conviction does not reflect the nature of the acts committed, and that the penalty is disproportionately small in relation to the suffering and hardships that have resulted. In addition, victims and other witnesses are expected to attend repeated court hearings where they are taken for granted or ignored entirely.

1. Rice op cit 21.

They are rarely informed of continuances or informal dispositions that make their presence unnecessary. They must endure the anxiety of waiting for hours upon end, often in the same room with, or even seated beside the person against whom they have been called to testify. They are expected to assume the financial hardship that the loss of their times entails; a hardship that can sometimes exceed the punishment that results for the defendant if he is convicted. In a very real sense, the victims and witnesses of crime become the victims of the criminal justice system itself. Yet for all this, even when a conviction results, the parties usually receive no tangible relief from each other for any of their injuries, losses and hardships". 1)

Rice is not only concerned with the delays and inconveniences that are part of the system. Inherent in his argument is the question of compensation for the victim. This is ignored, and it usually ends up with the victim being in a worse off position than he was

1. op cit 18.

before he brought the charge in the first place. This causes an injustice in that potential complainants become hesitant to bring charges which result in humiliating and costly experiences for them. The system itself denies its own justice.

"Burgeoning caseloads coupled with procedural delays have resulted in prosecutorial policies in which efficiency seems to be the predominating factor. Prosecutors are compelled to resort to plea bargaining. Criminal charges are reduced or dropped altogether in order to avoid lengthy and costly litigation. As a result, the underlying objectives of the criminal justice system often are lost in a mechanistic and perfunctory process in which expediency is the order of the day. Defendants are treated as statistics with too little attention being given to the unique circumstances of each case; unwarranted charges are sometimes pursued with a vengeance, while compelling complaints are dismissed without adequate consideration of the consequences". 1)

1. op cit 19.

B A Grossman The Prosecutor An Inquiry into the Exercise of Discretion University of Toronto Press (1969) 29.

Two points of criticism emerge here. Firstly, the courts, overburdened with minor offences, resort to expediency in order to cope. This results in a haphazard approach to individual charges and complaints. Secondly, the defendant loses his identity and becomes a pawn in the procedural game. He feels uninvolved in a system which employs norms and procedures which he cannot understand and which fall short of his expectations. The problem may go further and cause the complainant financial loss because of postponements and delays. The system is not geared to the private needs of the complainant and whether or not the defendant is convicted and punished, his needs and identity are ignored. Also, because of caseload pressures, certain crimes are not prosecuted at all. These usually involve domestic assault cases, and other cases which involve a continuing relationship. The failure here to protect the victim's interests is likely to lead to a more serious violation in the future. It is in these types of cases that underlying causes benefit from being investigated and resolved.

A number of jurisdictions in the United States have recognised this and are employing pretrial diversion

programs utilising mediation and/or arbitration because it is felt that through these processes not only the personal identity of the parties to the dispute will be recognised, but also the causes underlying their behaviour will be analysed. The parties become persons with a problem rather than court statistics.

The procedures of the programmes are generally the same in all the jurisdictions which have them although most do not have a process of civil enforcement, the exceptions being The Justice Department's Kansas City, Missouri, Neighbourhood Justice Centre and the programs in New York State. The programmes require the consent of the parties to the dispute after arrest, and prosecution is deferred for a specific period pending attempts at resolution. One of the advantages of mediation and arbitration is the effect they have of reducing tension between the parties by helping them resolve their disputes and by "creating a sense of meaningful and expeditious relief for the injuries suffered." 1)

The cases considered appropriate for the mediation and arbitration diversion programs and which serve to ease the pressure in the criminal courts involve relatives

1. Rice op cit 22.

and neighbours - those cases in fact where the complainant and defendant have a continuing relationship. The nature of the relationship suggests that there may be deeper issues between the parties than the single criminal act would suggest. Retribution for the one isolated act does not remove its cause. Punishment for the wrongdoer does not compensate the victim. Arbitration and mediation can be of particular use in such cases.

"In a domestic dispute, for example, an assault by one party may be merely the latest in a series of independent reciprocal acts. If a criminal complaint is filed by the latest "victim", only that assault is considered by the court. Prior acts that culminated in the assault are considered irrelevant to the inquiry into legal culpability; the underlying problems that perpetuate this game of "I-got-you-last", the actual disease, goes unattended. This exacerbates an already volatile situation, since the defendants are unjustifiably made to appear to be the only parties at fault"1)

1. ibid.

Rice also points to the danger of criminal complaints being used as a means of retaliation where the dispute has a long history behind it. The parties may have committed offences against each other in the past but never brought a complaint. In the latest occasion one party resorts to a complaint in a final grand gesture. 1)

"Because both parties may be culpable when an entire dispute or relationship is considered, the government cannot 'sponsor' the complaint of the party who has won the race to the courthouse and hope to achieve even a semblance of justice. Punitive action against a single party for an isolated act is counterproductive, and diminishes the confidence and respect that are essential for a successful criminal justice system". 2)

The mediation and arbitration programmes are not designed to apportion blame or to determine criminal conduct by any one party. Their approach is to bring the parties together in supervised conditions, allow them to vent their feelings, and, by a process of self and mutual analysis, try to understand the reason for their behaviour. Mediated disputes give the parties a sense

1. op cit 23.
2. op cit 22.

of belonging to the situation, and this sense of being part of the resolution process is more likely to encourage them to arrive at a mutually agreeable solution at which they will work. There is a greater chance for a commitment where the victim and the defendant have a stake in the outcome of their own fate, and this differs from being submitted to externally imposed norms to which, for many reasons, they cannot relate.

The question of compliance with the award or terms of a mediated settlement has presented some problems, as the majority of the programs do not have a means whereby the award can be converted into a civil action. It is hoped that the next stage in these programmes will be to provide for civil enforcement after the manner of the New York project .

Rice says:

"If non-compliance is alleged, four possible options are available. First, the breach can be ignored. This would promote neither the parties, nor society's confidence in the programs. Second, the agreement can be

renegotiated. This would be an appropriate solution if the parties want to continue to work on their problems but one of them is unable to meet the terms of the original settlement. Third, participation in the program can be revoked and the defendant returned to the conventional criminal justice system to face the original charges. ... None of these options in fact enforces the agreement, they are enforcement avoidance techniques. The fourth option, which if not currently available in most jurisdictions, is to permit the complaining party to sue on the contract in a regular civil action". 1)

It will be remembered that in the Rochester, New York, programme the referred case is converted into a civil action and the aggrieved party submits the case to arbitration. Agreements are enforced by making an application to court for the confirmation of the arbitrator's award.

However, as the majority of mediation and arbitration programs do not provide for civil enforcement, the

1. op cit 26.

question must arise whether the programs can have any ultimate effectiveness. This tends to lose sight of the nature of the programmes themselves. The purpose of mediating a dispute is not to take away the court's function to adjudicate and sanction. Its purpose is to remove from the criminal rolls those cases which would benefit from an alternative process of dispute resolution. By benefiting is meant that not only would justice be better served by decriminalising certain acts, but personal and community relationships would remain intact. If a fair result is achieved, and the parties' relationship remains intact, then the process cannot be said to have failed.

"But even then, success might be defined better by the fairness of the contracts' terms, and the manner by which those terms were reached. Resolving the parties' underlying problems is a laudable goal, but one which too often might prove elusive. There is no justification for programs being structured in such a way that equally important goals are ignored. If arbitration and mediation programs can produce results that are just as fair as those of the criminal

process, but with greater efficiency, a substantial measure of success is achieved. Even if the diversion system fails under some abstract concept of justice to produce results as "fair" as those provided by the conventional system, the programs nevertheless demonstrate a concern for people and gain real relief for victims. The parties and the community may thus view the diversion programs' results as more desirable than pursuing esoteric principles and seemingly trivial technicalities". 1)

The success of the Rochester programme which provides for an arbitration award may prove to be the model which other programmes will follow. Here both the victim and the defendant have a measure of certainty as to the result of their choice, in that their choice will have certain consequences. This should encourage a greater measure of participation. The question of a voluntary choice is important, as settlement agreements may be unenforceable if the decision to participate is involuntary. 2)

1. op cit 28.
2. op cit 68.

The matter of involuntariness can beg some questions. For example, are defendants in referred cases really faced with a choice at all? Where on one hand they face a criminal conviction, and on the other only civil consequences? 1) This question may again be answered in the light of the purpose of the programmes. There is no across the board choice for all defendants. Only those cases which will benefit both the parties and the community are referred. It is therefore not unreasonable to expect an arbitration procedure to have greater benefits than a criminal trial in these circumstances. As Rice puts it:

"Mediation and arbitration offer an encouraging alternative to the criminal process. Although not a panacea, they offer the potential for providing more meaningful and lasting solutions to ongoing disputes in a more efficient and economical fashion ... On balance, the legal problems that might arise by utilizing mediation and arbitration as an alternative means of resolving disputes are insignificant in the light of the potential benefits that these programs offer" 2)

1. op cit 69.
2. op cit 81.

MEDIATION AT COMMUNITY LEVEL AS AN ALTERNATIVE TO THE
JUSTICE SYSTEM

Disillusionment with the traditional justice system has paved the way for further developments in extra-judicial programmes which present an exciting and innovative approach to conflict and the resolution of disputes. In particular, a programme established in San Francisco by Professor Raymond Schonholtz of the University of San Francisco Law School has become a viable dispute resolution alternative which operates on a community level and involves members of the community from as young as fourteen years of age. Professor Schonholtz argues that informal dispute resolution is more effective than the traditional system, especially when practised at a community level:

"Because the justice system isn't working, a myth has grown up to explain why. The myth: the courts are overburdened. The reality is that they are misused. Few civil and criminal cases require the highly complex formal process of court; lawyers arguing over their clients' problems in front of a judge. Yet because there is no other forum

to resolve conflicts, people with a dispute must choose to tolerate either the problem or use the formal system. Few people decide to use the courts willingly. More often they participate in the court system only, quite literally, as a 'court of last resort' ." 1)

The scheme is a practical application of the new thinking in the United States, namely, that it is better to have minor conflicts resolved amicably between the parties than have them brought before a court of law. The thrust of Schonholtz's argument is two-fold: firstly that the justice system itself does not respond to the needs of a complex modern community, and secondly, that conflicts are better resolved to everyone's benefit in a separate system of conflict resolution based in the communities. In other words, the community itself, through its direct involvement and active participation, is in a better position to identify the cause of and to resolve the conflict. Schonholtz says that there is a reluctance to use the courts; the reasons:

1. Raymond Schonholtz "A Justice System that Isn't Working and its Impact on the Community" (Unpublished Paper): The Community Boards Program San Francisco (1983).

"... victims seldom get satisfaction or restitution; the court imposes an unacceptable formality in those who use it; the process is always professional and often insensitive, and there is a sense of futility that often develops as people use the courts. Generally, the process or its value seems uncertain. People weigh the speculative return against the social, time and money costs. Often they are effectively discouraged from using the court process".¹⁾

This unwillingness to use the courts has the effect of forcing individuals and communities "to tolerate disputes until they fester to the point of urgency", but were they to have been resolved earlier, they would not have escalated into a situation where state law enforcement or civil trials are the only answer.

"Long before an incident or conflict becomes a court or law enforcement statistic, people within the person's neighborhood, church or school community know about it. However, since school personnel, community leaders, church ministers and other individuals in

1. op cit.

contact with the community problems and conflicts are fully aware of the ineffectiveness of the justice system, they are generally reluctant to involve law enforcement or other agencies in the situation". 1)

This reluctance, Schonholtz says, is due to the conflicting interests between the community leaders and the formal system. The community leader seeks to find "constructive and non-stigmatizing" answers to the problems and are loath to formalise conflict in a court of law where some other, more effective, means could have achieved a positive result. This applies particularly in family and other on-going relationships.

"The prime example of this is wife and child abuse. The neighbors and often school people are aware of abuse. However, it is not until the situation becomes unbearable that any one responds. Neither neighbors nor school counsellors want to call the police 'on the family,' and only do so after repeated incidents have taken place."

"The opinions and attitudes of community

1. op cit.

people are critical. They see problems in the early stages, before they are forced into counter-productive systems. The failure of the only existing resolution forum to meet the needs of parents, school personnel, neighbors, church members and ministers, means the continuation of the problem and, most likely, its repetition. This inability to handle the problem at its early stages becomes an oppressive, festering source of conflict and tension within the home, school and neighborhood. The vast majority of assault, felonious assault and homicide cases are between parties who know one another. The origin of these conflicts is generally a petty squabble, on-going family dispute, or disagreement over money".1)

Professor Schonholtz's answer to the problem which he sees primarily as the result of an ineffective official forum for dispute settlement, is a complex system of community mediation. He has established a project known as the Community Boards Program which operates through the services of volunteer workers drawn from the community.

1. op cit.

Problems between people are investigated by a volunteer case-worker, and if it is felt that the conflict would respond, the aggrieved parties are invited to take the dispute before a panel of mediators. The mediating panel is made up of community members who will relate to the conflict and the disputants. If, for example, the conflict involves a teenager dispute, teenagers will be involved as part of the panel.

The task of the panel is to involve itself directly in the deliberations, and also to preside over the disputants communicating with one another. The panel and the parties then discuss resolutions to the problem. This project is a practical application of the general trend to seek out-of-court settlements for those disputes which are better resolved by non-judicial means, and Schonholtz reports a high settlement rate.

In the past a great many disputes were settled by community leaders:

"... those natural disputes resolvers, those ministers, priests, rabbis, high school principals, mom and pop grocery store folks

that you once knew so well because you lived in the community so long". 1)

Community Boards, Schonholtz says, are the modern substitute. With the fragmentation of the community and the disappearance of socially-organic mediators, disputes even of a minor nature, are either given over to the state authority, which has been found to be counter-productive, or ignored, which results in the conflict developing disproportionate dimensions within the community itself. In order to recreate the social cohesion which has been lost during this century, community leaders, like Schonholtz, have sought to structure neighbourhood justice systems

"where all the functions of the system are performed by trained volunteers, (and which) can be an effective mechanism to reduce conflict, alleviate residents fear of crime, lower intra-community tensions, and build community cohesion and understanding" 2)

The essence of the Community Board System is one of a structured mediation programme developed and organised within the community itself and where (the program)

"seeks to provide residents with the necessary skills to effectively operate a

1. op cit.

2. R Schonholtz "The Work Structure and Ethics of a Neighborhood Justice System" (Unpublished Paper) Community Boards Program San Francisco (1983).

non-judgmental conflict resolution system that other residents will respect and readily use". 1)

The goals of the Community Boards are not unlike those of the mediation project described by Felstiner and Williams; 2) in both instances there is an expressed dissatisfaction with the official system, and a feeling that conflict which leads to minor transgressions within the community are better dealt with by the community itself. Lay-mediators who are very likely to be familiar with the problem and its background, assist in bringing the parties together to analyse the history and nature of the dispute. Schonholtz asserts that two positive values emerge:

"The participating neighborhood begins to take on a civic or self-governing function in the area of justice or conflict resolution, which serves to directly enhance its overall ability to meet neighborhood needs; and the individual volunteers experience personal and skill growth that heighten their sense of self-esteem and competency through civic involvement, which serves to combat the sense of alienation pervasive in most urban areas". 3)

1. op cit.
2. supra.
3. Schonholtz op cit.

Inherent in the scheme of Community Boards is its formal structure and participatory character both of which provide community discipline and involvement which serve to indentify and prevent disputes from developing into major issues. Schönholtz describes the structure:

"In Community Boards, volunteers are recruited directly from the neighborhood and trained over a two-week period. Criteria for selection: residents must be over 14 years or older and live in the neighborhood to be served. Upon completion of training, the volunteer becomes a member of the Community Boards, works within the neighborhood justice forum, and performs one or more specific roles. A new member of the neighborhood forum may choose among the following work roles: outreach worker, case developer, panellist and/or follow-up worker. The Community Board program presently has six neighborhood conflict resolution forums serving approximately 200,000 people living in 15-19 different neighborhoods in San Francisco". 1)

1. op cit.

The volunteer's task, therefore, is one of the following: to inform the community of the Boards' service and to recruit volunteers, or to make contact with parties in dispute and encourage them to bring their problem to a mediation panel hearing, or to serve as a member of the mediation panel itself. The process of the panel function as follows:

- "1) Each party involved in the conflict is given an uninterrupted opportunity to express his or her perception of the issues and the feelings attached to the conflict.
- 2) Each party is encouraged to talk to one another directly, to begin to hear each other's concerns, fears and feelings.
- 3) Once having discussed the individual aspects of the conflict, the parties are now guided through an understanding of their responsibility in both the existence of the conflict and the resolution.
- 4) The final resolution is clearly spelled out, an agreement form between the parties is drawn up and signed, and the hearing is closed." 1)

1. op cit.

The process does not necessarily end with the resolution before the panel. Later, volunteer "follow-up" workers investigate how the parties are faring, and if need be, identify any unresolved issues for further panel mediation. There is, therefore, a continuing interest and therapy for the problem.

We see, from the foregoing experiment, a striking example of mediation being employed as a broad-based solution to the many problems which may arise in the community. What is of particular interest is that the community has decided to take the responsibility for its good order upon itself, employing the process of mediation in order to recognise and reconstruct conflict in a positive and creative way. The alternative: the criminal complaint, the charge and the criminalising of the individual is seen as counter-productive, unlikely to have lasting value, and inimical to neighbourhood harmony.

It seems that projects undertaken by services like Neighbourhood Justice Centres and Community Boards are a natural response to urban conditions of the late twentieth century. The response is due to the

fragmentation of community life, 1) and the inability of a centralised system to cope with the countless conflicts that arise. The irony is that a process like mediation is being called upon to assist: for mediation is by no means a device of modern times, indeed, it is one of the oldest dispute resolution processes known to man. But perhaps this is precisely where its value lies. There is a fundamental humanity in the concept of resolving disputes consensually. Conflict is part and parcel of life's experience, and each conflict is important to those involved; factors such as anger, pride, high-handed principle and sheer cussedness may form a large part of it. However, few would deny that they would prefer to see their dispute resolved constructively. The theory upon which mediation is based is that there are causes in a conflict other than those which precipitate a final negative act. These causes can be identified during mediation and the disputants made to see each other's point of view. The objectivity of a mediator helps the parties to recognise problems which, for those directly involved, are obscured.

1. R Coulson writes: "Similar (arbitration and mediation) systems have been established in many communities to deal with behavioral conflicts. The American Arbitration Association administers several such programs which have been widely accepted by the courts and other local groups. Mediation and arbitration tribunals for community disputes, an idea whose time has come, are being created all over the country. "R Coulson Business Arbitration What you need to know (1982) 9.

It is bold to assert that in every conflict situation there is inevitably only one who is right, and one who is wrong; and yet the traditional dispute resolving fora tend to operate along these lines. Perhaps this is inevitable where the maintaining of a particular government norm or class structure demands that certain behaviour is outright wrong, and other behaviour, which is more in line with state thinking, acceptable. But where the "'right or 'wrong'" type of thinking begins to operate negatively in grass roots areas of ordinary life, then the reaction is to seek an intermediate way.

It is submitted that there is much to be learned from community projects such as those outlined above. In South Africa, we are only beginning to approach socio-legal problems with community-minded self-help. Successful legal-aid clinics in law schools show that a start has been made in this type of thinking. Perhaps universities are the natural ground where mediation projects will take root in the future; perhaps as extensions of their legal-aid clinics. All that is needed is the appropriate conscience and the desire for a wider and more practical application of justice.

MEDIATION AND NEED TO DECRIMINALISE IN SOUTH AFRICA

The high cost of criminal litigation may force us, in South Africa, to consider similar lines of thought to those in the United States. A.J. Middleton 1) has ascertained that for the maintenance of our prison population of approximately 91,000 prisoners, more than 216 million rand annually is required. This figure is based on the prison population for the year ending 30th June, 1982, and at present the average number of persons in detention is 107122. 2) The figure of 216 million rand relates only to the maintenance of prisoners and does not include any other costs.

" ... this huge figure relates only to one aspect of the criminal process, namely, the maintenance in prison of criminal offenders. It does not take into account the costs relating to their apprehension by the various law enforcement agencies, their trial by the state, and the costs of reintroducing them into society, such as the costs in connection with probation services and so forth. It also does not take into account certain less direct costs

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1. "Law and Criminal Procedure" Modern Business Law Vol. 6 No. 1 March (1984) 29.
 2. Hoexter Commission Fifth and Final Report Part IX 579.

such as the fact that the dependants of prisoners must frequently be maintained by the state while their breadwinners are in gaol". 1)

It is with the above in mind that the American experiments, however limited in scope, take on a significance. The concept of decriminalising certain offences is not new in South Africa, 2) but the problem has been to find a substitute for the adversary process. Mr. Justice J.H. Steyn has suggested that certain processes could be directed into administrative rather than crimino-legal channels but fears the creation of a "bureaucratic Frankenstein monster". 3) It is submitted that a beginning might be made along the lines of arbitration and mediation for those offences which involve "family crimes" and on-going relationships. This would not be substituting the criminal process for an administrative one, but approaching certain offences in an entirely new way. 4) The act is decriminalised, the victim compensated and the offender and victim brought together to analyse the underlying cause of the act.

1. Middleton *op cit* 29.

2. A Rabie "the Need for Decriminalisation" (1977) CILSA 200. Thea T van Hove "Decriminalisation and Depenalization" Crime, Punishment and Correction (1973) 2 (2) 75.

3. J H Steyn "Crime and Punishment in South Africa". Crime, Punishment and Correction (1973) 4 (3) 18

4. Another possibility is the pretrial diversion programme where in the case of certain offences the prosecution is suspended for a period while the accused undergoes rehabilitation which includes counselling and training. W D LOH "Pretrial Diversion from the Criminal Process" 83 Yale Law Journal (1974) 827.

Middleton suggests a new look at our policy with regard to the prosecution of crime:

"In common with the English and Germans, we follow what the Dutch call the 'legaliteitsprinciep' . Our attitude is that if an offence has been committed, a prosecution should follow as the night follows the day, unless there are very good reasons why it should not. The Dutch, on the other hand, follow what they call the 'opportuniteitsprinciep' . A prosecution is not instituted, even if it could lead to a conviction, unless it is clear that it will achieve some useful purpose. This policy is derived from an interpretation of sec. 167 (2) of the Wetboek van Strafvordering, which provides simply that 'Van vervolging kan worden afgesien op gronden aan het algemeen belang ontleed' this section has been interpreted by the Openbare Ministerie, which is responsible for the prosecution of offences, as empowering them to withhold prosecutions provisionally ... further possibilities of

extrajudicial settlement of criminal cases, either conditionally or unconditionally, exist in sec. 74 and 74 (bis) of the Wetboek van Strafrecht and sec. 242 of the Wetboek van Strafvordering". 1)

Two points emerge from Middleton's observation.

Firstly, the consideration given to a "useful purpose". A prosecution is not instituted unless it can serve a useful purpose, either rehabilitative or reformative. This opens the way for prosecutions to be withheld in order that another process may be used to better effect; and secondly, other systems are exploring the possibilities of extra-judicial settlement of criminal cases, and these might very well engage our attention in the future.

There is in South Africa, therefore, the kind of thinking which will assist moves to decriminalise certain conduct. Mr. Justice Steyn has recommended that:

"... in areas which are politically non-contentious there is room for a broad overview of our crimino-legal framework with an emphasis upon the need to decriminalise

1. Middleton op cit 30.

conduct which, while unacceptable to many, is nevertheless not so morally reprehensible or dangerous to the maintenance of proper standards as to require control by way of criminal prohibition". 1)

Thus, where the conduct is not so reprehensible or dangerous to the community as a whole, some other avenue should be sought to deal with it. There can be little doubt that certain conduct within the family or close communities which would otherwise be considered criminal, could safely fall under consideration for de-criminalisation. Conduct within these groups, otherwise regarded as criminal, would be well suited for pilot schemes such as mediation and arbitration. The advantages are apparent. Mediators and arbitrators can be drawn from the community itself. These would be generally respected and known members of the group who could apply pressure on wrongdoers to adjust their behaviour. Furthermore, the causes of the conflict are more likely to emerge from the mediation and the responsibility for preventing a re-occurrence will be placed on the community through the mediators. In the event of loss or damage being suffered, compensation can

1. Steyn op cit 30.

can be effected through an extra-judicial process such as arbitration. Again, the arbitrators can be drawn from the community and their awards will be consonant with the general sense of that community's justice. It is submitted that there is much to be said for placing the responsibility for effecting community justice within the community itself.

This is in accord with the idea of de-penalisation which has been defined as:

"the process whereby in regard to certain behaviour the presently applicable legal reaction is replaced by a reaction via another system, as deemed necessary". 1)

So where conduct which would otherwise invite a criminal prosecution and sanction has taken place, but is not so reprehensible or dangerous to the community as a whole, other avenues should be explored to deal with it; 2) and what better avenue than through the community itself. First through mediation, which will uncover why the conduct occurred, and second, through arbitration which will serve to compensate the victim. Also, the conduct will be seen as sufficiently anti-social to justify action being taken, but the perpetrator will

1. Van Hove op cit 76.

2. W Friedman Law in a Changing Society (1959) 204.

not be criminalised, nor would the justice system be burdened with another offender.

Andre Rabie is emphatic that changes must take place:

"There can be little doubt that decriminalization of the criminal law is essential to relieve the congested machinery of criminal justice and to increase the criminal sanction's effectiveness by restricting it to its proper function as an ultimate tool to protect fundamental interests against punishable (strafwurdige) conduct". 1)

The converting of certain criminal offences into civil ones and compensating the victim by the extra-judicial process of arbitration is an attractive alternative to the idea of administrative processes now being considered to replace the ordinary criminal law avenues. It also sidesteps the objection that has been raised against decriminalisation that:

"... abandonment of the criminal sanction would convey the impression that social approval is now being given to the conduct in question, that the conduct is thus not regarded as being morally wrong, and that

1. Rabie op cit 203.

this could increase the likelihood that persons would engage in such actions". 1)

ARBITRATION & MEDIATION IN PRISONS

The success of the arbitration and mediation programs in both the civil and criminal systems in the United States has prompted observers to suggest extending their influence even wider.

The success of collective bargaining procedures and the use of arbitration in the labour field has led writers to look for other troubled areas where the process could be used effectively. Robert Coulson 2) makes the point that arbitration could be used for the resolving of widespread discontent in the penal institutions in the United States, and there is no reason why it could not be employed elsewhere. The procedure is aimed at avoiding costly damage to both property and human relations, in a situation where prison authorities are concerned whether they will be able in future to control their institutions. South Africa, with its large prison population, might well consider Coulson's argument.

1. ibid.

2. R Coulson "Justice Behind Bars" 59 American Bar Association Journal (1973) 612.

As the prison population increases 1) dispute mechanism for reconciling the conflicting interests of the inmates and the authorities should be found. Illegal means of settling disputes are counter-productive, and yet inmates will resort to them if there are no alternatives. Widespread prison riots in America emphasise this.

Coulson says:

"Much experience has been accumulated with voluntary arbitration in other settings, particularly in the labour field. The success of grievance arbitration in resolving complaints of individual workers turns largely on the quality of representation provided by the union. Traditional labour arbitration stands as eloquent testimony to that lesson. The collective bargaining agreement is enforceable only when workers are represented by their union. The union's willingness and ability to represent its aggrieved member gives life to the labour arbitration process". 2)

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1. At the moment (1984) prisons are overcrowded to the extent of 46% in South Africa. Hoexter Commission Fifth & Final Report op cit 579.
 2. Coulson op cit 612.

Prisoners have not been permitted in the past to organise for the purposes of collective bargaining, but Coulson sees this as a situation that must change. "External pressures such as court decisions, inmate militancy and reform-orientated advocacy are changing the traditional position of the prisoners. 1) Coulson quotes Linda Singer and Michael Keating in a report by the Centre for Correctional Justice on the Implications of Change.

"A ... startling new response on the part of the prisoners is the emerging movement for inmate organisation and the collective redress of grievances. This last response is quickly becoming the catalyst for a crucial confrontation between the courts and the prisons, in which the stakes may be a basic shift of power that eventually will reshape the entire structure of the prison system. To avoid this confrontation, so fraught with unhappy possibilities for them and perhaps for the prisoners as well, correction officials in several places, with varying success, have begun to fashion alternative mechanisms for resolving prisoners' grievances". 2)

1. ibid.
2. ibid.

What is alarming the prison authorities is that the prison population could become a powerful force in its own right, made particularly potent through the collective redress movement. Some attempts have been made by prison administrators to experiment with prisoner organisations. Others have appointed ombudsmen. 1) Coulson criticizes the appointment of ombudsmen because of the difficulty of impartiality. The ombudsman is hired and paid by the same authority that controls the prison and even if he works for a different agency, a government man is mistrusted by the prisoners. Even when the ombudsman is appointed by an outside agency he will perforce be hard put to command respect.

"Would anyone expect prison officials to suffer with patience the criticism of such a gadfly? It is unlikely that a private ombudsman, dependant on the warden's hospitality will maintain both militance and favour. The ombudsman may well be a transient institution in a changing world". 2)

Coulson postulates arbitration and collective bargaining as independent and flexible mechanisms for

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1. K Bottomley and K Pease "Justice in Prisons"
23 Howard Journal of Criminal Justice
No. 1 Feb (1984) 48 at 52.
 2. Coulson op cit 613.

negotiating inmate grievances, as these techniques have the advantage of being within the control of the parties themselves. This avoids mistrust and fear of partiality. He recommends a process by which the prisoners elect representatives from their own community. It is important, he says, that the "selection process should be one that cannot be manipulated by dominant, special-interest groups within the inmate power structure." 1) This process could be either a secret ballot of the entire inmate body, or what he calls a "selection by threes".

"Any member of the group wishing to participate in the election is permitted to form a group with two other members. Each group designates one of its members to enter the next stage, during which groups of three again are formed voluntarily to select one member to participate further. After several cycles, the persons finally selected are designated as a negotiating committee which should consist of ten or fewer persons". 2)

This group comprises the negotiating committee which operates in the first instance with a mediator to

1. op cit 614.
2. ibid.

establish ground rules and to assist both sides in establishing the terms of reference, the needs of the parties and the importance of resolving mutual problems. The mediator does not become involved in the dispute but prepares the way for the arbitrator.

"Inevitably, the discussions will transcend the informational. Negotiations will commence, looking towards mutual understandings. At this stage when the relationship has matured, the discussion should turn towards enforcement. Agreements will be reduced to writing. Arbitration can be a vital part of the machinery". 1)

The advantages presented for arbitrating prisoner grievances are firstly, that impartiality can be secured in that the arbitrator would be selected mutually from a list submitted by an independent agency. Secondly, if the process were to be adopted widely, a body of impartial experts would be created with the experience and expertise in prison problems.

1. ibid.

Successful arbitrations would then in future be referred to as defining an appropriate means of settling similar disputes.

Coulson's arguments are in accord with the present climate of consensually resolving disputes and the prospect of arbitrating disputes such as those which arise in a prison would be welcome not only by the inmates who feel deprived of opinion and bargaining ability, but also by the authorities.

"Impartial arbitration, willingly adopted by the inmates' bargaining committee as the enforcement mechanism for negotiated settlement would lend credibility to the correctional relationship. If disciplinary disputes could be solved promptly and with fairness, arbitration could make an important contribution towards resolving exactly those strains and antagonisms that might otherwise lead to prison riots. An inmate who is afforded a prompt, non-judicial remedy is less likely to turn to violence. The prison administrator can also refer the actions of guards to arbitration

rather than commit himself to defending the actions of his staff in questionable situations". 1)

Some independent negotiating mechanism is required in the prison of the future and it seems consonant with fairness and humaneness to allow prisoners' grievances to be settled by arbitration, where the negotiating body is properly elected and where the arbitrator is acceptable to both parties.

1. op cit 615.

CHAPTER SEVEN

DIVORCE MEDIATION AND ARBITRATION

The processes of mediation and arbitration are being used in the United States in areas which have long been regarded as the sole domain of the courts. In 1964, the New York Supreme Court expressly approved the use of arbitration in custody and visitation disputes 1), but recently there has been developed a widespread interest in the practice of extra-curial mediation whereby divorcing parties meet before a private mediator to settle their disputes.

The Americans are finding that privately settled disputes are more humane and more effective than traditional adjudication and there appears to be an ever-increasing interest in and use of out-of-court devices to bring the disputing parties to an amicable and therefore, hopefully lasting resolution of their problems.

There are two assumptions here. First, that by bringing the parties together in circumstances where

1. Sheets v Sheets 22 App. Div. 2d 176, 254 N.Y.S. 2d 320 (1964).

they will have both the time and the will to get to the root of their dispute, the chances are that they will be able to reach a lasting agreement, and second, private dispute settling avoids a polarising of the parties which an adversarial procedure tends to cause.

With the advent of 'no fault' divorce in the majority of the states, private attorneys have introduced a practice whereby:

"... one lawyer, acting as a mediator, defines the conflicting interests of the divorcing parties, explains the legal implications and helps prepare a fair settlement. The mediator provides personal and professional guidance through the legal process outside the Procrastean frame of the adversarial system". 1)

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1. Patricia Winks "Divorce Mediation: A Nonadversary Procedure for the No-fault Divorce" 19 Journal of Family Law (1981) 615 at 616.

The divorce mediation experiment in California involves the single attorney acting as a mediator for both parties. The question whether dual representation is involved here has been raised. However, it is asserted that the attorney represents neither party. His task is to listen, mediate and provide information which it is hoped will enable the parties to arrive at an amicable settlement. cf R E Crouch "Divorce Mediation and legal Ethics" 16 Family Law Quarterly (1982) 219; L J S Silberman "Professional Responsibility Problems of Divorce Mediation" 16 Family Law Quarterly (1982) 107; American Bar Association Conference 8 Family Law Reporter (1982) 2479.

1988 SAC p 671 1991 SAC #12 299 (26)

(25) In private divorce mediation, the attorney/mediator represents neither party, nor does he act for both parties. His function is to identify the problems of both parties and help them reach a settlement. The average mediation requires some four to six sessions, and the attorney uses his traditional legal skills to summarise and identify the problems of the parties. When the decisions to be taken involve legal problems, the parties are guided as to what the consequences will be. (Where there are children involved, these receive priority.

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"If there are children, most lawyers deal with child support, custody and visitation first. Resolution of these issues shows the couple that co-operation will be possible in other areas as well. Custodial arrangements necessarily involve financial planning. The parties must balance their own financial and economic needs with those of the children to arrive at an agreement that will not make one spouse the sacrificial victim, a role ultimately damaging to both parent and child. Shared responsibility for the resolution of the custodial issue makes resolution of other issues easier". 1)

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1. Winks op cit 638.

A great deal depends on the personal qualifications of the attorney as to whether or not he will be a successful mediator. Apart from the professional expertise which he affords his clients, his role is something more. He must be able to draw on a wide ranging insight into human relationships and apply his expertise with sympathy and understanding while still remaining detached.

"Mediation rewards the attorney as well as the client. Many lawyers find diminishing satisfaction in the adversary process. What was once seductive in its simplicity and finality proves too often an inadequate solution to complex problems. The mediator is at liberty to devise a framework uniquely suited to the individuals, often far more imaginative than any court-room analysis could evolve. 'Mediation is directed towards persons, judgments of law are directed towards acts.' No-fault divorce, which eliminates the evaluation of past acts, should not require formal adjudication. The courts may provide rules and guidelines for future behaviour which conform to the

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state's value-laden norms. The vagueness of juridical standards in this area has resulted in the arbitrary imposition of values by the presiding judge. This is not to say that rules and precedents are not relevant. But the mediator must understand the parameters of court-adjudicated settlement, and guide the parties toward a private resolution which the courts will accommodate. The task of the mediator is at once more creative and more difficult because he must deal with the individual situation, rather than fall back on the comfortable nostrum of legal precedent. The judge, on the other hand, selects from an array of specific remedies to end the argument". 1)

What is of interest in the development of divorce mediation is that it cannot be said that the traditional reasons for seeking 'other avenues of justice' apply here. We are not witnessing the opening of ordinary access to justice routes. Divorce mediation is not cheap when practised by an attorney, and the question must be asked whether the process is a

1. op cit 652.

genuine movement away from the formality of the adjudicatory process, or whether it is a trend, cultivated by the rich who use it as an indulgence. 1) Patricia Winks does not think so.

"... cultural change has traditionally emerged from the socially privileged. Eighty years ago only the rich dared to divorce. Now the affluent and the educated seek divorce mediation; perhaps eighty years hence most divorces will be mediated. The alternatives currently available to the poor who wish to divorce do not safeguard their interests. The indigent have no constitutional right to divorce counsel, yet most legal procedures are too complex for the uneducated". 2)

Divorce mediation is particularly effective in custodial issues, and provides for a full discussion. In non-mediated agreements points may be overlooked, or the parties may make decisions which at the time seemed appropriate but which they later regret and seek to change.

"An equitable settlement will militate against feelings of regret and guilt which

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1. R E Crouch "Divorce Mediation and Legal Ethics" 16 Family Law Quarterly (1982) 219 at 240.
 2. Winks op cit 650.

assail the person who has not resolved feelings about the divorce. In order to arrive at an agreement, husband and wife must alter dysfunctional patterns of communication and learn to deal with each other in a new way. The mediator, more than the clergyman or therapist, helps them to define and solve specific problems. Participation enables each party to accept responsibility for the future, and perhaps for the decision to divorce as well". 1)

Mediation gives the parties time for an in-depth consideration of the issues; and the time factor is of the utmost importance. The mediator must have the time to get to know the parties and vice versa, and a mutual respect and trust must be achieved. Decisions cannot be taken quickly, for those decisions taken in times of stress generally turn out to be the wrong ones.

Robert Mnookin is sympathetic to the mediation process in divorce matters, particularly where custody of children is an issue:

1. op cit 651.

"The problems posed ... invite explicit consideration of modes of dispute resolution other than traditional adjudication. Since the primary goal for cases of these sorts should be facilitating private resolutions, mediation is an obvious possibility. A negotiated settlement has considerable advantages over one imposed by the court. The adults seeking custody avoid the cost both financial and emotional of an adversary proceeding.

Under 29 (Divorcing parents often negotiate and agree about child custody while simultaneously settling other issues, such as visitation, child support and marital property division. The essential agreement about custody may often be a reflection of the parents' interest in these other matters, rather than the child's. Nevertheless, as an operating rule, it seems plain that a negotiated resolution is preferable from the child's perspective for several reasons. Since a child's social and psychological relationship with

both parents ordinarily continues after the divorce, a process that leads to agreement between the parents is preferable to one that necessarily has a winner and a loser. A child's future relationship with each of his parents may be better maintained and his existing relationship less damaged by a negotiated settlement than by one imposed by a court after an adversary proceeding". 1)

Patricia Winks describes divorce mediation:

At the initial interview the mediation process is explained and the couple are made aware that the attorney is representing neither party. Emphasis is also laid on the necessity for a full disclosure of all the relevant facts in issue. The parties are told that they may consult outside lawyers at any time. One mediator/attorney in a letter to his clients, includes the following:

"It is important to recall that I have advised each of you that you have adverse legal interests. This means that a particular resolution of any of the outstanding issues, such as spouse support or property

1. R H Mnookin "Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy" 3 Law and Contemporary Problems (1975) 226 at 287.

division, or even the date of separation, may be relatively disadvantageous or detrimental to either of you, depending on how the issue is decided". 1)

There may be issues which the parties have decided not to contest, but these nevertheless should be disclosed as they may become relevant later during the mediation.

"The initial interview is of special importance. The joint visit to the attorney (mediator) is the couple's first formal admission that the marriage has failed. Although the parties may have already agreed in general on the course of action, the actual decision to divorce is nearly always initiated by one party alone. Since the other must 'catch up emotionally' the two do not arrive at the lawyer's office in the same state of readiness. At first clients may feel constrained to be on their best behaviour and to try to impress the mediator with their mature co-operation.

1. Winks op cit 635.

Or they may welcome the audience as a chance to catalogue the wrongs no-fault divorce prevents them from parading in the courtroom". 1)

The mediator then attempts to get the parties to identify their problems and he draws on his experience and traditional legal skills to clarify what he considers to be the broad outlines of the main issues. There are certain caveats for the mediator. It is important that he does not become emotionally involved. One of the ground rules of mediation is that the parties be allowed to solve their own problems.

"Certain attitudes are inappropriate to the lawyer who would try mediation.

Paradoxically, one is excessive concern and involvement. Just as the activist in a legal clinic may plunge into a series of emotional entanglements which deter effectiveness, so the divorce lawyer who would 'help' the separating couple may be motivated by a rescue fantasy". 2)

1. op cit 636.
2. op cit 641.

Not every client can profit from mediation. One may assert his or her personality over the other in order to reach a favourable settlement. The same problem was encountered in the small claims mediation project in Maine. In such circumstances the mediator must halt the proceedings as the mediation can be of no further use.

(17) Most writers stress the human factor in the mediation process. Mediation is the logical follow-on to no-fault divorce where, as far as the adult parties are concerned, the law has passed on to them greater control of their own affairs. But passing on greater control has not changed inherent human weaknesses; the sense of loss and bewilderment and the feeling of being unable to cope with present circumstances. Mediation is a next step in a divorce situation where the major decision is relatively easy, but the many consequences overwhelming.

Victoria Solomon says:

"The concept of mediation recognizes that feelings are as important as the legal aspects of the divorce and that there are

often psychological as well as legal barriers which must be understood and overcome before compromise and agreement become possible. Thus representing a 'marriage' between the concepts of psychotherapy and labor mediation; divorce mediation stresses honesty, informality, open and direct communication, expression, attention to the underlying causes of the disputes, reinforcement of positive bonds and avoidance of blame. Its purpose is not only to help spouses reach an agreement which recognises the needs and rights of all family members, but also to lay the foundation for the healthy structuring of post-divorce family life". 1))

Victoria Solomon recommends four phases in the mediation process. During the first phase, which lasts from one to two sessions, the mediator assesses the emotional state of the parties and gathers information, encouraging the parties to express their concerns and feelings. The role of the mediator is outlined and the ground rules laid down. These "cover issues of mediator neutrality, full disclosure, confidentiality,

1. Victoria Solomon "Divorce Mediation - A New Solution to Old Problems" 16 Akron Law Review 665 at 670.

best interests of children, commitment to develop an equitable settlement, agreement not to participate in adversary legal proceedings during mediation," 1) and the question of later compliance.

In the second phase, the mediator attempts to get the parties to become aware of each others needs and fears and he assists them in learning to listen to each other.

"This stage usually lasts from one to four sessions depending upon several factors including the extent and intensity of emotional issues, the psychological readiness of each spouse to deal with the task of terminating the marital relationship, and the extent of the agreement regarding important issues such as the division of the marital assets, child custody and visitation". 2)

In the third stage of the process, tax consultants and other professional experts may be brought in to assist the mediator, and finally, a settlement agreement is prepared by the mediator incorporating the conclusion

1. op cit 671.
2. ibid.

reached by the couple. The estimated number of sessions, on average, for a mediation is between six and eight one hour sessions for a couple and mediator to work out a settlement. 1)

(Patricia Winks deals only with the single attorney as mediator but there are other models. Victoria Solomon says that the single attorney may not be fully equipped to deal with the many problems which may arise in mediation. She recommends, on the other hand, a team which should comprise a man and a woman in order to avoid a situation in which "one spouse feels outnumbered and overwhelmed." This team ideally consists of both a lawyer and a social worker trained in psychology.

"The mental health professional, generally a social worker or psychologist, because of his orientation toward understanding and reducing hostility, can help with emotional trauma which often interferes with a fair settlement or a healthy post-divorce adjustment. At the same time, he can assist the couple in understanding the emotional needs of their children and guide them in

1. Winks estimates that the average mediated case requires four to six one hour sessions.

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techniques of offering the necessary emotional support. The lawyer helps the couple analyse budget information, assess marital property and review the children's and spouses financial needs ... then if the parties do agree to compromise their position, the lawyer draws up the separation agreement outlining the various terms of the divorce and may then take the steps necessary to obtain a divorce judgment which incorporates the separation agreement". 1)

Solomon stresses the team model, as few mediators wishing to practise alone possess the qualifications of sociologist, mental health professional and lawyer, but she sees no reason why the solo mediator could not make use of members of another profession.)

Divorce mediation has gained wide attention as a means of settling disputes in the first instance. Russel M Coombs writes that there are basically two schools of thought on mediation: "structured mediation" and "comprehensive mediation". He illustrates the concept of structured mediation by describing the approach of

1. Solomon op cit 672.

one prominent mediation association:

"This association is an organisation directed to training professionals from the law and behavioural sciences in the techniques of marital mediation. It offers five-day training programs which cover property division, spousal and child support, custody and tax implications; a 250 hour practicum upon completion of the five-day program, and advanced one and two-day specialised issue programs. Counselors, therapists and attorneys who have been trained by the organisation in the techniques of 'structured mediation' then conduct their own mediation programs". 1)

The idea of "structured mediation" implies a formal structure which consists of a very definite approach to the procedure and content. It begins with the parties attending an orientation session with the mediator, so that the parties involved will get to know each other and establish a mutual trust. After this they sign a contract which represents their formal agreement to mediate and to abide by certain rules. These rules

1. R Coombs "Non-Court Connected Mediation and Counselling in Child Custody Disputes" 17 Family Law Quarterly (1984) 470 at 471.

include the preparation of a complete financial statement, a fixed schedule of meetings with the mediator and an agreement to submit the impasse to arbitration.

"After the couple sign the mediating contract, a temporary agreement regarding living, financial and custody arrangements to be in effect during the mediation process is made. This allows the mediator to lead the couple through the resolution of the four basic issues faced in a divorce settlement: spousal maintenance, child custody and support and property division. The issue of child custody will most likely be deferred until all the other disputed issues have been resolved due to its complexity and numerous economic consequences". 1)

The mediation sessions involve all three parties and usually require from four to six sessions of an hour each to reach an agreement. This accords with the estimate of Winks and Solomon. One of the features of the structured mediation approach is the availability of an advisory attorney whose function is that of a

1. op cit 471.

consultant and not that of an advocate. Once the couple have agreed on all relevant issues, he is called in to answer any legal questions that may have been raised, and to draft a formal agreement. He does not act for either party.

Comprehensive mediation, on the other hand, has no set formula of approach. The sessions need not be joint ones, nor is there any formal agreement to be signed before the mediation. There is no advisory attorney, and each party is free to consult his own to represent his or her interests.

Coombs says that from these two approaches:

"...a variety of programs has developed, adopting concepts from each other and intermingling them to the point where it is no longer possible to pigeonhole most mediation programs as belonging to one school or the other". 1)

Mediation in this field is still very much in the development stages and will require more experimentation and research before a general satisfactory approach can be achieved. What is noteworthy, however, is the extent of and interest in the practice of mediation.

1. op cit 472.

It is indicative of community cohesion and interest, and concern for the well-being of co-members of society.

In 1976, J M Spencer and J P Zammit 1) proposed a process for determining and protecting the interests of the child in divorce matters which involved three elements, which have been incorporated into later mediation and resolution programs. First, the use of a family counseling specialist to assist in drafting a separation agreement. Second, in the case of future disagreements the participation in a mediation process with a mediator, and third, when these disputes cannot be resolved by mediation, their submission to arbitration. The basis of their proposal is that the decisions of the parents as to what are the child's best interests will be given the widest expression; and the responsibility for the decisions affecting the child should be that of the parents.

They say: "... that parents, even after a good faith effort, cannot agree between themselves on what is best for their children, they should at least have the right to choose the decision-maker and should not be compelled to accept an individual or committee chosen by the state whose values may significantly differ from their own". 2)

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1. "Mediation - Arbitration - A Proposal for Private Resolution of Disputes between Divorced or Separated parents" 4 Duke Law Journal (1976) 911.
 2. op cit 919.

Also, they emphasise the value of privacy in domestic disputes, which removes the likelihood of any embarrassment and creates an atmosphere conducive to open and free discussion.

"... the concept of privacy goes beyond merely closing the courtroom door to the public. It means not having one's domestic problems made a matter of public record and not having one's future depend upon a government fiat. Perhaps most important, it assumes removal of the dispute from a forum traditionally associated with an adversary proceeding, thus avoiding the inference that there is a winner and a loser, that one partner has been 'right' and one has been 'wrong' . 1)

The alternative process which the authors recommend for settling the marital dispute which does not respond to mediation is arbitration, and in the United States it has received a limited reception.

1. op cit 919.

"Arbitration is a voluntary consensual process, one which is premised on the idea that the arbitrator derives his authority from the agreement and may not exceed the scope of that authority. The parties, therefore, can limit arbitration to disputes arising only under certain terms of the agreement. In addition, the arbitrator must decide the issue in the context of the agreement from which he derives his authority, and not on the basis of extra-contractual considerations". 1)

The way paved in the United States for arbitrating marital issues in 1964 in Sheets v Sheets where the New York Appellate Division expressly approved the use of arbitration in custody and visitation disputes. The late Mr Justice Valente said:

"There seems to be no clear and valid reason why the arbitration process should not be made available in the area of custody and the incidents thereto, i.e. the choice of schools, summer camps, medical and surgical

1. op cit 921.

expenses, trips and vacations. In fact the American Arbitration Association is now equipped to arbitrate marital disputes arising out of separation agreements". 1)

In Spencer and Zammit's proposal, the first stage of their process is the drawing up of a carefully drafted agreement under the guidance of a counsellor. His function would be:

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1. 22 App. Div. 2d 176, 254 N.Y.S. 2d 320 at 323 (1964); The acceptance of arbitration as a valid and useful device for settling disputes arising from divorce was not straightforward: Hill v Hill 199 Misc. 1035, 104 N.Y.S. 2d 755 (1951); In the Matter of Michelman 5 Misc. 2d 570, 135 N.Y.S. 2d 608 (1954); By 1960 the judicial attitude towards arbitration had softened, and in Freidberg v Freidberg 23 Misc. 2d 196, 201 N.Y.S. 2d 606 (1960), it was held that the education of a couple's son and the payment of tuition fees were an arbitrable issue, the court distinguishing Michelman on the ground that the education of the child did not go to the heart of the custody issue. We can see, therefore, that the courts in New York were making an effort to be sympathetic towards arbitration and that a clear way was being paved for the decision in Sheets. By expressly approving of arbitration in custody matters and, a fortiori, other matters incidental to the matrimonial issue such as maintenance, access and division of property, the courts did not abdicate their ultimate jurisdiction over minors. The arbitration award involving custody would always be subject to review by the courts on the question of the child's best interests. Any provision of the award could be challenged in court by a parent, relative, or the child himself through a friend. On such an application, the court would examine the matter de novo and decide what action was necessary in the best interests of the child. "New York Court Approves Use of Arbitration in Custody Disputes" 33 Fordham Law Review (1965) 726 at 730.

"... to open lines of communication within the family and to assist the parents in making mutually acceptable decisions which are rational and sensitive to the developmental needs of the children. He can help family members establish new relationship patterns appropriate to their new life situations, and advise them in identifying and realistically addressing long-term and contingency planning needs". 1)

At this stage an attorney, makes sure that the agreement, if one is reached, is legally acceptable and will not run into difficulties later. The attorney then drafts the separation agreement which expresses the parties decision on such matters as custody, access and maintenance. The separation agreement also provides for the resolution of future disputes by mediation and arbitration.

1. Spencer and Zammit op cit 930.

"The practice of mediation developed in the labor relations field as a preferred alternative to arbitration and legal action. Unlike these more coercive forms of dispute resolution, the objective of mediation is to get the parties to compromise their position and thereby reach a voluntary agreement between themselves. The process is premised on the notion that the presence of a disinterested third party, familiar with the issues involved in the dispute and skilled in promoting communication, will enable the parties to overcome their antagonism and to recognise their common interest in self-determination of the particular issue". 1)

The mediator's function is to bring the parties to mutually acceptable decisions on specific issues. Instead of maintaining separate decisions and directions, the mediator encourages the parties to seek areas which are common to both of them and the children. The mediator's role

"... does not represent an attempt to impose an external paternalistic force; rather it reflects the assumption that the parents

1. op cit 932.

will want to reach a decision which will promote the child's welfare". 1)

The procedure adopted by the mediators will depend largely upon their own experience and expertise. They may require joint conferences or separate consultation with the parties, but a great deal will depend upon the reaction and attitudes of the parties themselves. Where antagonism still persists, it is beneficial to begin the mediation by holding separate meetings, but implacable animosity should have been dealt with at the counselling stage.

The benefit of a successful mediation is that the decisions regarding the child's welfare will have been of the parents' making, but if it fails, then third party intervention is necessary; and the proposal is that it takes the form of arbitration because it has the advantage of providing an adjudicator of the parents' choosing who will have, as closely as possible, the same approach as the parties, had they been able to resolve their differences in the first place.

1. ibid.

"Selection of the arbitrator is of crucial significance since the object of this scheme is to come as close as possible to duplicating parental decision-making. Skill as a counselor or mediator does not qualify one as an arbitrator. The mediator's object is to help the parties communicate and to assist them in making their own decisions. The arbitrator, on the other hand, substitutes his judgement for that of the parents. It is of the utmost importance, therefore, that the parents select an arbitrator in whom they have confidence, who they feel views the needs and problems of their children from the same perspective as themselves, whom, in short, they trust to make vital decisions affecting the lives of their children if they cannot make those decisions themselves". 1)

Spencer and Zammit suggest that the selection of the arbitrator may be made either at the time of the separation agreement, and the parents can name a particular friend, relation, clergyman, or other

1. op cit 934.

person, or call upon the machinery provided by an organisation specialising in arbitration 1) which will be in a position to provide an arbitrator whose background and values correspond as closely as possible to those of the parties.

"One beneficial result of the increased use of arbitration in domestic relations matters may be the creation of a group of trained professionals who would be specially concerned with the integrity of the process. As in labor arbitration, these individuals will need to be sensitive to the importance of preserving the on-going relationship between the parties. As time goes on, they will develop reputations for their judiciousness, integrity and competence which assist the parties in the selection process". 2)

A further development which the authors propose is that the arbitrator be given wider powers to modify the agreement and where necessary "fill in the gaps". They base this proposal on the grounds that under normal conditions parents may change their plans to allow for altered conditions, and they see no reason why the arbitrator should not be allowed a similar freedom.

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1. For example, The American Arbitration Association: In South Africa, The Association of Arbitrators held its inaugural meeting in September, 1979. Although its activities are limited to commercial arbitration its aims are similar to its American counterpart.
 2. Spenser and Zammit op cit 935.

The arbitrator should, however, respect any express terms of the agreement.

"The arbitrator should be instructed that the agreement represents conscious value choices by the parties with respect to their children which should be upset only in response to substantially changed circumstances". 1)

The most progressive of the authors' proposals is that the award of the arbitrator be given a finality in the same way as an award in commercial and labour arbitrations and that the award be only capable of being reviewed on the grounds of misconduct, bias or breach of public policy. Such a breach would occur where the award has the effect of ordinary child neglect. 2) They advance the theory that modern, no-fault divorce laws have in effect recognised the autonomy of the individual with regard to his or her marital position and that consequently the state, through the courts should lessen or relinquish its hold over the parties' freedom to decide upon their matrimonial disputes.

1. op cit 936.
2. op cit 937.

They imply that the logical result of the freedom the law has given the parties includes the right to have custody matters the subject of private settlement, on the grounds that the parents themselves, in the absence of neglect or abuse, are the best equipped to decide.

Where the decision is difficult or made difficult by the failure of their relationship and the antagonisms of divorce and separation, the processes of mediation and arbitration will adequately assist them. There is no need for the courts to intervene.

"Unless the courts are willing to refrain from interfering in the model of dispute resolution proposed (in their article), the value of that model may be largely negated; parents will know that if they 'lose' in arbitration they can still resort to the courts. There are also reasons not directly related to the model for the courts to relinquish their parental role. In the first place, the state's prerogative to care for minors as parens patriae developed at a time when those seeking divorces were considered 'sick' persons, misfits (or) hopeless neurotics 1) ...' The modern trend, as

1. The writers quote here from E Fisher Divorce - The New Freedom (1974).

evidenced by the proliferation of no-fault divorce laws, is toward a recognition that most domestic difficulties are not the product of one spouse's 'sickness' or wrongdoing and that state interference in such matters should be minimal" 1)

While the above statement is hardly credible 2) in its suggestion that the courts' interest in minors developed at a time when divorcing parties were considered mentally or physically ill and therefore incapable of deciding issues concerning their children, its main thrust, namely that the modern trend is toward allowing the parties greater freedom in the conduct of their marital affairs is correct. In reality, the only link between the divorcing parties and the state should be the custodial issue. Once this is relinquished the parties will be free to make whatever decisions they like, assisted by extra-judicial private settlement processes.

It is submitted that we should prepare our thinking along these lines, however unacceptable they may appear at present. With the advent of no-fault divorce in

1. op cit 937.

2. See case note 33 Fordham Law Review (1965) 727.

South Africa, the law recognised to a great extent the autonomy of the parties. Where previously the decision to divorce involved guilty conduct which offended the divorcing spouse as well as the mores of society, the present position is de facto divorce by consent. The requirement of irretrievable breakdown is a residual sop to traditional thinking. The individual parties to the divorce have been recognised as able to decide their own fate and it is one small step further to grant them the freedom to decide who will adjudicate on those disputes which they are unable to resolve themselves. This is not impossible thinking. A beginning can be made in those matters which involve division of property and maintenance. There should be no opprobrium attaching to the idea of arbitration in matrimonial matters generally. English law, for example, allowed for the terms of a deed of separation between husband and wife to be referred to arbitration. Russell says: 1)

"There is nothing illegal or contrary to public policy or morals in agreements of this nature, whether they arise out of compromise of suits for dissolution of marriage or otherwise. The right to

1. Russell The Law of Arbitration Anthony Walton 18ed London (1970) 23.

compromise such suits is a natural corollary to the right to institute them and such agreements have frequently been specifically enforced". 1)

Section 2 of our Arbitration Act 2) has the effect of shutting the door completely on any innovative developmnts regarding arbitration and matrimonial issues. Sec 2 reads:

- "2. A reference to arbitration shall not be permissible in respect of:
- a) any matrimonial cause or any matter incidental to any such cause; or
 - b) any matter relating to status."

In Ressell v Ressell, 3) Davidson, J. took an unsympathetic approach towards arbitration. He interpreted sec 2 (a) restrictively saying that:

"The wording, 'any matter incidental to such matrimonial cause' ... seems to me to have been adequately wide enough to keep out of the field of arbitration matters which, like the present one, deal with the fate, albeit the temporary fate, of a small boy whose

1. Hart v Hart (1881) 18 Ch D 670, 2 Dig. (Repl) 468.
 2. No 42 of 1965.
 3. 1976 (1) S A 289 (W) at 291.

mother wishes to exercise her rights of access in a certain way, contrary to the wishes of the custodian father". 1)

and

"It seems to me perfectly clear that the intention of the statute, as was the intention of the common law hitherto, was to reserve jealously for the court control of this and the right to determine what was good and what was not good for a child in a matrimonial dispute, whether the dispute was before or after divorce. In my view there is nothing to be said for the proposition that this is a fit subject for arbitration". 2)

With respect, it is submitted that a dispute such as arose in Ressell which involved the question whether a child might be taken on holiday to Natal with the mother for two weeks subject to the approval of the custodian father, is just such a subject for arbitration. The fact that the father had had certain reservations about the company which his child would keep in Natal and whether it would be in his best

1. op cit 292.

2. ibid.

interests, could be considered quite effectively by an arbitrator. The arbitrator could have access to information about the family and its background and the type of company it kept. The nature of the dispute in question involved the morality of the mother's friend and whether it would be in the child's best interests for him to visit her. This surely is a fit and suitable matter for a sympathetic and wise arbitrator to decide.

The expense and trauma of a court action is unnecessary where the matter really involves a personal subjective value judgement on the part of one or other of the parties. It is submitted that the courts could well do without cases of this kind, and the administration of justice would be correspondingly less burdened.

An agreement to mediate and arbitrate future disputes regarding custody and support has the advantage of being inexpensive, and of being a readily available means of resolving continuing disputes of this kind. The best interests of the family as a whole might be served through private settlement. Section 2 (a) of the Arbitration Act can be changed to allow, a limited

freedom to arbitrate certain kinds of matrimonial disputes. The process can never be given a fair chance with the statute couched in such imperative language. It is submitted that initially, property division and maintenance can be made the subjects for arbitration, and also certain custodial issues such as minor variations of access. Schooling, holidays and religious instruction would be better decided by an arbitrator who had a more personal interest in the parties affairs and perhaps a more intimate knowledge of their private life. For a start, the statute could limit those areas which would be subject to arbitration. A blanket exclusion of arbitration in matrimonial issues is not in accord with modern progressive thinking. The parties' freedom to decide whether or not to stay married should include that freedom to decide on those issues which result from that freedom. If the law respects the parties' right to decide on the future of their marriage, it should also respect their freedom to choose, if they so desire, an independant third party to help them resolve their disputes.

Private mediation and arbitration have a future role in resolving many kinds of disputes in South Africa, including matrimonial issues. It is unhealthy for the state to interfere too much in what is, after all, the most private of the individual's life. By giving greater freedom to the individual, greater responsibility will be engendered, both towards one-another and towards society as a whole. Today's man and woman demand that freedom. Most modern couples are already fully capable of deciding the outcome of their divorce by agreement; but when they cannot agree on particular issues they should be able to elect a third party to decide for them and not have to invoke the heavy and costly machinery of the courts.

CHAPTER EIGHT

FAMILY MEDIATION IN SOUTH AFRICA

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In South Africa, the Hoexter Commission has recommended a conciliation and mediation service under the umbrella of the proposed Family Court. 1) Where there are minor children involved in divorce proceedings, the Commission recommends further that no action for a divorce may be instituted until an approved social agency has investigated the circumstances both of the children and of the parties to an action. 2) It seems, therefore, that where minor children are involved, the divorcing parties will be obliged to submit their case for an investigation to the Family Court's counselling service staff or by the staff of some approved social agency.

In addition to the obligatory investigation in the case where minor children are involved, the counselling service of the Family Court will also undertake the process of conciliation of divorcing spouses. 3)

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1. Hoexter Commission Fifth & Final Report Part VII 522.
 2. op cit 526.
 3. op cit 504.

Two problems could emerge here. Firstly, although in the opinion of the Commission there will be an adequate number of social workers to staff the social component of the Family Courts 1), it remains to be seen if this is really so. (If it is not, then the whole structure of the therapeutic component will fall to the ground. Successful mediation seems to be a time-consuming process and it will be remembered that in the United States it is estimated that a divorce mediation requires four to eight one hour sessions with the divorcing couple.) Mr Justice Fagan, in an opinion expressed before the Commission, expressed doubts with regard to availability of sufficiently experienced manpower.

"Ek dink dit is 'n bietjie vroeg in ons land om noual hiervan te praat Ons probleem is mannekrag. Ons het nie die mense nie, as ons yslike regbanke gehad en onsettend baie mense dan kon ons dit gedoen het ... Jy kry verslae, in die algemeen baie goed, maar nou en dan kan jy sien dit is maar jong meisietjies wat die goed opstel en waar kom hierdie mannekrag vandaan of vrouekrag?" 2)

1. op cit 497.
2. op cit 466.

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In the event of there being no shortage of qualified social workers to man the social component, and assuming that this component of the court is adequately staffed, the question arises whether in dealing with a wide spectrum of the public, a closed community of social workers, trained academically and probably young and inexperienced will be acceptable. We have seen that good rapport between mediator and spouses is essential. Will this rapport be achieved between persons of widely differing social and intellectual backgrounds? 1)

Secondly, with the freedom of choice of mediator removed by law where there are minor children, the divorcing couple will have no alternative but to submit their case to the investigating counselling component or "approved social agency". This might very well cause resentment and hamper frank and open discussion. The opposite effect of the intended mediation will result. 2)

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1. Mr P H Tebbutt (now Mr Justice Tebbutt) opined before the Commission "... but one does know that very often the social worker who goes out to do the report is a very young girl who has just come out of University, who really has no experience whatsoever of life at all, who herself has never really been in a position to experience any of the sort of things upon which she is now being called to pronounce a mature and adult judgement in regard to the welfare of children" op cit 468.
 2. A L James & K Wilson "Conciliation The Way Ahead" 14 Family Law (1984) 104, 105.

Furthermore, compulsory institutionalised mediation as envisaged by the Commission by State-appointed social workers will have no effect on recalcitrant parties, and a good deal of time would be wasted. The essence of mediation is a guided progress toward agreement - if this factor is missing, the mediation must fail. As early as 1969 Robert Coulson called for self-designed settlement machinery:

"The trend towards voluntary settlement methods for resolution of family controversy seems to be consistent with advanced thinking among family judges as to how such matters should be handled. Conciliation and counselling services are appearing in more and more family courts across the country, sometimes optional, sometimes compulsory.

(Although it seems logical for court systems to provide conciliation facilities for families in trouble, some such services do little more than increase the cost and delay of the final resolution, subjecting the parties to long drawn-out series of interrogations by well-meaning social workers, court aids and other appointees". 1)

1. R Coulson "Family Arbitration - An Exercise in Sensitivity" 3 Family Law Quarterly (1969) 22.

It is submitted that provision should have been made in the Commission's Report, at least during the pilot stage of the Family Court, for a greater freedom to be given to the parties who wish to seek responsible private mediation of their dispute, and for this mediation to be recognised.)

In New Zealand, The Domestic Proceedings Act of 1968, Sec. 14, (which came into effect of the 1st January, 1970) made provision for the appointment of a conciliator by the court on the application of either party. The court ordered the appointment of the conciliator only on the application of one of the parties, thus allowing a certain freedom of choice in the matter. After three years in force, it was reported that Section 14 had not been used to the extent hoped for. 1) It might have been that the provisions of the section were not known to the parties, or alternatively there was a hesitancy to submit their affairs to a court appointee for scrutiny.

It seems clear that the counselling service of the Family Court in South Africa has, as one of its primary functions, the mediation of disputes between divorcing parties. 2)

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1. K D MacRae "Conciliation in Domestic Proceedings" (1973) New Zealand Law Journal 188.
 2. Hoexter Report op cit 445.

But a further recommendation of the Commission is that no action for divorce where minor children are involved may be instituted until an approved social agency has investigated the circumstances both of the children and the parties to the action. 1) This means that where there are minor children the parties will have no alternative but to submit to an interrogation by the approved agency in order to obtain the necessary certificate to lodge with the Registrar. 2) This, it is submitted, could have an adverse effect on the quality and success of the mediation itself. Assuming that the same agency, namely the social component of the Family Court, functions both as mediator and investigating agency, the process envisages a compulsory investigation of the parties affairs, and at the same time the counsellors are required to placate, guide and encourage the parties to an amicable and lasting resolution of their differences. Mediation requires trust and confidence on the part of the parties and impartial sympathetic guidance of the part of the mediator. Whether a compulsory, bureaucratic investigation into the circumstances of the children and the parties to the action will pave an auspicious way for a successful mediation is doubtful.

1. op cit 526.
2. op cit 508.

Unless, of course, the Commission envisages the investigating agency to be a separate body from the social component and to carry out its investigation independantly. This would appear to be so from the words of the Report, but it would entail a duplication of process.

- (a) "that if there are minor children of a marriage no summons in a divorce action will be issued until the plaintiff has lodged with the registrar a certificate signed by an approved social agency from which it appears that the said organisation has carried out an investigation into the welfare of the minor children and the circumstances of both parties;" 1)

There are perhaps at least three possible approaches to divorce mediation; one, the State-controlled conciliation service provided as part of the Family Court service; two, the private mediator or team of mediators which are presently practising in the United States; and the privately funded conciliation service centres, such as the Bristol Courts Family Conciliation Service, sponsored by the Nuffield Foundation. There are also ad hoc measures adopted in individual courts in the

1. ibid.

United Kingdom where registrars, assisted by welfare officers, try to negotiate agreed settlements. 1)

Is there any direct explanation for the phenomenon of the upsurge of the interest in and practice of divorce mediation? There can be no doubt that a kind of mediation has always been practised by the divorce attorney in the conduct of his practice, but by construction this has mostly been of a partisan nature. 2) The proliferation of divorce mediation and conciliation (and an attempt will be made later to distinguish the two) follows in the wake of no-fault divorce. It seems that with greater freedom a substitute had to be found to replace judicial control and ordering. It may be that neither the judicial system nor the public were ready for such freedom and mediatory intervention has to a degree replaced it. The consequences of no-fault divorce in South Africa have led to severe criticism by the Hoexter Commission 3) and a recommendation of greater control of the consequences of the parties' initial freedom, especially where minor children are concerned.

Following the freedom the law has granted the parties in the conduct of their marital ordering, it has been

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1. Gwynn Davis "Settlement Seeking in Divorce" 132 New Law Journal June (1982) 355.
 2. See remarks of Mr Justice J J Trengrove Report on 11th South African Law Conference (1984) 84-86.
 3. Hoexter Report op cit 477-478.

found necessary to provide a process whereby they are assisted in their affairs. Previously, the law laid down specific rules and prescribed certain conduct with regard to divorce. However unrealistic the situation might have been, the parties knew the parameters in which they could move and had become used to the close control the law exercised on their marital lives. With the advent of no-fault divorce in most Western societies and the relinquishing of close control by the law, it seems that a void has been created, to be filled by the more informal process of divorce mediation. The new-found freedom has weighed heavily on many divorcing parties, as well as on society as a whole. It has been found easy to decide to divorce, but difficult to bear the consequences.

As Mnookin and Kornhauser put it,

"Dramatic changes in divorce law during the past decade now permit a substantial degree of private ordering. The 'no-fault revolution' has made divorce largely a matter of private concern. Parties to a marriage can now explicitly create circumstances that will allow divorce. 1)

1. R Mnookin and L Kornhauser "Bargaining in the Shadow of the Law" 88 Yale Law Journal (1979) 950 at 953.

After explicitly creating circumstances that will allow for divorce, the parties find themselves unable to arrange their circumstances which follow their decision. It is in these conditions that the idea and practice of divorce mediation and conciliation has flourished. Old attitudes die hard and many couples are at a loss to deal with the freedom of private ordering. Simon Roberts says:

"While a majority of couples do manage to decide matters of custody and access by themselves on breakdown some others do not; in some cases this is because they feel that it is not proper for them to do so. An experienced mediator has told me that quite a number of couples are surprised to find that they are 'allowed' to resolve the framework of custody and access arrangements for themselves. This apparently comes as a revelation so used are they to the idea that the whole rearrangement of their relationship must be the subject of official scrutiny and supervision. Visits to lawyers are seen as 'the right way' to respond to marital conflict, and there is the feeling

that it is 'dangerous' to move without professional legal advice and judicial regulation. These are states of mind which over the years lawyers have worked hard to establish, often quite easily". 1)

There can be no doubt that the concept of mediation in divorce is, at the moment of great interest in the United States, the United Kingdom and, by virtue of the recommendations of the Hoexter Commission, South Africa. The Commission has, almost overnight, quickened interest in and created a relevance for mediation as a new approach towards dispute settling in divorce. Some see mediation as a new approach to dispute settling in divorce, others are circumspect about the structure and implications of the different institutional arrangements. 2)

When we look at the writers on mediation in the United States 3), we see great emphasis placed on human factors, such as the parties' feelings, post-divorce inter-adjustment and the emotional implications in the dispute resolution together with better communication techniques. The writers are optimistic and welcome private divorce mediation by attorneys, psychologists and other professions. This private mediation seems

1. S Roberts "Mediation in Family Disputes" 46 Modern Law Review (1983) 537, 553.
2. op cit 537.
3. Supra.

to have evolved from the original family conciliation practised in the Family courts across the country and which was not with its critics. 1)

Bar Councils debate on the professional ethics of attorney mediation, 2) and other writers are strongly critical of private attorney participation and dismiss it as a money-making ruse. They regard the attorney mediation movement as a fad, indulged in by the affluent bored. 3)

In the United Kingdom, the Finer Report of the Committee on One Parent Families 4) began the mediation movement spawning privately-funded mediation services and raising the interest of court registrars and private solicitors. 5) In New Zealand, the Report of the Royal Commission on the Courts 6) which has been specially approved of and set up as a model by the Hoexter Commission with regard to conciliation and mediation in Family Courts, sees great advantage in institutionalised mediation within the confines of the Family Court.

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1. Coulson op cit 22.
 2. "Mediation Debated in Philadelphia" 9 Family Law Reporter (1982) 2014.
 3. R E Crouch "Divorce Mediation" 16 Family Law Quarterly (1982) 219.
 4. Cmnd 5629 (1974) G Davis "Conciliation and the Professions" 13 Family Law (1983) 6 at 8.
 5. Davis op cit 355 G Davis "Settlement Seeking in Divorce" 132 New Law Journal (1982) 355.
 6. (1978).

"... The Family Court concept demands that the Family Court should be essentially a conciliation service with court appearance as a last resort, rather than a court with a conciliation service. The emphasis is thus placed on mediation rather than adjudication. In this way, the disputing parties are encouraged to play a large part in resolving their differences under the guidance of trained staff rather than resorting to the wounding experience of litigation, unless such a course is inevitable". 1)

The Commission has accepted the New Zealand model and incorporated the idea and practice of conciliation/mediation into its recommendations of a social component of the proposed Family Court. The mediators will be drawn, presumably, from the ranks of the social services and other like bodies. It may have been a hasty judgement on his part, but one senior social worker to whom I spoke opined that the provisions of the Report regarding mediation/conciliation and investigation in the case where minor children are involved placed a very heavy demand on social work services.

1. Hoexter Report op cit 443.

MEDIATION AND CONCILIATION COMPARED

The Hoexter's Commission's recommendations in South Africa have synthesized the idea of mediation and conciliation within the bounds of the Family Court. Simply, the social component of the Family Court will undertake a counselling service which is aimed at a broad-based conciliation process. This process deals with communication between estranged spouses, helping the parties to reach agreement on disputed points, such as custody of minor children, access, maintenance, and division of the matrimonial assets. 1) The Commission recognises the need for such a service and proposes that this task be carried out in a single structured operation by social workers attached to the court's social component. The Hoexter Commission recommends the broad principles on which conciliation is to be based, but does not describe the structure and nature of the process of conciliation itself. As it stands, conciliation, in its methodology and structure, is not defined. The same criticism has been levelled at the recommendations of the Finer Report 2) in the United Kingdom. Simon Roberts, in a searching article has made the following observations:

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1. Hoexter Report *op cit* pp 503-505.
 2. The Finer Report of the Committee on One Parent Families (Cmd 5692) (1974).

"When the embryonic institutions of 'conciliation' now beginning to operate are examined, considerable diversity is also observable. Perhaps all this should not be surprising, for when we look back at the Finer Report, which many sees as the starting point of the movement towards 'conciliation' we find a large plea for a new disposition, a fresh general approach rather than specific institutional prescription. Although the Family Court is carefully described, the processes contemplated under the head of 'conciliation' remain hazy. Even the recent Inter-departmental Committee, explicitly required to report on the 'nature' of existing agencies of conciliation, has almost nothing to say about structure or the implications of different institutional arrangements. Yet much of the discussion takes for granted agreement about the nature of institutional forms that have never been worked out in detail, let alone submitted to serious evaluation". 1)

1. Simon Roberts op cit 537.

It might be useful to attempt to identify the "approach" and "structure" elements in conciliation/mediation as it applies to family matters. This nascent process is attracting a great deal of attention by writers in the Anglo-American world, few of whom are prepared to be absolute about its characterisation, but most of whom are prepared to recognize its present and future value.

It is submitted that the process envisaged by Hoexter is not unitary but consists of two or more parts of which mediation emerges as a distinct process. It has been shown in the United States, which has long practised conciliation in Family Courts, that mediation is a developing process in its own right, with professionals providing the necessary third party intervention in its structural processes. The term 'conciliation' is at present hardly used by the American writers.

In the United Kingdom and South Africa, the approach is different. We do not distinguish between conciliation and mediation, or at best use the terms interchangeably. There is in fact a confusion with regard to terminology. 1)

1. N Wilkins "Conciliation - A Friendly Feeling" 14 Family Law (1984) 122.

The Hoexter Report goes to some length to distinguish between conciliation and reconciliation, 1) but merges the concepts of conciliation and mediation:

".... The Family Court concept demands that the Family Court should be essentially a conciliation service with a court appearance as a last resort, rather than a court with a conciliation service. The emphasis is thus placed on mediation (my italics) rather than adjudication". 2)

Writers and academics in England are trying to establish whether there is some basic form which can identify the structure of family conciliation/mediation, and take it further than a broad statement of intent.

"In seeking to identify the objectives of family mediation some writers, notably Davis 3) have insisted upon a distinction between mediation and that complex of supportive activities associated with counselling, treatment and therapy. For them the essential focus of mediation is upon enabling the disputants to arrive at joint decisions upon specific issues which

1. Hoexter Report op cit 443-444.

2. ibid.

3. Gwynn Davis "Conciliation and the Professions" 13 Family Law (1983) 6.

divide them; it has nothing to do with advisory activities, with providing 'support' in the immediate crisis of breakdown, with longer-term examination of relationships, or wider problems of coping with changed circumstances". 1)

The mediator is seen as having a more special role and the objectives of mediation are confined to those areas which require specialised intervention on specific issues.

In South Africa, the terms "conciliation" and "mediation" also appear to be used loosely. The Report of the Royal Commission on the Courts which was tabled in New Zealand in 1978, and quoted with approval by the Hoexter Commission, makes this clear. 2) The emphasis is

"... placed on mediation rather than adjudication, and in this way the parties are encouraged to play a part in resolving their differences under the guidance of the counselling staff, rather than resorting to the wounding experience of litigation, unless

1. Roberts op cit 551.

2. Hoexter Report op cit 443.

such a course is inevitable". 1)

The Hoexter Report lays down broad patterns as to what the general purpose of conciliation should be, the terms of reference are broadly conceptualized. Simon Roberts sees the principles in the Finer Report as expressing two objectives:

"...that family breakdown should be dealt with in a quiet and restrained way, with the least possible bitterness and fighting; and that wherever possible, the parties themselves should take primary responsibility for resolving the dispute". 2)

The Hoexter recommendations regarding the creation of a Family Court, are clear as regards the court component, 3) but the process contemplated under the heading "social component" is widely defined. It is important that this is pointed out. In the United Kingdom, in 1984, there is a certain confusion with regard to what conciliation actually is, whether mediation is synonymous with it, and what its future is. There has been a proliferation of conciliation schemes; there are no less than fifty at present; 4) all purporting to

1. ibid para 3 and 4.
2. Roberts op cit 538.
3. Hoexter Report op cit 523-527.
4. Wilkins op cit 122.

follow the broad principles enunciated in Finer. If conciliation is going to follow the English pattern in South Africa, and its popularity elsewhere in the world suggests no reason why it will not, it would be better to decide our direction now, or at least be alert to what we can expect.

In Hoexter, conciliation is described as:

"(b) the conciliation process, which in cases of irreparable rift in the marriage, is aimed at helping estranged spouses to communicate directly and to good purpose with each other to make thier parting less traumatic for them as well as their children; and to resolve by agreement disputed points (such as custody of and access to minor children and the division of the matrimonial assets)".

The Report recommends a further process to be undertaken by the social component,

"(c) the supporting service to the court, where the court has to adjudicate upon a family matter, the counselling service will see to it that any further social welfare investigation or action that may be required

by the court will be undertaken either by the counselling service's staff or by the staff of some approved social agency".

It may be useful to attempt to analyse the structure of the process as contained in the idea of the social component.

Part (b), it is submitted, comprises two parts: first, the conciliation process which, urges a particular approach for the disputing parties. The approach is supportive and conciliatory. The parties are helped to communicate directly with each other, and their emotional needs are catered for. Second, and this may require a different approach, the service will help to resolve by agreement disputed points such as custody, access and division of matrimonial assets. These two distinct objectives contained in Part (b) serve to throw some light on the difference between conciliation and mediation in the family counselling context and the need to distinguish the two.

The Report uses the term "conciliation" to embrace both conciliation, which may comprise general counselling

and supportive advice, to a degree of advisory intervention in specific issues. Conciliation in the Finer Report is inherent in both the propositions as analysed by Roberts:

"...that the family breakdown be dealt with in a quiet restrained way, with the least possible bitterness and fighting; and two, that the parties themselves should, wherever possible, take responsibility for resolving their own dispute".

The counsellor's task here is broadly defined and may or may not include mediation, if mediation means a measure of third-party intervention in specific issues. Conciliation in Hoexter is inherent in the first part of the process, but in the second part it is clear that the counsellor will assume a degree of intervention. His task becomes more specific, and he is required to deal with particular issues such as custody, access, and the division of the matrimonial property.

In Hoexter, conciliation

"...is aimed at helping estranged spouses to communicate directly and to good purpose with each other to make their parting less

traumatic for them as well as their children",

and (and this is the second element inherent here)

"to resolve by agreement disputed points such as access, custody and the division of matrimonial assets"

The counsellor is required to perform two functions, one therapeutic, the other mediatory. Once the counsellor proceeds from the initial pacifying stage, to one where he assists the parties to resolve particular issues and disputes, his function becomes mediatory, and the approach is different. It seems, therefore, that in the Hoexter recommendations there are two functions to be performed by the counsellor, and the question is whether they should be kept actually and conceptually separate. There may be practical consequences. Simon Roberts says:

"... it seems that a broad distinction should be maintained between supportive or advisory activity and assistance with decision-making, given the different skills which the respective forms of intervention demand and the confusion suffered by the disputants if they are intermingled. It does seem

doubtful whether these disparate activities can be satisfactorily conducted alongside each other. If these objectives are entertained by a single agency, are they to be pursued by the same 'conciliator'? Are they to be combined in the same meeting? If so, how far are they insulated from each other; and how far is the transition from one mode to another to be handled? Are these operations going to remain distinct in the minds of the disputants themselves? All these questions require serious attention". 1)

It is submitted that these two functions should be kept conceptually, if not actually apart. The counsellor's task in the first instance is that of establishing communication between the warring parties, and attending to their emotional needs. At this stage, therapeutic support will be of more assistance to the parties than any discussion on issues of custody and maintenance; indeed, the emotional condition of the parties may be such as to preclude any useful mediation on specific issues.

1. Roberts op cit 553.

Once the disputants are prepared to talk to each other objectively and a general agreement to approach problems is established, the parties will then be ready to discuss the particular issues on which they cannot agree. We can call this later process "mediation" which will distinguish its content and structure from that range of supportive and therapeutic counselling now subsumed under the general head of conciliation. It would be useful to us, in South Africa, at this stage, to decide on an accurate and uniform terminology in order to avoid confusion later. In the United Kingdom, at present, there is a complaint among writers that:

"There is a good deal of confusion in the use of terminology and in the expectations of what can be achieved through conciliation. The word is being used as a kind of woolly blanket which covers, and partially conceals, a variety of procedures and methods". 1)

If "conciliation" as we use the term to-day is to have any scientific meaning then it must be structured in such a way that its components can be identified. We have basically a good idea: namely, that divorcing

1. Lisa Parkinson "Conciliation: Pros and Cons Part II"
13 Family Law (1983) 185.

parties should be helped to communicate with each other and be assisted in resolving disputed points arising out of their matrimonial break-down. No-one can argue that this is not a fundamentally sound policy; but how this idea is to be put most effectively into practice is a vital issue. As will be seen later, in the United Kingdom, this simple, sound idea has led to a plethora of schemes and processes, with laymen and professionals laying claim to be the best qualified and suited to undertake the task. Two government committees have been appointed to investigate these schemes, and their findings have been far from conclusive. 1)

It is submitted that to use the term "conciliation" is perhaps misleading in that conciliation forms only part of a binary process of which mediation is the more specialised form. Gwynn Davies, in the United Kingdom, a wide researcher on conciliation, uses the term "mediation" rather than "conciliation":

"...because, whilst both terms refer to one relatively simple idea, 'conciliation' is now occasionally employed to denote a variety of measures taken to improve family

1. A L James and K Wilson op cit 104.

life following marriage breakdown". 1)

It might be better to talk of mediation generally, while recognising conciliation as that part of the process which deals with its supportive and therapeutic aspects.

Conciliation in the United Kingdom

No-fault divorce has altered the attitude to divorce and the legal and moral ethos surrounding it. Perhaps nowhere else is the socio-legal revolution more apparent. The emphasis is shifting from state interest to private interest, and it is submitted that this emphasis will increase to a point where the institution of marriage will be regarded as a private affair, with state interest being maintained for the protection of minor children alone; in the same way as the state is interested in protecting the rights of other individuals with diminished capacity. It is a fiction for the state to continue to maintain an interest in the marital status of the parties where this interest has already been abdicated to a point when its present control is to a large extent formalistic and residual.

1. G Davis "Conciliation and the Professions" op cit 6.

The natural result of the decline of state interest in the consequences of marriage breakdown will be the growth of private interest, with the community and groups of individuals replacing the courts' formal intervention (at the moment in the first instance) in order to bring about a private or quasi-private ordering of the consequences of the relationship's breakdown. Conciliation and mediation can be developed and refined to replace ultimate state ordering. This, it is submitted, will be in accord with the emphasis on consensus, rather than rule, on which the modern relationship will depend.

At present, these institutions are very much in the development stage, but their influence in the future, as far as the adult parties are concerned, will be important. In the United Kingdom, writers are thinking along these lines:

"The scale of divorce has already contributed to a rapid and anxious re-appraisal of the future of marriage and the family. Divorce provides the occasion for investigating family circumstances, a rather token investigation possibly, but a reflection of

the state's growing concern for the welfare of children...But the scope for the surveillance of divorcing families is limited, and paternalistic approaches are anyway unpopular. We now see the main thrust of the child-saving movement being redirected. An emphasis on negotiation and counselling is seen to be more realistic than surveillance, and also more in keeping with the mood of the times. This trend is supported by commentators who regard divorce principally in terms of family re-organisation, involving changes in, rather than abandonment of the parental role". 1)

The growth and popularity of mediation in divorce matters in the Anglo-American world is a significant pointer to the future. We have seen the acceptance of private mediation by attorneys in the United States and the practice approved of at Bar Council level. 2) In the United Kingdom, since the concept of mediation first emerged officially as part of the deliberations of the Finer Committee, fifty out-of-court conciliation schemes have been created. Although some have been

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1. ibid.
 2. "ABA Conference on Mediation" 8 Family Law Reporter (1982) 2479; "Mediation Debated at Philadelphia Bar Association's Annual Meeting" 9 Family Law Reporter (1982) 2014.

established as a result of voluntary efforts by private agencies, others are supported in part by resources from statutory agencies. Two government committees 1) have been commissioned to investigate these out-of-court services, mainly, it seems, with a view to establishing whether the government will be able to afford the cost of expanding them. 2) Both committees expressed the view that conciliation, as a recognised part of the legal procedure of divorce should be encouraged, but it seems that because of financial considerations at present, they could not recommend support for the out-of-court schemes. 3)

Most of the out-of-court schemes have been in existence only since 1980, with the Bristol Courts Family Conciliation Service, which was established in 1978, being the longest running privately funded scheme.

Although there appear to be many domestic problems facing conciliation and mediation at present in the United Kingdom, that they exist at all is significant. The emergence and popularity of the private, out-of-court services indicates that there is a need for them. The fact that central government is delaying, on

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1. Inter-Departmental Committee on Conciliation (March 1982)
Booth Committee on Matrimonial Causes Procedure (August 1982); W Merricks "Traditional Views from Booth" 133 New Law Journal (1983) 838.
 2. A L James & K Wilson op cit 104.
 3. ibid.

account of financial reasons, the decision whether or not to give full support to private agencies is not really germane to the main issue: which is that now, and in the future, there is a need for non-adversarial, mediatory agencies to assist in all matters concerning the divorcing parties. Their constitution and structure, and how they are to be funded will no doubt be worked out in due course; the basic principles of mediation are not in dispute. 1)

We, in South Africa, should take careful note of the developments of conciliation in the United Kingdom. It took only four years from the initial concept in the Finer Report for the idea to develop nation-wide interest and for private schemes to proliferate, like the Bristol Courts Conciliation Service, which provides an effective, professional adjunctive service to the in-court state schemes. 2) Moreover, there is no reason to imagine that the idea of conciliation as proposed in Hoexter, will not eventually have the same reaction in South Africa as Finer's had in the United Kingdom. The idea is now universal, and not only accords with modern thinking, but is closely linked to the developments in and attitudes to modern marital

1. ibid.

2. op cit 106.

breakdown. It is submitted that conciliation in South Africa should not and will not be forever confined within the limits of a Family Court and controlled by state appointed welfare officers.

We should ask ourselves now what we are to do if private agencies do emerge, and if legal practitioners become conscious of the benefits of mediating disputes rather than practising adversarial methods? If the trends which have been described in the United States and Britain eventually do gain interest and popularity here, what will our reaction be? Will they be encouraged, or will our conservative and authoritarian society keep them under the control of the state Family Court and forbid community-minded private enterprise? Will our Bar Councils accept the practice of non-adversarial law by members of the profession? These questions should be considered now so that much of the uncertainty experienced at present in the United Kingdom will be avoided.

We cannot avoid the issue; we have accepted the two principles from which the consequences emerge, namely, no-fault divorce and the policy that the divorcing

parties should be assisted through a mediation process to resolve those conflicts which arise from the failure of their marriage. Both these principles have embodied in them a divesting of state intervention and the shifting of emphasis from legal to private control. If mediation forms part of that private control, then the parties should be given the freedom to decide what form that control will take.

Mediation will have a natural and evolutionary development and if the parties and the community benefit from its simplicity and efficacy, a way must be found to accommodate all its aspects within our socio-legal system.

CHAPTER NINE

CONCLUSION

In the foregoing I have tried, by reviewing some of the experimental processes in private dispute settlement now in use overseas, to encourage an interest in alternative methods of securing a measure of justice for the individual. I have listened attentively to the call for a "better way", and in so doing, I have considered the processes of arbitration and mediation and their possible application and expansion in the socio-legal problems of the future. If conclusions are to be reached at this stage, they will have to be, perforce, tentative.

There appear to be many reasons at present for seeking alternative avenues of justice. It is no secret that the expense and delay of court proceedings have created disillusionment with ordinary justice among members of the public. It is true that the expense of even consulting a lawyer deters many from asserting their rights. In the past many commercial men have turned to arbitration to secure an expeditious and less expensive

means of settling their disputes, but it seems that many of the traditional advantages of commercial arbitration no longer exist and that it has become expensive and dilatory.

I hope, however, that my research has shown that the expense and delay involved in litigation is not the only reason for the quickened interest in extra-judicial processes as a means of settling disputes. While it emerges that the use of arbitration and mediation in the small claims courts in the United States does much to relieve heavy court rolls, something more becomes apparent which, in my opinion, is of even greater interest than the simple pragmatics of expediting trials. There seems to have developed an interest in and concern for the individual and his problems and, a fortiori, society as a whole. Arbitration and mediation are used not only to relieve the pressure on the courts, but also to assist the individual and relieve him of the pressures and frustrations which inevitably flow from litigation. There appears to be genuine concern in this direction, and an eagerness to use informal methods to secure settlements.

The Americans have discovered that with the fragmentation of urban life and the de-personalising of the individual, a more private and concerned process of settling disputes between persons has the effect of creating greater social cohesion. The benefits of an informal process are seen as twofold: firstly, the disputants are brought together under conditions which are more likely to reveal the causes of the conflict which may involve problems other than strictly legal ones, and secondly, where problems are solved and solutions found under these conditions, there is not only a greater likelihood that the terms of the agreed solution will be complied with, but there will be a reduction or even absence of ill-feeling between the parties, which, it is claimed, is not the outcome of most adversarial proceedings. Inevitably, a process of reducing conflict and increasing satisfaction between disputants has its effect on society.

I venture to suggest that with the advent of our new small claims courts which have been constituted to make justice more accessible to litigants, we should take into account that there may be more to a small claims court than the expeditious disposing of claims.

Also an adjudication according to rule may not be the best method to deal with matters at this level, and a greater sense of litigant satisfaction may be derived from a more informal arbitral procedure, with the adjudicator becoming involved in the background of the dispute and in the personalities of the parties.

Moreover, mediation of small claims should be considered and the parties given a choice of whether to proceed in the relative formality of the small claims court, or to find a solution to the dispute with a mediator. Mediation schemes could be instituted by Law Schools as extensions of their legal aid programmes and members of other Faculties could be invited to assist them. I have suggested in this work that mediation would work well in rural areas which do not have an easily accessible small claims court, but I could go further and suggest that there is no reason why Universities could not establish mediation programmes for urban areas.

It is noteworthy that the principles of informal justice have been extended to include certain areas of the criminal law. The concept of the Neighbourhood Justice Centres having the authority and ability to

mediate and resolve certain minor criminal complaints is, in my opinion, a progressive and salutary advance in the quest for social justice. After studying some of the experiments in this area in the United States, I came to the conclusion that we, in South Africa, would do well to investigate the possibility of creating such projects. They have been found to be effective in culturally diverse communities, having not only the beneficial effect of decriminalising certain conduct, but of also developing responsible involvement among members of the community. While I see many obstacles being put in the path of such ventures in South Africa, I derive satisfaction from having studied them and suggesting their adoption here.

Again, in the area of divorce mediation and arbitration, I realise that the ideas and practices now being adopted abroad may not find ready acceptance at the moment in South Africa, but I have presented them as ideas to consider for the future.

I hope that it has emerged from the study that in South Africa arbitration could have a responsible role in settling family disputes, and that the climate in the future should not be adverse to its acceptance.

Arbitration could provide a readily accessible and sympathetic forum for hearing and resolving the many differences which arise from marriage breakdown; differences which an arbitrator of the parties' own choosing could decide in accordance with their own general approach and background. There is an added advantage in that the arbitrator is in a position to first mediate the dispute and then decide the outcome on the basis of a comprehensive knowledge of the nature and causes of the disagreements.

Mediation, in the case of divorce, has received attention from the Hoexter Commission and its recommendations are that a counselling service attached to the Family Court be provided to help divorcing spouses overcome the difficulties of their marriage breakdown. Mediation, through the offices of a private arbitrator, has the advantages over mediation practised by official state appointees in that the former will have both the time and personal commitment to investigate the deeper issues of the dispute. It is to be hoped, therefore, that once the idea of mediation in divorce has been fully received in South Africa, consideration will be given to extending its application as a viable dispute

resolution process into the private field, where responsible and committed individuals will take over the ordering of marriage breakdown in the first instance.

Thought, then, can be given to arbitration as a means of determining with finality those matters which, even through mediation, the parties are unable to resolve.

It has been the purpose of this work to draw attention to the use of informal processes in otherwise strictly traditional legal areas. I have tried to show that there are perhaps good reasons for approaching certain issues on a more informal and consensual basis, and that society generally can benefit from having disputes settled privately. If the courts can benefit from fewer hearings, if communities can benefit from a greater measure of self-help through private dispute resolution, and if people whose marriage has broken down can arrange their lives without the expense and trauma of a court trial, then there is much to be said for arbitration and mediation as "a better way".

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PROPOSAL FOR ATTORNEY MEDIATION
OF SMALL CLAIMS

- I. Attorneys will serve as mediators in small claims cases in order to attempt to resolve a great percentage of small claims without a trial. This program has been very successful in numerous other district courts.
- II. The 36th District Court Committee, Civil Division Subcommittee, of the Detroit Bar Association, has provided an initial list of attorneys willing to serve as mediators. If the pilot program is successful or continues to operate, all local bar associations will be contacted and their members invited to take part in order to obtain the widest possible cross-section of attorneys and to encourage the greatest attorney participation.
- III. Attorneys shall be paid \$150 per day, same as assigned house counsel in the Traffic and Ordinance Division of the Court.
- IV. Proposed starting date: August 1, 1984.
- V. Cases assigned per day: Approximately 35

This is the same number that are currently set for trial on any given day.
- VI. Scheduling: One-half at 8:30, one-half at 10:30.

First, this will eliminate the logjam of people all coming to the Assignment Room at one time. Second, this will eliminate a lot of waiting for half of the litigants and their witnesses, fostering increased respect for the judicial system.
- VII. Anticipated number of cases to be actually heard per day: 7-10, about the same as are currently heard, after defaults and dismissals for nonappearance.
- VIII. Place: Hearing room to be provided. Litigants to report to Assignment Clerk and check in.
- IX. Cases to be heard in order of parties' appearance.

X. Notice of hearing date to be given as follows.

When filing the Affidavit and Claim, there is a box on the form entitled "Notice of Hearing". Currently, when the claim is filed, the Clerk now inserts a trial date on this form which is approximately 30 days after filing. The words "See attached notice" will now be placed in that box.

A "Notice to Plaintiff and Defendant" shall be used in substantially the form as annexed hereto. This notice will notify the parties that the case has been assigned to the Attorney Mediation Program, and will set forth the date and time of hearing. The notice will also include a paragraph specifically notifying the parties that if they fail to appear, a default or dismissal will result.

That Notice will be given to the plaintiff by the Clerk at the time claim is filed, and will be served on the defendant together with the affidavit and claim.

XI. Attorney mediators will be sent a notice of the day assigned on a form entitled "Attorney Guidelines - Small Claims Mediation". A copy of such a sample form is annexed hereto. This form will tell the attorney where to check in and will notify the attorney of the procedures to be followed.

XII. The attorney will check in with the Assignment Clerk fifteen minutes ahead of time.

The attorney will pick up the following:

1. Files.
2. Recommendation forms, including optional second page.
3. Small Claims Judgment forms (DCS 84-2).
4. Satisfaction of Judgment forms (DCZ 17).
5. Notice of Trial Date forms.

The Assignment Clerk will notify the attorney of the trial date to be inserted on the Notice of Trial Date forms.

The attorney will be given a room assignment.

XIII. Hearing Procedure is basically to be as set forth on annexed Attorney Guidelines.

The attorney must review the complaint and answer before calling the parties. Not only will this save time in the long run, but it fosters respect for the judicial system. It also will assist in the resolution of the case as the parties will feel that the mediator has cared enough about their case to know what it is about prior to the hearing.

The attorney will then call the parties to the hearing room, introduce himself, and briefly explain the hearing procedure.

Each party will be given an opportunity to be heard, but each case will be limited to 15-20 minutes, depending on the facts and circumstances of the particular case.

The attorney will attempt to resolve the case, and give the parties his recommendation for disposition of the case.

XIV. If the case settles:

1. The attorney writes out the settlement on the Small Claims Judgment form.
2. The "consent" boxes are checked.
3. Both parties sign the form.
4. The file, the parties, the judgment, and a Satisfaction of Judgment form are taken to the Presiding Judge, who shall sign the judgment.
5. The Clerk of the Presiding Judge shall fill out the bottom of the judgment Form entitled "Entry, Notice of Judgment and Certificate of Mailing" modifying same for personal service on the parties.
6. The Clerk of the Presiding Judge shall hand each of the parties a copy of the judgment, and shall give the plaintiff the Satisfaction of Judgment form to be filled out and filed by the plaintiff upon satisfaction of the judgment by defendant.

xv. If the case does not settle:

1. The parties will be required to come back for trial on another date approximately 30 days later. This is an important factor in settling many cases.
2. The attorney fills out the recommendation form, signs it, and dates it. This form includes the following:
 - a. Facts. If more room is needed, optional second sheet is used.
 - b. Issues.
 - c. Settlement recommendation.
 - d. Legal recommendation, if different. Note that the settlement recommendation may very well differ from the legal recommendation as to the outcome of the case.
 - e. Any comments, if the attorney feels that any comments are called for, may be put down on the optional second sheet.
3. The attorney fills out the Notice of Trial Date form by inserting the case name and number, and the trial date previously given him by the Assignment Clerk.
4. The attorney gives the completed Notice of Trial Date form to each of the parties, fills out the Proof of Service on the bottom of the form, and files the form in the court file. All such files will be returned to the Assignment Clerk at the end of the day.

xvi. Default and Dismissal Procedure.

If both parties have not checked in one-half hour after the time scheduled for hearing, the Assignment Clerk shall take the files back from the attorney mediator.

The files shall be taken to the Presiding Judge.

The parties shall be notified by the Assignment Clerk to report to the Presiding Judge.

If the plaintiff has failed to appear, a dismissal shall ordinarily be entered.

If the defendant has failed to appear, the Presiding Judge shall ordinarily take whatever testimony is necessary and enter a Judgment for the plaintiff. Notice of entry of judgment shall be given by mail as currently provided for in the court rules.

If both parties fail to appear, the case may be dismissed for lack of prosecution, or the Presiding Judge may order any other disposition as justice may require.

Upon nonappearance of any party, the Presiding Judge may take any action so provided for in DCR 5004.2. Ordinarily, it is expected that the actions set forth above will be taken.

- XVI. Depending on the number of cases which must actually be heard on any given day, the attorney mediator may finish the cases in the morning, may hear the cases through the normal lunch period, or may adjourn some of the cases to the afternoon and require the parties to return in the afternoon.
- XVII. The pilot program shall be for an initial period of 3 months. Running changes may, of course, be made as needed. Statistics shall be kept in order to evaluate the success of the program.

- f. Depending on the number of disputed cases on any given day, you may wind up finishing your duties in the morning, or you may have to finish your duties in the afternoon. It is permissible to break for lunch and require the parties on the remaining cases to return to court after lunch.

3. HEARING PROCEDURE

- a. Briefly review Complaint and Answer (if any) before calling parties
- b. Call parties to mediation room
- c. Introduce yourself
- d. Briefly explain mediation procedure to them
- e. Give each party an opportunity to be heard
- f. LIMIT length of mediation to 15-20 minutes per case
- g. POLITELY and FIRMLY terminate discussion
- h. Give recommendation and attempt to settle

4. IF CASE SETTLES:

- a. Write out settlement on Small Claims Judgment form
- b. Check consent boxes
- c. Obtain both parties' signatures
- d. Put Judgment form and Satisfaction of Judgment form with file
- e. Take file, forms, and parties to clerk of Presiding Judge
- f. Judge will enter Judgment. Clerk will give parties copy of judgment, will fill out proof of service on bottom of judgment form, and will give plaintiff Satisfaction of Judgment form.

5. IF CASE DOES NOT SETTLE:

a. Fill out recommendation form:

- I. Facts. If necessary, use optional second sheet
 - II. Issues
 - III. Settlement recommendation
 - IV. Legal recommendation, if different. There may be a number of times when your recommendation for settlement purposes may differ from your strictly legal recommendation as to the outcome of the case.
 - V. If you feel that any comments are necessary, fill out Comments section on optional second sheet
- b. Inform parties that the recommendation will be part of the court file and that the Judge will have the recommendation before him or her at the time of trial
 - c. Inform the parties that they will be required to come back on a different date for their trial before the Judge
 - d. Fill out the Notice of Trial form, original plus two copies, inserting the caption and the trial date previously given to you by the Assignment Clerk
 - e. Give a copy of the Notice of Trial form to each party
 - f. Fill out the Proof of Service on the bottom of the Notice of Trial Form, and place the original Notice of Trial form in the court file
 - g. All such files must be returned to the Assignment Clerk at the end of the day

6. NEXT!

Call next case

7. END OF DAY

- a. Return all files and extra forms to Assignment Clerk
- b. Obtain voucher

NOTICE TO PLAINTIFF AND DEFENDANT

 Plaintiff,

vs.

Case No. _____

 Defendant.

Your case has been assigned to the 36th District Court Attorney Mediation Program. An impartial attorney from the Michigan State Bar Association will act as a mediator to assist in resolving or settling your case.

Your hearing is scheduled for ^{8:30}_{10:30} a.m. on _____, Day

_____, 198__ . Report to room 901, City-County Building, Detroit, Michigan. CHECK IN WITH ASSIGNMENT CLERK.

If your case is not resolved or settled on that date, it will be assigned to and heard by a Judge at a later date which will be given to you by the mediator.

Both Plaintiff and Defendant must bring all witnesses, books, papers, and other evidence needed to prove or disprove the claim or defense.

PLAINTIFF'S FAILURE TO APPEAR WILL RESULT IN DISMISSAL OF THIS CASE. DEFENDANT'S FAILURE TO APPEAR WILL RESULT IN JUDGMENT AGAINST DEFENDANT.

STATE OF MICHIGAN
IN THE 36th DISTRICT COURT

Plaintiff,

vs.

Case No. _____

Defendant.

MEDIATOR'S RECOMMENDATION

I. FACTS _____

(Attach additional sheet if necessary)

II. ISSUE(S) _____

III. SETTLEMENT RECOMMENDATION _____

IV. LEGAL RECOMMENDATION (if different) _____

DATE: _____

(Sign) _____
(Print) _____

MEDIATOR'S RECOMMENDATION

OPTIONAL SECOND SHEET

I. FACTS (Continued) _____

V. COMMENTS _____

DATE: _____

(Sign)
(Print)
Attorney Mediator