WHY ALERNTATIVE DISPUTE RESOLUTION SKILLS ARE ESSENTIAL FOR BUSINESS STUDENTS

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Abstract

Mediation is to enterprise, as litigation is to legal practice. Alternative dispute resolution (ADR) skills are taught within law and some business faculties as optional subjects. However these skills are also essential for all business students. This paper argues the need for awareness of ADR processes to be brought to undergraduate business students as a part of business practice. Business students should be specifically taught basic skills to recognise where ADR methods may be used where a dispute exists, in the same way all law students must show basic competency in the use of ADR processes.

I. Introduction

law teachers ensure that business students have the skills to recognise legal issues within business practice which this enables them to determine whether they can deal with disputes themselves, or whether there is need to retain legal advice services. These skills should include knowledge of ADR so that business students are empowered to identify when and how business disputes may be more effectively addressed and resolved. Mediation, for example, may be effective where there may be an intention to facilitate and cultivate ongoing future business dealings with the other party or parties involved.

As tertiary educators we provide instruction about the Australian legal system, contract, tort, legislation and where the risk of litigation may arise. Business students are expected to understand binding obligations and legislative requirements in commercial practice, managing a business, their obligations to others in that business as well as ethics and business practice. However managing business disputes is not addressed. In Australia, as in other comparable jurisdictions such as New Zealand, there is an identified trend[1] toward the use of more tailored dispute resolution processes in commerce due to a need for business students to learn about alternatives to litigation.

An awareness of dispute resolution techniques should form part of the graduate attributes of undergraduate business students. In an increasingly competitive globalised education environment, Australian tertiary business faculties must offer undergraduate education that provides relevant skills for modern enterprise in a globalised economy.[2]

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1 Michelle Sindler, 'Current Perspectives on International Mediation and ADR' Seminar presented at the Australian International Disputes Centre, Sydney 10 March 2011).

2 Suzanne J Schmitz, 'Giving Meaning to the Second Generation of ADR Education: Attorneys' Duty to Learn about ADR and What They Must Learn': (1999) 1 *Journal of dispute Resolution* 30. The teaching of ADR to law students is arguably more effective when those students have experience in the profession; see David Spencer and Marilyn Scott, ADR for Undergraduates: Are We Wide of the Mark?" (2002) 13 *Australasian Dispute Resolution Journal* 22 in Douglas K. 'Inspirational Teaching of Alternative Dispute Resolution', ALTA Refereed Conference Papers. Australian Law Teachers Association 2006.

II. ADR Skills Education

The evolution of ADR in Australia has a well documented history[3] and continues to evolve within the Australian legal system. ADR processes range from mediation and negotiation, conciliation and arbitration[4].With the obvious exception of negotiation, ADR requires a third party impartial facilitator.[5] Mediation is the simplest form of facilitated dispute resolution where a neutral mediator guides the parties to agree their own solution[6]. Conciliators and arbitrators will have different levels of determinative powers as agreed by the parties or as legislated[7]. Commencing each ADR process will also differ. At one end of the spectrum of commencing dispute resolution the process will be initiated by one person approaching the other party with whom they are in dispute. In other cases there is a contractual obligation for a particular form of ADR.

At the other end of the dispute resolution spectrum there is court ordered ADR or at times court case management requirement where parties are required to attempt mediation prior to obtaining a hearing date[8]. At this stage the parties are expected to participate in an ADR process. Business students therefore need to be ready to participate in ADR such as court ordered mediation, and to understand what is expected of them[9]. Where mediation is required by the Court and a party does not comply or participate in good faith, the Court may impose sanctions for inappropriate behavior such as an uncooperative attitude[10].

Conflict is a normal part of business experience. The methods of dealing with conflict will be determined by the actual individuals involved, the number of participants in a conflict, the circumstances, the type and level of conflict, as well as the history of the relationships between disputants and whether there are any pre-existing requirements for dealing with a dispute, such as the terms of a contract.

Disputes are also a fundamental part of the experience of business, whether within entities engaged in business or where there are issues with customers, clients, suppliers or competitors. Whether there is an individual participating in agreements for services, a partnership in crisis, a trading trust, a corporation or an unincorporated entity the issues remain constant. Disputes require attention, time and very often compensatory payments to resolve, or legal action. The usual legal action again will carry with it monetary requirements where there is the need for advice about a dispute, preparation and some cursory contact with the other party or parties. There may also be technical aspects to the dispute; there may also be aspects of interpretation of process and structure or the need for advice about the legality of actions and compliance with agreements. All these aspects occur prior to the decision to take what is generically, legal action[11].At the point of identifying there is a dispute, the issues are raw and the parties are close to the intertwined issues forming the dispute. The first step in dealing with the issues usually revolves around communication. The fact of communication does not always advance a resolution. At times communication assumptions may arise where there is no contact or where it is negative communication further increasing the conflict. Where there is an attempt at

3 Hilary Astor & Christine Chinkin, *Dispute Resolution in Australia* (LexisNexis Butterworths 2nd Ed 2002); Tania Sourdin, *Alternative Dispute Resolution* Thomson Reuters, Sydney 2012.

4 Sourdin above n 367.

5 Ibid 67.

6 Ibid 68.

7 Ibid.

8 Supreme Court of NSW, Supreme Court Practice Not SC CL 5, Supreme Court Act 1970 (NSW).

9 L. Boulle *Mediation Principles Process Practice* (2nd ed) Lexis Nexis (2005) page 471, referencing P. Grose '*Towards a Better Tomorrow – A Perspective on Dispute Resolution in Aboriginal Communities in Queensland*' (1994) 5 ADRJ 28 on Aboriginal parties and representative bodies in native title mediations.

10 *Capolingua v Phylum Pty Ltd (as Trustee for the Genoe Family Trust)* (1991) 5 WAR 137 in L. Boulle (2005*) Mediation Principles Process Practice* (2nd ed) LexisNexis (2005) page 230.

11 E. Wertheim *et. al*. *Skills for resolving Conflict* (2nd ed) Eruditions Publications, Melbourne (2006)

resolution which fails, there can be an added layer of mistrust and increased misapprehension by each party as to what will happen next. At this time decisions are made by each party which will then determine the nature of the dispute and the steps in resolution or recourse. This is the fork in the road where parties turn to advisors outside their camp to tell them why they are right and what their legal rights are[12].

The legal process may at this time, begin with the usual reshaping of the issues and gathering of the evidence. This stage will usually be some time from the initial events which gave rise to the dispute and will often involve some sanctioned discovery of relevant material by one party. This may include access to another party's documents and other subpoenaed materials. Continuing with the legal process brings inevitable delays and leads inexorably to the pre-hearing weeks. At this time the issues have been scrutinised by each party for some time with opposing understanding. The resulting arguments are based on the separate interpretations and arguments formed by each party[13].

In the case of a multi-party dispute there will be multiple legal opinions, all to be set before the Court for a determinative judgement on each issue. At times there will be some agreement on issues, however, this will not be a identified until the matter proceeds in the Court process and the issues are addressed in the proceedings. Clearly there are two zones of understanding, the days immediately following an event and the days just prior to commencement of the hearing[14]. The time between these two zones inevitably increases the intensity of the dispute.

It is obviously important for business participants to identify the need to act within the days following the events leading to the dispute and to utilise this understanding of the matters with an awareness of the subjective nature of raw feelings and information[15]. These are the two elements not possible in the litigation model because of the adversarial nature of the process. We are therefore looking at the Third Generation of ADR Education which is independent of the law faculties of Australia[16]. The duty to learn about alternative dispute resolution has reached law students who are seen as the second generation of ADR education after the solicitors.[17]. Business students must be taught how to participate in the mediation process.

The processes of ADR include using the past and present relationship of all parties for them to identify a way forward. The legal process will involve firming up a specific stand on each of the issues, which is inevitably the opposite of the other parties involved. Herein lies a further twist to the threads. With multiple parties involved there will be many issues that take on a different petina within one dispute. There will inevitably be multiple disputes between different parties and their legal advisors who have been set the task of documenting, analysing and advising each party from primary instructions

By way of example, in scenarios involving a family held proprietary company where disputes arise from bequests by a deceased family shareholder, an accounting or business student who has not studied any company law would still be required to understand the need for reaching a solution without jeopardising the business entity even where the exact repercussions are not familiar. Any court action diminishes the value of the company and affects each family member

III. ADR Skills Education in Business Schools

Dispute resolution has been included in law faculties in Australia and in New Zealand for some time. Dispute resolution is considered a law subject because it has risen from the principles of common law and equity. Many business schools may offer dispute resolution as an option

12 L. S Coltri, *Alternative Dispute Resolution. A Conflict Diagnosis Approach* (2nd ed.) Prentice Hall, Sydney 2010, page 19.
13 Coltri, above n 12, 20.
14 Ibid 19.
15 Ibid.
16 Schmitz, above n 2, 16.
17 Ibid 17.

within postgraduate courses, with only a few offering it to undergraduate business students. The use of the best alternative to a negotiated agreement (BATNA)[18] and coaching participants in dispute resolution must be seen as business based and more appropriately delivered within the overlapping education environment. Laurie Coltri[19] has identified these zones of understanding. These zones describe the stages of dealing with a dispute[20]. The Zones identify the approach each party in a dispute will take by reference to a distorted perception of events and issues arising from escalated conflict. [21]

For an Australian business student today, tertiary subjects provide knowledge in business ethics and the technical aspects of business. Ethics and conduct within enterprise are mandatory subjects and it is submitted that dispute resolution techniques should form a part of the graduate attributes required of undergraduate business students. There are subjects provided in accounting, human resources and also in law as they relate to doing business and to instructing .legal professionals Students are expected to graduate with the skills needed to identify and address issues relating to all of these aspects. Legal education for business students is limited to the creation and managing of relationships. Relationships of employment, service, products and advice are addressed broadly. Students are expected to understand binding obligations and legislative requirements in dealing with a business and with maintaining a place of business and staff, however, to date Australian business students have only been presented with one form of dispute resolution attached to these obligations. We provide instruction about the Australian legal system, contract and tort law, legislation and crime. Within the material presented there is identification of the adversarial process and the fact of alternative dispute resolution is presented. There is also an identification of the correct forum for seeking a remedy where a contract is breached, an injury is sustained or a statute breached

In many international dealings involving commercial activity there is usually some tailored mechanism[22] for dispute resolution, for example, those established through contractual provisions[23]. However where such provision is overlooked, the only suitable way to avoid jurisdiction dictated litigation will be private mediation or conciliation. All dispute resolution has the potential to succeed and the legal systems involved may be very divergent on many aspects of litigious process.

As technology advances and communication takes on abbreviated, mass audience and increasingly personal modes, the conflicts will become more complex, the issues more divergent and those issues will be seen through multiple perception filters[24]. Where once there may have been a breach of a term of a contract for supply, there may be a breach of three contracts leading to a domino effect, culminating in defamatory comments, property damage, breakdown of trust and confidence between parties, internal administration, even corporate governance failures, compliance inadequacies and potential business failure. Not to overstate the effects, there is a need for recognition that the future of business must involve methods of dealing with disputes which will allow the parties to manage the issues themselves either pre-emptively or within a process[25] they will feel empowered to participate in. The process is intended to allow the participants the opportunity of creating a way forward for the parties. This fundamental difference of process between the litigation based approach and the dispute resolution approach selection needs to be presented to students at the formative stage of their careers, not left to chance and good contract drafting at a future time.

18 Roger Fisher and William Ury Getting to Yes Business Books, London 1981 Page 45.
19 Coltri, above n 12, 20.
20 Ibid 21.
21 Ibid.
22 M.Sindler, ‘Current Perspectives on International Mediation and ADR’ Seminar presented 10 March 2011 Australian International Disputes Centre, Sydney.
23 Ibid.
24 Ibid.
25 Schmitz, above n 2.

Business students need to be exposed to the concepts and benefits of ADR in their different forms at undergraduate level. The dispute resolution subject would need to focus on the processes of ADR and to enable students to identify the key attributes of ADR and in particular, the mediation process. For students to gain the necessary skills to determine where ADR may benefit a business they will need to analyse and research the different methods and this would also build on the material delivered in introductory law subjects where, for example, a link can be made to the inclusion of a mediation clause in a contract. The learning objectives within the subject would then include identification of ADR methods other than mediation propelled by breakdown in the contract entirely[26] . It may be appropriate to appoint a conciliator to a particular contractual relationship, in the form of ongoing references that as issues arise, matters can be dealt with before they escalate to an identifiable breach of a condition of contract and multiple, ostensibly impassable, position based conflicts.

Where a mediation provision is included in a commercial agreement, parties are required to attend the mediation and take part in the process.. Mediation remains an event within the constraints of our system of law and as such commercial endeavors are more likely to be coloured by the concepts of ADR in some form. The case law in Australia has now begun to reflect the international trend in some jurisdictions for litigation about dispute resolution leaving mediators, parties and lawyers swimming in a relative sea of ambiguity[27]. Our business students require education in all aspects of the commercial environment to adequately deal with current practices As educators we ignore at our student's peril, the use of and the issues surrounding ADR and in particular, mediation

Parties involved in commercial transactions are more likely to require understanding about ADR than ever before[28] Commercial transactions will more often involve inclusion of ADR terms to be activated in the face of breaches and potential breaches of agreements. The duty of commercial parties to participate in mediation in good faith may be implied in the terms of the contract and in some cases a term may set out a requirement for parties to make 'diligent and good faith efforts to resolve all disputes in accordance with the provisions ... before either party commences mediation, legal action or the expert Resolution Process, as the case may be'[29] This judicial comment from the New South Wales Supreme Court presents an example of the requirement for disputing parties to attempt a mediated settlement prior to a court hearing[30] and the model of ADR utilised is determined either by the Court rules or may be determined by the Judge hearing the matter.

Most recent changes in court requirements is the Commonwealth Civil Dispute Resolution Act (Cth), passed 27 March 2011[31]. The legislation, once in effect, will require disputing parties to lodge a statement outlining "genuine steps" taken prior to filing any process to commence litigation. The steps are to remain broadly defined and may be as simple as notifying the other party of the issues that are, or may be, in dispute, and offering to discuss them, with a view to resolving the dispute.[32] This is reflected in amendments to the Civil Procedure Act 2005 (NSW)[33] which require parties to take "reasonable steps" to resolve, or at least narrow the issues in dispute before commencing proceedings.

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26 David Ardagh for Charles Sturt University, Skills of Conflict Resolution, HRM 545, Charles Sturt University Wagga Wagga 2012.

27 J R Coben and P N Thompson , (2006) Disputing Irony: A systemic look at litigation about mediation, *Harvard Negotiation Law Review* Spring; 43-154, page 144.

28 Cohen and Thompson above n 27, 144.

29 Justice Einstein, *Aiton v Transfield* [1999] NSWSC 996 (1 October 1999).

30 Spencer D (2001) "Mandatory mediation litigation begins in NSW," *ADR Bulletin*: Vol. 4: No. 4, Article 3. Available at: http://epublications.bond.edu.au/adr/vol4/iss4/3.

31 *Commonwealth Civil Dispute Resolution Act* 2011 (Cth).

32 A D'Amico and N Beresford-Wylie , Norton Rose Available at www.mondaq.com .

33 *Civil Procedure Act* 2005 (NSW).

IV. ADR Skills in Business

With all Australian jurisdictions requiring some level of dispute resolution other than litigation it is clear all business enterprise will be affected whether in the situation of conflict or in the creation of legal relationships, such as commercial contracts. The requirement for alternative dispute resolution may further be put to the scrutiny of the courts in determining disputes arising from the processes.

Where a dispute resolution clause is provided in a contract the courts have interpreted dispute resolution clauses broadly Chief Justice Gleeson (as he then was) identified that, 'where parties enter into a contract requiring mediation the clauses are to be read widely'[34]. Where there is no provision for dispute resolution in the terms of a contract the amendments in NSW may be read with the purpose of promoting real and meaningful attempts at dispute resolution outside the litigation model[35]. As for the new Commonwealth legislation there is a requirement for both parties to take 'genuine steps to resolve a dispute" and to then file a "genuine steps statement'[36], akin to a Legal Practitioner's statement as to "genuineness of claim" when filing to commence an action

There have been some form of ADR procedures in the United States since the 1970's[37] and an important model for ADR in the United States emerged from the Harvard Negotiation Project, founded in 1980 at the Harvard Law School under the supervision of Roscoe Pound[38]. The Project enunciated the core concepts of mediation and participant control and led to the establishment of The Program on Negotiation at Harvard which today has a strong focus on providing guidance to private enterprise with recent courses introduced to train corporate attorneys and company executives in the "techniques and perspectives of mediation"[39]. This is a clear example of the need for business graduates to have the ability to identify the most efficient means of dealing with conflict in commerce.

In 1999 Dany Ertel[40] described the emerging co-ordinated approach to negotiation, including disputes, being developed by certain corporations in the United States and Mexico.[41] Ertel observed how these corporations, rather than viewing each negotiation as a separate situation, identified successful dispute negotiation practices and formed negotiation protocols and training programs for staff.[42] Not only does the inclusion of dispute resolution processes in business improve negotiations it often improves business relationships also. Seeking "business-oriented solutions not constrained by conventional legal frameworks" can further transcend trans-jurisdictional issues.[43]

The judicature in the United States of America provides a disparate model of court process and judicial officers, however, this allows varied models of dispute resolution to evolve within each state. One such model is utilised in the District Court of New South Wales. The New South Wales District Court uses the Philadelphia Scheme which is named after a similar scheme

34 Chief Justice Gleeson , *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160.

35 *Interpretation Act* 1987 NSW.

36 *Commonwealth Civil Dispute Resolution Act* (Cth) 2011 s. 4(1A).

37 D. Stienstra, *ADR in the Federal District Courts: An Initial Report*, 2011 page 1.

38 Coltri, above n 12, 65.

39 The Tridant Guardian 'Mediation Trumps Litigation', Guardian Media online, 10 April 2011 21.29.

40 Dany Ertel , 'Turning Negotiation into Corporate Capability', *Harvard Business Review*, May-June 1999 page 55.

41 Ibid .

42 Grupo Financiero Serfin, a Large Mexican Bank, introduced a requirement that negotiation considerations be incorporated into the initial financial analysis of each loan application .

43 D Peters 'Can we Talk? Overcoming Barriers to Mediating Private Transborder Commercial Disputes in the Americas', (2008) *Vanderbilt Journal of Transnational Law* Vol 41, Number 5 November 2008 Page 1298.

in Philadelphia, Pennsylvania[44]. This scheme uses a number of arbitrators who are rostered to attend court where support services are provided[45]. The number of matters actually sent to arbitrators has decreased since inception in 2005[46] which indicates the increase in use of alternative methods of resolution, as much as an increase in the unsuitability of matters for arbitration, leading to litigation.

Current trends in specific states within America show an increase in cases settled by mediation. An example of this is seen in the statistics for Alternative Dispute Resolution in the United States District Court, Eastern District of New York, for the year to 30 June 2010. Of the 140 cases referred to mediation, 54 cases were either reported settled as a result of mediation or returned to the assigned Judge.[47] This report noted that frequently, cases may settle after they had been returned to the court[48] and also noted the demonstrated effectiveness of alternative dispute resolution options. The report noted these factors, along with the increase in case filings, strongly suggested greater consideration of mediation for constructively resolving civil cases was needed.[49] This use of the mediation process at District Court level reflects the Australian experience and identifies the extent to which methods of resolving disputes within government established systems has taken on aspects of private negotiation concepts where conflict exists[50]. In 2011 the Sydney District Court referred 786 matters to mediation[51]. Of those 670 were referred to private mediation and 116 to court provided mediation with approximately 52% of the matters referred to court provided mediation settling[52].

Where many states in the United States of America have introduced a level of conflict resolution[53] preliminary to litigation, the more homogenous example seen in the United Kingdom rests upon Practice Rules which have been changed to incorporate a professional obligation for a legal practitioner to advise a client about the possibility of mediation[54]. For the European Union nations the process of introducing some form of alternative dispute resolution is moving slowly, however, the discussions are well underway. The focus is on the use of mutually agreed methods for inter-nation disputes. Each member nation has, to a varying degree, a process of non-adversarial dispute resolution. Where a civil system of law is in place the concepts are more familiar and the processes already incorporate what we recognise as an inquisitorial judicature Even here the participants are now prevailed upon to resolve disputes without recourse to the adversarial system. The models for dispute resolution have been built within law schools and are commonly implemented within many of the world's legal systems. Most particularly, for the purposes of this paper, are the common law systems where dispute resolution process is seen within the judicature[55] itself and within certain government departments[56]. The Australian

44 NSW Department of the Attorney General and Justice, The District Court of New South Wales Annual Review 2009 (2010).
45 Ibid.
46 Ibid.
47 G P Lepp , *et. al.* United States District Court Eastern District of New York Mediation Report July 1, 2009 – June 30, *Alternative Dispute Resolution* (2010). Page 1
48 Ibid.
49 Ibid 8.
50 NSW Department of the Attorney General and Justice above n. 44.
51 Ibid.
52 Ibid.
53 D Stienstra ADR in the Federal District Courts: An Initial Report, Federal Judicial Centre (2011) www.uscourts.gov page 6.
54 United Kingdom Ministry of Justice, Practice Direction 8, UK Ministry of Justice web page www.justice.gov.uk.
55 *Civil Dispute Resolution Act 2011*(Cth) s 6.
56 ATO (2011) Dispute Management Plan is being developed in accordance with National Alternative Dispute Resolution Advisory Group recommendations, Minutes of Dispute Resolution Meeting June 2011 ato.gov.au .

Community Justice programs[57] are but one example of the alternative dispute resolution process in use in a local government setting. Slowly the state and federal executive governments have introduced tailored dispute resolution processes within departments and tribunals. The concept of alternative dispute resolution has moved from the realms of neighbours in conflict to family disputes to the current litigation models supported by legislation.

In Australia, Court processes now usually require an attempt at alternative dispute resolution, as noted previously[58] . While the statistics as to success of mediation within the courts of each state and territory are varied, the requirement is common and business disputants must be prepared to attempt mediation wherever considered appropriate by the Registrars within the courts of Australia.[59].. There are also very strong indicators the participants will choose a private mediator at the preliminary hearing stage of referral by the Court[60]. This fact alone indicates the need for business students intending to participate in business to appreciate the dramatic difference in approach the judicature takes to commercial matters in the current era of self-protection and keeping a look out for one's own well-being[61].

V. Conclusion

The negotiators of future business relationships need to be prepared for the use of ADR. Training is required in dispute resolution methods and participation, including pre-emptive methods prior to engaging in agreements to trade or provide services. Law faculties provide optional tutoring in the methods of mediation as well as in the theory for future lawyers. Many of the faculties teaching non-law students have optional dispute resolution subjects which are quite often at post graduate level[62]. The imbalance must be addressed in order that business students of tomorrow are prepared, early in their career, to confront the very real issue of conflict, to prepare for this and, in the event of an actual conflict, to have the courage to deal with it. These future business participants must be empowered to conduct business in a frame which includes dispute resolution methods outside litigation. Business today requires a skills set to deal with conflict in business whether by negotiating in accordance with prior agreed methods, or which may be presented to the other party at the very time of dispute. All current undergraduate business courses should include an ADR subject. Where our students are unprepared to deal with disputes once they are in business we set them up to fail. The spectre of costly litigation hangs over all of them in the post global economic crisis and that fear must surely eat at the very core of commercial decision making practices.[63]

57 In NSW the Community Justice Centres assisted parties to reach an agreement in 1,363 of the 1,731 mediations held during 2011, Attorney General & Justice 2011 Community Justice Centres Year in Review 2010-2011.

58 NSW Department of the Attorney General and Justice above n 44.

59 *Civil Dispute Resolution Act 2011* (Cth) and Spencer, above n 30.

60 Attorney General's Department of NSW In NSW District Court, of 592 matter referred to mediation in 2009, 458 were referred to private mediation and 134 to court provided mediation: NSW Department of the Attorney General and Justice (2010) The District Court of New South Wales Annual Review 2009 and in 2011 786 referred with 116 court appointed.

61 *Civil Liability Act 2002* (NSW) and *Civil Liability Amendment (Personal Responsibility) Act 2003* (NSW): requirements promoting personal responsibility in relation to individuals claiming civil wrongs.

62 David Ardagh for Charles Sturt University, above n 26.

63 Amanda Carrigan 'Dispute Resolution Skills are essential for Business Students' (Paper presented at the Australian Law Teachers Association Conference 4-6 July 2011).