

Med-Arb, Arb-Med, Neg-Arb and ODR

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ADR processes such as mediation and arbitration are noted for their variety, both of form and procedure. Hybrids, such as Med-Arb and Arb-Med, also offer variety but are subject to significant criticisms. If the criticisms can be overcome they could offer significant advantages, even though the mediation phase may be circumscribed. Neg-Arb also has something to offer. ODR is here and needs to be recognized as having some advantages over face-to-face processes, despite the limitations of online communication.

The hallmark of arbitration, mediation and other ADR processes is self-determination, also called party autonomy. Whether the process is directed at an agreed or an imposed outcome, the parties determine for themselves to embark on their chosen process. Thereafter their degree of control will differ depending on the process chosen².

No wonder that ADR offers a rich variety of processes designed to suit all types of disputes and all types of disputants.

The processes I would like to consider in this paper are known as hybrids because they combine elements of otherwise self-contained processes. Let us first examine them in their independent form.

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² This paper does not address the extent (if any) to which the principle of self-determination may be said to be eroded where courts order arbitration or mediation over the objection of one or more of the parties.

There have been numerous attempts to define **mediation**. All involve one or more neutral persons trying to help the disputants reach their own uncoerced agreement. There are many ways in which this may be done and much argument about the “right” way and the “wrong” way.

The mediator might take an **evaluative** approach, expressing opinions as to who is right or wrong and who is likely to win or lose if the dispute were litigated or arbitrated. The aim is primarily to settle the dispute and, if not, to improve understanding of the issues and to narrow them.

The mediator might take an **interests-based** approach, seeking to clarify the interests of the parties that underlie their respective positions, so as to explore possible options for agreement that would satisfy interests on both sides. When employed in the context of a dispute, the aim is also primarily to settle the dispute but in a way which might enable the parties to deal better with differences (with each other or others) in the future.

The mediator might take the **transformative** approach, which treats conflict as an opportunity for moral growth and transformation, focusing on enhancing the parties’ relationship by empowering them to handle their own situations better and to recognize each other’s concerns. Success in transformative mediation means empowering the parties to deal better with differences in future, even though today’s dispute may remain unresolved.³

³ According to the leading proponents of transformative mediation, Robert A. Baruch Bush and Joseph P. Folger, authors of *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition*(1994), Jossey Bass, the empowerment and recognition gained by the parties in transformative mediation often do enable them to achieve a mutually agreeable outcome, whereas (as Bush and Folger see it) the settlement-oriented mediation process followed by evaluative and interests-based

It follows from the variety of approaches that choice of mediator is a question of “horses for courses” and that there is no single correct approach suitable for all cases and all disputants.

Personally, I tend to adopt the interests-based approach. I prefer to avoid being evaluative for two reasons: I don’t have the stature to lend weight to my opinions and I worry that if one party disagrees, I will no longer appear impartial and that this will reduce my effectiveness. In one co-mediation with my son Ashley (an IAMA accredited mediator), we both thought the answer was blindingly obvious. When we raised it in caucus, we were given an equally blindingly good reason why that answer would not work! Fortunately we had raised it in the form of a question: “*why don’t you do this?*” So when the devastating answer came, we could continue to function as impartial neutrals.

It is particularly pleasing to me that the recently adopted IAMA Competency Standards for Accredited Mediators⁴ focus on the administrative, procedural, facilitation and communication skills required of a competent mediator, rather than stipulating any particular process to be followed. This contrasts with the requirement I encountered in 1995, when seeking Law Society of NSW Specialist Accreditation as a Mediator, to write an agenda on a whiteboard after summarizing the parties’ opening statements!

Moving from style to procedure, again one finds variety. Some mediators move almost immediately into separate private meetings (caucuses) with the parties and keep them separate while shuttling to and fro’. Some virtually never hold a caucus, preferring to keep the parties together.

mediators ignores relationship issues and may not lead to empowerment and recognition.

⁴ Adopted by IAMA National Council in May 2005.

I like to hold a caucus at least once with each side either before or during the mediation session(s) because until I have done so, I cannot be sure I understand all their interests that any agreement would need to meet. Also, sometimes it may be better for the parties to vent about each other to the mediator than to each other.

Because mediation of a dispute is usually an attempt to settle it, communication in the course of and for the purpose of the mediation is without prejudice to the positions of the parties. Hence evidence of those communications is inadmissible in later proceedings over the same dispute. Either by legislation or stipulation, information conveyed in the mediation is also confidential, particularly information conveyed to the mediator in caucus, which the mediator may not disclose or use without the consent of the party disclosing it.

Thus one important feature of interests-based mediation is that parties are encouraged to disclose their innermost confidences to the mediator, secure in the knowledge that the mediator may not use or disclose them and that the mediator's role is simply to help them seek an agreed outcome.

This has important implications for our consideration of the hybrid processes to which we shall come shortly.

Arbitration likewise has many forms but (unless ordered by a court) necessarily involves the parties agreeing to have their dispute resolved by a person or persons chosen by them (or by a process chosen by them) rendering what is usually a binding⁵, enforceable decision which may be set aside by the courts only on very narrow grounds.

Some of my favourite American arbitration processes are '**Hi-Lo**' arbitration, in which the parties set limits on the outcome so as to contain possible arbitrator excess, '**Baseball**' or '**Final Offer**' arbitration, in which the arbitrator must choose between the

⁵ One form of arbitration is non-binding, in which case the neutral's decision is advisory only.

parties' best monetary offers, and '**Night Baseball**' arbitration, in which the arbitrator is unaware of the parties' best offers before making a decision and must then make the award to the party whose best offer turns out to be closest to the arbitrator's decision.

The supervision which the courts may exercise imposes important constraints on the arbitrator's conduct of the proceedings. For example, the *Commercial Arbitration Act (1984) NSW* requires any question arising to be determined by law unless the parties agree otherwise - s.22(1). The award may be set aside where there has been misconduct by the arbitrator or where the award has been improperly procured – s.42(1). An arbitrator may be removed for misconduct or incompetence or where undue influence has been exercised in relation to the arbitrator – s.44. 'Misconduct' includes corruption, fraud, partiality, bias and a breach of the rules of natural justice – s.4(1)⁶. The last three are particularly relevant to our consideration of hybrids.

In international commercial arbitration, awards may be set aside by the courts in the country in which the arbitration takes place and enforcement may be refused wherever the award was made if, among other things, '*the arbitral procedure was not in accord with the agreement of the parties*'⁷.

Now let us briefly examine two of the hybrids, Med-Arb and Arb-Med.

In one form of **Med-Arb**, the parties agree in advance that (either in any disputes that may arise between them or in a particular dispute that has arisen) a neutral will act first as mediator and subsequently, if needed, as arbitrator. If agreement is reached in mediation, the parties sign a binding settlement agreement or the neutral may, by consent, convert

⁶ For discussion of the term 'misconduct' see e.g. *London Export Corp. Limited v. Jubilee Coffee Roasting Co. Limited* [1958] 1 WLR 27 and *Sea Containers Ltd. V. ICI Pty. Ltd.* [2002] NSWCA 84.

⁷ UNCITRAL Model Law, Articles 34(2)(a)(iii) and 36(a)(iv) and New York Convention, Article V(1)(d).

their settlement into an arbitral award. If the mediation does not produce agreement on all issues, the mediator becomes arbitrator and hears and determines the unresolved issues. The award may be non-binding or binding depending upon the agreement entered into by the disputants.

Another form involves different neutrals fulfilling the roles of mediator and arbitrator. The feature that has attracted the most criticism (to which I shall turn shortly) is having both roles played by the same person.

There are several varieties of Med-Arb, such as **Non-Binding Med-Arb** (rarely used because there is no certainty of resolving the dispute); **Med-Arb Show Cause**, in which the award is merely tentative, and the parties are given an opportunity to show cause as to why the dispute should not be so resolved; and **Medaloa (Mediation and Last-Offer** [aka Baseball] **Arbitration**) in which the arbitrator does not reach an independent decision on the merits but instead must choose between the parties' final offers.

Arb-Med

This is the reverse of Med-Arb. The arbitrator's award is sealed and is not revealed while the arbitrator proceeds to conduct a mediation. If the mediation is successful, the settlement agreement between the parties governs the resolution of the dispute and the award is never unsealed. However, if mediation fails to settle all issues, the arbitrator-mediator will unseal the arbitral award and deliver it to the parties to resolve the dispute.

Arb-Med has been used in South African union management relations in the auto and steel industries and in the United States in police and firefighter arbitrations.

Arb-Med has been proposed for use in the United States in the airline industry. The current system uses Med-Arb and the average negotiation period (including mediation) to renew a standard airline contract is more than a year. To negotiate an initial contract takes over 2½ years. It has been suggested that Arb-Med would remedy this situation because there would be a rapid arbitration with a final and binding decision, to be followed by

mediation during a finite time period, which may be shortened if the arbitrator serves as the mediator⁸.

Before turning to the many criticisms of these processes, let us consider their advantages.

Advantages of these hybrids

First, both Med-Arb and Arb-Med ensure certainty that, either by agreement or by award, the dispute will be resolved. The parties are at liberty to put a time frame on that in their Med-Arb or Arb-Med agreement. If the parties use only mediation, they run the risk of not settling all the issues in dispute. If they use only arbitration, they know that all the issues will be resolved but they deprive themselves of an opportunity to reach their own settlement agreement.

Second, where the neutral has the skills necessary to conduct both processes, there is a saving in both time and money in combining them, since the neutral is already “up to speed” when changing from one role to another and may gain insights during the mediation phase that could contribute to a more appropriate award.

Third, in the mediation phase of these hybrids, any “suggestions” by the mediator may carry more weight than in mediation alone: in Med-Arb the mediator will have the final say as arbitrator if the dispute is unresolved and in Arb-Med the parties might take the mediator’s suggestions as providing a glimpse of the already sealed award.

One study reported in 2002 in the Journal of Applied Psychology examined the impact of Med-Arb and Arb-Med on various dispute outcomes involving three disputant structures (individual v. individual, individual v. team, and team v. team). The authors found that disputants in the Arb-Med procedure settled in the mediation phase more frequently and

⁸ Zack AM: *The Quest For Finality In Airline Disputes: A Case for Arb-Med*, Dispute Resolution Journal, Nov 2003-Jan 2004.

achieved settlements of higher joint benefit than did disputants in the Med-Arb procedure. They concluded that Arb-Med may have broader applicability than originally imagined⁹.

Another study investigated the effects of these hybrid procedures on parties' perceptions of procedural and distributive fairness.

In the first experiment, three variables were manipulated: procedure (Med-Arb v. Arb-Med), concession making during the mediation phase (concessions v. no concessions), and role (labor v. management). Participants viewed Med-Arb as fairer than Arb-Med.

In the second experiment, the factors manipulated were third-party procedure (Med-Arb v. Arb-Med), whether confidential information was revealed during mediation (confidential information revealed v. not revealed), and arbitration outcomes (winning v. losing). The results suggested that when no confidential information was revealed, Med-Arb was seen as a significantly fairer procedure than Arb-Med, but if confidential information was revealed, then both procedures were seen as equally fair. This conclusion may come as a surprise to mediators. Not surprisingly however, winning the dispute increased fairness ratings.¹⁰

Criticisms of Arb-Med

The most frequently made criticism of Arb-Med is that, if the dispute is settled in the mediation phase, the possibly considerable time and money spent on the preceding arbitration phase will have been wasted.

⁹ Conlon DE, Moon H, Ng KY: *Putting the cart before the horse: The benefits of arbitrating before mediating*, Journal of Applied Psychology. 2002 Oct Vol 87(5) 978-984.

¹⁰ Ross WH, Brantmeier C, Ciriacks T: *The impact of hybrid dispute-resolution procedures on constituent fairness judgments*, Journal of Applied Social Psychology, 2002, 32.

Another criticism of Arb-Med is that any suggestions by the mediator in the mediation phase may be taken as hints as to the content of the already sealed arbitral award, thus inappropriately coercing the parties into settlement.

However, Arb-Med does have the advantage that it avoids the criticisms of the Med-Arb process mentioned below.

Criticisms of Med-Arb

Med-Arb is the most heavily criticized of these two hybrids. Criticisms include:

- the parties are likely to be inhibited in their discussions with the mediator (including letting the mediator know what settlement proposals they are likely to accept) if they know that the mediator might be called upon to act as arbitrator in the same dispute;¹¹
- inevitably, the issue of impartiality arises where the parties have refused to accept a compromise suggested by the med-arbiter in the previous mediation process. A neutral who mediates and then assumes the role of arbitrator may be biased by what has been conveyed to him or her informally and confidentially in the mediation process.¹² Attempts to counter this particular criticism are unpersuasive¹³;

¹¹ Redfern & Hunter, *Law and Practice of International Commercial Arbitration* 4th Ed. 1-82.

¹² Jones D, *Chartered Institute of Arbitrators (Australian Branch) Entry Course Materials on Australian Domestic Commercial Arbitration*, 2002 p.32.

¹³ Proponents of Med-Arb say a competent med-arbiter can handle confidential information in the same way as a competent arbitrator can exclude from consideration evidence ruled inadmissible. This does not address the possible appearance of bias nor the important difference between the two

- mediators often try to persuade a party to make or accept an offer. In the context of Med-Arb, this may be taken as pressure, in the form of an implied threat to make an adverse decision as arbitrator if the party is perceived as unreasonable during the mediation phase; and
- the disputants may use the mediation phase as preparation for a possible arbitration, thereby making it more probable that the dispute will reach arbitration.

Is it possible to overcome the criticisms of Med-Arb?

Under section 27 of the *Commercial Arbitration Act 1984 (NSW)*, parties to an arbitration agreement may authorise an arbitrator to act as a mediator between them before or after proceeding to arbitration. Unless the parties otherwise agree in writing, an arbitrator is bound by the rules of natural justice when seeking a settlement by mediation. If the dispute is not settled in the mediation phase, no objection shall be taken to the conduct by the arbitrator of the subsequent arbitration proceedings solely on the ground that the arbitrator had previously acted as mediator in the dispute.

As numerous commentators have pointed out, this completely ignores the potential impact of bias on the process.¹⁴

Astor and Chinkin point to the need for an arbitrator in these circumstances to be extremely careful not to exhibit partiality and not to act in any way contrary to the rules of natural justice or to the judicial nature of the arbitrator's function:

situations: all parties in arbitration are aware of the evidence that has been ruled inadmissible while in Med-Arb only one party knows what confidential information it has confided in the med-arbiter.

¹⁴ Jones (*supra*), p.33.

“An arbitrator when acting as mediator must therefore be careful not to express any definite opinion as to an appropriate outcome as that might create an impression of bias in a subsequent arbitration”.¹⁵

Being careful may not be enough. One of the fundamental principles of natural justice, nowadays called procedural fairness, is that a party has a right to know the case it has to meet and to be given an opportunity to respond to it. The natural justice requirement in section 27 precludes any private caucus between the arbitrator when acting as mediator and a party, unless the med-arbiter, when acting later as arbitrator, discloses to the previously absent party everything said in the private session which could affect that party’s case in the arbitration phase.

The prospect of such disclosure being made by the mediator-turned-arbitrator would, of course, have a chilling effect on the freedom with which parties would be likely to make disclosures in private session to the mediator and, in any event, unless the disclosing party agrees, this may not be done without breach of contract and breach of confidence.

Further, unless the party excluded from the private session is later informed of everything that transpired, it will never know whether or not the mediator-turned-arbitrator may be biased in the subsequent arbitration, despite any assurances that may be given. The difficulty of proving bias, absent anything apparent in the conduct of the arbitration phase or on the face of the award, could operate as a powerful disincentive to agree to a Med-Arb process involving private caucus.

Thus the Act as presently worded appears to be fatal to any form of mediation which involves private caucus.

While that may not render effective mediation impossible, it certainly emasculates it to such an extent as to deprive the parties of the opportunity, in the most economical and

¹⁵ Astor H and Chinkin CH, *Dispute Resolution in Australia*, 1992 pp.145-6.

time-efficient way, of combining the most valuable features of mediation with the certainty of resolution by arbitration.

It is thus apparent that the mediation phase in any Med-Arb to which the *Commercial Arbitration Act* applies must be conducted entirely in open session, so that the parties are privy to all communications. The mediator must still eschew the expression of opinions which might later be held indicative of bias. For interests-based mediators, this comes naturally but could inhibit any rights-based mediators who are not also experienced as arbitrators.

Although the *Commercial Arbitration Act* does not apply to all disputes, the concerns I have identified remain. Possible ways of avoiding the difficulties with Med-Arb while retaining private caucus in the mediation phase might include:

- having different people conduct the two different phases, while sitting together in the open sessions, so that the person who may later officiate as arbitrator is brought up to speed but is not exposed to communications in caucus which could give rise to a perception of bias, while the person mediating has available the full range of mediation techniques conducive to settlement. While providing some time saving and ensuring certainty of resolution, there is of course the additional cost of having a second person present;
- giving the parties an opportunity, after the mediation phase, to choose someone else to arbitrate. This raises the possibility that the economy and efficiency sought to be secured by the process will not be attained and does not adequately address the procedural fairness requirement of the Act in commercial disputes if the parties choose to continue with the same person;
- in commercial disputes the parties could agree at the outset (as permitted by the Act) that the rules of natural justice will not apply in the mediation phase and that no objection of bias or otherwise will later be made to the arbitrator's

conduct of the arbitration arising out of anything that occurred during the mediation phase¹⁶; and

- the Med-Arb agreement could provide for the arbitrator, early in the arbitration phase, to provide a report to the parties setting out all the rebuttable facts and points of law as then understood by the arbitrator, giving the parties an opportunity to object to the admissibility of any of the facts. Admitted facts would provide a starting point for the arbitration phase. This approach could reduce the risk of the arbitrator relying on confidential information and enable the desired economies to be realized.

Despite the great difficulties inherent in the attempt to combine these two totally different processes, some success has been reported. Med-Arb has long been used in the United States in labour and family disputes, including post-decree disputes concerning children. Research conducted in Canada in 2000 into the use of Med-Arb in Crown employee grievances in Ontario¹⁷ came to some interesting and controversial conclusions:

- the success of Med-Arb in solving labour disputes is highly dependent on the med-arbiter, whose skill and experience are essential;
- many critics of Med-Arb are actually expressing concerns about possible abuse of the process by the med-arbiter, rather than about the process itself;
- experienced med-arbiters are able to move from one role to the other and ensure that arbitration is not adversely affected by information learned during mediation;

¹⁶ We can all make up our own minds as to how likely it is that anyone would agree to this!

¹⁷ Telford ME, *Med-arb: a viable dispute resolution alternative*, Industrial Relations Centre, 2000.

- med-arbiters are careful not to go beyond their role as facilitators and the possibility of arbitration is not used as a threat during mediation, although med-arbiters do refer at times to the outcome of similar cases;
- Med-Arb works best when the parties choose the process voluntarily and when they choose the med-arbiter with whom they are comfortable, thus creating conditions most conducive to the success of mediation; and
- the success of Med-Arb is evident in the fact that very few cases progressed to the arbitration stage.

It was concluded that the research fails to support the usual criticisms. This is unsurprising since the research surveyed med-arbiters rather than disputants or their lawyers!

Examples of Neg-Arb

Turning to Australia, we find two examples of **Neg-Arb**, one from the Chartered Institute of Arbitrators and one from IAMA.

The Australian Branch of the Chartered Institute of Arbitrators has devised a process called **Chartered Arbitration**, in which a Chartered Arbitrator acts as an intermediary under s.27(1)(b) of the *Commercial Arbitration Act* to facilitate direct negotiations between the parties and subsequently arbitrates if no settlement is reached. During the negotiation phase the issues are listed and clarified, ensuring there is no misunderstanding between the parties as to the precise nature and extent of their dispute, a process which alone may simplify negotiations and bring matters to a conclusion. In an attempt to avoid the perils of Med-Arb in the commercial context, the Chartered Arbitrator is expressly not authorized to act as conciliator or mediator and is at all times bound by the rules of natural justice.

IAMA is, I apprehend, in the course of adopting Ian Bailey SC's and Tony Makin's remarkably efficient and cost-effective **Concise Dispute Resolution** process for small business disputes of less than \$100,000, in which there are three negotiation phases. Having regard to 'statutory restrictions', the process is 'avowedly not arbitration'.

The first negotiation phase, following an exchange of written submissions, takes place at an initial teleconference between the Resolver (an IAMA graded arbitrator) and the parties, in which the Resolver attempts to resolve the dispute by a process of 'assisted negotiation'.

If there is no resolution at the teleconference, the parties may agree that the Resolver may determine the dispute on the documents as expert, not as arbitrator, or they may proceed to a one-day conference.

The second negotiation phase is an 'open negotiation' being the initial hour of the one-day conference. The third is an 'assisted negotiation' phase, being the next two hours, during which each party is given a brief period to explain its case¹⁸.

During the one-day conference, the Resolver may use any procedure considered appropriate, subject to the maintenance of procedural fairness (which, as we have seen, effectively precludes private caucus). If no agreement is reached, the Resolver proceeds to hear the dispute and subsequently render a determination, with brief reasons if requested.

Although it may be thought that the expression 'assisted negotiation' distinguishes this part of the Concise Dispute Resolution process from mediation, that very expression has

¹⁸ Since both the 'open' and 'assisted' negotiation phases are assisted by the Resolver, the difference between the two appears to be that no suggestions for settlement are made by the Resolver in the 'open' phase.

been used as a definition of mediation¹⁹ (incompletely, since it embraces partisan as well as neutral assistance).

Accordingly, it needs to be recognized that the Resolver is acting as mediator (albeit in a way which limits what can be done to ascertain the parties' underlying interests) when seeking, in the presence of the disputants, to assist them to resolve their dispute by agreement. The questions arise:

- how forthcoming are disputants likely to be in the mediation phase when they know the Resolver may eventually make a determination? and
- will they tend to regard the mediation phase as a warm-up for the determination phase by seeking to persuade the Resolver that their position is correct?

One way to discourage disputants from adopting and sticking to possibly extreme positions during the mediation phase, in anticipation of persuading the Resolver during the determination phase to accept their case rather than their opponent's, may be to provide, at the outset, for the possibility that the determination phase will be **Last Offer Arbitration**. Under such a regime, the disputants may be expected, during the mediation phase, to attempt to show the Resolver just how reasonable they are by comparison with their opponent, so as to persuade the Resolver to choose their final offer, rather than that of their opponent, in the determination phase.

Although mediators will regret the absence of opportunities to ascertain privately the underlying interests of the parties (often unascertainable in open session), the possibility of offering, within the Concise Dispute Resolution process, the option of open session **Mediation and Last Offer Arbitration (“MEDALOA”)** may provide the benefits of self-determination, certainty, economy and procedural fairness while attracting neither the criticisms associated with Med-Arb nor the possibly unnecessary costs associated

¹⁹ See Acland AF, *A Sudden Outbreak of Common Sense - Managing Conflict Through Mediation*, London, Hutchison Business Books Limited, 1990.

with Arb-Med. Further, the decision-making process may itself be shortened since the Resolver would not be required to determine the dispute on the merits.

Online Dispute Resolution

Turning briefly to ODR, a colleague experienced in ‘look and sniff’ arbitration wondered whether ODR had something to do with odour, raising the possibility that ODR stands for Olfactory Dispute Resolution. That topic merits a paper on its own.

For the moment let me say that over 1,000,000 small value consumer disputes arising out of eBay transactions have been resolved through online negotiation and mediation and, as of March this year, over 7000 domain name disputes have been resolved (partially online) by the World Intellectual Property Organization (WIPO) alone, only one of the agencies offering dispute resolution services in this field. Others include the National Arbitration Forum, which acquired online DR technology from eResolution when it went into bankruptcy.

WIPO has recently launched a new tool, known as the WIPO Electronic Case Facility (ECAF), which parties may elect to use to manage disputes filed under the WIPO Mediation, Arbitration and Expedited Rules.²⁰ Parties may submit communications – documents of hundreds of pages, recorded witness statements, etc. – electronically into a secure online docket, which they and other parties may view and search at any time from any location through the Internet.

Closer to home, the Federal Court of Australia has introduced eCourt, a similar online filing and communication facility particularly suitable for complex cases with voluminous documentation.²¹ The eCourt Forum enables the Court to receive submissions and affidavit evidence and make orders as if the parties were in a normal courtroom.

²⁰ See: http://www.wipo.int/edocs/prdocs/en/2005/wipo_upd_2005_257.html.

²¹ See: http://www.fedcourt.gov.au/ecourt/ecourt_slide.html.

There is much debate on the pros and cons of online mediation and whether anything short of face to face communication can possibly work as well, having regard to the difficulties in communicating online. I have myself contributed to that debate and do not intend to do so here.²²

Suffice it to say that ODR does have some advantages over face to face DR, not merely in time and convenience. The ODR mediation facility I have recently introduced on my website has a Brainstorming Room. Parties and their representatives must log into that room under the uniform description ‘Brainstormer’ thus posting their ideas for possible settlement anonymously. Not only does this mechanism enable more ideas to be generated faster, it also compels disinterested evaluation, since the provenance of all ideas posted is unknown. These are two significant advantages over holding brainstorming sessions face to face.

My online mediation facility offers an open room where all participants may communicate, as well as a series of private rooms for caucusing. My online arbitration facility does not have separate rooms for private meetings between a party and the arbitrator. All proceedings in which the arbitrator participates are open to all parties and their representatives. Both the mediation and arbitration facilities offer private rooms for the parties and their own representatives.

Time will tell whether these processes are much used before being overtaken by TV-quality web-based teleconferencing that may combine the best of online with the best of face to face.

²² See “How to Resolve Disputes Online”, NSW Law Society Journal, October 2002 and the session on ODR at the IAMA 30th Anniversary Conference, Canberra 2005.

Conclusion

In considering today the challenges of mediation, arbitration, hybrid processes and online forms of dispute resolution, we are embarking on a journey through change that will seem very quaint to future generations looking back. Let us hope some of us, at least, are able to take the changes in our stride and appreciate their benefits.