WHAT GOOD IS EVALUATION?

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> *"Early neutral evaluation is a relatively rarely used ADR tool. It involves the appointment of a neutral expert, often a lawyer or an industry expert, to assess the parties' submissions, and the evidence which may be available. The expert will express an opinion which, whilst not binding on the parties, is likely to be influential. A party whose case is supported by the expert may be inclined to become entrenched in his view, and his opponent may simply not agree with the expert. This is an elective form of ADR. It is not binding, and its perceived disadvantages are many, some would say, compared to other forms of ADR."*[2]

Should we be selling early neutral evaluation?

1. With apologies to George Orwell, there is an element in the discourse of dispute resolution these days that views all things litigation[3] as being inherently bad, and all things ADR as being inherently good. I wonder about that. In particular I wonder about the wisdom of assuming that any and all ADR techniques are effective and cost efficient (at least, that they are inherently more effective and cost efficient than litigation; or that they are in some way laudable, just because they are not techniques of litigation).

2. The focus of this paper is Early Neutral Evaluation. As a group of people having a common interest in selling services for the resolution of disputes outside of the courts we should ask: when we say we offer early neutral evaluation, what are we really selling?

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[1] FAMINZ (Arbitration), Member, AMINZ Panel of Arbitrators. These notes prepared for AMINZ Breakfast meeting 12 July 2011. Not to be quoted without permission please. I gratefully acknowledge the assistance of Mr Benedict Tompkins for his research on the topics dealt with in this paper.

[2] N Broadbent, *'Alternative Dispute Resolution'* Legal Information Management 2009, (3), 195 – 198.

[3] I am using the word 'litigation' in this paper as broad reference to court procedures and the things that happen in courts en route to a formal decision by a Judge determining the issues.

Should we take care about the situations in which we offer it? Should we be selling it at all?[4]

Early Neutral Evaluation: what are we talking about?

3. Here is a description of early neutral evaluation which I think most would accept as including the important elements:

> *"Early Neutral evaluation is a consensual, confidential and relatively informal process in which the parties to a dispute use the services of an independent, neutral evaluator to provide a non-binding evaluation of the facts, evidence and legal merits of the matters in dispute."*[5]

4. Looking at some of these elements:

4.1. ***'Early'*:** The idea that one should conduct this kind of process at an early stage is pragmatic, but not of the essence to the technique. Indeed all that the process needs to be 'earlier' than is the date on which a final decision of the matters at issue is given by a court. There is no reason why a non-binding neutral evaluation could not be carried out on the eve of a court hearing, or even during a hearing in court case. Of course it will usually make better economic sense to carry out an evaluation sooner rather than later, but I suggest there are pitfalls in going to an evaluator too early. The most obvious is that the effectiveness of the technique as an ADR tool depends on the credibility of the evaluator and the content of the evaluation. Nothing much is likely to be achieved if the party that is disappointed by the evaluation can say that the evaluator simply did not understand the facts properly, or had not seen all the relevant documents, etc.

[44] I make no apology for being provocative in order to stimulate discussion.
[5] The NZ Building Disputes Tribunal see www.buildingdisputestribunal.c.nz/Early+neutral+evaluation.

4.2. **Neutrality (*'independent, neutral evaluator'*):** I suggest this element is essential. The whole purpose of the technique is to give the problem to someone whom all of the parties in dispute will accept as being in a position to express a view about the problem fairly and independently. Of course one can envisage a case in which the evaluator has links with one or other of the parties but is nonetheless seen as having such a high level of expertise and credibility that she should evaluate the matter notwithstanding. That would be unusual. In any event it would be very unwise for the evaluator to proceed without making full disclosure of any conflicts of interest or other potentially disqualifying circumstances. Furthermore, absent any statutory or regulatory framework for the process, one would envisage that the evaluator's fees would be shared by the parties. This is not a case of one party asking someone to look into a problem and be as objective as possible.

From the evaluator's point of view that gives rise to questions of transparency and fairness of process: What information will I use to carry out the evaluation? Have all parties had an adequate chance to consider and respond to each other? Am I satisfied that I have the information I need (or, should I restrict myself to the information provided, and just make it clear that is what I have done?) What expectations are there for the evaluation itself - for example, must reason be given? To what level of detail?

By its nature, neutral evaluation diminishes any real possibility that the evaluator could 'caucus' with the parties. It follows that, from the parties' point of view, agreeing to a neutral evaluation involves committing to a 'cards on the table' approach, but with no certainty that the evaluator will see things in the way the particular party sees them, no control over how the other parties will react, and at least a possibility that the outcome might be against its interests.

4.3. ***'relatively informal process':*** Maybe. One would certainly expect less formality than a court hearing, but evaluation is a consensual process so it really is up to the parties to agree what needs be done in any given case. As long as the result of the process is not binding, the idea of a 'mini trial' (which might even involve witnesses

being called and examined) fits the neutral evaluation model.[6] The process can be as informal as may be agreed, but again there are pitfalls in taking too many shortcuts. The result of the process is only useful if it is going to enlighten the parties in a way that enables them to go on to resolve matters. The more shortcuts, the greater the risk that a disappointed party will not regard the result as being persuasive.

4.4. ***Confidential***: Again, one would expect an evaluation process to be confidential as between the parties, both in the sense of being kept private and in the sense that the process is without prejudice (if the parties agree otherwise, that is for them to decide). But even in that case what would the position be if, say, a party used the evaluation to make a Calderbank offer?[7] Even if there are no issues of that kind, the fact that an evaluator has expressed an opinion which the parties disagree over has the capacity of itself to become an important dynamic in the litigation. The process may be confidential, but it is not risk free.

4.5. ***'non-binding evaluation'***: The essence of neutral evaluation as a technique of ADR is that the outcome is not binding. It is for that reason that the process is not (for example) arbitration, or adjudication or an expert determination or - at the other end of the ADR spectrum - mediation[8] or conciliation or a facilitated meeting. The parties put their dispute in the hands of a trusted third party, presumably in the hope that the evaluator's views will inform an early settlement on terms they see as appropriate. They put their cards on the table and provide their essential arguments. But in doing so there is no certainty that the outcome will be as hoped for or (even if it is) that the other parties will see the error of their views and settle. At least arguably neutral evaluation can give rise to the worst of all possible ADR outcomes: a cost incurred

[6] I have never been involved in, or even heard if, a true mini-trial type process in NZ although I understand that the technique may be rather more commonly used in the United States (see e.g. American Arbitration Association at www.adr.org/sp.asp?id=22007) and Canada (see e.g., www.justice.gc.ca). Mini trials are described as being useful where senior executives within a company deal with intra-company issues; in Canada there are rules governing mini-trial procedures that are conducted by Judges.

[7] See, e.g., *The Green Team (WA) Ltd v Sachse* Unreported decision of the Federal Court of Australia (Western Australia Division) 13 March 1995; 1995 Aust Fedct Lexis 900; BC9507232.

[8] To be clear: in this discussion I am not entering the debate as to whether or not mediators can or should advise or evaluate in a mediation process. The neutral evaluation model differs from mediation at least in the sense that obtaining the evaluator's view is all that is asked of the evaluator. In contrast with the mediator an evaluator has no on-going role in trying to help the parties to find a solution.

which has just emboldened the other side, and effectively increased the burden of any settlement that might later be agreed.

Court-sponsored neutral evaluation

5. This is a bit of a gloomy overview, I accept. In fact the idea of neutral evaluation has been enthusiastically adopted in other jurisdictions. As early as 1986 a neutral evaluation model was being trialled in the Northern District of the Californian courts[9]:

> *"The central feature of the experimental procedure is a confidential two hour case evaluation session that takes place early in the life of the litigation. The session is hosted by a neutral, experienced, highly respected private lawyer who is appointed by the court …"*[10]

6. Perhaps more relevantly a process for early neutral evaluation is now also included in the in the White Book, which governs procedure in the English courts:

> *"*[Early neutral evaluation] *is now most closely identified in England with the process of intervention by a judge during court proceedings. It can be a very useful exercise, but often takes place when a trial is not far away, which does not seem very 'early'. The process involves the Judge reading and hearing submissions, posing questions to the lawyers and then giving his view to assist the parties to reach a settlement. To ensure neutrality, the judge takes no further part in the proceedings."*[11]

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[9] Brazil, Kahn, Newman & Gold: *Early neutral evaluation: and experimental effort to expedite dispute resolution* (1986) Judicature Vol 69, 279 to 285.

[10] Note, however, that the report of this experiment goes on to talk about the evaluator helping the parties to develop a case management plan for the litigation rather than to settle. Caucusing was explicitly contemplated but the objective of overall settlement seems to have been an after-thought: *"After hearing the parties' positions and offering her assessments … the evaluator **may** consider the possibility of reaching an early settlement."* (my emphasis). Later the objective of obtaining a settlement was described as having been 'added' to the initial objectives of the programme: see Levine, *Early Neutral Evaluation: the Second Phase* 1989 J. Disp. Resol. 3 at p 45.

[11] J Kennedy, *Choosing a system for resolving commercial disputes* ICCLR 2000, 11(3), 82 -86. A practice note as early as 1996 makes it clear that appointing a 'neutral' or asking a judge for an evaluation was even then a recognised alternative to court process: see *Practice Statement (Commercial Cases: Alternative Dispute Resolution (No.2)* [1996] 1 WLR 1024.

7. One commentator has noted, however, that:

> *"In my experience the ENE procedure is not commonly used for construction disputes, whether as part of the court system, or in ad hoc arrangements before a non-court tribunal. Nevertheless, the fact that ENE is now recognised in the White Book means that the number of ENE's is likely to increase steadily, and many of the matters dealt with in this way are likely to settle after the evaluation, so that a dispute which might have proceeded to arbitration or trial will now disappear. One of the reasons why there has not been a significant uptake of ENE as a procedure for construction disputes is, I suspect, because it is in many ways similar to adjudication, and parties in the construction industry are now so familiar with the adjudication procedure that they feel more comfortable taking that route …* [The author goes on to suggest that as a result any real growth in the use of ENE in the courts is likely to be in commercial cases]."[12]

8. There are no doubt many other jurisdictions that have procedures for neutral evaluation within their court rules. My sense is that, in the end, for all practical purposes they are mirrored in New Zealand by the Judicial Settlement Conference procedure.

9. Of course the content of any given JSC and the procedure that is followed is up to the judge who deals with it, but it must be possible (either on the suggestion of the parties, or on the initiative of the judge) for the process to give rise to a neutral evaluation of the strengths and weaknesses of the competing positions by the judge.

10. There are, however, practical differences between that kind of process and the process of neutral evaluation when offered privately. Amongst other things, the judge who takes a JSC is not limited in his or her role by the terms of a private appointment by the parties to a dispute; even if evaluation is all that is intended at the outset the judge in a JSC can always go on to assist with settlement discussions. And, if the result is that agreement is

[12] R Gaitskill, *Current trends in dispute resolution*, Arbitration 2005, 71(4), 288 – 299. More recently in 2006 another commentator described the procedure as being used 'infrequently': see F Kirkham, *Judicial Support for arbitration and ADR in the courts in England and Wales* Arbitration 2006, 72(1), 53 – 56 at 56.

reached, then the outcome can be recorded including by way of consent orders by the Court if thought appropriate.

11. In contrast, a privately appointed evaluator cannot react in the same flexible way, even if circumstances indicate that might be helpful. His or her involvement after the evaluation would depend on a further appointment by the parties, presumably as a mediator to assist in the settlement discussion.[13]

So what?

12. I suggest that the question we ought to ask (and be able to answer!) is this: in what circumstances should/would one recommend neutral evaluation as a better option for progressing a dispute towards an outcome than either (a) a determinative process (such as arbitration) or (b) a frankly negotiation-focussed process which is intended to end with a settlement agreement?

[13] And, at a very practical level, anyone who chooses to act as a neutral evaluator would probably be well advised to make sure either that they have a watertight immunity from suit in the document by which they are appointed, or to double check that any professional indemnity insurance will cover the situation.