Dispute System Design: Why we need it . . . Part 1:
Dispute System Design: Why we need it . . . Part 2:

IDEAL SCENARIO

Dispute → No Dispute

GOOD, FAST & CHEAP
Dispute System Design: Why we need it . . . Part 3:

REAL SCENARIO, simplified

Dispute → Mediation?

Dispute → Conciliation?

Dispute → Litigation?

Dispute → Arbitration?

Dispute → Negotiation?

Dispute → Adjudication?

No Dispute
Dispute System Design: Why we need it . . . Part 4 continued:

REAL SCENARIO, not simplified, not fast or cheap
Dispute System Design: Why we need it . . .

Lawyering has changed. We no longer just advise and represent clients in courts and administrative agencies; we design justice.”

Lisa Blomgren Bingham (2008)
Dispute System Design: What is it?

These changes have led to the concept of DSD, a term coined by Professors William Ury, Jeanne Brett, and Stephen Goldberg to describe the purposeful creation of an ADR program in an organization through which it manages conflict through a series of steps or options for process.

Lisa Blomgren Bingham (2008)
Dispute System Design: What is it?

- Dispute resolution processes can focus on interests, rights, or power, but . . .
- Organizational conflict management systems will function better for the stakeholders if they focus primarily on interests.
- A healthy system should only use rights-based approaches (arbitration or litigation) as a fallback when disputants [reach] impasse;
- Parties should not generally resort to power.”

Lisa Blomgren Bingham (2008)
Dispute System Design: What is it?

1. A separate discipline taught at several U.S. law schools to design systems to:
   a) Assess various dimensions of initial conflict
   b) Identify appropriate dispute resolution objectives
   c) Design and implement appropriate dispute resolution systems
   d) Evaluate outcomes, recalibrate for next conflict

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Options?

1. **New approaches:**
   - Project managing dispute resolution

2. **New uses of old techniques:**
   - Trends in mediation and arbitration
   - Expert determination; Conciliation

3. **A whole new paradigm that really works:**
   - Adjudication

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Project managing dispute resolution

No difference between a $1 million construction project and a law suit that costs you $1m. Both need project management:

1. **Buy time wholesale** wherever possible.
2. **Outsource** wherever possible.
3. **Assign a trained “litigation manager”**.
4. **Use a critical path approach**.
5. **Keep a lid on experts’ scopes of work**.

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Trends in mediation and arbitration

1. Co-mediation/Arbitration

2. Fast track (100 Day) Arbitrations
   a) ADR Institute Rules
   b) JAMS Rules

3. DRBs and beyond? Pros & Cons
Expert determination

1. Not mediation, not arbitration, not dispute resolution.

2. No arbitrator immunity (Sports Maska, SCC).

3. Useful for “how much, how many” cases.

4. Many institutional rules available.
Hot tubbing

1. Hot Tubbing of experts/witnesses
   - Australian term, regulated there
   - Finding its way into ADR protocols everywhere
   - Useful at four stages:
     - Before questions are formulated for experts
     - Before experts deliver opinions
     - As part of negotiation/mediation process
     - To obtain evidence at arbitration/trial
Conciliation

1. Goes beyond mediation: results in a settlement or an evaluation of some kind

2. Conciliator’s “Recommendation”, subject to review by subsequent arbitration or litigation

3. ICE / SCL Rules for Conciliation

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When to litigate/arbitrate/settle

1. **When to litigate/arbitrate**
   a) Never in the hope of gain
   b) Once maybe to train your people
   c) With vigour in your own defense

2. **When to settle**
   a) As soon as possible
   b) As painlessly as possible
   c) As often as possible

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If you are going to litigate:

1. **The new Rules**
   a) New case management
   b) New & improved summary judgment
   c) New “lean” discovery

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New Rules

Case Management:

• Ottawa, Toronto, and Essex County

• Case management if needed and as appropriate

• Case management on consent, or on initiative of a judge

• Case management judge may now preside at trial where parties consent
New Rules

**Summary Judgment:**

- *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764:

Summary judgment motions should be limited to cases where

(i) the parties agree to use summary judgment;

(ii) the claim or defence is without merit or;

(iii) where the motion judge can “fully appreciate” all of the evidence needed to dispose of the case without a trial
New Rules 2010

New “lean” discovery:

• “Semblance of relevance” now just “relevance”

• Oral discovery limited to 7 hours

  May be extended in complex litigation with large amount at stake:
  • Hancock v. Lunn, [2010] O.J. No. 2791 (Master)
New Rules 2010

New “lean” discovery:

• “Semblance of relevance” now just “relevance”

• Oral discovery limited to 7 hours

• Parties *must* agree to discovery plan

• “Proportionality” now a major consideration

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Adjudication: A whole new paradigm

• Q: What is adjudication and why do we need it?

• A: Mandatory, summary, interim binding dispute resolution.

• A: It works. Real time solutions turn out to be better than judicial loss-shifting.
Adjudication: A whole new paradigm

- Statutory minimum procedural requirements
- Summary determination within 28 days
- Condition precedent to litigation/arbitration
- Work on the project continues
- Determination binding and enforceable for the life of the project
- Courts may (and do) assist
- 98% of “disputes” end there.

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What’s Really New?

COLLABORATIVE SETTLEMENT PROCESS

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Mediation

• Unprincipled settlements ultimately not as satisfying as we say they are
• Too mediator-dependent
• Too goal-oriented, not true to original principles of mediation
• Perceived as a waste of resources if unsuccessful
Arbitration

• Subject-matter expertise appears to be over-rated as a benefit
• Lack of precedent, *stare decisis* seems to be under-rated as a detriment
• Arbitration = litigation where you have to pay for the court too
• Reinventing the wheel: confidentiality, discovery, dispositive motions etc.
Disqualification provision

Fact gathering, experts’ ‘snapshots’

Lawyers’ collaboration

Lawyer/client briefing

B2B Settlement
<table>
<thead>
<tr>
<th>Challenging deeply held beliefs</th>
<th>Classic argumentation</th>
<th>Rogerian argumentation</th>
</tr>
</thead>
<tbody>
<tr>
<td>• System of oppositions, not individual presentation, reinforces deeply held beliefs.</td>
<td>• Audience and “opponent” are one, allowing deeply held beliefs to be challenged.</td>
<td></td>
</tr>
<tr>
<td>“Settlement” friendliness</td>
<td>• Defection to gladiatorial model rewarded.</td>
<td>• Defection to gladiatorial model discouraged.</td>
</tr>
<tr>
<td>• Perceived truth subordinated to winning.</td>
<td>• Winning subordinated to perceived truth.</td>
<td></td>
</tr>
<tr>
<td>Reputational markets</td>
<td>• Local.</td>
<td>• Global.</td>
</tr>
<tr>
<td>Rhetorical goals</td>
<td>• I persuade judge of my case, ridiculing and debasing your case.</td>
<td>• I persuade you I understand your case.</td>
</tr>
</tbody>
</table>
I would like to propose, as an hypothesis for consideration, that the major barrier to mutual interpersonal communication is our very natural tendency to judge, to evaluate, to approve or disapprove, the statement of the other person, or the other group.
Carl Rogers: “Communication: Its Blocking and its Facilitation” (1951)

Each person can speak up for himself only after he has first restated the ideas and feelings of the previous speaker accurately, and to that speaker’s satisfaction . . .

Easy to say, surprisingly hard to do.
When the parties to a dispute realize that they are being understood . . . the statements grow less exaggerated and less defensive, and it is no longer necessary to maintain the attitude, “I am 100% right and you are 100% wrong” . . . In this way mutual communication is established and some type of agreement becomes much more possible.
Is your case ready for collaboration?

• Maturity of the industry:
  • Resource based industries, heavy industrial, infrastructure development, energy industry

• Confidence in/by counsel:
  • What is the real risk of defection?
  • Is the collaborative process understood?

• Ability to commit resources to collaboration:
  • Can your client afford to settle in 60 days?