Commercial disputes: The mini-trial option

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This paper considers some of the limitations of the adversarial process, and discusses different options for dispute resolution. In particular it considers the mini-trial alternative which integrates elements of negotiation, mediation and adjudication in a new way. While well established in the United States, the mini-trial is only starting to be used in New Zealand.

I. INTRODUCTION

Increasingly in the last few years judges, lawyers, academics and clients have expressed concern about the adversarial system and the disadvantages inherent in it.[1] There are "practical" concerns about the cost of litigation which is rendered inaccessible to many and delays in the courts which defeat the goal of a speedy resolution of disputes.[2] Further, litigation involves endless amounts of the parties' and counsel's time which is unproductive. There are also more fundamental concerns about the justice of a system which places its emphasis on rules, rather than on finding the truth and a solution mutually beneficial to the parties. In other words, the system is structured in such a way that one person invariably wins while the other must lose.[3] The result of such a win/lose decision conducted in an adversarial framework is that there is a breakdown of relationships between the parties who come to identify their adversary as the enemy. Litigation drives people further apart as they seek to win at all costs. The solution, despite one party "winning", may in reality, be unsatisfactory to both parties. The "winners" may receive less than they have to pay in lawyers' fees. Another criticism is that expert evidence is often left to be interpreted by a judge or jury with no relevant experience in the given field.

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1 See for example: Raymond Bellioti "Our Adversary System: In Search of Foundation" (1988) 1 Canadian Journal of Law and Jurisprudence 19; Burger "Isn't There a Better Way?" (1982) 68 ABAJ 274; R Miller "The Adversary System: Dinosaur or Phoenix" (1984) 69 Minn LR 1. Many of the articles cited in this paper make some mention of the move away from litigation and the reasons for it.

2 See for example in New Zealand, The *Report of the Royal Commission on the Courts* 1978.

3 This win/lose versus win/win distinction is discussed by Fisher and Ury in *Getting to Yes* (Arrow Books, London, 1987).

The disputants themselves are not encouraged to participate directly in the fact-finding, nor in finding amicable and mutually acceptable solutions to their own dispute. The dispute is taken from them by their lawyers and a judgment is given by a judge on the basis of narrow legal issues which may ignore vital external factors. As the courts are open to the public this often results in a person or company's business interests and problems being exposed by the press for all to read. Although some suggest that these factors are desirable[4] there is an increasing number of people who are searching for alternatives to litigation. It is hoped that these alternatives will serve the goals justice, meeting the parties' needs, speed and efficiency, all of which are deemed to be important in the satisfactory resolution of disputes.[5]

In the last ten years the Alternative Dispute Resolution (ADR) movement has flourished in response to these criticisms.[6] Until recently litigation has been the only institutionalized mechanism for resolving disputes. Now there are a host of alternatives to our traditional systems which purport to overcome the problems inherent in litigation. These include arbitration, conciliation, mediation, negotiation and other hybrid processes including "rent-a-judge", summary jury trials and mini-trials. All of these are now written about and used extensively in the United States. They are constantly growing in acceptance to the extent that some states have made provision for their use within their civil procedure legislation while others have legislation to facilitate the use of ADR.[7]

In New Zealand the story is quite different although it is possible to see a limited growth and acceptance of ADR's in the last ten years.[8] Various avenues are open to negotiation, mediation and arbitration - the traditional ADR's. There has been industrial arbitration since the Industrial Conciliation and Arbitration Act was passed in 1894.[9] The Small Claims Tribunal provides another example of the attempt to create a forum outside the formal structures of the courts.[10] The Family Proceedings Act 1980 established mediation conferences in the Family Court which were implemented in

4 See in particular E Brunet "Questioning the Quality of Alternative Dispute Resolution" (1987) 62 Tulane LR 1; Owen Fiss "Against Settlement" (1984) 93 Yale LJ 1073; Landsman *The Adversary System - A Description and Defense* (American Enterprise Institute for Public Policy Research, Washington, 1986).

5 Rule 4, High Court Rules.

6 The Alternative Dispute Resolution (ADR) movement comprises a number of judges, lawyers and academics who are searching for better alternatives for dispute resolution outside the traditional adjudicative structures.

7 See for example r 44 of the Western District of Michigan Court Rules; recent amendments to the Federal Rules of Civil Procedure, eg. Fed R Civ P 16(c)(7) dealing with mini-trials; the Texas Alternative Dispute Resolution Procedures Act 1987; California Civil Code paras 3384 and 3390.

8 I Macduff "Mediation in New Zealand: Legislating for Community?" in *Transcultural Mediation in Asia-Pacific* (Asia-Pacific Organisation for Mediation, Manila, 1988).

9 The Industrial Relations Act 1973 (repealed) created the operation of an Industrial Mediation Service.

10 Small Claims Tribunal Act 1976, s 9 (repealed).

1981.[11] Recently the Residential Tenancies Act 1986 provided for the mediation of residential tenancy disputes,[12] and the Criminal Justice Act 1985 has a diversion programme involving reparation in which mediation is used.[13] There has also been the work of the Race Relations Conciliator, the Human Rights Commission and the Ministry for the Environment, and before dissolution, the Christchurch Mediation Centre.[14] The advantages of accessibility, participation, cost and time savings, and the private nature of the processes are attracting attention.

In New Zealand however, ADR's have tended to be used in 'marginal' legal disputes usually involving families and neighbours.[15] This in turn tends to result in a marginalising of ADR's in the minds of "serious lawyers'", those engaged in the "main stream work" areas of commercial and company law. In these areas some concessions have been made to reduce complaints about the expense and delay involved in traditional litigation. This has led to the development of the summary judgment procedures and the commercial list.[16] However, neither of these is aimed at negotiation. Rather, they retain the true adjudicative means of resolving a dispute - with a judge making a ruling.

The time is right in New Zealand to begin considering ADR in the commercial arena. This paper is timely in 1988 given the decision of the Pacific Basin Economic Committee given to approve the setting up of a committee:[17]

> to investigate and report on the availability and suitability of dispute resolution techniques in and for New Zealand and the desirability and feasibility of establishing a commercial dispute resolution centre or system in New Zealand to facilitate the resolution of commercial disputes.

Similar centres overseas, such as the Australian Commercial Disputes Centre in Sydney, are operating very effectively.[18] Initial enquiries in New Zealand reveal considerable interest in the idea.[19] Obviously there is an interest in ADR for commercial disputes where previously there has been none. This paper briefly analyses different options for ADR then concentrates on the mini-trial, a process being very successfully utilised in the United States to resolve large-scale commercial and corporate

11 Family Proceedings Act 1980, ss 13-16.
12 Residential Tenancies Act 1986, ss 76 and 88.
13 Criminal Justice Act 1985, ss 22-25. These provide for a reparation scheme in which processes like mediation may be used.
14 Above n8, 39-46.
15 So far in New Zealand the private mediation services that have been established have been called in to mediate in a number of fencing and domestic disputes. The institutionalized ADR's as described above also reflect the family/neighbourhood concerns.
16 See rr 134-144 (summary judgment) and rr 446A-446Q (commercial list).
17 NZ Committee of the Pacific Basin Economic Council - Special Steering Committee Background Paper "Commercial Dispute Resolution in New Zealand" Sept 1988.
18 Ibid 5 - 6.
19 The seminar at which the PBEC paper was given (above n17) showed considerable interest in the market place in ADR for commercial disputes.

disputes. It describes what the mini-trial is, how it works, the advantages and possible deterrents, then addresses some of the criticisms of ADR in relation to the mini-trial. It is hoped that lawyers and clients in New Zealand will be inspired to attempt the mini-trial procedure and that the results will prove to be as satisfying as they have been in the United States.

II. ALTERNATIVE DISPUTE RESOLUTION OPTIONS

These options are set out to show the range of ADR's available and to highlight some of the similarities and differences as compared with mini-trials.

A. *Arbitration*[20]

Arbitration is a kind of adjudication. A dispute is submitted to a third party, neutral, decision-maker with the authority to issue a binding judgment. In that respect, arbitration resembles litigation. However, it is different in that the hearing may be held wherever the parties agree; the rules of evidence, as required by a court, are not followed; the parties may select their own arbitrator; the decision is not appealable; and the proceedings are confidential. In theory at least arbitration can be quicker, cheaper and fairer. In practice, the arbitration process is subject to many of the same criticisms as litigation. Some doubt whether an arbitrator will be impartial because they are paid by the parties rather than the state. Consequently there is an incentive to find compromise solutions which may be fair to neither party.[21] This is not to deny that arbitration is a very useful form of dispute resolution, particularly in the industrial area.

B. *Conciliation*[22]

Conciliation is the process of facilitating negotiations between parties to a dispute. The conciliator assists by bringing the parties together and making it possible for them to communicate with each other. The conciliator does not contribute actively to the process of negotiation.

C. *Mediation*

Mediation is a very old and well used form of dispute resolution which involves parties in communicating confidentially to the mediator their position in the dispute. The mediator finds out what each of the parties "really wants", then attempts to gauge the differences that lie between their goals so as to formulate options which are presented to the parties. The parties then discuss the options and come to their own agreement. Unlike the arbitrator or the judge, the mediator has no authority to make a binding decision. The mediator's role, while active (unlike the conciliator) is purely facilitative. He or she "brings the parties together by listening, counselling, guiding,

20 Henry and Lieberman *The Manager's Guide to Resolving Legal Disputes* (Harper and Row, New York, 1985) 69-75.

21 Ibid 58.

22 Above n17, 4.

suggesting and persuading the parties to come to terms".[23] Mediation revolves around trust and communication and, like all ADR's, involves a desire by both parties to reach an agreement if it is to succeed. Because the parties come to their own agreement they tend to accept it and implement it without the resentment or loss of co-operation often seen to be an undesirable result of litigation. Mediation has no direct rules and therefore may be flexible in responding to different situations.

D. *Negotiation*

Negotiation is bilateral decision-making with no outside intervention. It is a form of dispute resolution that has been with us for centuries and which, unconsciously, we participate in every day. One may negotiate with parents, spouses, friends and colleagues - anyone, on a range of topics. Fisher and Ury define negotiation as "a basic means of getting what you want from others".[24] They continue:[25]

> it is back and forth communication designed to reach an agreement when you and the other side have some interests that are shared and others that are opposed. People have a basic need to negotiate and do so regularly. Even when a dispute proceeds to court it is often resolved prior to the trial through negotiation.

While negotiation is the most commonly used ADR, lawyers trained in the adversary way are often the worst negotiators. They "instinctively view the dispute as a battle to be won, rather than a problem to be solved, and the opposing party as the enemy, rather than a potential partner".[26] Business people and others not trained in the adversary way are often far better negotiators because they have the ability to solve a problem rather than beat their opposition. This is described as "problem-solving" or "principled negotiation".[27] The parties must come to terms with what they really want and discuss their interests and alternatives with each other. The aim of maximum victory to defeat the adversary is put aside as the parties search for the best possible solution. This is not always possible where there are disparities of power which may reduce the incentive to bargain. Where the plaintiff wants the defendant to suffer or to acknowledge fault and to admit responsibility publicly, negotiation and its various off-shoots will not necessarily be suitable. Where there is a relationship to preserve and advantages to be won by settlement then negotiation is a viable alternative to litigation.

23 Above n20, 58.
24 Above n3, xi.
25 It is said that over 80% of cases are settled out of court in the United States (see JH Wilkinson "Resolving Disputes by Using the Mini-trial" (1987) 198 NYLJ 5). It appears that the position is very similar in New Zealand.
26 Above n20, 79.
27 Above n3, 20.

E. *Hybrid Processes*

There are an increasing number of ADR's that have facets of these basic processes, including the mini-trial. Three command particular attention in America.[28]

F. *Rent A Judge*[29]

The Rent A Judge scheme involves the private hiring of past or present real Judges to decide disputes. The judge has authority to determine all issues of fact and law, and the decision is treated by all as if it were a judgment of a court. The judgments are filed in State courts and are enforceable. Unlike arbitration, the rules of evidence and procedure are applied and a decision may be appealed. The major advantage is speed and the ability to choose a judge whom the parties respect. Further, a judge familiar with a particular area of law may be chosen because hearing the case takes less time, costs are reduced, and a more informed judgment is given.

G. *Moderated Settlement Conferences*[30]

A moderated settlement conference is a "forum for case evaluation and realistic settlement negotiations".[31] Each party and counsel present their position before a panel of impartial third parties (usually experienced volunteer lawyers) who may issue an advisory opinion regarding the liability of the parties. The opinion is not binding. Effectively, this procedure provides a forum for settlement between litigants and their attorneys. Its use in Texas has proven successful despite some lawyers' reluctance to attempt it in more complex commercial disputes.

H. *Summary Jury Trials*[32]

This is a means of submitting a highly abbreviated trial to a mock jury composed of real jurors who issue an advisory non-binding opinion. Again, the idea is to show both parties what the relative merits of their case are, and it is designed to facilitate settlement. There is a requirement that representatives of both parties, empowered to settle, be present. Summary jury trials are designed to test the facts of a case without any needless expenditure of time, money or energy. It provides a "no risk" method for lawyers to obtain a jury's perception of their case.

28 See (1988) 51 Texas BJ for a range of ADR's and a description thereof. Also refer to Henry and Leiberman (above n20) for a description of others.

29 Above n20, 75-76.

30 O'Brien & Kovach *"Moderated Settlement Conference"* (1988) 51 Texas BJ 38.

31 Texas Alternative Dispute Resolution Procedures Act 1987, s 154.026.

32 Hittner, *"The Summary Jury Trial"* (1988) 51 Texas BJ 40; above n20, 124-125.

III. LAWYERS' RESPONSE TO ADR

Despite the growth of ADR and the number of options now available, of which the above are only a few, many lawyers seem unwilling to try ADR's. They unquestioningly accept that the adversarial system is the best and the only means of resolving disputes. They feel that ADR's may be all right when dealing with disputes involving neighbours or families but are not appropriate in the commercial domain. Many lawyers see settling or compromise as an indicator of weakness which is undesirable.[33] Yet it is suggested that the commercial area is extremely well suited to ADR and further, that this reluctance to try ADR is more related to feeling secure with litigation than with any well-considered reasons for consistently resorting to it. Commercial disputes often involve parties who have a vested interest in settlement to preserve their business relationships. While in America the excessive costs and delays which have become associated with litigation are driving people to search for new alternatives to litigation, in New Zealand there is the added consideration of the size of the business community. The need to preserve relationships and minimise the damage done by adverse publicity in a very small market where relationships are not necessarily replaceable must be an important consideration in opting for an out-of-court settlement process.

Whatever form of ADR is used the lawyers involved require somewhat different skills than those required in the usual court setting.[34] Preparing cases for other lawyers as in the moderated settlement conference or for a judge in a Rent A Judge process will be somewhat different to preparing a case for managers in a mini-trial. Although the shortened time frame in ADR reduces these differences it does not alter the usual way in which lawyers would prepare for a trial. There is an emphasis on presenting the best possible case in a short amount of time. Therefore it is not possible to canvas every conceivable issue and draw the argument out. Similarly the lawyers must keep in mind the settlement purpose of ADR compared with the gladiatorial purpose of litigation where the emphasis is on winning at all costs. Lawyers are not trained to resolve disputes, to negotiate or to settle. They are trained instead to foster, develop and win disputes - that is their role, their livelihood and understandably, many are loath to try something new, despite the present system not always being in the best interests of clients. Many clients lose cases at vast cost when it may have been possible to use an ADR to reach a cheaper and better solution which served the clients' interests. Lawyers have an ethical obligation to ensure that their clients' disputes are settled justly, quickly and cost-efficiently. They should consider such factors when deciding how any dispute should be resolved. Because the adversary system teaches lawyers to work for their client and to get the best results lawyers will be able to choose ADRT knowing they are doing the best job for their client if it is appropriate in the circumstances. Certainly it was considerations such as these which inspired the lawyers involved with TRW and Telecredit to formulate the mini-trial process.

33 Wilkinson, above n25, 7.

34 Sherman "Reshaping the Lawyer's Skills for Court Supervised ADR" (1988) 51 Texas B J 47.

IV. THE FIRST MINI-TRIAL - TELECREDIT - TRW[35]

The first mini-trial involved a possible infringement of Telecredit's patents by TRW. Telecredit, a small company holding patents on several computerised devices allowing department stores and others to verify a customer's credit-worthiness and right to use the credit cards presented, had licensed several manufacturers to produce the patent devices. None of the patents had ever been tested in court to see if they would be upheld. Telecredit believed TRW, a giant company, was infringing its patents on the computerised credit card and cheque authorisation machines that TRW manufactured. In 1974 Telecredit sued for $8 million in damages and for an injunction against further infringement. TRW denied infringement and asserted that Telecredit's patents were legally invalid anyway. If the patents were invalid anyone would be able to use the inventions which would be highly destructive to company assets. Each party stood to lose significantly.

For two years lawyers for both parties prepared for litigation and business relationships between the companies became increasingly strained. Both believed they were right and accused the other of acting in bad faith. Although over 100,000 documents had changed hands neither a trial nor even pre-trial conference date had been set. Attempts at settlement failed with both parties continuing to be convinced that the other was acting in bad faith. Furthermore, Telecredit was determined that the figure of $6 million was appropriate while TRW felt that it was highly inflated even if it was held that they were infringing in some way.

Faced with an indefinite number of years still to be spent collecting information - legal and technical, the attendant business problems involved with that allocation of resources and the continuous uncertainty, the parties began to discuss the possibility of an out of court settlement. Telecredit's proposed arbitration was turned down by TRW for a number of reasons. However, the negotiations between TRW and Telecredit's non-legal co-founder were more fruitful and they determined to hold an "information exchange".

They agreed to a six week schedule for limited discovery and for exchanging briefs. At the end of that time they presented the evidence and arguments orally to top management representatives of each company - the CEO of Telecredit and the vice-president of TRW - empowered to settle the dispute. Following the presentations and rebuttals on the second day the senior managers to whom the case had been presented met privately and attempted, without the lawyers, to settle the case. Also present was a former US Court of Claims trial judge with considerable patent law expertise. His role was that of a neutral advisor - he preserved order and in the event of the managers not settling, he was to give them an opinion on the respective strengths and weaknesses of their cases and on what the possible outcomes might be if the case went to court.

35 Above n 20, 19-26; Green, below n 38, 12-13.

The strategy worked and an informal agreement was reached by which TRW was called to pay for a licence against credits that Telecredit would grant and by which Telecredit was to get the Patent Office to issue new patents (which it eventually did). All the parties involved were impressed by this inexpensive and satisfying resolution of a difficult dispute. This is the strategy which has been coined "the mini-trial".

V. THE MINI-TRIAL

> The mini-trial is a dispute resolution hybrid process that structures private negotiation by combining elements of negotiation, mediation and adjudication in a new way.[36]

Essentially the mini-trial consists of an abbreviated address and evidentiary presentation, called "an information exchange" before the disputants' senior management officials or representatives. The desired result is a negotiated settlement of the matter effected by the senior executives often with some assistance from a neutral advisor.

The underlying objective of a mini-trial is to effect a speedy, cost-effective resolution of a dispute by narrowing the issues, promoting dialogue on the relative strengths, merits and weaknesses of each party's case, and converting a typical adversarial legal-battle into a business-type problem that can be solved by mutual agreement.

It is used most often in business disputes where there are barriers to successful negotiation or there are doubts about the effectiveness of litigation whether due to concern about costs, delays, outcomes, or wasted resources:[37]

> The motivation to adopt mini-hearing procedures include the avoidance of high litigation costs, the fear that adjudication will result in an outcome far more adverse than reasonably anticipated, the need to return employees supporting the litigation to more productive activities, and the desire to preserve a reasonably amicable relationship between litigants who wish to continue doing business together in the future.

The mini-trial is voluntary and flexible in that it may be tailored to suit the requirements of the dispute, the companies and the personalities of the management representatives and counsel involved. However, as one can see, there are certain key features established in most mini-trials.[38]

A. *Voluntary Agreement*

The parties agree to conduct a mini-trial and they may terminate it at any time.

36 Goldberg, Green, Sander *Dispute Resolution* (Little, Brown & Co, Boston, 1985) 271.

37 Parker and Radoff *"The Mini-Hearing: An Alternative to Protracted Litigation"* (1982) 38 Bus Law 35

38 See Green "Growth of the Mini-Trial" (1982) 9 ABAJ Litigation Sec 12.

B. *Mini-Trial Agreement*

Once the parties have agreed to conduct the mini-trial they can negotiate a set of ground rules, known as the "protocol" or mini-trial agreement. It should address at least ten concerns:

1. The issues to be discussed

Despite the mini-trial being non-binding and without need to rigidly enforce restrictions on certain issues, it is important to have some general idea of the issues to be discussed and those to be avoided.

2. The amount of allowable discovery

Often the parties will be well into discovery by the time the mini-trial is proposed, but due to the restricted time frame of a mini-trial discovery should be limited.

3. Obligations to present and negotiate

The agreement should make clear to counsel the importance of presenting the best case and to the business representatives of the necessity for negotiation.

4. Persons to be present

The names of the business representatives, their status and authority to settle should be set out along with the number of lawyers, experts, and other witnesses, so that there are no surprises on the day.

5. Time, place, schedule

These should be set forth with a schedule of events determining the allocation of parties' times for presentation, rebuttal and questions.

6. Rules of evidence

If any rules of evidence are to be followed (eg regarding expert evidence) these should be formally stated.

7 Neutral advisor

If a neutral advisor is to be used, the process of selecting one should be agreed and once selected, his or her name should be written into the agreement.

8 Confidentiality

The agreement should provide for confidentiality and, in the event of subsequent litigation, for the inadmissibility of documents exchanged and statements made. The neutral advisor's opinion should also be inadmissible. In America such inadmissibility

has been provided for by legislation. It would be important, if ADR develops in New Zealand, to legislate similarly to prevent discovery of this material. This will foster trust and confidence in the mini-trial process.[39]

Also, if there is any concern, it should be stated that the mini-trial will be kept from the press.

9 Apportionment of costs

Costs should be worked out at this stage. Usually the neutral advisor's fee is shared equally.

10 Pending litigation

Most commonly parties agree to the suspension of discovery and the stay of litigation until completion of the mini-trial and the attempted negotiation of a settlement.

C. *Exchange of Briefs and Other Documents*

An informal exchange of key documents, exhibits, summaries of witnesses' testimony, and briefs takes place prior to the mini-trial. Depositions and discovery may be engaged, without prejudice to the parties' rights to take full discovery later if the mini-trial does not settle the case. This is a particularly interesting feature in light of the current debate over exchanging briefs and other documents in ordinary litigation.[40] There are concerns expressed by lawyers that such an exchange could be prejudicial if the mini-trial were to fail and the case go to court. Usually there has been built into the mini-trial agreement a clause to say that such documents cannot later be used. Doing so could involve the infringing party in a breach of contract if the agreement were to have contractual status.

D. *Neutral Advisor*[41]

Often the parties select a neutral advisor who may have the role of pacifying when tempers flare and of asking questions to probe the strengths and weaknesses of each party's case. Unlike the judge or arbitrator, the advisor has no authority to make a binding decision although he or she may be asked by the business representatives to advise them on the likely outcome were the case to go to court. For this reason, a present or former judge or a person with specialist knowledge of the area in dispute will often be selected for this role. It is important however, to select someone with the

39 See Davis & Omlie "The Courtroom in the Boardroom" (1985) 21 Williamette LR 531, 543 and Green "The CPR Legal Program Mini-Trial Handbook" Corporate Dispute Management MH 65.

40 Practice Note from the Executive Judge at Auckland "Pre-trial Exclusion of Briefs and Evidence" (1988) 287 Law Talk 2.

41 Above n35 and above n36, 272-273 where the neutral advisor is discussed.

ability to differentiate between the adjudicative function and the advisory role which the neutral advisor plays during the course of a mini-trial. In technical disputes, such as patent cases, the parties would often select a non-judicial expert but it would be advisable if that person also had legal knowledge such as a patent examiner or patent attorney.

In some circumstances the parties will want someone who merely facilitates and does not advise; in others they want the neutral advisor to play a more active role and to attempt to mediate a resolution of the dispute. Although many people doubt the ability of parties locked into a dispute to agree on a mutually acceptable neutral advisor, this has not been a bar to the mini-trial. Certainly it is easier to select a neutral advisor than an arbitrator because his or her opinion is not binding.

Whatever sort of neutral advisor is selected, it is vital that the person selected be one whose credibility is respected by both parties, particularly in the event of having to advise a reluctant party to settle on the basis of an unfavourable outcome if the case went to court. The function the neutral advisor is expected to perform will determine the kind of person best suited for the role. Sometimes this may be difficult to determine at the outset, so it is important to select someone who is capable of playing the roles of advisor, mediator and facilitator as the situation demands.

In other situations, the parties may dispense altogether with the neutral advisor and prefer to rely solely on the business representatives to preside over the mini-trial. They will then negotiate a settlement privately with no outside assistance. Whatever the decision is, all parties participating should agree and be satisfied with the result, hence the reason why it is best to include this in the initial mini-trial agreement or protocol.

E. *Limited Time to Prepare*

Limits are placed on the time to prepare so that everyone must focus on the core issues of the case. Usually proceedings have commenced, in which case much of the discovery will have taken place, but arguments will as yet be unfocused. Usually the mini-trial will be set down for six weeks after the initial agreement is reached thereby focusing the lawyers' attention: "[This] eliminates the inconsequential, puts the case in perspective, and short-circuits the expensive routines the lawyer had been or would be pursuing."[42]

Focusing the parties on the legal merits at the heart of the dispute will also help to facilitate settlement as it will hopefully lessen the differing assessments of the likely outcome of litigation which could have been barring a resolution thus far.

42 Above n20, 29.

F. *Presenting the Best Case*

"Brevity is the soul of the mini-trial, therefore it forces concentration on what matters".[43] The mini-trial then will be abbreviated. It may last from half a day to three or four days with two being the average. Presentations by counsel are usually limited to one to six hours for each side. Usually each party retains complete discretion over how it will use its time. The entire presentation may be made by lawyers or the lawyers may call witnesses, experts, and produce documents to explain the case. Visual displays such as films have also been used to communicate the essence of the case.

Rules of evidence do not usually apply, therefore questioning of witnesses remains informal and tends to be in narrative form. Time is often set aside for rebuttal and this may give the opposing counsel the opportunity for questioning the witness and expert produced by the other party. There may also be open questioning where anyone may question anyone else present:[44]

> Thus, although mini-trial formats may vary considerably, the common goal is to employ a procedure that effectively draws out the strengths and weaknesses of each side - including the persuasiveness of counsel and witnesses - in a short time.

This process is most often described as "presenting the best case," the main advantage, as stated, being to focus the dispute. This is one of the two most important features of a mini-trial.

G. *Presentations to Business Representatives Empowered to Settle*

The second most important feature of a mini-trial is that the case is made before representatives of the disputing companies who have full authority to settle the aspects of the dispute with their adversaries. Most often, these representatives are very high-level non-legal members of the companies who have had no involvement thus far in creating or attempting to resolve the dispute.

By definition, this usually requires the companies involved to be reasonably large. The mini-trial will not work where the representatives are the people who were instrumental in creating the disputes, therefore a very small company will not usually opt for a mini-trial unless it chooses someone independent to act as the representative, such as a director who is not involved with the day to day running of the company. Where the parties are not companies, a representative will be appointed from the group concerned or from outside. These representatives are required to listen, observe, and to ask questions to clarify issues much as a judge or arbitrator would. Immediately following counsel's presentations the representatives meet privately to discuss the merits of the case and attempt to negotiate a resolution.

43 Above n 30.
44 Above n36, 274.

The idea behind presenting the merits of the case to business or other representatives rather than to a judge or arbitrator is that they are best equipped to resolve it. First, in mini-trials the representatives are most often high-level business executives with considerable proven experience in their field. They are probably far more adept negotiators than the average judge or lawyer. Secondly, they are aware of the larger interests of their side and consequently are in the best position to appraise their company's strengths and weaknesses and to negotiate a mutually beneficial settlement. They are the best people to hear the case and to resolve it. Furthermore, parties' representatives tend to be the most successful negotiators because they not only have an interest in the substance of the dispute but also in the relationship with the other party.[45] The additional interest in the relationship differentiates the representative who negotiates a settlement from the independent judge or arbitrator who has an interest in the substance of the dispute but no interest in the relationships between the parties.

Unfortunately, this vital aspect of a mini-trial appears to have been ignored so far in New Zealand where the attempts to conduct a mini-trial have resulted in a "rent-a-judge" process. The author understands that although these have been successful in terms of outcome, they have been settled by judges, not party representatives, and therefore are not mini-trials.[46] The presence of high-level representatives of the parties involved in the dispute seems to be the most important feature of the mini-trial.

H. *Neutral Advisor Opinion*

Where the representatives are unable to negotiate a settlement after a mini-trial they will often ask the neutral advisor to advise on likely trial outcomes or to shed some new light. This opinion will spell out to each side its best and worst alternatives to a negotiated agreement. With an independent expert's view on the advisability of settlement compared with litigation, the representatives may negotiate further. If they reach a settlement, the dispute is resolved and any pending litigation is dismissed completely. This may take time. If the representatives reach a settlement then the lawyers re-enter and formalize that agreement. If the case is not settled, the parties are free to try any other form of dispute resolution or go to court. Failure to reach an agreement will not always mean that the mini-trial has failed. If it fails to produce a settlement, it should at least give the corporate counsel a means of making future cost-benefit decisions on a far more informed basis:[47]

> In summary, even if a mini-trial does not settle the dispute, the time spent by counsel in intensive preparation for it may be worth significantly more to the client than the same amount of time spent less focussed during the long pre-trial phase.

45 Above n3, 20.

46 Two large New Zealand law firms have been involved in what they described as a mini-trial. Because the mini-trials are confidential, the parties' names and problem cannot be discussed. Suffice to say that the process has been attempted but a judge presided and gave judgment on litigation outcomes. The party representatives were not involved.

47 Above n36, 278.

Whatever happens, nothing can be lost by gaining an objective picture of the strengths and weaknesses of the case.

VI. ANALYSIS OF THE MINI-TRIAL

It is possible to see from this description that the mini-trial is a hybrid process blending selected characteristics of the adjudicative process with arbitration, mediation and negotiation:[48]

> [T]he mini-trial provides the parties the opportunity to present proofs and arguments on the merits of the case (Fuller's classic definition of adjudication), but in a process that has greater capacity to arrive at "win/win" results (negotiation) because the business representatives can work out their own integrative solution. The parties set their own procedure and select a third party to help them resolve the dispute by considering the proper outcome (arbitration). But the third party has no binding decision-making capacity (mediation). The procedure is private (arbitration, mediation, negotiation), but is usually carried on within the structure of an on-going adjudication, and the goal is agreement rather than consistency with substantive law (negotiation and mediation).

This hybrid nature of the mini-trial is one of its strengths. It enables all parties concerned to fulfil their natural roles and it is very flexible as the following examples illustrate. While all the companies involved in these examples are comparatively large high-profile organisations, this is not always the case. These companies receive more attention because of their size, and are therefore written about extensively. Smaller companies can and do successfully use the mini-trial process. The features which these examples illustrate indicate the strengths of the mini-trial in any circumstance.

VII. EXAMPLES OF MINI-TRIALS IN PRACTICE

A. *NASA - Spacecom*[49]

In 1976 Spacecom entered into a fixed price contract with the National Aeronautics and Space Administration (NASA) for the construction and operation of a Tracking and Data Relay Satellite System (TRDSS) vital for the production of space shuttles. NASA was to lease this system from Spacecom under a government contract. The principle sub-contractor was TRW, which was responsible for designing and manufacturing satellites. Initially there was a $786 million contract price and communication services were to be provided to NASA by TRDSS by 31 December, 1979. The commencement was re-scheduled to 1983 and the contract price had by 1981 more than doubled due to a number of factors, including delays in NASA's space shuttle production, major government changes, and a number of contractual disputes concerning technical issues which had arisen between Spacecom and NASA. Two of these disputes were the subject of consolidated appeals filed by Spacecom and TRW, its principle sub-contractors. The

48 Above n 36, 275.

49 Above n37; discussion by Dale H. Oliver at the First Annual Conference of the United States of Appeals for the Federal Circuit 100 FRD 499, 523-524.

issue related to the interpretation of the TRDSS performance specification in a variety of highly technical respects. Resolution of these issues depended upon the nature and extent of NASA's information concerning the position, velocity and so forth of spacecraft tracked by the TRDSS. The issues involved very technical questions about computer technology, electronics, orbital mechanics, as well as traditional questions of contract interpretation.

The dispute had been brewing since 1979 when the contractors filed a complaint. The parties had engaged in a massive document discovery and had commenced depositions resulting in huge transcripts of witness evidence. The cost for each side was an estimated $1 million. The dispute looked set to flare into large scale litigation which would have meant a further delay in launching the system and additional costs for all involved.

In 1981 a lawyer for Spacecom proposed a moratorium on discovery and an attempt at a mini-trial with the aim of a negotiated settlement. The lawyers suggested this for several reasons[50] including the high cost of trial preparation, the uncertainty of the result from litigation, the need for continued co-operation among the parties, and the need to address the merits of the case and to involve senior management. Furthermore, one of the lawyers had previously participated in a successful mini-trial hearing on another matter.

After much discussion, the parties suspended discovery and continued with the mini-trial on the following basis:

1 The contractors submit a formal claim;

2 The parties exchange briefs limited to between 50 - 100 pages containing citations to the depositions and documents;

3 There would be no reply briefs;

4 The presentations would be made in a single day, each party having a total of three hours to present their case;

5 The presentations would be made to two representatives of NASA and one from both Spacecom and TRW. Legal and technical personnel also attend;

6 The parties exchange copies of formal authorisations showing that the senior officials were empowered to act as negotiators and to execute a binding settlement agreement;

7 Immediately following the oral presentations, the officials would meet and attempt to negotiate a settlement within a predetermined period of time.

50 See above n37.

Although it took some time for the officials to reach a settlement, they did so on the seventh day, having had a number of breaks while they attended to their other commitments. Not only did they settle the matters between them, but also some unrelated disputes causing friction. Draftspeople were called in and a detailed memorandum of the agreement was executed that night. Later this was formalised and signed by the parties who were all satisfied with the agreement. Parker and Radoff, two of the lawyers involved, wrote,[51]

> Thus, not only did the mini-trial hearing proceeding terminate the on-going litigation in a satisfactory manner, but the impetus toward settlement fostered by the proceeding led to a resolution of two other major disputes that could have been the subject of protracted litigation in the future.

At the First Annual Conference of the US Court of Appeals for the Federal Circuit in May 1983 this mini-trial and its success were discussed. One commentator suggested that the recent problem with one of the satellites manufactured by TRW for NASA, which was thrown from a space shuttle and spun into orbit when its booster failed, showed the benefits of the mini-trial. The parties involved were the same as in the mini-trial just described and when this satellite failed all parties co-operated to bring it under control without disputes or remuneration:[52]

> I believe that the spirit of co-operation which resulted in saving this three hundred million dollar satellite is, in part, an out-product of the spirit of co-operation that results when parties, and those parties can include government, go through a mini-trial experience and are successful in resolving their disputes.

B. *Automatic Radio - TRW*[53]

This time TRW were manufacturing the FM portion of a car radio that Automatic Radio then combined with its AM portion to sell to car owners. Automatic Radio claimed that TRW had improperly designed and manufactured the FM portion of the car radio which Automatic Radio sold through its distributors and networks. Automatic Radio claimed that TRW's negligence which caused the FM tuners to malfunction, damaged their business to the tune of $27 million. TRW rejected this, stating that their part of the radio met the standard for car radios at that price, and that any problems were the fault of Automatic Radio.

The case had been in dispute for nearly five years before the parties decided to try a mini-trial. The costs so far had exceeded a million dollars and to prepare for a trial would cost a lot more. The parties used the mini-trial procedure as described. At the end of the second day the executives of Automatic Radio and TRW met privately and within an hour had made substantial progress towards resolving their dispute. They put the obstacles to settlement which they encountered to the neutral advisor, Irving Younger, a

51 Above n 35, 41.
52 Oliver, above n49, 524.
53 Green, n38, 18.

former judge and then professor. He responded with estimates of damages if the case went to court. With this information it took another hour to resolve the dispute. By the end of the day the parties had managed to exchange a full release and a dismissal of the litigation for a seven figure cheque. Five years' conflict was ended by a three-day mini-trial with an estimated saving of more than one million dollars.

C. *Wisconsin Electric Power Company - American Can Company*[54]

In April 1982 American Can sued Wisconsin Electric for $41 million claiming breach of contract. Wisconsin responded with a counter-claim for $20 million. The case involved substantial monetary losses on both sides and a highly complex and technical set of facts. The parties advised the court that 75 days would be required for trial. The case was one which threatened to be very costly and inconvenient. Discovery and the collection of depositions would be enormous tasks. The litigation was expected to cost millions of dollars.

Seven months after the lawsuit was commenced, the parties went to EnDispute, a Washington firm specializing in "dispute resolution and conflict management." EnDispute was organised by Jonathan Marks and Eric Green, lawyers who had, while partners in an L.A. law firm, successfully participated in the TRW and Telecredit mini-trial. They had been so impressed with the results that they formed a company to market the idea of ADR. As a rule, they suggest a number of alternatives which are available to clients.

To American Can and Wisconsin Electric they proposed mediation, the use of an outside expert, or a mini-trial, stating a preference for a mini-trial. The parties agreed to conduct a mini-trial. It was held at the end of June and took two days, after which the representatives met with and without the neutral advisor, to discuss the case. Although there was no immediate settlement, the mini-trial engendered a spirit of co-operation and showed that both parties were flexible, thus making future discussions useful. An agreement was reached in September.

That case has attracted much attention. Chief Justice Warren Burger of the US Supreme Court[55] described it as "an impressive example of the success of the mini-trial." According to Gorske, a participating lawyer, "numerous other newspapers and magazine articles told the story of the case and a number of seminars have examined its implications".[56] It is one of many examples of a very large, conventional commercial dispute which was settled most effectively by this process. Other examples of the successful use of a mini-trial include tort claims brought against Union Carbide

54 R.H. Gorske *"Alternative Dispute Resolution: The Mini-Trial"* (1985) 58 Wisconsin Bar Bulletin 1.

55 Chief Justice Warren Burger of the US Supreme Court in his 1983 year end report to the Judiciary 22.

56 Above n 55, 23.

Corporation,[57] a $200 million breach of contract and anti-trust suit between Texaco and Borden,[58] and a number of patent cases.[59] In America the popularity of the mini-trial has been established.

A 1986 survey of 19 lawyers and one former judge who had participated in mini-trials revealed that 24 out of 28 mini-trials ended in a final settlement and that 16 of the 19 lawyers interviewed were pleased with the mini-trial outcomes and enthusiastic about using mini-trials again.[60]

VIII. ADVANTAGES OF THE MINI-TRIAL

The mini-trial has several advantages over conventional litigation and arbitration. One of the most obvious advantages is cost reduction. Although there has been considerable doubt about the cost savings of ADR's generally,[61] few have disputed that mini-trials save money. While it is difficult to find accurate statistics on the overall cost of commercial disputes, many companies recognise the need to control costs.[62] Because preparation time is limited and the lengthiest mini-trial will take, at most, a few weeks of lawyers' time, costs are significantly reduced. The focusing of counsel on the core issues may also contribute to lowering the costs if the case goes to court. The mini-trial itself is inexpensive. It is estimated that the mini-trial of a complex business dispute may result in a cost to each company of $10,000 to $20,000.[63] This includes paying the neutral advisor, any expert witnesses, renting a room on neutral territory if necessary, and the immediate costs of the information exchange. Counsel would then be paid, but for a lot less time than with a trial. Organisations which have used the mini-trial process all state large savings as a major attraction.[64] In a mini-trial involving Texaco and Borden, Texaco estimated saving between $4 and $6 million in legal expenses.[65]

The mini-trial also avoids the delays inherent in getting a case to court which is important in fostering business certainty and conserving corporate personnel resources. Prolonged litigation can adversely affect business certainty by tying up business

57 "Union Carbide Uses Mini-Trial to Settle 19 Toxic Tort Cases" (1983), Alternatives to the High Cost of Litigation (Alternatives) 1, 3.

58 "Texaco-Borden Anti-Trust Mini-Trial Sets the Record" (1983) 1 Alternatives 1,2.

59 Green n38, 14.

60 "The Effectiveness of the Mini-Trial in Resolving Complex Commercial Disputes: A Survey" [1986] ABAJ Litigation Sec, Subcommittee on Alternative Means of Dispute Resolution of the Commission on Corporate Counsel.

61 Trubeck, Serat, Felstiner, Kritzer & Grossman "The Costs of Ordinary Litigation" (1983) 31 UCLA LR 72.

62 "Austen Industries Uses Mini-Trials to Settle Two Construction Cases at Less than 3% of Normal Cost" (1983) 1 Alternatives 1,4.

63 Above n20, 9.

64 Above n62; "US-German Mini-Trial Settles Distributor's Million Dollar Claim in One Day" (1984) 2 Alternatives 1; "Business Saves Big Money with the Mini-Trial" [1980] Bus Wk 168.

65 Above n58.

planning, thereby making decisions for the future difficult. Further, it drains management time, energy, and technical resources, while diverting them from productive activity. With a mini-trial on the other hand, top executives are educated about their company's dispute and lawyers are restrained, making companies more productive.[66]

Being faced with settlement or litigation, the disputing parties have to decide whether they wish to preserve continuing relationships between them. If they decide that these are important, then a negotiated settlement will be vastly preferable to litigation. Mini-trials tend to preserve those relationships which are usually lost as a result of litigation.[67] Often companies, if they had the choice, would preserve the relationships. Some companies who have used the mini-trial have concluded that preservation was the most important result of the successful mini-trial, and that the process must have been designed for that purpose.[68]

The Control Data Corporation mini-trial in 1982 illustrates this point.[69] Control Data employed contractors to build the company's headquarters which had a fourteen story glass wall. Unfortunately, the wall leaked whenever it rained. Control Data, after an unsuccessful negotiation attempt, sued the contractors. No one could agree on who was at fault. Finally Control Data, the architects and builders agreed to a mini-trial in an attempt to apportion liability amongst themselves. A settlement was agreed upon very quickly by the three managers involved.

Control Data was paid several million dollars and an arrangement was agreed to whereby the contractor and the architect would replace the leaking wall over a three year period at their expense. Were it not for this fair and practical solution, which could not have been arrived at in court, the representative of Control Data concluded that they would not have used those contractors or architects again. That would have lost the latter parties a lucrative source of future work.

Not only can the mini-trial preserve relationships, but it can also help to foster relations by building trust between the parties. Companies who began as adversaries can begin to co-operate, providing advantages to both. The mini-trial largely does this by satisfying the parties' needs for a mutually satisfactory resolution of their dispute, or in providing the opportunity for a win/win result, acknowledged to be nearly impossible to achieve through the adversarial system operating in the court. There is very little room for compromise solutions in the court because the judicial and arbitration forums are not conducive to negotiated settlements. Rather, they are concerned with the adjudication of legal rights. Moreover, in court, only the facts and circumstances

66 D Barr "Whose Dispute is This Anyway?: The Propriety of the Mini-Trial in Promoting Corporate Dispute Resolution" [1987] Journal of Dispute Resolution 133, 141.

67 See any of the articles cited in previous footnotes for an elucidation of this point.

68 Above n20, 43 where one lawyer involved in the Data Control Corp mini-trial concluded that the net result of the process was to preserve the business relationships.

69 Above n 20, 42-44.

directly relating to the case at issue are relevant. Factors affecting the case but external to the specific legal issues in the instant case, are not addressed, but they may be of fundamental importance to the parties. Thus it is argued that it is seldom, if ever, possible to achieve a mutually beneficial result in court, because courts lack the power and expertise to fashion complex remedies which really respond to the parties' problems.[70]

The mini-trial overcomes these problems as illustrated by the Texaco/Borden mini-trial, described as "the most dramatic example of this extra-judicial compromise".[71] In 1980 Borden filed a $200 million anti-trust suit against Texaco in connection with a purported breach of a natural gas contract. It was going to be a very expensive case if litigated due to the complexity of the issues. Therefore the possibility of a mini-trial was discussed and agreed to by the parties. Although the hearing went smoothly, the private discussions between the corporate representatives did not, and the position worsened. The parties did not, however, terminate the negotiations but, over a period of time, they continued to communicate with each other. Within a few weeks the dispute was resolved in a manner never anticipated, and which could never have been possible had the parties gone to court. The resolution involved settling the contract in dispute as well as a totally unrelated supply contract which promised substantial returns to both parties:[72]

> By taking their differences to a mini-trial, both companies were able to bring into the picture their other contracts, and to work out a deal that made economic sense to both. They were able to expand their opportunities by considering their entire business relationship. This was a business solution that could never have been contemplated by the lawyers, at least their outside lawyers. No court, no jury, no litigation can achieve what they achieved.

In a mini-trial, a solution may be arrived at which satisfies both parties, rather than the compromise solution so often imposed in arbitration, or the win/lose decision which is reached by litigation. Because the parties are actively participating they can formulate a pragmatic solution to their dispute which fits the companies' needs and capabilities. An executive is more likely to support each company's objectives than any decision imposed by a judge or arbitrator. Thus it is more likely that the parties will be satisfied with that decision. As yet, there has been no reported litigation concerning settlements following a mini-trial which tends to attest to its success.[73]

Another important feature of the mini-trial is confidentiality. As Leiberman and Henry say, "No-one wants to publicise an alleged mistake or a dispute with an important business partner".[74] This has to be compared with the "proverbial goldfish bowl" - the court which, being open to the public, often means sensational press

70 Above n 20, 39-40; above n66, 142.
71 Above n20, 40.
72 Above n 10, 42.
73 Above n66, 143.
74 Above n20, 45 and above n66, 143.

accounts of cases and disclosure of intimate facts which can detrimentally affect the company's business and reputation. Where it is not in the public interest to reveal such information, the mini-trial is better for parties who prefer to resolve their dispute in a private forum.

IX. TYPES OF DISPUTES MOST SUITED TO THE MINI-TRIAL PROCESS

Although there are definite advantages over other forms of dispute resolution, the mini-trial is not the cure-all of all commercial disputes. Rather, it is said that the mini-trial is more useful in some circumstances than in others. Mini-trials will not ordinarily be used by very small parties who cannot produce a representative empowered to settle. Small companies' disputes, where there are only a few people involved in the organisation, or partnership disputes, for example, will be better suited to other forms of dispute resolution, such as mediation. The mini-trial, because of its structure, tends to lend itself to larger disputes. However, this need not be a firm rule as the neutral advisor in such cases can take a more active role.[75]

Some authors suggest, in regard to appropriate material for mini-trials, that experience to date indicates that the mini-trial yields the best results where cases involve complex questions of mixed law and fact.[76] The following are examples of suitable subjects involving mixed questions of law and fact: patent, products liability, contract, anti-trust, and unfair competition. It has also been used in land and securities fraud, in international joint ventures, executive discharge, and employee grievances.[77] These are the sorts of cases in which litigation is often intractable and costly. Proponents of this limited view of the appropriateness of mini-trials believe that where a case turns solely on legal issues, traditional summary judgment procedures are likely to provide a better means of resolution. Similarly, where a case primarily revolves around factual disputes involving credibility, the mini-trial may be no more effective in resolving the dispute than traditional settlement negotiations or arbitration. It may be suitable, however, where the witness whose credibility is at issue appears at the mini-trial to present its case and be confronted by its opponents.[78]

Henry and Leiberman dispute these claims.[79] They maintain that in cases in which pure legal questions are the sole issues, that obtaining the opinion of a retired judge or expert in the area of law and acting in his or her capacity as a neutral advisor, may be equally effective to advise on litigation outcomes. The company representatives can

75 Green, above n38, 17.

76 Above n36, 275-276; Green, above n38, 17; above n37, 42; Olsen "Dispute Resolution: An Alternative for Large Case Litigation" (1980) 6 ABAJ Litigation Sec 22.

77 Wilkinson, above n25, 5.

78 Above n20 and above n36, 275.

79 Above n20, 51.

then reach a compromise based on the advisor's opinion. In regard to credibility of witnesses cases, it is suggested that:[80]

> Executives at this level - savvy business managers - are far more sophisticated than the average jury called upon to determine who is lying in a case and who is not. In these disputes, the executives are probably the best judges of who is lying, not the worst.

There are many people who would dispute a claim such as this, and who say the court is the best place in which to test such questions.[81] Either way, it is argued that the mini-trial is still too new and untried to dismiss the possibility of using it in questions of this type.[82]

One real deterrent may occur if little or no trust exists between the parties, or if they are adamant in their positions. There may be times when relations have deteriorated to the extent that one party may be very reluctant to attempt ADR in any shape or form on the basis that a co-operative venture is unthinkable. Such situations will not always preclude the mini-trial. Firstly, there may be a term included in the contract that ADR, or, more specifically, a mini-trial, will be tried before resorting to litigation, breach of which would result in a penalty for the defaulting party. This is one method that has been suggested to enforce ADR.[83] Another possible method is to have a binding agreement with a dispute resolution centre to take disputes with other parties who have similar agreements to the centre first. In the absence of such formal procedures, a mini-trial may still work where the companies and their lawyers remain conscious of even the slightest possibility of communication, and are willing to try a novel procedure before arming for battle. The existence of some animosity will not always be bad:[84]

> To the extent that some catharsis was necessary to unblock the parties, the mini-trial provided an opportunity for just enough animosity to exist, yet within a co-operative framework.

A further possible deterrent is counsel's unfamiliarity with the mini-trial process. The attempts to hold mini-trials in New Zealand illustrate this. The so-called mini-trials that have taken place in New Zealand have really been rent-a-judge processes with abbreviated presentations being made to a judge, not business representatives. The lawyers and clients presumably misunderstood the mini-trial, or were loath to surrender the dispute to non-legal people for resolution. There is an assumption on the part of many lawyers that lawyers and lawyers alone are capable of resolving disputes, but this is a rather egotistical view, which results in parties never being involved with their own

80 Above n 79.
81 Above n4 and discussion following.
82 Above n20, n52, n38, n66 - all these authors suggest leaving the classes of cases open.
83 Green, above n39.
84 Above n36, 277.

disputes or being encouraged to take charge of them. Even the most sceptical American lawyers have been persuaded of the benefits of mini-trials.[85]

Nevertheless, a mini-trial will be wholly inappropriate where one party is set on litigation because they are certain of a victorious outcome which will cripple the adversary. Similarly, it will not work where litigation is being used to achieve other ends such as gaining publicity and discrediting the adversary; deferring liability and payment thereof by means of litigation; wanting a jury trial in the first instance; seeking elucidation of principle, policy, or interpretation; where creating a binding precedent; or finally, if it is not inherent in all these options, where there is neither the need nor the desire to continue the relationship. ADR cannot obviously replace all litigation which has certain tactical, philosophical, social and legal advantages.[86]

In the final analysis, it must be up to the parties and their counsel to decide upon the suitability of any ADR based on the case in dispute. In choosing a mini-trial the following factors emerge as worthy of consideration in determining its possible effectiveness:[87]

1 The stage of the dispute;
2 The types of issues at the heart of the dispute;
3 The motivations and relationship of the parties;
4 The cost/benefit analysis.

A further consideration may be whether, in the event of settlement not being reached, one side has gained a tactical or strategic advantage. The risk of premature or untimely disclosures must be carefully weighed. If one party considers that the case, if it goes to court, may be prejudiced, it may be better to wait and see how things progress before embarking on any pre-trial settlement processes. On the one hand, the earlier the mini-trial is held, the greater the savings will be if a settlement is reached: the later it is held the more willing the parties will be to "avoid posturing and to present their strongest arguments."[88] These factors must be weighed and evaluated.

If all these factors are favourable and both clients and counsel wish to try a new method for resolving their commercial disputes, then the mini-trial may well prove to be very efficient, just and satisfying for all concerned. While there may be doubts now about trying something so new in New Zealand, it is worth remembering that it is well used in the United States. Moreover the process is flexible and may be tailored to the particular dispute, thereby facilitating settlement. Such a process may serve the client's interests better than any other, and is consequently worthy of consideration.

85 Above n20, 48-49.
86 Above n4.
87 Above n36, 278.
88 Above n37, 42.

X. CRITICISMS OF ADR GENERALLY

To fully appreciate all possible criticisms of mini-trials, it is necessary to evaluate them in light of the criticisms of ADR generally. Just as there are people who criticise the adversary system, there are those who criticise ADR. There are many who consider that the adversary system is the better way to resolve disputes. They repudiate the criticisms of litigation and emphasise the positive effects of an impartial application of substantive principles. Professor Resnik[89] has depicted twelve characteristics of litigation which she, and others, consider to be important in the effective resolution of disputes. These "valued features" of procedure include litigants" autonomy, litigants' persuasion opportunities, decision-makers' power, the diffusion and re-allocation of that power, decision-makers' impartiality and visibility, rationality and norm enforcement, ritual and formality, finality, revisionism, economy, consistency, and differentiation. Such authors believe that the adversary system provides an analytic framework in which disputes can be processed objectively and consistently. They compare these advantages with ADR which is seen as being an ad hoc system of justice which is inherently incapable of producing results as "just" as those in litigation.[90]

Professor Fiss attacks the ADR notion of settlement on four grounds:[91]

> Consent is often coerced; the bargain may be struck by someone without authority; the absence of trial and judgment renders subsequent judicial involvement troublesome; and although dockets are trimmed, justice may not be done.

In more detail, he states first, that ADR implicitly asks us to assume a rough equality between the contending parties where there may be none at all. He believes that the distribution of financial resources will invariably infect the bargaining process in ADR to a greater extent than in litigation, where the judge can employ a number of measures to lessen the impact of distributional inequalities:[92]

> There is a critical difference between a process like settlement, which is based on bargaining and accepts inequalities of wealth as an integral and legitimate component of the process, and a process like judgment, which knowingly struggles against those inequalities.

Secondly, he contends that with ADR there is an absence of authoritative consent on the part of the people represented by others such as a Director representing shareholders, a union official representing employees, or a member of an interest group representing others. He suggests that the representatives may represent their own rather than the other peoples' interests, and says that the problems here are again different from court adjudication, because the court makes the decision rather than the party representatives empowered to settle.

89 Resnik "Tiers" (1984) 57 S Cal LR 837, 844-859.
90 Above n4, especially Fiss and Brunet.
91 Fiss, above n4, 1075.
92 Above n 4, 1078.

Thirdly, he identifies the lack of a foundation for continuing judicial involvement. Fiss contends that people who consider the end product of litigation to be judgment are incorrect; that the courts' involvement goes considerably further. This is superior to settlement which terminates upon agreement being reached. The courts will give a judgment which will not end the struggle, but merely re-define the terms and the balance of power. The parties will often then return to court. Fiss contends that settlement also leads the parties back to court, where the judge will be at a loss because he or she has no basis for assessing the request.

Finally, he criticises ADR because it trivialises the remedial dimensions of a lawsuit to one of resolving private disputes. ADR may achieve peace between the parties at less cost, but adjudication, he argues, is concerned with more than just peace. The job of the judges, who are "public officials chosen by a process in which the public participates", and who "possess a power that has been defined and conferred by public law", is not to maximise the ends of private parties, nor to secure peace. Fiss says:[93]

> their job is to ... explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them. This duty is not discharged when the parties settle.

He believes "parties settle while leaving justice undone" because "to settle something means to accept less than some ideal".[94]

Other authors have taken this fourth point further and discussed ADR becoming a tool for diminishing the judicial development of legal rights for the disadvantaged:[95]

> Inexpensive, expeditious and informal adjudication is not always synonymous with *fair* and *just* adjudication. The decision makers may not understand the values at stake and parties to disputes do not always possess equal power and resources. Sometimes because of this inequality and sometimes because of deficiencies in informal processes lacking procedural protections, the use of alternative mechanisms will produce nothing more than inexpensive and ill-informed decisions. And these decisions may merely legitimate decisions made by the existing power structure within society.

In the areas of sexual and racial equality, it has been strongly argued that diverting cases away from the courts may result in a resurgence of the norms of the powerful in our society and a derogation of the rights hard won by women and blacks in the last few years.[96] Arguably, this is more likely to happen in an area like family law, to which ADR is least suited. Mediation will often result in women, who are usually

93 Above n 4, 1085.
94 Above n 4, 1086.
95 H T Edwards "Alternative Dispute Resolution: Panacea or Anathema" (1986) 99 Harv LR 668, 679.
96 Janet Rifkin "Mediation From a Feminist Perspective" (1987) 2 Law and Inequality 27.

disadvantaged by unequal bargaining power, having a compromise inflicted upon them, when they require determination of their substantive rights.[97]

Much of this criticism of ADR rests on its inapplicability to resolve difficult issues of constitutional or public law, where society at large has an interest in the substantive determination of the result. It is stated that making use of non-legal values to resolve important social issues, or allowing a side-stepping of the regulation of public rights and duties, is a real cause of concern because the legal system is designed to administer such regulation. That is justice. "An oft-forgotten virtue of adjudication is that it ensures the proper resolution and application of public values."[98] An example often given is the increasing drive to negotiate or mediate many environmental disputes. Negotiations of such disputes can result in a compromise of the strict standards of environmental protection legislation which is inconsistent with the rule of law, and the public interests. It gives the people with the greatest resources, often the infringers, the opportunity to over-ride smaller interest groups. In such areas it is conceded that facilitating mutual understanding and good faith between the disputants is a positive aspect of ADR but it must be recognised that some disputes cannot be so resolved without defeating the goals of justice.

Many of these considerations are as valid as the criticisms of litigation. However, it is important to evaluate each ADR process individually to see whether these criticisms render them invalid in some circumstances. As my focus is mini-trials, I will test these criticisms against mini-trials.

XI. MINI-TRIALS - MEETING THE CRITICS

In mini-trials, there is usually a rough equality between the parties, although this need not be strictly financial equality as in the TRW/Telecredit example. Rather, equality is achieved because the parties have an equal interest in resolving the dispute. There is nothing to be lost by mutual agreement, and everything to gain. Further, the structure of the mini-trial in limiting access to discovery and abbreviating the time for the legal presentations checks any resource disparities between the parties to some extent. Secondly, the parties do consent to the mini-trial process which usually involves companies, rather than collections of individuals represented by a self-interested spokes-person. Even where a group such as a union is represented by one party, the presence of lawyers acting for their client in substantially their ordinary adversarial role, lessens this criticism because all the relevant arguments are placed before the party representatives by the lawyers who present all the facts.

Thirdly, there have been no reported appeals from the negotiated settlements arrived at in a mini-trial to date.[99] That suggests that Fiss will be incorrect in his postulation that parties, invariably disgruntled with the settlement, return to court, taking up court time, and thereby delaying other cases and expending public resources. In fact, it has

97 Brunet, above n4 in general.
98 Above n95, 676.
99 Above n66, 143.

been argued that the mini-trial facilitates access to the courts in that the fewer protracted commercial disputes that are litigated, the more time there is available for hearing other cases. In this way the mini-trial is a better option than the commercial list which takes up judicial time and costs the public money. Every successfully settled mini-trial conserves public resources which would otherwise be spent on litigation which costs not only the parties' money, but also the State's:[100]

> The mini-trial relieves the public of this subsidy and enables court time and resources to be devoted to resolving other disputes, including those of true public concerns.

It is the fourth criticism regarding the public/private nature of the disputes that may have some validity in the mini-trial context. However, the difficulty in deciding whether a dispute is public or private must be noted. Judge Edwards includes "constitutional issues, issues surrounding government regulation, and issues of great public concern" in his list of public law cases.[101] Professor Fiss, on the other hand, argues that they include, "cases in which there are significant distributional equalities ... [and] where there is a genuine societal need for an authoritative interpretation of the law".[102] Thus far, most of the disputes that have been resolved by mini-trial have been private in nature. The possible exceptions to this have been the tort and product liability cases. There is one ameliorating factor and that is the non-binding character of the mini-trial. If an individual or company is dissatisfied with the negotiations, they may terminate them. If they subsequently dislike the settlement, they may resort to litigation and have their rights declared in the public arena.

Nevertheless, I agree with Lewis Barr who states:[103]

> ... [M]ini-trial use in resolving disputes which have great bearing on the public should not be encouraged. Nor should mini-trials be utilised in order to prevent precedent and public rulings which would force companies to rectify wrongs committed against a large segment of the public.

There are definitely situations in which a mini-trial will be unsuitable so, in this regard, there is no fear of mini-trials replacing traditional litigation. If parties decide that justice has not been done, will go to court and receive the advantages that an impartial, binding and public resolution can effect.

100 Above n 66, 145.
101 Above n95, 671.
102 Fiss, above n4, 1087.
103 Above n66, 146.

XII. CONCLUSION

While it is recognised that mini-trials are not appropriate in every case, it must be recognised that they are an effective and efficient means for resolving commercial disputes of an essentially private nature. In the United States it has been said:[104]

> Mini-trials are no longer a sport, no longer an aberration. To the contrary, among those who have used the mini-trial to settle disputes are some of America's largest and best known corporations. The mini-trial has proved its worth not simply as a theoretical technique, but as a practical device of widespread utility.

In the United States mini-trials have successfully resulted in the prompt settlement of more than 95% of the cases in which they have been used.[105] In New Zealand they could be equally successful. The market is ready for alternative means of dispute resolution which will avoid many of the difficulties faced when employing traditional adjudication. If the legal community is responsive to these new developments, mini-trials will have an assured future in resolving suitable commercial disputes in New Zealand.

104 Above n20, 47.
105 "Centre for Public Resources Has Alternatives to Courts" Assoc Press, Jan 1986.