In Search of Process: How to Best Align Disputants, Disputes, and Dispute Resolution Procedures

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Abstract

The focus of this thesis is on the mechanical "fitting" of disputants and their disputes to an optimum alternative dispute resolution (ADR) process. In the early 1990's, the Harvard Negotiation Project first problematised the need to align persons and their specific problems to the most appropriate forum of ADR. Sander's leading article in this area, 'Fitting the Forum to the Fuss' analysed the attributes of disputes and the corresponding features of several ADR processes, yet critically neglected to outline the actual mechanisms of 'fitting' by which a dispute is aligned to a process. This thesis addresses that knowledge gap.

The thesis is focused on which people or what devices serve the mechanical process of actually 'fitting' the 'Forum to the Fuss.' The thesis will qualitatively analyse the attributes and deficits of the most significant contemporary "fitting" mechanisms. This thesis uses the descriptors of gatekeepers, gateways, and adaptive processes to classify the three methods by which disputes can be 'fit' or allocated to contemporary ADR methods. The thesis also advances the prospect of a designated intermediate stage for alignment including the use of multi-door courtrooms and ADR consultants.

Possibilities for ADR alignment/realignment are analysed both *ex-ante* and *ex-post* process selection – both *without* and *within* the designated ADR processes. The thesis also examines the toolkits needed for the gatekeeping functions outlined and identifies the problems associated with each of the gatekeeping categories and those inherent in gateways that lead to pre-selected contractual or statutory ADR processes.

The thesis then turns to examine the promise of adaptive ADR processes. These modalities offer flexibility for alignment and continual realignment/readjustment within the processes themselves and include hybrid processes, eclectic/elastic mediation, and custom process design. Finally, the thesis makes recommendations for identifying or creating the ideal ADR intermediate to facilitate optimal process alignment in ADR.

Abstract Word Count: 299

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Abbreviations

ADR	Alternative Dispute Resolution
Arb-Med	Arbitration/Mediation
Med-Arb	Mediation/Arbitration
Ombuds	Ombudsman

Table of cases

Table of statutes

Bill n°28: An Act to Establish the New Code of Civil Procedure (2013)

Civil Procedure Rules 2017

Model Rules of Professional Conduct (1983)

Ontario Rules of Civil Procedure (1990)

The German Code of Civil Procedure (ZPO), Section 278a, (2016)

The Hague Convention on the Civil Aspects of International Child Abduction (1980)

1 Introduction

This thesis will examine the mechanisms by which disputants and their disputes are actually aligned to the most optimal Alternative Dispute Resolution (ADR) process. This subject is novel because of the lack of existing literature specifically addressing the critical intermediate junction where the essential "fit" is made, so that process alignment occurs. The thesis will provide qualitative analyses of a wide range of existing ADR alignment mechanisms and methods. The thesis will analyse the problems and prospects of these existing "fitting" mechanisms. Lastly, the thesis will suggest several "fitting" opportunities that promote better alignment in multi-door dispute resolution programs and intermediary ADR consultants.

The modern search for process began in the 1990's when the Harvard Negotiation project postulated the need to 'Fit the Forum to the Fuss'.[1] This seminal work concentrated on matching process features with the particulars of a dispute and the needs of the parties. Despite this powerful and early entry to the ADR literature on the subject, the importance of process selection has been side-lined. There remains a critical need to understand the 'who' and 'what' of the mechanics of process selection and exactly 'how' people and their problems are allocated or 'fit' to an ADR process, and the extent to which those processes can adapt. A 'fitting' is needed to align the people and their problem to an optimum process. This thesis provides analyses of the key features and deficiencies of current ADR process choice related actors, clauses,

[1] Frank Sander and Stephen Goldberg, 'Fitting the Forum to the Fuss: A user-friendly Guide to selecting an ADR Procedure' (1994) 10 Negotiation Journal 49

and adaptive processes that have the capability of being conduits to assist parties in 'fitting' their disputes to an optimum process.

A pivotal question in creating a paradigm for dispute resolution process alignment is whether to look first at this objective through the prism of the people, the problem, or the process.[2] Another key dilemma is exactly who (gatekeepers) or what (gateways) governs assessment, scoping and process 'fitting' and how that pre-process can be tailored to empower party self-determination and process alignment choice. Case managers, lawyers, mediators, clients and other actors can all sometimes act as potential gatekeepers to guide a problem towards alignment with certain ADR methods or processes while clauses and institutional mechanism can provide gateways leading to pre-determined ADR methods. Largely dependent on the answers to the first and the second enquiries as well as any boundaries, impediments, and limitations[3], is whether this process of 'fitting' can occur exclusively *without* (prior to) or also *within* the (adaptive) ADR process itself or potentially encompasses a re-evaluative fluidity stretching across both time periods.

Bearing down on the paradigm of dispute resolution alignment is the progression of a problem along a dispute timeline. Necessarily there is an inverse correlation between the scope of process alignment choice and movement along the dispute timeline. This fact favours early process choice – however, early on in a dispute there is often insufficient momentum, information exchange, or available

[2] Horst Eidenmüller and Andreas Hacke, 'The PPP Negotiation Model: Problem, People, and Process' (*Oxford Business Law Blog*, 17 March 2017) <https://www.law.ox.ac.uk/business-law-blog/blog/2017/03/ppp-negotiation-model-problem-people-and-process> accessed 17 May 2017

[3] Contractual (clauses), resources, time constraints and other real limitations may restrict the possibilities for process alignment. The ADR environment may also impair process choice, an example of which is Online Dispute Resolution (ODR).

gateways or gatekeepers to allow clients to strategically align their dispute.[4] At this early stage, parties and process gatekeepers may not yet know whether they require a definitive and binding method of ADR such as arbitration or a highly flexible modality such as mediation.[5] Essentially, the inception of the problem is the unplanted garden where seedlings grow the entrenched roots of the widening polarities that position the larger dispute above the surface. Since problem characterization often comes with that escalation, at inception, the people and their problems remain unbounded by legal and other formalities. However, typically, at this inception of the problem that may turn into a full-fledged dispute, no external actor with sufficient influence over process choice is in play yet to begin any process 'fitting' exercise. This situation is paradoxical: At this point, there is an empty playground for the widest array of creative strategic[6] process choice without any tools or knowledgeable actors who can help make informed choices.

A seasoned arbitrator once observed: *'We have to start by defining the process as part of the problem'.*[7] He is right to address this key theme. However, the problem is better understood as the challenge of correctly *linking* individual disputants and their unique problem to an appropriate process – the process is not a problem in and of itself. Quite the opposite. A well-aligned process that adapts or meets the challenge

[4] This early non-alignment of a dispute to a process can come to present a strategic barrier to settlement. See Robert Mnookin, 'Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict' (1993) 8 The Ohio State Journal on Dispute Resolution 235, 248

[5] Sander and Goldberg (n 1) 51

[6] Mnookin (n 7) 239–242

[7] David Plant quoted in Michael Leathes 'Dispute Resolution Mules: Preventing the Process from being Part of the Problem' (*IMI Mediation*) <https://imimediation.org|/hybrids> accessed 17 May 2017. This is the opinion of a seasoned arbitrator, mediator and general dispute resolver as well as author of *We Must Talk Because We Can*. *Mediating International Property Disputes* (ICC Press 2009)

of the unique needs and interests of the parties and their dispute becomes the vehicle for potential dialogue and resolution. It has been observed that:

> One must be wary of ascribing particular attributes to one or another method of dispute resolution, however. Litigation is not always final, although that is a commonly perceived benefit; mediation may not enable parties to work together in the future, as is often suggested; arbitration may not always be less expensive than pursuing a case in court. And all dispute resolution methods may have unanticipated consequences that make them more or less desirable in particular instances.[8]

Optimum process selection requires finding the right conduit, which once located, can help parties fulfil two fundamental values of ADR. Firstly, a well 'fit' process becomes subservient to the parties' needs and interests and not vice-versa. Secondly, 'fitting' honours disputants' 'preeminent role in making choices about their own disputes.'[9] It is only when the people involved in the dispute are unwilling to meet the challenge of finding a conduit to the optimum process, that the process unnecessarily becomes seen as part of the problem and an impediment to resolution.

Most problems will have to escalate before an actor with conduit influence to 'fit' processes is empowered or appointed. Some informed clients have developed the capacity to triage disputes at a very early stage or use ADR processes to prevent escalation.[10] However, generally, but by no means always, the problem will have become at least somewhat legalised by the time ADR options are first discussed and

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[8] National Institute for Dispute Resolution, 'Paths to Justice: Major Public Policy Issues of Dispute Resolution' (Report of the Ad Hoc Panel on Dispute Resolution and Public Policy, 1983) cited in Leonard Riskin, *Dispute Resolution and Lawyers: Cases and Materials* (5th edn, West Academic 2014) 887

[9] John Lande and Gregg Herman, 'Fitting the Forum to the Family Fuss. Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases' (2004) 42 Family Court Review 280, 284

[10] David Burt, 'The DuPont Company's Development of ADR Usage: From Theory to Practice (2014) 20 Dispute Resolution Magazine 1, 1-4

may be on course for a more formal legal dispute. The client's appointment of the lawyer is most probably their first encounter with the problem of 'fitting.'

2 Gatekeepers

This part of the thesis will examine the role of the ADR gatekeeper. A gatekeeper is the actor who influences the 'fitting' of a dispute to an ADR process. Typical gatekeepers can be clients, attorneys, case managers, and, occasionally, mediators. Gatekeepers are persons who have a discretion or influence over the routing of a dispute to a particular process in contrast to gateways that are static methods of process allocation often contained in contractual or dispute resolution clauses, court or procedural rules, and institutional processes. Gatekeepers offer a precipice at which decisions can be made about aligning a dispute with a particular method of dispute resolution. Sometimes alignment possibilities will be very narrowly conceived or non-existent. On other occasions, there may be a vast array of discretion and untapped potential for aligning a dispute with the most appropriate type of ADR. To fully understand process alignment at each stage of a dispute, it is necessary to evaluate the characteristics of each type of gatekeeper's salient features that can be advantageous or prejudicial to process 'fitting'.

2.1 The Key to Every Gate

To ensure optimum process alignment, all gatekeepers require comprehensive ADR skill sets. At the common core, gatekeepers need to be able to analyse a dispute including the nature of the conflict, aims of the parties, values and relational situation, understand conflict dynamics and escalation, recognize biases and heuristics, and see

essential particularities about the structure of the dispute, including understand extraneous financial and jurisdictional constraints that may limit the extent of process choice.

Gatekeepers must go beyond merely reviewing a case file or statements by initiating communication with parties and obtaining each disputant's perspectives on factual information, a self-statement, relationship indicators, and appeals of what they are looking to accomplish or resolve.[11] Gatekeepers must understand every individual's relationship to the conflict as well as their particular aims, apprehensions, communication skills, culture, disabilities, and relationship with the other people involved in the dispute. The gatekeeper must understand the parties' orientation towards ADR– whether they are seeking binding resolution or a voluntary process or unable/unwilling to decide.

Gatekeepers must have the ability to understand where a conflict is on the disputes timeline. For instance, are the parties hardening, involved in debates or polemics, shifting attention to actions over words, consolidating image and coalition about the other party, dealing with loss of face, invoking strategies of threats, using destructive blows, fragmenting the enemy, or heading together into the abyss.[12] Choice of ADR process will very often link to where parties find themselves in this hierarchy of escalation.[13]

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[11] Friedmann Schulz von Thun, 'Das Kommunikationsquadrat' (*Schulz von Thun Institut für Kommunikation*) <http://www.schulz-von-thun.de/index.php?article_id=71> accessed 18 May 2017

[12]Thomas Jordan, 'Glasl's Nine-Stage Model of Conflict Escalation' (*Everything Mediation*, 2000) <http://www.mediate.com/articles/jordan.cfm> accessed 18 May 2017, commenting on Friedrich Glasl, *Confronting Conflic*t (Hawthorn Pres, 1999)

[13] William Felsteiner et. al., 'The Emergency and Transformation of Disputes: Naming, Blaming, Claiming' (1981) 15 Law & Society Review 631, 642

Gatekeepers require expertise in how heuristics and biases affect the parties and impact on their decision making in relation to the presented problem,[14] understanding normative, descriptive, and prescriptive models for judgement and decision making.[15] By modelling the biases and heuristics of parties at the descriptive level, gatekeepers can look to the ADR process/es best suited to prescriptive models that could move the decision making of the parties towards the normative. Gatekeepers also need to discover and look at options already on the table from the parties' previous discussions, with a view to obtaining a process that will facilitate prioritization and decisions between these options, as well as overcoming biases that may have already entrenched.[16] Gatekeepers also need to take into account the psychology of the parties and their problem since 'even in the absence of miscalculation and strategic bargaining, psychological processes create barriers that preclude out-of-court settlements in some cases.'[17]

Every dispute has structural and substantive features that require special attention. Multi-party disputes can limit choice of ADR method and will require longer and more detailed gatekeeping analyses to account for the wider scope of needs and interests. Gatekeepers must know the financial status of parties to ensure that the designated process matches the resources available. Processes for certain

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[14] See, Amos Tversky and Daniel Kahneman, 'Judgment under Uncertainty: Heuristics and Biases' (1974) 185 Science 1124

[15] Eyal Zamir and Doron Teichman, *The Oxford Handbook of Behavioral Economics and the Law* (Oxford University Press 2014), 4-5

[16] Chris Guthrie, 'Panacea or Pandora's Box?: The Costs of Options in Negotiation' (2003) 88 Iowa Law Review 601, 608

[17] Russell Korobkin and Chris Guthrie, 'Psychological Barriers to Litigation Settlement: An Experimental Approach' (1995) 93 Michigan Law Review 107, 109

substantive areas may require subject matter expertise, such as maritime or IP disputes, necessitating additional research for alignment. Cross-border disputes will also trigger a range of special concerns, including contractual, jurisdictional, and conflicts of law questions that will need to be addressed by gatekeepers prior to making a recommendation to the parties.[18]

ADR training is key to successful gatekeeping for optimum ADR process alignment. While there are a wide range of training options and accreditation for ADR processes, there are a dearth of options addressing the specialised requirements of process alignment. While standards of accreditation have been developed for attorneys, these focus on representation in a singular ADR process. This guidance is not specifically tailored to an attorney's key gatekeeping role – guiding people and their problems towards optimum ADR processes.[19] There remains a need to fill the process "fitting" knowledge gap.

2.2 Individuals as Gatekeepers Ex-Ante

2.2.1 Parties as Gatekeepers

There can be little chance of optimizing process alignment if the people involved in a problem do not have a willingness to embrace ADR and the forward thinking procedures needed to accomplish this aim since '[c]hanging procedures alone, however, is not enough; disputants must have the motivation, skills, and resources to

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[18] Horst Eidenmüller and Helge Großerichter, 'Alternative Dispute Resolution and Private International Law' (2015) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2638471> accessed 21 May 2017, 6-10

[19] IMI has developed international Competency Criteria for Mediation Advocates. See, International Mediation Institute, 'Competency Criteria for Mediation Advocates/Advisors' <https://imimediation.org/mediation-advocacy-criteria> accessed 21 May 2017. Chartered Institute of Arbitrators has several accreditation courses in adjudication, arbitration, and mediation that are aimed at practitioners as well as providers. See, Chartered Institute of Arbitrators, 'Training Certifications' (2016) <http://www.ciarb.org/training-and-development> accessed 21 May 2017

use the new procedures.'[20] However, '[t]he challenge is to change the dispute resolution system--the set of procedures used and the factors affecting their use--in order to encourage people and organizations to talk [about the optimum resolution process] …'[21]and embrace the opportunities offered by the full spectrum of ADR methods, instead of simply taking the lowest hanging fruit made cheaply and readily available to them, whether mandatory mediation or another method that simply ticks boxes.

To take full advantage of the spectrum of ADR process choices available, a party needs to be educated in process alternatives, motivated to try something different, and sufficiently resourced to pay the bill. It also requires relative symmetry of these prerequisites amongst all parties to a dispute. These crucial selection factors taken together mitigate against opportunities for early action on ADR process selection in disputes where at least one of the parties is compromised, marginalised, or under resourced.

While a larger party may have institutional knowledge in the form of an internal ADR department or specialist, an ombudsman, or a workplace mediation program, many small parties will lack this internal know-how that can be leveraged for optimum process selection. An ADR aware party might coordinate with the other party to find a dispute resolution process they can agree on or instruct a lawyer who is experienced in ADR matters. In contrast, smaller scale parties will be much more dependent on lawyers, case managers and sometimes mediators acting as gatekeepers

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[20] William Ury et al., 'Designing an Effective Dispute Resolution System' (1988) Negotiation Journal 413, 414

[21] ibid

to align them to the optimum process or will have to rely on institutional or clausal gateways that guide them to a standardised ADR process, typically arbitration or mediation.[22]

Overcoming resistance to process change or modification is a common problem amongst all parties – whether in a commercial or family dispute. Parties require the motivation to participate in a process that may be well suited to their dispute, but which has not been previously tried. For instance, the parents of a child in special education may have mediated with the school's administration about their child's learning program in the absence of the child and achieved a positive result. However, when the child is not doing well because of truancy, the school might suggest a circle process such as community conferencing to bring all stakeholders together and get positive assurances from the child.[23] The prospect of process alignment requires the parents to be motivated and to consider a shift to an alternative to mediation in order take advantage of this lesser known, potentially more effective method of resolving disputes relating to truancy in schools.

Most ADR processes, particularly the more unusual and customised flavours, are typically private and often costly. Resource constraints will often dictate the range of process choice available to parties. However, even parties with no resources may still have good *choices* of well-aligned processes. For instance, depending on the jurisdiction, in a cross-border Ebay transaction paid with a credit card through Paypal,

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[22] National Institute for Dispute Resolution, 'Paths to Justice: Major Public Policy Issues of Dispute Resolution' (Report of the Ad Hoc Panel on Dispute Resolution and Public Policy, 1983) cited in Leonard Riskin, *Dispute Resolution and Lawyers: Cases and Materials* (5th edn, West Academic 2014), 889

[23] Community Conferencing Center, 'Community Conferencing' (2008) <http://www.communityconferencing.org/index.php/programs/schools_youth_programs/> accessed 17 May 2017

a consumer can choose between Ebay's ODR process,[24] Paypal's ODR process,[25] a credit card chargeback process,[26] the Better Business Bureau,[27] a consumer dispute resolution provider[28] or mediation as part of a small claims court procedure.[29] Each of these ADR processes would be available at little or no cost and present viable process choices. All that is required of the party to effect process choice is the awareness of what advantages and disadvantages each procedure entails[30] and the willingness to try the one that is best aligned to the parameters of the people and problem in dispute. However, the client must be proactive and understand the interrelationship between processes to benefit from being able select a process, otherwise, in many instances, the self-executing nature of an ADR process may vitiate any choice they once had.[31]

2.2.2 Attorneys as ADR Gatekeepers

As a problem escalates into a dispute, most clients will retain attorneys for their

[24] EBay, 'Resolving Disputes' (2017) <http://pages.ebay.co.uk/help/tp/problems-dispute-resolution.html> accessed 17 May 2017

[25] PayPal, 'Resolving a Dispute with Your Seller. Guide to Handling a Dispute' (2017) <https://www.paypal.com/uk/webapps/mpp/first-dispute> accessed 17 May 2017

[26] Leonard Riskin, *Dispute Resolution and Lawyers: Cases and Materials* (5th edn, West Academic 2014), 880

[27] ibid 880-881

[28] Chartered Trading Standards Institute, 'Approval and Accreditation. ADR Approval' (2017) <https://www.tradingstandards.uk/commercial-services/approval-and-accreditation/adr-approval> accessed 17 May 2017

[29] District of Columbia Courts, 'Small Claims Mediation Program' (2017) <http://www.dccourts.gov/internet/superior/org_multidoor/smallclaimsmed.jsf> accessed 17 May 2017

[30] With some basic internet research, a party can easily develop a simple matrix to detail the advantages and disadvantages of each ADR method. See, e.g. Leonard Riskin, *Dispute Resolution and Lawyers: Cases and Materials* (5th edn, West Academic 2014), 894-895

[31] In an EBay dispute resolution processes, a PayPal dispute gets priority over an EBay process, and a credit card chargeback cancels all previous processes. Some processes, for instance at the Office of the Independent Adjudicator for Higher Education get cancelled if the matter is filed in court. See, Office at the Independent Adjudicator, 'Guidance Note: Eligibility and the Rules' (9 July 2015) <http://www.oiahe.org.uk/media/100348/guidance-note-scheme-eligibility-july-2015.pdf> accessed 17 May 2017

credentials, experience, and relevant expertise. In a potential dispute, attorneys have the formidable task of aligning clients to the most appropriate legal products. An informed attorney can help their clients to select worthwhile options from a virtual buffet of potential dispute resolution products on the marketplace. In some jurisdictions[32], it is now obligatory to provide candid and holistic ADR advice[33] whereas elsewhere it may be an emerging ethical duty under the guise that 'A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions.' [34]

In an optimal dispute resolution paradigm, an attorney would be the Emergency Room physician who carefully makes an initial assessment to triage patients into the appropriate ward based on the nature and extent of the underlying illness.[35] This paradigm, however, suffers from several real-world failings.

Firstly, there is a 'framing issue' in that attorneys view disputes almost exclusively through the lens of the law. The law obfuscates the menu of dispute resolution options and tends to favour familiar flavours that have some legal nexus, such as arbitration and litigation. However, the dishes being served on dispute resolution menus are inherently wider than just legal options, including amongst other things emotional, fact-finding, and relational products. These ADR products may be better aligned to a client or their problem and offer preferable prospects for timely

[32] See, e.g. in Quebec, Canada: Bill n°28: An Act to Establish the New Code of Civil Procedure (2013)

[33] Paul Lurie and Sharon Press, 'On Professional Practice: The Lawyer's Obligation to Advise Clients of Dispute Settlement Options' (2014) 20 Dispute Resolution Magazine 1

[34] Frank Sander, 'Professional Responsibility. Should there be a Duty to Advise of ADR Options?' (1990) 76 ABA Journal 50 citing the Model Rules of Professional Conduct 1983, s1.4(b)

[35] Suzanne Schmitz, 'Giving Meaning to the Second Generation of ADR Education: Attorneys' Duty to Learn about ADR and what they Must Learn' (1999) 1 Journal of Dispute Resolution 29, 37

resolution. However, in addition to the problem of lack of familiarity with these methods, these processes, particularly more psychological ones, move attorneys away from their comfort zone. Although attorney-client privilege often obstructs the gathering of reliable empirical data, these facts would point to the conclusion that attorneys are less likely to recommend exploring non-legal forms of dispute resolution.

Secondly, attorneys are not trained or equipped to be impartial actors and allow client instructions and relationships to influence and impact their decision-making matrix.[36] Particularly in societies where attorneys are ostensible 'hired guns,' clients expect them to 'fight their corner' and 'find' frames that confirm their perspectives on a dispute. This orientation may unduly prejudice attorneys' ability to take account of nuances that will be vital to setting the appropriate course for dispute resolution.[37]

Thirdly, most disputes have at least two attorneys representing divergent interests. Dissimilar to the decision of a single ER physician, it generally[38] takes across-the-table client agreement before a dispute can be submitted to *any dispute resolution mechanism* except litigation. Litigation is the daily bread legal option not

[36] Gwynn Davis, *Partisans and Mediators. The Resolution of Divorce Disputes* (Clarendon Press 1988), 85

[37] Lawyers often have misalignment with their client's core interests. For further discussion see, Jeffrey Rubin and Frank Sander, 'When Should We Use Agents? Direct vs. Representative Negotiation' (1988) 4 Negotiation Journal 395, 399–40 cited in Leonard Riskin, *Dispute Resolution and Lawyers: Cases and Materials* (5th edn, West Academic 2014), 62.

[38] Except if the contract contains an explicit clause or if local civil procedure has mandatory dispute resolution.

requiring agreement from the other side, whereas wider dispute resolution possibilities inherently require additional efforts and the meeting of minds.[39]

Lastly, knowledge of 'alternatives' to litigation is widely variable[40] amongst legal practitioners. It ranges from absolutely no specific knowledge of ADR processes to those practitioners who are highly specialised arbitration attorneys, collaborative lawyers, and mediation advocates. An attorney with no specific knowledge may be reluctant to recommend/participate in an ADR process where their incompetence would become apparent. They may prevent proper process alignment taking place and/or derail processes because of their lack of ADR advocacy experience.[41]

In terms of alignment, knowledge can be a double-edged sword. Those attorneys without an adequate knowledge base cannot perform an alignment function, whereas, those attorneys with extensive specialization might be prone to misalign a dispute by guiding clients towards the ADR method with which they are most familiar – without particular regard to the process needs of the underlying dispute. Culture, geography, and jurisdiction are other important factors that may significantly impact on an attorney's familiarity with and willingness to explore a range of ADR methods. The attorney best equipped to guide a dispute will be one with strong foundational experience and knowledge of a range of applicable dispute resolution processes, but lacking an initial bias towards a particular method.

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[39] Jonathan Marks, 'Mediation Business Disputes: Why Counsel, Clients and The Natural Must Emphasize Process, and Not Just an Event' (2013) 31Alternatives to the High Cost of Litigation 49, 56

[40] Schmitz (n 26) 29

[41] Roger Jacobs, 'Process Problems: Intervention Points for Recurring Mediation Logjams in Alternatives to the High Cost of Litigation' (2016) 34 The Newsletter of the International Institute for Conflict Prevention & Resolution 136

In theory, the attorneys present a *tabula rasa* from which to explore and triage a conflict towards all appropriate ADR options.[42] In practice the role of attorneys acting as gatekeepers to ADR process alignment and choice is at best, a compromised one. While attorneys might not be the optimum vehicle for aligning disputes to ADR choices, they may still be in the best position to guide the client to a *place* that will serve as an effective gateway for ADR process alignment and choice. The question remains what is the best *place* for this alignment and process choice to take place and where on the conflict timeline should it take place?

Overcoming the attorneys' legal lens, partiality, numbers, and knowledge asymmetries that create adverse selection risks[43] for clients when attorneys act as ADR gatekeepers, can necessitate the intervention of a third-person or process to optimize ADR process selection. Optimal third-persons must be familiar with the ADR landscape, neutral in orientation, possessing the requisite knowledge and experience of a wide range of ADR methods – without a personal or institutional bias towards any one of them. The third-person can in principle be an ADR consultant or expert, an independent case manager, a case manager in a dispute resolution business or institution, a settlement lawyer, and/or in many cases a mediator or dispute resolver.

[42] Schmitz (n 26) 38

[43] Marshall Breger, 'Should an Attorney be Required to advise Client of ADR Options?' (2000) 13 Georgetown Journal of Legal Ethics 427, 437

2.2.3 The Role of the Mediation Advocate

It is worth examining the role of a specially trained mediation advocate in contrast to that of a traditional attorney in being able to guide ADR process selection. A specialist in mediation advocacy will recognize that 'there must be clear and pressing reasons for unsuitability [for mediation], otherwise the focus should be on when in the lifeline of the dispute it would be tactically advantageous to call a mediation.'[44] In contrast to ordinary attorneys, the specialist begins with a presumption in favour of the suitability of ADR and assesses the case from that standpoint.

These specialised mediation attorneys will critically recognize that in 'addition to robust legal skills, tactical mediation draws on a range of disciplines, including psychology, game theory and economics.'[45] Necessitating that '[a] successful advocate will be attuned to the other side's message. They will note - consciously or otherwise - whether the opposition is confident, defensive, angry, or a mixture of these feelings.'[46] Attorneys will use this '…analysis … to judge what the other side needs as opposed to what they would like'[47] to advocate for an ADR process that will embrace the stance of both sides. For parties with limited resources, hiring a lawyer who is an ADR specialist may be the best way of securing the ADR process expertise needed for optimum process alignment without taking on the added expense of a separate administrator or case manager. However, choosing an ADR attorney means

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[44] Charles Middleton-Smith, *Effective Mediation Advocacy: Hopes and Expectations (Mediation Publishing Expert Briefing Book 1)* (Mediation Publishing 2013), Kindle Locations 147-148

[45] ibid 130-133

[46] ibid

[47] ibid

client awareness that this option exists on the legal market – effectively limiting this option to the educated ADR consumer.

2.2.4 The Role of the Case Manager and the ADR Consultant

In practice '… the term 'case management' covers a range of approaches and technologies used by law firms and courts to leverage knowledge and methodologies for managing the life cycle of a case or matter more effectively.'[48] Similarly, an ADR specialist case manager can examine that life cycle in terms of coordinating cases for allocation to one or more ADR methods.[49] Tzankova observes 'That adequate administrative support and flawless operating IT systems are crucial for the handling of mass disputes is evident and does not need much clarification.'[50] While mass disputes may benefit from increased resources that can meet the financial and logistical burdens of achieving this level of case management, the same core sentiment in favour of case management for optimum process alignment could rightly be reflected in almost all disputes.

The desirable case manager from a process selection perspective is an impartial third-party involved *before* resolution and who *will not* directly partake in or benefit from the chosen dispute resolution process. This type of case manager would be uniquely situated to objectively evaluate persons and problems with a view towards early alignment to and optimization of ADR processes. This evaluation can be undertaken from a documentary perspective or include interviews or depositions to

[48] Ianika Tzankova, 'Case Management: The Stepchild of Mass Claim Dispute Resolution' (2014) 19 Uniform Law Review 329, 329

[49] ibid 333

[50] ibid 334

determine the needs and interests that underlie the problem to be resolved and the attitude of the parties – essential elements to the identification of an optimised ADR process for resolution. Depending on resources, they may even work with parties to customize a process to fit the people and the problem. However, the reality is that not all case managers are situated in this optimum way and it is worth looking at how the nuances of different case management positions will potentially affect how they are poised to handle process alignment questions.

There is a critical difference between the role of a non-institutional case manager and the institutional case manager, in that the former is an employee of one or both parties and the latter works within an institution, such as the ICC, LCIA, or ICDR.[51] There is also a critical distinction to be drawn between private case managers and public pre-trial judges in case management conferences or case managers appointed by the court.[52] In all cases the search for process alignment must be managed in a time sensitive fashion with the aim of 'A sensible timetable … that allows the parties to take part in ADR along the way [to resolution] [and that] is a sensible management tool…[because] [a] stay or fixed 'window' is likely to lead to delay, extra cost and uncertainty, and should not ordinarily be ordered [or planned].'[53]

[51] e.g. Arbitration and ADR Worldwide, 'Organisation' <http://www.lcia.org/LCIA/organisation.aspx> accessed 18 May 2017, International Chamber of Commerce, 'Administration of Experts Proceedings' <https://iccwbo.org/dispute-resolution-services/experts/administration-experts-proceedings/> accessed 18 May 2017, Luis Martinez, 'A Guide to ICDR Case Management' in Grant Hanessian (ed.), *ICDR Awards and Commentaries* (JurisNet LLC 2012), 3-7, 31

[52] See, Giles Tagg and David McArdle, 'Case Management and ADR – Finding the Right Balance' (*Beale & Company,* 2014) <http://www.beale-law.com/publications/380-case-management-and-adr-finding-the-right-balance.php> accessed 18 May 2017

[53] As per Mr Justice Coulson in *CIP Properties (AIPT) Limited v Galliford Try Infrastructure Limited and Others* [2015] EWHC 481 cited in Giles Tagg and David McArdle (n 42)

2.2.4.1 The Non-Institutional Case Manager

2.2.4.1.1 Internal Case Manager

An internal case manager works for one of the parties, possibly within an ADR department such as that created at Dupont.[54] Organisational ombudsman can also function as case managers for institutional problems.[55] These case managers have an insight into the people and the problem at the earliest possible stage. In the case of an internal dispute between an employer and employee, the case manager may be able to ascertain the subjective features of a dispute from both parties and triage it to a suitable form of ADR before either party even consults with a lawyer. In the case of disputes with external parties, the internal case manager may still have a significant role to play in putting ADR process options across-the-table.

Even if only one disputant has an internal case manager trained in ADR methods, the role can serve to quickly recognize processes that best align to the people and the problem. For instance, case managers should be trained to recognize the difference between a personality conflict between two CEOs that is at heart relational and a multi-party conflict over non-receipt of goods lost at sea and understand that whereas a transformative mediation might work to resolve the former, expert determination, early neutral evaluation, or even arbitration may be necessitated for the latter. Perceived partiality is the largest deficit of the internal case manager in being able to convince all parties in relation to a recommended process option. Even Ombudsman type internal case managers suffer from possible partiality problems,

[54] Burt (n 10) 1-4

[55] For a detailed description of the Ombudsman's role see, Charles Howard, *The Organizational Ombudsman: Origins, Roles, and Operations. A Legal Guide* (American Bar Association 2011)

especially when recommending process options for resolving conflicts between employees and management in the company that hired them.[56]

Unquestionably, internal case managers can be early gatekeepers – providing essential direction to the ADR process. However, to function, they must remain acutely conscious of any perceived partiality. They must continually counter the impediment of reactive devaluation on process preferences communicated to the other side.[57]

2.2.4.1.2 External Case Manager/ADR Consultant

Disputants may jointly hire a non-institutional case manager to deal with issues related to dispute management, including process alignment. The external case manager could simply be a one-time dispute resolution consultant or someone jointly hired to resolve a series of anticipated disputes in a joint venture. While the exact character of the case manager's role will be defined by contract with the parties, they are in an excellent position to examine disputes when or shortly after they arise and make decisions about how to triage them to the right type of resolution.

Experts are commonly thought to be confined to offering opinions at trial in the evidential stage of a dispute or providing an independent ADR process of expert determination or early neutral evaluation. However, if resources allow, experts can

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[56] Although many Ombudsman adhere to a code of ethics, it is generally optional to belong to a professional association. There may also be an inherent tension in the role, that can affect what they advise clients in terms of process amongst other matters. See e.g. International Ombudsman Association, 'IOA Code of Ethics' <http://www.ombudsassociation.org/IOA_Main/media/SiteFiles/Code_Ethics_1-07.pdf> accessed 18 May 2017

[57] Mnookin (n 7) 246–249

also be hired to provide case management guidance and advice on process alignment. A process expert can be jointly hired at an early stage when both parties anticipate escalation – either recruited at-large or from a roster of experts.[58] As a jointly instructed dispute resolution expert external to the parties and presumably maintaining their joint confidence, a non-institutional case manager can be tasked to recommend process options from the entire spectrum of the ADR market or custom make resolution processes for specific persons and problems. While the jointly instructed case manager overcomes the problem of partiality and reactive devaluation, it often presents a problem of expense.

One emergent modality of external case management practice is that of the 'Guided Choice system' that has been advanced as a means of curing early information asymmetry in construction disputes, enabling ADR process choices to be made.[59] The system developed in response to the frequent assertion of parties that it was 'too early' in a dispute for a choice of ADR process to be made or mediation to take place.[60] In this system, a guided choice mediator is appointed, who has a limited role to act as an external case manager facilitating information exchange related to the people and the problem. This managed information exchange enables parties to feel more confident in working with that mediator to select or custom build an ADR process at an early stage of a dispute.[61] While there are clearly additional costs associated with the appointment of this type of case management mediator, much of

[58] See, e.g. The Academy of Experts, 'Find an Expert' (2017) <https://www.academyofexperts.org/find-an-expert> accessed 18 May 2017

[59] Paul Lurie, 'Using the Guided Choice Process to Reduce the Cost of Resolving Construction Disputes' (2014) 9 Construction Law International 18, 18

[60] ibid 19

[61] ibid

this pertains to disclosure and production costs that would happen in any event. Additional fees for the case management mediator are recouped in the corollary cost and time savings of dealing with the dispute at such an early stage.

2.2.4.2 The Institutional Case Manager

2.2.4.2.1 ADR Institutions

Some ADR institutions also provide administration services in addition to core dispute resolution functions. Often institutional staff have a wealth of knowledge and experience in dealing with a vast array of complex, cross border, multi-party, and high value disputes. In an administrative capacity, they may be able to assist parties in aligning their dispute to an optimum process. Some institutions such as the AAA/ICDR at the parties' request, offer a 'Guided Choice' process mediator as part of their mediation services package.[62] The difficulty with institutions, is the inherent partiality to the services they provide and the expense.

2.2.4.2.2 Courtroom Case Management

The court can never offer the type of independent and impartial case management that parties will receive in the private sector. Courts are by their very nature balancing the interests of their docket, resources, and scheduling with the needs and interests of the parties. There is therefore a third-party interest, usually in efficiency, that pervades the entirety of case management within the court system. However, that is not to say that there cannot be 'value added' for disputants from actively participating in the court's case management initiatives.

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[62] ibid 22

Often, judges have acute insights into the potential outcomes of cases and can offer authoritative perspectives to parties on the benefits of utilizing ADR instead of litigating. As will be elaborated below, some courts run sophisticated ADR programs with multiple types of processes available at different stages of a dispute.[63] Case management staff in these programs often understand process alignment and can help unfamiliar attorneys and clients to navigate these publicly funded options. While courts generally cannot order a private ADR process outside of those established in the relevant civil procedure rules, those rules can be drafted in such a way as to make parties seriously contemplate their ADR options.[64] Costs consequences can bring pressure to bear on parties to consider what ADR options are recommended at a court case management conference instead of unabatedly continuing to trial.[65]

2.2.5 Counsellors in Family Court

Family matters make up a large proportion of the overall disputes referred to and resolved in ADR.[66] Some family courts have mandatory diversion programs that may include referral to counsellors for a certificate or exemption.[67] Many families will

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[63] See, e.g. Jeannie Adams, 'Multi-Door Dispute Resolution Division' (*District of Columbia Courts*) <http://www.dccourts.gov/internet/superior/org_multidoor/main.jsf> accessed 18 May 2017

[64] Civil Procedure Rules 2017, Part 36

[65] See *Dunnett v Railtrack* [2002] EWCA Civ 302. See also *Halsey v Milton Keynes General NHS Trust*, *Steel v Joy and Another* [2004] EWCA Civ 576. For a list of relevant English case law see, Fenwick Elliott, 'Key Case Law on Mediation and Costs' <https://www.fenwickelliott.com/sites/default/files/key_case_law_on_mediation_and_costs.pdf> accessed 18 May 2017

[66] While not all jurisdictions tabulate statistics or classify disputes in the same manner, some jurisdictions have compiled useful data on the use of ADR. One such jurisdiction is Australia: National Alternative Dispute Resolution Advisory Council, 'ADR Statistics. Published Statistics on Alternative Dispute Resolution in Australia' (2003) <http://c.ymcdn.com/sites/nafcm.site-ym.com/resource/resmgr/Research/Published_Statistics_on_Alte.pdf> accessed 18 May 2017

[67] Australia has compulsory ADR in most family disputes, See, Family Court of Australia, 'Compulsory Family Dispute Resolution. Court Procedures and Requirements' (2009) <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/reports-and-

seek recourse to counsellors or psychotherapists prior to initiating proceedings. While normally this role is not *within* ADR, an inquiry into process selection would be amiss without including non-ADR actors who *could* be trained to assist parties as process gatekeepers. Whether in divorce, custody proceedings or child abduction, counsellors or family therapists will by the nature of their function be exposed to precursor problems that could escalate into family disputes. Understanding all parties' needs and interests puts family counsellors in a privileged position to advise potential parties about their process options. Insightful counsellors can guide a divorcing family to use cooperative or collaborative practice or inform them whether transformative or evaluative mediation would be more beneficial. With the proper ADR training, counsellors can be brought into the manifold of potential gatekeepers and provide added value to parties in the form of process alignment recommendations.

2.3 Gatekeepers Ex-Post initial process selection

2.3.1 The Settlement Attorney as Gatekeeper: Collaborative Law

The emergence of collaborative law[68] as a dispute resolution option has given rise to a new role: The Settlement Attorney. These attorneys are specialists at settlement oriented collaboration in the expectation that litigation is not on the table or at least that they are not a stakeholder in any aspect of future litigation.[69] These attorneys disqualify themselves from litigation and commit to 'negotiate a mutually acceptable

publications/publications/getting-ready-for-court/compulsory-family-dispute-resolution-court-procedures-and-requirements> accessed 18 May 2017

[68] International Academy of Collaborative Professionals, 'What is Collaborative Practice?' (2017) <https://www.collaborativepractice.com/public/about/about-collaborative-practice/what-is-collaborative-practice.aspx>

[69] ibid

resolution without having courts decide issues … [m]aintain open communication and information sharing … [c]reate shared solutions acknowledging the highest priorities of all.'[70]

2.3.2 Cooperative Law

Although a much smaller movement, cooperative law has emerged as an alternative to collaborative law for those not desiring to lose their lawyer if a settlement agreement is not reached with the other party.[71] Cooperative law does not use an attorney disqualification agreement allowing parties to retain their desired counsel beyond negotiations.[72] Similar to collaborative lawyers, cooperative lawyers look to resolve a potential dispute with the other party and their cooperative lawyer, however, they may not always be able to do so. Since they will remain as the parties' attorneys and are already committed to engendering an accommodating process of parties working together, they are in a prime position to provide a joint recommendation on tracking the dispute to an optimum ADR process that may yield a resolution.

2.3.3 Conciliators as a Gatekeepers

Conciliation is an ADR process that often gets short shrift in the literature.[73] Although an ancient process, conciliation is not well defined within strict parameters. Lack of

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[70] ibid: 'In Collaborative Practice: 1. The parties sign a collaborative participation agreement describing the nature and scope of the matter; 2. The parties voluntarily disclose all information which is relevant and material to the matter that must be decided; 3. The parties agree to use good faith efforts in their negotiations to reach a mutually acceptable settlement; 4. Each party must be represented by a lawyer whose representation terminates upon the undertaking of any contested court proceeding; 5. The parties may engage mental health and financial professionals whose engagement terminates upon the undertaking of any contested court proceeding; and 6. The parties may jointly engage other experts as needed.'

[71] Lande and Herman (n 4) 281

[72] ibid 284.

[73] Conciliation literature is very sparse outside of the labour context.

specificity may be helpful in terms of making it a highly adjustable process. The primary difference between conciliation and mediation is that the latter affords a more evaluative role to conciliators than would normally be ascribed to mediators, including the possibility of making a comprehensive non-binding proposal.[74] Conciliators are essentially go-betweens who ascertain information about the substance of the dispute from the parties with a view to recommending a resolution that both parties might accede to.[75]

There is absolutely nothing in the conciliators' role that says that they must deliver a recommendation that resolves the substantive dispute – they can instead recommend an optimum process that would alleviate the parties' concerns – one with the potential to provide a result that they are unable or unwilling to deliver themselves. For example, during information gathering in a high value maritime dispute concerning loss of a shipment at sea, a conciliator may discover that a dispute involves more than the two known parties and unanticipated technical complexities of maritime practice. In this scenario, a conciliator could recommend that the additional parties are contacted and that all parties sign a submission agreement to go to a specialist binding arbitration under the auspices of the London Association of Maritime Arbitrators[76] or to contract with specialist mediators having subject matter expertise.[77] Instead of suggesting a substantive resolution, skilled conciliators can

[74] For some definitions, see: Dispute Resolution Hamburg, 'Conciliation' <http://www.dispute-resolution-hamburg.com/conciliation/what-is-conciliation/> accessed 18 May 2017 and Understanding ADR, 'Conciliation' <https://understandingadr.wordpress.com/conciliation> accessed 18 May 2017

[75] Irvine Gersch and Adam Gersch, 'SEN Conciliation' in Irvine Gersch, Cathy Casale and Chris Luck (eds.), *Resolving Disagreement in Special Education Needs: A Practical Guide to Conciliation and Mediation* (Routledge Falmer 2003)

[76] The London Maritime Arbitrators Association, 'The LMAA Terms' (2017) <http://www.lmaa.london/terms2012.aspx> accessed 18 May 2017

provide an in-depth procedural conclusion taking into account what they have ascertained about the needs and interests of the parties in relation to advantages or disadvantages apparent with particular ADR processes. Conciliators can use their ADR process expertise to act as gatekeepers to suggest the most appropriate ADR processes. Even if process recommendations are not followed, conciliators' efforts may have the indirect effect of having improved inter-party communication[78] on the availability and need for eventual commitment to an ADR process and highlighted the availability of process choice – setting the stage for potential resolution.

2.3.4 Mediators as a Gatekeepers

Parties may often select mediation without regard to the subset or style of mediation or even whether it is the right process. However, mediation is a process that is potentially so flexible it can engender the choice of another process within its conceptual framework – with the mediator becoming a gatekeeper towards alignment to another process. In contrast to lawyers and case managers who are initial gatekeepers, because parties are involved in the 'first process' of mediation, the mediator/s in terms of process choice functions as a 'safety net'[79] or secondary gatekeeper. Mediators who have relevant training and skills in process management should be equipped, if need arises, to provide proper alignment to a more appropriate ADR process or sub-process. Despite any shortcoming in whether mediation is the correct process to resolve the dispute – mediation's neutral, confidential, and non-binding nature that is focused on inter-party communication is ideal for exposing

[77] See, e.g. The Maritime Mediation Specialists, 'Meet the Mediators' <http://seamediation.com> accessed 18 May 2017

[78] See, Understanding ADR (n 64)

[79] Ury et al. (n 11) 420-421

those elements that are needed to align the conflict to, if required, a more appropriate form of dispute resolution.

Mediators are in a rare and a privileged position in relation to acting as a gatekeeper to other forms of ADR. Dissimilar to the attorneys' role, mediators are neutral third-parties who principally are both subjectively and objectively detached from the conflicts they mediate. Mediators' direct involvement with the parties necessitates that they acquire a depth of understanding of a dispute that a case manager could not expect to ascertain from the periphery. As a third-party neutral with toolkits to ascertain the 'needs and interests' and other factors that underlie disputes, mediators should have the training and resultant toolkits to use these insights to 'fit' 'the Forum to the Fuss.'[80]

To act as a gatekeeper, mediators must reframe their own role in the exploration stages of the mediation from that of 'problem solver' to that of 'facilitating a gateway to possible solutions' *even if the appropriate method of ADR is not within their remit*. Performing a triage function of 'gatekeeper' instead of as 'problem solver' inherently presents both ethical and process challenges. Mediators will usually only be a second stage gatekeeper in that they will deal with misalignment when a case has been allocated to mediation, either by poor process selection by a prior gatekeeper or automatic process allocation through a gateway such a contractual provision, a step ADR-clause or a court mediation program. To assist the parties to get on the right track, mediators need to have the ethical poise to remove their ego and remuneration from the equation and use process knowledge to

[80] Sander and Goldberg (n 1) 49

recommend better aligned options. For a mediator to avoid potential conflicts of interest, there may be an inherent ethical duty to act the way that most empowers party self-determination,[81] including providing parties with the requisite toolkits to make appropriate process determinations.[82]

The first stage at which mediators may detect process alignment problems is if they read party submissions and/or conduct pre-mediation meetings or phone calls with the parties.[83] Often pre-mediation acts will yield useful insights into where the parties are at on the dispute resolution timeline and what conversations or negotiations have already taken place. Although not all mediators yet conduct pre-mediation, best practice is certainly heading in that direction,[84] meaning that opportunities will increase for early stage recognition of the need for mediators to intervene in process alignment. The other juncture where mediators might encounter a process alignment problem is in the opening statement or early sessions with the parties, where it becomes clear that there is an attitude or suitability question, either because of the style of the mediators, the nature of the mediation process, or the specific mediator.

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[81] Suzanne McCorkle, 'The Murky World of Mediation Ethics: Neutrality, Impartiality, and Conflict of Interest in State Codes of Conduct' (2005) 23 Conflict Resolution Quarterly 165, 176

[82] There may be an additional tension here with some styles of mediation such as transformative, where the mediator would have such a great degree of deference towards self-determination that they would not dare to add to or supplement the information that the parties bring to the table. For more on this subject see, Joseph Folger and Robert Baruch Bush, *Transformative Mediation Sourcebook* (Institute for the Study of Conflict Transformation 2010)

[83] Jonathan Marks, 'Mediating Complex Business Disputes: How Pre-Mediation Interactions Affect In-Session Negotiations Success' (2013) 31 Alternatives to the High Cost of Litigation 83, 83-84

[84] Linda Kochanski, 'Intake Uptake: How to Get the Most out of a Pre-Mediation Interview' (2013) 33 Proctor 32. For a vision of the potential for pre-mediation techniques, see, Johanna Bragge, 'Pre-Mediation Analysis of the Energy Taxation Dispute in Finland' (2001) 132 European Journal of Operational Research 1

At this point mediators can hold a 'process evaluation stage' in which process options are examined with the parties. Given the importance of process alignment as a factor in being able to achieve the most satisfactory process, mediators might think of including a question about process options in their opening statements. Especially where there has been no pre-mediation, a question about whether parties are content with the process and the extent to which they have explored process options can be asked alongside the mediators' explanation of the importance of party autonomy and voluntariness of the process. Although it is very late in the dispute resolution timeline and far from optimal, at least in this manner mediators can be true to voluntariness by ensuring that parties have had the opportunity to comment on or ask questions about process choice before carrying on with the mediation. Authentic party empowerment and procedural consent can only be obtained if parties are aware that there are other process options prior to participating in a resolution exercise.

To demonstrate how mediators might intervene to shape process choice, it is instructive to look at a hypothetical example. If the parties in pre-mediation are talking about needing a third-party to help them decide or evaluate what would happen in court in relation to a quantity surveying dispute – a transformative mediator might decide to recommend a different type of mediation or suggest that a totally different process such as expert determination would be better suited to meet the expectations of the parties. Maybe misalignment happened because the client or the lawyer did not know that mediators have different styles or maybe they were just unaware of expert determination. In any event, the mediator as secondary gatekeeper can put them back on track. A specially trained and flexible ADR professional could

also, as will be explored later, put on a different hat and offer to mix or shift processes or alternatively provide an eclectic, highly adaptive style of mediation.

When concluding a mediation where there is no resolution, mediators have another opportunity to function as gatekeepers. Rather than leave the next steps up to the parties and their representatives or just assume that litigation is forgone conclusion, proactive mediators can take what they have learned about the parties and their problem and utilize it to make recommendation for better process alternatives. After the parties have determined that they cannot resolve the substantive issues, mediators can go on to assist decision making on procedural next steps by conducting a mini-mediation. To adapt to the people and their conflict 'our role as mediators is not simply to settle conflicts or fashion agreements but to create choices.'[85] At the end of the process, mediators have an opportunity to leverage the trust earned during the course of the dialogue to the benefit of all parties deciding on the next steps. While many mediations do not yield a substantive resolution, they may still include relational gains.

2.3.5 Ombudsman as Gatekeepers

It is difficult to define the role of an Ombudsman, especially in an article not dedicated to that subject. The Ombudsman role is so many things in so many different contexts, ranging from the Parliament, Financial Regulation, Civil Service, and the United Nations in the public sector to Coca-Cola and Chevron in the private sector. Ombudsman deserve mentioning as a potential gatekeepers to other ADR processes, but the nature and scope of gatekeeping capacity will be dependent on the definition

[85] Kenneth Cloke, *The Crossroads of Conflict: A Journey Into the Heart Of Dispute Resolution* (Jossey-Bass 2001), xii

of Ombudsman in any given organisation. Organisational Ombudsman can create processes to deal with internal conflicts that are catered to meet the specific problems of particular disputants. In this capacity, Ombudsman will very much have a gatekeeping function. On the other hand, consumer Ombudsman may offer alternatives to court processes for asymmetric conflicts where they actually perform a defined resolution function and are not gatekeepers, but self-contained ADR processes. In any event, it is essential to recognize that Ombudsman can have an important gatekeeping function, especially within an organisational context.

2.3.6 Gatekeeping and Binding Processes

Arbitration, expert determination, and litigation offer binding resolution processes. To the extent parties have been guided to submit to one of these processes, they will remain bound into that process until finality, alternate settlement, or withdrawal. Dissimilar to the non-binding routes discussed previously, these modalities of dispute resolution are inflexible. Generally, these decision makers cannot function as gatekeepers to other processes. It is possible that parties can contract out of a process that has commenced, but such an action would be an extreme rarity. The only exception to this rule would be that occasionally an arbitral panel will be constituted where there is a step-clause as a precondition to arbitration. Depending on *situs* this process can be a matter of admissibility or jurisdiction that can result in the dispute being sent back for another form of ADR as a prerequisite to the binding process. Additionally, in litigation, courts can suggest or order parties to try ADR based on civil procedural rules or the exercise of judicial discretion[86] and in this manner, provide an extra gatekeeping function.

[86] See, Section 278a German Code of Civil Procedure (ZPO)

3 Gateways

For the purposes of this thesis, gateways are less thought-provoking than gatekeepers. Gateways result in ADR process selection, that tends to obfuscate rather than facilitate choice. Gatekeepers are dynamic and personal – individuals who can adjust processes to people and their disputes in an adaptable and fluid fashion depending on where in the dispute timeline they are asked to intervene to secure alignment. In contrast a gateway is generally a 'static' vehicle that allocates a dispute to a specific pre-defined method or track of ADR. Alignment of the parties or dispute to the process either occurs because the gateway is predictive, as is the case in most forms of arbitration clauses, or responsive, in that an ADR process is triggered by something about the nature and character of the people and their dispute as is the case with mandatory adjudication or mediation schemes.

3.1 Rigid Clauses

Many commercial and consumer contracts contain explicit dispute resolution clauses. These clauses typically benefit from the doctrine of separability[87] and remain operable even in the event there is a legal question in relation to the validity of the main contract.[88] These clauses can contain a recourse to a single method of ADR, typically

[87] The definition of separability differs across jurisdictions. For an overview of jurisdictional approaches see, Aiste Sklenyte, 'International Arbitration: The Doctrine of Separability and Competence-Competence Principle' (MSc Thesis, The Aarhus School of Business 2003)

[88]See, Thomson Reuters Practical Law, 'Separability' (2017) <https://uk.practicallaw.thomsonreuters.com/4-205-5215?__lrTS=20170511154724282&transitionType=Default&contextData=(sc.Default)&firstPage=tru

arbitration, or be formulated as step-clauses that dictate multiple ADR steps to be taken in succession during the resolution process. Both are proscriptive and function as strict gateways that inherently limit party choice by precluding other methods of ADR from being utilised. In some instances, weaker parties may not even realise that they have bound themselves to arbitration to the exclusion of all other process possibilities.[89]

These clauses can be very specific or quite general so long as they contain the functional prerequisites to be valid and enforceable.[90] A very specific clause may not only limit the method of dispute resolution to, for instance, arbitration, but also delimit the exact parameters of that arbitration and its modalities including the designation of an institution, number of arbitrators, administration of the arbitration, language, location and other relevant parameters. Assuming such an option exists, any process alignment concerns must be dealt with in anticipation of such dispute, at the stage of contractual negotiation, which could be years, even decades before any real dispute occurs. However, as a precaution against non-alignment due to static or old clauses, an additional contractual clause can be added, whereby a third-party process manager or expert is designated to assist the parties with future alignment. This clause can assign issues of process design and "fit" to the manager's unfettered discretion, to be adjusted based on the nature of the dispute.

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e&bhcp=1> accessed 21 May 2017. See also, Nigel Blackaby et al. *Redfern and Hunter on International Arbitration* (Sweet & Maxwell 2009)

[89] See e.g., Harvard Law Review, 'Case note. Federal Arbitration Act — *DirecTV, Inc. v. Imburgia*' 130 Harvard Law Review 457

[90] For a discussion of some of the more important validity and enforceability issues, see, Michael Hwang, *Selected Essays on International Arbitration* (SIAC 2013), 545-564

A specific step-clause may designate the mediation service to be used, how long parties need to participate in mediation for, what constitutes a good faith effort at settlement, and how to proceed to the next step in the process. To provide certainty and clausal utility an administrating arbitration institution, the type of mediation, or even particular mediator can be designated *ex-ante*, negating any *ex-post* process flexibility. Even so, step-clauses incidentally offer more potential that process alignment will occur, since necessarily, they encompass at least two different ADR processes, including both one voluntary and one binding method.

3.2 Mandatory ADR processes

Many court processes include mandatory referral to ADR, most frequently mediation and conciliation.[91] These tracking procedures are typically embedded in the civil or family procedure rules. While institutionalised ADR forces parties to contemplate and utilise ADR, and improves the prospect of settlement,[92] these methods generally cut against the autonomy, self-determination, and voluntariness of party process choices that could be said to form the *raison d'etre* of ADR generally.[93] Rules can be drafted to mandate mediation within a designated timeframe, but leave it for the parties to choose between a private mediator or a publicly funded alternative. In this type of mandatory program the ADR method is proscribed but the parties retain process choice in relation to who is their provider and what speciality or style they might be able to offer. Even more permissive rules could encompass a wider choice between

[91] New Zealand has 30 statutory mediation programs. See, Claire Baylis, 'Reviewing Statutory Models of Mediation/Conciliation in New Zealand: Three Conclusions' (1999) 30 Victoria University Wellington Law Review 279. See also, Rule 24.1 of the Ontario Rules of Civil Procedure 1990.

[92] Yannick Gabuthy and Eve-Angéline Lambert, 'Freedom to Bargain and Disputes' Resolution' (2013) 36 European Journal of Law and Economics 373, 376 and Dorcas Quek, 'Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program' (2010) 11 Cardozo Journal of Conflict Resolution 479, 484

[93] Gabuthy and Lambert (n 89) 376

ADR processes and leave process typology to the discretion of the parties. However, many court programs offer no such choice and simply allocate parties to a mandatory ADR track that is pre-determined in the procedural rules. Empirical data has demonstrated that the difficulty inherent in compulsory ADR is that it often negatively impacts bargaining behaviours.[94] Resultantly, parties tend to feel constrained to 'negotiate over the partition of a pie, before this pie is divided exogenously in case of disagreement' instead of voluntarily 'hav[ing] the choice between bargaining or asking for the immediate exogenous splitting of the pie.'[95]

Statutory adjudication is another ADR process that is mandatory in respect of designated disputes, typically in relation to the construction industry.[96] Adjudication offers a mandatory fast track ADR process that may not be appealed but may later be arbitrated or litigated. It is designed to provide a stop-gap measure to ensure the continuation of contractual performance. Dissimilar to other compulsory methods of ADR, adjudication offers the possibility to revisit the result in another forum. The compulsory adjudication process may resolve the issue or at the election of the parties, have only temporary effect. It is not preclusive of other ADR processes being utilised in connection with a party sending the case for arbitration or litigation. In this manner, it provides needed certainty in the short term but yields to party self-determination and process choice overall.

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[94] ibid 375

[95] ibid 386

[96] Statutes have been approved in Australia, Singapore, Ireland, UK, New Zealand, and Malaysia. See, Berwin Leighton Paisner, 'The Continued Growth of Statutory Adjudication is Good News for a Global Construction Industry' (2014) <http://www.blplaw.com/expert-legal-insights/articles/continued-growth-statutory-adjudication-good-news-global-construction-industry> accessed 21 May 2017

4 Adaptation within an ADR Process

In a broad sense, the adaptive process is the very best of what ADR should offer as an 'alternative' to litigation. Adaptive process is the 'bespoke suit' that is only possible in ADR – an alternative where one size does not fit all. Only in an adaptive modality is the process made wholly subservient to serving the parties and their specific problem/s. Perceived resource constraints often put these Rolls Royce processes seemingly out of reach for most disputes, despite the fact that with some initiative and the right gatekeeper, adaptive variants are actually equally accessible to the 'off-the-rack' methods.

There are three potential ways in which adaptive processes can be orchestrated. The first is mixed-mode ADR where identified processes are mixed to provide for one process moving into the others. A prime example of a multi-modal process would be Med-Arb or less commonly Arb-Med. The second method is a single hybrid process that combines features of several processes or sub-processes. Mediation and conciliation are frequently blended into a single process.[97] The move of some ADR professionals towards using an eclectic style of mediation or using co-mediators with different styles and substantive expertise are additional variants of hybrids. The third possibility is when parties completely customize or invent a suitable ADR process. This may be an internal or external modality on client initiative or by using an expert consultant and may include elements of several streams of ADR.

[97] Felicity Steadman, Senior Practitioner, 'Disputes Both Realistic and Fantastical' Lecture at St. Hugh's College on 4 May 2017. Ms. Steadman and her team designed a process that mixed co-mediation with conciliation for dealing with the demands of a large multi-party labor dispute in South Africa.

4.1 Multi-Modal Processes

Arb-Med and Med-Arb are the most common forms of multi-modal ADR process. It is also possible to have a multi-modal conciliation with arbitration.[98] In a multi-modal process parties are potentially able to have the benefits of both a voluntary and a binding process, knowing that they will have the chance to discuss their problem with the certainty of resolution. Certain cultures, particularly North Asian,[99] have seen enormous value in multi-modal processes as the combined ADR process alternatives reflects alignment with certain core societal values.[100] From a process selection standpoint, multi-modal methods offer excellent possibilities for allowing parties to shift paradigms within a process, rather than having the process collapse and starting afresh. Initial gatekeepers who find themselves with parties that cannot decide between voluntary and non-binding ADR can guide parties to these multi-modal methods that are readily available on the market[101] and which allow for the fundamental and potentially coercive process shift from non-binding to binding resolution.

[98] See, Global Arbitration Review, 'Beijing: Arbitral Procedure and Med-Arb from English and Chinese Eyes' (2011) Global Arbitration Review <http://globalarbitrationreview.com/article/1030847/beijing-arbitral-procedure-and-med-arb-from-english-and-chinese-eyes> accessed 21 May 2017

[99] See, Samuel Volling, 'Mediation-Arbitration: Is There a Method or is it Madness?' (*Corrs Chambers Westgarth* 2012) <http://www.corrs.com.au/thinking/insights/mediation-arbitration-is-there-a-method-or-is-it-madness/> accessed 21 May 2017

[100] Colin Wall, Senior Practitioner, 'Arb Med Arb – Chinese Style' PowerPoint Presentation, Slide 2 <goo.gl/OaSBMK> accessed 21 May 2017

[101] Jia Zheng, 'Competition Between Arbitral Institutions in China – Fighting for a Better System?' (*Kluwer Arbitration Blog* 2015) <http://kluwerarbitrationblog.com/2015/10/16/competition-between-arbitral-institutions-in-china-fighting-for-a-better-system/> accessed 21 May 2017

4.2 Hybrid Processes

It has been noted that '[t]o understand the nature of a mule it is first necessary to understand the horse and the donkey. To value hybrid forms of ADR requires an appreciation of mediation and arbitration.'[102] While mediation is probably the best known and most utilised vehicle for providing a single ADR process that embraces elements of other processes and sub-processes (styles) it is by no means exclusively so. Early Neutral Evaluation, Expert Determination, and Conciliation can also be influenced by different schools of ADR thinking to create more rigid or flexible versions of these ADR methods. However, mediation is in many ways the ADR process that has developed the most cohesive and discernible set of subprocesses, or styles, each with their own distinct features and characteristics, while also being an adaptable process well suited for the introduction of elements of other ADR methods within the mediation – all without becoming multi-modal in character. For instance, a business dispute between two partners over share ownership, could be mediated by an evaluative mediator who as an expert provides an early neutral evaluation of the dispute based on an analysis of the share records. This mediator could also simultaneously put on a transformative hat to recognize and work on relational issues between the divergent partners – all under the auspices of a single mediation.

4.3 Mediation as an adaptive process

While mediation may be viewed as a single process when comparing it to other ADR methods for the purposes of process selection – any definitive characterization of its parameters can be highly elusive.[103] Alongside arbitration, mediation is the most

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[102] Leathes (n 2) 4

established form of ADR. However, in mediation, there are so many procedural styles and variables that an outsider could never guess what transpired in a particular mediation. To make informed process recommendations, gatekeepers must distinguish between different procedural and stylistic forms of mediation and understand the methods of particular mediators.

Mediation is substantively and stylistically the most diverse and flexible form of ADR, which from a process selection standpoint is both a weakness and a strength.[104] Not having definitive process boundaries means that mediation is not 'one size fits all' despite often being treated in this manner.[105] Alignment requires an in-depth exploration of styles, substance, and the personal attributes of a mediator.[106] The benefit of mediation is the diversity *within* the process, meaning that a skilled gatekeeper has vast arrays of process options to choose from within one field of ADR. Additionally, diversity within mediation allows for the possibility of eclectic or elastic practice, where the shape of the mediation process is reactive to what is needed to address the specific needs of the parties and their problem. Instead of holding a firm

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[103] Lorig Charkoudian et al., 'Mediation by Any Other Name Would Smell as Sweet—or Would It? The Struggle to Define Mediation and Its Various Approaches' (2009) 26 Conflict Resolution Quarterly 293, 294-297

[104] Substantively, the mediation community has recognised special skills sets for mediation expertise in civil, community, cross-border, family, IP, inter-cultural, maritime, and workplace mediation amongst others. Stylistically, Dr. Kenneth Cloke identifies nine possible styles of mediation that can be used as the basis for mediation including, conciliative, evaluative or directive, facilitative, transformative, spiritual, heart-based, or transcendent, systems design, and eclectic. See, Cloke (n 74) 11-12.

[105] Court based ADR programs will most often offer 'mediation' to parties with no regard to optimum process alignment between the parties and their dispute and the skills set of a roster mediator - stylistically, substantively, or personality wise. See, e.g. California's long list of local mediation programs which instructively are 'one size fits all' in that they do not refer to substance or style at State of California Department of Consumer Affairs, 'Local Mediation Programs' <http://www.dca.ca.gov/consumer/mediation_programs.shtml> accessed 21 May 2017

[106] Daniel Bowling and David Hoffman, *Bringing Peace into the Room: How the Personal Qualities of the Mediator Impact the Process of Conflict Resolution* (Wiley 2003), 13.

position on Riskin's grid,[107] the mediator travels between evaluative, facilitative, and transformative techniques to respond to changing themes and shifting focuses in the mediation dialogue. Some authors do not view this as a definable technique, but rather as mixed-mediation skill sets to adapt to the requirements of the situation.[108] This notion probes the question as to whether eclectic or elastic mediation is defined in the negative or the positive. Is eclectic mediation a style or a lack of adherence to any doctrine? The distinct advantage in defining eclectic or elastic mediation in the positive, as a style unto itself, is that it becomes a marketable ADR process product with the accompanying doctrinal understanding that a mediator of the eclectic type *will* rather than *can* use an array of diverse skill sets to adapt to the parties and the problem and provide a process that aligns with changing needs.

Either way eclectic process is an innovation that opens a world of possibility for process choice within an ADR process. If parties and their gatekeepers cannot decide on the optimal type of ADR process or style of mediation *ex-ante*, defaulting to an eclectic mediator offers the unique prospect of an *ex-post* process allowing fluid adaptation within the widest parameters of what can be offered within the style, substance, and skill sets of the selected mediator. This fact makes eclectic forms of mediation an ADR product similar to no other.

4.4 Custom Processes

A custom ADR process is one designed by the parties themselves or with the assistance of gatekeepers, such as an ADR consultant. The custom process is designed to either anticipate or meet the needs of the parties' specific dispute. Although

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[107] See, Leonard Riskin, 'Mediator Orientations, Strategies and Techniques' (1994) 12 Alternatives to the High Cost of Litigation 111, 111–114.

[108] Cheryl Picard, 'Exploring an Integrative Framework for Understanding Mediation' (2004) 21 Conflict Resolution Quarterly 295, 304.

offering a high prospect of optimal process alignment and the possibility for adaptation within the process, these processes can be very costly and time consuming to develop and implement, restricting its utility for the average ADR consumer.

5 A Model Intermediary?

As we have observed, the ADR market has a variety of gatekeepers who offer process alignment possibilities across the disputes timeline. However, for the reasons outlined, most of these methods prove sub-optimal in practice. Equally, adaptive processes mostly derive from, relate to, or centre around only one ADR process – mediation – a process that although utmost flexible will certainly not be appropriate for all disputants and disputes. These shortcomings prompt the question of how to create a viable independent system of gatekeepers at an intermediary stage who are tasked to triage disputes to the most appropriate form of ADR.

In 1976, Harvard Law School Professor Frank Sander addressed the Pound Conference with the idea of creating what he coined 'The Multi-Door Courthouse'[109] 'based on the idea of a coordinated approach to dispute resolution within the administrative structure of the trial court.'[110] This setup foresees the use of case managers who will help people to triage their disputes to an ADR process under the same roof – one stop dispute resolution shop. Ideally, parties would come to the courthouse and have assistance in 'shopping' for a process. By conducting this

[109] Frank Sander, 'Varieties of Dispute Processing. Address at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice' (1976) 70 Federal Rules Decisions 79, 111-134

[110] Ericka Gray, 'A Day in the Life of a Multi-Door Courthouse' (1993) Negotiation Journal 215

intermediary process within the courthouse, additional transaction costs may be kept to a minimum, increasing the opportunity for cooperative value.[111]

In practice, multi-door programs have emerged as courthouses first and foremost – with added ADR. The number of ADR processes that can be offered is limited by budget, capacities, and preselection. Resource constraints mean that some gates, rather than every gate is open to the parties. A focus on measurable metrics and outcomes can also restrict utility.[112]

People come to shop for litigation – and are convinced to try ADR or required to do so.[113] Litigation is the engine of the multi-door system that drives people in the door. It is a cost-efficient method that provides for some 'fitting' for the general public. However, multi-door is limited to an audience already in a courthouse. It is also unsuitable for many complex or multi-party disputes. For example, some international child abductions cannot be litigated when one country is not a signatory to The Hague Convention.[114] ADR may be the only mechanism capable of retrieving the child, yet this party will not find themselves in a multi-door courthouse. Equally, alignment for many complex multi-party disputes require dedicated specialists because of the complex pre-mediation shuttle diplomacy needed to generate a workable process.

The existence of tough parties or problems necessitates the role of an 'independent' gatekeeping specialist who allows for adequately resourced parties to

[111] Ronald Coase, 'The Problem of Social Cost' (1960) 3 Journal of Law & Economics, 1-44

[112] Wayne Brazil, 'Court ADR 25 Years After Pound: Have We Found a Better Way?' (2002) 18 Ohio State Journal on Dispute Resolution 93

[113] Mandatory multi-door programs mitigate against party self-determination of process.

[114] The Hague Convention on the Civil Aspects of International Child Abduction 1980

benefit from a customised process 'fit'. This independent 'fitting role' would require an intermediate stage of evaluation between the problem's origin and process origination.[115] The gatekeeping role an intermediary is an expanded version of a referral to mediation process, to cover all ADR.[116] Here an independent process expert focuses on case and party analyses with a view to applying the gatekeepers' keys to unlock potential ADR process matches.[117] Similar to the Guided Choice System, this intermediary is a conduit to early information exchange.[118]

Optimally, this ideal 'fitter' would be utilised at the earliest possible stage after mutual recognition of conflict and no later than what today would be considered pre-mediation. This process specialist gatekeeper would then use their process evaluation keys to align the parties and problem with an appropriate process recommendation that '*fits'* that 'forum to the fuss'– allowing parties access to the 'optimal' gate most synchronous with the shape of their dispute and tweak that process choice as demanded by circumstance.

6 Conclusion

There is no one qualitative "best" answer to "fit the forum to the fuss". Each choice of 'fitting' ultimately must be reflective of the dispute, disputants, available process choices and situational constraints such as resources and timeline. As discussed, each

[115] Andreas Hacke, 'Process Design in Complex Business Mediations'. Presentation at the conference 'Current Issues in Arbitration and Dispute Resolution' in Oxford on 16-17 December 2016

[116] Machteld Pel, *Referral to Mediation* (Sdu Uitgevers 2016), Kindle Location 904

[117] Ibid

[118] Lurie (n 59) 19

gatekeeper has its relative problems and prospects for certain persons and disputes. Intermediate systems are not a panacea to all challenges and certain situations will be best served by existing structures. While intermediate alignment mechanisms such as the multi-door courthouse do provide some viable fitting options in the public sector, there remains much work to be done on the critical 'fitting' needed in complex cases that require more specialised responses.

Despite the diverse range of gatekeepers and gateways, it remains essential to develop a role for an independent expert in conflict analyses and ADR market expertise that provides case management consulting, preferably at an intermediate stage. ADR process scholarship has not evolved much since 'Fitting the Forum to the Fuss,'[119] and not adequately developed the role of these "fitting" intermediaries. The conduit 'fitting' role needs to be conceived in the intermediate stage between the dispute and the start of a resolution process, where appropriate neutral intervention can guide the parties towards an optimal ADR process. Only the achievement of an optimal 'fit' of 'the Forum to the Fuss' can wholly realise the promise of true party self-determination in ADR.

[119] Lande and Herman (n 4)

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