The Evolving “A” in ADR

Kluwer Mediation Blog
March 14, 2012

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Please refer to this post as: Joel Lee, ‘The Evolving “A” in ADR’, Kluwer Mediation Blog, March 14 2012, http://mediationblog.kluwerarbitration.com/2012/03/14/the-evolving-a-in-adr/

The term “ADR” is certainly familiar to not just those of us in the teaching and practice of mediation, but legal practitioners as well. In this post, I want to share some thoughts about the evolving nature of the “A” in ADR and how this is both reflective of the changes that have occurred in the legal industry and can also provide a normative sign post of how the movement can and perhaps should develop.

Before proceeding, it is useful to make one preliminary comment. As one reads this, you might wonder if this is just semantics. At one level, it is about semantics. However, this is not to say it is not important. As mediators, there is no dispute that reframing affects how parties perceive the dispute and whether progress is made. This is premised on the assumption that the choice of words we use makes a difference. Similarly, this writer is suggesting that what the “A” stands for in ADR makes a difference.

The initial and still commonly used version of “A” is Alternative. Without going into the history of the Alternative Dispute Resolution movement, it is trite that it arose out of a dissatisfaction with litigation as a dispute resolution process; the common complaints of litigation being too expensive, taking too long and being too destructive. Under this version, Negotiation, Mediation and Arbitration were wheeled out as alternatives to litigation as lawyers searched for better ways of resolving their clients’ problems.

What is interesting is that the term “Alternative Dispute Resolution” drew its definition with reference to what it was not i.e. litigation. This of course accurately reflected the reality of the situation at the time. However, as a normative statement, I submit that it was not as helpful in two ways.

First, stems from the idea that the brain cannot easily process a negative. For example, saying to someone “Don’t think of a pink elephant” requires that the person think of a pink elephant first, before not thinking of it. In a similar way, the term “Alternative Dispute Resolution” meant that one had to first think of what the main form of dispute resolution was i.e. litigation before thinking of what the alternatives to it were. Secondly, and this is a related point, the term provided a psychological barrier in favour of litigation. After all, going for an alternative implied second best. Ask any drinker of Coca Cola. Would they go for the alternative Pepsi? As such, litigation therefore continued to occupy mind space.

A step forward occurred when some academics and practitioners began to refer to ADR as “Appropriate Dispute Resolution”. To the writer’s mind, this required a shift in focus from the position that litigation was presumptively the main form of dispute resolution (which could be rebutted and replaced with one of the alternative forms of dispute resolution) to a sincere consideration of what form of dispute resolution was appropriate for the client’s particular problem. Put another way, the lawyer had to come to the client’s problem with a blank slate and weigh the pros and cons of each form of dispute resolution before deciding with his/her client which one to adopt. The lawyer therefore had to have a “meta-strategy” for deciding the suitability for any form of dispute resolution for his/her client. While this writer would like to think that this evolution of “A” was reflective of the times, it was probably more normative and seen as a way to overcome some of the problems discussed in relation to “Alternative” Dispute Resolution.

While this evolution helped somewhat, I am not sure it achieved its full potential. First, lawyers who were invested in the litigation mindset could simply go through the motions of considering other forms of dispute resolution and then influence their clients to adopt mediation. Secondly, and this hints at a fundamental conceptual problem, it may be unreasonable to expect lawyers who have been typically trained in rights-based win-lose thinking to consider adversarial and amicable forms of dispute resolution for any particular problem at the same go. And even if they could, there was a disincentive in that clients might wonder why their lawyers were not fighting for them and “rolling over”.

This leads us to the next step in the evolution of “A”. The term “Amicable” Dispute Resolution is one that is increasingly used by those practicing collaborative law. The movement towards collaborative law is a relatively young one but the idea is an appealing one. One iteration of it is that collaborative lawyers will choose to engage in only amicable forms of dispute resolution i.e. negotiation and mediation. Where matters need to move on to more contentious forms such as arbitration or litigation, collaborative lawyers will refer those clients on to those who choose to specialize in contentious work.

Seeing ADR as “Amicable” Dispute Resolution addresses the problems associated with “Appropriate” Dispute Resolution in that it does not require lawyers to hold two vastly different dispute resolution paradigms in their minds. Further, a client can go to a lawyer practicing “Amicable” Dispute Resolution knowing full well what the lawyer is offering. It also addresses the increasingly held view that arbitration does not really fit well with Negotiation and Mediation as dispute resolution processes by cleanly separating Negotiation and Mediation from the more adversarial and contentious forms of dispute resolution.

At the end of the day, it is not clear whether there will be further evolution to the “A” in ADR. Both contentious and amicable forms of dispute resolution have their place in legal practice and clients should have access to lawyers who specialize in either type of dispute resolution. This present incarnation of ADR allows for a fair consideration of amicable dispute resolution processes without the concern of that consideration being tainted by either a win-lose mindset and or a need to appear strong to a client. I believe that we are at the right place.