Kluwer Mediation Blog

Mediations Ripped From the Headlines

Rick Weiler (Weiler ADR Inc.) · Saturday, December 22nd, 2012

Two stories currently making headlines in Canada provide the occasion to harken back to previous posts on this blog.

Mediation Backlog – Ontario No-Fault Auto Insurance Disputes

In March of this year I blogged about the consequences of under-resourcing mandatory mediation programs. The Financial Services Commission of Ontario (FSCO) had (and still has) a huge backlog of disputes involving no-fault car accident benefits such that it was unable to refer cases to mediation within 60 days as required by law. Claimants, unwilling to wait, proceeded to commence actions in Superior Court, as is their right following a "failed mediation". In March I wrote about the insurers' failed attempt in the Courts to block this development. The insurers appealed their initial loss and the Ontario Court of Appeal has now confirmed the lower Court decision. You can read the full decision here. The potential consequences of the decision can be seen in this interesting article from The Law Times.

It seems clear that the additional costs resulting from this state of affairs will be borne, in the first instance, by Ontario auto insurers and ultimately by those they insure, in the form of higher premiums. Given the historically high rate of success for FSCO mediations (75%) there would appear to be a compelling argument for increasing the number of mediators to meet the demand and that's exactly what FSCO is doing. The Law Times article reports, "In a statement, Tom Golfetto, director of arbitrations at FSCO, said the backlog should "quickly decrease" with the help of an external dispute resolution service provider assisting with the caseload by taking on an additional 2,000 mediations monthly. That's in addition to the files handled by FSCO's own mediators."

The reference to "an external dispute resolution service provider" raises some interesting issues that I plan to return to in a subsequent post.

National Hockey League – Mediation Suitability

Last month I blogged, out of turn, on reports that NHL owners and players had agreed to submit their ongoing dispute to mediation. Those mediation efforts, described here, have so far failed to produce a settlement. In fact, talks broke down in spectacular fashion with one negotiator saying, with regard to contracting issues, "this is the hill we will die on." (a line I've had occasion to use in my own mediations recently).

With the whole NHL season now very much in jeopardy and litigation being contemplated to award the Stanley Cup (the top honour in hockey) to a non-NHL team, I thought it might be interesting to submit this dispute to the Mediation Suitability Checklist I blogged about in April. Faithful readers will recall that the Checklist is a tool for helping to decide if a dispute is suitable for mediation. Below are the Checklist questions and my short take on each.

> ***Instructions: For each of the following statements circle the number which most closely corresponds to your reaction. Total the circled numbers. Disputes generating a score of 21 or greater should be considered prime candidates to refer to mediation. 1 = strongly disagree; 2 = disagree; 3 = no opinion; 4 = agree; 5 = strongly agree***
>
> 1. *Parties have a history of cooperation and successful problem solving.* (1) – Yikes! This will be the second time in a decade that a whole NHL season has been lost.
>
> 2. *The number of parties to this dispute is limited (i.e. four or less)*. (1) – There are only two parties at the table: the players and the owners, but the constituencies away from the table (30 teams and about 700 players) hold positions all along the spectrum from hawk to dove.
>
> 3. *Issues in dispute are not overwhelming in number and we have been able to agree on some issues*: (4) – progress has been made on revenue sharing and the remaining issues should be manageable.
>
> 4. *The hostility of both sides to this dispute is moderate or low:* (1) – see "the hill we will die on", above. (Note to self – perhaps the checklist needs a 0 rating for, "are you kidding me?")
>
> 5. *The parties desire for settlement is high:* (3) – with the tremendous financial cost to both sides, not to mention the pressure of a short playing career for the players one would have thought these is a high desire to settle. Events to date have proven otherwise.
>
> 6. *There is external pressure to settle (time, money, unpredictable outcomes, etc.):* (5) – the fan pressure has become increasingly intense with a recent poll showing the dispute is doing serious harm to the NHL brand.
>
> 7. *There is a possibility of an ongoing relationship among the parties:* (5) Duh….

So, my total scoring comes to 20; one point short of the 21 point threshold for a matter to be referred to mediation. Close enough I say! They should stick with the FMCS mediators.

Finally, let me take this opportunity to wish Happy Holidays to all my colleagues on this Blog, to everyone at Kluwer and to you, the reader. I wish all much joy in 2013.

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