Kluwer Mediation Blog

The Dispute Resolution Dilemma: Opt-In or Opt-Out?

Michael Leathes (Corporate counsel & author) · Sunday, May 18th, 2014

In his now famous Stanford Commencement Address in June 2005, Steve Jobs remarked: "Remembering that I'll be dead soon is the most important tool I've ever encountered to help me make the big choices in life…. [and] to avoid the trap of thinking you have something to lose."

One of the choices that we all have to make regularly these days is whether to opt-in or to opt-out of alternatives that are presented to us. Do we want to opt in or opt out of receiving marketing ads, disclosing our identities, vaccinations, being in a pension scheme, donating our organs and other opportunities where we have to tick a box to indicate yes or no – otherwise the choices is made by default?

Should mediation – alias, assisted settlement negotiation – be something we are left to opt into, or is it appropriate to make settlement negotiations with the help of a neutral an automatic process step in formal proceedings unless we opt-out of the opportunity?

Many court procedures these days expressly or by implication require parties to opt out of mediation, rather than opt-in. But encouraging parties who are already part of an arbitration proceeding into mediation is somehow different. Until now.

In October 2013, the American Arbitration Association (AAA) published its new *Commercial Arbitration Rules and Mediation Procedures* to become the first leading arbitration institution to make mediation a process step that the parties need to opt out of, rather than a choice they would have to opt into. New Rule 9 provides:

> In all cases where a claim or counterclaim exceeds $75,000, upon the AAA's administration of the arbitration or at any time while the arbitration is pending, the parties shall mediate their dispute pursuant to the applicable provisions of the AAA's Commercial Mediation Procedures, or as otherwise agreed by the parties. Absent an agreement of the parties to the contrary, the mediation shall take place concurrently with the arbitration and shall not serve to delay the arbitration proceedings. However, any party to an arbitration may unilaterally opt out of this rule upon notification to the AAA and the other parties to the arbitration. The parties shall confirm the completion of any mediation or any decision to opt out of this rule to the AAA. Unless agreed to by all parties and the mediator, the mediator shall not be appointed as an arbitrator to the case.

Is this driven by user demand? Earlier in 2013, the International Mediation Institute, assisted by the Corporate Counsel International Arbitration Group and the Conflict Management Round Table of German Business, surveyed in-house dispute resolution counsel, General Counsel and some senior management in over 70 multinational corporations. One of the propositions put to those surveyed was: “Parties to an arbitration proceeding should be actively encouraged by the Arbitration Provider to use mediation to settle their dispute.” A total of 74% of responders agreed with this statement, 22% were ambivalent and only 4% disagreed.

Another proposition was: “Mediation should be a compulsory process step in the conduct of all commercial disputes, both in litigation and arbitration.” To this, 48% agreed, 15% were ambivalent and 37% were against.

The inference is that what most users want is something between mediation being a mandatory step and active encouragement to mediate. AAA’s solution is to replace the implicit opt-in with an express opt-out.

Also in October 2013, Lord Woolf delivered the Annual Mediation Lecture in Singapore, one of the highlights of the dispute resolution calendar in Southeast Asia (see Ruminations on the Singapore Mediation Lecture 2013 by Joel Lee, 14 October 2013). His speech contained the following remarks:

> Remarkably, while I would have expected mediation to have a more prominent role in arbitration than in other areas of litigation, in fact from my unscientific observation the opposite is true…. I have over the years found among the arbitration industry a remarkable reluctance about promoting mediation. I find the reasons advanced for this worryingly unsatisfactory. If this is due in any way to supposed self-interest, this is a mistake. Parties to commercial arbitration, as in litigation, are increasingly jaundiced as to the rising costs. If increased use of mediation reduces the average cost of arbitration, this would increase its popularity.

AAA has improved their arbitration procedure by making mediation a normal process step that parties will have to opt out of, rather than opt into. This seems to address the expressed needs and desires of users. May this be the start of an international trend? The survey evidence suggests that users are likely to be hoping so.

Michael Leathes and Deborah Masucci

---

uncover potential conflicts of interest.

Learn how **Kluwer Arbitration** can support you.

This entry was posted on Sunday, May 18th, 2014 at 12:00 am and is filed under Mediation Institutions and Rules, Opt-In, Opt-Out
You can follow any responses to this entry through the Comments (RSS) feed. You can skip to the end and leave a response. Pinging is currently not allowed.