Kluwer Mediation Blog

Court Involvement in Mediation

Geoff Sharp (Brick Court Chambers / Clifton Chambers) · Thursday, October 1st, 2015

Many jurisdictions have grappled with the extent to which their courts should get themselves involved in the mediation of litigated cases.

Many different approaches have found favour around the globe, with diverse programs being implemented in courts from Hong Kong to Florida and places in between. Some courts are hands off while others are heavy handed – regulating every aspect and some even use judges to mediate.

Some programs are creatures of statute, others are mandated by procedural rules while others simply rely on a mediation friendly presiding judge. Some courts, I suspect, see mediation as a competitor – taking the best cases out of the system and contributing to the vanishing trial phenomena occurring in many jurisdictions.

At a recent Resolution Institute conference (formerly LEADR) in Auckland, New Zealand a high-powered panel of judges and NZ/UK barristers discussed the appropriate degree of mediation involvement of courts in the New Zealand context in a session entitled Courts and Mediation: A Symbiotic Relationship?

Some would say New Zealand is, on any measure, a mature even sophisticated mediation jurisdiction. So the question arises in NZ and elsewhere, do our courts really need to nudge litigated matters towards mediation or are we better to simply build it and they will come? The research is mixed however it's clear many litigated cases do not find their way to mediation without encouragement and direction from the court.

Our panel discussed the **Continuum of Court Involvement** below – being a spectrum ranging from hands off/light touch to mandatory referral of all civil matters.

> **NZ** is in the judicial persuasion space verging on some fairly weak tick box case management levers. I would like to see it move right.
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> **England and Wales are** a little further along, utilising pre action protocols and soft (financial) sanctions for unreasonable refusal to mediate.
>
> **Singapore** is further along still – subscribing to a presumption of ADR (parties can opt out with reasons) in its Subordinate Courts – resulting in around 6000 mediations annually.

> At the far right of our continuum are many courts in mature jurisdictions, most notably some states in the **US** and **Australia**, which not so much nudge as two hands push disputes out of the courtroom into the mediation room.
>
> Some refer selected litigants to mediation without their consent however most stop short of a wholesale referral of *all* civil filings. Or as Nadja Alexander puts it, there exists discretionary mandatory, soft mandatory and routine mandatory.

To some extent, many of the issues that arise within the court environment (confidentiality, status of the outcome etc.) are different from those where mediation is outside it, however part of the problem with court programs is that often they are designed by people who know little about mediation but know everything about court process. Add to that judges who use the ability to refer cases out as a blunt instrument (maybe even as a hospital pass) without understanding the nuances of the process.

If one gets past that old chestnut of mediation being a voluntary process therefore how can there be *any* coercion of *any* kind by *anybody* (coercion *into* mediation/coercion *within* mediation) then the litigation community's primary concerns appear to be;
1. what cases are mediated
2. how that referral takes place
3. who selects the mediator
4. who pays the mediator

Florida and the England are good examples of how two justice systems have approached these issues.

Florida is widely seen as the pre-eminent US state when it comes to court connected mediation. Some figures have over 100,000 cases being referred out annually. Florida judges have the ability to order cases to mediation and parties have the ability to challenge that referral on grounds that the case has already been mediated or that it involves a question of law only or "for other good cause". Florida's success is in large part due to the fact that parties can choose their own mediator.

The English soft sanctions approach is perhaps more familiar to readers of this blog. It is one that I favour as stopping short of mandatory referral but having enough teeth to nudge cases that would not otherwise get to the mediation table. While there is much to say and cases to read, essentially the English position allows judges to impose financial sanctions (in the form of costs) if a party unreasonably declines to mediate, in some cases whether or not they prevail at trial. One of the latest cases in the Halsey line of cases is *Laporte & anor v Commissioner of Police of the Metropolis*

Other Common Law jurisdictions take a similar approach, for instance, Hong Kong's District Court recently imposed adverse costs orders against a party who unreasonably refused to mediate; *Wu Yim Kwong Kingwind v Manhood Development*

[a useful summary of both cases by Herbert Smith Freehills here and here]

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