Kluwer Mediation Blog

Compulsory ADR – Halsey revisited

Alan Limbury (Strategic Resolution) · Thursday, July 22nd, 2021

On July 12, 2021 the UK Civil Justice Council published its Report on Compulsory ADR . It considered first whether parties to a civil dispute in England and Wales may be compelled to participate in an ADR process.

As to this question, it will be recalled that, in the Court of Appeal decision in Halsey v Milton Keynes [2004] 1 WLR 3002, Dyson LJ (as he then was) said:

"It is one thing to encourage the parties to agree to mediation, even to encourage them in the strongest terms. It is another to order them to do so. It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court. The court in Strasbourg has said in relation to article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms that the right of access to a court may be waived, for example by means of an arbitration agreement, but such waiver should be subjected to "particularly careful review" to ensure that the claimant is not subject to "constraint": see Deweer v Belgium (1980) 2 EHRR 439, para 49. If that is the approach of the European Court of Human Rights to an agreement to arbitrate, it seems to us likely that compulsion of ADR would be regarded as an unacceptable constraint on the right of access to the court and, therefore, a violation of article 6."

Article 6 of the Convention provides, relevantly, that:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

Report Findings

The Report:

- found the facts in Deweer v Belgium (which did not involve arbitration anyway) of little relevance to the Halsey decision since it held that Article 6 was infringed by a coerced agreement to waive the right to trial.
- noted that in Rosalba Alassini [2010] 3 C.M.L.R. 17 the European Court of Justice ruled, contrary to the reasoning in Halsey, that an Italian law which provided that parties would forfeit their legal right to bring court proceedings if they declined to submit to mediation beforehand did not impose an unacceptable constraint on the right of access to the court in violation of Article 6.
- cited recent academic opinion appearing to favour the view that provided parties retain the right to proceed to court at all stages, participation in ADR can be made compulsory without any breach of Article 6.

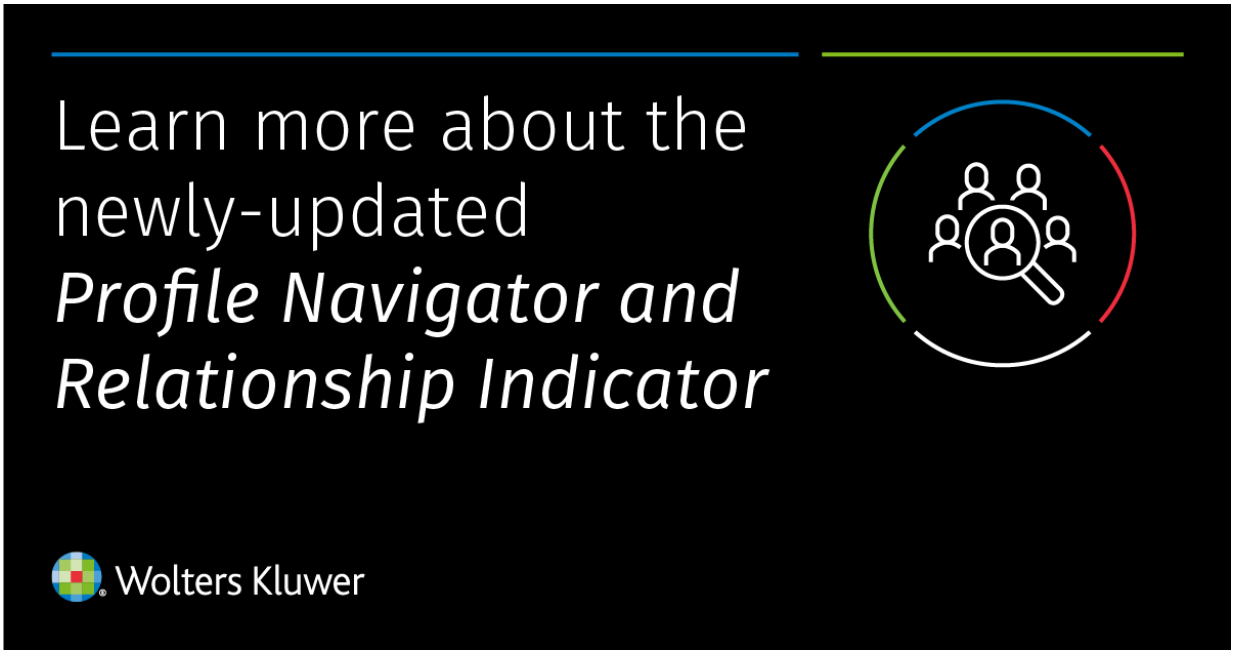
And the Report Concluded that:

- parties in England and Wales can lawfully be compelled to participate in ADR, provided that any cost and delay is *proportionate*;
- an order requiring unwilling parties to participate in ADR should be enforced and
- that parties who fail to attend in breach of such an order should be sanctioned.

This is in line with the Australian experience set out in my blog here.

Having thus managed to sweep that aspect of the Halsey decision aside, while calling for it to be formally overruled by decision or by legislation, the Report went on to consider how, in what circumstances, in what kind of case and at what stage should compulsion be imposed, noting that several jurisdictions have adopted various forms of compulsory ADR.

These considerations may be addressed in a future Kluwer blog.



This entry was posted on Thursday, July 22nd, 2021 at 5:00 am and is filed under ADR, Litigation, Mandatory mediation, Mediation and Society, Mediation Institutions and Rules, mediation models, Mediation Practice, Uncategorized
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