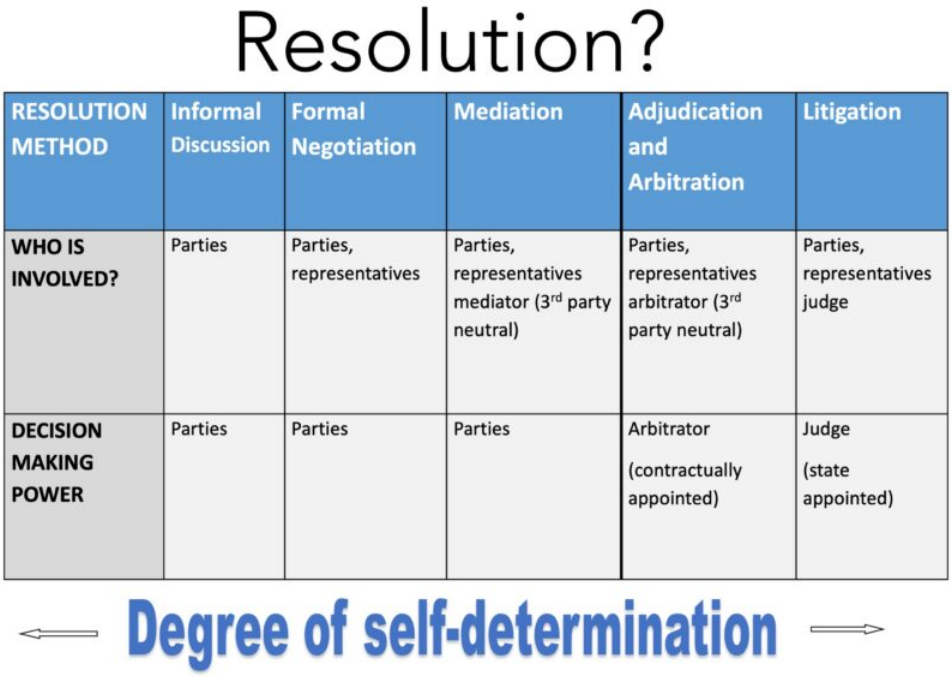
Kluwer Mediation Blog

The Thick Line Between Mediation and Arbitration (Or Why ADR is a Weasel Word)

Charlie Irvine (University of Strathclyde) · Saturday, July 24th, 2021



Law students are probably familiar with a diagram like the one above. It arranges different ways of resolving disputes according to how much say parties have in the outcome. Much as Felstiner and colleagues (1) famously described disputes being transformed into court cases through '*naming, blaming and claiming,*' this graphic illustrates a parallel transformation in their resolution. At one end parties control process and outcome (informal discussion). Further along they delegate process but retain control of the outcome (formal negotiation and mediation). At the far end they hand over both process and outcome to another (arbitration and litigation). Vigilant readers will notice the thick line between mediation and arbitration.

In this blog I draw attention to the hard logical distinction between consensual and adjudicative processes, glossed over by the vague and unhelpful term alternative dispute resolution. I then describe some of the mischief caused by overlooking the difference between making a decision and having it made for you.

ADR: A Weasel Word

Frank Sander is credited with coining the term 'alternative dispute resolution' in his address to the 'Pound Conference' in 1976 (2). In fact his case for a shakeup of the American justice system used the term *'alternative dispute resolution mechanisms'* (3). Sander devised a similar diagram to mine (which I can't reproduce for copyright reasons.) This places 'adjudication' to the left of a scale of *'decreasing external involvement'* (4). Strikingly he employs a single term, adjudication, to describe both court AND arbitration (5), placing mediation, conciliation, negotiation and avoidance on the other side of his 'line.' Later in the piece he proposes a two stage process for a range of disputes, starting with a *'mediational phase, and then, if necessary, … an adjudicative one'* (6).

No lack of conceptual clarity from Professor Sander, then. He seems to have understood that processes where a binding decision is made by a third party belong together, citing Fuller's definition of adjudication as *'a social process of decision which assures to the affected party a particular form of participation, that of presenting proofs and arguments for a decision in his favor.'* (7) Unfortunately his successors have been less clear. The acronym ADR, whether referring to alternative dispute resolution or its modern variant, appropriate dispute resolution, now draws the line in a different place. On one side are the courts (decidedly not alternative). On the other, modern commentators lump together arbitration, mediation, negotiation and a rag tag of assorted processes, including early neutral evaluation, med-arb, arb-med and even tribunals. 'Alternative' now appears to include adjudication in the form of arbitration.

The Mischief

Why does this matter? We can't expect the public to care if members of one rather obscure profession object to being confused with another. This lack of clarity, however, affects others. When a court or lawyer suggests ADR, what do consumers think they are getting? Will they be 'decision makers' or 'decision recipients' (8)? As things stand it could mean either.

This assumes even greater significance when ADR becomes mandatory. It is one thing to require, or encourage, people to take part in a process that gives them a veto over the outcome (as in court-ordered mediation). It is quite another to compel them to submit to the binding decision of an individual who is not a state-appointed judge (as in arbitration). There is no veto, and often no appeal.

In the US, fierce political debate about mandatory arbitration clauses in employment contracts has culminated in a legislative attempt to outlaw them: the Enforced Arbitration Injustice Repeal Act. While it may not reach the statute books undiluted (9) the outcry concerning this practice raises deeply uncomfortable issues for mediators. By sharing the umbrella term ADR, mediators foster an association in the mind of consumers with a practice many regard as oppressive, now dubbed by the American congress an 'injustice.'

Justice

Controversy about the justice or injustice of processes like mediation and arbitration is not new.

Concerns have been raised about mediation's capacity to protect vulnerable individuals, its privacy, its informality and its effect on the wider justice system. I summarise forty years of critical writing on mediation in a recent article, What Do Lay People Know About Justice? (10)

I am NOT making a simple equation: mediation = good, arbitration = bad. Some of the critiques just mentioned apply to mediation but not to arbitration. And if two businesses in dispute choose to appoint someone with relevant skills and experience to render a binding decision, why should they not? But I repeat my call for clarity. By forgetting the thick line between mediation and arbitration we lump profoundly dissimilar processes together. This enables those with vested interests, or who are simply resistant to change, to write us all off. It is time to drop the term ADR, coined in the middle of the last century, and say what we mean. If we think it is a good idea to refer people to arbitration, then say so. If courts deem mediation appropriate, then the legislation and rules should use the correct word.

UK developments

Sadly my own jurisdiction of Scotland provides a recent example of the confusion. As I've mentioned before on this blog, its 2016 Simple Procedure Rules contain repeated references to ADR. I speculated whether the courts would actually use the rules to refer more cases to mediation 'or any other form of ADR' (like most mediators I had fallen into the habit of using a formula like this as a polite nod to arbitrators). In reality they have, now 'encouraging' hundreds of small claimants annually to resolve their disputes via mediation. Sheriffs (judges) have learned to use ADR as a synonym for mediation. There may be examples of referral to arbitration, but I'm unaware of them. And here's the puzzle: the rules say 'ADR' while those following them think 'mediation.'

A more hopeful instance of clarity has just been published in England and Wales, nicely summarised by Alan Limbury in this blog. Admittedly the title of the Civil Justice Council's 2021 report 'Compulsory ADR' is not promising. I expected the usual fudge. Then I was cheered to read the following footnote to its definition of ADR: *'This definition excludes arbitration even though arbitration is sometimes listed as a form of ADR. Arbitration is an adjudicatory process in its own right and represents a permanent diversion from the court process. It culminates in an award from which there is typically only a very limited right of appeal. Arbitration therefore inevitably raises different issues in relation to constitutionality'* (11). Finally.

A great deal of the report is devoted to unpicking the consequences of a puzzling 2004 Court of Appeal decision (12). But its conclusion is that ADR (for which read consensual processes, particularly mediation) is no longer separate from or even alternative to the courts and can reasonably be encouraged through sanctions. While I'd have preferred them to ditch the term ADR altogether the authors make laudable efforts to confine themselves to processes where parties remain decision makers, distinguishing arbitration as a *'"cul de sac" which removes disputes from the court process entirely'* (13).

Conclusion

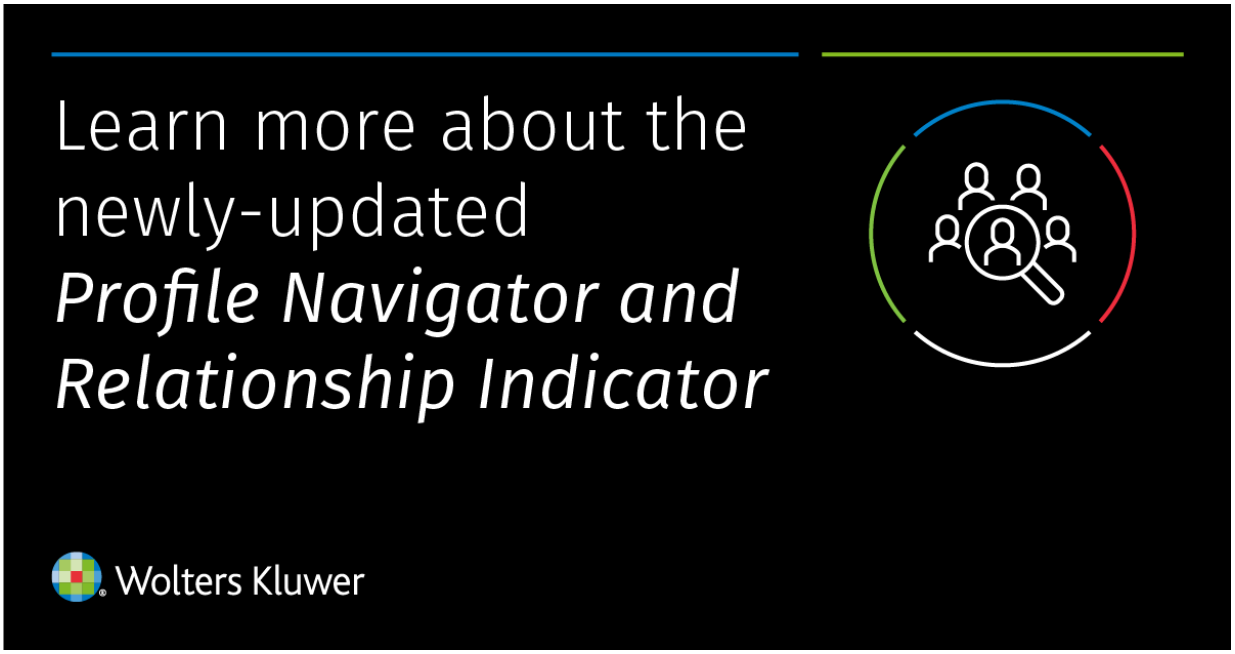
It is time to remind ourselves of the thick line between mediation and arbitration. This is not simply an intellectual game for legal scholars. For many years those who work in dispute resolution, myself

included, have persisted in employing ADR as a synonym for mediation, or whatever process they prefer. This is confusing for consumers and a disservice to policymakers. Let us say what we mean.

To take one final example, Scotland already has an Arbitration Act and many of us believe it needs a Mediation Act. Whatever we do, let it not be an ADR Act.

References

(1) Felstiner. W.L.F., Abel. R.L. and Sarat. A., 1981. The emergence and transformation of disputes: naming, blaming, claiming… *Law and Society Review* 15 (4) 631–654.
(2) The full title was The National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice; Sander. F.E.A., 1976. Pound Conference addresses. *Federal Rules Decisions* 79: 111-133.
(3) Ibid. 113.
(4) Ibid. 114.
(5) He also includes 'Administrative Process' which seems to refer to the US's range of administrative agencies for large volume, repetitive cases.
(6) Sander 1976, 127
(7) Ibid. 114, citing L. Fuller, 1963. Collective Bargaining and the Arbitrator *Wisconsin Law Review* 1, 19.
(8) Sivasubramanium. D. and Heuer. L., 2007. Decision makers and decision recipients: understanding disparities in the meaning of fairness. *Court Review* 44: 62–70.
(9) See Turning of the Tide: Could Congress Ban Mandatory Employment Arbitration?
(10) Irvine, C. (2020) What Do Lay People Know About Justice? An Empirical Enquiry *International Journal of Law in Context*, 16 (20) 146-164.
(11) Fn 3 on p. 8.
(12) *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002
(13) Civil Justice Council, 2021, p. 11



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