Kluwer Mediation Blog

Revisiting a Contentious Question – When is compulsion into (A)DR appropriate?

Alan Limbury (Strategic Resolution) · Wednesday, September 22nd, 2021

As mentioned in my last blog , the UK Civil Justice Council, in its June 2021 Report on *Compulsory ADR* , endorsed the idea, contrary to the ruling in the notorious Halsey case, that unwilling parties in dispute may lawfully and appropriately be compelled to participate in a DR process such as mediation.

(As an advocate for calling all processes for resolving disputes DR processes, I have dropped the 'A' in what follows even though that letter has been used in the passages cited).

The Report then turned to the question: "In what circumstances, in what kind of case and at what stage should DR be imposed?" Without being prescriptive, the Report suggested that when deciding whether or not compulsion may be appropriate, the following considerations should be taken into account:

• whether the form of DR proposed or required may be too burdensome or disproportionate in terms of cost or time;
• whether particular specialist jurisdictions may be better suited to compulsion than general litigation;
• whether there is sufficient confidence in the neutral person, the DR provider;
• whether the DR participants have access to legal advice;
• at what stage should DR be required; and
• how perfunctory performance by participants should be addressed (i.e. punished).

One overarching question when considering possible compulsion into ADR is the prospect if its effectiveness. As noted by the Australian Dispute Resolution Advisory Council (ADRAC) in its

2019 paper Effectiveness in DR – Key Issues, effectiveness in DR is most commonly accepted as being the achievement of settlement.

However, as ADRAC notes, effectiveness can include levels of satisfaction with the process, the practitioner and the outcomes; the perceived fairness of the process; the nature of the terms of any settlement agreement (e.g., whether they are more personalised than a basic exchange of resources); its perceived durability; and perceived improvements in the relationship between the disputants. Hence effectiveness can include the achievement of settlement plus any of these factors. It can also include a partial agreement and any narrowing of the issues in dispute.

In determining how to go about implementing compulsory DR, a good starting point is Harvard Professor Frank E. A. Sander's paper delivered at the 1976 Pound Conference in Minneapolis, named after Roscoe Pound, (1872–1964), Dean of the Harvard Law School, who addressed the American Bar Association annual meeting in 1906 on 'The Causes of Popular Dissatisfaction with the Administration of Justice'.
Professor Sander's paper, 'Varieties of Dispute Processing', proposed the idea of a 'Dispute Resolution Center', in which a process of triage would lead to referral to one or more of a range of processes considered to be appropriate in the circumstances of the particular dispute and the disposition of the parties.
Professor Sander envisaged "not simply a court house but a Dispute Resolution Center, where the grievant would first be channeled through a screening clerk who would then direct him to the process (or sequence of processes) most appropriate to his type of case. The room directory in the lobby of such a Center might look as follows:
Screening Clerk Room 1
Mediation Room 2
Arbitration Room 3
Fact Finding Room 4
Malpractice Screening Panel Room 5
Superior Court Room 6
Ombudsman Room 7".

Despite contemplating litigation as only one of several available options, with the possibility that disputes might be resolved without going near a courtroom, Professor Sander's concept of a Dispute Resolution Center was later dubbed by the American Bar Association a 'Multi-Door Courthouse', with the consequence that courts have come to see themselves as being in charge of the triage and referral processes.

One example of this in Australia can be found in the Land and Environment Court of New South Wales, as explained by the Hon. Justice Brian J Preston, Chief Judge of that Court, in his address to the LEADR NSW Chapter Annual Dinner in 2007, The Land and Environment Court of New South Wales – Moving Towards a Multi-Door Courthouse.

Those contemplating implementing compulsory DR in response to the question posed in the CDC Report: "In what circumstances, in what kind of case and at what stage should DR be imposed?" could benefit from the several reports on the Global Pound Conference Series "Shaping the Future of Dispute Resolution & Improving Access to Justice", held in 29 venues around the world between March 2016 and July 2017. As noted on the IMI website :

"Intending to encompass all forms of dispute resolution, including litigation, arbitration,

conciliation, and mediation, the Series considered how disputants in civil and commercial conflicts have access to appropriate dispute resolution processes that respond to users' needs. The GPC analyzed whether current dispute resolution is proportionate in terms of costs, time, possible outcomes and their enforceability, as well as whether it impacts reputations, relationships, and other social or cultural issues. Overall, the GPC produced data on what corporate and individual dispute resolution users actually need and want, both locally and globally."

The North America GPC Reports are available here . For a participant's view on the importance of the GPC, see Dr. Rosemary Howell's blog on The Australian Dispute Resolution Research Network: The Global Pound Conference London – the end of the beginning.

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