ADR – BOOM OR BUST?

Given the changes in civil litigation brought about by the Civil Procedure Rules 1998, does ADR have a future in the UK? Assuming that litigation is now quicker and cheaper, with judicial case management eliminating spurious claims and other tactics designed to wear down opponents, court services appear to be a more attractive proposition than ADR, particularly since the courts are in a position to recommend mediation in appropriate circumstances.

As ADR practitioners, NADR members have a vested interest in this issue. Let us not lose sight of the fact that ADR practice, whilst a vocation for some, is above all about occupying an office which carries with it great responsibilities. We are ethically bound to recognise that the interests of the community are paramount. We exist to provide the best possible dispute settlement services to the community. If the courts now provide the best possible service where does that leave the ADR industry?

More now than ever, it is essential for ADR to provide added value, that something distinctive and valuable that the courts cannot provide. The private nature of ADR and benefits of peer assessment, whilst important factors may not in themselves be enough to persuade parties to hold faith with ADR. User friendliness, informality, cost effectiveness and speed, whilst much trumpeted benefits of ADR, are often more wishful thinking than reality. If the ADR industry is to survive this can no longer be the case.

First the introduction of the Model Law internationally, followed by the Arbitration Act 1996 reforms in the UK has provided a solid base for the arbitration industry to build upon. The arbitrator is now afforded considerable scope to regulate the process and is indeed under a duty to adopt cost effective procedures.

There is an urgent need for all arbitrators and ADR service providers to fully embrace these opportunities to meet the challenge from the newly reformed litigation process. The courts provide a Rolls-Royce civil justice process, which falls down in two respects. The sheer cost of litigation means that justice is not available to all. Legal Aid provision is severely restricted and contingency fee representation is highly selective, leaving large numbers of potential claimants and indeed defendants on the outside. Justice delayed is often tantamount to justice denied. Whilst the CPR 1998 has speeded up the litigation process it remains a relatively slow process. There is therefore a need to develop timely, low cost and fixed price arbitration services to meet the needs of these excluded categories. Construction adjudication has shown us the way towards achieving both of these objectives, but much more needs to be done to extend the benefits to all categories of dispute.

First there is a need to develop improved ADR service provision but secondly, there is a need to educate both users and their representatives about the existence of these new alternatives to litigation. In the absence of a major organisation dedicated to this task, it falls to us as practitioners, not just to promote ourselves but also the new ADR products at every opportunity. Only by so doing can we meet and prevail over the challenge from a reformed and more vital litigation process.

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