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DR knowledge: getting beyond belief

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This paper was prepared and settled jointly by the members of ADRAC.

Despite their widely and strongly held adherence, the reputations of some Dispute Resolution ('DR') processes have not yet been fully substantiated through rigorous studies, and it could be said that those reputations are based more on beliefs than on knowledge or evidence. For example, arbitration is often said to be cheaper, quicker and less formal than litigation; however, it is also said that some arbitrations are quite expensive, take a long time to complete, and require strict adherence to procedure and to formal rules of evidence. A further example concerns mediation.

Mediation

Mediation is widely reported to be an efficient alternative to litigation and enjoys a reputation for high levels of participant satisfaction; however, empirical studies also report that not all mediations enjoy high levels of either resolution or of participant satisfaction.

Some reports about mediation suggest it has high levels of participant self-determination; other reports suggest that it does not; reports suggest that the levels of participant satisfaction are context-dependent. Some reports about mediation suggest that it is a low-cost alternative to litigation; other reports suggest that, while it may be an alternative to litigation, it is not low-cost. Many reports suggest that most mediations achieve resolution – or an agreement – for the participants; other reports suggest that little is known about the durability of such agreements. There are also conflicting reports about whether some professions make better mediators than others.

Why do the beliefs continue to exist?

Arbitration

Commercial arbitration developed as a quick ‘look and sniff’ process: when traders disputed the quality of raw goods (such as wool or spices), an arbitrator physically examined the goods in question, on-site at the dock or in the warehouse to check their quality, that arbitrator then provided a quick decision for the commercial disputants. In this form, arbitration first gained its reputation for being a cheap, quick and informal DR process for trade and commerce disputes. However, as trade and commerce became more complex, so did the arbitration process, and so did its relationship with the court systems in the various countries in which it is practised. When it is still asserted that arbitration is a cheap, quick, and informal process, it could be added that this is based on belief about arbitration rather than on knowledge about its operation. Domestic commercial arbitration in Australia is now governed by uniform legislation, as well as various practice rules; international commercial arbitration is overseen by the United Nations Commission on International Trade Law (UNCITRAL) and its Arbitration Rules (as revised in 2010).

Sometimes, arbitration is described as a form of private litigation, or private judging. Unlike with the allocation of judges, the parties to an arbitration have the right and authority to select the arbitrator for their dispute, and the arbitration process is generally expected to be conducted according to the above-mentioned statutes and rules; both these factors differentiate arbitration from the court processes.

Mediation

Many of the beliefs about mediation are said to have their basis in the ideologies from which the process arose during the 1960s and 1970s. During that period of social upheaval in countries like Australia, the USA, and parts of Europe, people sought a DR process that would achieve lasting resolution based on the disputants working together to design their own terms of resolution within the context of their own community. Such ideologies fostered *beliefs* about mediation that continue to dominate its reputation today.

When mediation became an integral part of the legal system, that system's need for efficiency fostered *beliefs* about mediation being an efficient DR process.

It is often said, in pejorative tones, that mediation is a 'soft' process, but many experienced mediators and mediation participants know that the effort of creating a mutually beneficial agreement can be much more strenuous than an adversarial, or fighting, display. Similarly, mediation is said to be about the art of compromise; but it has been noted that, when people resort to compromise, no-one gets what they want; it has even been said that resort to compromise is a denial of justice.[1]

Mediation is designed to provide every opportunity for participants to create durable terms of agreement that meet as many as possible of everyone's needs. Although mediation may help participants cease their hostilities – a 'cease-fire', if you will – at its best the mediation process affords participants the opportunity to design a full 'peace treaty' that helps to pre-empt and prevent future hostilities between them.

Which DR process is best?

Another widespread belief is that one or more DR processes is better than any other. ADRAC considers that no one DR process is necessarily or intrinsically better than any other, and it may be quite misleading to suggest otherwise. In some circumstances, arbitration may be more suitable; in another circumstance, conciliation may be more suitable; in another circumstance, mediation may be more suitable; in yet another circumstance, a hybrid process, such as med/arb, may be the most suitable. In some circumstances an unformulated hybrid process may be the most suitable. Ultimately, the participants – and their advisers - should make the decision about which DR process (or combination of processes) to use, and that decision should be based on having considered reliable information about the various DR processes available to them. Participants should not be pushed into the DR process that happens to be preferred by a DR practitioner. And within each broad DR process, it will often (if not usually) be desirable to adapt or modify the process to take account of circumstances surrounding the particular dispute and disputants. Initial intake sessions may be a very useful tool for fine-tuning the ADR process.

What needs to happen?

Most of the beliefs about DR processes are longstanding, which gives them strength and credibility; but they continue to be perpetuated by research gaps. Many beliefs could be readily clarified through well-designed research studies. A couple of examples are provided:

a. Arbitrators in Australia already have access to so-called 'fast-track' arbitration processes that give parties the option for less formal, more efficient forms of arbitration. It would be beneficial for arbitration generally were researchers to examine the rate of usage of fast-track arbitration, the levels of participant and arbitrator satisfaction with it as a DR process, and the business (and other) sectors in which it is most predominantly used.

b. For mediation, there are many research gaps that, if filled, would help to clarify the beliefs described above. For example, rigorously designed empirical studies could compare mediation across different sectors (e.g. legal and family, or court-connected and community, or workplace and interpersonal, or broader combinations) or compare the effectiveness of different models, or styles, of practice; or comparative investigations of participant satisfaction; or investigate the impact of mediator skills; or the comparative nature and effectiveness of mediated outcomes; or the durability of mediated outcomes; or the existence of links between mediator professions and mediator effectiveness.

c. There is not a lot of data about the uptake of DR processes or which processes are preferred within different *private* sectors. It would be beneficial if rigorously designed research were to examine the rates of usage of the various DR processes across different sectors and industries. Thus, does the commercial or business sector predominantly use arbitration or mediation or another DR process?

1. Professor Dame H. Genn, *Why the Privatisation of Civil Justice is a Rule of Law Issue* (36th F. A. Mann Lecture, Lincoln's Inn, November 2012), citing: A. J. Draper, 'Corruptions in the Administration of Justice: Bentham's Critique of Civil Procedure 1806 – 1811' (2004) 7 *Journal of Bentham Studies*.