ADR LECTURE - IRN 42 - 14/11/2012

ADR catching on in the US, are there lessons for Ireland?

BRIAN SHEEHAN

Alternative dispute resolution systems are something we are starting to hear more about in Ireland. But they are commonly used by U.S. employers who wish to avoid costly litigation or trade union recognition, a visiting US expert told a special lecture at UCD's Business School last week.

Professor Alex Colvin from the Industrial and Labour Relations School at Cornell University in New York, who addressed the theme, 'Developments in Alternative Dispute Resolution in Employment in the United States', explained that many US firms no longer worry about the presence of trade unions, but they do wish to avoid costly and lengthy litigation.

...The desire for protection from litigation drove the "turn towards ADR"...

One way of doing so is to require their employees to sign employment contracts that stipulate they will abide by 'peer review' in-house arbitration, instead of opting for the law courts. The US Supreme Court has ruled that firms can engage in this practice, even if the internal arbitration system they create is largely controlled by the employer.

Prof Colvin said the distinction between unionised and non-union firms remains as sharp as ever in the United States, as does the determination of US employers to resist unionisation.

But alternative dispute resolution (ADR) can work in both areas - and in the public and private sectors. And while US-based ADR innovations are a response to "unique US problems" such as its litigation system, Colvin concluded that some elements could be adapted to other settings.

UNIONS - RELATIVE DECLINE

At the outset, Prof Colvin explained that labour arbitration was a central component of workforce dispute resolution in unionised companies since the 1940s. During World War Two, the special War Labor Board pressurised managements and unions to resolve their grievances peacefully. In doing so, they set the scene for the development of post-war arbitration.

However, union density declined from around 35% across the U.S. economy in the 1950s, to 12.9% today. It is just about 7% in the private sector.

Professor Colvin explained that this still represents around 15 million workers, including those employees and firms who benefitted from the recent auto bailout, which played a major role in two states during the recent Presidential election in favour of the incumbent, Barack Obama.

It was the expansion of substantive legal protections in the 1960s – such as the Civil Rights Act – that boosted the potential for employees to secure large gains in cases that went the full legal distance. Cases might take two and half years to come to trial (a full jury trial) but awards were substantial if a case was won: €176,000 was the median but this rose to a median of €394,000 in the Federal Courts. During the 1990s the rate of increase in cases stood at 270%.

It was dissatisfaction with this litigation system "within the legal profession" and the desire of companies "for protection from litigation and unionization" that drove the "turn towards ADR", Prof Colvin explained. Efforts to enhance such conflict resolution could also, though certainly not always, be used as part of "high commitment" HR strategies. There was to be no one type of ADR: the varieties could range from simply 'open door' to elaborate multi-element systems.

In unionised employments, such as the "high conflict unionized" West Virginia coalmines, grievance mediation was used successfully. The conflict in that industry was not just between employer and unions, but also within unions, Prof Colvin explained. (In one case a worker representative was, allegedly, murdered.) The arbitration system was paid for on a 'fifty/fifty' basis.

'PEER REVIEW'

Peer review was developed in non-union forms to substitute for grievance procedures. Typically, a panel of 3 peers and 2 managers would be selected, sitting as a "workplace jury" to decide grievances. (Five workers would be picked out of a hat, and the 'accused' could reject two of these – to allow for personal issues, dislikes and so forth). Prof Colvin explained that often the worker members of the peer review group can be tougher on the worker who is being assessed than the managers are, because they know him/her better.

Employment arbitration, he explained, had been rare in non-union workplaces until a key Supreme Court case (Gilmer, 1991) allowed for arbitration in relation to statutory claims. This system now covers more than a quarter of all non-union employees. It is a sort of "private ADR system" and substitutes for and bars access to the courts.

"DECK CAN BE STACKED"

The gains for employers are self evident: they can design the procedure while damages and win rates are lower than in litigation. Prof Colvin acknowledged that the "deck can be stacked" against the employee. On average the number of claims is down and the amount of damages payable, are one half to a third the amount of damages that might have been secured through the law courts.

For lawyers, there is an incentive in such a system to ensure self-financing. For example, if a lawyer takes 10 cases, he or she will need to win four of the ten to ensure the legal practice secures a return.

For top level people in the US, however, the system works more in their favour. First of all, they may even have been involved in the design of the internal ADR system. Typically they have the finance to retain some legal bargaining power, and often have privacy rules built into their contracts of employment. This group of employees tends to win 60% to 70% of the time, Prof Colvin said.

HORSES FOR COURSES

Taking a case study, Colvin explained how the ADR system can work well, albeit in quite different ways for different groups or categories of employee. The example he used was TRW, which is not a firm we hear much about in this part of the world, but in the US is a relatively big player, making a diverse range of products from air bags for the automotive industry and lasers for the US defence industry.

At the end of the Cold War, TRW's Southern California-based plant suffered from diminished defence spending, leading to downsizing and lay-offs. This coincided with a time (early 1990s) when age discrimination was kicking-off as a major employment rights issue. Managers at TRW would see giant billboards on the freeway driving to work that were advertising solicitors willing to take age discrimination cases on behalf of those being laid off. They felt they had to act.

Their reaction was to introduce arbitration agreements, making all new employees sign up to them as a condition of employment. But as Prof Colvin explained, TRW had retained a strong tradition of "welfare capitalism", which was part of its culture - and it wanted to maintain this traditional approach to relationships with staff. If anyone wanted to go outside for arbitration they could do so, after first goring trough the internal system. But what they found was that arbitration was rarely used at all; what people liked was internal peer review or internal mediation.

Blue collar workers at TRW went generally for peer review, because they were used to a culture of operating in work teams. But white collar – more science based – workers opted for mediation, and didn't like peer review. So two quite different groups within the same major multinational opted for quite different types of ADR under the one "roof".

ADAPTABLE?

Another recent development has been the use of informal pre-mediation talks, using an expert to help assess the claim, situation or whatever, before the commencement of any form mediation or arbitration. This is an area, he suggests, which has a lot of potential.

Prof Colvin concluded that the union versus non-union nature of US employment relations is quite distinct as is its unique legislative system, but he believes that elements of the ADR system can be adapted to suit other systems. To do so, he suggests, it is best to integrate an ADR system into the company's HR strategy.