

## Med-Arb: getting the best of both worlds

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As in other parts of the world, in Australia the litigation climate is changing. "Just, cheap and quick" is the objective.<sup>2</sup> Courts are streamlining their processes. Unless arbitrators willingly facilitate settlement, arbitration will become less attractive than litigation. One option is to entertain the use of a hybrid process in appropriate cases. The Victorian Law Reform Commission reported in 2008:

*"The Commission believes "hybrid" dispute resolution processes should be included in the list of ADR options available to the parties. The US experience suggests that hybrid processes can be very effective in the right circumstances and offer parties another alternative to conventional dispute-resolution approaches".*<sup>3</sup>

The practice of combining mediation and arbitration by the same neutral has been traced back to ancient Greece and Ptolemaic Egypt.<sup>4</sup>

Unlike mediation alone and arbitration alone, Med-Arb has the advantage of offering both the possibility of resolution by the parties' own agreement and, failing such agreement, the certainty of resolution by the binding decision of the arbitrator. Where the neutral has the skills necessary to conduct both processes, there is a saving in both time and money in combining them, since the neutral is already to some extent "up to speed" when changing from one role to another and may gain insights during the mediation that could contribute to a more appropriate arbitral award.

If agreement is reached in mediation, the parties sign a binding settlement agreement or the neutral may, by consent, as arbitrator, convert their intended settlement into an arbitral award. It is important, especially in international commercial disputes, that the process should formally begin as an arbitration. Otherwise, if the dispute is settled at mediation, there will be no "dispute" on foot entitling the parties to an enforceable consent award.<sup>5</sup> If the mediation does not produce agreement on all issues, the mediator becomes arbitrator and hears and determines the remainder. The award may be non-binding or binding depending upon the agreement entered into by the disputants.

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<sup>2</sup> Civil Procedure Act 2005 (NSW) – s. 56

<sup>3</sup> VLRC Civil Justice Review Report (2008) at p.235.

<sup>4</sup> Roebuck, D *The Myth of Modern Mediation* (2007) 73 Arbitration 1, 105 at 106.

<sup>5</sup> See Newmark, C and Richard, H *Can A Mediated Settlement Become An Enforceable Arbitration Award?* (2000) 16 Arbitration International 8.

Variants include Non-Binding Med-Arb (rarely used because there is no certainty of resolving the dispute); Med-Arb Show Cause, in which a tentative award is made to give the parties an opportunity to show cause as to why the dispute should not be so resolved; and MEDALOA (Mediation and Last-Offer [aka Baseball] Arbitration) in which the arbitrator does not reach an independent decision on the merits but instead must choose between the parties' final offers.

Apart from relative speed and economy, Med-Arb ensures certainty that, either by agreement or by award, the dispute will be resolved. The parties are at liberty to put a time limit on that in their Med-Arb agreement. If they use only mediation, they run the risk of not settling all the issues in dispute. If they use only arbitration, they know that all the issues will be resolved but they deprive themselves of the creative options their own negotiated solution might provide.

The potential to save time and money for disputants needs to be weighed against several concerns about Med-Arb, mainly in common law countries, to the effect that linking mediation and arbitration in the same third party neutral threatens to distort both aspects of the process, inhibiting disputants' bargaining creativity and forthrightness, tainting the Med-Arb practitioner's interventions, and threatening the validity and enforceability of the arbitral award.

Arbitral awards may be set aside by the courts and an arbitrator may be removed for misconduct (which includes *inter alia* partiality, bias and a breach of the rules of natural justice *aka* procedural fairness).<sup>6</sup> In international commercial arbitration, awards may be set aside by the courts in the country in which the arbitration takes place and enforcement may be refused wherever the award was made if, among other things, the arbitral procedure was not in accord with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place;<sup>7</sup> or if the recognition or enforcement of the award would be contrary to the public policy of that country.<sup>8</sup>

One concern about Med-Arb is that disputants may be inhibited in their discussions with the mediator if they know the mediator might act as arbitrator in the same dispute. They may be unwilling to reveal their underlying needs and interests and this could hamper the mediator's ability to find common ground. They may be unwilling to reveal their "bottom line" if they think that might appear in any subsequent award.<sup>9</sup>

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<sup>6</sup> For discussion of the term 'misconduct' see e.g. *London Export Corp. Limited v. Jubilee Coffee Roasting Co. Limited* [1958] 1 WLR 27 and *Sea Containers Ltd. v. ICI Pty. Ltd.* [2002] NSWCA 84.

<sup>7</sup> UNCITRAL Model Law, Articles 34(2)(a)(iii) and 36(a)(iv) and New York Convention, Article V(1)(d).

<sup>8</sup> New York Convention, Article V(2)(b).

<sup>9</sup> Redfern & Hunter *Law and Practice of International Commercial Arbitration* 4<sup>th</sup> Ed.1-82.

However, even in straightforward mediation, disputants are only as forthcoming with the mediator as they think appropriate. Where the nature of the dispute is susceptible to a “win-win” solution, there may be no need to discuss, in the mediation phase, who is right and who is wrong nor what the “bottom line” is.

Another concern is that it is easier to let a third party sort things out rather than engage in the hard work of dialogue, disclosure and compromise. Accordingly, presenting disputants with arbitration as an end-point might lead them to treat the mediation phase as a mere prelude to arbitration, thereby rendering more likely the failure of the mediation and an arbitrated result all the more inevitable. Research into Med-Arb may be needed to see whether fewer settlements occur in the mediation phase.

Also of concern is that, in the context of Med-Arb, suggestions by the mediator may be taken as an implied threat to make an adverse decision as arbitrator if the party is perceived as unreasonable during the mediation. The mediator should therefore be careful to avoid making suggestions and appearing to exert pressure on a party to proffer or accept a particular settlement. Adopting a facilitative – as opposed to evaluative – stance in mediation should alleviate this concern.

Other concerns focus on the requirements of procedural fairness in proceedings which culminate in binding decisions imposed by judges and arbitrators. Unlike mediation, where disputants retain decisional autonomy, disputants accord to judges and arbitrators the power to determine the outcome of their disputes, while retaining certain procedural rights, including the right to be heard, to know the case they have to meet and to be judged by an unbiased, impartial decision-maker.

Allowing an arbitrator to receive private representations during the mediation phase creates an appearance of bias and may actually bias the arbitrator when determining the dispute.<sup>10</sup> However, in Australia an objection on that ground may be waived. In the South Australian *Duke Group* case,<sup>11</sup> in which a judge disqualified himself from hearing a case, where he had mediated between officers of the parties some years before being appointed to the bench, the following relevant principles were enunciated:

*“It would be inconsistent with basic notions of fairness that a judge should take into account, or even receive, secret or private representations on behalf of a party or from a stranger with reference to a case which he has to decide”.*<sup>12</sup>

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<sup>10</sup> *The Duke Group Ltd (In Liq.) v. Alamain Investments Ltd & Ors*, [2003] SASC 272.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 350 per Mason J.

"...save in the most exceptional cases, there should be no communication or association between a judge and one of the parties (or the legal advisers or witnesses of such a party) otherwise than in the presence of or with the previous knowledge **or consent** of the other party"<sup>13</sup> [Emphasis added].

Procedural fairness also requires that arguments be made in the presence of the opposing party and be subject to rebuttal. In Med-Arb, this creates a conflict between the confidentiality of private disclosures in the mediation and the openness of the arbitration.

Many courts and legislatures recognize that parties may validly consent to these encroachments on the right to procedural fairness and thereby waive their procedural rights. Given the importance of ensuring, for the purposes of Article V(2)(b) of the New York Convention, that an international arbitral award made at the end of the Med-Arb process will be valid and enforceable in the country or countries concerned, an important contribution to the learning in this field would be research identifying those New York Convention countries in which waiver of the right to procedural fairness is or is likely to be regarded as contrary to public policy. In Australia, waiver is acceptable.

Australian domestic uniform commercial arbitration legislation has long enabled arbitrators, with the parties' consent, to mediate and, likewise with consent, to hold private sessions, on the basis that no objection may be made if this course is followed.<sup>14</sup> There was little or no use of this provision since it was enacted in New South Wales in 1984 and adopted elsewhere shortly afterwards, most likely because the section did not make it clear whether the parties could opt out after the mediation phase, should the dispute be unresolved. However, in May, 2010 the Attorneys-General of the States and Territories agreed to modernize this legislation by adopting the approach to arbitration of the UNCITRAL Model Law, thus aligning Australia's administration of domestic and international arbitration. Instead of abandoning the provision empowering the arbitrator to mediate (since there is no such provision in the UNCITRAL Model Law) the legislators have taken advantage of the opportunity to improve it so as to make Med-Arb more attractive and so as to address the procedural fairness issues.

The first jurisdiction to introduce amending legislation was New South Wales. Section 27D of the *Commercial Arbitration Act 2010 (NSW)*<sup>15</sup> , a

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<sup>13</sup> Per McInerney J in *R. v. Magistrates' Court at Lilydale; Ex parte Ciccone*[1973] VR 122 at 127, cited with approval by Gibbs CJ and Mason J in *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 346 and 350.

<sup>14</sup> See section 27 of the *Commercial Arbitration Act (NSW) 1984* and its state and territory counterparts.

<sup>15</sup> Act No. 61 of 2010, which came into force on October 1, 2010.

copy of which is attached to this paper, modifies the previous Med-Arb provision by requiring not merely that the parties consent at the outset (in the arbitration agreement or otherwise) to the arbitrator mediating, but that the parties expressly consent in writing, after the mediation has terminated, to the arbitrator proceeding to arbitrate. This accords with the approach adopted in Article 12 of the UNCITRAL Model Law on International Commercial Conciliation (2002), as explained in the accompanying Guide.<sup>16</sup>

The 2010 NSW Act further requires the arbitrator, before taking any further steps in the proceedings, to disclose to the parties any confidential information learned during the mediation which the arbitrator considers material to the arbitration.<sup>17</sup> This echoes comparable legislation in Hong Kong<sup>18</sup> and Singapore.<sup>19</sup>

It may be expected that these amendments will encourage greater resort to the Med-Arb process in Australia, because the disputants will have the opportunity to opt out after the mediation phase if they feel uncomfortable about continuing with the same person as arbitrator, in which case the 2010 Act requires another person to be appointed to arbitrate.<sup>20</sup>

Further, knowing that the arbitrator is required to disclose to the other party or parties to the arbitration any confidential information obtained during the mediation that is material to the arbitration, parties can be expected both to be circumspect in their disclosures during the mediation phase and to enquire, before deciding whether to consent to the mediator arbitrating, what disclosures to the other parties are contemplated. Again, the opportunity to opt out, having obtained the answer, will provide assurance that they may confidently embark on the first stage of the process and that, if they do consent to the second stage, they will know what disclosure of their own information the arbitrator will make.

It follows that, in practice

- the issues to be addressed in any arbitration will need to be clarified before the commencement of the mediation phase; and
- the prudent mediator will respond in writing when asked what potential disclosures to the other parties are contemplated.

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<sup>16</sup> See: [http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf) at paragraphs 78 – 81.

<sup>17</sup> *Commercial Arbitration Act 2010* (NSW) s.27D(7).

<sup>18</sup> See sections 2A-2C of the *Arbitration Ordinance* (Cap 341) (Hong Kong).

<sup>19</sup> See section 17 of the *International Arbitration Act* (Cap134A) (Singapore), which followed the Hong Kong Arbitration Ordinance in this regard.

<sup>20</sup> *Commercial Arbitration Act 2010* (NSW) s.27D(6).

Picking the right dispute for this process will be important, as it is with all ADR processes. It is a question of "Fitting the Forum to the Fuss", to quote the architect of the modern ADR movement, Harvard Professor Frank E.A. Sander.<sup>21</sup>

The kind of dispute most suitable for Med-Arb is one in which there appear to be "win-win" possibilities that may be explored in mediation without having much debate about who is right and who is wrong. One example in my experience (which settled at mediation) was a trademark infringement proceeding in which the defence was that the proceeding itself amounted to an abuse of market power, in breach of Australia's *Trade Practices Act, 1974*. The mediation was spent discussing ways in which the parties might be able to do business with each other to their mutual benefit, with no discussion about the legal issues, except to agree at the outset that they were very interesting.

It remains to be seen what use is made of Med-Arb in Australia in the coming years and the extent to which mediators learn to arbitrate, arbitrators learn to mediate, lawyers learn to recommend the most suitable ADR process for their clients' disputes, and clients learn to choose lawyers with the requisite skills:

"The challenge for the legal profession... is not simply a matter of adopting less adversarial practices and attitudes, but also being skilled in being able to move elegantly between adversarial and consensual or collaborative approaches."<sup>22</sup>

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<sup>21</sup> Frank E.A. Sander and Stephen B. Goldberg, *Fitting the Forum to the Fuss; A User-Friendly Guide to Selecting an ADR Procedure*, Harvard Negotiation Journal, January, 1994.

<sup>22</sup> NADRAC submission 03/9165 to the Attorney-General commenting on the Federal Civil Justice System Strategy Paper.

## COMMERCIAL ARBITRATION ACT 2010 - SECT 27D

### **27D Power of arbitrator to act as mediator, conciliator or other non-arbitral intermediary**

- (1) An arbitrator may act as a mediator in proceedings relating to a dispute between the parties to an arbitration agreement ("mediation proceedings") if:
  - (a) the arbitration agreement provides for the arbitrator to act as mediator in mediation proceedings (whether before or after proceeding to arbitration, and whether or not continuing with the arbitration), or
  - (b) each party has consented in writing to the arbitrator so acting.
  
- (2) An arbitrator acting as a mediator:
  - (a) may communicate with the parties collectively or separately, and
  - (b) must treat information obtained by the arbitrator from a party with whom he or she communicates separately as confidential, unless that party otherwise agrees or unless the provisions of the arbitration agreement relating to mediation proceedings otherwise provide.
  
- (3) Mediation proceedings in relation to a dispute terminate if:
  - (a) the parties to the dispute agree to terminate the proceedings, or
  - (b) any party to the dispute withdraws consent to the arbitrator acting as mediator in the proceedings, or
  - (c) the arbitrator terminates the proceedings.
  
- (4) An arbitrator who has acted as mediator in mediation proceedings that are terminated may not conduct subsequent arbitration proceedings in relation to the dispute without the written consent of all the parties to the arbitration given on or after the termination of the mediation proceedings.
  
- (5) If the parties consent under subsection (4), no objection may be taken to the conduct of subsequent arbitration proceedings by the arbitrator solely on the ground that he or she has acted previously as a mediator in accordance with this section.
  
- (6) If the parties do not consent under subsection (4), the arbitrator's mandate is taken to have been terminated under section 14 and a substitute arbitrator is to be appointed in accordance with section 15.
  
- (7) If confidential information is obtained from a party during mediation proceedings as referred to in subsection (2) (b) and the mediation proceedings terminate, the arbitrator must, before conducting subsequent arbitration proceedings in relation to the dispute, disclose to all other parties to the arbitration proceedings so much of the information as the arbitrator considers material to the arbitration proceedings.
  
- (8) In this section, a reference to a "mediator" includes a reference to a conciliator or other non-arbitral intermediary between parties.

**Note:** There is no equivalent of this section in the Model Law.