MEDIATION AND ARBITRATION - ARE THEY FRIENDS OR FOES?

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FOR BANI / RODYK & DAVIDSON CONFERENCE

SHANGRI-LA HOTEL JAKARTA 1 NOVEMBER 2012

1. Arbitration, both international and domestic, is well understood and widely practised in many jurisdictions in Southeast Asia including Indonesia and Singapore. Mediation, with all its benefits and flexibility, is not nearly so well known or practised. It is also significantly less understood. An increasing recognition of the importance of mediation is readily apparent from the fact that bodies formerly focused almost entirely on arbitration such as CIArb, ICC, CIETAC and ACICA now actively promote mediation and prescribe rules for the conduct of mediations under their auspices.

2. It is surprising that while concepts of discussion, consensus and compromise which are essential features of many Asian cultures (e.g. the concept of *musyawarah* in Indonesian society), the climate in which litigation is conducted in much of Asia does not embrace the same philosophy. The growth of arbitration has occurred partly because of perceived inadequacies with local court systems and partly because (in the case of international arbitration) domestic court systems (however effective they may be in dealing with domestic and limited international issues) simply do not provide the flexibility and advantages to the parties provided by structured international arbitration. This paper will focus very much on the resolution of international disputes by way of international arbitration and/or mediation.

3. The notion that mediation and arbitration are alternative processes or are somehow competitors in the legal landscape demonstrates a misunderstanding about the nature of and effectiveness of mediation. There is of course no “one size fits all" solution. As this paper will endeavour to demonstrate, while the processes are fundamentally different they can and do complement each other. Indeed, practitioners in one field will be very much more effective in that field if they have an understanding of the other.

4. The best way to resolve any dispute will depend upon the nature of the dispute, the protagonists involved, logistical issues such as time factors and many other considerations. There are two themes which will be at the centre of the issues raised in this paper:-

   (a) From a procedural perspective, arbitration and mediation, while fundamentally different and each having their own distinctive place, uses and functions, should be regarded as a complimentary processes which can be used separately or together to achieve the best possible outcome for the parties. Practical experience has shown that arbitration and mediation can be used as alternative, sequential (in whichever order is more appropriate), or as conjunctive or combined processes.

(b) The notion that mediation is somehow "soft" and should be discouraged is incorrect and not in the best interest of resolving disputes. Most parties agree to mediate because they want a dispute to end. The nature of some mediations and the intensity of negotiations involved is anything but soft and easy. It is not uncommon for lawyers, their clients or the mediator involved in an extremely lengthy and difficult mediation to make the comment that it would have been easier to simply run the court case or arbitration as the case may be. The compromises which are often reached are anything but soft compromises.

5. From a cultural perspective, the historical attitude in Australia has been to assert one's legal rights with little regard for face and Confucian like philosophical issues prevalent in Indonesia and other Asian cultures. In such societies, there is very much greater emphasis placed on the maintenance of social harmony. This would tend to suggest that mediation should be far more successful in Asia than in Australia. Somewhat counter culturally, mediation rather than arbitration or litigation is now the most popular means of resolving disputes in Australia.

6. In terms of the subject of this paper, it is instructive to examine why this has occurred. In jurisdictions in which mediation is frequently utilised across a wide range of disputes, the starting point of the process is that in such jurisdictions there has been a radical change in culture. Clients demanded that their lawyers must be able to resolve cases with a minimal amount of cost, delay and conflict. Such an approach was initiated by the Australian courts, but it has been driven by the clients. Most large corporations, institutions and insurers now demand that their lawyers be active and competent at the mediation process. The sophistication and awareness of clients, particularly governments and institutional organisations such as banks and insurers, is such that any lawyers who actively advocate protracted arbitration or litigation as an alternative to mediation will run a great risk of forever losing the client. Insurers will actively pressure their lawyers into achieving early settlement and will scrutinise their lawyers' track record on the specific issue of the percentage of cases in which they achieve early settlement. In general it is the clients and not the lawyers who in the first instance have ensured that the culture of ADR and mediation in particular has swamped the previously existing strong adversarial legal culture of Australia. There is now in Australia no perception that a suggestion of some form of ADR indicates a sign of weakness or vulnerability. Even the most entrenched attitudes can be changed - it just takes time.

7. Before looking at issues of compatibility, it is instructive to remind oneself of the fundamental nature of each procedure. One definition of arbitration is as follows: –

> *Arbitration is a process where the parties agree to submit their dispute for determination by an arbitrator. Arbitration provides for the resolution of disputes in a legally binding way by an independent tribunal (composed of one or more people) and is usually formal and adversarial. The decision of the tribunal is final and binding, subject to rights of appeal to the courts, although such rights are limited.*

The parties to an arbitration may in large degree themselves determine the procedure to be followed and the powers the arbitrator is to have, as well is the constitution of the arbitral tribunal.[1]"

8. Arbitration is a quasi-judicial process having much more in common with conventional litigation than other forms of ADR. Arbitrations are conducted in an adversarial setting with a one or more arbitrators determining questions of fact and/or law and imposing on the parties a result which they may or may not like. Many of the procedural aspects of arbitration are taken straight from litigation. The procedures utilised in most arbitrations usually involve pleadings defining issues (or their equivalent), evidence given orally and/or by witness statements, expert reports and various interlocutory procedures. Depending upon the agreement of the parties, usually any unsuccessful party will pay the costs as it would do in litigation in many common law jurisdictions.

9. Mediation is a fundamentally different process both philosophically and procedurally. There is no single all encompassing definition of mediation. The Singapore Mediation Centre defines mediation on its website as follows:-

"Mediation is a voluntary means of dispute resolution in which the parties to a dispute engage the assistance of an impartial third party (called the Mediator) to facilitate negotiations between them with a view to resolving their dispute privately and in an amicable manner.

The focus is not on who is right or wrong, nor on who has a stronger or weaker case in court. Rather it is on how the parties can move forward and put the dispute behind them. The Mediator helps the parties to adopt a problem-solving approach, move away from their respective positions and focus on their interests, needs and concerns."

10. It is unhelpful to get tied up in the semantics of one definition or another of mediation or become too wedded to the various textbook models of mediation. While mediation is a structured process, one of its many benefits is its almost infinite flexibility. It is best to regard it as a process of dispute resolution where the parties themselves, with skilled impartial outside assistance, look at addressing the issues in dispute and endeavour to resolve those disputes themselves.

11. Unlike an arbitrator, a mediator does not make any decisions – final, intermediate or otherwise. A fundamental feature of mediation is that the parties arrive at their own decision rather than have a decision imposed on them. The mediator's function is to assist the parties to make their own decisions. While there may be differences in style and technique of particular mediators i.e. whether they are evaluative or facilitative, the fundamental characteristic of mediation never changes in this significant respect. In this regard mediation is very different from and is not to be confused with other ADR procedures such as ombudsman-type procedures, early neutral or independent evaluation, and arbitration. In each of these processes, unlike mediation, there is an independent decision maker.

12. Not all disputes will be resolved by mediation, but any dispute can be resolved by mediation. Mediation can be highly effective in any dispute from the seemingly trivial

[1] ILSAC Guide at paragraph 1.1.5

to a civil war. As the mediation between the Indonesian Government and the Free Aceh Movement (GAM) demonstrated, even the most bitter, tragic and long standing disputes can be resolved by mediation.

13. It is instructive to do a comparative analysis of the advantages and disadvantages of arbitration and mediation vis a vis each other.

Mediation and Arbitration – Are they Voluntary Processes?

14. Most arbitrations take place pursuant to an agreement to that effect which binds the parties. There are some ad hoc arbitrations. Arbitration is involuntary in the sense that once the dispute resolution mechanisms which have been determined by the parties by contract are triggered, the process from that point on becomes compulsory. Thereafter the determination of all issues, procedural or otherwise, is in the hands of the arbitrator. Parties and their representatives usually attend the arbitration. Parties and their lawyers would usually fully participate in the arbitration by complying with all interlocutory steps and procedures, calling or tendering evidence, making submissions and awaiting the decision of the tribunal. It is generally unwise for any party to refuse to participate in an arbitration whether that refusal comes about as a result of refusing to participate at all, simply not attending the proceedings or by absenting oneself from the arbitration during the conduct of the proceedings. The result may be an adverse award with dire financial and other consequences.

15. Mediation on the other hand is usually a voluntary process. While it is true that there are many instances of compulsory mediation in different jurisdictions, most commercial mediations these days are conducted on a voluntary basis. Even in jurisdictions where courts can order mediation over the objections of the parties[2], no result can be imposed on them without their mutual consent. In this fundamental respect, mediation differs from arbitration. Furthermore, subject to requirements of good faith[3] attendance for an unspecified period of time at the insistence of the mediator is not required. If agreement cannot be reached at a mediation, it is rare but not unknown for parties to simply walk out of the mediation.

Procedures and Processes

16. While arbitrators have a good deal of flexibility about the way in which procedural matters can be implemented during the course of an arbitration, the overall process is strictly controlled by the applicable law. There are frequently disputes concerning the law governing the agreement to arbitrate, the law governing the arbitration, and the law applicable to the substance of the dispute. Arbitrations are not conducted in a legal vacuum but are regulated by rules of procedure that had been agreed and adopted by the parties and the arbitral tribunal.[4]

17. Mediation, on the other hand, is almost infinitely flexible. There is no set code of rules, procedures, or conventions which provide a standard form of how mediations are to

[2] e.g. Civil Procedure Act (NSW) s26(1)
[3] e.g. Civil Procedure Act (NSW) s 27
[4] Redfern And Hunter on International Arbitration (Fifth Edition) at paragraph 3.04

be conducted. The mediator can usually determine all issues relating to timing and format of pre-mediation meetings, what documents pertinent to the dispute should be served, and the content and time for service of position papers. The mediator will require the parties to agree as to a venue and will usually want to be provided with a list of persons who will attend the mediation including representatives with authority to settle. While in some jurisdictions there may be some legislative provisions dealing with such issues[5], usually such matters are within the sole control of the mediator.

18. While lawyers tend to be oriented towards disputes which would otherwise be determined by litigation, mediation can be used as a technique to resolve issues ranging from a trivial dispute between neighbours about noise, animals or some other nuisance to a civil war or other seemingly intractable international issue. Because of its flexibility, mediation can be used in an attempt to resolve a whole dispute or only part of a dispute. A mediation can take place before any formal steps which would otherwise constitute the commencement of a litigation or arbitration process. It can take place right up to the time of conclusion of the arbitration or associated litigation. A mediation can be conducted during the course of an arbitration or it can be conducted on discrete issues within the dispute which would otherwise be dealt with on an interlocutory basis. The issue of hybrid processes (arb-med and med-arb) will be discussed later in this paper.

19. In some jurisdictions, there will be court rules imposing obligations on various parties to court ordered or court-annexed mediations to conduct themselves in a particular fashion, for example, imposing an obligation to mediate in good faith[6], or requiring persons in authority or having authority to settle to attend or be contactable during the mediation[7]. Because the mediator does not make any judicial or quasi-judicial determination, considerations such as procedural fairness (the rules of natural justice) simply are not relevant to a mediation. Needless to say, if a party is strongly aggrieved and has a view that it is not being fairly dealt with or properly heard in relation to the dispute, it is unlikely that it will be able to progress to an agreement.

Confidentiality and Privacy

20. On 20 April 2012 in *Samaan v Kentucky Fried Chicken Pty Ltd*[8] Rothman J. in the Supreme Court of New South Wales gave judgment in the sum of $8 million in a case in which a plaintiff alleged she had been poisoned by salmonella present in some chicken which she had purchased at one of the defendant's stores resulting in catastrophic consequences. The judgment is currently under appeal. Within a day or so of the judgment, it was a front page news story on the websites of CNN, BBC, the Straits Times, Times of India, the Jakarta Post, the Jakarta Globe and on dozens of other news websites and newspapers worldwide. The benefits of confidentiality in such a case are readily apparent. The loss of confidentiality will mean that even if the appeal is successful, much commercial damage has already been done.

21. Both arbitrations and mediations can be conducted privately and/or confidentially if the parties so wish. In reality, both processes are usually so conducted. Indeed it is one

[5] Uniform Civil Procedure Rules (NSW) Part 20 Rule 6
[6] Civil Procedure Act 2005 (New South Wales) s 27
[7] Uniform Civil Procedure Rules (New South Wales) Part 20 Rule 20.6
[8] [2012] NSWSC 381

of the attractions of both processes. Confidentiality and privacy are different but interrelated concepts. Arbitrations are conducted in private with the consequence that the names of the parties, the issues, the pleadings, the evidence (including witness statements and expert reports) would usually remain hidden from public view, as will the award itself. In some jurisdictions proceedings in arbitration are confidential, subject to the parties opting out of that obligation[9]. In other jurisdictions, there is confidentiality if the parties opt in[10]. The secrecy attaching to such matters cannot be maintained, except in unusual circumstances, if the arbitration award or the process is appealed or challenged. In such circumstances, the names of the parties, a number of issues and details relating to the relevant criticism of the process will find their way into the public eye.

22. The same considerations which apply the concept of confidentiality in mediation will also make it attractive in the field of arbitration. The confidentiality attaching to arbitral proceedings is attractive to companies that may become involved (often extremely reluctantly) in legal proceedings. Evidence about matters such as trade secrets, commercial practices, or even personal or business details about individuals can all be factors which make an arbitration conducted confidentially and in private most attractive to the protagonists[11].

23. Mediations are usually conducted in private in the sense that only the mediator, the parties, and their authorised representatives or supporters attend the mediation. It is normal to require everyone at the mediation to sign an undertaking as to confidentiality. Confidentiality applies to non-publication of:-

    (a) What occurred during the mediation;

    (b) The result of the mediation; and

    (c) The material provided for the purposes of the mediation;

24. The confidentiality which is imposed on the mediation process is recognised in four principal ways:-

    (a) The common law recognises the public interest in promoting the settlement of disputes without resorting to judicial determination.

    (b) The parties usually expressly agree that the mediation is to be conducted both in private and confidentially.

    (c) Courts recognise an express or implied agreement between the parties that their communications will be kept confidential.

    (d) Statute and subordinate regulation in many jurisdictions[12] which can cover many issues e.g. privilege attaching to mediations.

[9] BANI Rules and Procedures Chapter V Article 13.2; Commercial Arbitration Act 2010 (NSW) s 27E
[10] International Arbitration Act 1974 (Commonwealth of Australia) s 22(3)(a)
[11] Redfern and Hunter on International Arbitration (Fifth Edition) at 1.96
[12] Civil Procedure Act 2005 (NSW) s 30

25. In many cases parties are justifiably concerned about matters of personal and business reputation. There are many reasons why parties would wish the dispute to be determined confidentially. The protection from public disclosure of material which might be said during a mediation or be disclosed in evidence at an arbitration is a factor. A common reason for this view is commercial sensitivity.

26. In Australia, professional negligence actions are frequently mediated for a number of reasons, including the fact that the confidentiality of the process ensures that professional reputations are protected by otherwise damaging public evidence irrespective of the outcome of public proceedings. The issue of confidentiality is of critical importance to many other bodies other than business corporations. It is particularly important to governments and institutions such as government agencies, hospitals and (in Australia), churches and religious bodies.

Speed

27. As a sweeping generalisation - mediation is usually fast and arbitration is usually not so. There are exceptions. Many commercial disputes can be mediated well before they get anywhere near a court. Some can be mediated even before the institution of any court proceedings. Others will require the gathering of some evidence (particularly expert evidence) before a mediation can take place. Commercial disputes which can drag on for years (delaying investment in destroying a potentially profitable business relationship in the process) can be dealt with in weeks at most (from planning to finality) with the actual mediation taking only between one and several days. The fact that many disputes can be mediated early and mediated fast makes a very attractive proposition for any business. If the problem is solved early, it becomes easy to restore a previously good business or personal relationship. The speed with which the process can be implemented ought be a factor in intellectual property disputes. In such disputes, delay in getting products onto the market is critical to commercial success.

28. As a general rule, it can take months or even longer to get a matter being arbitrated to the point where it is actually heard and an award given. The usual issues of gathering evidence and witnesses, including expert evidence, which applies to litigation also applies to arbitration. As in litigation, there may be a delay of weeks or months before an award is given, followed by a further delay when it comes to enforcement of any Final Award.

29. In mediation, on the other hand, there is no delay in getting a decision because the parties make their own agreement at the conclusion of the mediation. The question of enforceability of a mediated settlement can be more problematic, particularly in jurisdictions other than common law jurisdictions. This issue will be discussed later in this paper.

Cost

30. The actual cost of the mediation will almost always be far less than a contested hearing or arbitration. Cases which may take several weeks of hearing are commonly

mediated in several hours or a day at the most. In Singapore or Australia, the cost of the hearing can be many thousands of dollars a day for each party. Actual hearing of contested arbitrations can take several days or weeks (even months or years in some cases). The overwhelming majority of mediations will be concluded in one day. The witness fees in any technical arbitration will invariably be expensive. In a mediation, there are almost always no witness fees nor are there transcription costs. The additional cost of a mediation involves only the cost of the premises (which can often be arranged for nothing in the board room of one or another of the law firms or various other commercial premises at minimal cost), and the cost of the mediator (usually one days fees plus a limited amount of preparation plus any other incidental expenses). In some jurisdictions and in some areas, the courts will provide facilities and a mediator at no cost to the parties.

31. Apart from the financial cost of conducting a lengthy dispute by way of arbitration, there are also collateral cost in terms of damage to reputation, relationships and other matters. The disruption to a business by reason of the fact that senior executives might be involved for weeks or months in preparing for and conducting an arbitration rather than going about their more productive business is a factor. These matters are minimised in a mediation rather than a contested arbitration. If a large investment may be dependent upon the outcome, mediation can be an effective way of reducing delay and identifying and eliminating irrelevant "issues" formally in dispute. Mediation is thus more likely to reduce collateral costs.

32. Even if the entire dispute cannot be resolved, mediation can be used to shorten the duration of the dispute. Even if an entire dispute is not resolve, significant issues within the dispute can be removed from areas of contest for the arbitration as a result of what happens at the mediation. It is the author's experience that no trial or arbitration gets longer as a result of a mediation.

Risk

33. Arbitration has precisely the same concept of winners and losers as does litigation. Even parties with the best legal advice can find that an arbitrator or a judge will come to a different view. It is sobering to remind oneself that every case in the law reports has a loser. Similar sentiments apply to concluded arbitrations. Indeed, the decision-making tribunal can often come to a view which is not expected by any of the parties to the contest. During the course of the process, documents can come into existence or previously unknown documents come to the attention of a party which dramatically change everyone's perception of the dispute. Witnesses can be unreliable. Unfortunately the full extent of a defect in one's case may not be apparent or even suspected until well into the process. Sometimes a fatal flaw will not emerge until the proceedings are virtually at an end.

34. In mediation, the parties not the mediator are largely in control of the process and the parties are fully in control of the result. The parties determine if and how a dispute will be resolved. The mediator does not impose a result on them as would happen in arbitration. A mediation is a wonderful opportunity for a skilled mediator to point out to the parties that their self perceived strengths may not be invulnerable after all. Parties can be reminded in a somewhat sobering fashion that in most litigation arbitration, you may be 49.99% correct in your argument in respect of which you may quite correctly

have very strong views. As part of reality testing, the parties can be reminded that most of the litigants going all the way to the highest court in any country thought they were going to win and nearly half of them lost. When confronted with these home truths against the fact that the great burden of now incurred (and unrecoverable) costs is yet to fall, the parties can often be persuaded to see the whole dispute and its consequences in a more realistic light.

35. In many Asian cultures, mediation is practised as a means of social interaction much more so than in Western cultures. Where social order, harmony and face-saving are highly valued (as in many Indonesian cultures such as Javanese) forms of mediation are an appropriate means of dispute resolution from village level up to the high levels of society. The Indonesian practice of *musyawarah* or reaching agreement through discussion and negotiation is indicative of how the culture of mediation is ingrained in the Indonesian psyche.

36. The mediator can and should give assistance to get parties to a result and assist in ensuring that any result which the parties wish to reach is structured in such a way that it will work.

Flexibility

37. Arbitration is by its nature a structured process where the structure is determined by the parties who usually define the issues by pleadings or similar documentation. The parties jointly decide the nature and extent of the battlefield. The arbitrator(s) is constrained by the issues as raised by the parties and by the law in terms of what result can be reached.

38. Attempts to resolve a dispute at mediation can (and often will) involve a holistic look at the entire relationship between the parties, not just the narrow commercial or other issue as pleaded. Pleadings or their equivalent in arbitration or litigation define issues and define potential solutions in terms of money and legal rights, but often the needs of protagonists can be quite different. At mediation, issues can be addressed and a solution reached which is unobtainable within the legal constraints of arbitration. Sometimes the law simply does not provide any mechanism for a solution that the parties really want. Expressions of apology and the acknowledgement can be made at a mediation (often with statutory protection that an apology in such circumstances is not being taken as an admission of liability[13]). Such expressions often enable a party to move on to the point that they can resolve the case. Such mechanisms are not available in the same way in an arbitration.

39. By way of further example, under the Partnership Act of New South Wales a partnership dispute can really only be resolved by dissolving the partnership or by payment of money. In fact many partnerships are salvaged by a redefinition of rights and responsibilities within the partnership. In intellectual property disputes, while the actual dispute may involve only one product, patent or trade mark, the protagonists often have a number of products in which they claim intellectual property rights against each other in the same market place which are the subject of contention but

[13] Civil Liability Act 2002 (NSW) s69

not litigation or arbitration. Solutions reached at mediation can involve compromise on other products which are not the subject of the actual proceedings.

40. Such matters can be thrashed out at mediation but cannot be litigated or arbitrated. While an arbitrator is constrained by the range of solutions which he or she can provide to a particular problem before him, a mediator can suggest virtually anything to which the parties can agree if they wish.

Nature of the Process

41. It does not require a detailed analysis of each process to realise that arbitration is essentially adversarial in nature and mediation is essentially collaborative. Arbitration by its nature perpetuates the dispute while the matter is being conducted. It entrenches positions and attitudes, and usually renders cases more difficult to settle as time goes on. One can only live in the hope that the parties will come to a realisation that, one way or another, the dispute might be best dealt with by being ended.

42. Most mediations take place either because both sides want to finish the dispute or because a third party has persuaded or ordered them to at least try to do so. Most parties arrive at a mediation with at least some belief that it is to their advantage if the matter is ended there and then. The question becomes one of a mediator dealing with each side's expectations and trying to get them to a result they can live with even if no party is particularly happy. In the view of the writer, this should be done in a much more gentle (albeit manipulative) way than would be the situation as if it was dealt with in a purely adversarial setting. While parties may want to engage in belligerent behaviour early in a mediation and "get things off their chests", generally behaviour patterns tend to settle down during the course of a mediation even if frustration levels increase owing to the intractability of one or another party. While parties take strong positions and posture early in the day, as the day wears on, what parties need to truly reach a solution often becomes apparent but it may take some time. In response to the misguided suggestion that mediation is "soft", there are many disputes where the negotiations are so difficult it would be easier to simply run the case and let somebody else try and work it out.

When Arbitration or Mediation may be Inappropriate

43. There are obviously some situations where one or the other process may not be appropriate. With respect to arbitration, the issue may be, whether having regard to broader issues between the parties such as the maintenance of relationships, timing, potential cost issues, and the fact that the real solution may not be capable of being the subject of an arbitral award, it may be very wise to pursue the mediation option first. Unfortunately there are many litigants who do not get what they really want or need despite winning a court case or an arbitration. The battlefields of the court and arbitration room are also littered with combatants who have much in common with the ancient Greek general Pyrrhus who was renowned for winning battles but at such a cost to his own army that he was unable to enjoy the fruits of victory.

44. The principal issue concerning whether mediation is appropriate usually relates to timing i.e. whether it is too early (or, very occasionally, too late) to mediate. The difficulties created by the suggestion that it is too early to mediate are usually solved by parties obtaining relevant evidence to enable them to adopt a properly informed position at a mediation. Other situations can include:-

(a) If there are fundamental legal issues which control the outcome or which must be tested and the parties are unwilling to compromise, it may be inappropriate to mediate;

(b) The opposite problem to that outlined in the preceding paragraph is where one party must run a legal point as a test case i.e. to obtain a precedent which will assist it in other respects. This is not a relevant consideration with respect to the alternative being an arbitration because arbitration awards do not create precedents.

(c) It has been suggested that there is no point in mediating if the point of the proceedings is to generate publicity. While in theory that may be correct, the experience of a writer is that overwhelmingly the converse applies i.e. confidentiality and privacy are significant factors in the reasons why parties want to mediate.

(d) Prima facie a complete absence of trust between the parties will render it virtually impossible to mediate a dispute, but settlements can and do come from seemingly impossible situations. To support this proposition, one need look no further than the successful mediation of the war in Aceh and the fact that in Australia almost all of the many cases of sexual abuse of children involving churches and schools are successfully mediated despite the personal feelings, sometimes even hatred, are involved.

Enforceability

45. The Convention on the Recognition and Enforcement of Foreign Arbitration Awards of 1958 (the New York Convention) and the structures in place in various countries whereby courts enforce arbitral awards are one of the primary reasons why international arbitration has become such a popular means of resolving disputes. A criticism levelled at mediation is that mediated settlements are often not enforceable whereas arbitration awards are enforceable through the New York Convention. Neither proposition is precisely correct.

46. It is true that obtaining an arbitration award is, at first blush, similar to obtaining a court judgment but there may yet be a long way to go before a party with an award in its favour actually sees the fruits of victory. They are significant issues about whether courts in particular jurisdictions will enforce arbitration awards and the terms upon which they will do it. The mere fact that enforcement is sought in a country that is a party to the New York Convention does not guarantee success in this regard. There may be continuing litigation about the arbitration process itself and the award. This litigation can take years in some jurisdictions. Furthermore, actual enforcement can be a time-consuming and expensive process.

47. On the other hand, at the end of the mediation there is no order or award made by the mediator for the simple reason that a mediator has no power to make a final determination in the matter. Any settlement that is reached will be an agreement between the parties to that effect. The next question is how the parties agree that the settlement will be recognised and by whom. In common law jurisdictions, it is relatively simple as those parts of the agreement which are enforceable in that jurisdiction are recorded and noted as consent orders or a consent judgment of the court. Other terms may be noted simply on the basis that they are agreed between the parties rather than being formulated as a specific court order. Generally speaking, the courts will enforce consent orders (for example for the payment of money) as if it was a judgment after an adjudicated hearing. It makes no difference whether the mediation was court annexed or arranged privately by the parties.

48. Matters become significantly more problematic in jurisdictions where procedural powers of enforcement vary depending upon whether a mediation is court annexed or not. Matters usually settle at mediation because the parties (frequently reluctantly) just want the whole process with its associated trauma and cost to end. Of course if the matter does not resolve, the mediation will simply break up leaving the parties to work out whether they want to fight the matter out in a court or arbitral tribunal, or make a further attempt to resolve it by way of negotiation or further mediation. The experience of the writer has been that in literally hundreds of mediations in which I have acted as mediator, no one has ever reneged on a settlement made at mediation. Occasionally there have been problems which have arisen, usually as a result of the fact that something which ought to have been considered during the course of or prior to the mediation has been overlooked. If the parties are genuinely desirous of resolving the problem, these matters are almost invariably resolved as well.

49. As stated earlier, when dealing with the question of the flexibility of the mediation process, many matters will be the subject of agreement between the parties without being legally enforceable. The best approach of a mediator is that if the parties would agree to do something then, subject to the legality of the proposal, let them do it. Unfortunately lawyers get overly focused on issues of enforceability. Many matters, particularly international disputes in a non-trade context, are resolved by mediation without the question of enforceability ever being a consideration. The success of the mediation in the ultimate resolution of the dispute simply turns upon the willingness of the parties to put the issue behind them.

50. It is obviously preferable for an agreement reached at the mediation stage to be enforceable in its entirety or in relation to a significant aspect if that can be done. Court processes may make this easy or difficult depending upon the jurisdiction and the rules which apply. Another solution to the problem is to look at whether and how the particular agreement which is made by the parties can be the subject of an arbitral award. In some jurisdictions, this has the great attraction of removing the practical difficulties which arise from the distinction between mediations which are court annexed and those which are not. Furthermore, there may be real advantages in having an arbitral award (from an enforcement perspective) as opposed to a consent judgment of a particular court. It is in this context that I turn to the question of filter and combined processes.

HYBRID PROCESSES

51. The agreement between the parties can acknowledge and provide for a filter process i.e. a contractual recognition that mediation can take place prior to the commencement of the arbitral process or after its commencement. This is done by incorporating mediation in a tiered dispute resolution clause. The parties can agree that a mediation will take place at any stage of the arbitration process. This has the advantage of providing a formal mechanism for resolution of the entire dispute which statistically has a reasonable prospect of success before moving on to a more complex and expensive arbitration with the associated disadvantages of that process. It gives the parties a final opportunity to resolve the dispute amicably and has positive consequences in terms of the prospect of maintaining a commercial or other relationship. As in most aspects of mediation, there is a great deal of flexibility about how the process can be implemented.

52. The rules of the arbitral body may provide that as a first step the parties endeavour to resolve their differences either on their own or with the assistance of a third party such as a mediator. Sometimes provision is made for the arbitral tribunal to participate in this process if the parties agree[14]. The BANI arbitration rules contemplate not only a hybrid process but also, if agreed by the parties, the participation of the arbitrator in any pre-arbitration attempt at a negotiated settlement or a mediation.

53. The nature of the hybrid process can be both flexible and varied. Common examples are a mediation followed by an arbitration ("med–arb") or an arbitration followed by mediation ("arb-med") or even a process whereby one goes from arbitration to mediation and then back to arbitration if the matter does not resolve ("arb–med–arb").

54. A definition of med-arb appears on the website of the Singapore mediation centre in the following terms:-

> *Med-arb (or mediation-arbitration) is a hybrid dispute resolution process that brings together the elements of both mediation and arbitration. In med-arb, the parties will first attempt to resolve their dispute by mediation. Where the mediation does not result in a settlement, the parties will proceed to arbitration. Where the parties choose med-arb as their dispute resolution mechanism, they prescribe a fixed time frame during which they will retain control over how the dispute will be resolved and work towards a voluntary settlement with the other party, after which they agree to relinquish control over the outcome and opt for a final determination of the dispute by a neutral person. Med-arb therefore strikes a balance between party autonomy and finality in dispute resolution.*

55. Just as neither mediation or arbitration are ideal for every situation, hybrid processes combining them will not suit every situation. Some disputes may be amenable to one particular formulation of a hybrid process but not another. There are also significant areas of opposition to the process, particularly among practitioners in common law jurisdictions. However, combined processes are finding ever-increasing recognition both in legislation[15] and in courts in common law jurisdictions[16].

[14] BANI Rules and Procedures Chapter V Article 20.
[15] Commercial Arbitration Act 2010 (NSW) s 27D
[16] Gao Haiyan and Xie Heping v Keeneye Holdings Limited [2011] 3 HKC 157,

56. In a paper given to the IAMA (Institute of Arbitrators and Mediators – Australia) Forum on 3 August 2005, Alan Limbury identified a number of specific considerations which are relevant to combine the processes including:-

(a) In the case of arb-med:-

(i) If the dispute settles in mediation, much will have already been spent in terms of time and money;

(ii) If the mediation takes place at the conclusion of the arbitration, any suggestions made by the mediator during the mediation may be construed as a hint with respect to the final award and thus inappropriate and manipulative.

(b) In the case of med-arb:-

(i) The element of candour which is essential to frank communication in a mediation context may be severely inhibited by the prospect of a pending arbitration;

(ii) Issues of impartiality may arise when the parties do not accept a suggestion of the mediator. Matters disclosed confidentially may contaminate the subsequent arbitration process. Any mediation in such circumstances must be conducted on the basis that during the mediation phase, the mediator is totally non evaluative. Attempts can and have been made in legislation to deal with this issue and with the issue of procedural fairness which can arise in a med-arb [17].

(iii) Any action of the mediator perceived by the parties as pressure to take or reject a particular offer may be construed as an implied threat as to what might happen in the arbitration phase if the party refuses to do so.

(iv) The parties may use the mediation as a testing ground or advice on evidence in respect of what will transpire at the arbitration.

57. The Singapore Mediation Centre website also expresses the following view about the apparent undesirability of the same person acting as both an arbitrator and mediator in the same dispute, particularly where mediation takes place before the arbitration. There are two reasons identified in support of this proposition:-

(a) A party may, during the mediation phase of med-arb, disclose confidential or privileged information to the mediator. The mediator is obliged not to disclose such information to the other party without the consent of the party disclosing the information. Should the mediator subsequently act as an arbitrator in the arbitration phase of med-arb, he might be in possession of information that the other party is not given an opportunity to explain or rebut. If he allows himself to

[17] Commercial Arbitration Act 2010 (NSW) s 27D (4), (5), (6), (7).

be influenced by such information in rendering his decision as an arbitrator, he would be acting in breach of the rules of natural justice.

(b) A party may be less open with a mediator during the mediation phase of med-arb if he is concerned that the information provided to the mediator may be relied on by the mediator, subconsciously or otherwise, when the mediator assumes the role of an arbitrator in the arbitration phase of med-arb. This could undermine the effectiveness of the mediation phase of med-arb.

58. Other procedural issues which are partly covered by the above concerns and which are partly addressed by the New South Wales legislation referred to above concern the fact that the arbitrator may appear to be or may actually be biased as a result of the fact that he or she has received information in caucus when acting as a mediator. As a matter of common sense it would seem that the rules of procedural fairness would require that there be a full disclosure to the parties of anything said in caucus session during the mediation which might have some bearing on how the arbitrator might come to a decision on the matter.

59. While there is no reason why the parties cannot agree to mediate during the currency of a dispute at any time from the initiation of the dispute right through until the conclusion of an arbitration, it is prudent to define a procedure by way of a multi-tiered dispute resolution clause. Consideration must be given to whether the agreement should provide that the arbitration should formally commence before any mediation takes place. It is suggested that it is preferable to ensure that the mediation takes place within the framework of the arbitration and actually commences while there is a genuine dispute on foot. Such an approach may have some bearing on whether or not a settlement reached during the mediation can be transformed into an effective arbitration award. The issue is not entirely clear and the problems which arise will vary depending upon the jurisdiction in which the arbitration is conducted and the governing law of the arbitration.

60. The obvious practical advantage of a multi-tiered dispute resolution clause incorporating mediation into the dispute resolution mechanism is that the parties get a chance (preferably relatively early in the dispute) to settle their dispute quickly and do so in a less costly and more amicable fashion before becoming fully engaged in the time-consuming and expensive arbitration process. Apart from cost and delay, this approach has the advantage of giving the parties the best chance of maintaining business relationships which would be severely jeopardised should be arbitration proceed to a conclusion.

61. The issue of enforceability has a particular importance when one looks at carrying into effect any settlement reached at any stage of a hybrid process. In some jurisdictions, it is all relatively simple. In Australia, for example, any litigated matter which is mediated can be settled and a consent judgment entered which gives effect to the settlement reached that the mediation irrespective of whether or not the mediation is court annexed or court ordered. If there are no court proceedings on foot, a settlement can take effect of a binding agreement upon which either party can sue. If there are court proceedings on foot, the settlement agreement will take the effect of a judgment upon which either party can execute. In similar jurisdictions, it would make

no difference whether the settlement was reached during a hybrid process or where, within the process, the settlement was reached.

62. In international arbitration, it is trite that awards are enforceable under the New York Convention. Arbitral awards made in one Convention state are enforceable in another Convention state. There is no similar provision with respect to agreements reached by way of mediation. Thus, there is a real advantage in converting a mediated agreement into an arbitral award if that can be legally done.

63. It is important to also bear in mind that there is a distinction between a settlement or compromise reached during an arbitration and the concept of converting a mediated settlement agreement into an arbitration award for the purposes of having an enforceable award. The Model Rules provide for settlement or compromise of the dispute during the course of a mediation. The relevant rule [18] provides:-

If, before the award is made, the parties agree on a settlement of the dispute, the arbitral tribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by the parties and accepted by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms. The arbitral tribunal is not obliged to give reasons for such an award.

64. The BANI rules[19] contained a rule which is designed to have similar effect:-

Award on Amicable Agreement

If such a settlement can be reached, the Tribunal will prepare a written memorandum of such settlement, which memorandum shall have the force of a consent Award and shall be binding upon both parties and enforceable in the same manner as an Award of the Tribunal

65. As Anthony Connerty points out in his paper[20], the issues which are raised in relation to salvaging a legally enforceable settlement from an agreement reached from a hybrid process are not without their difficulties. The various provisions contained in various rules to the effect that settlement reached during a mediation can be "converted" into arbitration awards are wise given the provisions and benefits of the New York Convention. A possible solution (and the one which is most likely to be effective) may be for the parties to agree to have an arb – med – arb. An arbitration could be commenced then before the proceedings get fully underway, the procedure immediately changes to mediation mode (accepting the reservations of Alan Limbury referred to above). If the proceedings do not resolve at mediation then the matter proceeds by reverting to arbitration and continuing as if the mediation had not taken place.

66. Two apparent benefits particularly relevant to Indonesia of utilising a hybrid process of one form or another as discussed above concerns the difficulty of transforming agreement reached in matters which are being currently litigated but which are the subject of a non-court annexed mediation into a formal settlement which is filed in

[18] UNCITRAL Model Rules 2010 Rule 36
[19] BANI Rules and Procedures Article 20
[20] "ADR as a 'Filter' Mechanism: The Use of ADR in the Context of International Disputes

court. A hybrid procedure without court proceedings but set in arbitration proceedings may well enable the settlement reached at the mediation stage to be transformed into an arbitral award. There would thus be no necessity to turn a settlement agreement into a judgement of the court per se - one would in fact be seeking to enforce the award and relying upon the New York Convention to do so. It would provide a good reason to arbitrate from the start and avoid any court based proceedings altogether.

67. A further difficulty which would be obviated would be that which potentially arises under the Supreme Court Rules of Indonesia and the associated Mediator Guidelines. Article 24 of the Supreme Court Rule No. 1 of 2008 concerning Procedures for Mediation at Court provides:

"(1) Every mediator in performing his/her functions must obey mediator guidelines

(2) The Supreme Court will issue mediator guidelines"

Article 6(3) of the attached Supreme Court's Mediator Guidelines says:

"A mediator who practices as an advocate and the colleagues from the same law firm are forbidden from becoming legal advisors to a party in the dispute that is being handled both during and after the mediation process."

68. Arbitration and mediation are totally different dispute resolution methods which embrace totally different techniques, procedures and philosophies. They are neither friend nor foe but both can and should be used imaginatively, jointly or separately depending on the circumstances, to achieve the best possible outcome for one's client. They can be used individually but will often be best used collaboratively. Using mediation in an imaginative way outside the court process and within the arbitration process can be remarkably effective and efficient in resolving many disputes.

69. In preparing this paper I have been greatly assisted by research and knowledge of others notably Alan Limbury of Strategic Resolution in Sydney, Mark Dempsey SC of the New South Wales Bar, Andrew Conduit of SKC Law (Sudirman Central Business District, Jakarta) and a number of research and conference papers of eminent arbitrators and mediators[21].

[21] "Introduction to Alternative Dispute Resolution: A Comparison between Arbitration and Mediation - Rhys Clift of Hill Dickson; various papers of Alan L. Limbury in the ADR bulletin (Australia) and other publications; "A Guide to Commercial Dispute Avoidance and Resolution For Legal Practitioners and Business Managers" - International Legal Services Advisory Council (ILSAC) Attorney Generals Department, Canberra Australia; various papers of Alan L Limbury in the ADR Bulletin (Australia) and other publications; "The Better Way to Resolve Disputes" by John West QC given to IPBA Conference Manila 2009; "ADR As a "Filter' Mechanism - the use of ADR In the Context of International Disputes" by Anthony Connerty given to The 5C's of ADR Conference in Singapore October 2012 and a similar paper given to the Asian Mediation Association conference in Singapore in 2009.