REMOVING HANDICAPS TO THE WIDESPREAD USE OF MEDIATION IN MAJOR COMMERCIAL/INTERNATIONAL DISPUTES

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Over the past 20 years mediation has been increasingly utilised as a most effective dispute resolution mechanism in commercial disputes (both international and domestic) in the Asia-Pacific region. It has and can be used with equal effectiveness in both international and domestic disputes. The impetus for its success has come about because it provides a fast, effective and relatively inexpensive way of resolving commercial disputes while preserving valuable commercial relationships. Its great success in some jurisdictions is a direct result of its effectiveness in commercial dispute resolution.

This paper is directed at sophisticated parties experienced in substantial domestic and international commerce. Most such parties will either have their own corporate counsel and/or access to experienced commercial lawyers (frequently from large and/or international law firms) who are familiar with both adversarial and non-adversarial dispute resolution techniques. In the area of international commercial disputes, the users of dispute resolution services and mechanisms are sophisticated. Mediation should be a simple process although its practice can be subtle and nuanced. To further increase its popularity, it is essential that it continue to be flexible, fast and relatively inexpensive.

From a client's perspective, the attractions of mediation over litigation or other alternative dispute resolution procedures can be summarised as follows:-

(a) It is usually a far more economical means of dispute resolution than either litigation or arbitration ;

(b) It is fast;

(c) It is confidential;

(d) It is almost infinitely flexible;

(e) Because the parties themselves make the ultimate decision, in most instances the parties perceive both the process and the result to be fair;

(f) It minimises risk for the parties whether the risk be financial, cultural or risk of any other sort.[1]

Part of the rise in the popularity of mediation is attributable to dissatisfaction with adversarial processes. While international arbitration was originally intended to be much more efficient, faster, and cheaper than litigation, it has been criticised in many papers and publications because many users perceive that it does not achieve those ends. In the 2015 White & Case International Arbitration Survey, the worst feature of international arbitration was identified as cost. "Lack of speed" (i.e. delay) was identified as another key complaint together with specific procedural difficulties.[2]

The advantages of mediation as set out above are not being effectively utilised as they should be. There is evidence to suggest that some potential mediation practitioners believe that a lack of understanding of the benefits of mediation is the cause of its limited use. They suggest that demystification of the "mediation voodoo" could increase its popularity[3]. In particular, mediation as it is practised and organised in some jurisdictions is currently losing sight of the fundamental idea that it should be as economical, as fast and as flexible as possible. It is instructive to examine the causes of these problems.

It is necessary to look at jurisdictions where mediation is used pre-eminently to resolve major commercial international and domestic disputes. In such jurisdictions it maintains its object of being extremely efficient and infinitely flexible (with some court oversight but not control). There are many mediations and almost invariably no administration fees.

By way of example, between 2010 and 2014, the total number of cases referred to mediation in the Supreme Court of New South Wales was 5065[4]. The actual numbers were 1144 (2010),

[1] The Better Way to Resolve Disputes by John West QC – IPBA Manila Annual Conference 2009
[2] White & Case 2015 International Arbitration Survey at page 4 and 7.
[3] White & Case 2015 International Arbitration Survey at page 34.
[4] Statistics produced by the Supreme Court of New South Wales.

902 (2011), 1092 (2012), 1088 (2013) and 839 (2014). Of these total mediations, just under 40% were *ad hoc* mediations. The remainder were court annexed mediations. Court annexed mediations were usually utilised in the smaller matters where the court provided mediators and facilities free of charge. Virtually all the larger matters which went to mediation were dealt with *ad hoc* by way of the parties making private arrangements with an experienced mediator pursuant to a court order or direction (frequently made by consent).

There are also a large number of *ad hoc* mediations conducted in litigated matters without a court order or in unlitigated disputes. Virtually no major commercial dispute in Australia in any court goes to trial without at least one mediation. In *ad hoc* mediations parties pay the professional fees of the mediator. There is no administration fee but there may be a charge for the use of private premises. Mediations are commonly conducted in the offices of one or another of the law firms without cost to the parties.

Because of the large number of mediations covering virtually all areas of legal and commercial disputes, there is a large pool of very experienced mediation practitioners and mediators. In any major commercial dispute, there are always lawyers, shareholders, boards of directors and other stakeholders are in the background forming part of the overall landscape of the dispute. Most such disputes are mediated by Senior Counsel or ex-judges. In such an active mediation market, with so many practitioners actually doing a large number of mediations, the market determines who is competent to be retained as a mediator in particular matters. While particular accreditations with particular the bodies may have some significance, it is one's practical skill as a mediator which determines who is appointed in most cases.

MYTHS (AND CHALLENGES) OF MEDIATION

There is a German word which well describes some of the myths of mediation which emerge - "entmythologisierung" - the historical process by which a story or fable, originally mythical, comes to be presented as fact. It is necessary to question the validity of these assumptions. Some of the theoretical commentary about mediation and some of the practices which are adopted contain implicit assumptions in relation to the implementation and organisation of

mediations which render mediation unnecessarily complicated. Some such propositions are publicly promoted regularly and with enthusiasm at conferences without any factual or statistical backup.

Myth number 1 – Major Mediations Cannot Be Conducted Ad Hoc.

This proposition is best tested by case studies involving two major mediations. The mediation involving the RiverCity Motorway in Queensland, Australia involved two sets of litigation in Australia (see Hopkins v AECOM Australia Pty Limited (No 8) [2016] FCA 1096), satellite litigation in New York and an arbitration in the Netherlands. One of the Australian actions was a class action. The amount in dispute was AUD$350,000,000.00. In the Australian litigation in the Federal Court there were 11 firms of lawyers (both local and international) involved plus counsel. Altogether there were 12 parties. The actual organisation of the mediation (without any administration fee) took approximately one month from the joint appointment of a mediators (a senior Sydney QC and a retired Federal Court judge). The first preliminary meeting followed two weeks later. While the original referral to mediation involved only the class action in the Federal Court of Australia, the parties were able to quickly agree without formality or further administration to mediate the whole dispute wherever the litigation was taking place. The case was successfully mediated over 12 months.

The second case study involved a dispute concerning an Indonesian power station in which the author was appointed as mediator. The value of the claim was approximately €40 million. The mediation was arranged after service of a Notice of Arbitration but prior to its filing. There were no proceedings actually on foot at the time of the mediation. Lawyers from Jakarta, London and Sydney (the latter two being from well-known international firms) were involved with representatives from London, the USA, Europe, and Indonesia. The actual agreement as to the rules (which was in fact a Permanent Court of Arbitration Conciliation), the venue, the retainer and fees of the mediator, the independence of the mediator, the provision of documentation including position papers and the holding of a preliminary conference by video link (including the provision of agenda by the mediator) was arranged in approximately 2 weeks by the exchange between the mediator and the parties of approximately 20 e-mails. With competent and experienced practitioners on both sides, the

administration by the mediator was minimal and took no more than a few hours. The imposition of a mediation institution into the actual organisation of the mediation would have been totally unnecessary and, most probably, a significant impediment to the fast and smooth organisation of the mediation. The mediation itself was conducted in the Singapore office of one of the multinational law firms involved. There was no administration fee nor was there a fee for the use of the premises over 2 full days.

Myth number 2 – A dispute resolution clause containing a mediation provision is essential (or even necessary).

Mediation is a voluntary process. You can force people to mediate by contract or court order but you cannot force them to agree. A compulsory mediation clause or hybrid process clause is completely ineffective in achieving a resolution if a party does not want to mediate in good faith or, with the best will in the world, simply does not want to agree. The obverse is that parties can mediate at any stage of any dispute if they agree to do, so notwithstanding the absence of a formal contractual provision or agreement. The only requirement is that they jointly come to the view that they wish to utilise mediation in an endeavour to resolve their differences. This can occur at any time during the course of a dispute including after an adversarial hearing has been concluded. One of the obvious benefits of mediation clauses is that they force the parties to consider mediation as an option. For this reason, it is always of assistance to include such clauses in commercial contracts, trade treaties and other documents which deal with dispute resolution mechanisms. However, parties should never lose sight of the fact that they can mediate any dispute at any time even if there is no pre-existing agreement to do so.

In another major mediation involving a motorway (the Lane Cove Tunnel), the mediation commenced shortly before the commencement of the trial and continued concurrently with the hearing to the point that the dispute was resolved at mediation before the conclusion of the trial. The Indonesian power station mediation was commenced and successfully concluded prior to the institution of any proceedings.

Myth number 3 - There is a magic to International (as opposed to Domestic) Mediation

Unlike arbitration, questions of jurisdiction and law are rarely the front and centre focus in mediating a dispute. A mediator in an international dispute is carrying out the same function

as in a domestic dispute with the same object - to get the parties to agree. Of necessity this often involves significant cultural considerations. While all parties mediating in good faith want to achieve a resolution, culture will often determine the different routes they will take to get there. Precisely the same issues arise in any mediation involving parties from very different backgrounds. By way of example, today there are more than 24 million Australians. Australians speak over 300 languages, including indigenous languages, identify with more than 200 ancestries and observe a wide variety of cultural and religious traditions. Many purely domestic mediations conducted in Australia (often involving major commercial disputes with large amounts of money in issue) involve parties who do not speak English and/or whose culture is far removed from the western/Australian stereotype.

A good mediator will have cultural awareness and understanding generally and preferably have some sensitivity to the particular cultural traits of all parties. Mediators in *ad hoc* mediations involving such parties are commonly selected because of their understanding of cultural issues. The critical question is the choice of mediator. Experienced lawyers and parties involved in international disputes are best placed to make enquiries and choose who they wish.

Myth Number 4 - Hybrid Processes Can/Cannot Be Easily Mediated.

There are two principal difficulties which need to be addressed in dealing with hybrid processes in the context of arbitration. The first is a necessity of having a "dispute" actually on foot so as to permit an award to be entered if that is desired. The second problem concerns procedural fairness or natural justice issues. In theory, there is no reason why the parties cannot agree to mediate in the middle of an arbitration either pursuant to a dispute resolution clause or on an *ad hoc* basis. They do not need an agreement to do so in a dispute resolution clause or any similar document. If, part way through an arbitration, the parties wish to mediate they should and can do so provided they agree to do so. Consistent with what has been said earlier in this paper, there is no point in forcing a party to mediate in the middle of arbitration if they have no desire to come to a consensual resolution.

The parties to an arbitration can settle their dispute during the course of the proceedings. The Model Law provides for an award by agreement[5] and the UNCITRAL Rules provide for a settlement to be recorded by an order or by an award if so requested by the parties[6].

The BANI arbitration rules[7] 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. Proceeding in such a fashion has its challenges.

There is no reason why the parties to arbitration proceedings cannot ask the tribunal to adjourn the proceedings for a short period of time (which could be days only) to enable an ad hoc mediation to take place. One might ask rhetorically why an arbitration should be adjourned for many weeks when a mediation can be arranged within hours or days without bureaucracy or additional cost (other than the fees of a mediator - who is not involved in the arbitration). On the assumption that the parties and their representatives are at the site of the arbitration, it makes sense to immediately conduct any mediation with those same representatives. Any agreement reached can become an award.

The specific objections of those opposed to hybrid processes also concern a number of fundamental questions which include whether one can hold an effective mediation given, on the one hand, the concept of full and frank disclosure during a mediation and on the other hand the constraints relating to keeping material confidential in a quasi-adversarial contest such as a contested arbitration. More fundamental questions arise when one comes to consider the natural justice implications of this conflict.

Opponents of such processes point to cases such as *Gao Hai Yan & Anor v. Keeneye Holdings Ltd & Ors*[8] as supportive of the proposition that the use of such hybrid processes can be incompatible with the obligation of fairness in arbitration. It is suggested that the conduct of the arbitrators in the *Keeneye* case would be regarded as unsatisfactory by any reputable arbitration practitioner irrespective of their jurisdictional background and culture. For the purposes of the discussion on the subject of this paper, the real

[5] Model Law Article 30
[6] UNCITRAL Rules Article 34(1)
[7] BANI Arbitration Rules Article 20 Rule 1
[8] [2011] HKEC 514

significance of the *Keeneye* case is that it supports the proposition that combined mediation with arbitration is acceptable.

Myth #5 – The Enforceability Hang-up

Lawyers are obsessed with enforceability. Enforceability is always good if it can be achieved. However, the simple fact is that parties who want to resolve disputes will do so even if the proposed resolution is legally unenforceable. A good Indonesian example is the war in Aceh which was mediated by Martti Ahtisaari, the ex-president of Finland (who won a Nobel Peace Prize for his effort). The agreement which was reached was clearly unenforceable in a court but it has stood for over 10 years because the parties wanted the dispute to end.

Parties can and do often resolve disputes on different bases which is strictly legally unenforceable. The experience of the author, having acted as mediator in several hundred disputes on different continents and over a wide range of subject matters, is that no settlement which has been mediated by me has ever fallen over. The overwhelming evidence both personally and anecdotally from other experienced mediators is that if parties to a dispute want problems to go away and achieve a resolution, the agreement to settle will be honoured.

In a recent survey on the question of whether or not a party has had difficulties in enforcing the settlement agreement, only 8% said yes[9]. While this figure is somewhat higher than the author's personal experience and what is anecdotally told to me by other mediators, one would expect that is significantly less than challenges of one sort or another to arbitral awards.

Myth #6 – The Value and Alleged Necessity of Endless Mediator Training and Analysis

Just as no amount of athletic training will get most of us to elite athlete level, no amount of mediation training will give most of us the skills to mediate major commercial disputes. The ability to conduct such mediations requires a blending of personality, communication skills and commercial know-how to the extent that one can persuade most parties to resolve their commercial differences. Endless analysis of whether a mediator should be evaluative or facilitative loses sight of the proposition that in any mediation it is usually necessary for the

[9] White & Case 2015 International Arbitration Survey at page 32

mediator to change his or her approach depending not only upon the nature of the instant problem but also upon the personalities of the party or parties with whom he or she is dealing. The lie of overanalysing mediation techniques and advocating one style in particular is apparent when one is confronted with a mediation where one side is in part focused upon relationships and the other side is concerned only with risk and money. One must doubt whether Martti Ahtisaari had a certificate from one on other of the accreditation bodies and whether he approached the Aceh peace negotiations upon the basis that he would be facilitated, evaluative, or something else.

SPECIFIC MEDIATION "VOODOOS" - FUTURE CHALLENGES AND PITFALLS

Cost is a significant factor in the minds of consumers of legal services. Those concerns extend to the cost of mediation. Conducting the RiverCity mediation through an institution would have incurred a case management fee of SIN $10,000.00 *per party*, and a case filing fee of SIN $2,500.00. This is before paying the professional fees of a mediator and the cost of any venue. In the second case study of the Indonesian power station mediation, the total administration fees would have been SIN $32,500.00. Some mediation institutions even charge a *daily* administration fee. In the RiverCity case, the fee would be SIN$4,601.00 per party per day for in excess of 20 mediation days – i.e. SIN$55,212.00 per day in administration fees alone and over one million dollars in total.

An experienced mediator can deal with many of the issues which arise which of their nature are significantly less complicated than in arbitration. While arbitration generally benefits from structure and administration, mediations generally do not. The actual administration of a mediation is not complicated. If it were so, there would be an unwillingness on the part of mediators to conduct *ad hoc* mediations. The only fees charged by mediators are for their professional time face-to-face with the parties, and fees for preparation and reading. With experienced and competent practitioners, such administration fees are a large and unwarranted expense.

The "administration" in a mediation is simple and should be extremely limited. It usually involves the mediator providing a range of dates which are then dealt with by the parties by e-mail (as would occur in arranging any meeting), sending out a letter of retainer to the parties which will involve setting a timetable for the provision of documents to the mediator,

informing the parties which documents should be provided to the mediator, and prescribing matters such as professional fees payable to the mediator and travel and accommodation expenses (if appropriate). The mediator may arrange a preliminary conference by e-mail and provide an agenda for the conference in advance, inviting the parties to add to it as they see fit. Whoever provides the venue (a mediation room and breakout rooms) will almost always takes care of those details. At the conclusion of the mediation, the mediator simply submits a memorandum of fees to the parties in whatever proportions the parties have agreed in the mediation agreement.

There is a further issue relating to the fixing of administration fees by reference to the value of any claim. Firstly, it unfairly attracts a much higher charge in the event that a claim is met with a very much more substantial (frequently unmeritorious) cross-claim for tactical reasons. One might rhetorically asked why all parties should incur a very significantly higher fee than the fee which would apply to the principal claim simply because one party chooses to make a spurious claim for tactical reasons. Secondly, one might ask how one would cost the value of the claim which is not and often cannot be put in purely monetary terms such as in proceedings for a declaration of indemnity under an insurance policy.

On the question of speed, a competent mediator can arrange and conduct a complicated commercial mediation in days at the most. The *ad hoc* nature of such mediations enables them to be arranged and conducted extremely quickly. The author recently received a phone call from a party on the afternoon of day six of a three week trial during the course of which the judge raised the question of mediation. It was agreed to adjourn the case the following day to enable the mediation to take place. I met with counsel for both parties at 4 PM at the end of court, received some limited documentation during the course of that meeting, and commenced the mediation at 10 AM the following day. It was successfully concluded at 4 PM on the following day. Such flexibility and efficiency exemplifies the true advantage of ad hoc mediation as opposed to other process based institutional procedures. Competent experienced mediators, assisted by competent and experienced mediation practitioners, can act very fast and efficiently in most matters with ease and frequently do so.

On the question of flexibility, it is difficult to imagine how an institution could structure its procedures to cope with a mediation such as the RiverCity mediation. The actual conduct of

any complicated mediation can only be determined by the mediator in consultation with the parties. Virtually all meaningful communication would need to take place between the mediator and the representatives of the parties in any event. The imposition of an additional layer of bureaucracy between the mediator and the parties would only constitute a significant handicap to the flexibility and speed with which such mediation must be conducted.

It is axiomatic that the speed with which legal processes take place is related to the cost of those processes. In simple commercial terms, the faster disputes are resolved, it usually follows that the cost of resolving them is less. This concept is a principal reason why mediation, properly conducted, has proved so attractive to the commercial community. Any structure or process which unnecessarily attracts additional cost, delay, or bureaucracy will be counter-productive to the continued spread of mediation.

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