Commercial Mediation

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Paper delivered at The Institute of Arbitrators Australia Annual Conference, 17-19 May 1997, ANA Hotel, Sydney.

Introduction

In contrast to the mechanisms of arbitration and litigation mediation should be seen as providing an approach that will facilitate a free-ranging discussion between the parties directed towards assisting them to negotiate their own resolution of their dispute. Arbitrations, in common with litigation before the courts, necessarily follow relatively standardised courses of procedure compulsorily imposed by directions or rules – a procedure formulated with the object of enabling both sides of the dispute to be placed fairly and adequately before the arbitrator or the judge for binding determination. The parties control neither the process nor the outcome. An arbitration differs from a court determination in that an arbitration originates in an agreement between the parties to refer the dispute for the binding decision of an arbitrator; a court determination derives its enforceability from the sovereign authority of the national court system. But notwithstanding these different origins, both arbitration and court determinations culminate in a binding being decision *imposed* on the disputants.

The fundamentally important distinction between mediation on the one hand and arbitration or litigation on the other, is that a mediator has no authority to impose a decision or determination on the parties. The mediator's role is essentially to create a negotiation environment which will enable the parties to *reach their own determination* of the way in which the dispute should be resolved. Not only is the mediation process variable and flexible, but the range of resolutions open to the parties is as extensive as are their common commercial interests.

There are many definitions of mediation but a distillation of them reveals three essential criteria by which to identify and classify a mediation. Those criteria are:

1. the parties appoint a chosen mediator who will both meet the parties in joint session and confer with each party privately and in total confidence during the course of the mediation discussions;
2. the mediator has no authority to make any determination or decision; and
3. the whole process is voluntary and consensus-oriented from its inception in the

agreement between the parties to mediate on through to the end of the mediation; the end result of a successful mediation is a legally enforceable contract recording the settlement; unsuccessful mediations end in one or other, or both, of the parties (or the mediator) terminating the course of discussions.

The object of the mediator is to move the parties through three phases:

- the *first phase* focuses on *communication* between the parties;
- the *second phase* focuses on developing an *understanding* by the parties of their own and their opponent's perceptions of the dispute and the respective strengths and weaknesses of the positions of the parties;
- the *third phase* focuses on the emergence of a negotiated *consensus*.

The first two phases – communication and understanding – overlap to a greater or lesser extent. Both are directed towards enabling the parties to discuss their dispute, to exchange views and thus to gain a fuller understanding both of their own as well as of the other party's points of view. The mediator's task is to guide and facilitate the flow of communication and to assist the parties to gain a sufficient understanding of the total dispute and of the respective points of view of the disputants so that each can make a dispassionate, objective appraisal of the total dispute situation. From that point the parties then move towards a negotiated resolution of their dispute.

It is, perhaps, appropriate to develop separately the role of the mediator, the role of lawyers and the role of party representatives in mediations. This will serve to mark yet further the basic contrast between mediation on the one hand and arbitration and litigation on the other.

The role of the mediator

The mediator is a neutral, impartial third party who is independent of the disputants. This is not an absolute requirement in the mediation of commercial disputes. At times prior contact with one or more of the disputants may be regarded as of some help provided that the mediator's integrity and total independence of mind are accepted unquestioningly by the disputants. It is, however, always essential that the chosen mediator make full disclosure of any circumstance that might give rise to justifiable concern by any party. At the slightest indication of such concern, whether or not the mediator considers it justifiable, the mediator should decline or relinquish the appointment.

Ordinarily the mediator has legal qualifications but this is not an essential prerequisite. Nor is it necessary that the mediator be highly skilled in the subject matter of the dispute. What is necessary is that the mediator should have a thorough knowledge of the various dispute resolution processes and be well versed in the techniques by which the disputants may be assisted towards achieving a

resolution of their dispute. The qualities of a good mediator are person skills rather than technical or legal expertise of experience.

The mediator has at times been described as an architect of the mediation process in that he/she will develop and recommend to the parties the precise way in which the mediation discussions should go forward. There may, for example, be some advantage in appropriate cases in suggesting to the parties that they obtain from a mutually acceptable expert an opinion on a point of significant difference between the parties that they can use in carrying the negotiations forward. A laboratory report on a scientific question or a valuation or an accounting report on financial disagreements are instances. The parties will agree in advance whether the opinion will be binding or non-binding.

In some cases the mediator may perceive and suggest that a particularly deeply divisive issue may be able to be served from the total dispute and taken separately to a confined arbitration or litigation with a view to using the arbitrator's award or the judgment as part of the overall complex of material the parties will ultimately evaluate in arriving at their settlement.

Again, the mediator may form the view and suggest that a controlled adversarial exchange between the lawyers for the parties, carried through in the presence of the parties and the mediator, is likely to assist them to a better informed understanding of their respective strengths and weaknesses. At times this may be as short as, say, half an hour or less each on a discrete issue. At other times, a period of up to two or even more hours each may be appropriate. Too long a period presents the risk of an undue descent into the details of the dispute and the risk of diverting the concentration of the parties away from the attainment of a dispassionate objective appraisal of the total dispute situation. This technique is sometimes called a mini-trial.

The mediator's object throughout is to assist the parties to gather together the building blocks out of which to construct their settlement. The two phases of communication and understanding are necessary precursors to the informed and dispassionate objective appraisal that each party must make in negotiating effectively towards accomplishing the third phase of achieving a consensus.

Quite frequently a successful mediation will involve a rearrangement of the commercial relationship between the parties and this again is an area where a mediator, drawing on the knowledge gained in the course of private discussions with each of the parties, can provide significant assistance. With this in mind it is helpful if the mediator is well versed in the ordinary course of business or commerce as well as having an understanding and working knowledge of the processes of litigation and arbitration.

From time to time situations arise in the course of mediations in which both parties may despair of being able to reach a settlement and they join in asking the

mediator to make a determination or embark on an arbitration of the dispute. Superficially, this may seem to be a good idea because the mediator will already have gained some understanding of the issues between the parties. It is, however, a course fraught with danger and experienced mediators invariably decline any such invitation to adopt a decision making role. There are two particular considerations that need to be recognised.

In the first place, the party who loses is quite likely subsequently to accuse the mediator-turned-arbitrator of having misled that party by creating during the mediation an impression that the mediator not only understood but favoured that party's position. Any incautious observations made by the mediator during the mediation phase may well be seized upon by the unsuccessful party as a basis for criticising or challenging the determination of the mediator-turned-arbitrator.

In the second place, if the parties foresee it as even possible that the mediator might later adopt a decision making role, their frankness in the caucusing stages will almost certainly be inhibited and much of the value of the caucusing process will accordingly be lost.

In this regard it is instructive to refer to a case in Florida in 1992. The case was *Evans v. State of Florida (Flo.App.5 Dist 1992 15)*. A first instance judge, whilst conducting a case management conference, offered to attempt to mediate. All the parties agreed they would not use the judge's attempt to mediate as a basis for disqualification. The mediation failed. There was then a motion by one party to disqualify the judge from proceeding with the hearing based upon the judge, during the mediation, having commented unfavourably about one of the parties. The joint judgment of the Appeal Court, ruling that the judge was disqualified, includes a passage which conveys a timely warning to arbitrators and judges alike:

> "A mediator, through training and experience, approaches different parties in different ways. Because a mediator will not be deciding the case, both the mediator and the parties are free to discuss without fear of any consequence the ramifications of settling a particular dispute as opposed to litigating it. This is one of the reasons that a mediator must generally preserve and maintain the confidentiality of all mediation proceedings...
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> In contrast, the judge's role is to decide the controversy fairly and impartially, consistent with established rules of law...
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> As a caveat, we suggest that mediation should be left to the mediators and judging to the judges."

The role of legal advisers

Legal advisers present at a commercial mediation with their clients will take such part in the proceedings as their clients wish. It should be borne in mind at all times that a mediation is an informal meeting between the parties themselves in a non-legal context. It is essentially directed to the parties being able to engage in a free, and totally protected, person-to-person exchange of views about the dispute

and ways in which it might be able to be settled. Unless a mini-trial type segment is to be utilised in the mediation, legal advisers are not present as advocates or for the purpose of participating in an adversarial courtroom-style contest with each other, still less with the opposing party. A legal adviser who does not understand and observe this is a direct impediment to the mediation process.

The role of legal advisers is essentially threefold:

(i) to advise and assist their clients in the course of the mediation;
(ii) to discuss with the mediator, with each other and with their respective clients, such legal, procedural or practical matters as the mediator might suggest or their clients might wish; and
(iii) to prepare the terms of settlement or heads of agreement recording the agreement reached at the end of the mediation for signature by the parties prior to departure at the end of the mediation.

The role of party representatives

It is essential that each party be present in person or have present at the mediation a representative with full authority to negotiate and settle the dispute. The representative should not be subjected to any limitation or restriction of authority to settle. Large corporations recognise this requirement and in major disputes are ordinarily represented by their chief executive, an executive director or other very senior person who has been vested with total authority in the dispute. When it is recognised than an intensive one or two day mediation has an 80% or better prospect of settling a dispute that may occupy weeks or months of contested hearing, it is generally accepted that the time of such seniority of representation is amply justified.

At the heart of the mediation process is the opportunity for each party to make a dispassionate and fundamental objective reappraisal of the whole situation in the free and totally protected discussions that take place within the mediation. These discussions enable each party to make a more fully informed and reliable assessment of its own position and interests, of the other party's position and interests and of likely future developments and options. The reliability and validity of such assessment will develop and grow throughout the course of the mediation discussions. A constraint or predetermined limit on the authority of a representative denies that party the full benefit of on-the-spot informed reappraisal and inhibits the prospect of a successful outcome.

There can, of course, be cases where unquestionable full authority cannot be present, for example disputes involving reinsurers or overseas principals. It should, however, be possible for the representative attending the mediation to give a confident and responsible assurance of expectation that a recommendation will be accepted.

The few mediations that fail to succeed more often than not are mediations in which one or more of the parties has, through a lack of understanding, viewed the procedure as simply involving settlement discussions or pre-trial conferences such as some court systems require and has sent along a representative with limited authority in the contemplation of seeing whether the other party can be talked down (or up) to not more (or less) than some arbitrarily predetermined figure. Such an approach inhibits the potential value of the mediation. If the representative feels the need, or is required, to consult before concluding a settlement agreement, then the person or persons to be consulted should if practicable be present at the mediation throughout so that they, too, can take part in the discussions and appraisal.

Structuring a mediation

Having made come general observations regarding the concept of mediation and outlined the respective roles of the mediator, legal advisers and party representatives, it will be of assistance to outline and comment on the actual structure of a mediation. It will be noted that the structure leaves room for almost unlimited flexibility in the actual course of the mediation. The nature of the dispute, the stage it has reached and the personalities of the individuals involved all play a part in tailoring the course of proceedings.

A mediation may arise from a specific decision by the parties to a dispute to embark on mediation or it may derive from a clause inserted in the original contract between the parties. Such a clause can be written in relatively straightforward and simple terms.

There is a dual advantage in inserting a mediation clause in the original contract. In the first place it serves to remind the parties, when they find themselves in dispute some months or years after entering into the contract, that mediation was the chosen mechanism of first resort. If, of course, the mediation fails, it always remains open to the parties to arbitrate or litigate and it will be prudent as a matter of invariable practice to give consideration to including in commercial contracts an arbitration clause which will become operative if the mediation fails. In international commercial contracts an arbitration clause is commonly regarded as of great value.

The second advantage of including a mediation clause is that not infrequently two parties to a dispute would both be minded to submit it to mediation but each hesitates to make the first move in this direction lest it be interpreted by the other side as a sign of weakness. A mediation clause in a contract will remove the occasion for this hesitation.

Concluding observations

Earlier in this paper I have described mediation as a concept and identified the three indicative criteria which will characterise a process as a mediation. At times

well-intentioned efforts are made to distinguish between different modes of carrying into effect the underlying philosophy of seeking a consensus-oriented resolution of the dispute. Descriptive names for various techniques (e.g. mini-trial, early neutral evaluation, and so on) are valuable identifiers of species within the mediation genus. But none should be seen as constituting a separate genus as for example is litigation or arbitration. It will be found in analysis that all the various specific consensus-oriented techniques are in truth mediations within the conceptual formulation that I have presented in this paper.

A common misconception is that there is a distinction between mediation and conciliation. In the view that I put forward, the two words are synonymous. Conciliation is a description frequently used in the field of international commercial dispute resolution. For example, UNCITRAL has promulgated Conciliation Rules; ICSID incorporates a conciliation process within its available mechanisms, as does the ICC Court of Arbitration in Paris. Mediation is the preferred description in the United States and the Asia-Pacific region, including Australia. Not only is there no distinction in substance, but indeed there is not even a cosmetic difference between mechanisms propounded as mediation and mechanisms propounded as conciliation. As I have emphasised earlier in this paper, part of the value of the consensus-oriented mechanism is its wide flexibility. Attempts to introduce arbitrary classifications within the consensus-oriented concept present a risk of creating confusion where none need exist as well as of inhibiting the flexibility of the implementation of the process.

I conclude this paper with a comment upon one of the attractions of mediation to persons involved in commercial disputation. In arbitration and litigation the mechanism is of necessity operated by the legal advisers of the parties. The issue is joined and fought between the legal advisers. Inevitably this distances the real parties from the dispute resolution process. Mediation provides a mechanism which will empower the parties. Both the working through of the process and the negotiation of its resolution are in the hands of the parties themselves. The earlier sections of this paper dealing with the roles of lawyers and party representatives emphasise this characteristic of mediation. It is a characteristic that is in general attractive to commercial disputants, along with the informality, flexibility and expeditions of a mediation. Whilst mediations do not always succeed, the prospect of success will normally be regarded by the parties as sufficiently good to require serious consideration to be given to implementing this mechanism. Even if it does not wholly resolve the dispute it will build a bridge of communication and hopefully a bridge of understanding between the parties. Moreover it will almost certainly assist in confining the area of the commercial conflict between them.