

11-1-2000

Senior executive appraisal mediation

Ian Hanger

Recommended Citation

Hanger, Ian (2000) "Senior executive appraisal mediation," *ADR Bulletin*: Vol. 3: No. 4, Article 1.
Available at: <http://epublications.bond.edu.au/adr/vol3/iss4/1>

This Article is brought to you by epublications@bond. It has been accepted for inclusion in ADR Bulletin by an authorized administrator of epublications@bond. For more information, please contact [Bond University's Repository Coordinator](#).



ADR The Bulletin

The monthly newsletter on dispute resolution

contents

VOLUME 3 NUMBER 4

Senior executive appraisal mediation45

New books47

Ten rules of hard bargaining.....48

Yet another way to get parties to the table50

General Editor



Laurence Boulle
*Professor of Law,
Bond University, Queensland*

Information contained in this bulletin is current as at November 2000.

Developing forms of ADR

Senior executive appraisal mediation

Ian Hanger

What is senior executive appraisal mediation?

Senior executive appraisal mediation (SEAM) is a process in which senior executives of large organisations that are in dispute join a panel with an independent neutral to appraise the dispute, in which they have not personally been involved. They take into account both the rights and the interests of their respective organisations with a view to resolving the dispute.

When is the SEAM process appropriate?

The SEAM process is one that I have found appropriate for only the occasional dispute, but in each case it has resulted in a resolution of the dispute and a commitment to further business ventures between the parties.

It is most appropriate in the following situation:

- (1) the parties want a dispute resolved quickly and cheaply;
- (2) the dispute has arisen at the level of middle management;
- (3) there are senior executives who are not personally involved in the subject of the dispute and believe that they can act objectively in an appraisal of the issues and make a decision;
- (4) the parties wish to work together after the dispute has been resolved; and
- (5) generally the parties are large and the dispute is large.

I mention the need for the dispute to be large and the parties to be large because:

- (a) generally speaking, if the parties were

not substantial corporations one would not find senior executives who had not already been involved in the dispute; and

- (b) the process is not cheap in terms of resources.

The kind of dispute which lends itself readily to SEAM is a dispute arising out of large engineering or construction contracts.

SEAM procedure

Intake

It is necessary for the parties to understand the process and to ensure that the appropriate senior executives are selected. In the first intake conference the mediator outlines to the senior executives what will be involved in the process, ascertains whether they think that the process proposed is the correct process for their dispute, establishes that they are prepared to work with each other and with the mediator to resolve the dispute, and ensures that they feel that they can bring a significant degree of objectivity to the process.

The executives then draft a protocol on the SEAM procedure which they submit to the mediator for comment. The mediator discusses the draft protocol with them and suggests amendments to the protocol based on the mediator's experience. This is the rapport building stage of the process. It has the effect of the two executives working towards a common goal, at first with each other, and then with the mediator. The expectation is that trust and mutual respect will emerge from this exercise. If it does ➤



Editorial Panel



Tom Altobelli
*Senior Lecturer,
 Faculty of Law,
 University of Wollongong*

David Bryson
*Conciliation Officer,
 WorkCover Conciliation
 Service, Victoria*

Peter Condliffe
*Barrister/Mediator,
 Director, Peacemaking
 Associates, Brisbane*

Shirli Kirschner
*Resolve Advisors Pty Ltd,
 Sydney*

Nadja Alexander
*Senior Lecturer,
 Faculty of Law,
 University of Queensland*

Michael Mills
*Partner,
 Freehill, Hollingdale
 and Page, Perth*

➤ not, it may be time to change the players.

The agreed protocol that emerges is not the agreement of the middle managers or of the lawyers acting behind the scenes; it is the agreement of the two key players. Obviously the protocol will vary depending on the individuals and the dispute in question. Because it has been drafted by the parties rather than by their lawyers it is simple and the individuals are committed to it.

It has also been suggested to me by senior executives who have been involved in the process that the protocol should be approved and signed by the CEOs of the companies involved if the CEOs are not already the senior executives involved. The result of this is that the management of each company owns the process and the protocol and senior management has a commitment to making the process work.

Appraisal

The last part of the intake process is also the first part of the appraisal process. This involves briefing the middle managers on the process and the expectations of the SEAM panel (that is, those involved in the SEAM process). This involves the mediator going to the premises of each party with both of the senior executives and explaining the process to them, telling them what is expected of them and answering questions.

This exercise provides an opportunity for each member of the panel to establish some rapport with, and the trust of, the middle managers, in relation to both the process and the individuals.

A conference should also be held between the SEAM panel and the lawyers for the parties to brief them on their role. My preference is for lawyers to stay in the background during a SEAM. They should help the middle managers prepare for the SEAM and should assist the SEAM panel with the administration of the process. They do not have a speaking role during the presentations unless a pure point of law is involved and the SEAM panel asks for assistance.

It should not for a moment be thought that lawyers do not have a role in SEAMs. They do, and in my opinion that role is invaluable. They are organisers. They filter the material.

They decide what the SEAM panel must know, should know, could know and what is irrelevant from the legal standpoint, and they almost invariably have the wisdom and experience to advise on not only the legal rights but also the interests of the parties. I have been involved in only one SEAM in which lawyers were not involved. It was quite a small matter, but the process did not go as smoothly as it would have done with legal input in the background.

The preliminary conference with the lawyers will also settle an agenda and seek input as to how much time the lawyers and managers believe should be allocated to particular issues.

The amount of time allocated to a particular matter will be determined not merely by its complexity but also by the amount of money involved. There is no point in spending half a day on a matter which might only involve \$10,000. Nevertheless, the panel must be conscious of the fact that the process is not just about money — it is about rebuilding working relationships. While the appraisers specify a time limit for each middle manager to make a presentation, it is counter-productive to insist upon absolute adherence to such time limits. Flexibility is vital to success. Equal short extensions of time may be given to each presenter.

Hearing

I have found it useful for the SEAM panel and the parties to be provided with a short briefing paper (a few pages) the day prior to the hearing.

At the hearing presentations will be made verbally with the help of videos, powerpoint presentations, overhead transparencies and slides. During the presentations the senior executives and the mediator ask questions to clarify their understanding of the issues. The whole process is conducted as informally and expeditiously as possible and it is the role of the SEAM panel to create a friendly, relaxed and constructive environment for the hearing.

One must not overlook the value of catharsis in such an environment. The parties want to be heard. They want their own senior executives to understand the difficulties they are having with the other party and, of course, they appreciate feedback from ➤



➤ the opposing party's senior executive showing that their concerns are being understood and addressed.

At the conclusion of some or all of the presentations, the mediator meets privately with the senior executives and discusses the presentations with a view to reaching a resolution in accordance with normal principles and practices of mediation. This may involve confidential sessions with either panel member.

In an appraisal that lasted for 12 days we met each day before the presentations, during the lunch break and after the presentations had finished for the day, and dealt with each issue by either agreeing on the matter or agreeing to disagree. When the senior executives disagreed we would identify the issue causing the problem and consider our options. This frequently involved requesting further information or work from the presenters on a very precise point — this additional presentation sometimes being in writing and sometimes verbal.

To proceed to resolve issues on a daily basis in a complex matter which may take place over many weeks means:

- (1) one doesn't have to remember a mass of detail about the issue that is resolved; and
- (2) the success in resolving issues encourages the resolution of the

next issue.

Ultimately the parties become locked into the success. A point is reached where so much has been achieved that to fail to resolve the outstanding issues (which by the process of elimination described above are the most difficult issues) is simply unthinkable.

The process is such a flexible one that the SEAM panel can refer particular aspects of the dispute to other people for advice or determination or recommendation.

Conclusion

I do not suggest that the SEAM process is applicable in a great many situations. However, in an appropriate dispute, it:

- (1) is quick, relatively cheap and effective — a 12 day SEAM saved a formal hearing that would have exceeded six months;
- (2) is cathartic — the middle managers hopefully feel they have been heard and understood; and
- (3) enables the parties to rebuild a satisfactory relationship.

A successful resolution should conclude with a celebratory and long luncheon with all the participants. ●

Ian Hanger QC is a Commercial Mediator and Arbitrator in Brisbane.

'Ultimately the parties become locked into the success. A point is reached where so much has been achieved that to fail to resolve the outstanding issues is simply unthinkable.'

From the literature

New books

The following new dispute resolution books from Australia and abroad may be of interest to readers. Some of these books will be reviewed in future issues of the Bulletin.

Ruth Charlton *Dispute Resolution Guidebook* Law Book Company Information Services Sydney 2000.

Gregory Tillet *Resolving Conflict — A Practical Approach* (2nd ed) Oxford University Press Sydney 2000.

William Ury *Getting to Peace —*

Transforming Conflict at Home, at Work and in the World Viking US 1999.

Morton Deutsch and Peter T Coleman (eds) *The Handbook of Conflict Resolution — Theory and Practice* Jossey-Bass Publishers San Francisco 2000.

Bernard Mayer *The Dynamics of Conflict Resolution — A Practitioner's Guide* Jossey-Bass San Francisco 2000.

Michael D Lang and Alison Taylor *The Making of a Mediator — Developing Artistry in Practice* Jossey-Bass San Francisco 2000. ●