

5-1-2007

Making med-arb work

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Recommended Citation

Limbury, Alan L. (2007) "Making med-arb work," *ADR Bulletin*: Vol. 9: No. 7, Article 1.
Available at: <http://epublications.bond.edu.au/adr/vol9/iss7/1>

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ADR bulletin

The monthly newsletter on dispute resolution

Information contained in this newsletter is current as at May 2007

Volume 9 Number 7

ADR in practice

Making med-arb work

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ADR Diary

Unlike mediation alone and arbitration alone, med-arb has the advantage of offering both the possibility of resolution by the parties' own agreement and, failing such agreement, the certainty of resolution by the binding decision of the arbitrator (the award).¹

Where the neutral has the skills necessary to conduct both processes, there is a saving in both time and money in combining them, since he or she is already 'up to speed' when changing from one role to another and may gain insights during the mediation phase that could contribute to a more appropriate award. If agreement is reached in mediation, the parties may sign a binding settlement agreement or the neutral may, by consent, convert their settlement into an arbitral award. If the mediation does not produce agreement on all issues, the mediator becomes arbitrator and hears and determines the unresolved issues. The award may be non-binding or binding, depending upon the agreement entered into by the disputants.

Lest med-arb be thought to be a novel process, it should be observed that Professor Derek Roebuck has traced its use back to the ancient world:

Everywhere in the Ancient Greek world, including Ptolemaic Egypt, arbitration was normal and in arbitration the mediation element was primary.²

Criticisms of med-arb

Common criticisms of med-arb today are both behavioural and procedural in nature.

Behavioural criticisms

The behavioural criticisms, together with the author's commentary on them, include:

- Disputants are likely to be inhibited in their discussions with the mediator if they know that he or she might be called upon to act as arbitrator in the same dispute. In particular, they are unlikely to let the mediator know what settlement proposals they are likely to accept.³

Clearly disputants will be only as forthcoming with the mediator as they think appropriate. If no mediated agreement is reached, the dispute will still be resolved by arbitration within the pre-arranged time. Experience alone will show whether the opportunity to mediate before arbitrating with the same neutral turns out to be useful. Choosing the kind of dispute most conducive to private discussion with the mediator about issues other than who is right and who is wrong may be critically important here. More is said on this point later.

- Disputants may use the mediation phase as mere preparation for arbitration, thereby making it more probable that the dispute will reach arbitration. *Finding the right kind of disputes will be important here. If there are no apparent 'creative problem-solving' possibilities, the parties may be better off going directly to arbitration.*
- Mediators often make suggestions or try to persuade a party to make or accept an offer. In the context of med-arb, this may be taken as pressure, in the form of an implied threat to make an adverse decision as arbitrator if the party is perceived as unreasonable during the mediation.

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Mediators engaging in med-arb will have to be careful not to make suggestions, or at least not to make them in ways that could be so interpreted. This may be easier for facilitative mediators than for evaluative ones.

Procedural criticisms

The procedural criticisms include:

- The arbitrator may appear to be, and may actually be, biased if he or she had received private representations from the parties when acting as mediator.⁴
- Procedural fairness in the arbitration would also require full disclosure to the parties of any such private representations.

Apparent or actual bias in the arbitrator and lack of procedural fairness will attract the supervision which the courts may exercise over the arbitrator's conduct of the proceedings. The Commercial Arbitration Act 1984 (NSW) and its corresponding Acts in other States require any question arising to be determined by law unless the parties agree otherwise: s 22(1). The award may be set aside where there has been misconduct by the arbitrator or where the award has been improperly procured: s 42(1). An arbitrator may be removed for misconduct or incompetence or where undue influence has been exercised in relation to the arbitrator: s 44. 'Misconduct' includes corruption, fraud, partiality, bias and a breach of the rules of natural justice: s 4(1).⁵ The last three are particularly relevant to a consideration of med-arb.

In international commercial arbitration, awards may be set aside by the courts in the country in which the arbitration takes place and enforcement may be refused wherever the award was made if, among other things, 'the arbitral procedure was not in accord with the agreement of the parties'.⁶

Combining the most valuable mediation features effectively and economically with the certainty of arbitral resolution?

While a competent 'med-arbiter' can exclude from consideration confidential information in the same way as a

competent arbitrator or judge can exclude from consideration evidence he or she has heard but ruled inadmissible, there is an important difference between the two situations: all parties in arbitration are aware of the evidence that has been ruled inadmissible, whereas in med-arb only one party knows what confidential information it has confided in the 'med-arbiter'.

Enacted before mediation became widely used in commercial disputes, s 27 of the *Commercial Arbitration Act 1984* (NSW) provides that parties to an arbitration agreement may authorise an arbitrator to act as a mediator between them before or after proceeding to arbitration. Under s 27(3), unless the parties otherwise agree in writing, an arbitrator is bound by the rules of natural justice when seeking a settlement by mediation. If the dispute is not settled in the mediation, no objection shall be taken to the conduct by the arbitrator of the subsequent arbitration proceedings solely on the ground that the arbitrator had previously acted as mediator in the dispute. The section is reproduced in full in the Appendix at the end of this article.

One of the fundamental principles of natural justice (nowadays called 'procedural fairness') is that a party has a right to know the case it has to meet and to be given an opportunity to respond to it. Yet one of the greatest advantages of mediation is that the parties may make private disclosures to the mediator which might enable the mediator to see opportunities to make progress when everyone else is stuck. Section 27(3) allows the parties to waive their right to procedural fairness in the mediation phase, thereby allowing private sessions. Section 27(4) requires procedural fairness to be observed in the subsequent arbitration phase but under s 27(2), where the parties agree that private sessions may be held during the mediation, no objection may be taken in the arbitration that the parties were not informed as to what occurred privately in the mediation.

Likewise, where the parties consent to private meetings in the mediation, s 27(2) also precludes objection to the conduct of the arbitration or the content of the award on the ground of bias and the appearance of bias merely because the arbitrator held private meetings



as mediator. However, the parties are always free (as they are in 'stand alone' arbitration) to object that the conduct of the arbitration or the content of the award reveals apparent or actual bias. In the present context, this would apply to apparent reliance by the arbitrator on extraneous information, such as information gained privately during the mediation.

Accordingly during the mediation phase it is important for the mediator to be circumspect:

An arbitrator when acting as mediator must therefore be careful not to express any definite opinion as to an appropriate outcome as that might create an impression of bias in a subsequent arbitration.⁸

Likewise during the arbitration phase the arbitrator must be careful to avoid any reliance on information not provided openly to all parties.

The *Duke Group* case⁹ and the UK case of *Glencot v Barrett*¹⁰ confirm that the mere holding of private sessions in the mediation phase creates the appearance of bias in the arbitrator. However, those and other cases also establish that an objection on that ground may be waived. Debelle J in the *Duke Group* case cited the following relevant principles:

... one of the cardinal principles of the law is that a judge tries the case before him on the evidence and arguments presented to him in open court by the parties or their legal representatives and by reference to those matters alone, unless Parliament otherwise provides. It would be inconsistent with basic notions of fairness that a judge should take into account, or even receive, secret or private representations on behalf of a party or from a stranger with reference to a case which he has to decide.¹¹

...save in the most exceptional cases, there should be no communication or association between a judge and one of the parties (or the legal advisers or witnesses of such a party) otherwise than in the presence of or with the previous knowledge or consent of the other party.¹²

Note the words 'or consent', which clearly indicate that, apart from statute, the law will allow private communications with a judge [read 'arbitrator'] where the parties consent beforehand.

Procedural fairness creates more difficult problems in the UK because of the unresolved question whether the *Human Rights Act 1998* may preclude waiver of the right to procedural fairness.¹³ In contrast, s 27 of the *Commercial Arbitration Act* expressly permits waiver of that right in NSW.

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A possible approach

It seems to me that the following approach could work, in the sense that mediation followed by arbitration by the same person will not be objectionable unless apparent or actual bias were shown in the arbitration phase:

- (1) the parties should enter into an arbitration agreement at the outset, in order to attract the operation of s 27;
- (2) that agreement should provide inter alia that:
 - (a) the arbitrator may mediate before conducting any arbitration;
 - (b) during the mediation, the arbitrator may hold private sessions with the parties. Both during the mediation and thereafter the arbitrator must keep confidential all information imparted in confidence during the mediation;
 - (c) upon the conclusion of the mediation, the neutral must tell the parties whether he or she feels able to conduct the arbitration impartially including, in formulating the award, feeling able to put out of consideration all such confidential information. If the arbitrator informs the parties that he or she does not feel able to ignore the confidential information, the arbitration must be conducted by another arbitrator or the

parties must expressly permit the arbitrator to use the confidential information;¹³

- (d) whether or not the arbitrator feels able to conduct the arbitration impartially, any party may object to the arbitrator conducting the arbitration, in which case the

arbitration must be conducted by another arbitrator to be appointed by the parties or, failing their agreement, by an appropriate institution identified beforehand;

- (e) should no party object to the arbitrator conducting the arbitration after having mediated, each party must expressly consent in writing to that course.

This builds in the opportunity for both the parties and the arbitrator to opt out of having the arbitration conducted by the person who mediated, once they have considered how the mediation went. It nevertheless still commits the parties to an arbitrated outcome within the previously agreed, or any extended, time at the cost of bringing a new arbitrator up to speed.

As mentioned, if any arbitrator manifests bias during the arbitration phase or in the content of the award, the court will set aside the award and/or disqualify the arbitrator. Accordingly, unless the parties agree otherwise, the arbitrator will need to ensure that no reliance is placed on anything learned in confidence during the mediation. This would be assisted if the arbitrator provides at the outset of the arbitration phase a written statement of what the arbitrator apprehends to be the issues to be determined and the facts as then understood, and invites the parties to comment on it.



Returning to the serious concerns as to how the parties will behave in med-arb, there is not much point in crafting a suitable med-arb agreement and securing the parties' attendance at the mediation, if they either clam up in caucus or spend all their time trying to persuade the mediator they are right. One approach to this problem may be to choose the kinds of dispute that are best suited to med-arb. The ideal is the kind of case in which there appear to be possible outcomes involving arrangements which only the parties can make, such as continuing or adjusted business relations, thereby making it more likely that they will discuss their interests and needs frankly with the mediator in caucus and confine their submissions as to their rights to the subsequent arbitration phase. I believe there are very many such kinds of case waiting to be identified.

In commenting on the (recent) success of mediation, one of the UK's top mediators, Philip Naughton QC, has said:

Perhaps the next step will be the recognition that this new process¹⁴ need not be fenced off from arbitration so that at least any fencing should be interrupted by some well-placed gateways.¹⁵

I suggest that in the 21st century, finding the right place for a gateway to med-arb will benefit disputants in terms of time, money and satisfactory outcomes and will benefit neutrals by encouraging them to bring together in the same person, as in the Ancient World, the skills of both mediator and arbitrator. ●

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Endnotes

1. This article is confined to discussion of med-arb and does not consider alternative procedures such as arb-med and mediation followed by arbitration by a different neutral, both of which have an appropriate place in the dispute resolution spectrum.

2. Roebuck D 'The myth of modern mediation' (2007) 73 *Arbitration* 1, 105 at 106.

3. Redfern & Hunter, *Law and Practice of International Commercial*

Appendix: Commercial Arbitration Act 1984 (NSW)

27. Settlement of disputes otherwise than by arbitration

- (1) Parties to an arbitration agreement —
- may seek settlement of a dispute between them by mediation, conciliation or similar means; or
 - may authorize an arbitrator or umpire to act as a mediator, conciliator or other non-arbitral intermediary between them (whether or not involving a conference to be conducted by the arbitrator or umpire), whether before or after proceeding to arbitration, and whether or not continuing with the arbitration.
- (2) Where —
- an arbitrator or umpire acts as a mediator, conciliator or intermediary (with or without a conference) under subsection (1); and
 - that action fails to produce a settlement of the dispute acceptable to the parties to the dispute,

no objection shall be taken to the conduct by the arbitrator or umpire of the subsequent arbitration proceedings solely on the ground that the arbitrator or umpire had previously taken that action in relation to the dispute.

- Unless the parties otherwise agree in writing, an arbitrator or umpire is bound by the rules of natural justice when seeking a settlement under subsection (1).
- Nothing in subsection (3) affects the application of the rules of natural justice to an arbitrator or umpire in other circumstances.
- The time appointed by or under this Act or fixed by an arbitration agreement or by an order under section 48 for doing any act or taking any proceeding in or in relation to an arbitration is not affected by any action taken by an arbitrator or umpire under subsection (1).
- Nothing in subsection (5) shall be construed as preventing the making of an application to the Court for the making of an order under section 48.

Arbitration (4th ed) pp 1–82.

4. *The Duke Group Ltd (in liq) v Alamain Investments Ltd* [2003] SASC 272.

5. For discussion of the term 'misconduct' see *London Export Corporation Ltd v Jubilee Coffee Roasting Co Ltd* [1958] 1 WLR 27 and *Sea Containers Ltd v ICI Pty Ltd* [2002] NSWCA 84.

6. UNCITRAL Model Law, Articles 34(2)(a)(iii) and 36(a)(iv) and New York Convention, Article V(1)(d).

7. Astor H and Chinkin CH, *Dispute Resolution in Australia*, 1992 pp 145–6.

8. See note 5 above.

9. *Glencot Development & Design Ltd v Ben Barrett & Son (Contractors) Ltd* [2001] EWHC Technology 15 (13 February 2001).

10. *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 350 per Mason J.

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

12. See eg *Halsey v Milton Keynes*

General NHS Trust [2004] EWCA Civ 576 (11 May 2004) and *Glencot Development & Design Ltd v Ben Barrett & Son (Contractors) Ltd* [2001] EWHC Technology 15 (13 February 2001).

13. See the med-arb conducted by Israeli Professor Mordehai (Moti) Mironi, reported in (2007) *Arbitration* 1, 52 at 58:

Special provisions were added to the agreement to protect the mediators and their award against a party's attempt to quash our decision for lack of neutrality. The provisions stipulated that the parties had selected the mediators as arbitrators knowing that we had acted previously as mediators, had conducted private caucuses and had received confidential information. The parties agreed that we would use all this confidential information for our decision, waiving any right they had to attack the award for that reason.

14. His remarks were made before publication of Professor Roebuck's debunking of the 'myth of modern mediation' in above note 2.

15. Naughton P 'The role of arbitrators and arbitration institutions in the use of alternatives for the settlement of disputes', (2007) 73 *Arbitration* 1, 31 at 37.