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Addressing difficulties at the preparatory stage: case studies for thought

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Making mediation work

Addressing difficulties at the preparatory stage: case studies for thought

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Introduction

Even before a mediator gets the parties to the mediation table, there are many potential difficulties that they must face and address.

Stubborn parties, litigious lawyers, positional hard-bargaining stances being taken on every logistical issue and a lack of agreement as to the location for mediation are just a few of the hiccups that a mediator may be presented with.

In our experience administering dispute resolution under five industry codes of conduct, we have faced a number of pre-procedural challenges and also coached our panel mediators in how to deal with difficult preparatory issues.

The following case studies are based on our experiences under the following five industry codes:

- The Franchising Code of Conduct[1]
- The Horticulture Code of Conduct[2]
- The Oilcode[3]
- The Produce and Grocery Industry Code of Conduct[4]
- The Film Exhibition and Distribution Code.[5]

The following examples are designed to raise and address the difficulties faced by mediators during the preparatory stages. The purpose here is to stimulate thought on the possibilities for approaching each issue and to exchange various experiences of successful approaches. My hope and aim in this article is to inspire mediators to acquire new skills and approaches to add to their tool-kits and to refresh their responses to such challenges.

As mediators, we are often confined by the confidential nature of the process within which we work and often lack the opportunity to debrief on the difficulties faced in the early stages of mediation.

Preparation is the key to a successful mediation and will impact significantly on the success of the process as a whole. By being armed with ways in which to address the early obstacles, we have a greater chance not only of getting the parties to the mediation table, but also to assist them to reach unique and workable outcomes.

I invite you to step into each of the following worlds and to ask yourself, 'How would I address this particular issue?'

Case Study 1: Location, location, location!

Barry is a fruit grower based in Western Australia. He has been having difficulties with the wholesaler he supplies the majority of his produce to and has

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requested mediation through the Horticulture Mediation Adviser under the Horticulture Code of Conduct. Under the Code it is mandatory that each party attend mediation. However, there is a difficulty as the wholesaler is based in Melbourne. The wholesaler argues that because Barry has raised the dispute it is Barry who should travel to Victoria. Barry argues that the wholesaler has the cash flow to make travel to WA possible and that the wholesaler should travel in order to resolve an issue that he has created.

Given that there are as many approaches to such situations as there are mediators, there will be more than one path that may be taken to address this issue. From our own experience we have found that people tend to respond well to the existence of an external 'norm' or procedure that is separate to their dispute and can be relied upon when mutual agreement seems like a long distance pipe-dream.

In handling the obstacle of location and travel we have found the following procedure to be useful, as it provides a framework for agreement, while still allowing for creativity by the parties:

Ask:

1. Is one party willing to travel to the other party?

2. Is the other party willing to make a contribution for the other party to travel? (We suggest half of an economy return airfare as the benchmark.)

Where the above two steps do not result in agreement, we will appoint a mediator in a mutually convenient mid-point and each party will bear its own travel costs.

We find that setting out this procedure for the parties is important, as it manages expectations, while allowing a fallback option that saves face for each of the parties. It can be more palatable for a party to travel when the party can justify the destination as 'neutral turf' rather than facing any kind of perception that the other party has 'won ground' on the location issue. It can set a certain tone of 'meeting in the middle' where possible.

Case Study 2: I won't come to the table unless …

Susan owns a franchise business and so does her friend Michael. They both own businesses within the same franchise system and have recently been discussing the fact that they are experiencing the same difficulties with their common franchisor. They have proceeded to request group mediation under the Franchising Code of Conduct.[6]

The franchisor has declined the suggestion of group mediation, based on the differences in the issues raised by the franchisees and a preference for addressing these issues confidentially with each franchisee. After overcoming this initial hurdle, Susan then asserts that Michael will be accompanying her to mediation for support. The franchisor will not agree to this. As a result Susan has now objected to the franchisor bringing a lawyer to the mediation and refuses to attend unless it is just she and the franchisor.

The battle of 'who brings whom' can be a very challenging one — for the mediator in particular! In this case there is no particular office procedure or 'fall-back example' other than the general principle of mutual agreement between the parties to mediation.

The Franchising Code of Conduct simply refers to 'parties' to mediation in Part 4 of the Code, which relates to dispute resolution. 'Parties' are defined as the complainant and the respondent in a dispute arising under the franchise agreement or this Code. This is taken to mean that no person other than the parties to the franchise agreement have the express right to be at mediation. Therefore, while there is no express right for a lawyer or support person to attend, there is no express denial of such a right. In the above example, this is where the parties became confused in their positional stances and began looking for something concrete to make the decision clearer for all involved.

From experience you will know that a situation like this does have a loophole — that of mutual agreement. But what if there is no mutual agreement on representation?

That is where creativity, doubt creation and basically the whole mediator's toolkit come into play — well before parties even sit at the mediation table.

Perhaps agreement can be reached on persons attending but not verbally

expressing points of view? Or perhaps representatives/advisors can be present outside of the mediation room, available for advisory discussion with their client/friend as the need arises? Or perhaps there can be agreement that only the two parties are present at mediation, but breaks are permissible for telephone advice to be obtained? There would of course also be issues of confidentiality agreements to be signed before these options could occur.

It may be that ultimately, where no agreement can be reached on the above, the question must be asked, 'Do the parties actually want to meet and work to resolve their issues?' If so, then great, as their ultimate need and goal is not dependent on the need for their advisor/support person to be physically present. If not, then perhaps there is not adequate good faith to make the process workable.

Case Study 3: Travel costs blues

Eva has issued Joe with a Notice of Dispute under one of the Australian mandatory codes of conduct. Eva has agreed to travel from her home state to Joe's home state for mediation if Joe will meet all of her travel costs. Joe has refused this initial suggestion but has agreed to the common practice of meeting half of the airfare for Eva's travel. Eva has responded that she will need to bring her business partner, accountant, lawyer and her cousin who is her business advisor. She would like half of each airfare paid to attend mediation. Joe finds this ludicrous and telephone calls to try and facilitate agreement on this issue have become excessive.

This is not uncommon, whether mediation is sought under a code or on a personal level. The challenge in this particular matter was made greater due to strong cultural differences between the two parties, and the styles of bargaining that are attached to each culture. The complainant in this matter saw each pre-procedural point as a bargaining chip and displayed a negotiation style that we will all be familiar with — ask for the most you can get and do not be seen to be backing down on any demand that you make.

Certainly our first appeal as a mediator might be to create doubts as to the viability of a party's demands — how do they think the other person might react to their request? We may need to dig deeper to ascertain the real underlying goals of the person making these demands and then work towards the party acknowledging whether their current position will help them to achieve these needs. A certain level of reality testing is going to be required and a level of patience and persistence that can withstand the tough positional, and in this case, culturally concreted negotiation style.

Again, ultimately we may need to make some kind of judgment call as to whether there is sufficient good faith to proceed with mediation. We may have done hours of work just at this preparatory level, so the tendency to feel one way or another on this point may be somewhat clouded. The added difficulty in matters like this is of course the mandatory nature of the Code that is being operated under. However, these codes can at least provide the external point of reference that may make reality testing and doubt creation somewhat easier.

We all have varied experiences with negotiation styles and cultural differences. This is a case that we might all benefit from hearing others' points of view and potential approaches.

Case Study 4: I am willing to mediate but …

Mark has been issued with a Notice of Dispute under the Franchising Code of Conduct and has been contacted by the Office of the Mediation Adviser[7] regarding the appointment of a mediator to the dispute. Mark has said that he is very willing to mediate but that the Notice of Dispute has been incorrectly addressed and that, as a company, he requires the correct headings and references on the Notice. He has said that he is happy to waive the three-week waiting period[8] after the issue of a Notice of Dispute, as this re-issued Notice will address the same concerns as the incorrectly addressed version.

Upon receiving the amended Notice Mark changes his mind. He is still happy to mediate, he says, but would like the three-week opportunity to resolve the matter directly. He argues that he is entitled to this period under the Code.

Three weeks goes by and there is no resolution. As a result a mediator is appointed. Two weeks later there are delays in agreeing to a date for mediation. Mark states that he believes the mediator to be biased and would like another mediator. A new mediator is appointed yet Mark now argues that the mediator does not have ample experience in franchise matters. Mark then changes his mind again after receiving further information on the mediator's experience. However, a further two weeks have elapsed and there is still no agreement on the date for mediation. Mark has remained firm on the fact that he is very willing to mediate but he is now not answering his telephone and email, or acknowledging post. The other party is frantic as they are losing money through these delays.

Does this person really want to mediate? It is easy to make a snap judgment here, but in our experience people may really want to mediate but may not quite be ready, whether emotionally, financially or otherwise. Allowing a few strikes before calling them out can be helpful. However, we do have to draw a line somewhere.

In terms of the Notice of Dispute, it is understandable that for business and record-keeping purposes, correct

… ultimately we may need to make some kind of judgment call as to whether there is sufficient good faith to proceed with mediation.

documentation may be necessary if not essential to a party. It is also conceivable that once receiving the amended Notice of Dispute the party may not have felt adequately prepared to negotiate and may have required further time.

In regard to the initial objection to the mediator appointed, this is also something that we have dealt with more than once, but thankfully not as a common occurrence! In a world of different personalities and social styles there are bound to be clashes, even between a mediator and a party. Therefore, for the sake of preserving the process, a change of mediator seems the most logical choice. However, when the appointment of a second mediator is questioned, alarm bells might start to be raised. In this example the party required further information and the matter was therefore dealt with.

However, this process is the parties' process, not one party's process alone. If we are to establish the most level playing field that we can in the circumstances, we need to consider not only both parties but also the preservation of the process.

Persistence and patience are paramount, but so is a reality check and a process that is and appears to be equal in its consideration of both parties.

If all the necessary strikes have been given and all of the possible opportunities provided, then it might be time to call it a day. Once again, under the Australian mandatory codes there is at least the external benchmark of mandatory attendance and the reference to possible consequences of non-attendance that can be used in your reality testing.

Case Study 5: Different strokes for different folks

Party A and Party B both wish to mediate under one of the Australian mandatory Codes of Conduct. However, there is a problem. Party A wants the mediation to go through the office appointed by the Federal Government to administer dispute resolution under the Code, while Party B is aware of a state-based scheme that is subsidised by State Government and is therefore a fraction of the cost of mediation under the federally-appointed office. Party A is adamant that they want this mediation to be done completely in line with the Code and its procedures and they will not budge on this point. Party B refuses to pay additional money for mediation when there is a lower cost option. Both are desperate to mediate but neither will budge on the issue of which office they will go through for mediation to occur.

A mediator's gem — both parties want to mediate! Where we are assured that good faith is present it then becomes a question of being creative.

In this particular matter each of the parties was staunch in their preferences, yet there was a blend of great frustration and anxiety to get the process started.

You may have a number of ideas as to how you might progress this matter. Here is what we did: we approached the state-based service, as they had also been dealing with this matter from their end. Together we were able to negotiate a variance to our respective processes in order to meet the procedural needs of both parties.

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Through a joint appointment, a co-mediation was set up using two mediators that were panel members under both schemes. The mediation was structured in ways that, as a one-off, worked well, using paperwork from one service yet the fee structure from the other.

This scenario serves as a good example of the creative solutions that are possible even at a pre-procedural stage.

Conclusion

As mediators, each dispute that we are invited to facilitate opens up a new world of information and personalities that we are momentarily consumed by. What many disputants will not initially realise is that the mediation process does not begin at the table and end at the door. It is a process that begins from the moment we are invited to mediate and if the preparatory period is one day or 10 weeks, that is the time that we spend in that dispute prior to even setting foot into the mediation room and sitting at the mediation table.

During this preparation time the obstacles can seem both enormous and numerous and in many respects they can be more challenging than the obstacles faced once sitting with the negotiating parties. Some of these obstacles will be familiar to us from past disputes, while others will be completely new and initially baffling! Sometimes, the obstacles may be familiar but there will be several of them and the challenge lies in which one we battle with first. Ultimately, where there is a will there is a way, and every mediator has the strong will and desire to help parties though the process — that is why we choose this as a profession. The ongoing challenge comes from the need to remain positive and creative in managing these pre-procedural obstacles.

Creating a forum for the exchange of ideas can be very productive and personally refreshing and revitalising. It is my hope that the case studies presented to you here have opened up new ideas and possibilities for you as a mediator, and created a positive and refreshing feeling about the numerous potential paths that can be explored, regardless of the obstacle that you are

presented with. Best of luck for the challenges and rewards that lie ahead. ●

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Endnotes

1. *Trade Practices (Industry Codes — Franchising) Regulations 1998*. A mandatory code under the *Trade Practices Act* relating to franchise agreements. The Code requires parties to attend mediation when the dispute resolution procedures of the Code have been undertaken and a request for mediation has been made.

2. *Trade Practices (Horticulture Code of Conduct) Regulations 2006*. A mandatory code under the *Trade Practices Act* that covers transactions between growers and traders. Parties are required to attend mediation once a written notice of dispute has been sent and mediation has been requested.

3. *Trade Practices (Industry Codes — Oilcode) Regulations 2006*. A mandatory code that requires attendance at mediation when one party requests that a mediator is appointed. No formal written notice is required to initiate mediation. The Code applies to participants within the petroleum industry — suppliers/retailers/distributors.

4. An industry code based on best practice principles and applying to the vertical chain of supply between growers, wholesalers and retailers. Becoming a signatory to this Code is voluntary, although participation by major retail chains and wholesaler bodies is high.

5. Code of Conduct for Film Exhibition and Distribution is a voluntary industry code that defines best practice for business/supply relationships between film exhibitors and distribution companies. There is a high level of industry support for this Code evident through its signatory list.

6. The Franchising Code refers to parties to a franchise mediation being the parties to a franchise agreement. It does not refer to group mediation. However, the general principle of flexibility of the process and mutual agreement by the parties to the process makes group mediation a possibility where the issues are the same or largely similar and where there is agreement by both parties to address group-shared issues through group mediation. Where there is agreement for group mediation to occur it is an exception to common practice.

7. The Office of the Mediation Adviser is set up under Part 4 of the Code to administer dispute resolution through the appointment of mediators to franchise disputes.

8. The Code sets out the procedure for dispute resolution. The first step is to send a written notice to the other party, setting out the nature of the dispute and the desired outcome and action to resolve the matter. There is a 21-day period set aside to negotiate the matter directly. Where no resolution is reached after 21 days, either party may request that a mediator be appointed.

ADR DEVELOPMENTS

Mediation by the UN

On 23 September, a high-level public meeting was held by the UN Security Council. The meeting was chaired by Blaise Campaoré, the president of Burkina Faso and the current chairperson of the Economic Community of West African States (ECOWAS). Prior to the meeting, Burkina Faso circulated a concept paper entitled 'Mediation and settlement of disputes'. This paper identified a number of objectives for the meeting including:

- to determine the significance and condition of the UN activities and mechanisms in the area of mediation;
- to consider ways of making UN mediation more effective in both operational and institutional terms;
- to assess the roles of existing sub-regional and regional mechanisms for mediation and make recommendations for enhancing their effectiveness;
- to explore avenues to improve coordination of mediation activities; and
- to present a platform for the exchange of experiences in mediation among major personalities, civil society and entities involved in mediation activity.

As a result of the meeting, the Security Council reaffirmed 'the UN's role in mediation efforts and requested a report from the Secretary-General in six months on UN mediation and possible ways to improve it.'

Further information can be accessed at <www.securitycouncilreport.org/>. ●

Four key areas to mediation quality

A recent report brought out by the American Bar Association's Task Force on Improving Mediation Quality has identified four key issues that are important to mediation quality. The task force focused on private practice civil cases where parties are represented by counsel. The issues were:

- preparation for mediation by the mediator, parties, and counsel;
- case-by-case customisation of the mediation process;
- 'analytical' assistance from the mediator;
- 'persistence' by the mediator.

As a result of their investigations the task force has made recommendations such as the development of comprehensive mediation user guides; further examination of quality (in other mediation contexts), training implications, analytical techniques; promotion of local efforts to improve mediation quality; and pamphlets for mediation users and for mediators.

The full report can be accessed at <www.abanet.org/dch/committee.cfm?com=DR020600>. ●

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