

Alternative Dispute Resolution in Arbitration: Is arb-med really an option?*

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INTRODUCTION

Considerable change has taken place in recent years regarding the way in which civil litigation is conducted in a number of jurisdictions around the world, including in both Victoria and New South Wales. Legislation introduced in both States¹ has seen the just, cost-effective and timely resolution of disputes become a guiding principle in civil litigation, by providing the Courts “with a powerful mechanism to exert greater control over the conduct of the parties and their legal representatives, and thus over the process of civil litigation and the use of its own limited resources.”²

With a greater emphasis being placed by the courts on the efficient conduct of proceedings, arbitrators and arbitral institutions must ensure that arbitration processes continue to develop along a similar line, to ensure that arbitration remains an attractive choice within which parties are able to resolve their disputes. One option that is often suggested as a means to promote the efficiency of arbitration, is through the use of hybrid processes aimed at facilitating early settlement.

The concerns which are raised by the hybrid process, particularly in relation arbitrated, or med-arb, processes are well-known. It has been suggested that the common criticisms are seen as both procedural and behavioural in nature. While there is legitimacy to some of the arguments put forward as to why the use of early settlement procedures may not be appropriate in certain circumstances – namely when the same person both mediates and arbitrates – it is important that the concerns surrounding these processes do not unnecessarily detract from the benefits which may flow through including mediation in an arbitration process.

¹ See *Civil Procedure Act* (Vic), s. 7; and *Civil Procedure Act* (NSW), s. 56.

² *Yara Australia Pty Ltd v Oswal; Carson & ors v Oswal; ANZ Banking Group Limited v Oswal; Apache Fertilisers v Oswal* [2013] VSCA 337 :(collectively referred to as the “*Oswal Proceedings*”), para 21.

Behavioural Concerns of the Parties:

One of the most commonly recognised behavioural concerns with arb-med is that disputants are likely to be inhibited in their discussions with the mediator if they know that the mediator is, or is likely to be, acting as arbitrator in the same dispute.³

This, of course, can impede any forthrightness, or bargaining creativity, that a party may display. In particular, the parties are unlikely to let the mediator know what settlement proposals they are likely to accept.

Another commonly raised concern is that having the arbitration procedure sitting as an end-point may lead to parties to treating any mediation set down in an arb-med process as merely preparation for the arbitration. By engendering such attitudes amongst the parties, the purpose of the mediation can be defeated, as any creative problem solving that may arise from the dialogue, disclosure and compromise in the mediation can be lost.

Concerns regarding behaviour of parties may be overstated

Placing too much emphasis on the negative aspects that the arb-med process can create regarding the behaviour and manner of the parties is, in my opinion, often overstated, and fails to fully grasp the reason why the process is implemented in the first place.

Whether the mediation takes place as part of the arbitration process, or by an order of a court, or even simply with the agreement of the parties as they attempt to resolve a dispute before either side seeks any type of formal adjudication, parties to a mediation will only ever be as forthcoming as they think appropriate. Often disputed facts will be well-aired in joint sessions and there is little risk that the

³ A Limbury, "Getting the best of both worlds with Med-Arb" (2010) 48(8) *Law Society Journal* 62 at 63.

judgment of the arbitrator will be poisoned by private caucuses.⁴ In the event that this may occur, the procedural steps set out in s 27D of the *Commercial Arbitration Act 2010 (Vic)* (“the CAA”) can operate to prevent harm being done.

Should the parties fail to be as forthcoming in the mediation as they may otherwise be, such that the mediation fails, the dispute simply refers back to arbitration for final resolution

Procedural Concerns - Caucusing and Issues of Fairness:

Perhaps the more pressing issue for arbitrators relates to criticisms of a procedural nature which may bring into question the neutrality and fairness of the arbitration, particularly where the arbitrator may have received private representations from either of the parties when acting as a mediator.

The concept of procedural fairness requires that arguments be made in the presence of the opposing party and be subject to rebuttal. This concept, by its very nature, creates a dichotomy between the confidentiality of private disclosures made during caucusing against the transparency of arbitration.

It is important that due consideration is given to any concerns surrounding the procedural integrity of the arbitration process. In a South Australian Supreme Court⁵ case from 2003, the issue of procedural integrity within the Court was discussed when a judge disqualified from hearing a case where he had mediated between officers of the parties some years before being appointed to the bench, where the following principles were stated:

⁴ Tom Arnold, ‘A Vocabulary of Alternative Dispute Resolution Procedures’ in E. Wendy Trachte-Huber and Stephen K. Huber (eds), *Alternative Dispute Resolution: Strategies for Law and Business* (Anderson Publishing Company, 1996) 816.

⁵ *The Duke Group Ltd (in Liq) v Alamain Investments Ltd & Ors* [2003] SASC 272.

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 case which he has to decide.⁶

The very same principles apply in relation to arbitrators. An arbitrator may appear to be, and may even actually be, biased if they have received private representations from the parties while acting as the mediator. In this regard, and in the interests of promoting trust from the parties in the arbitral process, the quest for balance in procedural integrity entails a spectrum of situations in which mere perceptions of bias should be given equal weight to real bias. An arbitrator should not be put in the position where they have formed an opinion on a matter in controversy prior to hearing evidence and argument.⁷

Again, the procedural steps set out in s 27D of the CAA can operate to alleviate party concerns, as well as operating to maintain integrity in the arbitral process. The important point that needs to be kept in mind whichever way one frames the arb-med, or med-arb, debate, is that by its very nature, it is a hybrid procedure that is designed to combine the advantages of both mediation and arbitration in a complementary fashion. It cannot be expected that a perfect form of both mediation and arbitration can merge together without some form of compromise being made

With this in mind, I don't believe that it is unreasonable to suggest that many of the concerns raised against the use of the arb-med process are somewhat misguided, particularly when one views the steps that are provided in s 27D of the CAA.

PROCEDURAL STEPS - THE COMMERCIAL ARBITRATION ACT

⁶ *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 250 (Mason J)

⁷ William W. Park, 'Arbitrator Integrity: The Transient and the Permanent' (2009) 46 *San Diego Law Review* 629 at 635

It has been said that s 27D is the most controversial section in the CAA.⁸ Similar provisions occur in the Singaporean and Hong Kong Arbitration Acts. Unlike arbitrators in other countries, Australian Arbitrators are not accustomed to acting as mediators in the one action. The lack of arb-med, or arb-med, proceedings in Australia is perhaps reflected in the fact that neither the IAMA, nor the ACICA, Rules, provide any guidance or provisions for it

Section 27D of the CAA, however, despite some of the criticism, as well as a general lack of use of the section, does at least provide some support to promoting the potential to use arb-med without encountering many of the procedural problems that surround such methods.

The first important point that s 27D addresses is the pre-conditions in subs (1) which first must be satisfied is that, before an arbitrator can act as a mediator, the parties must consent in writing. Where either side has concerns about the integrity of the process, or otherwise, they simply do not need to consent.

Subsection (2) provides guidance for the arbitrators as to the procedures they must follow when acting as a mediator, allowing them to meet with parties separately or collectively, while also requiring the arbitrator/mediator to keep any information obtained while caucusing with the parties confidential, unless given specific instructions to divulge part or all of that information to the other party or parties or unless the arbitration agreement provides otherwise.

This requirement of confidentiality is tempered somewhat by a discretion given to the arbitrator should the mediation fail. Where this is the case, the arbitrator maintains the discretion to disclose information obtained at individual caucusing during the mediation which is considered to be material to the arbitration proceedings. There is no requirement for the arbitrator to disclose all confidential

⁸ For a comprehensive discussion on the New South Wales counterpart to s 27D and the legislative developments which preceded the current version, see Doug Jones, *Commercial Arbitration in Australia* (Thomson Reuters (Professional) Australia Limited, 2nd edition, 2013)

information obtained in the mediation process but only that part of the confidential information which the arbitrator considers material to the arbitral proceedings. The parties must have trust and faith in the arbitrator to make this disclosure.

While this provision may bring back into consideration concerns that such disclosure can inhibit a party from fully engaging in the mediation process, these concerns can again be displaced when one looks at the provisions of s 27D. Where a party has a concern about the disclosure of confidential information during caucusing, subs (4) provides that upon a mediation being terminated, an arbitrator who acted as a mediator cannot, without the written consent of all the parties to the arbitration, conduct subsequent arbitration proceedings. In this way, the parties are aware of the dual role played by the arbitrator and are required to sanction the reinstatement to the role of the arbitrator.

As I mentioned earlier, to this point this provision has not been utilised, to my knowledge, in Australian proceedings. The relatively simple steps that the section outlines does highlight, however, how many of the concerns that may have traditionally arisen during discussions on the merits of the arb-med procedure, can be easily addressed with the consent of the parties.

OPTIONS FOR A PRO-ACTIVE TRIBUNAL

For the purpose of setting a context for these comments, I observe at the outset that there is far greater similarity between commercial arbitration proceedings and those adopted by courts, such as the Commercial Court in the Supreme Court of Victoria, than is generally understood. We see, continually, the now rather hackneyed comparisons made between arbitration and civil litigation in the courts – and the advantages of the former. In saying this, I am not suggesting that there are not real advantages in well run arbitration processes, but there are also advantages in well managed litigation processes – all of which need to be properly considered by

parties and their advisers in deciding which process to utilise, to the extent that they may have a choice.

Many years ago now I said at a conference attended by a number of judges that we had seen in Australia constructive “competition” between arbitration and the developing judge-managed commercial divisions or commercial lists, particularly in the Supreme Courts of Victoria and New South Wales and the Federal Court of Australia. Judge management in a docket system, use of witness statements and expedited procedures made arbitration, as it was then being conducted, look very slow and expensive by comparison. Arbitrators looked at what the courts were doing and arbitration became more efficient and attractive. The courts, in turn, had regard to these developments in arbitration processes and further developed more efficient and attractive litigation processes. So the process of development of arbitration and litigation continued – and continues now.

The judges at that conference looked horrified. Competition from an “inferior” jurisdiction – what temerity! Fortunately, this kind of thinking is a thing of the past, and a cooperative and constructive approach to dispute resolution is the norm – every effort now being made to ensure that the dispute resolution process adopted by parties best suits the nature of the particular dispute and its elements. Indicative of this position is the legislative imperative in Victoria to apply appropriate dispute resolution processes – as defined in the *Civil Procedure Act 2010* (Vic) (“the CPA”):⁹

appropriate dispute resolution means a process attended, or participated in, by a [party](#) for the purposes of negotiating a settlement of the [civil proceeding](#) or resolving or narrowing the issues in dispute, including, but not limited to –

- (a) mediation, whether or not referred to a mediator in accordance with rules of [court](#);
- (b) early neutral evaluation;

⁹ Section 3.

- (c) [judicial resolution conference](#);
- (d) settlement conference;
- (e) reference of a question, a [civil proceeding](#) or part of a [civil proceeding](#) to a special referee;
- (f) expert determination;
- (g) conciliation;
- (h) arbitration;

Moreover, against this background it should be emphasised that the flexibility of the procedures adopted by the Commercial Court in Victoria enable a judge hearing a trial to apply the same procedures and techniques that would be expected of a commercial arbitrator in the same circumstances – in other words, a modern court of this kind can, relevantly, do anything an arbitrator can do and, in many instances, more quickly.¹⁰ Again, I emphasise that I am not discounting some of the real advantages of arbitration, nor am I discounting the real advantages of this kind of litigation - simply emphasising that there is real competition between dispute resolution options, competition which should advantage the parties.

Case-Management Principles in the Court

My personal experience sitting as a Judge in the Commercial Court, and as the head of the Arbitration List, in the Supreme Court has led to me to strongly believe that the case-management principles that have been set down with the introduction of the CPA have begun to significantly shift the culture of civil litigation in Victoria.

This has been achieved in two ways. First, the changes implemented through the Act have begun to create a culture in which litigants are encouraged to resolve their

¹⁰ *Supreme Court of Victoria, Commercial Court, Practice Note 10 of 2011.*

cases without going to court, and where litigation is seen as a measure of last resort. The second aspect has been the focusing on the building of a culture within the court system that encourages litigants and, perhaps even more importantly, their lawyers to use “reasonable endeavours to achieve early resolution of cases by agreement, using appropriate dispute resolution processes where appropriate or to narrow the issues in dispute, except where the interests of justice require access to the court, or where the dispute is of such a nature that only judicial determination is appropriate.”¹¹

While the courts have always had the inherent jurisdiction to manage their own proceedings, the force that the overarching obligations of the Civil Procedure Act have on the minds and conduct of the parties to litigation, have greatly assisted in achieving more efficient, timely and cost-effective resolution of civil disputes.

REGIONAL DEVELOPMENTS IN MEDIATION

With the introduction of the CPA, court-ordered mediation has increasingly played an important role in the case management principles at the court’s disposal. Provided it is appropriate, orders will almost always be given at the first or second directions hearing that the parties are to attend mediation. Given the many highly regarded mediators at the Victorian Bar, this process has assisted greatly in early resolution of disputes.

Mediations are also conducted regularly by associate judges or the judicial registrar of their own motion and upon referral by judges or associate judges, and also arising from practitioners making requests and applications.

In 2012-13 there were 259 cases where a mediation was listed before an Associate Judge or Judicial Registrar. Of those that proceeded, 131 were settled at mediation, 62 were not resolved, and the balance were either part finalised, adjourned or vacated.

¹¹ Explanatory Memorandum, *Civil Procedure Bill* 2010 (Vic), 1

Judicial mediations conducted in 2012-13 have increased when compared with earlier years, predominantly because the associate judges and judicial registrar have responded to the increase in demand. Publication of Practice Note No. 2 of 2012 – *Judicial Mediation Guidelines*, has also raised the awareness of the availability of judicial mediation. The demand for proceedings to be mediated by associate judges or a judicial registrar is now exceeding availability.

Given the success that the Court is having with utilising mediation, both judicially or otherwise, in achieving early and cost-effective resolution for parties, it would be remiss to disregard mediation as an effective tool in arbitration proceedings. While there is legitimacy in a number of concerns that may arise in regard to arb-med processes, it is important that these concerns are not overstated to the point that the benefits of mediation are lost.

INTERNATIONAL JURISPRUDENCE

***Gao Haiyan v Keeneye Holdings Ltd*¹² (“Keeneye”)**

Given that there is little international jurisprudence that has arisen out of arb-med proceedings, it is worth noting a recent Hong Kong decision in which the Hong Kong Court of Appeal allowed the enforcement of a mainland Chinese arbitral award, reversing a decision of the Court of First Instance to refuse enforcement on the grounds of public policy.

In *Keeneye*, there were a number of irregularities in the conduct of the proceedings, including the fact that the mediation was conducted by one of the party appointed arbitrators in conjunction with the Secretary-General of the Xian Arbitration Commission, despite the parties not having approved the Secretary-General to operate in this capacity. It was also somewhat unclear as to whether the time and place of the mediation was assented to by the parties, and why the mediators did not

¹² *Gao Haiyan v Keeneye Holdings Ltd* [2011] 3 HKC 157

invite the respondent's lawyers to the mediation, instead inviting another individual who was known to be "friendly with" the respondents.¹³

In allowing the appeal, the Court of appeal approved the enforcement of the award in Hong Kong on two principal grounds.

Ground 1: Waiver by Keeney of its right to object

The Court of Appeal found that the respondents had waived their right to complain about the procedure of the mediation by choosing to continue with the arbitration proceedings. By failing to raise any objection to the arb-med procedure during the arbitration itself, the respondents had waived its right to do so in the enforcement proceedings.

The Court of Appeal also emphasised the principle that is not open to a party to keep a complaint regarding impropriety or bias "up its sleeve" for potential use at a later point.

Ground 2: no apparent bias

The second ground for the Court of Appeal's decision was that, in any case, the arb-med procedure adopted did not disclose apprehended bias giving rise to an issue of public policy. The circumstances of the case which the Court of First Instance had held established apprehended bias included, inter alia, the fact that the mediation took place in the form of a private meeting over dinner, it was not held in the presence of both parties, and the mediators appeared to make a settlement proposal of their own initiative.

In concluding that there was, in fact, no apprehended bias, the Court of Appeal placed considerable emphasis upon the need to understand how mediation was conducted in mainland China. Both the arbitration and the mediation took place in Xian, and thus the proceedings were subject to the arbitration law of Xian. The fact

¹³ *Gao Haiyan v Keeneye Holdings Ltd* [2011] 3 HKC 157 at [22] in Doug Jones, *Commercial Arbitration in Australia* (Thomson Reuters (Professional) Australia Limited, 2nd edition, 2013), 350.

that the respondents had already attempted, unsuccessfully, to have the award set aside in the Xian Intermediate People's Court of Shaanxi was seen as a very strong policy consideration for the court to take into account in deciding whether or not to enforce the award.

The mere fact that the procedure adopted would give rise to an apprehension of bias if adopted in Hong Kong will not necessarily amount to a breach of public policy if the procedure is acceptable practice in the jurisdiction in which it took place, unless it was so serious as to be contrary to fundamental conceptions of morality and justice.

CONCLUSION

The challenges of modern dispute resolution – whether it be by arbitration, litigation or other processes – become more pressing as the cost and complexity of proceedings grows and continues to grow very significantly. This will be particularly so with arbitration. It comes as no surprise that there has been a great increase of international arbitrations being heard in the Asia-Pacific region over the past few decades.¹⁴ This can in part be attributed to developing and rapidly industrialising economies, particularly those in Asia, which in turn leads to an increase in business opportunities, dealings and disputes that follow. In order to keep pace with the pressures of both the changing economic and litigation environment, it will become increasingly important to ensure that the timely and efficient conduct and resolution of the arbitration proceedings remains a primary goal.

¹⁴ See Simon Greenberg, Christopher Kee and J. Romesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge University Press, 2011) at 33-43.