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Recent legislative attempts to introduce arbitration-mediation in New South Wales

The use of a fused process involving both arbitration and mediation to resolve an international dispute

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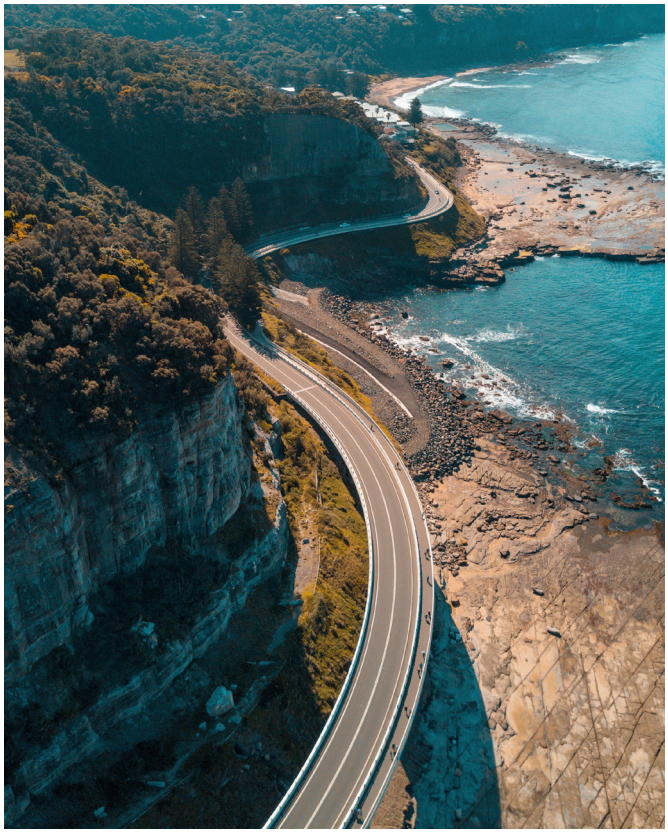

This is the second briefing note on the use of a fused process involving both arbitration and mediation to resolve an international commercial dispute that has been referred to arbitration. This note will examine the recent legislative attempts to introduce the use of arb-med in New South Wales.

The use of a combined process has had legislative support in domestic arbitration in New South Wales since the enactment of s.27 of the (now repealed) *Commercial Arbitration Act 1984* (NSW). This section provided that the parties to an arbitration agreement could authorise an arbitrator to act as a mediator between them, before or after proceeding to arbitration. If the dispute was not resolved in the mediation, no objection could be taken to the subsequent conduct of the arbitration solely on the ground that the arbitrator had previously acted as a mediator in the dispute. Further, unless the parties otherwise agreed in writing, the arbitrator was bound by the rules of natural justice (nowadays called 'procedural fairness', although sometimes called 'due process') when seeking settlement as a mediator. There was no or virtually no resort to this hybrid process contemplated by s.27 of the 1984 Act. This is most likely because once parties had agreed to the Arb-Med-Arb process, they would have no opportunity to opt out of having the arbitrator continue with the arbitration following a failure of the mediation to resolve the dispute.

The requirement to observe the rules of natural justice during the mediation phase also meant that, if private sessions were held, any subsequent arbitral award could be set aside by a court as contrary to those rules since one or more of the parties would not have been given an opportunity to know and respond to the case it had to meet. Also it was possible to argue that an award made by a tribunal which had allowed a party to communicate information confidentially to the tribunal during the mediation phase, should be set aside as the tribunal's conduct had the appearance of bias.

s.27D – Improved arbitration-mediation procedure

In the opinion of most mediation specialists in Sydney these serious problems in domestic arbitration/mediation were fixed in 2010 when the 1984 legislation was repealed and the provision replaced by s.27D of the *Commercial Arbitration Act* 2010 (NSW). Under the procedure contemplated by the current s.27D:

(1) **The parties must agree in writing before the arbitrator may mediate.** *Comment:* this ensures the arbitrator may not attempt to mediate without the parties' written consent.

(2) **When acting as a mediator, an arbitrator may communicate separately with the parties and, unless otherwise agreed, must treat any information obtained in the course of such communications as**

confidential.

Comment: this enables the mediator to explore creative possibilities for resolution (such as enlarging the pie) that cannot be properly addressed in the arbitration, which is confined to determination of who is right, who is wrong and what should be the consequences flow from that determination.

(3) **The mediation terminates by the agreement of the parties, the withdrawal of a party or by the decision of the mediator**.

Comment: as with 'normal' mediation, as distinct from a combined process, the parties may withdraw at any time, whether or not there has been a resolution of their dispute. The arbitrator turned mediator may also decide that the continuation of the process is likely to be unproductive and terminate the mediation.

(4) **For an arbitrator who has acted as a mediator to continue with the arbitration, the parties must give their written consent upon or after the termination of the mediation, in which case no objection may be taken to the arbitrator's subsequent conduct of the arbitration solely on the ground that the arbitrator acted previously as mediator.**

Comment: this is perhaps the most important improvement to the previous legislative regime. The parties may embark on the process with greater confidence and may speak frankly and freely in the mediation phase because they know in advance that they may opt out of any continued arbitration after the termination of the mediation phase. The parties retain control over the process. Party autonomy in the mediation! If anything were to happen during the mediation which makes them feel uncomfortable with the mediator resuming as an arbitrator, they may withhold their written consent to that course. The fetter on subsequent objection is confined to the mere fact that the arbitrator acted as mediator in the same dispute, so any other objections to the arbitrator's subsequent conduct may still be taken by the parties.

(5) **If the parties do not so consent, the mandate of the arbitrator is taken to have been terminated and a substitute arbitrator is required to be appointed.**

Comment: this means that the initial arbitrator will remain bound to keep confidential anything learned in private session during the mediation. It also suggests that the parties should agree that the mediation should take place early in the arbitration process (for example, as soon as the issues to be arbitrated have been identified) so as to avoid the possibility of wasted arbitration costs in the event that a substitute arbitrator would have to start the process all over again.

(6) **Before continuing with the arbitration following termination of the mediation, the arbitrator must disclose to all parties any confidential information obtained during the mediation which the arbitrator considers to be material to the arbitratio**n.

Comment: although this seems at first sight to be a surprising idea, in practice no sensible disputant or legal advisor to a disputant in a common law jurisdiction would be willing to agree to the arbitrator continuing with the arbitration without first ascertaining what confidential information had been provided in the mediation that the arbitrator regards as being material to the arbitration. Upon being so informed, the disputant may decide to refuse to give consent to the arbitrator continuing with the arbitration or may decide to give consent. It would make sense for the party or its advisor to ask for any such information to be provided in writing before making that decision so that, if the arbitration were to continue, each party and the arbitrator would be in no doubt as to precisely what confidential information imparted to the arbitrator in the mediation by that party is to be disclosed to the other parties and so that any award based on undisclosed confidential information may be set aside for lack of procedural fairness or bias. Similar legislative provisions have been adopted in Hong Kong and Singapore.

Critical factors for successful arbitration-mediation

It is important not to assume that this form of combined process will work in any dispute. It is even more important not to assume that it will never work which seems to be the case at present, because despite the problems

in domestic arbitration having been fixed by s.27D, there does not appear to be any instance where the section has been used since its enactment in 2010.

1) One key factor likely to be critical to the success of this combined use of arbitration and mediation, is choosing the kind of dispute that appears to lend itself to a creative solution irrespective of who is right and who is wrong.

2) Another factor likely to be critical to the success of this combined process, is choosing a dispute in which the parties' decision-makers appear reasonable and willing to engage in assisted negotiation to find their own solution. As with most disputes, success of the process will depend on 'fitting the forum to the fuss'.

3) It is, and will also be, important to select an arbitrator with expertise as a "facilitative" mediator, as distinct from an "evaluative" one. Briefly, a facilitative mediator will not express any of his or her views on any aspect of the dispute. An evaluative mediator will consider and evaluate each party's position and may express his or her views on aspects of the dispute. By having a facilitative mediator this will avoid having the arbitrator express an opinion in the mediation phase on the merits of a party's case (facilitative mediators don't do this) and it should also avoid any discussion in the mediation phase of a party's 'bottom line', that is the least amount that they will accept or pay to settle the dispute. This is a matter that should be irrelevant to the desired discussion of possible creative solutions but which may influence the outcome of any arbitration if it were to resume.

Conclusion

Unfortunately, in Australia arbitration and facilitative mediation are seen as different worlds, inhabited by different species. This may be a consequence of the relatively recent advent of mediation in commercial disputes

There is hope that the increasingly sophisticated requirements of corporate counsel and executives for speedy and less costly resolution and the emergence from Law Schools of graduates familiar with the full range of adjudicative and non-adjudicative ADR processes, will see the emergence of arbitrators who are also skilled in facilitative mediation and facilitative mediators who are also skilled in arbitration.

Then perhaps a combined process may be used to some advantage in resolving disputes.

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This briefing is based on a lecture series Malcolm presented in Beijing, PRC in May 2017.

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