THE ARBITRATORS' ROLE IN MEDIATION AND DISPUTE RESOLUTION

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The text of this article is based upon views expressed by the author at an Institute Members' Forum held in Melbourne on the 16th October 1985 at which Mr Golvan and Mr Brian Gallagher, Building Consultant, considered the ramifications of Section 27 of the Commercial Arbitration Act 1984.

Section 27 of the *Commercial Arbitration Act* 1984 can, in my opinion, be read as a wide ranging provision which entitles an arbitrator to order the parties to take whatever steps he thinks suitable to achieve a settlement of the dispute; either prior to the arbitration proceedings, or whilst the arbitration is continuing. Attendance at a mediation conference conducted by the arbitrator is merely one of the options which an arbitrator can direct—but by no means the only one. Section 27 should be seen in context with s. 14 which gives a power to the arbitrator to determine his own procedure. Procedures ordered by an arbitrator for the purpose of facilitating settlement of a dispute may also be very useful in narrowing the issues and assisting with the organised presentation of the arbitration if mediation is unsuccessful.

Obviously, the prospects of settlement are enhanced if parties have a full and realistic appreciation of the strengths and weaknesses of both their own and their opponents cases. Any direction which requires a party to formulate his own claims in precise terms or enables a party to better understand the opposing claims assists settlement. In this regard, s. 27 appears to entitle an arbitrator to take steps such as: directing an exchange of experts' reports at a relatively early stage, or compelling the parties to prepare a "Scott Schedule" conveniently summarising the parties' own contentions and monetary claims.

It seems to me, that the power given under s. 27 would also entitle an arbitrator in the course of the hearing to give some indication as to his thinking concerning the dispute, or some aspect of it, and if approp-

riate adjourn the hearing for some time to enable the parties to re-assess their positions. For instance, a significant portion of a dispute may concern whether allegedly defective work should be demolished and reconstructed. If the arbitrator is of the opinion, after viewing the site and hearing some evidence, that although some rectification is necessary demolition and reconstruction could not reasonably be justified, I consider that an arbitrator should in a constructive manner make apparent his line of thinking, without finally pre-judging the issue, so that time is not wasted during the arbitration by a series of witnesses being called to assess the costs of demolishing and reconstructing the defective works. Furthermore, a party, if his case rests upon the arbitrator determining that defective works should be replaced rather than rectified, should be given the opportunity to reconsider his position in light of the arbitrator's prima facie views, before he unnecessarily incurs further costs in pursuing a potentially futile claim.

It may well be that an arbitrator upon being furnished with copies of the experts' reports exchanged by the parties considers that neither of the experts engaged has really understood the particular problem and that they propose solutions which can be improved upon. I believe that an arbitrator could facilitate settlement by directing that the parties obtain the opinion of an independent third expert, who may be in a position to offer some compromise solution, which is in the interests of both parties and would be likely to result in the settlement of the dispute. Again, this is the sort of direction which I believe an arbitrator can make under s. 27.

I also consider that there is a power under s. 27 to enable an arbitrator to direct that the parties attend a mediation session before an independent mediator, other than the arbitrator. My own view is that this should only be done with the parties' consent. If a party wishes to have a dispute resolved by adversarial procedures then he is entitled to do so. Mediation should not be imposed upon unwilling parties.

Mediation has been shown to work in a surprisingly high proportion of cases where both parties agree to use mediation as a preferred method of dispute resolution. In New South Wales Community Justice Centres have been established to deal with minor civil disputes and the statistics consistently show that once the parties sit down to the mediation table 80% to 85% reach an agreement. This high rate of success has also been established in similar mediation projects in the United States and in the extensive Mediation Committees in China*. At present in Victoria we do not have a body of persons with expert skills in mediation techniques. There have been mediators appointed pursuant to the Building Cases Rules of the County Court, but it is disappointing that no steps have been taken to require mediators to attend any course or programme in mediation techniques. I believe that it is imperative that the Institute of Arbitrators establish a register of members who possess specific experience or skills in mediation and who can be called upon to conduct a mediation session if requested to do so, either as a result of being approached by parties in dispute directly, or as a consequence of a consentual direction given under s. 27 of the *Commercial Arbitration Act* 1984.

I have raised the option of an Arbitrator directing that the parties attend a mediation session before an independent mediator as this would

enable the dispute to be returned before the arbitrator if mediation does not work, without there being any danger of the arbitrator compromising his position by seeking to mediate the dispute himself. I have grave doubts concerning the advisability of an arbitrator seeking to act as a mediator in a dispute and subsequently, in the event of the mediation not working, taking the role of arbitrator to determine the dispute.

In the first place, successful mediation necessarily involves the parties in being open and frank about their negotiating positions on the basis that anything which is said during the mediation session or any concessions which are made, are entirely without prejudice. Parties to a dispute are unlikely to be open and frank concerning their negotiating positions if they are aware that the mediator will subsequently act as arbitrator in the dispute if the mediation is unsuccessful. For example, a claimant may be claiming $10,000.00 in an Arbitration but for the purpose of a prompt resolution of the dispute may be prepared to forego a legitimate aspect of his claim and accept a lesser figure. However if the dispute is not promptly settled the claimant may well desire to pursue his original claim with vigour. The claimant in these circumstances would be most reluctant to make such a concession in the presence of an arbitrator/mediator as he would have a very legitimate fear that his ability to pursue his legitimate claim may be seriously compromised by the arbitrator/mediator's knowledge of his willingness to accept a lesser amount. I think that an arbitrator would also have to doubt his ability to act impartially in a future arbitration if he forms views concerning the reasonableness or otherwise of the parties during the mediation conference and also their willingness to accept or pay amounts which are inconsistent with their claims. There is also the problem of monies paid into Court and open offers. Clearly the fact that offers have been made or monies paid into Court is a matter of very real significance in any mediation conference and may explain why a party is taking a particularly rigid position in settlement negotiations. An arbitrator should not be made aware of the state of settlement negotiations or the existence of monies paid into Court. These seem to be insurmountable problems to an arbitrator also seeking to simultaneously wear the hats of a mediator and arbitrator.

There is also the consideration that whilst s. 27 provides that "no objection shall be taken to the conduct by the arbitrator of the subsequent arbitration proceedings *solely* on the grounds that the arbitrator had previously conducted a conference in relation to the dispute", it may well be that an arbitrator's participation in a mediation conference could very readily lead to accusations that his activities as a mediator are not consistent with his possessing true impartiality if he later seeks to act as arbitrator. An arbitrator commits an act of "misconduct" pursuant to the definition of "misconduct" in the Act if his conduct includes "partiality, bias and a breach of the rules of natural justice". It seems to me, that all these accusations can be made against an arbitrator who has participated in a mediation session and subsequently proposes to conduct arbitration proceedings.

I strongly believe that that part of s. 27 of the Act which appears to permit an arbitrator to conduct a mediation conference without prejudicing his entitlement to subsequently embark upon an arbitration

is a serious anomaly in the Act. Arbitrators should be most cautious, if not reluctant, to attempt to act in both capacities. A preferable course is, the one previously suggested of referring parties who wish to embark upon mediation to an independent mediator, with the proviso that all discussions before the mediator are without prejudice and that the parties are free to return to the arbitration process if the mediation does not work.

Having acted as a mediator on three occasions, I would like to make some personal observations. A mediator should seek to give the parties a realistic appreciation of their chances of success. Parties generally desire an independent expert appraisal of the prospects of success of their claim. I have found that parties, even those acting with legal advice, frequently have unrealistic and exaggerated expectations concerning their case. A skilled mediator, whilst remaining impartial, can add a dose of reality to a party's negotiating position by indicating what the appropriate legal or factual analysis is in relation to the circumstances at hand and what a judge or arbitrator is likely to conclude. For example, an owner in a building case may believe that he is entitled to a large amount of general damages for inconvenience occasioned to himself and his family due to defective works. A skilled mediator should point out the limited circumstances in which damages are awarded for inconvenience and vexation and the general small quantum of the damages which are awarded. A party's realistic appreciation of his case and its probable outcome is likely to make him more amenable to a reasonable settlement.

In a building case involving a number of items in dispute, the most constructive contribution which a mediator can frequently make is advising the parties of his opinions concerning the merits of each matter in dispute and allowing the parties to accept or reject his judgments. I think that this is more manageable than endeavouring to seek a compromise settlement relating to each item.

A skilled mediator should encourage communication between the parties and assist them to describe their particular claims and allegations in an ordered and rational fashion; indicating their ideas for settlement. It has been established that although there are different models of mediation, they tend to have the common aim of establishing and improving communications between the parties. I believe that a mediator should encourage the parties to communicate directly with each other, rather than through the mediator.

A vital aspect of a mediator's role is also to ensure that the dispute is handled in an organised and manageable fashion.

Mediators have a responsibility to ensure that each side is treated fairly and that no party is "overborne" or "bullied" by the other. Some parties are more articulate and assertive and possess greater power whether emotional or economic.

There may be circumstances where it becomes readily apparent from an early stage in the mediation process that the mediation is of limited value. In that case, either party should be free to withdraw from the mediation without any pressure by the mediator. Indeed, it is an inherent feature of mediation that it is a voluntary process.

In the event that a mediation works, I believe that a mediator should be in the position to assist the parties to formalise the resolution of their dispute by working with the

parties in the preparation of a compromise agreement. I believe that if parties reach agreement, it should be formalised by a written settlement agreement.

In conclusion, it would appear as if mediation currently has the status of "flavour of the month" so far as dispute resolution procedures are concerned.

It seems to me, that mediation has a very real role to play in dispute resolution. Above all, a settlement arrived at through mediation avoids the enormous costs inherent in adversarial proceedings. It is also far better that parties end a dispute in a manner which is satisfactory to both of them rather than the win/loss outcome which distinguishes the adversarial process. However, mediation should not be considered as a substitute for litigation; rather it should be regarded as an alternative to the adversarial system suitable for some cases but not all. Furthermore, there should be a body of expertise and guidelines which govern mediation so that it is a process which is more than simply an ad hoc procedure dependent on the whims of individual "mediators".

I have not considered in this paper the role of lawyers in mediation—(as representatives rather than mediators). In New South Wales the *Community Justice Centres Act* 1983 excludes representation unless approved by the director. Apparently, in the few cases where the director has approved representation by an agent, the representation has restricted the scope of the mediation to a narrow range of issues, has severely limited the effectiveness of the mediation and reduced the satisfaction of all parties. My own experience in the mediations I have conducted, where the parties were legally represented, was that the lawyers assisted the mediation process by ensuring the arguments were put in an orderly manner and that their clients were encouraged to take a more compromising stance. Clearly, the matter of legal representation in mediations and the precise role that lawyers should play needs to be a matter for continuing discussion and evaluation as the experience of mediation becomes more extensive. ■

* —"Pursuing the Best Ends by the Best Means"—Wendy Faulkes Director, Community Justice Centres, New South Wales 59 A.L.J. 457. ■