Practical Commercial Mediation Issues

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1. INTRODUCTION

Given that historically about 90% of disputes have settled, perhaps, it is not surprising that success figures of 80 to, even, 100% have been claimed for mediation. Whilst the historical record of settlement might suggest to some mediation is a shadow puppet play, more impression than reality, the advantages of mediation are in settling earlier (often considerably so), in settling difficult disputes which might not have been resolved without the assistance of the parties' willingness to attempt mediation and the independent's assistance, and in cost savings.

It is fashionable positively to market mediation as the solution to all disputes. The advantages of mediation and its positive results have been well explained and promoted with zeal approaching the religious. Rather than explain the mediation process (which should generally be well known by now) or proselytise mediation, the scope and purpose of this article is to set out some practical issues and difficulties which parties and commercial mediators face and to comment on some available strategies to deal with these matters.

2. MEDIATION ISSUES

Timing

Timing is all important.

Whilst early resolution is cost-effective and desirable, at times, if the parties agree to mediate too soon that might prejudicially affect their appreciation of the relative strengths and weaknesses of their respective positions, the reality of their bargaining positions and their willingness to cooperate and compromise. The parties need to be at the stage where they can fully and properly assess the dispute.

If conducted too late, the wasted costs of case preparation (and the conduct of the case to date) may hinder or even prevent settlement. There have been many disputes where the parties have passed the point of no return and proceed merely in the hope of a costs order in their favour. In a consensual process where the parties agree to share the costs of the mediation equally, there is usually strenuous resistance to the notion that one party should pay the other's costs as part of a settlement deal.

In the case of mediations attempted too early, rather than disband the mediation as a failure, the mediator and parties should consider deferral for a period or until the parties carry out some further "homework", such as obtaining legal advice, experts' reports or key witness statements, which might enable them to mediate with a better knowledge and understanding of the important issues.

Poor Claim - Let's Mediate

At times, there is an element of economic coercion in claims and disputes. Just as with a strong claim, the litigation or arbitration of a claim which is of doubtful merit can cause considerable expense, disruption and anguish to a defendant. Even if of questionable merit, the reality of the dispute must be dealt with. Such claims are sometimes resolved by paying "going away money" to get rid of the problem.

A claim which would face significant difficulties in a formal dispute process due to the terms of the contract, poor contract administration, the evidentiary burden, lack of records, difficulties in the legal position etc may have a better outcome if compromised in a mediation process.

Whilst it might be regarded by some as undesirable, claimants often do relatively well (including with problematic claims) by acting aggressively, pursuing their claims formally to the point where the other side is forced to face the issue squarely, including the legal costs and disruption of defending the matter, and then offer or agree to mediate. Furthermore, claimants often do better by posturing aggressively and adopting highly positional behaviour in the mediation. Whilst this approach is a gamble and can involve a risky balance between success and failure, the outcome through mediation for some claimants exceeds the likely outcome of a formal process, and at reduced cost.

Perhaps, this might be regarded as the dark side of mediation. However, the position is little different from the formal claim vigorously pursued and settled by negotiation.

Provided there is no coercion of any kind, no wrongful advice nor complicity with the claimant (in other words, provided the mediator conducts himself or herself and the process carefully and properly), whilst any settlement outcome may not match the mediator's own assessment of the merits of the matter, willingness to settle is a matter for the defendant/respondent. In such circumstances, any comparatively beneficial outcome of the mediation for one party does not equate with fault or wrongdoing on the part of the mediator; the responsibility for settling and for the terms of settlement rests with the parties.

Nevertheless, defendants/respondents should be aware of the potential that compromise by mediation might

unduly reward a plaintiff/claimant. Protection lies in the defendant/respondent's own hands by:

(a) obtaining appropriate professional assistance in carrying out an in depth factual, technical and legal assessment of the merits of the claim;
(b) strongly defending;
(c) considering the incentive which may be there for the claimant to mediate a solution, rather than litigate or arbitrate;
(d) making an informed choice about mediation;
(e) ensuring strong, detailed preparation for the mediation so that the respondent may rebut and counter the claimant's contentions to reduce the claimant's inflated expectations;
(f) ensuring strong representation and professional assistance is available in the mediation regarding the factual, technical and legal issues;
(g) balancing the desire to settle the matter by assessments of the alternative to settlement for both parties, including the difficulties and costs they will each face if settlement does not occur and a formal dispute resolution process is required.

Benefits of a Binding Decision

A factor which can render some mediations difficult is the problem individuals (in both public and private sectors) can have in making decisions for which they may be held accountable. That difficulty is sometimes compounded where it is necessary to accept some fault, wrong-doing, liability and responsibility in order to compromise and settle the dispute. In such circumstances, litigation or arbitration might be considered more personally desirable as the outcome is imposed by binding decision, rather than a consequence of one's own actions. The officers can always blame the judge or arbitrator for getting it wrong. (But then there are the issues of the costs, the time, the disruption and the uncertainty of a formal dispute process.)

In mediation, this might be addressed to the extent possible by detailed analysis of the dispute, by technical and legal reports, by combining the mediation with expert appraisal and by the parties' lawyers (or the mediator, see below) setting down in writing support for the mediated outcome.

The Shadow of Litigation

Mediation seems best conducted in the shadow of litigation or arbitration. The threat and impending reality of the formal dispute process provides the backdrop, incentive and compulsion to find a way of breaking through to resolution.

Without the threat or deferred reality of litigation or arbitration, often the incentive is simply not there for the parties (or, at least, one of them) to come willingly to the table or to negotiate resolution.

The Soft Fall Back - Avoiding Decision

Mediation seems to work best when there is a painful fallback alternative, such as litigation or arbitration with risk and significant legal and other costs. Mediation works particularly well, when the formal process will involve considerable time, disruption and high costs and risk.

Conversely, a combination of processes which provides a soft fallback alternative to mediation can be counter-productive to resolution of the dispute in the mediation. Apart from the case of those individuals who make decisions and work hard to manage or resolve problems, it seems it is human nature to take the easy option.

Mediations which are part of a stepped process, lead too easily to avoidance or deferral so that a decision (whether advisory or binding) may be made by others. Often, the parties (or one of them) will refuse to face and resolve the hard issues.

Examples include agreement on a one day mediation, which if not successful, was to be followed by an expert appraisal with a limited procedure and constrained time and cost regime. In such circumstances, the mediator's usual reality check of the horrendous alternative to a mediated agreement might fall on deaf ears - "Oh no, we have agreed to refer the matter to a non-binding expert appraisal if the mediation does not work and it will only costs us $x and take y time". The unspoken rider being - "Therefore it does not matter, we do not have to face the issues and resolve them here".

The experienced mediator might prefer to avoid such soft fallbacks and steer the parties towards real commitment to a mediation process.

Interest Based Outcomes

Mediators love to find the "win-win" interest based outcomes where everyone emerges from the mediation better off and happier.

Sometimes they occur, such as in the case of an international marketing and distribution dispute where the parties:

(i) identified the causes of the dispute, including conflicts of interests by some key personnel and communication difficulties caused by culture and distance;
(ii) agreed a mechanism to avoid the troublesome personnel and to ensure regular and better international communications;
(ii) identified that their relationship had evolved to the point where their contract no longer matched the situation and needed to be replaced;
(iv) both agreed to waive their respective rights under the present contract and to damages, and agreed to terminate litigation and their present contract;
(v) agreed on the key features to be incorporated in a replacement contract.

Consider also the major building dispute where a key issue for both parties' chief executives was the breakdown in relationships between management staff from both organisations, which was adversely affecting other projects and prejudicing future dealings. In addition to the dollars, agreement between the chief executives on methods of resolving the relationship problems was essential to resolution, and was negotiated privately between them.

Consider also the mining dispute where the future provision of spare parts, maintenance and development of expensive

equipment was an essential ingredient in the resolution of a relationship which had broken down, almost completely.

However, such satisfying and dramatic outcomes require a considerable amount of goodwill and the desire for, or necessity of, an on-going relationship.

There are occasions where one party is willing to find ways of rebuilding the relationship, but the other side is not willing, or the potential is not there for some reason, such as the lack of an on-going building programme which might enable the parties to contract again as part of the settlement agreement.

Perhaps disappointingly to some, most mediations are resolved on their own merits alone, without lateral, interest based solutions and, sometimes, without any intention or willingness by either party ever to have any further dealings with the other. In such cases, there is usually a requirement for each party to make difficult concessions to the other to get the deal done.

Rights Based Mediation

Generally, there is a requirement in many commercial disputes, and certainly in construction disputes, for the parties to resolve the dispute on the basis of their expectations of the likely outcome of a formal dispute resolution process. That is, a requirement to construct a rights and obligations based settlement.

The challenge for the parties and the mediator is to find meaningful ways of assessing the parties' respective positions. Usually, that is done by a detailed exploration of factual, technical, contractual and legal issues. It is often carried out on the basis of extensive preparation and with the input of technical (including legal) advisers, technical experts and key staff who have had responsibility for the performance of the contract.

In some circumstances, combinations of processes may assist, e.g. mediation and non-binding expert appraisal.

Mediation As A Condition Precedent

In recent years there have been purpose contracts and model dispute resolution provisions which provide for mediation as a condition precedent to adjudication, litigation or arbitration (e.g. the Hong Kong Airport Core Programme Mediation Rules 1992).

To avoid lengthy delay and the problems of strategic forays or fishing expeditions to uncover the other side's arguments, likely evidence, strengths and weaknesses, it is suggested such clauses should enable either party to avoid or terminate them by written notice for circumstances such as those where a party:

(i) does not consider the process to be desirable in the circumstances; or

(ii) is not satisfied with the other party's bona fides or endeavours; or

(iii) is unhappy with the elapse of time.

Coerced Mediations

The author's view is that mediation works best as a consensual process. The parties should come to mediation willingly.

An unwilling party, participating in a mediation by presence only for the sake of form or procedure to comply with a contractually pre-agreed and required mediation, or court directed mediation, is unlikely to be conducive to a mediation worth the time and effort. Coerced mediations are often productive of failed mediations. (Of course, there is some potential that the reluctant party may become involved in the process, or the mediator's skill might induce the unwilling party into positive participation.)

Those who are of the view that compulsory mediation is a waste of time for these reasons also tend to the position that an unwilling party should not be compelled to mediate by enforcing a contractually agreed mediation clause. Generally, (subject to the dynamics of the particular circumstances) that is the author's view.

The opposing view is that the parties should be required to meet their obligations in a dispute resolution clause which provides for mediation, say as a pre-cursor to arbitration or litigation. There may be two aspects to this view. The first and most obvious policy imperative is that of holding the parties to their bargain. Then there is the additional confident reliance upon the skill of the mediator to draw the party into real involvement, which was the approach taken in *AWA Ltd v Daniel & Ors trading as Deloitte Haskins & Sells,* (1992) 7 ACSR 463, albeit Rogers CJ Comm Div. **by consent** directed the parties to undertake mediation with a mediator agreed on between them (the mediation did not succeed).

In *Allco Steel (Queensland) Pty Ltd v Torres Strait Gold Pty Ltd and Ors*, unreported, Supreme Court of Queensland, Master Horton QC, 12 March 1990, a disputes clause provided for conciliation as a precursor to litigation. Litigation was commenced by Torres Strait Gold without it having complied with the conciliation provisions of the dispute clause. Allco Steel sought a stay and Ambrose J (Supreme Court of Queensland, 16 September 1990) ordered that no further steps be taken in the action and that the parties should proceed with the conciliation in accordance with their agreement. The parties then had two conciliation meetings, which failed to resolve the dispute. Allco Steel then commenced litigation and Torres Strait Gold sought a stay order which was denied. If that decision had been on the basis the disputes clause had already been enforced by the Court it would be readily understandable, but that point may not have been argued as it did not come out in the judgement. Master Horton QC held that decisions dealing with *Scott v Avery* arbitration clauses were not relevant, that the remedy for non-compliance with the disputes clause only sounded in damages, and the doctrine that the jurisdiction of the Court could not be ousted dominated any other principle which would require the parties to conciliate in accordance with their disputes clause. Master Horton QC also held that, even if the Court had jurisdiction to grant such a stay, the discretion should not be exercised as it was "abundantly clear the parties have taken up positions which effectively rule out the possibility of compromise and conciliation"[1].

Inquisitorially Conducted Mediation

Although it is not mediation in its traditional model and it may be structured fact-finding prior to structured negotiation or mediation, from the author's experience,

occasionally parties strongly request mediators to "get to the bottom of the matter" by conducting the mediation session and asking questions. Only in those situations where the parties strongly require this approach and are robust enough not to take their bat and ball and go home if the independent's probing questioning becomes uncomfortable might this approach be worthwhile. And even then there is a risk that the parties, or one of them, might change its mind about the procedure, due to the independent setting the agenda and probing sensitive or vulnerable issues.

By providing both parties with ample opportunities to raise issues about, and to comment on, the mediator's questions and the responses given to them, the mediator can provide the parties with a level of comfort about the conduct of the mediation.

If worth undertaking in all the circumstances, the advantage of such a procedure is the speed at which a knowledgable, experienced and skilled independent can get to the "heart of the matter", expose the strengths and weaknesses of the parties' respective positions, and crystallise the issues for resolution.

Co-Mediation

Perhaps to enable participation by greater numbers of mediators in dispute resolution, some dispute facilitation organisations favour co-mediation.

However, if there is present a knowledgable, experienced, competent mediator who has the confidence of the parties, co-mediation of construction disputes should not be necessary. Indeed, a mediator who required a co-mediator might lose the parties' confidence; they might well wonder why two persons are necessary and why the mediator lacks the confidence or ability to do it alone. The parties might consider it preferable to find another person capable of doing it alone.

There is also the potential for communication problems and tension to arise between the co-mediators. Usually, this is dealt with in co-mediation by the mediators pre-agreeing who is to take the lead and how they are each to perform their respective roles. Nevertheless, problems can arise; e.g. the co-mediator who cannot cope with the tension of silence and jumps in, diverting the parties at just the wrong time.

Of course, to every general rule or personal prejudice there can be exceptions. The author considers there are some circumstances where an assistant or co-mediator might be helpful. Such circumstances might include:

(a) where there are so many parties that controlling and directing the traffic of their individual involvements might be difficult for one person;

(b) the issues are so many and complex that it would be helpful to have an assistant putting facts, issues, agendas, possible outcomes, negotiation positions etc up on a whiteboard or overhead transparency machine to enable the mediator to concentrate on management of the parties' inputs, without distraction;

(c) where the negotiation positions of the key parties impact upon, and in turn are affected by, the related interests and positions of other parties, such as subcontractors, consultants, suppliers, lessees, professional indemnity insurers, financiers, liquidators, action groups etc.

Complex multi-party disputes can necessitate subsidiary mediations which feed positions back into the main game mediation and vice versa. In those circumstances, the use of a co-mediator can be helpful to enable parallel mediations of the different tiers of the dispute, thus saving time and enabling the avoidance of frustrating delays.

3. SETTING UP THE MEDIATION

Negotiating the Mediation - A Role for ADR Organisations

Negotiating the parties' agreement to the mediation can be more difficult than conducting the mediation itself (e.g. consider one dispute which took the parties 15-18 months to agree to mediate, to agree upon the identity of the mediator, the terms of the mediation agreement and the pre-mediation processes, but which took just 2.5 hours to settle at the mediation).

The antipathy of the parties towards each other can render it difficult for them to negotiate their own mediation process. Often it is better for the parties to avoid these difficulties by turning to a third party to negotiate and resolve them. By this means, they might also avoid any concerns about proposing mediation being read as a sign of weakness, or that it might signal a lack of confidence in the strength of the party's position.

Organisations such as The Australian Commercial Dispute Centre Ltd can perform a most important facilitation role in negotiating the dispute resolution process, proposing a panel of neutrals for the parties' selection, selecting or nominating the neutral, negotiating the terms of the agreement, resolving difficulties, holding security and the like. Other organisations can also provide some or all of these services, e.g. LEADR, the NSW Law Society, The Institute of Arbitrators Australia.

Mediation Agreement

Some mediators just do it, rather than bothering themselves and the parties too much about formalising the process by a written agreement. Even some senior lawyers have expressed the view that the formality of a mediation contract with the parties is anathema to the process.

The author's view is that for commercial mediations, there must be a formal agreement for the parties' and the mediator's protection.

It is necessary to bear in mind the potential the mediation might not succeed and a subsequent formal dispute process will be required. Is the mediation to be without prejudice and confidential? Should a party be able to put in evidence the willingness of the other party to settle the dispute, and the terms it was willing to accept? Should a party be able to put in evidence a document produced in the mediation (see below)? Should the parties be able to call upon the mediator to give evidence? Should the mediator act later as an arbitrator of the same dispute, or act for one of the parties as an expert, adviser, or advocate - or should the

agreement preclude this potential? Should the mediator be obliged to conduct the process in accordance with natural justice? Should the mediator be liable to the parties? Should the basis of the mediator's fees be agreed? These rhetorical questions suggest their own obvious answers.

These and other issues demand detailed consideration and formalisation in a written agreement. To conduct commercial mediation on an informal, ad hoc basis is too loose, and just too risky for the parties and for the mediator. Parties and mediators who eschew a detailed formal agreement do so at their own peril.

Protections For The Mediator

It may be axiomatic that disputants behave disputatiously. There is always some potential that a party may for some reason subsequently choose to treat the mediator as an adversary. One only has to examine the case law on attacks against arbitrators to see the willingness of parties to attack the independent person in the middle, if it suits their needs or strategic purposes.

Consequently, in the absence of legislative protection or comforting case law, it is suggested the mediator requires strident protections - against the parties. Excepting fraud for which the mediator should be liable, it is suggested a detailed exclusion is required to protect the mediator. The prudent mediator will also seek an indemnity from the parties against liability to third parties, such as related companies, financiers, creditors etc, who may have reason to feel aggrieved by any settlement terms. It is not impossible that third parties might contend they have a cause of action against the mediator - e.g. for negligent breach of a duty of care, for negligent advice or misrepresentation or, possibly, for misleading and deceptive conduct in breach of the *Trade Practices Act* 1974 (Cth) or a State *Fair Trading Act*.

How to negotiate such prophylactics? One might ask parties who resist providing such protections how preserving a capacity to sue the mediator will assist them resolve their dispute. Further, to comment that, whilst one might be willing to do all that one can to assist resolve their dispute, one does not wish to become embroiled in the parties' dispute or be the subject of separate legal attack. Furthermore, that one does not wish to become liable to third parties in relation to attempts to assist the parties resolve their dispute.

Whilst it is not possible absolutely to prevent a party from issuing a subpoena requiring the mediator to produce documents or to give evidence, the prudent mediator might also consider seeking a written undertaking from the parties that they will not do so and an undertaking to meet the mediator's costs and expenses in the event of breach (e.g. the time involved, legal advice, legal representation etc).

The willingness of parties adequately to protect the mediator might even be regarded as a litmus test - i.e. whether attempts to assist the parties might present too great a risk.

Finally, there is the subject of fees. If successful, the parties might consider that they resolved their own dispute and the mediator did nothing (good mediators often **seem** invisible) and that, therefore, it is now unattractive to pay the mediator. If the dispute does not settle, a party might think why pay for that waste of time? At best, the mediator might fall into the parties' 30, 60, 90, 120 day or never-never payment system. The mediator who does not need the aggravation will require the lodgement of security with a stakeholder such as the Australian Commercial Dispute Centre, The Institute of Arbitrators Australia etc.

Confidentiality

Generally, there is a concern about confidentiality which is reflected in the terms of the mediation agreement. Whilst the parties and the mediator bind themselves to the agreement's confidentiality provisions, often there is no confidentiality obligation imposed on the experts and quasi-witnesses used. They should also be subjected to written confidentiality undertakings, which might be enforced in the event of disclosure.

Whilst the parties may regard the process as without prejudice and confidential, there are limits. Mediation cannot be used to disinfect facts or documents from later use in formal dispute resolution procedures; see *AWA Ltd v Daniel & Ors t/as Deloitte Haskins & Sells* (1992) 10 ACLC 933 where objective facts of which knowledge was obtained in a mediation were held to be admissible.

Limits of Authority

Mediation should be conducted with the parties represented by persons who have full, delegated power to settle. That is the ideal. Anything short of the ideal can be problematic. However, in reality most mediations are conducted with some shortcoming regarding delegated authority to settle.

For example, in the case of professional liability cases where settlement might depend upon the PI insurer, rarely will the insurance company participate. Usually, the PI insurer will rely upon its lawyer to represent its interests and give the lawyer a limited, delegated authority to settle. If settlement depends upon the insurer paying more, it is necessary for the lawyer to negotiate an increase in the approval limit. In some situations, that may depend upon a recommendation being approved in say London.

In other situations, executives are given a delegated limit, e.g. an executive of a Japanese company who must gain the approval of his superiors in Tokyo to the proposed settlement terms, or a project or construction manager who must gain the approval of his or her principal. In other circumstances, legislation, ordinances, ministerial policy, board policy or the duties of a trustee may preclude giving full delegated settlement power.

Whilst most parties' representatives are as open and honest as they can be in the difficult circumstances about these issues, there are some who actively mislead the mediator and the other party that they have the requisite full, delegated authority. Sometimes that is done by half-truths - "Yes, I have full delegated authority" - the rider "to negotiate" silently intoned. Or, "Yes, I have full delegated authority to settle" - with the qualification "up to the limit of $1.5m" unstated. Or, "Yes, I have full delegated authority to settle" - "but I'll just have to get the Board's final approval" concealed.

Notwithstanding the statements and undertakings given at the preliminary conference about having authority, it will almost certainly become apparent in the mediation, sooner or later, and probably sooner, if there are any such limitations.

The experienced mediator learns to probe about the issue of authority.

However, to take a position that the mediation cannot take place unless there is available full, delegated authority to settle the dispute without reference back to head office, or an approval process, is often just unrealistic. Where there are limitations on authority, it is essential that the other party and the mediator know that there are limits and consciously make a decision to proceed nevertheless, with knowledge of the procedure which will be required to finalise the matter. Of course, flushing out the precise nature of limits on authority is often not possible, as that might expose a party's bargaining position and even, seemingly, negate the value of embarking upon the mediation. Rather, a general understanding that there are some limits is more realistic. Often it is more important for the other party to know and accept the procedure that will be required finally to settle the matter - i.e. what internal procedure is required for approval of the proposed settlement terms.

The Facts

For mediations where the parties' respective positions, rights and obligations depend upon the facts and an understanding and assessment thereof, it will probably be necessary for the parties to assemble teams which have command of, or access to, the facts upon which their positions are based. Otherwise, when an issue of purported fact upon which some aspect of the dispute turns is raised by a party, the other party is likely to respond - "I don't know. I wasn't there. I would have to ask my project manager." etc. That type of response is unlikely to advance consideration of the issue - unless the parties just wish to horse-trade the dispute away without regard for the facts.

Where the facts and their consequences have a key effect on a party's position and rights, it may also be necessary preparation for the mediation to have expert analyses and reports prepared for use in the mediation, e.g. an analysis of construction delays and programming issues; a building defects report etc.

During the conduct of mediations where such an impasse arises and a need for some factual input is required there are a number of possible responses. Occasionally, it is possible to get the necessary factual input by a telephone call from the mediation. Sometimes it is agreed to defer the mediation to obtain the presence of a key person or persons to provide their knowledge or account of the facts, or to obtain an expert report etc. From the author's experience, in some instances where a party has a strong desire, or objective, to resolve the dispute on the day of the mediation, rather than deferring to obtain the quasi-evidence or technical assistance, some parties prefer instead to move the mediation away from a rights and obligations based approach to settlement by horse-trading.

4. THE PARTICIPANTS

The Role Of Lawyers

Whilst some may disagree with the "lawyerisation" of mediation, unless the parties are strongly opposed, the author encourages the presence of lawyers in mediations for a range of reasons.

Often it is the lawyers who have the carriage of the matter and consider and advise that mediation should be attempted. Concerned to protect their clients' interests, it is not unusual for them to wish to participate, or for their clients to require them to do so.

Most lawyers conduct themselves well in mediations and, simply put, are usually the mediator's greatest assistants and best weapons in resolving the dispute.

The lawyers usually identify the relevant issues and present them well on behalf of their clients. Some clients do not have the skills to articulate their positions or to maintain a sharp focus on the salient issues. Some party representatives do not have the necessary negotiation skills to separate the issues from the people. Some party representatives are too emotionally involved to conduct themselves with any objectivity.

From experience, the lawyers also assist with the reality testing of their client's position by assessing the relative strengths and weaknesses of each party's positions. They are usually good at analysing and developing positions and at negotiating solutions to problems; the vast majority of cases have been resolved in the past by lawyer to lawyer negotiations.

Private meetings between the mediator and the lawyers are often helpful in keeping the process focused and preventing it from aborting on impasse or emotional difficulties. Sometimes the lawyers can assist the mediator to re-direct the mediation around an impasse by their views, or agreement, on the best course of action for the mediator to take.

Some lawyers, contrary to usual perceptions, are quite numerate and can evaluate complex, structured settlement proposals.

And the lawyers have an important role with respect to the terms of the settlement agreement and in taking responsibility for ensuring the legal efficacy of the settlement agreement (see below).

Yet, occasionally, there are the lawyers who are inflexible, aggressive or belligerent. Sometimes, lawyers have their own agendas, with their own interests at stake, e.g. in protecting their position with respect to advice they may have given their client, regarding the terms of the documentation which they prepared and which might now be found wanting, or by preferring the future business of a formal dispute process.

Nevertheless, it is a risky course for the mediator to intervene between a client and his or her lawyer. The author has never found it desirable or necessary to do so. From experience, clients often instruct their lawyers, even contrary to recommendations, that they wish to settle the matter by mediation and are not interested in discovering whether the lawyer is correct in his or her view that a point is "winnable" in a formal dispute process. Most clients also seem to be alive to the discomfort of their lawyer about matters such as the efficacy of contracts or the quality of

advice provided.

Any attempts to undermine a party's confidence in its lawyer is fraught with risk that it will instead destroy confidence in the mediator or the mediation - apart from any exposure on the part of the mediator; usually, it is not a necessary or wise course of action.

In the few cases where the lawyers are the problem, party representatives will often propose their own private meeting, with or without the mediator, or act to exclude the lawyers from further participation.

The Role of Experts - The Positive

In a rights based mediation, the involvement of experts in the process and the use of experts' reports can assist greatly in the parties' attempts to come to grips with the detailed technical and factual issues.

Experts from each side (e.g. re delay and programming), who respect each other, quite often communicate well and cooperate in explorations of their respective assumptions, views and reports. The mediator's arrangement of a conclave of experts can lead to common positions on some issues and the narrowing of areas of disagreement. By feeding the experts' collective views back into the mediation, it may be possible for the mediation to advance on particular issues.

Where impasse is reached in a rights based mediation, it can sometimes be helpful for the mediator to suggest the parties break and reconvene after they have obtained a jointly commissioned expert report, or after their respective experts have investigated and reported on the issues in impasse.

The Role of Experts - The Negative

Experts can be a mixed blessing. There are some "experts" who think it appropriate to act in mediations as aggressive advocates for their "employer", or who wish to conduct any discussions or negotiations about the views of the other side's experts adversarially, rather than in a positive, co-operative, non-confrontational manner. Sometimes it is best for the mediator to divert such deal killers onto meaningless investigations, which they all seem to enjoy, whilst the mediation proceeds with the real event of the parties' structured and facilitated negotiations.

There is also the problem that many industry "experts" may have great knowledge, experience and insight into their own discipline, but have no comprehension of the issues which really drive the dispute. For example, if the parties' contentions are about their respective rights and obligations under the contract and at law in a particular factual matrix, then the views, comments and opinions of industry experts about these matters may be worse than irrelevant. They may be totally at odds with the contractual and legal position. They may even set a false benchmark of a party's expectations and bog-down or even destroy the mediation. These people must be ignored, controlled, diverted or removed before they do too much damage.

The Problem of Unskilled Operatives

The involvement of relatively unskilled operatives can be problematic in mediations. The motivation of those at the front line of contractual dealings is sometimes fuelled by anger, self-vindication, denial, and a desire for revenge, to inflict humiliation, or to take advantage. Their involvement in mediations sometimes reflects a complete lack of negotiation skills, viz:

(i) separating the people from the problem;
(ii) focussing on interest, not position;
(iii) exploring options for mutual gain;
(iv) reducing issues and solutions to objective criteria.

If the behaviour of such people is disruptive to the mediation, or threatens its continuance or potential for success, the mediator might move to:

(a) re-direct their attention, e.g. by getting them to think differently about the issues, empathise with the other party's problems, positions and interests etc;
(a) muzzle them by personal discussion, or by obtaining senior management's assistance to instruct them about the limits of permissible behaviour;
(b) reduce their involvement, isolate or bypass them;
(c) divert them with some task, such as to investigate an issue and report back or to engage in discussions with officers of the other side about arcane technical issues;
(d) eject them from future involvement, with the assistance of their seniors. This can be done in a relatively understated way by simply having them told their input is complete and they wont be required further.

5. TOOLS

Scott Schedules

Once the introductory statements of positions have been made, clarified and discussed, the issue arises how to progress the mediation. Usually, it is sensible to explore in detail the parties' respective positions about the key issues driving the dispute. Sometimes, the parties wish to deal seriatum with each issue.

A Scott Schedule (prepared for the litigation or arbitration, or purpose prepared for the mediation) setting out the issues and the parties' respective positions will often serve as a useful agenda for the detailed discussions and issue explorations. It can also be used to record the parties' developed positions and the outcomes of the discussions or negotiations.

The Electronic Copy Whiteboard

Setting out the issues and the parties' positions on a whiteboard can assist the parties and the mediator to consider and discuss objectively the issues, positions and offers.

The capacity to print them out from an electronic whiteboard for photocopying and distribution can be helpful. The author has also found the capacity with an electronic whiteboard to refer back to previous positions by moving the screen can also be most helpful in comparing the current negotiation positions with the previous ones, or even in reverting back to an earlier, more acceptable proposal.

The electronic whiteboard can be a great practical aid to the mediator and assist in the conduct of the mediation. It is worth the effort to acquire or hire one for the mediation, if at all possible.

6. THE PROCESS

Power Imbalances - Empowering

Frequently, mediations are imbalanced between the parties due to the parties' disparity in bargaining power. This may be due to differences in size, nature, financial strength, market place position, resources, intelligence, qualifications, knowledge, sophistication, quality of advice, representation, degree of responsibility for wrong-doing, strength of contractual and legal positions, future work potential etc.

The issue for the mediator can be whether to attempt to redress power imbalances by the manner of conduct of the mediation, e.g. by "empowering" the weak party to equal participation. As with many issues relating to mediation, this is often a value judgement call on the part of the mediator. There is the potential that any excessive attempts to empower the weak party may be construed as bias or partiality, which could threaten or destroy the mediation.

The mediator can work to ensure the dispute is dealt with on its merits, and also ensure the weaker party has adequate opportunity to present its case, obtain advice etc. The presence of the fair minded and reasonable mediator can suppress unreasonable behaviour and ensure the process is conducted fairly.

However, imbalance in the parties' relationship is often just a reality of the particular dispute, which both parties tacitly accept. From the author's experience, power imbalances in mediations are often clearly understood by the parties, who nevertheless choose to mediate cognisant of them. For the mediator, often the comfort is that of informed consent - provided the parties are still willing to mediate in the light of the circumstances, conscious of, and subject to, the inequality, then that is their choice and it is suggested the mediator has no reason to refuse to continue in such circumstances. Subject to ensuring the process is properly and fairly conducted, sometimes there is little the mediator can, or should do, in response to the power imbalance.

Obviously, the mediator should consider power imbalances with respect to settlement terms and ensure the weaker party is entering into the settlement agreement knowingly, without ignorance of the position, coercion, trickery etc. The mediator must not be a party to threats, intimidation, coercion, trickery, misrepresentation, fraud, or other wrong doing.

In some circumstances, the mediator might consider deferring the process whilst the disadvantaged party obtains information or advice, or suggest a cooling off period for any proposed settlement so the disadvantaged party can consider its position and obtain advice. In extreme circumstances, the mediator might consider terminating the mediation. Termination may well be a better option for both the disadvantaged party and the mediator than facilitating settlement which is inequitable or the result of bad faith bargaining.

Of course, the mediator cannot allow himself or herself to be drawn into involvement in a settlement which involves illegality, fraud or other wrong-doing. Examples might be settlement terms which involve a continuance of breaches of legislative or common law requirements with respect to health or safety, the environment, tax evasion, fraud on third parties such as creditors, breach of the Trade Practices Act, secret commissions, etc.

Firm, Entrenched Negotiation Positions

On occasions, representatives are given firm, inflexible instructions by their superiors to achieve a certain outcome from the mediation, e.g. receipt of a withheld final payment as part of the settlement terms. This is sometimes a problem with international mediations, where representatives with limited authority are delegated with responsibility to achieve a certain outcome and have limited capacity to move positions or even access the real decision makers to influence any change in the instructions.

If such rigid instructions are simply unachievable and are preventing settlement, the mediator might:

(a) inform the representative that he or she will not achieve the desired outcome and will also fail to achieve settlement of the dispute;

(b) request the representative seek a change in the instructions;

(c) defer the mediation for a time so that the party can consider its failure to achieve its objectives and re-consider its demands for settlement. Sometimes, it is necessary to give the party a period to face the reality of its position and the pain of non-settlement;

(d) seek a restructure of the mediation with higher-tiered representatives who have the capacity to make decisions and change positions.

Unprincipled Conduct

It is reasonable for the mediator to expect principled good faith conduct in mediation and, mostly, this is the case. However, there are mediations conducted by parties or individual representatives only with regard to the desired outcome, rather than on the basis of reasoned, supportable, reasonable, and even moral behaviour. At best, such behaviour might be merely positional. At the extreme, such behaviour might deny logic, deny the facts and beggar the imagination.

In such circumstances, any public displays of moral judgement, righteous indignation or even attempts to control behaviour by the mediator might end the mediation. In most instances, it is better for the mediator to remain publicly neutral, not to indicate condemnation and leave any response to the questionable behaviour to the other party. If the behaviour is so questionably positional it is noticed by the mediator, almost certainly the other side will be aware of it, will react to it, or consider its own conduct of the mediation. In extreme circumstances, the other party might even consider whether there is any point in continued participation.

In private caucus, it might be a different matter. It is a matter of judgement for the mediator whether to attempt to

modify that behaviour by private discussion. The mediator might heavily "reality test" the party's positional play. If the behaviour is affecting the mediation and might bring about its discontinuance, it might be appropriate for the mediator to discuss the possible consequences of continuing with such an approach - such as the other party's sudden departure.

Often the other party will choose to continue with the mediation, without comment but consciously taking into account the positional play as a factor affecting negotiations and settlement of the dispute. At times, the recipient party might even tell the mediator not to worry about the other party's aggressive, positional play; that they expected it and can deal with it.

Venting Emotion

Perhaps the greatest challenge for mediators is that of dealing with bad and abusive behaviour, emotional outbursts, threats, emotion, and even stupidity during the mediation. Whilst most mediations are extraordinarily polite and civilised, from time to time mediations become tense spleen-venting affairs.

There is a human tendency for mediators to wish to control the manner of conduct and to prevent or suppress the emotional outburst. Yet, it takes greater courage to let the emotion or abuse manifest. Often that venting process is important - even essential to the capacity of the parties to move towards resolution. The greatest progress might be made during those periods where the mediation seems most out-of-control and off-the-rails. Often there is good reason for frustration, annoyance and even loathing or hatred. Even a party representative's attempts at inflicting personal damage or in seeking revenge can be helpful in clearing the air, by letting it out so that the mediation can move on.

Toxic Behaviour

Whilst venting emotion may be helpful, it depends on the extent, the duration and the capacity of the other party to accept such behaviour, to deal with it or to respond. In extreme circumstances, the solution might be to separate the parties and to conduct the mediation by caucuses, communication of positions, offers and counter-offers, and general shuttle diplomacy; only bringing them back together when it is appropriate, e.g. to sign-off on the agreement.

Third Party Interests

Third party interests can render settlement difficult. A third party may have the capacity to dictate limits to a party's settlement position, such as occurs at times in the case of insurers or financiers.

Where the parties' terms of settlement will impact upon a third party, such as other creditors, a related company, a subcontractor, supplier or consultant, difficult ethical questions may arise for the mediator. For example, the structure of settlement might perhaps prejudice other creditors and, in the extreme, might even be a fraud on them. Obviously, the mediator cannot be a party to a fraud or other wrongful conduct. There may arise need for specialist advice or to communicate with the third party and even, perhaps, to involve the third party in the mediation.

Leaping Too Early to Negotiation Positions

Just as there are litigants who want their day in court, there are some disputants who wish to explore and ventilate every issue in detail in mediation, before considering the other party's positions and offers and attempting to negotiate any gap between them. That is the approach often taken in a rights based mediation to arrive at positions about each element of the dispute.

What then to do about the party impatient with all that regurgitation and recrimination, who just wishes to cut to the main event and put an offer on the table for consideration and negotiation.

At some stage, the dispute will come down to the positions the parties are willing to offer or accept. The advantage of leaping over the detail to the positions, offers and negotiations is that it can cut days out of the process and save the parties considerable costs.

However, the disadvantage is that moving too quickly to negotiation positions can be counter productive where the other party *requires* a detailed, in-depth exploration of the facts, technical and legal issues so that the parties may "appraise" their respective positions and reach a view on a supportable outcome. The other party may not wish to consider positions and offers and negotiate until the completion of that exercise. Such a difference in viewpoints about the conduct of the mediation and the best way of moving forward can be a dispute in itself to be mediated or, at least, negotiated.

The issue might become whether the parties should stay with their negotiation attempts, without regard to other than their requirements to settle, or leave aside the negotiations for a time whilst they revert to an exploration of the issues upon which negotiation and settlement positions should be based.

In the case of strong but different positions from the parties about how to approach the mediation, it may be necessary (although, perhaps, unsatisfactory) to attempt a combination of the different approaches. To explore the issues for a time, then consider the positions and offers and, if a party insists, return for a time to the detailed consideration of issues. And then back to the bargaining but, perhaps, based upon positions from the detailed consideration.

Sometimes, a party's desire to descend to the detail can be circumvented by asking the party to identify the first, second and third most important issues in the dispute. Sometimes, that exercise will exhaust the party sufficiently that one can then quickly dispose of the lesser issues.

Outcome Expectations And Positional Backtracking

It is interesting to observe circumstances where the parties negotiate a basis for settlement, only to find a party resile from it when its expectations of outcome are not met. For example, where the parties negotiate a sensible, legally justifiable, rights based method of calculating interest, but where application of the agreed method does not produce

the financial result a party expects. Then that party has the choice of accepting the outcome of the agreed calculation, or facing the embarrassment of an insupportable backtracking on the basis it wants, or needs, a certain financial outcome from the dispute and the agreed method will not provide it.

Face

Although not often mentioned in the context of mediation in this country, face or, perhaps better, pride and dignity can be important ingredients in the conduct of mediations and the resolution of disputes. To find ways of recognising the emotional positions and the difficulties a party or person has in being in the wrong, or in facing a liability and financial exposure for oneself, one's employer or client.

At times, the manifestations of pride, and affronts to dignity, can be extreme. Denial. Refusal to accept the facts or wrongdoing. Even lies or threats.

Rather than attempting to control such strange behaviour, which may be the mediator's first impulse, as in the case of emotional venting, often it is better for the mediator to watch the drama unfold between the parties and to allow the parties to resolve it. Alternatively, at times, there may be ways for the mediator to neutralise or divert the discussion away from these issues of personal difficulty. There may also be formulae which may be struck in settlement which will allow a party to retain dignity. Often, one finds the opposing party generous about such issues.

There occasionally occurs (e.g. sometimes between Asian or Japanese parties) a manifestation of what seems to be negative face, where the objective of a party seems to be foremost to reveal to the other party the extent of that other party's wrongdoing, even to humiliate the other party, for its breaches of expected codes of behaviour. In such circumstances, that is the reality of that particular mediation. The mediator first has the challenge of understanding what is occurring and then the challenge of responding to it. Usually, but not always, that might simply be to watch the dynamics of the parties' behaviour, allowing them to achieve that objective without comment or moral judgement and focus instead on moving the parties towards resolution outcomes.

Finding Common Ground

By identifying areas of agreement on the events in dispute, on methods of settling aspects of the dispute, on methods of advancing the parties' future relationships, one can limit the issues unresolved. By that means, the dispute may be chipped away, so that it moves from a large, complex dispute seemingly impossible to resolve to a smaller, more manageable dispute. Then, the areas of remaining disagreement can be dealt with one by one.

Maintaining the Pressure

It is not every silence which should be filled. Silence unbroken can at times maintain a pressure on a party or the parties which too early intervention can alleviate without benefit. One of the parties is likely to emerge from the silence - and often with a comment or position which might take the process forward. It can divert the course of a mediation if the mediator intervenes (perhaps, through discomfort about silence or due to the normal imperative to manage the process) when silence is likely to force a party to a position or response.

There are stages in mediations where it is helpful to maintain the pain. Stages where allowing the parties to break for lunch, for dinner, or for the day can interrupt the impetus to resolve a difficult issue.

It can be difficult to let the matter go for the day, when settlement seems close or possible. Late at night, when the parties are long passed dinner, they may be willing to make difficult decisions to stop the pain the process is inflicting.

Of course, there might be other situations where it achieves nothing and can even be counter-productive to continue without a break.

Once again, these are ad hoc, individual judgement calls.

Spitting the Dummy

Mediators often experience angry outbursts from party representatives about the process or the other party's conduct, when all seems to the mediator to be going according to plan; e.g. the angry faxes or telephone calls late at night to the hotel room to make demands for the mediator to extract undertakings from the other party about the outcome, or the conduct of the mediation.

Interestingly, these outbursts do not necessarily coincide from the parties. They can occur at quite different times and for quite different and even trivial reasons. Party representatives can "lose it" emotionally for the most unexpected reasons.

Sometimes, the mediator needs to recognise when to call a halt to the process to allow a party to regain perspective and equanimity. Or, that it may be best to smooth over the outburst and calm the emotions down.

Private Meetings of the Key Personnel

Whilst it can be a difficult judgement call and it is risky, sometimes the best course of action is for the mediator to place the two major protagonists together without their expert advisers and lawyers to resolve their differences themselves - with or without the mediator present.

Elevating the Dispute To A Higher Level

If the parties are unable to resolve the dispute at the level of personnel delegated to mediate, one strategy worth pursuing is to renegotiate the mediation at a higher level of management. If the mediation is failing or has failed at the delegated level, what have the mediator and the parties got to lose by taking it higher?

The senior management may bring a level of dispassion to the matter which is missing at the lower management level, a greater appreciation of the negative impact continuance of the dispute will have on their respective organisations and an enhanced ability to negotiate outcomes which will be positive for the parties' future relationships.

Occasionally, it is sensible to devise a two-tiered mediation process, involving mediation conducted at the

level of management which has the day to day responsibility for the project and with senior management to sign off on the deal reached by the lower tier mediation teams, or to become involved in the mediation as substitute teams, if the lower-tier mediation teams fail to reach settlement.

The Consequences of Failing To Agree

It can be salient for the parties to draw from them, or even provide them (perhaps, with some risk), with an estimate of the time a particular dispute might take and the legal costs which could be involved. Often facing the issue of the worst alternative to a negotiated agreement can assist the party develop positions which will enable settlement.

Equally important is the unpredictability of outcome of formal dispute proceedings. There is the risk of evidence not being persuasive, or believed. Being human, arbitrators and judges sometimes err. In any event, the outcomes of appeals show the capacity for different tribunals to reach different conclusions; viz the *Codelfa* case[3].

At times, the mediator's exploration of these issues with a party can bring some reality, where an inexperienced party representative has a very low understanding or expectation of the time, costs and likely impact of a dispute. In such situations, the mediator's comments might be more compelling than the party's own lawyers' advice, which might not be believed through the client's lack of arbitration or litigation experience. (The parties' lawyers have been known later to thank mediators for the support their comments have given them about such matters.)

There are disputes where the parties' own estimates of the time and costs of a formal process will greatly exceed the mediator's. For example, a dispute where the author's estimates of time and costs was in the order of 18 months to two years and about $3m to $5m, but the lawyers' collective response for both parties was that it would likely take about 3 years and, collectively, $12m. Not surprisingly, their own assessment drove resolution of the dispute. Particularly, as neither party wished to experience the negative impact of key personnel tied up for that period in unproductive work.

Mediator Proposed Solutions/ Mediation and Expert Appraisal

In many mediation courses, trainees are taught that it is not the role of the mediator to make any personal input and that personal opinions should not be expressed. Yet, the *secret* of successful mediation is that sometimes disputes will just not settle without the mediator making vigorous efforts to rattle a party's erroneously confident position by expressing strong views on the weaknesses of positions. Contrary to the formal position of trainers, many successful mediators make such an input. Indeed, some dispute facilitation organisations (in other countries) identify those who have the ability, strength and capacity for strenuous reality testing (or head-banging) - if it is required. And some disputants expressly ask the mediator to do whatever is required to get a deal done.

Strenuously reality testing a disputant in caucus can break through an impasse which would otherwise have left the parties bogged down for hours or destroyed any potential for a mediated settlement (e.g. challenging a party's reliance upon an exclusion clause which was most unlikely to have the desired effect and which, in any event, only caught some minor aspects of the parties' contractual dealings, relationship and conduct (with which diagnosis the party's own lawyer agreed)).

When the going gets tough, often a party or the parties will turn to the mediator for an opinion about the proper position regarding some matter or for proposals about an appropriate basis to settle the dispute.

In some circumstances, for the mediator to respond to the invitation would destroy the mediation or the mediator's neutrality and objectivity and capacity to continue. So, such invitations require a value judgement about compliance or refusal. It is not difficult to refuse. The mediator can simply say, "Well, it is not a question of what I think. It's your dispute and I am just here to assist you resolve it."

However, if both parties so request, or the "mediation" rules so provide, it might be helpful or even essential to resolution for the mediator to respond. In such circumstances, the process might really be one of conciliation or non-binding expert appraisal. Sometimes the parties, or one of them, might take the approach of a respondent in one dispute - "We don't care what you call it, just do it!"

In some cultures, this input is expected of a mediator.

But it is a risky enterprise. It may resolve the dispute, or it may bring the ADR process to an end. It might also defeat any real attempts by the parties to mediate as they have the easy fall back of the mediator's proposals; as Michael Byrne, Chief Assistant Secretary, Hong Kong Works Branch has said:

> *"The mediation rules, which require the mediator to form an opinion and propose terms for settlement, has discouraged parties, particularly on the government side from negotiating in good faith during mediations. Most party representatives prefer instead to ask the mediator to decide the issue. This is probably because of the need for accountability in the public sector and a perceived lack of authority by government negotiators to settle claims and disputes on a commercial basis. In public sector disputes it is natural for the government party to want to use the mediator's view to justify the payment of money in settlement, if queried. All but one of the completed airport mediations, so far, have ended without a settlement, leaving the parties to negotiate a final settlement based on the mediator's report."*[2]

There are a number of procedures which provide for the independent to make a non-binding decision or proposal. The UK Institution of Civil Engineers Conciliation Procedure 1988 states that the primary objective of the conciliation is to obtain the conciliator's recommendation as soon as possible. The UK Chartered Institute of Arbitrators Guidelines for Conciliation and Mediation state "a conciliator may, and a mediator will submit his/her proposals for settlement to the parties for comment. Proposals will be resubmitted by the conciliator/mediator

after he/she has taken account of the parties comments" (rule 5).

It is certainly possible to construct a process which will enable the mediator to provide, if the parties agree or the mediator thinks it would be helpful, an opinion or non-binding appraisal. Whether the mediation will be able to continue after that action will depend in each case on the parties' views, interests, and perceptions. Whilst there is potential for dramatic breakthrough by providing such a service, there is probably a greater potential the mediation will be brought to an end by the exercise.

The risk of an unacceptable opinion bringing the mediation to an end might be reduced by giving the parties the opportunity to question the mediator on the mediator's opinion and to raise issues about it, and by giving the mediator the opportunity of revising the opinion.

Despite the difficulties and risks involved, the author has found that combinations of mediation and expert appraisal can be very powerful. In one dispute, the author mediated until a threshold issue of the nature of the contract crystallised, i.e. whether the contract was a traditional lump sum contract or a detailed design and construct contract. At the parties' request, the mediation was adjourned whilst the author prepared a non-binding opinion. That opinion was accepted at the next session and the mediation continued until the next major crunch point in the dispute, about which the parties also requested an opinion. By this combination of processes, the dispute was ultimately resolved.

In a major international mining dispute, the final gap could not be overcome in the mediation and all the author's efforts to take the mediation to a higher management level and to a different country to overcome the reasons for failure to settle were met by a request by both parties for the author instead to prepare a detailed non-binding appraisal of all of the issues in dispute, after formal written submissions. The stated reason for this request was that it would provide the parties' Presidents (in another country) with a basis for their own negotiations. Although those negotiations became protracted and litigation was commenced, ultimately, the matter settled and the parties' lawyers considered the expert appraisal to be a key to the settlement.

Yet, in other circumstances, the author's perceptions have been that invitations to provide an appraisal would be counter-productive and that they should be refused.

There is also the technique of the parties or the mediator engaging another person to prepare the appraisal so that the mediator is not prejudiced from continuing with the mediation. It is important who is chosen for such an exercise. An appraisal prepared on the basis of an industry expert's views, unrelated to the proper contractual and legal position, might create unrealistic expectations and set an erroneous negotiation benchmark which might be hard for the mediator to dislodge.

Impasse - Cooling Off Periods

In the event of real impasse, it may be that there is no point in continuing the mediation at that time. Often, there is a need to give the parties a cooling off period of a few days, weeks, or even months to enable them to re-assess their positions. A time to re-assess the pain of not achieving settlement and to allow the party to face reality and change its position. Where there are problems of limits of authority, it may be necessary for a party representative to report and re-negotiate the limits. Time might also be required to obtain the consent of an insurer, principal, financier etc to the terms necessary to achieve settlement. Where there is a factual or technical impasse, it may be necessary to investigate issues and obtain the assistance of experts.

Perseverance - Refusing to Pander to Failure

Generally, parties seem prepared to treat mediation as a failure and give up far earlier than the calm, confident mediator. For example, the party's representative who says, "Tell me if we're more than three million apart. Because if we are I'm going home". The response, "No, no, you're not too far apart to be able to resolve it" - when they were still $18m apart. By three days later they had resolved the dispute.

The lesson the author has learnt from many complex and difficult mediations is "never give up"! The capacity of the long distance mediator to achieve settlement in the face of apparent failure of the process by persevering cannot be underestimated. In about the last five years by such a change of approach (or by luck), the author's success rate in mediations has gone from about 80 to 100%, albeit some have taken a lot of time and a combination of processes.

7. THE END GAME

The Final Gap - Horse-trading

Whilst the parties' may state that they wish to construct a rights and obligation based settlement, frequently there is a tension between that approach and the inevitable desire by the parties to maximise or minimise the outcome, depending upon their respective positions.

Furthermore, despite every effort to arrive at rights based positions and to construct settlement terms which reflect, if not mirror, assessments and expectations of outcomes in a formal process, often the difference between parties' positions can only be resolved by negotiation. And, frequently, the negotiation will degenerate towards the end to simple horse-trading, without regard to rights and obligations. By bargaining. By splitting, and further splitting, differences until the gap is down to a point where neither side has any realistic option but to trade out any remaining differences. A point where the differences are relatively minor, but the consequences of failing to settle are comparatively horrendous, so that the last difference can be bridged.

There often comes a stage where the mediator and the parties recognise that a failure to bridge remaining differences is no longer commercially a potential, e.g. where the difference may be down to $50,000 but the consequence of not bridging this gap may be $millions.

Although it would be an interesting and colourful manner of solving the difference, often at least one of the parties baulks at suggestions to take the gambler's approach of simply flicking a coin.

Closing the Deal - The Rhino Mediator Pushes Home

It is suggested the mediator needs to maintain a great

deal of impartiality and professional distance from the parties and the process. In other words, it is fraught with danger for the mediator to care too much about achieving settlement. Better for the mediator to remain relaxed and to consider that a failure to achieve settlement will be the parties' failure, rather than that of the mediator.

In a consensual process it is important to the mediator to stay in tune with the parties' attitudes, expectations and comfort about the situation, rather than to push ahead of the parties' comfort zone. Like the salesman who whips out the order form and coerces the customer to sign up before the customer is really personally happy to do so, only to find the order subsequently come undone through annoyance or dissatisfaction, a mediator who coerces settlement may subsequently find the purported settlement fail. Pushing too hard for settlement could even disadvantage the parties and lead to liability on the party of the mediator. Instead, the mediator should maintain the parties' confidence, and ensure they are happy about the settlement terms, even though that may take a longer to achieve.

The mediator must be unfailing in his or her neutrality and objectivity.

Confronting the Parties With Failure

A useful skill, when all else seems to have failed and the parties, or a party, is about to call it quits is to draw the parties back together, summarise the ground covered, the impasse reached and (even brutally) to confront the parties with the consequences of their failure to resolve the matter. It is surprising how such a final session can result in the parties opening up further dialogue, in making renewed efforts. It can even result in settlement.

Termination

There are some mediations which should be terminated by the parties or the mediator, for example where:

(a) a party's lack of cooperative participation so undermines the mediation process that it would be fruitless to continue;

(b) the parties have exhausted all attempts to bridge their remaining differences to the point that continuance would be pointless and a waste of time and money;

(c) where there is a serious issue of lack of informed consent, due to some deficiency of knowledge, understanding or information (usually, such problems can be resolved by deferring the process for a period or by restructuring the mediation regarding available advice, information etc);

(d) a party is obviously misusing the process for tactical advantage such as the conduct of a "fishing expedition" to gain information or by delaying the day of reckoning through a protracted ADR process;

(e) the proposed settlement agreement would involve illegality, fraud, conspiracy etc;

(f) there is duress and the proposed settlement terms might be regarded as unconscionable.

Partial Settlement

There is a tendency in mediated efforts to resolve disputes for the parties to regard the process as all or nothing. However, if it is not possible to resolve the entire dispute, it makes sense for the parties to consider using the mediator's assistance to:

(a) resolve some aspects of the dispute;

(b) where there are multiple parties and it is possible to do so without prejudicing interests, attempt a resolution of disputes between some of the parties;

(c) refine and limit the issues in dispute;

(d) negotiate a revised dispute resolution process which might progress the matter.

Settlement Agreements

Having reached oral agreement on settlement terms, if the parties leave the mediation without written agreement, there is a possibility that the agreement will fall apart prior to its formalisation. Generally, the parties agree terms subject to later encoding in a formal settlement agreement. To ensure in the meantime there is an enforceable settlement agreement, usually, the parties set out the settlement terms by hand, even in bullet point form, and sign it before they leave the mediation - later to be superseded by the more formal agreement.

There have been occasions where the enforceability of such a handwritten agreement has arisen, e.g. due to the views of other interested bystanders that those with the delegated authority to settle might have done better.

The mediator should seek to ensure that the parties have covered the issue of what is to happen until a later formal typewritten agreement is made, or if no formal agreement is made within a certain time. Usually, the parties require that the handwritten agreement will function as a binding settlement agreement in such circumstances.

The terms of settlement agreements are important. Consider the disaster if a party could raise the matter again, despite (apparent) settlement, perhaps, in another forum or in another guise. There have been examples where parties have apparently settled disputes only to have them arise again.

Consequently, if the parties reach agreement to settle their dispute, it is essential their agreement have effect at law as a full and final settlement of the matter. It is suggested that this issue is not a matter for the mediator. The mediator's role is not to provide legal services to a party or the parties. It is a matter for the parties' lawyers.

The author raises this issue with the parties at the Preliminary Conference and recommends they consider it as important. In some mediations, the parties have responded by pre-preparing and negotiating a settlement agreement other than the particular terms, which can be added by hand say in a Schedule or added by word processor, and checked and agreed before execution. (As the only person present with greater than two finger typing skills, on one occasion the author engrossed the draft with the parties' agreed amendments on a computer in the dispute centre.)

Settlement Cooling-Off Periods

It has been suggested that mediators might be negligent if they do not suggest to parties without legal representation

that there should be a "cooling-off period" prior to binding settlement terms being entered into[4].

There might also be particular circumstances which suggest the need for specialist advice about particular issues prior to proposed settlement terms being finalised, e.g. insolvency, trusts, taxation, stamp duty etc. An approval might be required, such as that of a third party, a financier, a principal, a parent company, a board, minister, trustee, ICAC etc. Under such circumstances, it might be remiss for the mediator not to allow ample opportunity for such advice or approval to be obtained. Any mediator who attempted to curtail or prevent the parties from obtaining that advice or approval, or who attempted to coerce the parties to instant settlement might prejudice a party's position and put himself or herself at some jeopardy.

However, in the absence of such circumstances, it is suggested the important issue is to ensure the parties' settlement agreement is knowingly entered into, and that they are cognisant of the relevant issues. Since these issues are matters for the parties' legal representatives to advise them about, in the absence of legal representation, perhaps all the mediator can do is to suggest a cooling off period to allow access to legal advice. Such offers are often refused, on the basis the party just wishes to settle without further delay. If the parties wish to have an end to the matter without further delay, then that is their decision in a consensual process and it is suggested it is not the mediator's business to dissuade them from doing so - at their risk.

Post-Settlement Justification

Once settlement has been achieved, for reasons of accountability, it is not unknown for a party to seek independent acknowledgment - "certification" - that the settlement is appropriate and justified. Usually, those best placed to do so are the parties' own lawyers.

Often a party will seek the independent certification of the mediator. This is not the mediator's function and many mediators will refuse to do so. Some might question how they could possibly do so, due to the inevitable limitations on the mediator's knowledge of the dispute, e.g. a party might have concealed issues or information; or the parties might have decided not to raise certain issues in the mediation and to leave them for arbitration or litigation if the mediation failed to resolve the dispute.

Obviously, there is the considerable issue of the liability that a certificate from the mediator might attract. The protective terms of the mediation agreement are relevant, but they might not be effective in closing off all liability, e.g. statutory liability pursuant to say a State Fa*ir Trading Act*. Any professional indemnity insurance might not extend to cover certification.

If willing to do so, the mediator's "certification" might be simply that he or she considers the settlement terms to be appropriate. Yet, there might be excessive risk for the mediator in such a blanket approval for the parties' settlement terms.

If willing to assist the parties, or a party in this manner, perhaps, settlement justification might better be provided by pointing to the likely legal costs avoided and the uncertainty and risks of outcome of any formal dispute process. Furthermore, by referring to the issues which the parties would have had to contend with if the matter were litigated or arbitrated, such as the need to obtain experts' reports (or the need to address any inadequacies of the draft experts' reports) and to address problems in the contract, the factual and technical issues or the law. Whether one can go further than pointing to these issues and state that under the circumstances the settlement achieved was good or beneficial for these reasons depends on the mediator's view, confidence, willingness and robustness. Prudence might demand greater circumspection. ❑

Footnotes

1. For a discussion of this case and the resulting issues, see *Breach Of An ADR Clause - A Wrong Without A Remedy*, Shirley, (1991) ADRJ Vol 2, No 2, p117 and *Alternative Dispute Resolution Clauses*, Angyal, (1991) ADRJ Vol 2, No 1, p32.)
2. Byrne, Dis*pute Settlement and Mediation in Hong Kong's New Airport Construction Contracts*, (1995) 1 Commercial Dispute Resolution Journal 240.
3. C*odelfa Constructions Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337.
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