Kluwer Mediation Blog

How Not To Do Arb-Med-Arb

Alan Limbury (Strategic Resolution) · Thursday, July 5th, 2018

(This post is being republished because of technical problems when it was first published)

The recently reported Australian case of Ku-ring-gai Council v Ichor Constructions Pty Ltd [2018] NSWSC 610 (8 May 2018) provides a useful lesson in how not to conduct the hybrid Arb-Med-Arb process, from which (I hope) we might learn how to make it work properly.

Ichor contracted in 2011 to build a swimming pool for the Council. Both parties claimed damages from the other. An arbitrator was appointed in March 2016. The hearing began in March 2018 and ran for 12 days. To quote the judgement: *"It would seem that a very considerable bulk of documentary material was inflicted on the Arbitrator"*. Before lunch on the last day the Arbitrator asked whether the parties would consent to his putting forward a proposal for settlement "under the cloak of mediation". They agreed. After lunch, as the Judge found, the Arbitrator drew attention to and obtained the parties' written consent for him to act as mediator, as required by s.27D of the Commercial Arbitration Act, 2010 (NSW).

In "a less formal room", the Arbitrator said the matter was complex and that he would be very busy with other commitments before he could render a decision. He suggested to both parties that they drop their claims and that each walk away and "stomach its cost". This was rejected. The arbitration hearing then resumed with closing submissions.

The parties, their lawyers and, so it appears, the Arbitrator had overlooked the need under the legislation for further written consent to be given after the termination of the mediation before the arbitrator may continue to arbitrate and that, in the absence of such written consent, the arbitrator's mandate is terminated and a substitute arbitrator must be appointed.

Ichor did not know of the requirement for further written consent until 4 days after the last day of the hearing and it then protested. In seeking to salvage the arbitration so as to avoid having to start all over again with another arbitrator, the Council contended that what took place did not constitute mediation; if it did, the transcript of the resumed arbitration amounted to written consent; alternatively that the parties could and did derogate from that requirement; and that Ichor waived its right to object to the Arbitrator's having resumed the conduct of the arbitration or was estopped from asserting that the requirement for written consent was not met. The judge rejected all these contentions and, in doing so, made some interesting comments on what mediation is.

The Council submitted that the Arbitrator had not acted as mediators frequently do. He had not held discussions with one party in the absence of the other nor had he received any confidential

information from either party. What he put to them was no more than a judge might say in open court in urging them to settle. The judge noted that the legislation contemplates that the mediator may communicate with the parties collectively or separately and may but will not necessarily obtain confidential information from a party during mediation proceedings. Also, that in s.27D "mediator" includes "a conciliator or other non-arbitral intermediary between parties", so the essential contrast between the functions of arbitrator and mediator is that the mediator is acting in a non-arbitral capacity, as the judge found was the case when the Arbitrator put his specific proposal to the parties.

The judge noted that mediation has been defined by the National Alternative Dispute Resolution Advisory Council as:

"a process in which the parties to a dispute, with the assistance of a neutral third party (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted."

My own preferred definition is simply "a process whereby a neutral person helps disputants to reach their own uncoerced agreement". This works well even where the mediation is court-ordered or required by legislation, since the essential feature is that the outcome, as distinct from entry into the process, is voluntary.

The judge found that, before they went into the less formal room, the parties were aware that they were going to attempt mediation with the Arbitrator as mediator and that what happened thereafter did not follow the course that mediations frequently do, in that there were no individual sessions and the Arbitrator did not convey proposals from one side to the other. Nonetheless the Arbitrator put a specific proposal to the parties and because it was rejected the mediation came to an end. The judge said it was very difficult to conclude that everyone was mistaken as to what was to happen and did happen, once the consent to mediate had been signed and before the Arbitrator purported to resume acting as arbitrator.

S.27D of the NSW Commercial Arbitration Act was designed to address legitimate concerns about neutrals "switching hats" so that enforceable arbitral awards may be rendered even though an arbitrator has mediated in the way most of us do, including meeting separately with the parties and receiving confidential information. The requirement of parties' written consents after the mediation terminates before the arbitration may resume and the requirement, if such consents are given, of disclosure to all parties by the arbitrator of relevant confidential information, are critical to this. Clearly, no-one sensible would give consent unless they know what confidential information the arbitrator intends to disclose. This leads to the conclusion that any mediation conducted by the arbitrator should take place as early as possible in the process, so as to reduce the quantum of costs at risk of being wasted if the required consents are not forthcoming.

In the *Ku-ring-gai* case the Arbitrator was the one to draw attention to the need for consent before he mediated but neither he nor anyone else noted the need for the second consent before he resumed the arbitration. In the result, the dispute has been set back to where it was in March 2016 when the Arbitrator was appointed; the parties have incurred significant costs and must start all over again with another arbitrator; and the Arbitrator has been relieved of the burden of having to render a decision.

As happened in relation to the notorious Hong Kong case of Gao Haiyan & Anor. v Keeneye Holdings Ltd & Anor CACV No.79 of 2011, this case plays into the hands of those who cannot bear the idea of arbitrators mediating and mediators arbitrating. I suggest this is because few arbitrators are trained as mediators and few mediators are trained as arbitrators. They inhabit different worlds and arbitrators may see their market shrinking as mediation takes off. For some interesting comments on that case see The Arb-Med hybrid in Hong Kong – Much ado about nothing?

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