Mediation - A Singapore Lawyer's View

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Much has been written and said of the advantages of mediation. It is a flexible process which can be used in partnership with or in addition to the existing curial process. And for those who are yet to be convinced, Justice George W Adams, a judge of the Ontario Court of justice and Naomi L Bussin, a Canadian mediator in their article Alternative Dispute Resolution and the Canadian Courts: Time for a Change [1995] ADRLJ 243 at 262 have this to say:

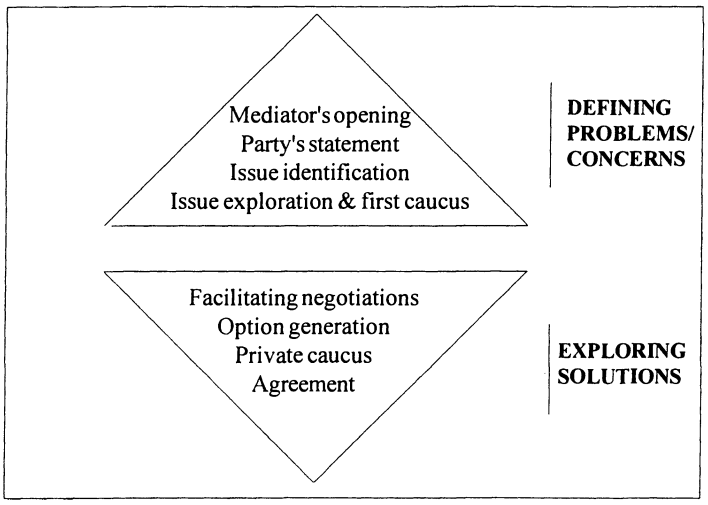
ADR is an approach to justice whose time has come. The problems afflicting the traditional court system from its total dependence on one dispute resolution mechanism. A more comprehensive dispute resolution response is required. Today many Canadians cannot afford a trial which means they cannot afford to have a dispute! ADR provides a necessary supplement to the traditional litigation process and builds on both previous court initiatives and the strengths of the legal profession. Most important, for the twenty-first century, ADR can restore the role of our courts as community centres for conflict resolution and thereby foster values fundamental to the well-being of contemporary Canadian society.

In simple terms mediation is a voluntary and informal process in which a third party assists in:

- isolating the disputed issues
- identifying the interests and needs of the parties
- developing options for an acceptable solution.

It may be worthwhile, at this stage, to look at the mediation process. There are various models of mediation. Generally they can be divided into two stages, viz. defining the problem/concerns stage and the problem solving stage.

The two stages can be represented by two triangles (LEADR model)



At the problem defining stage, the following usually takes place:

- **Opening statement by mediator**

The mediator will briefly explain the mediation process and his or her role as mediator. The mediator will usually emphasise again that mediation is voluntary and confidential.

If any of the parties have concerns about the neutrality or otherwise of the mediator, this is the time to raise it, before mediation commences.

- **Each party presents their statement**

The purpose of the party's statement is to encourage the parties to participate actively in the mediation by letting the parties have their say. Parties express their concerns to the other party.

- **Summarising, clarification and issue identification**

The mediator will summarise each of the party's statements, occasionally clarifying what the parties said. He or she then identifies the issues in broad and neutral terms for the parties' approval and sets the agenda for discussion.

- **Issue exploration**

The issues identified are then explored with the parties. The mediator's role is to encourage the parties to communicate and discuss the issues. If necessary the mediator may break fore private sessions with each of the parties.

Experience shows that the problem defining stage takes about two thirds of the time and the problem solving stage the other third.

At this stage the parties become focused on the solutions and the following takes place:

- **Joint session**

The mediator will, at some stage after the private sessions or caucus, bring the parties back to a joint session to explore options for settlement and generally to facilitate negotiations between the parties.

- **Further private sessions**

The mediator usually goes into caucus again to discuss proposals for settlement. In my experience, parties usually prefer to put their proposals to the mediator and for the mediator to convey the proposal to the other side.

The normal shuttle negotiations take place here.

- **Agreement**

Once a settlement is achieved the parties are encouraged to enter into an agreement. Some mediators assist the parties to write up the terms of settlement while others believe that it is for the parties' advisers to draw up the agreement.

If no settlement is achieved, the mediation may either be adjourned or terminated.

Mediation is now widely used in America, Britain, Australia, New Zealand and Canada – with much of the early impetus coming from the courts themselves. In Victoria mediation has crossed the Rubicon, so to speak, and the rules of the court have been amended to empower the courts to order mediation,

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with or without the consent of any party to the litigation. Mediation is well and truly a part of the court process there.

In Australia the legal profession among those in the forefront of mediation – and the benefits of that early entry are now being reaped. Most of the mediators on the court's list are lawyers. In addition, the premier mediator institutions today are the Law School of Bond University and LEADR (Lawyers Engaged in Alternative Dispute Resolution). Further the Law Institute of Victoria has a specialist examination on mediation. Successful candidates in that examination can hold themselves out as Accredited Specialist in Mediation for three years, subject to reaccreditation.

It is a trite law that a lawyer must act in the best interest of the client – but so far it has not extended to requiring lawyers to advise their clients about alternatives to litigation. In view of the increasing importance of ADR, there may soon be an obligation on the part of the lawyers "to at least consider the possibility of mediation with a client' – Sammon G, '*The Ethical Duties of Lawyers who Act for Parties to a Mediation.* (1993) 4 ADRJ 190 at 192.

Significantly, in Australia the Family Law Act has been amended to require lawyers, when they are consulted by a party, either a party who is involved in an existing proceeding or is considering initiating one, must consider whether or not to advise the client about resolving the dispute by primary dispute resolution methods – see s 14G of the Family Law Reform Act 1995. This presupposes that the legal practitioner understands mediation.

In the west Australian case of *Capolinga v Phyllum Pty Ltd [1951]* 5 WAR 137 Ipp J, while not holding that a solicitor owes a duty to advice on mediation, nevertheless expressed the view that *'where at a mediation conference, a party ... adopts an obstructive or uncooperative attitude in regard to attempts to narrow the issues, and where it is subsequently shown that, but for such conduct, the issues would probably have been reduced, the extent to which the trial is in consequence of unnecessarily extended is a relevant factor when deciding upon an appropriate award of costs.'* [at p 140].

Clauses referring disputes to mediation can be difficult to enforce unless carefully drafted and the conduct required of the parties is sufficiently clear. Courts are of the view that it is inherently wrong, in an adversarial legal system, to compel any party to a litigation to negotiate. The agreement to negotiate, given that any party has the right top terminate at any time, is too uncertain to be enforceable.

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Thus in the House of Lords case of *Walford v Miles* [1992] 2 AC 128, Lord Ackner in deciding whether the contractual clause to 'continue to negotiate in good faith' is enforceable, held that the duty to negotiate in good faith is repugnant to the adversarial system of justice and acts as a clog on the individual's freedom to pursue their own individual interest. Further he says that:

'A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of negotiating party. It is here that the uncertainty lies. On my judgment, while negotiations are in existence either party is entitled to withdraw from those negotiations at any time and for any reasons. There can thus be no obligation to continue to negotiate until there is 'proper reason" to withdraw. Accordingly a bare agreement to negotiate has no legal content. [at p 138]

In contrast in *Channel Tunnel Group Ltd v Balfour Beatty Constructions Ltd* [1993] A C 334, the House of Lords was asked to consider the enforceability of a contractual term in which the parties agreed to refer any dispute to a panel of three experts, who are not acting as arbitrators. Lord Mustill, in upholding the contractual term, said that the issue is not one of jurisdiction purporting to exclude the ordinary citizen from access to the courts. Rather this is a case where the parties, in their commercial wisdom have chosen to refer their dispute to a panel of experts and that is where the appellant should go.

In Australia in the case of *Hooper Baille Associated Ltd v Natcon Group Pty Ltd* [1992] 28 NSWLR 194 Giles J, after reviewing the various English as well as Australian cases on the issue, held that an agreement to conciliate or mediate is enforceable in principle if the conduct required of the parties is sufficiently certain. In his view *'[w]hat is enforced is not cooperation and consent but participation in a process from which cooperation and consent might come.'* at p 206.

One downside of mediation is that it allows a party, with no genuine intention to settle, to use the mediation process as a fishing expedition. In addition there seems to be a belief that everything said, shown or done at a mediation conference is confidential and privileged – which can turn out to be quite wrong and costly for the party relying on such confidentiality. There is a distinction between statements made during the course of mediation, which are privileged and statements made during mediation about matters which can be independently proved, which are not privileged.

In *AWA Ltd v Daniels (unreported Supreme Court of NSW 18 March 1992)* the plaintiff sued the auditors for failure to audit properly the plaintiff's 1986 accounts and the defendant cross claimed against the plaintiff's former chairman and others. The matter was referred for mediation but before mediation commenced, the defendant sought to change the mediation agreement by seeking a warranty from the other parties that their ability to mediate was not fettered by any agreement for indemnity existing between any of the parties. The parties refused to consent to the amendment but the issue was resolved when the plaintiff's solicitor made an oral statement which was made on the basis that it was

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to be without prejudice and confidential.

When the mediation failed, the defendant served a notice to produce on the plaintiff and some of the cross defendants, requiring them to produce some of the documents that the defendant had become aware of only because of what the plaintiff's solicitor had said at mediation.

In ruling in favour of the defendant and the notice to produce, Rolfe J held that the defendant was not seeking to prove what was said during mediation. Rather they were seeking to prove what already existed independently. The defendant was seeking to prove *'a fact to which reference was made at mediation not by reference to the statement but to the factual material which sourced the statement.'* [at p 13]

Harrington v Lowe, a decision of the High Court of Australia delivered on 24 April 1996 and reported in the winter edition of *LEADR Brief*, illustrates how the turn of an extraordinary event can affect the rule of confidentiality. Dr Harrington sued her husband, Dr Lowe for property settlement. In October 1992 the parties attended a mediation or conciliation conference before the registrar of the Family Court, pursuant to Order 24 of the Family Law rules. A settlement was reached and, by agreement, Dr Harrington's solicitor was to prepare the draft consent orders. The consent orders were not made until October 1992.

Dr Harrington now sues to set aside or vary the consent orders on the ground that the orders did not reflect the agreement reached at the conference. Section 79A (1)(a) of the Family law Act allows the court to vary or set side property orders 'if satisfied there has been a miscarriage of justice by reason of fraud or, duress, suppression of evidence or the giving of false evidence or any other circumstance.'

Naturally Dr Lowe objected, citing Order 24 (8) and (9) of the Family Law Rules. In substance)24 (8) provides for stringent confidentiality of matters raised in the mediation or conciliation conference. The exceptions, as provided in sub-rule (9) are where such evidence is required at the trial of a person charged for an offence committed at the conference or on the hearing of an application for costs arising from the conference.

On appeal by Dr Harrington, the High Court held that Order 24 is ultra vires the rule making powers conferred by the Family Law Act because it is not a rule to facilitate the procedure of the court. It is beyond the power given to the judges under the Act to make procedural rules. Consequently Dr Harrington was allowed to adduce evidence of the agreement reached at the conference.

It is also not clear if the obligation of confidentiality and privilege bind third parties – though there is some comfort in the House of Lords' decision in *Rush & Tomkins Ltd v Greater London Council & Anor [1989]* 1 AC 1280. This was a case where a builder sued the owner of the land and one of the builder's subcontractors. The owner and the builder settled and the action between them discontinued. The subcontractor then sought discovery of the 'without prejudice' correspondence by which the settlement was achieved. The Court of Appeal allowed the application, ruling that the privilege ceased once settlement was achieved.

The House of Lords reversed the decision. They held that in general, the "without prejudice' rule renders inadmissible in any subsequent litigation connected with the same subject matter, proof of any admissions made for the purpose of reaching a settlement. That rule extends to admissions made to reach settlement with a different party within the same litigation, whether or not a settlement was reached with that party.

A similar view was expressed in *Phipson on Evidence* 13 edition at page 373 where the author opined that "[i]t is probable that the modern rule extends to all third parties who act as mediators with a view to enabling the parties to reach a settlement or compromise, whether or not that third party is a legal representative.'

Conclusion

Like any other aspect of legal practice, and in my view mediation is part of legal practice, there are pitfalls for those unfamiliar with the mediation process. Whilst it is not yet obligatory at this stage to advise clients of mediation, the fact seems to be that mediation is here to stay. It is equally important to understand the limitations on the extent to which courts will protect confidentiality of communications during mediation.

The attractiveness of mediation lies in the smorgasbord of solutions available to the parties – these options are not confined to those specific remedies usually awarded by the courts but extend to preserving the parties' interests which go beyond the subject matter of the dispute.