CHINESE NATIONAL JUDGES' COLLEGE

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SOME BENEFITS OF MEDIATION

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Mediation – an introduction

Court processes in New South Wales are conducted using the adversary system. This requires the party bringing the proceedings to identify the nature of the dispute and, in the formal setting of a court, tender evidence, both oral and written, to prove its case. Oral witnesses are examined and cross-examined. The opposing party (or parties) may also tender evidence. Their witnesses will be examined and cross-examined. At the end of the evidence the advocates address the court in an endeavour to persuade the judge to find in favour of their client. The decision of the judge may be appealed to a higher court. The process is formal and can be time consuming, costing the parties large sums of money. It is also expensive for the State which must provide the courtrooms, judges and support staff.

Mediation as a means of resolving legal disputes is increasingly used in Australia. There are no reliable statistics available but it is generally accepted that the number of disputes which are finally resolved by a formal court judgment is diminishing.

Arbitration and neutral evaluation are also utilised but mediation provides the most effective alternative to a trial in court.

The Chief Justice of the Supreme Court of New South Wales, Chief Justice Spigelman has stated,

> *"The success of mediation cannot be measured merely by savings in money and time. The opportunity of achieving participant satisfaction, early resolution and just outcomes are relevant and important reasons for referring matters to mediation."*[1]

Mediation is utilised in Australia in relation to many different types of dispute. There are significant benefits for the courts as a result of the reduced number of contested hearings with consequential savings for the court's resources including the time of a judge in preparing a judgment. Those savings are of increasing significance having regard to the cost to the state of providing the resources necessary for a contested hearing. If the mediation process is successful and the matter settles, considerable costs may be saved by not only the parties but the wider community as well. Even if the case does not settle mediation can assist by confining the issues to be tried with a consequential shortening of the trial. Mediation allows the parties to resolve their dispute in private unlike the court process which is public. The parties control the proceedings. They can reach a commercially acceptable solution of the dispute even if it is not the solution which a judge, applying the strict letter of the law would have provided.

[1] The Honourable Chief Justice JJ Spigelman, "Address to the LEADR Dinner", University and Schools Club Sydney, 9 November 2000

A mediator is an impartial third party whose role is to assist the parties to identify the issues in the dispute between them and take steps towards resolving that dispute. The mediator must be completely impartial and have no interest in the outcome of the dispute. One of Australia's leading mediators, Sir Laurence Street once stated that the most important technique in mediation is *"developing an inter-personal relationship of trust and confidence between the mediator and each of the parties".*[2]

The mediator's task is to promote the efficient and expeditious resolution of a dispute. Many mediators have legal qualifications or professional qualifications in a discipline relevant to the particular dispute. Many also have formal training in resolving disputes through mediation.

Mediation has a long history. It is reported to have been used in the 19th Century BC between Assyrian merchants. There is reference to mediation in the records of ancient Greece, Rome and Egypt. There are also references to mediation in many religious traditions. It is referred to in the Christian bible, and there is reference to similar methods of dispute resolution in China found in the writings of Confucious. There is also some evidence that indigenous Australians employed a method of resolving conflicts based on similar principles to contemporary mediation.[3]

More recently mediation began to be used in western societies in a structured manner in the early twentieth century. Its use gathered significant momentum in Australia from about the 1970's.

[2] Angela Cummine, "Sir Lorenzo II Magnifico" (2004) Justinian, 29 July 2004.
[3] Laurence Boulle, "Mediation: Principles, Process, Practice" (2nd ed, 2005) at 49

In New South Wales mediation first came to be used regularly in commercial litigation. It is now used in all forms of dispute. Family disputes, including disputes with the beneficiaries of deceased estates, professional negligence cases, all forms of personal injury matters, workplace disputes, environmental problems and many others are mediated. Certain industry groups, in particular banking and financial services, have developed their own forms of self regulation which require the use of mediation to resolve disputes between the financial institution and its customers. Mediation has been particularly successful in cases where there are multiple issues at stake.

An attribute of mediation which is important to its popularity is that it provides a means of resolving a dispute which keeps the reputation of the disputants from public scrutiny or criticism. It allows corporations to continue doing business with each other without the problems created by court findings as to the credit of witnesses which may follow acrimonious exchanges in the courtroom.

The benefits of mediation

Mediation has been identified as providing five fundamental benefits: confidentiality; voluntariness; empowerment; neutrality and a unique solution.[4] It also has the potential to provide a cheaper and more timely resolution of a dispute.

[4] David Spencer and Michael C Brogan, "Mediation Law and Practice" (2006) at 3.

(i) Confidentiality

The court system is an open public forum. The disputing parties must disclose the nature of their dealings in an open court. Personal information may be disclosed and reported on in the media. Any person may, for a fee, have access to the transcript of the hearing. By contrast mediation is a private method of resolving disputes. Both the content of the matters discussed in the mediation room and the terms of any settlement which may be achieved are not subject to public scrutiny. Mediation allows the parties to avoid a finding by a judge which may be embarrassing or inhibit their future commercial dealings. Mediation provides a forum where trade secrets and other information which a person or corporation may wish to keep confidential is withheld from the public record. Because the process is private and the discussions and outcome confidential, the stress for litigants may be diminished compared with conventional litigation in the courtroom.

(ii) Voluntariness

Mediation is a consensual process which allows the parties involved to control the proceedings. The parties can agree on the mediator and the procedure for the mediation. If the matter settles, they agree on the terms upon which the dispute is resolved. For many people this is a more satisfactory process than having the terms of the resolution imposed by a court. It is better to have a solution to which the parties agree than one about which no party may be entirely satisfied. It is important to appreciate that in a mediation the parties are encouraged but not placed under any pressure to settle their cases.

Although mediation is a fundamentally consensual process the power to require mediation was given to the Supreme Court in 2000.[5] In his second reading speech, the Attorney-General for New South Wales stated that the proposed law:

> *"[R]eflects the current view that many matters are better dealt with by alternative dispute resolution forms rather than the expense and formality of litigation. That does not deprive the parties – the plaintiffs or the defendants – of their ultimate rights to have matters determined by a court… The Bill provides alternative, less formal and less expensive modes of resolution of controversies between citizens, and I believe makes a significant contribution to that process."*[6]

The introduction of compulsory mediation was highly controversial. Two prominent Australian barristers said at the time:

> *"Such a forced process of mediation also has the potential to erode respect for the rule of law, especially if the power to order compulsory mediation is exercised frequently. It is not difficult to suppose that the power will be exercised frequently in times of pressure on courts institutionally to 'up their productivity', whatever this is meant to mean, and on judges individually, to deliver judgments expeditiously. Citizens may legitimately wonder about the importance of the rule of law in this State if, before they can have their disputes determined by a judge of the Supreme Court, they may be required to explore compromises which, again ex hypothesi, will not be based upon an application of law to the facts of the case as determined by the Court."*[7]

At about the same time, Chief Justice Spigelman said that:

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[5] *Supreme Court Amendment (Referral of Proceedings) Act* 2000.
[6] The Hon JW Shaw, Attorney-General, and Minister for Industrial Relations, *Supreme Court (Referral of Proceedings) Act 2000,* (Second Reading Speech delivered to the New South Wales Legislative Council, 8 June 2000).
[7] Brett Walker QC and Andrew S Bell, "Justice According to Compulsory Mediation" (2000) Spring Bar News 7 at 8.

> *"Notwithstanding the 'contradiction in terms', there are precedents for compulsion of mediation. Indeed any contractual arrangement which requires mediation, as is frequently the case, is in one sense a compulsion of this character, albeit one agreed consensually at a time when the possibility of dispute was far from the contracting parties' minds. The Federal Court and the Supreme Courts of South Australia, Victoria and Western Australia have for some time had power to refer matters to mediation over the objection of one or both of the parties."* [8]

Initially, the power to refer a matter to mediation was used cautiously by judges, particularly in cases where there was strong resistance from the parties. It is now more common for the court to order that unwilling parties attend mediation. However, care must be exercised when deciding to impose mediation rather than leave the matter in the hands of the parties.

Mediation may be less effective where the parties are emotionally involved and unable to separate their own anger or frustration from the dispute. Forcing parties into mediation in such circumstances may be counterproductive, and lead to further hostility.

Experience has shown that even in court ordered mediations, a satisfactory result can be achieved. This may be in part because it provides an opportunity for the parties to reflect on the likely burdens of a contested hearing. Sir Laurence Street once stated that it is the role of the mediator to remind the parties of the likely outcome of failing to reach agreement during the mediation:

[8] Above, n1.

> *"You go to court, it costs a lot of money, you can't guarantee an outcome. You need to take into account the uncertainties of the court system, because that's part of the context in which this dispute exists and in which we're approaching it … ."*[9]

Mediation enables parties to participate in the process without the restrictions, which a conventional court case imposes. Rather than have their views expressed through advocates, the participants can discuss them directly with each other and either reach a common view or clearly identify their areas of disagreement and their reasons for them. This process may ultimately suggest appropriate ways of resolving the dispute altogether.

(iii) Empowerment

Many commentators believe mediation is effective because it allows a dispute to be resolved by the parties rather than by a third party. The presence of a mediator facilitates the exchange of information and will generally confine, if not eliminate, acrimonious exchanges. The mediation process often reduces hostility between the parties. They must face each other and engage in direct conversation. This is in contrast to litigation in the courtroom to which the adversarial notions of hostility and confrontation are fundamental. When parties and their witnesses give evidence they may be aggressively cross-examined with a view to demonstrating that their recollections are faulty or that they are lying about particular matters.

Because the parties have control over the process it is more likely that the costs of resolving the dispute through mediation can be contained within reasonable limits.

[9] Above, n2.

Where mediation operates effectively parties are able to prevent the dispute from reaching the point where the costs of the litigation are out of proportion with the amount originally in dispute.[10] Mediation requires the parties to give careful thought to the factual matrix of their dispute and identify the legal principles relevant to its resolution. The parties are required to identify the essential elements of their case and then test in open but confidential discussions with the party or parties. Weaknesses and strengths can be more readily recognised, providing an opportunity for appropriate assessment of the prospects of success if the matter goes to a contested hearing or the benefits of reaching compromise and settling the dispute.

(iv) Neutrality

Mediation can be advantageous where there is unequal power between the disputing parties. The mediator is neutral and will listen to and discuss each party's position with that party and the other party or parties. Any difficulty which a party may have in identifying and articulating the elements of their position may be overcome by a skilled mediator who can ensure that each party has effectively put their position forward.

Mediation provides an opportunity to minimise cultural differences and ensure that any problems from ambiguity or miscommunication due to differences of language do not impede the resolution of the dispute.

[10] Supreme Court of New South Wales, *Annual Review* 2006 (2007) at 26.

(v) A Unique Solution

Mediation allows the parties complete flexibility in the resolution of their dispute. It allows a practical resolution of a problem even if the resolution does not accord with accepted legal principles. This may have significant advantages, particularly in commercial disputes. The parties are in the best position to determine a solution which reflects their knowledge of their business and the industry or profession in which they operate.

Some general matters

Mediation can also assist in the ”just, quick and cheap” resolution of disputes. Some practitioners in the courts treat every minor dispute as a “tactical battle” which must be won at all costs, irrespective of its contribution to the broader issues in the trial. Mediation can assist by encouraging the parties to look at the “big issue” or “issues” in the case.

It should not be overlooked that although a matter may not initially settle at mediation the process may facilitate settlement at a later stage. It can lead to a narrowing of the issues in dispute and may provide an agenda for further negotiation. The exchange of views between the parties may also confine the number of issues which the court will ultimately be required to resolve. Although the entire matter may not be settled it will ensure that, to some extent, which may be significant in particular cases, the litigation will be confined to the issues really in dispute with consequential savings of costs.

A mediation “hearing” will almost always take less time, often far less time, than a contested court hearing. Because the parties are able to agree a solution without waiting for a court judgment it will also provide for an earlier resolution of the dispute. This may have considerable benefit for a party – in particular for a successful plaintiff.

Mediation may provide opportunities for the expression of emotions and the discussion of matters beyond the litigation which can in themselves facilitate settlement. An apology offered in the course of a mediation may have a significant affect on the parties and result in an increased likelihood of resolution of the dispute.

Some criticisms of mediation

Mediation has been accepted by the general legal community in Australia but some criticisms should be acknowledged. It is sometimes suggested that those who favour mediation place too much focus upon cost and efficiency and not enough on whether parties do in fact have their needs and expectations met by the final outcome of the dispute. It is argued that some people do not feel satisfied with the outcome unless they have had the chance to have their “day in court.” Because the mediation process creates an environment of compromise a party may feel pressure to settle which they later regret. For some people the court process is an opportunity to publicly vindicate their position and have it endorsed by the judgment of the court.

Although mediation affords parties an opportunity to resolve their dispute it does not allow the court to make a judgment. Judgments are important in defining legal

principles and upholding social values. Some people argue that mediation allows the parties to reach a solution which may seem fair in their eyes, but in the eyes of the larger community has limited benefit. They are also concerned that mediation allows government or corporate dealings to be concealed from public scrutiny. It is suggested that the public resolution of disputes brings significant benefits in identifying and strengthening appropriate norms of individual and corporate conduct which are not available when a matter is mediated “behind closed doors”.

In some cases mediation may lengthen the time and increase the cost of resolving a dispute. If the mediation is not successful the time and cost of the process may be an additional burden on the parties. Although used in appeal proceedings it has less utility. By the time a dispute is in the appeal process one party has already “won” at the trial and may reject mediation as a process designed to require them to negotiate away part of that win.

Some people have expressed concern that parties will be cautious about the extent of information that they disclose during a mediation out of a fear that if the case does not settle their chances of winning in court may be adversely affected. In some cases parties may ‘fish’ for information during the mediation. While, any admissions made in mediation are not admissible in any court or other body, they may nevertheless provide a tactical advantage or suggest lines of inquiry to the other party.[11]

Concerns are sometimes expressed that an inequality of bargaining power may frustrate the mediation process. For example, in negligence cases, where the

[11] *Esso Australia Resources Ltd v Plowman (Minister for Energy and Minerals*) (1995) 183 CLR 10.

defendant is insured, some insurance companies will declare their position at the beginning of a mediation and then refuse to move, effectively closing down negotiations. Often the boundaries for negotiation are set by company officers who are not present at the mediation. The officers that do attend are often bound to act on the instruction of their superiors, regardless of the content of discussions and with no discretion to vary any offer irrespective of the strength of the other side's case.

Conclusion

There are many advantages both to the parties and the courts in the increasing use of mediation. Although there are some legitimate criticisms, the benefits which I have outlined are generally accepted as significantly greater than any of the problems that I have identified.