153.310 Arbitration Practicum

Course Co-Ordinator: P D Green

Pre-Course Assignment

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Process Models

For the purposes of this essay, mediation is the model used to typify a consensual dispute resolution process. Arbitration is the model used to typify an adjudicative process. Neither is an exclusive model.

First Principles

Whether entering onto an agreement to mediate or an arbitration agreement (to that extent both are consensual processes), a participant is contracting an independent third person to administer a process aimed at resolving a dispute.

In procuring a consensual dispute resolution process the participant agrees to cede to that third party, powers to determine at least some aspects of the process by which the resolution will be reached. Crucially, the participant retains control over the outcome. That is the essence of a consensual process. The participant cannot be bound to an outcome that he or she does not specifically agree to be bound to.

In procuring an adjudicative process, the participant, as well as ceding to the third party control over at least some aspects of the process by which the resolution will be reached, yields to the adjudicator control over the outcome. That is the essence of an adjudicative process. The participant can be bound to an outcome that he or she has not specifically agreed to and may indeed oppose.

These processes are fundamentally different. They are aimed at different ends. To optimise outcomes from mediation, for example, the process will maximise participants' opportunity to uncover and explore subjective interests, consider a broad range of options tor consensus and resolve a dispute by agreement. That is the "point" of the process.

By contrast, the "point" of an adjudicative process is to enhance the fair application of an objective evaluation. Optimum process will enhance participants' opportunity, within the agreed set of rules, to efficiently present their case to the adjudicator and thus have a fair and equal opportunity to influence the adjudicator's application of objective criteria to "relevant" facts.

Hybrids

For participants, there will often be competing interests. On one hand will be the desirability of retaining control over the outcome, which a consensual process will provide. On the other will be a preference for the certainty that an adjudicative process assures, that there will be an outcome.

Not surprisingly perhaps, those competing interests, which will be in the minds of many if not most disputants, have led to the desire to formulate hybrid models which aim to provide participants with the best of both processes i.e. to maximise the opportunity for consensual resolution while also providing certainty of outcome.

A limited range of hybrid models are either mandated or contemplated in New Zealand by statute or in commonly used agreements. By way of example, but without wishing to deeply analyse each:

1. Disputes Tribunal referees are required, before determining a dispute, to assess whether the parties should be assisted to negotiate a settlement[1];
2. The Crown Minerals Act 1991[2] similarly requires a conciliator to use best endeavours to encourage settlement;
3. Employment Authority mediators can be authorised by the parties to decide the issues[3]
4. The Federated Farmers form of 50/50 sharemilker's agreement considered in the *Acorn Farms*[4] decision discussed below, prescribes a process where the conciliator is required to assist the parties resolve the dispute but if they can't to then issue a determination which becomes binding unless the parties object within 5 days;

In New South Wales, arbitrators acting in domestic disputes under the Commercial Arbitration Act 2010[5] may, with consent, mediate, conduct separate confidential meetings and subsequently arbitrate – after determining what confidential information obtained in private meetings should be disclosed.

Other jurisdictions give examples of hybrid processes with less jurisdictional constraint. In his paper for the AMINZ Conference 2013[6] Royden Hindle considers the approach of our South East Asian trading partners in particular and notes that[7] "*We can hardly ignore the reality of med/arb given our trading links with Asia. As Keeneye*[8] *shows the process is alive and well In China. The Hong Kong Arbitration Ordinance (no 17 of 2010) provides rules for the process. So too does the Singapore International Arbitration Act and the Singapore Mediation Centre and Singapore International Arbitration Centre have a detailed protocol as well"*

Issues

What that cursory examination shows is that there are persistent reasons why participants might want access to the benefits of both processes. The difficulty is that, as discussed above, the "point" of each process is very different. So, aspects of each process are incompatible.

In his Paper for the AMINZ Conference 1994[9], P D Green notes an illustrative list, in Table 2 to that Article, of tools which are the "bread and butter" of effective mediation practice which are inimical to adjudication. Caucusing, reframing, interest revelation and other hallmarks of the "omnipartial" mediation approach do not fit well with the more passively "impartial" role of the traditional adjudicator. Colloquially, a mediator can be on everybody's side. An adjudicator can be on nobody's.

[1] Disputes Tribunals Act 1988, s.18.
[2] s. 68
[3] Employment Relations Act 2000, s.150
[4] Acorn Farms Ltd v Schuringer [2003] 3 NZLR 121
[5] S. 27D
[6] Is Med/Arb an Oxymoron? – paper for AMNINZ Conference Auckland 25-27 July 2013
[7] Para [27]
[8] Gao Haiyan v Keeneye Holdings Limited [2012] HKRLD 627
[9] C0-Med-Arg – Strengths, weaknesses & ethical problems

The fundamental issues are:

1. Is there a single process that can safely marry elements of both arbitration and mediation?
2. If so, is that process so adulterated and "bland" as to rob either process of its real value?
3. To what extent can informed consent of the parties overcome otherwise unsafe consequences of the marriage?

Acorn Farms

Those kinds of question were considered in depth by Fisher J in *Acorn Farms.* His Honour began from the premise that (p. 122 line 20), *"There is no difficulty combining the roles of mediator and conciliator but steps taken in a conventional mediation will often conflict with the requirements of a legally valid arbitration."* Essentially that conflict arises from the natural justice principles required to ensure a participant in arbitration has fair and equal opportunity to influence the arbitrator's objective assessment. At p.128 line 45 the decision records "*Because they have no determinative powers, mediators are not bound by the requirements of natural justice. There is no legal requirement that they be impartial."* By contrast (p. 129 line 10) *"Arbitrators are…..bound by the strict requirements of natural justice….and must be impartial, equal and open in their dealings with the parties."*

For Justice Fisher, the question of whether there can be a safe marriage of the processes depends on who is the "dominant partner". His honour (who, with respect, has an iconically adjudicative function) is comfortable grafting aspects of mediation onto an arbitration process but not with a process that results in a determination being made following a mediation that does not result in settlement. At p. 130 line 16, "*The key, in my view, is that while limited aspects of mediation can be successfully engrafted onto a fundamentally conventionally arbitration, the reverse is unlikely to be true."* Because (line 37) "*If the process starts out as a conventional mediation, the frank disclosures, open offers, mediator evaluations and/or caucusing likely to occur could pre-empt the natural justice requirements of any arbitration that may follow."*

Really, with respect, what His Honour considers appropriate, reflects what is contemplated by the High Court Rules[10], which permit the Judge to convene a settlement conference to assist a negotiated settlement on the basis that the Judge does not then proceed to hear and determine the matter except on matters of law or with consent. For me, at the risk of getting stuck on labels, the kind of mediation interventions that are contemplated by this approach are limited to "settlement" interventions. The process with which the Courts are very familiar where a judge can encourage a negotiated settlement but without the party engagement that the *Acorn Farms* decision raises cautions about, has undoubted value. That value though is likely to be limited to the risk management and cost saving benefits for the parties (and the Court) of litigation being ended more quickly. It is unlikely to result in resolution of causal issues. That is not the "point" of those interventions.

[10] R. 442

Further, to the extent that *Acorn Farms* represents the current law in New Zealand, informed consent cannot infinitely extend the boundaries of acceptable process, as (p. 130, line 47), "….*it is beyond the power of the parties to contract out of the fundamental requirements of natural justice."*

Natural Justice

The question then becomes, what natural justice requires in this context, as whatever the parties' preferences, any hybrid model will need to ensure those requirements are met.

The Acorn Farms decision (p122, line 25 and following) provides a helpful list of 5 precautions to be observed, if arbitration is to be formally combined with mediation. The word count does not permit them to be reproduced here. Of those 5, I suggest with respect, 4 are unexceptional as they involve ensuring that the participants are fully aware of the nature of the process and given opportunity to participate. Those are features of both processes. Where the real "rub" comes is in precaution *"(b) the mediator-arbitrator may not receive information without the knowledge of both parties. This rules out the possibility of caucusing at any stage of the process;"*

The essential concern is that the private engagement of the mediator with each party, typified by the use of caucusing, creates a risk that if the mediator later dons an arbitrator's hat and makes a binding decision, that decision will reflect information/ influence not known to and able to be answered by both parties.

I wonder whether that aspect of natural justice ("*fairness writ large*") is over emphasised because of our historical reliance on adversarial models of dispute resolution. Royden Hindle's paper, referred to above, seems to suggest that jurisdictions which rely on a less adversarial and perhaps more investigative model do not reflect those same concerns. *Scott Doahey*[11] *compared the U.S. and Germany in a report of his that led to the conclusion that Germans "often encountered arbitrators participating in the settlement negotiations," while in the U.S. this attitude was "very rarely" seen. Furthermore, 92% of Germans considered this attitude appropriate, while 71% of the U.S. sample group rejected that role of the arbitrator."* Equally, in many other forums, commissions of enquiry and tribunals, affected parties are given opportunity to present their position without right of reply. Culturally, if our legal system had evolved out of a model focussed more on enquiry than on combat, I doubt there would be the same level of concern .

[11] M. Scott Donahey, Seeking Harmony, Is the Asian Concept of the Conciliator/Arbitrator Applicable in the West? 50 Disp. Resol. J. 74 ,April 1995 – as cited in L. Loranzo – Can a Med-Arb Serve in 2 Processes? Mediate.com, May 2013.

Gaye Greenwood and Roger Pitchforth in a 2007 Paper[12], reviewed the *Haines v Carter*[13], *Duncan v Davies*[14] and *McCosh v Williams*[15] decisions, as examples of ADR processes where:

a. A mediator was empowered by the settlement agreement to make determinations for the parties; but
b. A party was dissatisfied with the outcome; so that
c. The parties ended up in Court contrary to their intent in engaging in mediation.

While in each case the Court upheld the integrity of the mediation process, the authors conclude (p. 16) "*….the agreement cannot become an award just because and (sic) ADR professional facilitated the process, that a decision by a mediator after mediation is not a safe arbitration and that med/ arb processes are fraught, even for the most senior and experienced people."*

For me, I think an essential aspect of those cases is the parties' having entered into a mediation process, with determinative powers having been given to the mediator as part of the settlement agreement. Perhaps the key lesson, as the authors note (p15) is that *"….it is important for the parties and the ADR professional to know what he/she has agreed to do, their role and their limitations".*

I am not sure that where we are left today gives satisfactory answers to disputants, particularly in "low value" family/community based disputes, who ask for a process where they are given every opportunity for resolution but with the added certainty of knowing that if there are matters they cannot resolved a well informed, neutral will then decide those matters for them. I suggest that is an entirely legitimate request. For cost reasons the obvious safeguard of having different persons undertaking the mediation/ arbitration roles is unlikely to appeal.

What I think we can offer them as an endorsed process under current law, provided the process is entered into on a fully informed basis is:

a. A mediation without separate confidential mediator engagement/ caucusing , leading to arbitration if needed; or
b. An arbitration with the possibility of the arbitrator assisting with settlement negotiations; or
c. Co med/ arb with different med and arb.

None of those seems to me to be getting the best out of either process or to be offering what those disputants legitimately want.

[12] G. Greenwood and R. Pitchforth – Creative DIY Processes v Standard Procedures: Where is Alternative Dispute Resolution Heading? AMINZ Annual Conference 3-5 August 2007

[13] Haines v Carter CA [2001] 2NZLR 167

[14] Duncan & Davies Nurseries New Plymouth v Honnor Black Ltd & Annor (HC Auckland, CIV 2005-4040-2513, 14 June 2005) 4.

[15] McCosh v Williams (Unreported- CA275/02 12 August 2003)

Summary

There is nothing to stop disputants and the mediators/ arbitrators they engage entering into an agreement on whatever terms they choose . Royden Hindle's article (above) suggests that under the radar and perhaps more so in the rural South this is being done quite regularly without undue concern for the legal "niceties".

The fact is though that if an award is issued following a med/arb process, consensual or not, that involved separate mediator engagement during the mediation phase, that award must be open to challenge on the basis of *Acorn Farms.* That is unsatisfactory for disputants and ADR professionals.

Design of an endorsed Med/Arb model perhaps with elements of the NSW Commercial Arbitration Act or conciliation models which seem to recognise the value in both processes for disputants while giving some protections against the effects of the natural justice "shortcuts" entailed in grafting them together would seem a valuable exercise.

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