ARBITRATION INSIGHTS: AUSTRALIA

MED-ARB

Mediation and arbitration are commonly used dispute resolution methods. Both processes have their pros and cons and this article considers whether it is possible to combine the advantages of both in a "Med-Arb" process.

What is Med-Arb?

Med-Arb is not a precisely defined term and there may be different variations as to how it operates in practice. In a broad sense, it refers to a process where parties choose the same person to conduct both mediation and arbitration of dispute. This assumes that the arbitration process has already started.

Med-Arb is not new. Sections 32 and 33 of the Hong Kong Arbitration Ordinance (Cap: 609) provides a mechanism for a person to act as both an arbitrator and a mediator. There are similar provisions in the Australian states' Commercial Arbitration Acts (section 27D of the Commercial Arbitration Act 2011 (Vic) and in Singapore Arbitration Act (section 63)).

Benefits of Med-Arb

The primary advantage is expedience and potential savings in time and costs. If the arbitrator has already read into the pleadings, it is not necessary to spend significant time on position papers and bringing the mediator up to speed.

It may also be the case that any settlement in the mediation part of the med-arb process can be set out in a consent award issued by the arbitrator and the parties could use the New York Convention on the Recognition and Enforcement of Arbitral Awards to enforce the consent award in foreign jurisdictions. Until a sufficient number of states ratify the Singapore Convention on Mediation, this may remain an advantage of med-arb.

Pitfalls of Med-Arb

The biggest problem is that the role of the mediator and the role of the arbitrator are not the same and there is a problem (at least one of perception) that parties would be less willing to confide in a mediator knowing that the same person may issue a binding arbitration award about the very same issue at some later stage.

There is also a significant problem with how confidential information is to be treated. An arbitrator should not be provided with information by one party unless the other party is also made aware of that information. This is why it is common for med arb provisions to require the arbitrator to disclose confidential information if the mediation fails before the arbitration recommences (see for instance section 63 (3) of the Singapore Arbitration Act).

Problems were the med-arb process were highlighted in the case of *Ku-ring-gai Council v Ichor Constructions Pty Ltd* [2018] NSWSC 610. Section 27 D of the Commercial Arbitration Act (NSW) provides that an arbitrator may act as a mediator with consent of the parties. However, the parties must provide written consent to allow the arbitrator to continue with the arbitration if the mediation fails. In *Ku-ring-gai Council*, the arbitrator, during the hearing, asked the parties whether they would accept hearing a proposal settlement from him. While the parties had agreed to the arbitrator's proposal (by written consent), they did not agree with it and the arbitration resumed, but crucially without the written consent of the parties. The court in the First Instance held that because the parties had not provided their written consent, the arbitrator's mandate had been terminated. An appeal to the New South Wales Court of Appeal was dismissed on the grounds that the First Instance judgment was "final" pursuant to the relevant arbitration act, but the Court of Appeal made obiter comments agreeing that the decision was correct (*Ku-ring-gai Council v Ichor Constructions Pty Ltd* [2019] NSWCA 2).

Ultimately and while there may be certain advantages for having a "Med-Arb", parties should carefully consider whether such benefit would outweigh the potential risks involved. Although Med-Arb may sound expedient, the cost of failure could be significant.

In our next article, we will write on Emergency Arbitrations.

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