

Arb-Med in Australia: The Time has Come

Dr Luke Nottage*

31 October 2007

- (1) The website of the Chartered Institute of Arbitrators – Australia Branch (CIArb) has long stated that it is “developing a nationally-based, combined mediation/arbitration service” for disputes between \$10,000-40,000.¹ Two recent contributions to this Newsletter have attempted to rekindle the debate about such true hybrids, rather than the now well-known multi-tiered processes involving mediation facilitated by one person followed by arbitration by another.² The time has now come for more specific proposals, at least for international commercial disputes.
- (2) This year’s Clayton Utz / University of Sydney Arbitration Lecture, delivered in the Banco Court on 9 October by Professor Gabrielle Kaufmann-Kohler from the University of Geneva, was on “When Arbitrators Facilitate Settlement: Amiable Imposition or Actual Solution?” (transcript forthcoming on www.ialecture.com). The next day, the Chartered Institute of Arbitrators co-hosted at Sydney Law School a CLE Seminar to explore some aspects of “Arb-med” in more detail. It included presentations by Prof Kaufmann-Kohler, CIArb Chairman Malcolm Holmes QC (including a case study of med-arb in sports arbitration),³ and myself (contrasting approaches in Japan versus China).⁴ Then followed a vigorous general discussion facilitated by Derek Minus, a CIArb member with particular interest and experience in hybrid ADR processes.⁵
- (3) The broad consensus was that there is there are no significant legal or practical obstacles to implementing a hybrid process whereby arbitrators actively facilitate settlement at least in international arbitrations even when the seat is in Australia. Professor Kaufmann-Kohler’s recent empirical research confirms that this mostly happens overseas when the arbitrators come from certain jurisdictions following the continental European tradition (notably Switzerland, Germany and Latin America).⁶ However, even in the common law world, views have evolved to acknowledge that judging or arbitrating is not fundamentally incompatible with

* Associate Professor and Co-Director, Australian Network for Japanese Law, Sydney Law School; Director, Japanese Law Links Pty Ltd.

¹ At www.arbitrators.org.au/4627.01.1-0-Mediation-arbitration+scheme.php

² See Jim Creer J, *Should It Be the Duty of the Arbitrator to Promote Settlement of Disputes?* (April 2007) *ADR Reporter* 14; and Limbury A *Making Med-Arb Work* (July 2007) *ADR Reporter* 14.

³ See further Holmes M, *The Ad Hoc Division of CAS at the XX Olympic Games in Torino 2006* [2006] *ISLR* 58.

⁴ See further Nottage L *Japan's New Arbitration Law: Domestication Reinforcing Internationalisation?* (2004) 7 *International Arbitration Law Review* 54-60 (also at: <http://ssrn.com/abstract=838025>); and Nottage L and McAlinn G *Changing the JCAA Rules: Improving International Commercial Arbitration in Japan* (2004) 18 *Journal of Japanese Law* 23 (also at: <http://ssrn.com/abstract=837085>).

⁵ See generally Minus D, *You Say Mediate, I Say Arbitrate* (27 April 2007) *Lawyers Weekly Online*, at

<http://www.lawyersweekly.com.au/articles/05/0C04B905.asp?Type=55&Category=1115>.

⁶ See Kaufmann-Kohler G and Bonnin V *L'arbitre-conciliateur: approche statistique de la correlation entre le role de l'arbitre et sa culture juridique* (forthcoming) *ICC Bulletin*.

mediating.⁷ Her other research could find no judgment from courts anywhere in the world where a consent award has been successfully challenged either at the seat or in the jurisdiction where enforcement of a consent award has been sought.⁸ A growing number of jurisdictions take the UNCITRAL Model Law on International Commercial Arbitration (1985, with minor revisions in 2006) as the basis for their arbitration legislation these days, including Australia, so we should not expect successful challenges here either. (Australian parties anyway are free to opt out of the Model Law regime under our *International Arbitration Act* (Cth) and into the *Commercial Arbitration Act* (NSW), and then invoke s27 aimed precisely at promoting arb-med. However, the latter Act is not tailored to international arbitrations, although for example it does allow parties to such arbitrations to exclude challenges for arbitrators' substantive errors of law – as under the Model Law regime.)

- (4) Nonetheless, lawyers and judges are inherently conservative, and Anglo-Commonwealth jurists are only just beginning to get used to the (more continental) idea more active intervention by judges to resolve commercial disputes before a binding decision needs to be made. It therefore becomes particularly important to minimise concerns in Australia about procedural fairness when arbitrators engage more actively in settlement facilitation, despite the probable efficiency advantages from such involvement by an expert familiar with the case.
- (5) That makes it unlikely that it will be enough to add to institutional arbitration rules in Australia a provision like that in Article 32.1 of the German Arbitration Institute's Rules: "At every stage of the proceedings, the arbitral tribunal should seek to encourage an amicable settlement of the dispute or of individual issues in dispute". That approach was echoed by Arthur Marriott QC when presenting his Lecture in 2005 (also at www.ialecture.com). But it probably would not provide enough guidance to even open-minded parties, legal advisors or arbitrators trained in the Anglo-Australian common law, and they might also be wary of imposing a positive duty on arbitrators instead of a discretion.
- (6) Instead, Professor Kaufmann-Kohler suggested that a Rule (or ad hoc arbitration agreement between the parties) adds that the arbitrator, although given the power to promote settlement, may not meet privately with a party. That is, s/he may not 'caucus', but rather must engage in settlement facilitation with all parties present. As pointed out by another prominent Swiss expert a decade ago, although this may have some chilling effect on parties' willingness to express views or concessions aimed at achieving settlement, there are offsetting advantages such as the deeper insight of the file that the Arbitrator can gain (even compared to a separate Mediator).⁹ Disallowing Arbitrators from facilitating settlement by

⁷ See eg Nottage L *Is (International) Commercial Arbitration ADR?* (2002) 20 *The Arbitrator and Mediator* 83 (also at: <http://ssrn.com/abstract=838044>).

⁸ See also generally Loerchner G *Enforceability of Agreed Awards in Foreign Jurisdictions* (2001) 17 *Arbitration International* 275; and Berger K-P, *Integration of Mediation Elements into Arbitration: Hybrid Procedures and "Intuitive" Mediation by International Arbitrators* (2003) 19 *Arbitration International* 398.

⁹ Schneider M, *Combining Arbitration with Mediation* in Berg A (ed) *International Dispute Resolution: Towards an International Arbitration Culture* (Kluwer, The Hague, 1998) 57.

caucusing with parties individually also avoids committing in advance to additional Rules (or clauses) that attempt to minimise procedural justice concerns related to that practice. The CIETAC Rules in China provide that an Arbitrator-Mediator may not use confidential information provided by the parties in settlement facilitation mode, when returning to arbitrator mode, but such a proscription is probably unrealistic in practice. By contrast, the Model Law based legislation enacted in Hong Kong and then Singapore requires the Arbitrator-Mediator, who may caucus, to disclose “to all other parties to the arbitration proceedings as much of that information [obtained in confidence from one party during the mediation] as he considers material to the arbitration proceedings” (Singapore International Arbitration Act s63(3)). But this probably goes too far as well.

- (7) Even with a Rule proscribing caucusing when attempting settlement, Professor Kaufmann-Kohler points out that the arbitrator should be very careful about when first to try to facilitate settlement, and how to do so. From her practical experiences and those of others, the best time tends to be after full written briefs have been filed. Settlement can often be facilitated by asking each party searching questions and even expressing tentative views, as in more “evaluative” mediation: but the Arbitrator-Mediator should not give the impression that s/he has already reached firm conclusions about key factual or legal points in dispute. If s/he has any doubt about being able to maintain procedural fairness and impartiality when reverting to arbitrator mode in order to give a binding decision, s/he should at least disclose this to the parties and give each the option of obtaining his or her resignation. (I would add that the latter is the only point that it would be appropriate to draft a Rule or clause for, and that the 2004 IBA Guidelines on Conflicts of Interest in International Arbitration might provide some more guidance as to the procedural steps to be followed.¹⁰) Another point that might need to be considered especially when drafting Rules, raised in the CLE Seminar discussion by Damian Sturzaker, is clarification of the immunity of arbitrators even when engaging in settlement facilitation.
- (8) From such a perspective, the appended Model Arb-Med Clause (or, potentially, Rule) that I originally proposed as a further discussion point at the CLE Seminar is probably not so good. Its default position is also no caucusing; but then, if parties agree separately on caucusing, ‘facilitative’ rather than ‘evaluative’ mediation. Yet, Prof Kaufmann-Kohler indicated that parties generally appreciate more evaluative mediation, albeit preferably without caucusing. On further self-reflection, a more serious problem with my original Clause is that it will be very difficult to assess and prove whether an Arbitrator-Mediator conducted a separately authorised “facilitative” or “evaluative” mediation. On the other hand, I still think it would be helpful to minimise the chance of natural justice challenges by requiring parties to confirm to the arbitrator, before s/he proceeds with mediation attempts, that they have received legal advice about the risks and benefits of such hybrid processes.
- (9) Lastly, like myself, Professor Kaufmann-Kohler remained sceptical about Arb-Med Rules (or a model clause) that involved a two-stage process, suggesting this

¹⁰ Available via <http://www.ibanet.org/legalpractice/Arbitration.cfm#Guides>.

would not be invoked much or instead lead to delays. Under Alan Limbury's 'opt-out' variant,¹¹ the parties would begin the arbitration agreeing on the arbitrator's power to act as mediator, but any party would be able to veto that Arbitrator-Mediator from reverting to arbitrator mode (otherwise, perhaps after a set period, s/he could proceed to give the award). Under an 'opt-in' variant proposed by Derek Minus,¹² both parties would have to re-authorise the Arbitrator/Mediator to continue.

(10) In sum, therefore, a possible revised Model Clause or Rule might read like this:

- (a) At any stage, the arbitrator may assist the parties to reach a settlement of their dispute.
- (b) However, the arbitrator may not meet separately ('caucus') with each party.
- (c) Before proceeding to encourage settlement on this basis, the arbitrator shall confirm that the parties have received legal advice about associated risks and benefits.
- (d) If the arbitrator has encouraged settlement to no avail, and has doubts about being able to maintain impartiality and natural justice in proceeding to deliver an award, s/he shall disclose this to the parties. At the request of any party, the arbitrator shall then resign.

I look forward to further views from CIArb members and others, especially in the form of specific proposals like these.

Appendix: My original model Arb-Med clause proposed for the CLE Seminar -

The sole arbitrator may act as mediator, but:

- (a) cannot caucus (meet separately with each party), or
- (b) if parties agree separately by writing that s/he can caucus (instead or in addition to mediating with all parties present), the arbitrator acting as mediator must use "facilitative" not "evaluative" mediation, or
- (c) if parties agree separately by writing that s/he can caucus *and* use evaluative mediation (instead of or in addition to facilitative mediation), each party shall appoint an additional arbitrator to form an arbitral tribunal and those other arbitrators may not caucus with the parties.

Each party shall obtain written advice from independent lawyers about the implications of allowing arb-med in accordance with (a), (b), (c) or any other arb-med procedure that the parties may agree on in writing; and each shall notify the arbitrator(s) at the commencement of proceedings that this has been completed.

¹¹ Above n 2 at 15.

¹² Care must also be taken that the process begins as an arbitration, not a mediation, especially for international commercial disputes. Otherwise, even if the dispute is successfully mediated, a consent award cannot be issued because there is no 'dispute', hindering cross-border enforcement. See the critique of such a "Med-Arb" procedure proposed by the Stockholm Chamber of Commerce: Newmark C and Richard H *Can A Mediated Settlement Become An Enforceable Arbitration award?*(2000) 16 *Arbitration International* 81 .