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ARB-MED: A HYBRID PROCESS

Catherine Green
Executive Director, NZIAC

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Arb-Med: an overview



- A hybrid dispute resolution process that combines the benefits of arbitration and mediation, including:
 - Speed;
 - Procedural flexibility;
 - Confidentiality;
 - Choice of decision maker;
 - Ease of access to the tribunal;
 - Continuity;
 - Finality; and
 - Enforceability of the outcome.



Arb-Med: primary objective

The informed good faith negotiation and settlement of the dispute by the parties, with the initial assistance and efficiency of the Arbitral Tribunal's information gathering powers, in the context of a formal arbitration process that will immediately resume if the mediation that follows is not successful.

- ▶ NB: Arb-Med is just one iteration of the many and varied hybrid processes

Arb-Med: how does it work in practice?

Appointment

- Parties agree to adopt process
- Same neutral appointed as arbitrator and mediator

Directions Conference

- To discuss and determine procedural and evidential issues and timetabling

Submissions

- Exchange of parties' case submissions and key documents

Arbitration Stayed

- **Mediation** commences. If parties reach settlement then that is recorded as an Award on Agreed Terms and process concludes

Arbitration Resumes

- If mediation unsuccessful, further directions conference and **continuance of arbitration process** concluding with Award



Arb-Med: potential pitfalls

- ▶ **Caucusing** with parties (ie the third-party neutral in his or her capacity as mediator meeting with one or more parties separately and then going on to make a binding decision); and
- ▶ The **sequencing** of the process and uncertainty about what is occurring at any point (ie whether the parties are mediating or arbitrating).



Arb-Med: caucusing

- ▶ Caucusing is common practice in mediation, but what is it that we are talking about?
 - ▶ Separate and private sessions with the mediator and one party
 - ▶ Information exchanged in caucus will not be divulged to other parties without consent
- ▶ Why is this a problem for Arb-Med?
 - ▶ The right of a party to present its case for determination by an independent and impartial arbitral tribunal which is not influenced by private communications is basic to the notion of natural justice
 - ▶ The practice of caucusing is antithetical to the notion of natural justice



Arb-Med: caucusing

- ▶ How do we avoid this pitfall?
 - ▶ Simple – don't do it
 - ▶ NZIAC Arb-Med Rules, r 22.4

An arbitrator acting as a Mediator may not communicate with the Parties separately and, if that person is a co-mediator, that person may not communicate with any other co-mediator in relation to any Confidential Information or material obtained by that co-mediator from a Party during a separate session with any of the Parties.



Arb-Med: caucusing

- ▶ If confidential information is obtained from a party or a co-mediator during the mediation by the arbitrator acting as a mediator:
 - ▶ the arbitrator must disclose to every party the fact that confidential information was obtained during the course of the mediation;
 - ▶ following that disclosure, the arbitrator may not conduct subsequent arbitral proceedings without the written consent of all the parties; and
 - ▶ if all the parties do not consent to the arbitrator conducting subsequent arbitral proceedings, the arbitrator's mandate will be taken to have been terminated and a replacement arbitrator will be appointed.



Arb-Med: sequencing

- Essential the process commences as an arbitration
- Why?
 - To ensure the outcome is a valid and enforceable Award regardless of whether the dispute settles at mediation or an Award is published following the recommenced arbitration
 - No jurisdiction to embark on an arbitration after the matter settles at mediation because there is no dispute to resolve



Arb-Med: sequencing



- ▶ Essential parties fully understand the procedural steps of the process and where they are at any stage
- ▶ Why?
 - ▶ To ensure each party has a full opportunity to present its case and rebut that of any other party in the overall context of the procedural rules adopted (ie, the parties might agree to adopt expedited procedures which limit the extent and manner of, and time for presentation of argument and evidence and/or they might agree to adopt summary procedures for the early dismissal of a claim or defence)



Arb-Med: concluding thoughts

- ▶ The importance of a clear, well-structured and defined process that is carefully followed by the arbitral tribunal/mediator and understood by the parties is key and cannot be understated
- ▶ Arb-Med, when structured and delivered in a way that ensures procedural certainty and efficacy, can provide disputing parties with the 'best of both worlds' in terms of a single unified process that:
 - ▶ combines the benefits of both mediation and arbitration: speed, procedural flexibility, confidentiality, choice of decision maker, ease of access to the tribunal, continuity, finality and enforceability of the outcome; and
 - ▶ (most importantly) ensures the principles of natural justice are observed and a just, final, binding and enforceable Award is made



Catherine Green

Arbitrator, Mediator, Adjudicator

Executive Director, NZIAC

catherine@nziac.com

www.nziac.com