

IS MED/ARB AN OXYMORON?

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*Oxymoron – ‘A figure of speech in which apparently contradictory terms appear in conjunction’.*²

- [1] Arbitration is a determinative process. Once appointed, the arbitrator controls the substantive outcome. At the other end of the ADR spectrum, a mediator has no such power. Substantive outcomes depend on party agreement; indeed, making a decision for the parties is the very antithesis of what a mediator does.
- [2] Can one and the same person really play both roles in the same dispute?
- [3] The confidentiality that attaches to arbitration and mediation makes it impossible to offer any empirical data as to how often these processes are being used in New Zealand, much less in any sort of combination. My sense, however, of the circles in which I practice is that med/arb is not being used – certainly not to any significant extent. I am not, for example, aware of any practitioner who offers a standard form of med/arb agreement on their website. To the best of my knowledge none of AMINZ, NZDRC, LEADR or IAMA offer any standard forms or protocols for such a service either. I do not hear colleagues talking about recent med/arbs they have been involved in.
- [4] As Groucho Marx would say, perhaps we should get out more. Maybe even just to the South Island:

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² <http://oxforddictionaries.com/definition/english/oxymoron>, accessed 24 July 2013. Maybe at this conference the phrase ‘cognitive dissonance’ is apt too.



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“...There is a very stark divide between those who regard [med/arb] as acceptable and, indeed, desirable and those who condemn it with a significant number of people between those two poles. ...

“ ... the same kind of divide was discerned by one of the authors in the course of a New Zealand Law Society touring seminar on arbitration in 2011. In the North Island, seminar participants seemed to be wary of mediation/arbitration perhaps influenced by the precautionary observations of Fisher J in the Acorn Farms case. In the South Island, however, participants reported that mediation/arbitration was utilised very frequently with parties who agreed to its use for reasons of speed, efficiency, and lower cost: the view was that the risks with mediation/arbitration were not significant and were well worth running.”³

- [5] The purpose of this session is to consider the possibilities and pitfalls of med/arb as a dispute resolution process, and to look to the experience of the technique in other jurisdictions. The question is whether we should give greater attention to med/arb than we have to date.
- [6] It seems sensible to start by identifying exactly what is meant by ‘med/arb’ in this paper.
- [7] I am not concerned with cases in which the parties mediate and then later arbitrate (or *vice versa*), but using a different person as the neutral in each process. Nor does this paper dwell on processes in which there is an element of one in the other – for example, a mediator who is strongly evaluative, or an arbitrator who encourages parties to consider settlement.⁴ Conciliation is not really in focus here either – at least not conciliation of the kind which, if unsuccessful, leads to an arbitral process undertaken by someone other than the conciliator.⁵
- [8] In some cases, the parties will agree to change the nature of a process before it is completed. It is difficult to see anything objectionable, for example, in a situation in which a person who is acting as an arbitrator is asked before final award to stop being an arbitrator, and to become a mediator instead.⁶ The position of a mediator who is asked to become an arbitrator as a matter unfolds is less clear but – in

³ D A R Williams QC & A Kawharu, *Arbitration and Dispute Resolution* [2012] New Zealand Law Review 487 at 490-494.

⁴ Some of the possible permutations (e.g., Med-Arb as opposed to ‘lean arbitration’) are discussed in Hill, *Med-Arb: New Coke or Swatch?* J Int. Arb 13, 105.

⁵ E.g., the AMINZ Conciliation Protocol for the Dairying Industry in New Zealand at http://www.aminz.org.nz/Folder?Action=View%20File&Folder_id=1&File=Conciliation%20Protocol.pdf.

Although a conciliator can propose a determination that may become binding, ordinarily that happens only if the proposal is not rejected by one or other of the parties. In that case arbitration follows – the conciliator can be the arbitrator but, again, only with the agreement of both parties at that point.

⁶ Assuming, that is, that if the mediation fails then a new arbitrator will be found.

principle – as long all parties agree to the change of role part way through, there will be grounds to argue that they have waived any objections to the arbitrator’s impartiality and independence arising out of whatever has occurred to that point.

- [9] This discussion focusses on processes which end with an award; typically where:
- [a] One person (or tribunal) is appointed at the outset to be mediator and, if mediation fails, then to be arbitrator in respect of the same dispute between the same parties; or
 - [b] One person (or tribunal) is appointed as arbitrator, and has power within the arbitral appointment to act as mediator, but will continue to be the arbitrator even if the mediation fails.⁷

[10] Any discussion of med/arb in New Zealand must start with the decision of Fisher, J in *Acorn Farms Limited v Schnuriger*⁸. The case involved a share-milking dispute. After some correspondence about what processes might be used, the advocate for the sharemilkers proposed:

“ ... I do believe that the best way to settle this dispute is to proceed to a Mediation/Arbitration. The process is that a person is appointed as a Mediator/Arbitrator and tries to settle the issue in mediation and if that is not successful then that person acts as an Arbitrator. The difference between the two is that mediation is done by agreement and Arbitration is a decision imposed on the parties. Given that there is in my opinion no chance of you two agreeing then perhaps you should go straight to arbitration”

[11] The appointee walked the farm with the parties. Some issues were resolved in that way, but others were the subject of a hearing process held afterwards. The arbitrator issued an award in which the sharemilkers were largely successful. The farm owner then complained that it had not appreciated that the process would give rise to an enforceable award.

[12] The Court held that the farm owner had not really been under any misapprehension about the process that had taken place. The application to set the award aside was dismissed on that basis. But the judgment contains a description of the differences

⁷ Much of the literature on the topic in other countries uses the label ‘arb/med’ but, although the label ends with ‘med’, in fact the processes being discussed end with an award not a settlement agreement.

⁸ *Acorn Farms Limited v Schnuriger* [2003] 3 NZLR 121.

between mediation, conciliation and arbitration, and offers five precautions for anyone contemplating combining arbitration and mediation:

- “(a) *It must be made clear to the parties from the beginning that if there is no agreement the mediator-arbitrator will be imposing a binding solution.*
- (b) *The mediator-arbitrator may not receive information without the knowledge of both parties (Art 24(3)). For all practical purposes this rules out the possibility of caucusing at any stage of the process.*
- (c) *The parties must be warned from the outset that anything said to the mediator-arbitrator could be used against that party as the basis for an award, this including offers and confidential information disclosed for negotiating purposes.*
- (d) *The mediator-arbitrator must avoid the expression of final views until all evidence and argument is complete (Art 34(2)(b)(ii) and (6)(b).*
- (e) *If the process moves into arbitration mode, both parties must be given full opportunity to present their cases (First Schedule, Art 18). This includes a clear indication when the process switches from mediation to arbitration and the timing and process for presenting evidence and argument (see in particular Arts 24(2) and 34(2)(a)(ii)).”*

[13] The desirability of this kind of hybrid process is usually explained in terms of efficiency, cost-saving and so on.⁹ How many who have conducted a mediation over millions of dollars through a difficult and demanding day, only to be left with an immaterial but absolutely insoluble monetary gap between the parties, have not wanted to cut the Gordian Knot by simply saying: ‘here is the answer’?¹⁰ Enforceability of settlement agreements may be another reason for engaging in a hybrid process.¹¹ But, while one can certainly arbitrate if these precautions are followed, is the mediation part of the process really going to be a mediation?¹²

[14] For some mediators the possibility of caucusing is at the very heart of the process. It must also be debateable whether and to what extent a mediator can truly perform the role of *mediator* under these parameters – for example, having first warned the parties that anything they say may be used against them.

[15] There is little in the way of case law in New Zealand on the topic beyond the *Acorn Farms* decision.

⁹ Rosoff, *Hybrid Efficiency in Arbitration: Waiving Potential Conflicts for Dual Role Arbitrators in Med-Arb and Arb-Med Proceedings* J Int. Arb 26 (1) 89 – 100, 2009.

¹⁰ I am not really suggesting it would be that easy (or immediate) but that is the effect.

¹¹ M Dean QC, *Converting Mediated Agreements into Arbitral Awards* [2005] NZLJ 159.

¹² Cf Powell, *Med-Arb, How risky is it?* [2007] NZLJ 140.

[16] *Duncan & Davies Nurseries New Plymouth Limited v Honnor Block Limited*¹³ concerned an application to set aside an arbitral appointment on the basis that the arbitrator had previously been a mediator in respect of matters at issue between the parties. However the parties had persuaded the mediator at the mediation to accept appointment as arbitrator in case of any disputes that might emerge out of their settlement agreement. Unsurprisingly the High Court rejected the challenge to the Arbitrator's appointment:

"The concerns leading to the five 'precautions' set out by Fisher J in Acorn Farms Limited v Schnuriger [2003] 3 NZLR 121, and relied on by the applicant, do not arise in the present situation. Rather they relate to the situation of a 'med-arb' procedure. That is a procedure which begins as a mediation but, where the parties are unable to resolve the dispute, the mediator then becomes an arbitrator to determine the substantive issues between the parties. The role here is different. Although the applicant argues the position is different, the better view for present purposes is that the parties have completed the 'med' part of the procedure and have made provision for arbitration on implementation."

[17] Even so, one wonders whether and to what extent confidential information might have been given to the mediator (*qua* mediator) that could in some later argument have compromised her ability to act impartially. However that problem does not seem to have emerged in the case and, in any event, it is clear that both parties had agreed to appoint the mediator as arbitrator for subsequent disputes knowing all that had just taken place in the mediation.

[18] Despite the paucity of authority, it would be wrong to suggest that med/arb processes are unknown in New Zealand. To the contrary, there are several statutes that call for something like that sort of process. For example:

[a] Mediators acting under the Employment Relations Act 2000 can be given authority to decide disputes, although there are several conditions¹⁴:

150 Decision by authority of parties:

- (1) *The parties to a problem may agree in writing to confer on a person employed or engaged by the chief executive to provide mediation services, the power to decide the matters in issue.*
- (2) *The person on whom the power is conferred must, before making and signing a decision under that power,—*
 - (a) *explain to the parties the effect of subsection (3); and*

¹³ *Duncan & Davies Nurseries New Plymouth Limited v Honnor Block Limited* High Court Auckland CIV 2005-404-2513, Ellen France J, 1 June 2005.

¹⁴ Section 150 Employment Relations Act 2000. See also G Rossiter, *Med-arb and employment disputes* [2006] NZLJ 388.

- (b) be satisfied that, knowing the effect of that subsection, the parties affirm their agreement.
- (3) Where, following the affirmation referred to in subsection (2) of an agreement made under subsection (1), a decision on how to resolve a problem is made and signed by the person empowered to do so,—
- (a) that decision is final and binding on, and enforceable by, the parties; and
- (b) except for enforcement purposes, no party may seek to bring that decision before the Authority or the Court, whether by action, appeal, application for review, or otherwise.¹⁵

- [b] Dispute Tribunal referees are obliged to assess whether it is appropriate to assist the parties to negotiate a settlement in every case;¹⁶
- [c] In other more specific situations, for example as in relation to access disputes under the Crown Minerals Act 1991, an arbitrator may not make a determination until the arbitrator has brought, or has used his or her best endeavours to bring, the parties to a settlement acceptable to all of them.¹⁷
- [d] There are some regulations under which a person described as ‘a mediator’ is entitled to receive evidence and required to make a decision.¹⁸
- [19] None of these examples make it altogether clear whether or to what extent the legislation will protect any final decision that is imposed on the parties against a claim of actual or apparent bias (or other breach of natural justice) arising out of a caucusing process. All in all¹⁹ I suggest it is unlikely many would argue that med/arb is part of the ADR mainstream in New Zealand.
- [20] If that is correct, we may be increasingly out of step with other jurisdictions – particularly those that matter most to us as trading partners.
- [21] The decision in *Gao Haiyan v Keeneye Holdings Limited*²⁰ is illustrative. In this case the Hong Kong Court of Appeal allowed an appeal from a High Court decision in which enforcement of an award made after something like a med/arb process had been refused. The Court of Appeal’s description of the background opens somewhat

¹⁵ Discussion with practitioners in the area suggests, however, that this provision is seldom (maybe even never) used.

¹⁶ Disputes Tribunals Act 1988, s.18.

¹⁷ Section 68. The section is entitled ‘conciliation’ but the arbitrator’s award does not depend on consent of the parties.

¹⁸ For example, Commodities (Cereal Silage) Order 2012 under the Commodities Levies Act 1990.

¹⁹ And even holding open the possibility that things may be different in the South Island.

²⁰ *Gao Haiyan v Keeneye Holdings Ltd* [2012] 1 HKRDL 627 – ‘the *Keeneye* case’.

ominously: “*The background is complicated and murky. Much of it comes from one-sided assertions and have to be taken for what they are worth*”. In essence, however, the case concerned a share transfer agreement that had turned sour. Arbitration was initiated in the Xian Arbitration Commission of China (‘XAC’), the rules of which allowed parties to agree to mediation within the arbitral process.

[22] The arbitration began, and there was a hearing. At a point after that hearing, the arbitral tribunal decided to propose a settlement that would have involved the respondents paying CNY 250 million to the applicants. This was, note, an initiative by the arbitrators. Two of them met with a person who was thought to be in a position to influence the respondents (one Zeng Wei). The meeting took place over a dinner at a hotel. The arbitrators conveyed their suggestion to Zeng, and asked him to ‘*work on*’ the respondents. The initiative failed. The respondents could not be persuaded to pay (in fact as it transpired the applicants would not have been willing to accept only CNY 250 million out of very much larger claim in any event). A second hearing in the arbitration then took place. In due course the arbitrators issued an award revoking the share transfer agreements (i.e., upholding the applicants’ position, and deciding the substance against the respondents). It also recommended that the applicants should pay the respondents CNY 50 million as compensation to end the dispute - although that was said to be based on fairness and reasonableness, was not binding, and was ‘*not included in the arbitral matters*’.

[23] The case turned on the issue of waiver; i.e., whether the fact that the respondent had proceeded with the second hearing knowing what had taken place by then meant that it was too late for them to complain about any impropriety in what the arbitrators had done to try to settle the dispute. The High Court held that they had not, but the Court of Appeal disagreed. The Court of Appeal also concluded that – even if the respondents had not waived any right to object – in any event the facts would not have met the test for bias since a fair minded observer would not have apprehended any real possibility of partiality by the arbitral tribunal.

[24] The dispute about the award had already been before the Xian Courts, where the award had been upheld. The Hong Kong Court of Appeal thought that it should be slow to find that an award is contrary to public policy and refuse to enforce it when to do so would be at odds with the conclusion of the court of the seat of the arbitration (here, the Xian Courts):

“With respect, although one might share the Learned Judge’s unease about the way in which the mediation was conducted because mediation is normally conducted differently in Hong Kong, whether that would give rise to an apprehension of bias, may depend also on an understanding of how mediation is normally conducted in the place where it was concluded. In this context, I believe that due weight must be given to the decision of the Xian Court refusing to set aside the Award.”²¹

[25] There has been a good deal written about the decision:

“... Keeneye has caused major debate because it is clearly a hard case in that two cardinal principles of international arbitration are in conflict. First, that arbitration awards should be widely enforced and public policy objections kept within narrow grounds. Secondly, that arbitration requires ‘due process’ or ‘fair procedure’ (it cannot seriously be denied that there was a major failure in that regard in the Keeneye case). There is also the question of the extent to which courts tasked with enforcement should give deference to the decisions of the courts having jurisdiction over the seat of the arbitration.

Accordingly the case has sparked a debate not just on its specific facts but also in relation to wider questions of whether combining mediation with an arbitration procedure is an acceptable practice.”²²

[26] Opponents of the practice typically raise objections about the potential dangers of an arbitrator caucusing with parties when that does seem to be the antithesis of due arbitral process. There are also reservations about a situation in which an arbitrator (acting as mediator) proposes an outcome which may be quite at odds with the decided outcome. Even so, what emerges from the literature is that, despite these reservations, med/arb is now an established practice in many jurisdictions (in addition to the South Island):

“As Schneider points out, there is a very strong link to different legal cultures. German respondents are very positive, the rest of continental Europe less so and American respondents negative (this latter conclusion can likely be extended to the

²¹ Per Hon Tang VP, at para 102.

²² Goodrich, *Arb- Med: Ideal solution or dangerous heresy?* (2012) Vol. 15 International Arbitration Law Review. This quote is taken from an abbreviated version of the paper published in the White & Case journal for March 2012 at p 4 (<http://www.whitecase.com/articles-03302012-1/#.UfFu1ayN3IU>, accessed 26/7/13). The paper provides references to other contributions in the debate – see esp. notes 19 to 25. See also Yeoh & Ang, *Reflections on Gao Haiyan – Of ‘Arb-Med’, ‘Waivers’, and Cultural Contextualisation of Public Policy Arguments* J Int. Arb 285 (2012); Williams & Kawharu (supra, note 3 at pp.490 to 494); Lau, *Resolution of disputes in China – What it means for Australia*, http://www.claytonutz.com/publications/edition/15_march_2012/20120315/resolution_of_disputes_in_china-what_it_means_for_australia.page (accessed 26/7/2013); Kaufmann-Kohler & Kun, *Integrating Mediation into Arbitration: Why it works in China* J Int. Arb 25 (4) 479 – 492 (2008).

*whole common law tradition). Although not considered by Schneider in detail, it is also clear that mainland China and Japan (and likely other parts of Asia) side with Germany in this debate ...*²³

[27] We can hardly ignore the reality of med/arb given our trading links with Asia. As Keeneye shows, the practice is alive and well in mainland 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.²⁴

[28] More than that, med/arb has legislative recognition in Australia.²⁵ Section 27D of the Commercial Arbitration Act 2010 provides (amongst other things) that for domestic arbitral proceedings:

- An arbitrator may act as a mediator in proceedings relating to a dispute between the parties to an arbitration agreement;
- An arbitrator acting as a mediator may communicate with the parties collectively or separately, although he or she must treat information obtained from a party with whom he or she has communicated separately as confidential (unless party otherwise agrees, or unless the provisions of the arbitration agreement relating to mediation proceedings otherwise provide);
- Albeit that the parties must consent before an arbitrator who has acted as mediator unsuccessfully proceeds to make an award as arbitrator, if there is consent then the arbitrator can, indeed must, go on to complete an arbitral process and make an award;
- In a case where an arbitrator has caucused during the mediation phase, before conducting subsequent arbitration proceedings in relation to the dispute the arbitrator must “...disclose to all other parties to the arbitration

²³ Goodrich, *ibid* p 4. The reference he gives is to a survey by Michael Schneider, *Combining Arbitration with Conciliation*, Report to the Seoul Conference of the International Council for Commercial Arbitration, ICCA Congress Series, No 8 (1996) at p57.

²⁴ Although if mediation fails under the SMC- SIAC protocol, the parties have to agree at that point whether the mediator will continue as arbitrator. The process is a bit different from that governed by the Ordinances referred to and probably comes closer to the kind of situation that was considered by the High Court in the *Duncan & Davies Nurseries* case (*supra*, note 10).

²⁵ For more detail see Monichino, *Arbitration Reforms in Australia: Striving for International Best Practice*, *The Arbitrator and Mediator* (October 2012) pp 45 – 46.

*proceedings so much of the information as the arbitrator considers material to the arbitration proceedings.*²⁶ (27D(vii)).

- [29] This approach is not quite the same as that in issue in *Keeneye*, and is closer to the process in the SMC- SIAC protocol. The parties to the process have to consent to the on-going involvement of the mediator as arbitrator once the mediation phase is over (although, if they do, then no objection can later be taken to the conduct of the arbitral proceedings solely on the ground that the arbitrator previously acted as mediator).
- [30] There is plenty of scope for debate about these provisions. One can imagine, for example, that a mediator turned arbitrator might have some difficult decisions to make as to what confidential information given in private session is material to the arbitration and so must be disclosed under s.27D(7). Indeed some commentators have observed that the legislation may even act as a brake on the use of med/arb because it introduces a legislative requirement for consent to proceed after mediation (which would not apply otherwise).²⁷
- [31] But the question for those of us who practice as arbitrators and mediators in New Zealand must now be: Are we out of step with the rest of the world (or, at least, with Australia and the Asian regions with which we do most of our trading)? Should we embrace med/arb? Should AMINZ have a med/arb protocol, just as it has protocols for each of arbitration and mediation? If New Zealand were to embrace med/arb as a process, do we need legislative protection for awards made after that kind of process?
- [32] If that the thought gains any traction, then I suggest questions that will need to be debated include:
- [a] How frequently is med/arb really being used in New Zealand? Is it important to have some understanding about that? If so, how would one gather that information? Or is this a topic of most concern to who are working to attract international arbitration to New Zealand?

²⁶ Section 27D(7).

²⁷ So, for example, consent would be required even though no caucusing had taken place.

- [b] Are there any circumstances in which med/arb should not be allowed at all?
 - [c] If one is going to engage in med/arb, then what are the minimal procedural requirements needed to ensure the sanctity of the process (by which I mean, that the arbitrators' award will survive scrutiny by the Courts for arguments about breach of public policy, bias and the like, **and** that the mediation part of the process will be meaningful?)
 - [d] Should institutions such as AMINZ, NZDRC, or LEADR encourage the use of med/arb? Should protocols such as the SMC-SIAC protocol be developed?
 - [e] If one is going to engage in this process, would you engage someone who is essentially and primarily trained as a mediator? Or an arbitrator? Why?²⁸
 - [f] If not, then what about s 27D(7) of the Australian legislation. Should we have that kind of legislation? If not, why not? If so, what would our legislation need to say?
 - [g] What will that do for the dynamics of caucusing?
- [33] While the conservative view may be that a mediator (certainly one who has caucused with the parties) would be unwise to go on to act as arbitrator in the same matter, in the end what must matter most is what the parties will agree to. As long as the processes are clear, then med/arb may well have a useful place in the armoury of ADR techniques. I suggest med/arb deserves a closer look here in New Zealand.

²⁸ Consider Sussman, *Developing an Effective Med-Arb/Arb-Med Process*, New York Dispute Resolution Lawyer, Spring 2009 Vol 2 No.1, p 71 at p. 73.