WHAT YOU SHOULD EXPECT FROM YOUR MEDIATOR AND HOW TO MAXIMISE THE PROSPECTS OF A SUCCESSFUL MEDIATION

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1. I want to discuss "what you should expect from your mediator" (by which I really mean to convey what your mediator should be doing for you) and how to maximise the prospects of a successful mediation. And for those of you who are involved in complex litigation – whether it be construction and infrastructure or otherwise – I hope my comments will find an audience and that you will indulge my generalisations.

Why bother mediating

2. I should make clear that I imply absolutely no criticism of litigators: I could not possibly cast that first stone – having been a litigator for 30 years. Clients *are* entitled to protect and enforce their rights, including by court process. But, as practitioners, I think that there is an imperative to ask of ourselves – as early as practicable in a dispute – "how can I extract my client from this before the compulsory processes of litigation take over?" – because those processes are directed towards a judicial determination on the merits, not a commercial resolution. And I do not see ADR as a threat to litigation: they are both means of providing resolution for the client and ought to be able to go hand in glove. After all, most mediations have their genesis in litigation which is on foot.

3. And a settlement of a dispute is what most corporate clients want: many become disenchanted with the litigation process – which can be quite overwhelming (as it is) and a distraction from the main game, which is usually concentrating on running a business and keeping direct reports happy. Clients regard litigation as inefficient because of its delays; and high risk because they cannot control either the process (which is compulsory) or the outcome – which is in the hands of a third party.

4. Corporates usually much prefer a negotiated outcome – because negotiation is a medium they understand: it is a core business skill – albeit framed within the context of a legal dispute: hence the involvement of lawyers and a mediator.

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5. I have had clients for whom complex commercial litigation has resulted in a court victory after years of warfare; the expenditure of enormous sums of money and enduring a lengthy trial; and their attitude to their lawyers after the event has invariably been polite, *but with a bite about the process*: "thank you very much for your efforts; you have all been very dedicated to the task; but we never want to go through that process again".

6. Hopefully, what your mediator does for you and your expectations will coincide – at the high end, not the low end, of the bar; because, if they do coincide in that way, there is a much better chance of settling the dispute.

Background

7. By way of background, I have been engaged as Counsel to appear for parties in many mediations; and I have had a chance to observe the way various mediators conducted themselves: *some were good; some were not so good*. *Such is life*. As I am now focusing on doing much more work as a mediator, I have had the chance to think about what, as counsel for a party, I want of a mediator; and what, as a mediator, I want from the parties *and their representatives* – in order to maximise the prospects of a settlement.

8. And before concluding, I will say something of the characteristics of a good mediator; but my main focus today is to deal with the mediation process *conceptually*; to make you think about what it involves; and, hopefully, you will be able to identify for yourselves what a mediator needs to bring to the table; and, equally importantly, *what you as practitioners need to bring to the table* in a mediation to maximise the prospects of settlement.

9. Of the features that can be controlled, I have a particular view of what is the single most influential feature in successfully mediating a dispute; and that feature may not be all that revelatory; but I will give you this hint: I think mediation is often an *undernourished* process.

10. Let me identify what a mediation actually *is* and what it *is not*; and once we do that, I think we will seize upon what is at the heart of the success or not of the mediation process.

What a mediation is not

11. Four points come immediately to mind:

    a. It is not *litigation*. Litigation involves a determination on the merits – a matter for a trial judge – although the merits can intrude to an extent in a mediation. To what extent, experience and judgment will determine. If a determination on the merits is what your clients want, then a trial is the process for them – because it will permit them to *advance entrenched positions*. That approach is a real intrusion on the mediation process – including for the reason that litigation can involve "tarting-up" bad points to look as good as they legitimately can until a judge determines otherwise. The litigation approach of advancing entrenched positions has no place in the mediation process. As some of you may remember, Paul Keating, when talking of doing "the business of politics", once said: "*Every now and then you have to flick the switch to vaudeville*". Well, if you are involved in a mediation, you need to flick the switch out of litigation mode and into mediation mode – and there is a big difference: the ultimate objective of litigation is to pursue and win a case in court; whereas the ultimate objective of mediation is to have that case discontinued by agreement;

    b. Nor is mediation merely *a day* out of the litigation process; a day away from the tribulations associated with pleadings, affidavits, admissibility of evidence and witnessing the divergence in approach of various Judges. If the parties view mediation as a hindrance or detour while en route to the final destination – litigation – they may have missed an opportunity that will prove to be a one-off;

    c. Nor is there any place in a mediation for an *attitude* that says "ah, if it settles, well and good", as though a settlement would almost be inadvertent: "how did that happen?";

    d. And mediation is not merely an opportunity for a chat, a Jatz cracker and a cup of tea at someone else's expense.

What a mediation actually is

12. A mediation involves persuading parties – who are often well funded corporate clients – to at least modify if not abandon their entrenched positions: to give up pursuing a cause of action on the one hand and its defence of that cause of action on the other hand. *And, just for added pressure,* that result has to be achieved (usually) in the space of 8 hours or so set aside for the mediation.

13. To me, that sounds like a *hard gig*. Think about it: persuading a Plaintiff to take a discount on its expectations (as it would see it) and persuading a Defendant to pay a premium above its expectations (as it would see it) - in the interest of *certainty* if you like.

14. And how is that best achieved? The answer seems to me to be in persuading the parties to recognise the risks inherent in litigation. And then to ask whether those risks have properly been taken into account by the parties? And those risks:

    a. oblige the parties to question their entrenched positions (including the assumptions on which they are based), and to conceive of the possibility that they might be wrong – or at least not correct to the extent that they initially thought;

    b. might also include:

        - witnesses not coming up to proof – whether as a consequence of making unexpected concessions or stage fright;
        - the late disclosure of previously unseen documents which puts a different complexion on the case; and
        - the judge – perhaps unfairly – taking an adverse view of a witness.

Saving face and decision making

15. Usually someone in particular within a client has the *initial* ownership of a decision; but, ultimately, decisions are often *collective* - perhaps involving a Board of Directors.

16. How does a company executive (perhaps a General Counsel or a CEO) who has taken initial ownership of a decision – often after advice – and who has persuaded a Board of Directors to sign off on that decision, then persuade that Board to change its mind and lower its expectations *without that executive losing face and credibility?* This is a

real consideration, because, often, that executive will be the face of the company at mediation; and that executive may have to make a difficult phone call to the Board to have it sign off on a less attractive option. Well, the best justification for that change in course is to be found in a *change in the premise* on which everyone was operating; because that change in premise often requires a reassessment of the risks involved in continuing with the cause of action or the defence of that cause of action.

17. I had just such a situation in a (2 day) mediation; and the CEO was able to phone his Board and tell the directors that additional facts had arisen during the course of the mediation which called for a different decision by the Board. He obtained the Board's approval; but he was concerned about how he ought to go about it and the justification for having to make the approach; and, fortunately, we were able to help him with that.

18. The opportunity for a mediator to bring about that *reassessment of the risks* can only happen if relevant information (good or bad, including what I will call the back story of the parties) becomes part of the accumulated knowledge of the mediator - *because knowledge creates a capacity to understand and to influence*. Parties commence mediation with their own attitudes, motivations and expectations, each with a different figure (or solution) at which they are willing to agree – but I would like to think that no party is incorrigible if the mediator is equipped with the necessary information. Let me give an extreme example to highlight the point: would I, as a mediator in a *commercial* dispute, want to know that the Defendant is having an affair with the Plaintiff's wife/husband? – I mean apart from any prurient interest I might have in the question. The answer is "Yes. I would" – because *for me,* as a mediator, that fact would be an important part of the back story and would tell me that matters *entirely extraneous* to the pleaded case will likely influence the settlement of the dispute; it will tell me something of the various motivations; the psyche of the parties and perhaps why any objectively reasonable proposals to settle have so far been rebuffed.

19. And this leads to what I regard as an essential requirement for any successful mediation: *preparation*.

Preparation

20. A successful mediation does not happen inadvertently; that success comes with companions: *the necessary ground work and preparation*; and if that success comes

without those elements, then I suspect the involvement of a mediator was unnecessary: the parties could probably have settled the dispute themselves. But, it is critical, in my view, to recognise not just the necessity for preparation and what steps it involves; it is also critical to recognise that preparation *must* be a *collaborative* process involving the mediator, the *practitioners* and the clients. *For me, this is the key to success*. There is an elemental reason for this: the mediator is a *complete stranger* to the dispute and the personalities behind it; so how is this stranger going to intrude in a meaningful way and persuade warring parties to reach an agreement that will involve abandoning the litigation? Well, *practitioners* have an important responsibility to *arm the mediator*; and that can be done in a variety of ways – but the feature which is common to each of those is *communication* with the mediator in *advance* of the mediation:

a. so, pick up the phone;

b. send an email;

c. convey your innovative thoughts and ideas; and

d. join the mediator for coffee or lunch and *think about bringing your client* with you. Why not? It is all confidential.

21. Why involve the client?: as a mediator I want to be able to make an assessment of the people who will be influential on the day: are they tentative, emotional, aggressive; are they genuine in wanting to to settle the dispute; are they subject to extraneous motivations; are they fully appreciative of the risks; and, remember, you can tell the mediator anything – and this *collaboration* is part of the mediator's armoury and remains *confidential*.

22. The mediator may well know the practitioners; but most likely not the parties; so, to my mind, there is a wasted opportunity if the mediator and the clients meet for the first time *on the day of the mediation* – and that would certainly not happen in litigation. That is a handicap to the process and will not maximise the prospects of settlement – *which is the objective*.

23. But let me go back a step.

24. Once you have instructions or an order to convene a mediation, preparation probably begins with the *choice of the mediator*; and, here, I tend to bear in mind the ancient proverb "*The fish rots from the head*" – most often attributed to the Dutch theologian Erasamus. Choose your mediator with care and regard for the particular dispute.

25. So, my own view – perhaps heretical – is that a mediator *should have an interest in the brief …. which extends to actually reading the material*; and that is irrespective of the volume of material: the "gold" might be found in volume six; and if the mediator does not read it, an opportunity may be lost. And, as I observed earlier, *knowledge* creates not just a capacity to understand, but also a capacity to *influence*. Also, a mediator is paid a lot of money and should be across the detail. At least I think that you as practitioners deserve to be told if the mediator does not propose to get across the detail: you can then make a decision as to whether that mediator is the right one for you.

26. And it is worth remembering that it is an important part of a mediator's function to identify potential weaknesses – the risks – in the respective cases; and even though a mediation is not a mini-trial, the merits – even at an early stage – can intrude legitimately to an extent. And that is because a mediator's experience might permit it to be suggested, in private session, that the risks need to be reconsidered – perhaps simply because a judge is unlikely to do what a party is advocating.

27. And I would invite practitioners to bear in mind that the mere "badge" as a former judge (which some mediators have) is not enough to make that person a good mediator. Retired judges tend to want to tell the parties who will win and who will lose – including in joint session sometimes (an elemental error). And determining the merits is what they did on the Bench. But it is an alien concept in a mediation. And, just as "getting into the arena" is an alien concept for a judge; it is an elemental requirement in a mediation. Also, that "badge" of former office will not tell a mediator what is in the brief *without reading it*. And that person may have never participated in a mediation as a barrister before going to the Bench.

28. *Position papers* are essential and should be provided well *before the mediation*. And it may be that a party, through its lawyers, will also provide a *confidential* position paper (*for the mediator's eyes only*) identifying particular matters which it thinks will

be influential at the mediation – either to it or to the other side; and those matters may not be at all obvious to the mediator from the material – which may consist of colourless or formal documents such as pleadings, contracts and the like.

29. Speaking personally, once I have read the brief, including the position papers, I find it useful to write a memorandum to each of the parties (separately and privately) identifying what I regard as the points of legitimate concern about the respective cases – by which I mean I identify to the Plaintiff my concerns about its case and the risks; and I do the same for the Defendant; and to then convene (separately) a conference with each of the parties *and their representatives* during which introductions can be made; the participants can deal with formal matters – including identifying how a mediation works – and they can then prepare for the mediation itself: they can tell me what is important to them and to the other side. *This is part of the continuing education of the mediator*; but it is also a "settling down" or familiarisation process – so that the parties can ease into the day of the mediation with some sense of place and expectation, and with a little bit of a head start.

30. Conferring with the parties in advance of the mediation also has the benefit of saving time on the day of the mediation itself – where time is best spent on substantive, not formal, matters.

Is a dispute ready for mediation?

31. You need to consider whether a dispute is ready for mediation – and I mean in terms of material, not attitude. Have the pleadings closed; have expert reports – assuming they are required – been prepared and exchanged: if not, it may be premature to convene the mediation and a waste of time and costs. And the mediator should have an input into what is required. But we can safely assume that there will be two consequences when a party appears at a mediation with previously unseen schedules/graphs/projections/expert reports:

    - the recipient and its representatives will be annoyed; and
    - the likely result, at best, will be an adjourned mediation with a consequential waste of time and costs.

32. So, in summary, the single most significant feature seems to me to be the need for *collaboration* between the mediator, the practitioners and the parties *in the process of mediation*. This has a number of features:

    a. on the "fish rots from the head" theory, the mediator is an important link in the chain and should direct the process, including by making necessary directions;

    b. the mediator must read and understand the material;

    c. the mediator must communicate with the parties and their representatives well in advance of the day of the mediation; and

    d. the mediator must encourage the practitioners to play their role in maximising the prospects of settlement by "flicking their switch" out of litigation mode and into mediation mode. A particular mind set and innovative thinking is important: *how can this dispute be settled* and how do I put the client into that mindset.

Characteristics to bring to a mediation

33. I said earlier that I would identify what I thought were the characteristics of a good mediator. But one point I want to make is that these characteristics should not be peculiar - by which I mean exclusive - to the *mediator*; instead, I think that they should be common to all those participating in the mediation process. Can I suggest the following attributes:

    a. a willingness to do the *preparation* – and we discussed earlier some particular things that invariably need to be done: reading the brief and position papers well ahead of the mediation and becoming familiar with the contents and the issues;

    b. an ability to identify from the brief and position papers the weaknesses – the risks – in each party's case and an ability to deal with those *weaknesses* in private session;

    c. an ability to glean and understand the *motivations* of the parties: why is a party being aggressive and how can I as a mediator change that. And part of that may involve assessing whether a party is thinking analytically or instinctively – as to

which see “Thinking, Fast and Slow” by Professor Kahneman, a Nobel prize winning economist;

d. an ability to think creatively and assist the parties in arriving at a *solution that may not be available from a court*, particularly if there is likely to be a future relationship between the parties;

e. an ability to understand how each of the parties communicates and recognize if there is a barrier to that communication. For example, sometimes it is useful to chat to the parties, jointly, in private without the assistance of their advisors. I have found this particularly useful in cases where the parties know one another well, including their respective strengths and weaknesses. And I have found that, in those circumstances, the parties tend to give one another some credit when that is due. It is also very hard to lie to the face of someone who actually knows the true position.

f. persistence: an ability to persist even when the parties claim settlement is impossible, particularly if there is no actual impenetrable barrier to settlement. Part of this involves recognising the fact that clients do not always keep the practitioners or the mediator “in the loop” as to their actual intentions. Those intentions are often not revealed – as I found very recently – until late in the day. So, persistence is a must.

g. patience: an ability to let each party vent – within the realms of reason – even on matters not immediately relevant to settlement. Sometimes it takes a while for a party to accept that it has to lower its expectations or agree to a larger compromise than it expected at the beginning; so venting may help;

h. be alive to opportunities to permit parties who must change position to save face in doing so;

i. treat the parties seriously;

j. be observant, including by being a good listener: note how parties relate to any support person they may have brought to the mediation, as that person may be the actual decision maker; and a good mediator should spot that and address

arguments accordingly (perhaps even in private). In other words, identify who is influential;

k. ensure the real decision maker is present and able to sign off on any compromise – an insurance claims representative; a senior corporate official etc; whoever has the final decision;

l. be prepared to engage in the negotiations – as the mediator will have to do this in private session; and

m. a mediator should be aware in advance of the identity of the persons attending the mediation, together with their role and influence.

34. My view is that a mediator is not a mere facilitator. The role, as I see it, involves much more than conveying offers from one room to the next.

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