Recent developments in commercial mediation

By Mark Kelly

MEDIATION HAS been part of the commercial dispute resolution landscape in New Zealand for a long time now.

Most commercial litigators are well familiar with whiteboards, caucusing, and phrases like: *"I'm just wonderin ..."* But commercial mediation continues to grow and evolve, as recent developments show.

Growth

Firstly, on growth. There are no recent New Zealand statistics, but there is a sense that growth here is significant (apparently some 85% of leaky homes claims are now settled by mediation), and numbers from the United Kingdom are compelling. A 2012 audit by the UK's Centre for Effective Dispute Resolution (CEDR) reported a 20% per annum growth in ad hoc commercial case referrals since 2010.

There are multiple drivers for such growth. Mediation is mandated in more and more contracts (eg, standard form franchise, construction and licence agreements), and ever more by law too (it has been said that over 50 acts mandate mediation in New Zealand (*LawTalk 795, 11 May 2012*)).

Many judges are encouraging mediation. Lord Justice Ward recently bemoaned the need for some cases to litigate for so long before they mediated, stating: *"While you can drag a horse to water, you cannot make it drink ...* [but] *... I suppose you can make it run around the litigation course so vigorously that in a muck sweat it will find the mediation trough more friendly and desirable".*

Even the United Kingdom Court of Appeal has a mediation scheme.

Perhaps most importantly, parties want to mediate. In New Zealand, experienced commercial litigation parties such as insurers, councils and contractors seem to be turning to mediation more often.

No doubt a growing desire for early and efficient dispute resolution is at play here. A 2013 survey in the United States by the BTI Consulting Group found that US in-house lawyers expected to resolve 40% of their active matters over the next 12 months, up from 22.2% on 2009.

A word on in-house lawyers. Traditionally, the process of referring commercial cases to mediation, and representing clients at them, has fallen to private practice litigators. But change may well be in the wind on this. In the United Kingdom in 2013, CEDR found that just over a third of its mediations involved direct in-house referrals.

There are ongoing developments in the mediation process.

Typically, a commercial mediation in New Zealand will follow a batting order of: openings, agenda-setting, joint session on the agenda items, private sessions/caucusing, and then deal-making. But in the United States, some top practitioners and academics, including Harvard Law School Professor Bob Mnookin, advocate for what they call *"the understanding model"*, which eschews private sessions/caucusing altogether. There are reports of this model being used successfully in highly sophisticated commercial disputes, but the writer's sense is that it would be seen here as a Kumbaya too far, and is unlikely to gain traction in the local commercial context any time soon.

Some top practitioners and academics advocate for what they call "the understanding model", which eschews private sessions/caucusing altogether

Hybrid process

Another development, notably offered by the Singapore International Arbitration Centre, is a formalised version of a hybrid arbitration-mediation-arbitration process. The dispute begins as an arbitration, which is adjourned while mediation is attempted. If the mediation reaches a settlement, the terms can be recorded as part of the arbitral award, providing for potential enforceability in approximately 150 countries under the New York Convention.

The extent to which the mediator should provide evaluative input on the case is an ongoing topic of debate.

There is anecdotal evidence that the provision of such input is much more common in the United States (the writer has seen a US mediation where the mediator paused the mediation, and provided a written opinion to the parties on a determinative legal point before he reconvened it). But there is also a sense that evaluative input from the mediator is becoming more commonly sought here, and retired judges are perceived (rightly or wrongly) to be best placed to deliver it.

At a more practical level, some New Zealand mediators are pushing for a greater degree of front-loading, via a preliminary meeting ahead of the actual mediation (eg, C Powell, NZLJ Aug 2013).

The idea here is for the mediator and the parties to be better prepared ahead of the mediation, and better able to shape the process to suit the parties' needs. There is a real appeal in the commercial context here. Having matters such as expert exchanges, identification of non-contentious issues and even agenda-setting for the joint session addressed before the mediation must enhance the prospects for an effective process.

Better performance

A final word about counsel at commercial mediations. As the process becomes more commonplace and sophisticated, counsel are under pressure to get better at their role within it. Obviously, *"know your case"* is good advice for any context. But counsel in commercial mediations can commit a raft of subtle sins, such as over-identifying with their clients, preparing for the case but not for settlement, failing to work out figures, not fully explaining costs to their clients, and not bringing draft settlement documents with them where appropriate. Conscious of such issues, more and more lawyers are wisely upskilling in how to be effective in mediations.

No doubt commercial mediation will continue to grow and evolve. There are plenty of mediators, counsel, and parties who value and appreciate the dynamism and effectiveness of the process, and recognise the prospects for ongoing development.

Mark Kelly is an Auckland civil and commercial barrister. In addition to his advocacy work, he is a LEADR accredited commercial mediator. Mark has also trained in mediating disputes at Harvard Law School. See www.markkelly.co.nz.

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