

Arbitration or mediation – a curmudgeon's guide



What's this about ?

- A quick biased history
- What arbitration is
- What mediation is
- Even a quick mention of judicial settlement conferences
- The pros and cons, or, why arbitration sucks
- When to use each

A short and biased history of
ADR according to a short and
biased claims manager

In a land before time there was
no Warren



Only the courts – hijacked by
judicial activists



And arbitration – mediation was
touchy feely stuff for the Family
Court (and wimps)



Or Fair Go

Insurers were stuck with :

- Judicial activist judges who could spring sudden changes in the law on them
- An expensive and lengthy process to get that extremely average result
- With no short cuts available – forget Rule 426A and case management
- And no chance to sue your lawyer either
- And everyone thought we had very deep pockets which deserved emptying

Yes Insurers are risk takers by
nature

But only when the risks can be calculated
And not when the dice are loaded

Unmoved by our plight the Courts may have been, but :

- By 1991 the High Court was facing a backlog in civil litigation flowing on from the 1987 crash
- New and bigger courtrooms were having to be built to cope with Equiticorp alone
- And the Aussies had sorted out court ordered mediation for civil litigation

So we stole your stuff Australia

- By 1992 a pilot scheme was running in the Auckland High Court for judicial settlement conferences
- And mediation began to appear as a viable alternative to both arbitration and judicial settlement conferencing, although it wasn't Court directed

The end of history

So what's arbitration ?

- Process similar to High Court litigation except you pay for the arbitrator
- Or, if you and the other side can't agree on an arbitrator, you pay for 3 arbitrators
- Is a private confidential process of hearings – with witnesses & submissions – resulting in a written decision handed down by the arbitrator(s) at the end

Arbitration pros

- Not many
- But at least you can probably get an arbitration “fixture” date faster than a High Court date, depending on the availability of your arbitrators
- And the process and results are confidential

Arbitration cons - heaps

- You may not even want to be there – but the contract forces you to be there – and hey, who takes dispute resolution processes seriously at the start of a beautiful relationship
- Other culpable parties won't be there because they're not bound to be under contract, so it's just your chequebook & you

More cons :

- You pay for the arbitrator(s)
- Including their disbursements
- For a hearing which takes as long as a High Court hearing
- If there aren't interlocutory hearings first
- Plus you pay for your own lawyer(s)
- And their disbursements

And some more :

- And just when you think you've run out of money and it can't get worse
- You get a decision - perhaps faster than a High Court judgment ...
- Which records you as the ultimate loser – with costs and damages to pay
- But if you don't like it you can't typically appeal it

So what's mediation ?

- A voluntary process agreed upon at the time of the dispute
- With a mediator agreed upon by the parties
- Who simply assists the parties to come to a resolution recorded in writing
- A private and confidential process

Mediation pros – many

- The parties pick the format – no-one opts for a hearing
- Anything goes – not a courtroom with a transcript
- Break when you want to
- Usually a result one way or the other in a day
- Massively inexpensive (don't listen to that Warren)

More mediation pros :

- You can walk out of a mediation if you want to and take your chances in Court
- All parties with a viable stake in the matter stroll along so you can pass blame around
- It's never one winner and one loser – unlike arbitration or Court
- Importantly the parties can talk directly to one another if they want to without lawyers

Mediation cons

- Just the one - settler's remorse

So – judicial settlement conferences ?

- A meeting between all parties to litigation called by the District or High Court
- In Court
- At which a Judge is present
- And which is not optional
- Which may or may not result in a settlement

J-s-c pros and cons ?

- They're compulsory when ordered so I'll make observations only
- And only parties attend – you may not have joined everyone yet
- Degree of informality and involvement depends on the judge
- Confidentiality depends on whether or not the judge is minded to write a judicial minute
- But you **ALWAYS** have to stand & be quiet for the judge, and speak only when spoken to

Why use arbitration ?

- Easy – you just wouldn't
- So brokers and lawyers should **STOP** recommending it to clients for inclusion in agreements as you're laying on them a cost burden and process that's unreasonable
- In fact you should be strongly recommending that the client try for a mediation clause instead
- And if you don't, prepare to face the day when you'll be sued for it

Why use mediation ?

- What – I forgot to throw in the steak knives to make the deal sweet enough ?

Why use j-s-cs ?

- You have to – Court ordered
- But don't worry – often if a matter isn't resolved the judge will suggest the parties go off and mediate anyway
- And I've never heard a judge recommend everyone go off to a jolly arbitration
- Plus you might get lucky – the assigned trial judge might preside over the j-s-c in error

In conclusion :

- Think seriously about why on earth you'd ever recommend an arbitration clause be included in any contract
- Or why you'd ever volunteer you or your client for the process
- And then stop yourself
- And write a strong recommendation that mediation be used instead