Rule 48 – Another View

By George Roussos, Cridlands

In the December 1997- January 1998 issue of *Balance*, Mr Steve Southwood, in his article entitled *Rule 48 - Some Concerns*, set out the case against mandatory mediation.

I would like to reply, by setting out the case in favour of Rule 48.

Before I turn to address Mr Southwood's concerns, a short discussion on the merits of mediation, whether or not organised by the court, might assist.

As an aside, twenty years ago, Professor Frank E A Sander of the Harvard Law School told the Pound Conference, which was called to address public dissatisfaction with the justice system said:

"One might envision by the year 2000 not simply a courthouse but a dispute resolution centre, where the grievant would first be channelled through a screening clerk who would direct him to the process, or sequence of processes, most appropriate to the case."

For those who are unfamiliar with the term, this is the "multidoor" courthouse that Mr Southwood refers to. Anecdotally, this has not yet, in any real way, come about in the United States.

Mediation is not a "refinement" of litigation processes. Litigation is litigation and mediation is an alternative.

Essentially, a mediation is a negotiation managed by an independent third party. It is not an arbitration nor an adjudication. The process is voluntary. It is facilitative.

For a formal definition LEADR provides this:

"The process by which the participants, together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives and reach a consensual agreement that will accommodate their needs."

Simply put, the parties decide for themselves how to resolve their dispute by talking out their differences, with the mediator helping to get them past their positions so that their real interests can be addressed.

Over recent years, the process has gained favour in resolving particularly commercial disputes.

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There are some disputes that cannot be mediated because the issues are such that they are not amenable to negotiation. However, even in those cases, mediation can be helpful in resolving subsidiary issues, even if it does not resolve the whole dispute.

A well-prepared and professionally managed mediation can be quite effective.

The process is not simply a meeting between people for a general discussion. A well-run mediation is prepared in advance by the parties' solicitors (including production of schedules and lists of issues as well as a brief to the mediator), and the mediator himself or herself is qualified and conducts it in a professional manner.

A skilled negotiator acts on principle and will usually have regard to these factors:

- relationship – can this be improved?
- communication – are you open to persuasion?
- interests – are each of your interests being met?
- alternatives – what are your alternatives? How can they be improved? What is your best alternative to a negotiated settlement and what is theirs?
- options – are we looking for joint gains? Can we change their choice? Are there other possibilities?
- legitimacy – are our options based on objective criteria?
- commitment – what are the realistic commitments? Are they sufficient and operational?

With the right skill and attitude, almost all disputes are amenable to a negotiated outcome.

The secret lies in encouraging people involved in helping others resolve disputes to:

- adopt the right attitude; and
- take a more professional approach towards negotiating an outcome, as an alternative to one imposed by a third party.

In some respects, it is probably easier to litigate, to allow a matter to proceed to hearing, than it is to resolve a dispute by negotiation via mediation. The analysis, preparation and creativity required is not only intellectually taxing, but hard work, albeit concentrated for a defined period.

Now to consider Mr Southwood's concerns;

1. *Compulsory court appointed mediation perceived as a rejection of the principles of impartiality and due process.*

   Parties are not denied the traditional adversarial formal hearing. Rather, at its discretion, the court orders that a mediation take place. It is not a substitute for a hearing. It is giving mediation a go, before the effort of a formal trial takes place.

   In any event, cannot a judge, impartially, refer a matter to mediation? And how does such a referral infringe "due process"?

   A better argument that Mr Southwood could have advanced is that whilst legal rules balance the playing field between the parties and provide for ordered process, mediation does neither.

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2. *Consent of all parties is required for a successful mediation.*
   Mediations have been successfully concluded even where one party has initially opposed the process.
   The power to require a managed negotiation is unlikely to be exercised willy nilly by the court. Judges are sufficiently experienced and skilled to identify those matters that require mediation.
   Further, if a judge needs to resort to a Rule 48 mediation order, one or all of the parties are probably not serving their client's interests as well as they could.
3. *How is the court to determine that a proceeding is capable of settlement? The court knows very little about the substance of a matter until trial.*
   There are few matters that are incapable of settlement. Judges can generally glean the issues from the court material sufficient to determine whether a mediation may assist. Also, the court can always hear argument on an issue.
   It is not always those who know about the "substance" of the matter that are the only ones who can determine the best way of resolving a dispute.
4. *It is likely to increase the cost of litigation and reduce access by the parties to a trial on the merits of a matter.*
   Often the real merits of a matter are not tried, but the adeptness of solicitors' skills in using pre-trial litigation mechanisms, and barristers' advocacy and skills in trial practice and procedure and evidence.
   A negotiated outcome that addresses the seven elements discussed above, must yield a better outcome for each party than that imposed by a third person.
   A judge, in delivering judgment, is unable to explore options and creatively structure an outcome which is most likely to suit the needs of all parties. A decision must necessarily be black letter. Many times, it is probably not what the winning party wanted anyway.
   If the right outcome is not achieved, there are far greater costs to parties than just the cost of litigation.
   Let us not concentrate on the cost of litigation but on the cost of not resolving disputes satisfactorily.
5. *What remedy will be available if a mediator misconducts a mediation?*
   This question seems to assume that the mediator has an adjudicating role. He or she does not. The mediator's role is to manage the negotiation. How does, or could one "misconduct" this role? In any event, this is an issue that can be worked through. What about parties' legal representatives? What remedy is available against them, if a matter, capable of an outcome other than court imposed, is not accordingly resolved?
6. *Only legal practitioners of the greatest experience and standing should be appointed mediators.*
   Again this statement seems to assume that the mediator has some type of adjudicative role.
   Whilst standards are required, it is not necessary that the role of mediator be restricted to lawyers "of the greatest experience".
   The desired person is a skilled and experienced mediator, properly and adequately briefed and ably assisted by lawyers familiar with the principles of negotiation and mediation. This person need not be a lawyer, although a legally trained mind could be of advantage.
   Having said this, the services of a lawyer may not be required at all, particularly for disputes that require a mediator of specialised background, e.g. civil engineering.
   If lawyers, even those of "greatest experience" are engaged as mediators, they should avoid making assessments or predictions, unless specifically requested by the parties, and refrain from pushing parties to accept a particular solution. Also, that lawyer should be aware of not focusing on the facts and issues that would be important in litigation.
   A successful mediation is made of many parts, of which a mediator is only one. The brief to the mediator is also important. The skill of the parties' lawyers in identifying, articulating and negotiating issues is the key.
   If any of these things are missing, even the lawyer of "greatest experience may not prevent the mediation from failing.
   Having said the above, if the court decides to make a Rule 48.15 (1) mediation order, there is no reason why the parties should be restricted to a choice of mediators from the list kept by the Master and imposed on them by the court.
   It would be preferable, and in keeping with the principles behind mediation, that the parties have the freedom to select a mediator of their choice, appropriate to the dispute. A Rule 48.15 (2) order can be made if the parties are unable, after a reasonable period of time, to agree on a mediator, but not before.

I conclude by quoting Richard Reuben, a reporter with the *American Bar Association Journal:*

> *"[T]here is no doubt that the more sophisticated mediation techniques become and the more lawyers and their clients learn about mediation, the more that people with problems are being drawn to mediation and its transformative power."*

And the mandatory mediation program introduced by Rule 48 gets the ball rolling.

Regarding a useful guide for solicitors, in 1995, the Law Institute of Victoria produced a publication entitled *Mediation – A Guide for Victorian Solicitors.* This is an excellent publication and comes equipped with sample mediation clauses for commercial agreements and precedent mediation agreements.