A Mediator's Perspective

In conversation with John West QC

By Kevin Tang and Michelle Nisbet

Mr West came to the Bar in 1975. He developed a substantial commercial practice and took silk in 1989 on his 42nd Birthday.

Arbitration has always been regarded as the work of a barrister. Questions were sometimes raised about mediation up until about 5 years ago.

He sat as an Arbitrator on his first Commercial Arbitration in the New Year of 1994 to arbitrate the Cockatoo Island dockyard case which ran from 1994 – 1996. This was his first encounter with Arbitration which, to his previous knowledge, had usually occurred in construction disputes or in commercial cases, in great secrecy.

Over the years Mr West's ADR practice grew and he was more and more regularly asked to present papers across South East Asia on ADR and was attracted to membership of the Inter-Pacific Bar Association (IPBA).

More recently Mr West was asked to Chair the Disciplinary Tribunal in the Israel Folau case in relation to the termination of his contract with Rugby Australia. This was, although not strictly a commercial arbitration, the Tribunal's procedures closely mirrored that of commercial arbitration. This was the first sporting Tribunal that Mr West had been asked to Chair.

Most Australian Businesses have traditionally preferred to go to Court. The advantage however is the private nature of an Arbitration which makes it perfect for considering cases related to high profile people and corporations.

The "sister" arm of ADR, mediation, has also become a major focus of Mr West's work.

The real benefits of mediation in classic corporations work is that timely mediation can ease tensions and save relationships.

More often now cases are coming for mediation early which is a costs saving in cases such as large class actions. Some disputes are coming for mediation even before pleadings have been filed - a situation Mr West calls "preemptive mediation".

1. When did mediation become a feature of your practice?

Mediation and Arbitration have always existed, long before I entered the profession.

It was just less frequently utilised in my earlier years. There were mechanisms and processes to settle cases, and they have always been there. I recall before mediation and ADR generally became popular, that a Judge – a commercial judge usually, would make it known to parties that a case should be settled. There have always been ways to settle a case. Mediation and reference out were strongly becoming part of the landscape but they took a little while to catch on. Mediation and ADR were not well known and were not resorted to by parties or practitioners.

ADR really came to my attention after I took Silk in 1989. I was asked to sit as sole Arbitrator in the Cockatoo Island Dockyard case. It was a long and hard fought case. It was a commercial dispute.

Since that time, mediation and arbitration and other ADR mechanisms have had a strong presence in my work. It was a turning point which put my practice on a path paralleled to the development of ADR generally in Commercial Law.

2. What was your experience with mediation in your earlier years after coming to the bar?

I had minimal exposure to mediation and other ADR mechanisms and procedures that are so common now. I came to the Bar in 1975. The Bar in those years was very different to what it is like now. I was primarily a commercial law barrister but I had brought with me to the Bar, a specialty in industrial law, together with common law and employment law. These were the areas in which I practiced most as a barrister. Those years in the 1970s and 1980s were busy years. These areas formed the basis of my life as a practitioner. From time to time, there were cases that settled without a hearing or just after the hearing commencement - especially in common law. People have different reasons for settling a case or certain parts of a case.

After Sir Laurence Street AC KCMG QC retired as Chief Justice, he championed ADR, especially mediation. It assumed a greater profile and it was no longer prone to be

ignored. I started to see mediations and ADR methods being utilised in cases more often. He was a great exponent of ADR and to large extent, he started the trend of introducing it to the Bar and solicitors. The inevitable result has been the fostering of mediation by the Australian Courts.

3. What do you think is the role of Barristers in ADR?

I think that their role is the same as it is in a Court hearing. To represent their client to the best of their ability so as to ensure that their client's position is properly advanced or protected.

There is a difference however, in context in which the barrister's skills are being deployed in ADR, more especially in mediation than in arbitration. The arbitration context is very much like the Court hearing process – with a few tricks and short cuts.

But mediation is different. The aim is different for a start. In mediation the aim of the mediator is to assist the parties to reach a settlement – an accommodation if you will. The barrister is there to assist his client to get to a settlement, as favourable as possible for his client, in all the circumstances. And, the barrister is doing this in an atmosphere of negotiation where he or she is only too aware of the problems inherent in their case. In working with the mediator, no party has anywhere to hide. It is the realisation, privately, of the weakness in cases and their discussion of them with their clients, where the barrister can really do valuable work.

I am an advocate for barristers representing parties in mediation. I find myself assisted by their presence.

When it is all said and done, the face of litigation has changed especially over the last twenty years. We will see more of the ADR processes being utilised. I want the Bar to be part of that development.

4. From your experience, is there any particular area that Counsel representing parties in ADR can improve? What have you observed?

I think the standard of position papers needs to be kept high. Their role is not to summarise the pleadings – the mediator can work out the formal position from those anyway.

Rather, their role is to take the mediator to the heart of the dispute and explain the particular Party's position in relation to that core matter for the purpose of the mediation. That is, what is the Party's stand at mediation – note their formal stance on the pleadings.

If there is a point or an issue which is knitted to that mediation stance, what is it? If the Party has a proposal for the mediated result, what is it? Or course that position will not usually be the end position of that Party – but that does not matter.

A second matter is the nature of the oral exposition of a Party's position after the Mediator has explained the "ground rules" in a joint opening session.

In their joint session, you sometimes witness a legal representative addressing remarks directly to the opponent's client. Sometimes this is done in a quite direct and some might say "confronting" way.

In my experience, such displays rarely have a positive effect on the mediation. Rather, they more often than not provoke resentment and anger in the target of the remarks. The mediator is then faced with having to "put out another fire".

My preference is for a calm and precise explanation of a Party's position. Sometimes, that will be sufficiently controversial in itself.

5. It seems we are lagging behind developments in ADR internationally. What do you suggest Australian barristers can do to improve their chances of developing international ADR practices?

When we speak of "international practices" it is worth remembering that international commercial disputes are regularly heard in our Courts or come for arbitration here or are mediated here.

A barrister may have a partially international practice even though a large part of the work is performed in Australia.

While I have mediated overseas, I find myself frequently mediating commercial disputes where one or more of the Parties is a foreign Party, with no presence here in Australia, save for having sold equipment or services into the Australian market.

I think that there are opportunities for Australian barristers to work overseas in mediation or ADR more generally. Much depends upon what steps the barrister is prepared to, or able to, undertake in jurisdictions such as say Singapore or Hong Kong. It is easier to become part of the foreign local scene if you are able to live there for a time, or be able to spend significant periods of time there. But, no matter which of these two approaches are followed, it is critical to get to know your colleagues in those places and get to know them well.

It is also possible to get to know your colleagues in such commercial cities by associating with them through the membership of professional legal associations, by following the opportunities which such involvement brings and to visit with them on a regular basis.

Essentially I have always believed that you make your own luck. In my own case, I have gained immense enjoyment in life in South East Asia through my membership of IPBA – which I joined back in 1993 after being invited to attend its Annual Conference which that year was held in Taipei.

6. What are some of the benefits for parties that you have noticed in using mediation to resolve disputes?

The process is different every time. The parties are not under public scrutiny to the same extent. The procedure is private and for the barristers involved all of the skills one uses as a barrister are relevant. Mediations can take on differing degrees of formality. Nothing like a court, but especially in large value, multi-party disputes, there is often a need for Counsel to address the positions of one or more opponents in a formal session of the mediation. Also confidentiality is an advantage if it is a matter which might otherwise attract public attention. I think that it needs to be remembered that a mediation is the parties' mediation. They are the people who decide whether there will or will not be a settlement.

7. Will ADR continue to grow?

Most Australian businessmen have traditionally preferred to go to Court. Given the standing and reputation of our Commercial Courts, that is not surprising.

However, I think that preference has given way to a willingness now to go to mediation as soon as appropriate.

Interestingly I see evidence of acceptance of arbitration in the event that mediation is unsuccessful. It is more common these days to see commercial contracts containing compulsory mediation clauses and then compulsory arbitration clauses. I think the trend will continue. BN