A mediation miscellany

By François Kunc

Why is mediation indispensable today?

There is much anecdotal evidence of dissatisfaction with traditional adversarial dispute resolution, especially among the commercial community. The main reasons are concerns about costs and delay. In an era where most fields of human endeavour have benefited from reduced labour costs through technology, litigation remains intractably labour intensive and, therefore, expensive. Moreover, technology which has improved efficiency in many enterprises, such as photocopiers, word processing and e-mail, has simply served to increase the amount of grist for the litigator's mill. A famous economic analysis of the performing arts had to grapple with the fact that you couldn't save costs and achieve a satisfactory outcome by reducing a symphony orchestra to one amplified player per part or by only playing every second note. There is a similar irreducibility of labour costs which applies to litigation.

That being said, much of the cost and delay still arises from an unwillingness (no doubt in part driven by concerns of professional liability if no stone is left unturned) to embrace seriously the implications of 'just, cheap and quick' resolution of disputes and the obligations of s56 of the *Civil Procedure Act 2002*. An example of a recent judicial response to this problem is the testing of a 'fast track list' in the Victorian registry of the Federal Court. To encourage mediation is one of the most important ways of facilitating the just, quick and cheap resolution of disputes and reducing costs and delay for clients. Practitioners should not need the encouragement of *the New South Wales Barristers' Rules* to accept that they are doing the right thing by their clients to advise early in relation to mediation and to explore actively its use at all stages of litigation.

Why shouldn't mediation put barristers out of a job?

This question can be answered from two angles. First, it must be acknowledged that the New South Wales culture (unlike, say, Victoria) is for most significant disputes to be mediated by a retired judge. Nevertheless, I suggest there is considerable room for senior members of the NSW Bar to develop expertise as mediators. While even retired judges could benefit from formal training as mediators, the case for having training for senior barristers who wish to be mediators is, in my view, even stronger. This is because they do not exercise on a daily basis some aspects of the mediator's art which are closer to the dispositions and experiences gained through judicial service.

Second, contrary to the position that seemed to have popular currency some years ago, in my opinion the barrister who will ultimately conduct the trial is an essential participant in any mediation. While there are many highly experienced litigation solicitors who can give the client good advice about what might happen at trial, counsel who will run the case is uniquely qualified to provide advice as to possible outcomes if the matter does not settle. That being said, there is far more to a barrister's role in a mediation than advising as to prospects. Hence I strongly support ongoing training in mediation for counsel who are briefed to appear as advocates in that setting.

Should mediation be compulsory immediately upon filing suit (or, where applicable, immediately after the resolution of any urgent interlocutory relief)?

Accepting the truth of Morling QC's dictum that it is never too early to mediate, this is an important question. I have framed it as relating to the period immediately after the filing of suit so that upon service a defendant who might rebuff the invitation to mediation before litigation can be compelled to attend mediation once properly joined. As I will go on to discuss, different types of dispute are more likely to be successfully mediated at different stages along the road to trial. For this reason I suggest it is not possible to lay down a blanket rule. On the other hand, thought should be given to developing categories of dispute which, prima facie, should be the subject of a compulsory mediation before the court permits further steps to be taken after proceedings have been commenced (but excluding disputes where the parties have voluntarily attempted mediation before action). One category might be disputes over a certain value. To allow for the multitude of circumstances, even in such a prima facie case, liberty would have to be reserved to a plaintiff to persuade a registrar, perhaps in writing, as to why the matter should not be mediated. In that situation a defendant who wanted an early mediation would have to be given an opportunity to respond.

Otherwise, when do you mediate?

This is a matter for professional judgment. Some disputes are obviously 'ripe' for mediation early in the interlocutory stages, especially where most of the key material is already in the possession of the litigants. Other cases need discovery to have occurred, while others are unlikely to be successfully mediated until statements have been served and parties have 'nailed their colours to the mast'. Some matters may even need a couple of attempts at mediation and, in all cases, participants in an unsuccessful mediation need to be reminded that formal and informal discussions can continue if and when the parties wish.

Assuming the idea of compulsory mediation on filing suit is not acceptable, there is one further question which I wish to pose in the light of the power of many courts to refer matters to mediation even over objection: in relation to matters where mediation has not been attempted, why shouldn't such matters be automatically referred to mediation as a precondition to being fixed for hearing? While space does not permit a reasoned consideration of this question, I suggest it is worthy of discussion.

Position paper or opening statement?

Time is at a premium in any mediation, which, of its nature, tends to be a slow process. Therefore, in my opinion a clear, but concise, position paper setting out a party's opening position is essential. The other useful piece of information which can be imparted in a position paper is that party's own estimate of its likely solicitor and client costs should the matter go to hearing so that each side can be given advice as to its possible costs liability should it be ordered to pay its opponent's costs. In an appropriate case it may even be desirable for a position paper to contain an opening offer.

My experience has been that a well crafted position paper is preferable to an opening statement as a means of informing one's opponents for the purposes of mediation. I am unconvinced about the utility of an opening statement as a means of exposing one's case or emphasising matters already set out in a position paper. Given that time is precious I suggest that the best form of opening statement for most mediations is to assume that the participants have read the position papers and to use the opportunity to set the tone by emphasising the client's realistic approach and willingness to explore alternative mechanisms to resolve the dispute at hand. In many situations it is also then better for the clients, if they are willing and able, to express in their own words their feelings about the dispute. This affirms their ownership of the process and can provide a sometimes very necessary opportunity for catharsis before constructive negotiation can begin.