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Med-Arb: NSW case highlights the importance of strict compliance with the relevant legislation

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In the recent case of *Ku-ring-gai Council v Ichor Constructions Pty Ltd* ("**Ku-ring-gai v Ichor**") the Supreme Court of New South Wales (Australia) was asked to decide whether an arbitrator who had conducted a mid-proceedings mediation required the written consent of the parties to recommence the arbitration.

Introduction

The term "med-arb" refers to the practice of an arbitrator assuming the role of a mediator between the parties, during the course of arbitration proceedings.

As noted in a previous med-arb update (https://www.whitecase.com/sites/whitecase/files/files/download/publications/articles-IALR-2012-Arb-med-solution-or-dangerous-heresay.pdf), prevalence, industry opinion, acceptability and regulation of med-arb varies significantly, depending upon the particular jurisdiction. On one view, med-arb gives rise to a risk of apparent bias, and conflicts with due process. Another view is that med-arb is a desirable method for dispute resolution which facilitates settlement.

The case of *Ku-ring-gai v Ichor* reminds us that med-arb, where it is permitted, is often subject to prescriptive legislation, and that a failure to comply can compromise the validity of any subsequent arbitral award (if the mediation is unsuccessful, and the arbitration resumes).

Background

In *Ku-ring-gai v Ichor*, the Court was asked to decide whether an arbitrator had assumed the role of a mediator, during the arbitration proceedings. The Court was also asked to decide whether, if the arbitrator had assumed the role of a mediator, written consent was required by s27D(4) of Commercial Arbitration Act 2010 (NSW) (the "**Act**") in order for the arbitrator to recommence the arbitration (following the unsuccessful mediation). This section of the Act requires all parties to the arbitration to provide written consent for an arbitrator to resume proceedings, following a failed mediation.

The Court held that the arbitrator had assumed the role of a mediator during the proceedings, and that written consent of the parties was required by the Act in order for the arbitrator to recommence the arbitration. Such written consent was held to be required, even though the parties all agreed to re-commence the arbitration following the mediation. The issue was that the parties had not committed this apparent agreement to writing.

Analysis

Despite all parties seeming to have agreed to re-commence the arbitration, following unsuccessful mediation by the arbitrator, the court decided that the arbitrator's mandate was terminated due to the lack of written consent (as required by the Act). As such, the arbitrator was not authorised to continue with the arbitral proceedings after assuming the role of the mediator, and the award made by the arbitrator was invalid.

Ku-ring-gai's argument was that, as the parties had willingly continued to participate in the arbitration, written consent should not be required as it was implied by the parties' conduct. However, the court held that *implied* consent would not satisfy the explicit requirement for *written* consent in the Act. One justification for this finding was that other aspects of the Act did specifically provide for circumstances where the parties could deviate from the provisions of the Act by agreement.

Comment

In this case, the legislative position was prescriptive. Although all parties appear to have been happy to proceed with the arbitration following the unsuccessful mediation, the lack of written consent from the parties resulted in the arbitrator's mandate being terminated.

Parties should exercise care and consider the applicable procedural laws governing interactions with arbitrators to avoid disputes as to the validity of an arbitrator's mandate. Failing to do so can seriously compromise arbitrations, potentially even rendering an arbitration award unenforceable.

This case should be of interest to practitioners in jurisdictions which also have prescriptive legislation in relation to med-arb. For example, under the Hong Kong arbitration statue, the arbitrator is required to seek the prior written consent of all parties in order to act as a mediator after the arbitration has commenced (see: Arbitration Ordinance (Cap 609) (HK), section 33(1)). The position is also similar in Singapore (see: Arbitration Act (Cap 10) (Sing), section 63.) Whereas, in the UK, parties generally have the freedom to agree how to resolve their disputes, and there is no specific legislative requirement for parties to provide written consent to med-arb. However, case law suggests that if the arbitrator's impartiality is considered by the court to have been compromised by the mediation, an award may still be held invalid even if the parties consented (in writing or otherwise) to re-commence the arbitration (see: *Glencot Development and Design v Ben Barrett & Son* [2001] All ER (D) 384).

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