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17 October 2011

Hon Adele Farina MLC
Chair
Standing Committee on Uniform Legislation and Statutes Review
Legislative Council of Western Australia
Parliament House
Perth WA 6000

Dear Ms Farina

Inquiry into Commercial Arbitration Bill 2011 (WA) – clause 27D mediation clause

Thank you for your invitation to provide submissions on clause 27D of the *Commercial Arbitration Bill 2011* (WA) ('the *WA Bill*'). I note that your invitation asks for views on two matters: namely matters of interpretation of the *WA Bill* as drafted (in particular clause 27D(7)), or the likely or possible extent and application of its provisions. I wish to limit my submission to what I regard as the most important aspect of clause 27D; namely, private meetings between the mediator-arbitrator and the parties. In my view, the *WA Bill* should not permit such meetings. This is the heart of the problem with clause 27D.

The *WA Bill* of course is substantially identical to the Model Bill produced by the Standing Committee of Attorneys-General ('SCAG') which resolved on 7 April 2010 to adopt the Model Bill to replace the then *Commercial Arbitration Acts*, representing a major overhaul of domestic arbitration law in Australia. The Model Bill has been enacted in New South Wales, Tasmania, the Northern Territory and Victoria. Like Western Australia, South Australia has introduced a similar Bill into its parliament. Only Queensland and the Australian Capital Territory are yet to introduce such legislation.

From what I am able to decipher, clause 27D is identical to s 27D of the Model Bill except that in sub-para (4), the following words are added at the end of the sub-section: "*given on or after the termination of the mediation proceedings*".[1] In my view, this is a sensible amendment, but if my submissions are accepted, sub-section (4) is unnecessary (for reasons explained below).

[1] The New South Wales, Tasmania, Northern Territory and Victoria Acts similarly have these added words.

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Clause 27D expressly provides that an arbitrator acting as a mediator may communicate separately with the parties (clause 27D(2)(a)). In other words, an arbitrator may conduct private mediation sessions. If the mediation is unsuccessful, the arbitrator cannot continue with the arbitration unless all parties to the arbitration provide their written consent to him/her doing so (clause 27D(4)). If the arbitrator continues with the mediation, clause 27D(7) imposes a statutory obligation on the arbitrator to first disclose to all other parties to the arbitration proceedings, any confidential information obtained from another party during the mediation – in particular, private sessions. This disclosure requirement appears to derive from s 17 of the Singapore *International Arbitration Act (Cap. 143A).* [2] There is no similar provision in the *International Arbitration Act 1974 (Cth).*

This statutory disclosure requirement has engendered consternation from some commentators on the basis that it undermines the confidentiality of mediation. Such concern was raised during debate in the Legislative Council of New South Wales in June 2010 during the passage of the *Commercial Arbitration Bill 2010 (NSW).*[3]

It is now accepted in international arbitration circles that arbitrators should promote settlement of disputes referred to arbitration.[4] In that regard, the Centre for Effective Dispute Resolution (**"CEDR"**) published a report in November 2009 concerning settlement in international arbitration, together with rules for the facilitation of settlement in international arbitration.[5] It is significant that those rules, developed through consultation with dispute settlement bodies worldwide, do not condone arbitrators engaging in private sessions with the parties when facilitating settlement.

The apparent philosophy underlying clause 27D is that if an arbitrator engages in private sessions with the parties during the mediation phase of a combined arbitration-mediation process, he/she cannot continue in his/her role as arbitrator (even with the consent of the parties) without disclosing any relevant confidential information learned during the mediation phase. As alluded to above, some commentators argue that to impose such an obligation of disclosure undermines the integrity of the mediation process.[6]

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2 There is an identical provision in s 33 of the Hong Kong Arbitration Ordinance 2010.

3 New South Wales, *Parliamentary Debates*, Legislative Council, 9 June 2010, 24034 (David Clarke)

4 See Gabrielle Kaufmann-Kohler, 'When Arbitrators Facilitate Settlement: Towards a Transnational Standard', Clayton Utz and University of Sydney International Arbitration Lecture 2007.

5 The Report and Rules are available at <http://www.cedr.com/about_us/arbitration_commission/>

6 Derek Minus, 'Turning Point for Arbitration' (4 June 2010) *Lawyers Weekly* 12.

Although mediation may be one way (and indeed perhaps the best way) to encourage settlement, an arbitrator may promote settlement without engaging in private sessions with the parties. This is commonly referred to as conciliation. A conciliator, unlike a mediator, does not come into possession of confidential information and therefore the obligation of disclosure does not arise.

It might be argued that to remove the arbitrator's power to meet privately with the parties (in clause 27(2)(a)) diminishes the ability of the arbitrator to promote settlement. However, the fact is that in Australia (unlike many other jurisdictions) there is a well-credentialed group of professional, independent mediators who can be called upon to mediate at short notice should resolution of a particular dispute call for private sessions. In addition, the arbitrator can still facilitate settlement in open session with the parties (as is the case with the CEDR Rules).

It is sometimes said that Med-Arb (or Arb-Med) is widely practised throughout Asia and that it is common for arbitrators in Asia when promoting settlement to engage in private sessions with the parties. This general statement is not correct. It is only common in China[7] and Japan[8] for arbitrators to engage in private sessions with the parties when facilitating settlement. It is not, for example, common in Korea.

Australia is a common law jurisdiction where parties and practitioners are highly suspicious of the notion that a judge or arbitrator may engage in private communications with parties before proceeding to determine a dispute involving them. It is simply not possible to adapt what might be a commonly accepted practice in China or Japan into the Australian legal landscape. Likewise, while Singapore and Hong Kong (both common law jurisdictions) have Arbitration Acts which for some time have allowed arbitrators to engage in private sessions with the parties pursuant to an Arb-Med process, anecdotal evidence reveals that there has been little or no uptake in those jurisdictions of such a process (except where the parties come from mainland China).

Indeed, a recent decision of the High Court of Hong Kong in *Gao Haiyang & Anor v Keeneye Holdings Limited & Anor* (unreported, Reyes J, 12 April 2011) refused to enforce in Hong Kong a mainland China arbitration award in circumstances where a member of the arbitral tribunal had private communications with one of the parties purportedly pursuant to an Arb-Med process. In the course of his judgement, Reyes J raised serious concerns about arbitrators engaging in private

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7 Sally A. Harpole, 'The Combination of Conciliation with Arbitration in the People's Republic of China', (2007) 24(6) *Journal of International Arbitration* 623-624.

8 Yasunobu Sato, 'The New Arbitration Law in Japan: Will It Cause Changes in Japanese Conciliatory Arbitration Practices?' (2005) 22(2) *Journal of International Arbitration* 141.

communications with parties when attempting to facilitate settlement, and the consequent risk of apparent bias:

> *[72] From the point-of-view of impartiality, the med-arb process runs into self-evident difficulties. The risk of a mediator turned arbitrator appearing to be biased will always be great.*
>
> *[73] The potential for an appearance of bias arises because of important differences between the meditation and arbitration processes.*
>
> *[74] For example, a mediator typically meets individually with the parties to explore the concerns of the latter and the possible settlement plans which the latter may broach. An arbitrator, on the other hand, must avoid unilateral dealings with the parties.*
>
> *[75] Further, the mediator who acts as arbitrator obtains confidential information in the course of one-on-one meetings with a party. That information may consciously or sub-consciously influence the mediator when sitting as arbitrator. It would be unfair on the other party for the mediator turned arbitrator to act upon the confidential information without first disclosing the same and affording that other party a chance to comment on any prejudicial impact of the confidential information.*
>
> *[76] Thus, the mediator who may be sitting as arbitrator in the same case must be particularly careful not to convey to one party or the other the impression of bias. This means that, in a mediation session with one party A, the mediator when conveying settlement suggestions apparently benefitting the other party B to the dispute, must be sensitive to the need not to appear to A as if the mediator favoured B's case.*
>
> *[77] The problems inherent in med-arb are such that many arbitrators decline to engage in it. They view the risk of apparent bias arising from their participation in med-arb as an insurmountable difficulty.*[9]

In sum, it is my view that clause 27D of the *WA Bill* should be revised to remove –

a. statutory permission for an arbitrator acting as a mediator[10] to meet separately with the parties; and

b. the consequent obligation of the arbitrator to disclose confidential information obtained during the mediation phase while meeting separately with either party.

On the other hand, clause 27D should encourage arbitrators to promote settlement of disputes referred to arbitration.

If my primary submission is accepted, clause 27D can be pruned back substantially as much of it is drafted with the idea in mind that the neutral is entitled to meet privately with the parties - hence necessary safeguards are required.

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9 See Phillip Georgiou, "The real risk of bias in 'Chinese style' arbitration" (July 2011) *Asian Dispute Review*, p 89.

10 Indeed, it would be preferable if section s27D spoke of "conciliation" and not "mediation". But conciliation" would need to be defined as there are no universal definitions.

I set out below how I think clause 27D should be drafted:

27D. Power of arbitrator to act as conciliator

(1) An arbitrator may act as a conciliator in proceedings relating to a dispute between the parties to an arbitration agreement (conciliation proceedings) if --

(a) the arbitration agreement provides for the arbitrator to act as conciliator in conciliation proceedings (whether before or after proceeding to arbitration, and whether or not continuing with the arbitration); or

(b) each party has consented in writing to the arbitrator so acting.

(2) [deleted]

(3) Conciliation proceedings in relation to a dispute terminate if --

(a) the parties to the dispute agree to terminate the proceedings; or

(b) any party to the dispute withdraws consent to the arbitrator acting as conciliator in the proceedings; or

(c) the arbitrator terminates the proceedings.

(4) An arbitrator who has acted as conciliator in conciliation proceedings that are terminated may not conduct subsequent arbitration proceedings in relation to the dispute without the written consent of all the parties to the arbitration given on or after the termination of the conciliation proceedings.

(5) If the parties consent under subsection (4), no objection may be taken to the conduct of subsequent arbitration proceedings by the arbitrator solely on the ground that he or she has acted previously as a conciliator in accordance with this section.

(6) If the parties do not consent under subsection (4), the arbitrator's mandate is taken to have been terminated under section 14 and a substitute arbitrator is to be appointed in accordance with section 15.

(7) [deleted]

(8) In this section, a reference to a conciliator means a person who attempts to facilitate settlement of the dispute between the parties without communicating with the parties separately.

By way of explanation:

(a) the reference to "mediator" or "mediation" should, I think, be removed and replaced with "conciliator" and "conciliation" respectively;

(b) the section should contain a definition of conciliation, in particular referring to the fact that the conciliator is not entitled to meet privately with the parties;

(c) if private sessions are not permitted, subsections (2) and (7) are rendered otiose;

(d) indeed, subsections (4) and (6) could also be deleted if private sessions were not permitted. That is, the requirement in subsection (4) for consent to be given after the

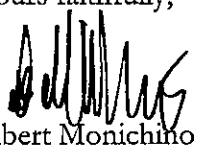
conclusion of the mediation proceedings before an arbitrator can continue with the arbitration is no doubt drafted in response to the prospect that the mediator in conducting the mediation process may have engaged in private communications with the parties, and thus may have come into possession of confidential information material to the determination of the dispute. If, on the other hand, the neutral is only entitled to meet with the parties in joint session during the conciliation process, he (or she) does not come into possession of confidential information, and therefore it is difficult to see why any further separate consent of the parties is required following the conclusion of the conciliation process before the arbitrator can continue on with the arbitration;

(e) on the other hand, subsection (5) should remain but with the deletion of the opening words "*If the parties consent under subsection (4)*";

(f) therefore, to summarise, clause 27D could be further refined to delete subsections (4) and (7), and to delete the opening words of subsection (5) as per the shading above.

I appreciate that my submissions involve a substantial departure from clause 27D of the *WA Bill* (or indeed the Model Bill). I also appreciate that uniformity across the States and Territories is highly desirable and that therefore this is a matter better taken up by SCAG. However, as drafted, clause 27D of the *WA Bill* (and the Model Bill) is, in my view, unlikely to be embraced by arbitration practitioners in Australia.

Yours faithfully,



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