

CARTER'S LAW

Arbitrate, Litigate or Mediate?

BY JOHN CARTER

There have been a few legal teething problems with the Arbitration Act 1996 but the Courts have now worked through these. The new Act provides specifically that the parties must be treated with equality and be given a full opportunity to present their cases. The main advantages of arbitration over litigation are:

1. It tends to be more informal and hearing dates can be more quickly settled rather than waiting for the Courts to find available judge time but major disputes are just as, and possibly more expensive than the Courts because the parties have to pay the Arbitrator.
2. Under section 14 of the 1996 Act unless the parties agree otherwise, they are prohibited from publishing, disclosing or communicating any information relating to arbitral proceeding under the Agreement or to an Award made in these proceeding.

This strict confidentiality provision is of great importance to parties who have to litigate / arbitrate disputes involving discovery of commercially sensitive information.

Mediation

Mediation in my experience tends to work best in bringing parties to a settlement when a full scale hearing in Court is imminent. Having to front up in Court focuses the mind and the pocket on settlement.

One leading Auckland legal mediator reckons he can solve in three months the same number of cases that it would take a High Court Judge three years to dispose of through the Courts.

Various mediators have different styles but the varying styles all seem to work in their own ways and in my experience most mediations result in settled outcomes.

Most disputes have uncertain legal issues and disputed facts which mediations always clarify. After a few days negotiation with an experienced mediator most experienced lawyers have a pretty good idea of how the case will probably be decided by the Courts if it comes to that.

This is where BATNA comes in. BATNA is the best alternative to a negotiated agreement. Will you win if you go to Court? Can your lawyer guarantee that you will win? What will be the result if you lose - in money, legal costs and legal costs to the other side, executive time, lost opportunities in other areas, negative publicity, future relationships? You may not want to settle but can you afford to lose?

I've taken about thirty disputed cases to mediation. All but one was resolved by an agreed settlement at the mediation.

The other was settled as between Plaintiff and Defendant at the Arbitration and as between Defendant and two third parties a few weeks later on the terms offered by the third parties at the mediation.

Not one of my clients have later come back to me and said they wish they had not settled at mediation. All my clients have professed to be very happy with the mediated solution.

I wish all my clients who litigated to the end and those who feel they were bullied into a settlement by their lawyer (who usually has a better appreciation of the likely outcome) felt the same way.

What is mediation?

For those of you who have not been involved in a mediation, the process takes place over half a day, usually a day, possibly two. Lawyers attend together with the individuals or executives who have the power to settle.

There are opening statements on both sides. The merits are disputed between the parties and their lawyers. The widest possible range of solutions are canvassed and then a lengthy negotiation takes place usually culminating in agreement and settlement.

Most of the mediations I have been involved in have been like mini trials without witnesses and cross examinations. The mediator doesn't involve themselves in the merits of the dispute but facilitates the process so that the parties themselves can assimilate and clarify the strengths and weaknesses of the respective cases. Many clients finally appreciate at mediation that they are not backing the sure winner they previously imagined. The preparation for any significant mediation needs to be thorough and without such preparation favourable mediated outcomes are not achieved.

Why have a mediator at all you ask? Why can't the parties and their lawyers do it themselves? The answer is that without a qualified mediator controlling the process and the egos of those involved, inhibiting walkouts, nudging one or other of the parties closer to settlement and holding the parties together for a day or more most of the settlements would never be reached.