MEDIATION

Purpose of this Part

10.1 (1) This part deals with assisting the court to refer matters for mediation

(2) This Part does not prevent the parties to a proceeding from agreeing to or arranging mediation otherwise than under this Part.

[10.1.1] Other sources of mediation powers See further r.1.4(2)(e) and (f). Compare also the mediation framework provided by: *Trade Disputes* [Cap 162], Part III; *Island Courts* [Cap 167], s.20; *Ombudsman* [Cap 252], s.13; *Maritime* [Cap 131], s.150. See also the powers of mediation exercisable by a Master under s.42, *Judicial Services and Courts* [Cap 270].

What is mediation

10.2 For this Part, "mediation" means a structured negotiation process in which the mediator, as a neutral and independent party, helps the parties to a dispute to achieve their own resolution of the dispute.

[10.2.1] Meaning of "mediation" Mediation is qualitatively different from the process of formal adjudication. Within the above general definition there may be a wide variety of methods. These may be broadly classified as process-oriented or substance-oriented. In the former it is assumed that parties hold the solution to their dispute and the mediator is the facilitator of that process, not an authority figure providing substantive advice or pressure to settle. In the latter the mediator is often an authority figure who evaluates the case based upon experience and offers recommendations on how it ought to be resolved: See R Amadei and L Lehrburger, "The World of Mediation: A Spectrum of Styles" (1996) 51 *Dispute Resolution Journal* 62. Within these classifications there are many additional and overlapping variants: See J Wade, "Mediation - The Terminological Debate" (1994) 5 *Australian Dispute Resolution Journal* 204. Note that arbitration, now dealt with under the provisions of s.42B – F, *Judicial Services and Courts* [Cap 270] (inserted by Act 26 of 2008, Gazetted 30 June 2008), is not yet the subject of any specific rules of court.

[10.2.2] Objectives of mediation The objectives of mediation are made clear by this rule: *Australian Competition and Consumer Commission v Lux* [2001] FCA 600. Mediation is not simply an occasion for each side to give consideration, with the assistance of the mediator, to the strength of its legal case and concomitantly to the extent to which it may be willing to compromise on its formal legal position. Rather, it is an opportunity for the parties to resolve their dispute according to wider and more flexible options when compared with those available to a court were their dispute litigated: *Dunnett v Railtrack* [2002] 1 WLR 2434 at [14]; [2002] 2 All ER 850 at [14]; *Hopeshore v Melroad Equipment* [2004] FCA 1445 at [30] - [32]; [2004] 212 ALR 66. The point of mediation is that there be some give and take on both sides and neither party enters mediation with any prescriptions: *Australian Competition and Consumer Commission v Lux Pty Ltd* [2001] FCA 600 at [28].

[10.2.3] Importance of mediation Mediation is an important feature of modern litigation and in extra-curial remarks the Chief Justice has stated that alternative dispute resolution is also "consistent with traditional methods of dispute resolution that predated the introduction of the formalised system of justice": cited in G Hassall, "Alternative Dispute resolution in Pacific Island Countries" [2005] JSPL 1.

Referral by court

10.3 (1) The court may by order refer a matter for mediation if:

[10.3.1] Source of power Section 42A(1), *Judicial Services and Courts* [Cap 270] (inserted by Act 26 of 2008, Gazetted 30 June 2008) provides that the court may refer a matter to mediation, subject to the *Rules*. This proviso is important because the *Rules* are currently much more restrictive than s.42A.

(a) the judge considers mediation may help resolve some or all of the issues in dispute; and

(b) no party to the dispute raises a substantial objection.

[10.3.2] Mediation voluntary It is made clear below that mediation is entirely voluntary and cannot be ordered, conducted or continued against the will of any party. In these circumstances, it is difficult to understand why mediation is conditioned on the fiction of a "substantial objection" when in fact, any objection will preclude mediation, regardless of its merits. Section 42A(2), *Judicial Services and Courts* [Cap 270] (inserted by Act 26 of 2008, Gazetted 30 June 2008) provides that the mediation referral may be made with or without the consent of the parties. Given the proviso in subs.(1) that the referral may be made "subject to the rules of court" (see [10.3.1]), it would seem that there can be no referral without consent until the *Rules* are amended accordingly.

(2) For subrule (1), a substantial objection includes:

(a) that the parties do not consent to mediation; or

[10.3.3] Necessity of consent The role of the court is limited to encouragement and facilitation: See generally *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576 at [9]; [2004] 1 WLR 3002; [2004] 4 All ER 920 and r.1.4(2)(e) and (f). See further [10.3.2].

[10.3.4] Refusal to mediate may sound in costs Despite the lack of power to require the parties to mediate, an unreasonable refusal may sound in costs: *R (Cowl) v Plymouth City Council* [2002] 1 WLR 803 at [25], [27]; *Dunnett v Railtrack* [2002] 1 WLR 2434 at [15]; [2002] 2 All ER 850 at [15]; *Leicester Circuits v Coates Brothers* [2003] EWCA Civ 333; *Cullwick v Ligo* [2003] VUSC 60; CC 51 of 2003 (no order as to costs where parties failed to make good use of internal mediation system). There is no presumption that refusal to mediate is always unreasonable: *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576 at [16]; [2004] 1 WLR 3002; [2004] 4 All ER 920. As to what may amount to an unreasonable refusal see for example *Capolingua v Phylum Pty Ltd* (1989) 5 WAR 137.

(b) that the dispute is of its nature unsuitable for mediation; or

[10.3.5] Indications and contraindications to mediation For a detailed description and consideration of the factors which might be taken into account see *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576 at [17] – [23]; [2004] 1 WLR 3002; [2004] 4 All ER 920. Note that different jurisdictions have developed various approaches to referral, for example the New South Wales Supreme Court in its 1995 Steering Committee report recommended developing positive criteria for referral to various ADR processes and produced a checklist of factors favouring mediation: (1) Whether the matter is complex or likely to be lengthy (2) Whether the matter involves more than one plaintiff or defendant (3) Whether there are any cross claims (4) Whether the parties have a continuing relationship (5) Whether either party could be characterised as a frequent litigator or there is evidence that the subject matter is related to a large number of other matters (6) Whether the possible outcome of the matter may be flexible and where differing contractual or other arrangements can be canvassed. Poor compliance rates in similar types of matters could be considered in respect of this factor (7) Whether the parties have a desire to keep a matter private or confidential (8) Whether a party is a litigant in person (9) Whether it is an appropriate time for referral (10) Whether the dispute has a number of facets that may be litigated separately at some time (11) Whether the dispute has facets that may be the subject of proceedings other jurisdictions.

(c) anything else that suggests that mediation will be futile, or

unfair or unjust to a party.

[10.3.6] Additional contraindications The fact that a party may be a government agency performing public interest functions does not necessarily make mediation inappropriate: *Australian Competition and Consumer Commission v Lux* [2001] FCA 600 at [30] - [31]; *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576 at [34]; [2004] 1 WLR 3002; [2004] 4 All ER 920.

(3) In particular, a judge may make a mediation order at a conference.

[10.3.7] When mediation order may be made It is difficult to see how this subrule expands (or limits) the availability of a mediation order given that it is permissive and also given the unrestricted nature of subr. (1). The power to refer a matter to mediation in s.47A(1) is unrestricted as to time.

(4) The mediator may be, but need not be, a person whose name is on a list of mediators.

[10.3.8] Any person may be a mediator In other words, any person may be a mediator. See further the definitions of "person" in Part 20 and in Schedule 2 of the *Interpretation Act* [Cap 132]. Section 47A(1), *Judicial Services and Courts* [Cap 270] (inserted by Act 26 of 2008, Gazetted 30 June 2008) provides that a referral may be made to a "master, deputy master or mediator" and defines "mediator" in subr.(5) as the person appointed to mediate under the *Rules*. Accordingly, s.47A does not operate as a restriction on who may be a mediator. Rather, any person can (continue to) be a mediator.

[10.3.9] Under-utilisation of mediation Mediation is said to be under-utilised partly because of the absence of qualified mediators: S Farran & E Hill, "Making Changes With Rules in the South Pacific: Civil Procedure in Vanuatu" (2005) 3(2) *JCLLE* 27 at 48-9. It is suggested that mediation is also under-utilised because the courts do not have the resources to conduct mediation with the result that the parties must bear the cost of a private mediator.

Who may be mediators

10.4 (1) The Chief Justice may keep a list of persons whom the Chief Justice considers to be suitable to be mediators.

(2) The list may state whether a person may be a mediator for the Supreme Court or the Magistrates Court, or both.

[10.4.3] Any person may be mediator It is difficult to see how this rule expands (or limits) the choices as to mediators given the terms of r.10.3(4). See further [10.3.8].

Content of mediation order

10.5 (1) The mediation order must set out enough information about:

(a) the statements of the case; and

(b) the issues between the parties; and

(c) any other relevant matters;

to tell the mediator about the dispute and the present stage of the proceeding between the parties.

(2) The court may include in the order directions about:

(a) the mediator's role; and

(b) time deadlines; and

(c) any other matters relevant to the particular case.

Mediation voluntary

10.6 (1) Attendance at and participation in mediation sessions are voluntary.

(2) A party may withdraw from mediation at any time.

[10.6.1] General observations See further r.10.3(1)(b), (2)(a). The provisions of s.47A(2) and (3)(a) of the Judicial Services and Courts Act [Cap 270] are, for the reasons discussed in [10.3.1] and [10.3.2], ineffective without amendment to the *Rules*.

Mediator's role

10.7 During the mediation, the mediator may see the parties together or separately and with or without their lawyers.

Mediator's powers

10.8 (1) A mediator may:

(a) ask a party to answer questions; and

(b) ask a party to produce documents or objects in the party's possession; and

(c) visit places and inspect places and objects; and

(d) ask a party to do particular things; and

(e) ask questions of an expert witness to the proceeding.

[10.8.1] Source and nature of mediator's powers Given that mediation is entirely voluntary and that a party can withdraw from mediation at any time, these powers are largely symbolic. In practice, a mediator's powers are a function of the imagination of the mediator and the consent of the parties. Curiously, the new amendments to *Judicial Services and Courts* [Cap 270] (No 26 of 2008, Gazetted 30 June 2008), which imply a future in which mediation may be non-consensual, does not contain any elaboration of the powers of the mediator or statutory basis for rules in that connection. Presumably the use of the word "ask" (as opposed to "require") suggests that, even in a non-consensual mediation, these "powers" are quite limited. The alternative construction would appear to be massively precipitous.

(2) A mediator may at any time ask for guidance and directions from the court.

Settlement

10.9 (1) If a settlement is reached it must be:

[10.9.1] Meaning of "settlement" When speaking of a "settlement" important questions arise as to whether and when the same becomes binding. The ordinary law of contract in its application to settlements requires that at least its essential or critical terms have been agreed upon: *Pittorino v Meynert* [2002] WASC 76 at [111].

(a) written down, signed and dated by the mediator and the parties; and

[10.9.2] Signature by lawyer Although a party's lawyer has ostensible authority to sign a settlement on behalf of a party (*Waugh v H B Clifford* [1982] Ch 374 at 387; [1982] 2 WLR 679 at 690; [1982] 1 All ER 1095 at 1105), it is probably wise to ensure that the parties themselves sign the settlement, if only to avoid arguments of the kind raised (but not upheld) in *Von Schulz v Morriello* [1998] QCA 236. Note that the new s.47A(3)(d) does not refer to signing by the parties and so this requirement is additional.

(b) filed with the court.

[10.9.3] Obsolescence of paragraph The new s.47A(3) does not contain this requirement.

(2) The court may approve the settlement and may make orders to give effect to any agreement or arrangement arising out of mediation.

(3) These orders do not constitute a judgment against a party.

[10.9.4] Obsolescence of subrule The new s.47A(3)(e) provides that a signed record of a "settlement" is enforceable as an order of the Supreme Court. Of course, the parties may alternatively invite the court to make consent orders for judgment reflecting a mediated or otherwise negotiated outcome. The effect of the new provision, having regard to the proviso in subs.(1) (see [10.3.1]) is uncertain.

(4) This rule does not affect the enforceability of any other agreement or arrangement that may be made between the parties about the matters the subject of mediation.

[10.9.5] Other agreements See generally *Pittorino v Meynert* [2002] WASC 76 (application to set aside settlement based on duress, etc). The effect of s.47A(3)(e) on this provision is uncertain.

Costs of mediation

10.10 The costs of a mediator are to be paid by each party equally, unless the parties agree otherwise.

Proceeding suspended during mediation

10.11 If a matter is referred to mediation by the court under this Part, the proceeding about that matter is suspended during the mediation.

Privileged information and documents

10.12 (1) Anything said during mediation, or a document produced during mediation, has the same privilege as if it had been said or produced during a proceeding before the court.

(2) Evidence of anything said during mediation is not admissible in a proceeding before a court.

(3) A document prepared for, or in the course of or as a result of, mediation is not admissible in a proceeding before a court.

[10.12.1] Legislative foundation of rule The efficacy of the above provisions is yet to be tested. It has been noted that, when they were made, these were matters of substantive law without legislative foundation: S Farran & E Tarrant, "Making Waves and Breaking the Mould in Civil Procedure in the Pacific: The New Civil Procedure Rules of Vanuatu" (2002) 28(2) *Commonwealth Law Bulletin* 1108 at 1119. Now, the new s.47A(3)(b) and (f) to the Judicial Services and Courts Act [Cap 270] provide a legislative basis for subrules (1) and (2). Curiously, however, there is no attempt in the rectify the absence of statutory cover for documents, as in subr.(3).

(4) Subrules (2) and (3) do not apply to evidence or a document if the parties to the mediation, or persons identified in the document, consent to the admission of the evidence or document.

Secrecy

10.13 A mediator must not disclose to any person who is not a party to a mediation information obtained during the mediation except:

(a) with the consent of the person who gave the information; or

(b) in connection with his or her duties under this Part; or

(c) if the mediator believes on reasonable grounds that disclosing the information is necessary to prevent or minimise the danger of injury to a person or damage to property; or

(d) if both parties consent; or

(e) if disclosing the information is required by another law of Vanuatu.

[10.13.1] Legislative foundation of rule Unfortunately, the new s.47A, *Judicial Services and Courts* [Cap 270] did not attend to providing a statutory basis for this rule, without which it is of doubtful effect.

Liability of mediators

10.14 A mediator is not liable for anything done or omitted to be done during mediation if the thing was done in good faith for the purposes of the mediation.

[10.14.1] Obsolescence of rule The protection afforded by such a rule is dubious absent legislative support, which was absent until recently. Even wider legislative protection is now extended by s.47A(4), *Judicial Services and Courts* [Cap 270] thus rendering this rule otiose.

Unsuccessful mediations

10.15 If a mediation is unsuccessful, no inference may be drawn against a party because of the failure to settle the matter through mediation.

[10.15.1] See, however, [10.3.4] as to the possible costs consequences of an unreasonable refusal to mediate.

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