

**Contemporary Issues in
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and Mediation**

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Med-Arb/Arb-Med: A More Efficient ADR Process or an Invitation to a Potential Ethical Disaster?

Donna Ross

The practice of combining arbitration and mediation into a single, hybrid process when the role of mediator and arbitrator is assumed by the same neutral raises a tidal wave of controversy. Certain detractors of Med-Arb/Arb-Med¹ oppose it so fervently they consider it not only an ethical disaster, but heretical—a process that should be burned at the stake. On the other side of the spectrum, some of its devotees believe it is not only more efficient, but a panacea, encompassing the best of both worlds.

In fact, it is neither. There is no right solution. In some cases it is a more efficient option, in others, perhaps not. The potential ethical disaster lies not in using these processes, but in allowing them to develop without supervision, to the detriment of international arbitration, and not as a well-structured complement or integral part of it. The invitation, therefore, is one to arbitration and mediation practitioners to act as gatekeepers and help to establish safeguards to ensure that these single-neutral hybrid processes remain more efficient, ethical and afford finality.

The purpose of this article is to underscore the development and use of these methods because of the advantages they offer, identify and highlight some of their pitfalls and offer some suggestions to help ensure that these party-driven processes are structured and conducted successfully, and more importantly, lead to the finality that parties desire.

¹ Med-Arb and Arb-Med as used in this paper generally refer to those processes with a single neutral.

THE SHIFT FROM ARBITRATION TO MEDIATION TO ADR HYBRIDS

Increasingly disenchanted with the fact that international arbitration has become as lengthy and costly as litigation, parties have been turning to mediation as an alternative.²

However, as mediation has gained in popularity, lawyers have become increasingly involved as counsel and often as mediators. As a consequence, the mediation process has become more adversarial—less interests-based and more rights-based—particularly with the practice of mediator evaluation and mediator proposals. As arbitration is often referred to as the new litigation, so mediation has now been coined the “new arbitration”.³

On the international front, the use of same neutral Med-Arb/Arb-Med has been predominantly in the Far East. Today, with the increasing importance of Asia as an arbitral and ADR hub, these processes, used domestically in specific sectors in many countries, are experiencing a renaissance. As a result, institutions and countries, even those that do not actively promote or agree with these techniques, are adapting their rules and laws to grant parties the flexibility to adopt them as appropriate. This trend suggests that they must be more efficient, at least in certain circumstances, otherwise parties would not choose them. That said, these hybrid dispute resolution methods are hardly new: they date back to the ancient Greeks, were even codified by the Ottoman Empire and have been traditionally used in Latin America.⁴

² A number of institutions have responded to this problem by creating fast-track and expedited procedures for arbitration to control time and cost in international arbitration, such as the ICC, SIAC and AAA (ICDR), for instance.

³ For an extensive study of this phenomenon, see Jacqueline Nolan-Haley, “Mediation: The New Arbitration”, available at <http://www.hnlr.org/wp-content/uploads/2012/09/61-96.pdf>.

⁴ See Alan L. Limbury, Getting the best of both worlds with Med-Arb: Law Society of NSW Journal, September 2010, Vol. 48 No. 8, 62-65; Amadou DIENG, APPROCHE CULTURELLE DES ADR EN OHADA, available at http://www.jadaf.fr/fichiers_site/a1585jad/contenu_pages/graphisme_global/jada2011_1.pdf#page=24; M. Tarrazón, Arb.Med: A Reflection à Propos of a Bolivian Experience, NYSBA New York Dispute Resolution Lawyer 2, no. 1 (Spring 2009), 87-88. The articles cited in this paper from the NYSBA New York Dispute Resolution Lawyer 2, No. 1, are all available at http://www.nysba.org/AM/Template.cfm?Section1/4New_York_Dispute_Resolution_Lawyer&TEMPLATE1/4/CM/ContentDisplay.cfm&CONTENTID1/426825.

A BRIEF TOUR D'HORIZON OF INSTITUTIONAL RULES AND NATIONAL LAWS THAT ENDORSE OR ACCOMMODATE MED-ARB AND ARB-MED

Virtually all of the major institutions, even those not favorable to a hybrid process conducted by the same neutral, uphold party autonomy and allow for these processes under of their rules.

There often exists a preconceived notion that because in Asian countries parties have a general aversion to conflict and seek more harmonious solutions to disputes, whereas common law countries have more adversarial legal systems, only Asian parties have traditionally used hybrid processes such as Med-Arb.⁵ However, while Asian countries may have led the global trend in adopting laws, and their institutions, rules, allowing parties to choose the same neutral in international arbitration and ADR, a look below the surface shows that many similar techniques are used widely in specific fields in many other countries with both civil and common law systems. A few examples of common law countries where single-neutral hybrid processes are commonly used (particularly in employment law and labor relations and construction) are the UK, the US, South Africa and Australia.⁶ Another example is Chile's 1979 Labor Reform, which mandates pendulum arbitration for special collective bargaining cases.⁷

In China, conciliation⁸ is enshrined as part of the dispute resolution process. The China International Economic and Trade Arbitration Commission ("CIETAC") Rules and the Arbitration Law of the People's Republic of China, both allow arbitrators to conciliate, conditional on acceptance by the parties.⁹

⁵ See Cheng, Tai-Heng Reflections on Culture In Med-Arb, 4 CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 421 (A. Rovine ed. 2009), p. 424; Barney Jordaan, Hybrid ADR Processes in South Africa, NYSBA New York Dispute Resolution Lawyer 2, No. 1 (Spring 2009), 117.

⁶ Australia has recently enacted a new commercial arbitration act. Strangely, the domestic Commercial Arbitration Acts, based on the Model Law, allow for Med-Arb with party consent, but this option is not available to parties under the International Arbitration Act.

⁷ Law No. D.L. 2.758, Julio 6, 1979 Diario Oficial [D.O.] (Chile).

⁸ Unless otherwise specified, the terms mediation and conciliation are used interchangeably, although in some countries or languages they may refer to different types of processes, particularly in Switzerland and other civil law countries.

⁹ Article 40 of the CIETAC Arbitration Rules provides that "*the arbitral tribunal may conciliate the case during arbitration proceedings*" in the manner it considers appropriate. See also, Tai-Heng Cheng & Anthony Kohtio, Some Limits to Applying Chinese Med-Arb Internationally, NYSBA New York Dispute Resolution Lawyer 2, No. 1 (Spring 2009), 95.

Japan's Arbitration Law of 2003 and the JCAA Arbitration Rules permit arbitrators to mediate disputes within the framework of the arbitration with party consent. Similarly, under the JCAA Mediation Rules, a mediator may act as an arbitrator in subsequent arbitral proceedings arising from the same dispute, and any mediation settlement may be incorporated into an arbitral award. Since Japanese judges are trained as mediators, the combination of adversarial proceedings where an arbitrator also acts as a mediator (or *vice versa*) is not novel for Japanese parties.¹⁰

In Europe, judges and arbitrators in Germany, Switzerland and Austria have historically encouraged settlement.¹¹ Conciliation in Germany and Switzerland is more akin to early neutral evaluation, evaluative mediation or mediation with a mediator's proposal.¹² Hearings are generally held in joint session, as caucusing is rare. For this reason, this form of conciliation seems to be based more on rights than interests. A similar process exists in Italy,¹³ and although mediation is little used in Sweden, the Mediation Rules of the Stockholm Chamber of Commerce Mediation Institute allow for this possibility.¹⁴ France does not favor same neutral hybrid processes, but French courts will not vacate an award for bias when a single neutral has acted as arbitrator and mediator with the parties' consent.¹⁵

In several Latin American countries, hybrid processes are also used. For example, under the Brazilian Arbitration Act, arbitrators have a duty to attempt to conciliate at the beginning of the arbitration.¹⁶

¹⁰ See Houchih Kuo, Country Developments; Asia: East & Pacific; IBA Arb. & ADR News. LEXIS 76 March, 2011.

¹¹ Section 32 of the DIS-Arbitration Rules requires that the arbitral tribunal encourage settlement at every stage of the proceedings; See also, Prof. Dr. Renate Dendorfer LL.M. One Continent: Many Methods, Mediation in Germany Structure, Status Quo and Special Issues available at MBA <http://www.ciarb-europeanbranch.com/Conference/Archive/Archive%20Paris%20202011/Mediation%20in%20Germany%20by%20Renate%20Dendorfer.pdf>.

¹² The Mediation Rules of the Swiss Chamber of Commerce also allow for caucusing (Art. 7) and for a mediator to act as arbitrator with the "express consent of the parties" Art. 8.3, available at <http://www.skwm.ch/index-fr.php?page=168&frameset=2>.

¹³ The Chamber of Arbitration of Milan allows provides for a mediator to act as an arbitrator, see http://www.camera-arbitrale.it/Documenti/codice_etico_mediatori.pdf.

¹⁴ Available at: http://www.sccinstitute.com/filearchive/1/12753/web_A4_Medling_eng.pdf.

¹⁵ See Laurent JAEGER et Céline LACHMANN, Interactions entre médiation et arbitrage, available at: http://www.jadaf.fr/fichiers_site/a1585jad/contenu_pages/graphisme_global/jada2011_1.pdf#page=13; Renzo Maria Morresi, The Use of Med-Arb-like Mechanisms in Italy and Other European Countries, NYSBA New York Dispute Resolution Lawyer 2, No. 1 (Spring 2009), 106.

¹⁶ See Pedro Alberto Costa Braga de Oliveira, Designing Effective Med-Arb and Arb-Med Processes in Brazil, NYSBA New York Dispute Resolution Lawyer 2, No. 1 (Spring 2009), 89.

Some states in the US have laws that allow for single neutrals to mediate then arbitrate, such as California and Colorado. Similarly, New York courts will uphold awards emanating from these techniques provided a proper waiver has been given. In Canada, the Model Law is the basis for the international arbitration statutes. In addition, Québec and Ontario have statutes that specifically permit the use of mediation during the arbitration proceeding¹⁷ and a number of advocates and neutrals in Ontario promote hybrid processes in their practice.

In Hong Kong and Singapore, an arbitrator may act as a mediator. However, although these jurisdictions have laws favorable to this notion, in addition to requiring the parties, written consent, a further layer of protection has been added to both the Hong Kong Arbitration Ordinance (Cap. 609) revised 2010 and the Singapore International Arbitration Act amended 2012, which is that a mediator must disclose to the parties all confidential information learned during the mediation process—and in particular, during caucusing—that is “material” to the dispute, before commencing the subsequent arbitration. South Africa has adopted this same requirement to disclose information that is material to the arbitral proceedings.

The Indian Arbitration and Conciliation Act of 1996 allows an arbitral tribunal to employ settlement, mediation or conciliation, reflecting India’s long tradition of utilizing forms of dispute resolution akin to Med-Arb at the local level. The Bangladesh Arbitration Act of 2001 has similar provisions.¹⁸

Hybrid or conciliation-based dispute resolution also exists throughout the Arab and Muslim world due to the communitarian traditions in these societies.¹⁹

The country descriptions above are by no means exhaustive, but are representative of a trend to offer parties the opportunity to use these dispute resolution methods, even if not always favoring them, in the name of party autonomy.²⁰

The majority of leading institutions, in their arbitration or conciliation rules, allow an arbitrator to facilitate settlement or for an arbitrator to act as a mediator and *vice versa*, if the parties so choose. Party consent is mandatory and should always be in writing.

¹⁷ Barry Leon and Alexandra Peterson, Med-Arb: Ontario’s Appeal Court Brings More Effective Dispute Resolution One Step Closer, *2007 IBA Arb. & ADR News*. *LEXIS* 42.

¹⁸ See Sriram Panchu, Arb-Med and Med-Arb Are Well-Suited to Meeting India’s ADR Needs, *NYSBA New York Dispute Resolution Lawyer* 2, No. 1 (Spring 2009), 103; Dr A.F.M. Maniruzzaman, “International Commercial Arbitration in the Asia-Pacific: Asian Values, Culture and Context,” 30(11) *Int’l Bus. Law*. 508 (2002).

¹⁹ Nabil N. Antaki, Muslims’ and Arabs’ Practice of ADR, *NYSBA New York Dispute Resolution Lawyer* 2, No. 1 (Spring 2009), 113.

²⁰ The CEDR Commission Report provides a detailed chart of hybrid processes with a single neutral in various countries around the world. See CEDR Commission on Settlement in International Arbitration, Final Report of the Commission Appendix 4, 9 Nov. 2009, available at http://www.cedr.com/about_us/arbitration_commission/Arbitration_Commission_Doc_Final.pdf.

Article 12 of the Model Law on International Commercial Conciliation, on which a number of other institutional and national rules and laws are based, frames hybrids as more of an opt-in process, stating in the negative that a conciliator shall not act as an arbitrator, “unless otherwise agreed by the parties.”²¹ Similarly, the Mediation Procedure of the CPR Institute provides that, unless the parties and the mediator agree otherwise, a mediator shall not also serve as an arbitrator. The JAMS International Mediation Rules have similar provisions. ICC ADR Rule 7(3) permits a neutral to act as an arbitrator with the written agreement of the parties, and the new ICC Arbitration Rules encourage the arbitral tribunal to facilitate settlement, with the *proviso* that every effort be made to ensure the enforceability of the award. Similarly, the CEDR requires that the tribunal, when facilitating settlement, not act in a way that could affect the validity of the award. CIArb Practice Guideline 7 provides for the parties to waive challenges on the basis of settlement efforts. Although ICDR International Arbitration Rules are silent on Med-Arb, it is mentioned as a technique that may be used, albeit in unusual circumstances.²²

THE RISKS AND ADVANTAGES OF SINGLE-NEUTRAL HYBRID PROCESSES

When used together in the right circumstances, mediation and arbitration performed by a single neutral can offer the advantages of each of these methods of dispute resolution and enable the parties to control the process to resolve their disputes more expeditiously, efficiently and at a lesser cost. This is enhanced by the fact that the parties themselves actively participate in ADR. This is rarely the case in adversarial proceedings, which are the province of counsel. However, the

²¹ The United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (adopted 1985 with amendments as adopted in 2006), available at <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html>; UNCITRAL Model Law on International Commercial Conciliations with Guide to Enactment (2002), http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf.

²² ICC, CIArb, AAA, and CEDR, Rules cited available at <http://iccwbo.org/products-and-services/arbitration-and-adr/adr/adr-rules-and-guide-to-adr-rules/>; ICC Arbitration Rules, Appendix iv(h)(ii), <http://iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/>; <http://www.ciarb.org/information-and-resources/Practice%20Guideline%207%20international.pdf>; Drafting Dispute Resolution Clauses, published by the American Arbitration Association, available at: http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_012249; <http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/613/Mediation-Procedure.aspx>; http://www.cedr.com/about_us/arbitration_commission/Arbitration_Commission_Doc_Final.pdf; <http://www.jamsadr.com/international-mediation-rules/#Role-of-Mediator-in-Other-Proceedings>.

benefits are not without risk, and the risks in each situation must be weighed against the potential benefits to determine if this is the most appropriate option. Consent and waiver are the two most critical factors to consider, in addition to party autonomy, in examining how to limit such risks.

Clearly, from an ethical or enforceability standpoint, having separate neutrals is the safest, albeit not always the most efficient, option in every circumstance. With traditional step or acceleration clauses, unless the dispute is settled in the mediation phase, there is little savings in time and cost, since these clauses generally provide for mediation first, and only at the conclusion of the mediation, if unsuccessful, would the arbitration proceeding begin.²³

The same holds true for shadow or co-mediation and arbitration, although these hybrid processes are somewhat more efficient. In the one case, a mediator attends the arbitration, and, either at the end of the arbitration proceedings or at different intervals during them, conducts a mediation. In the other, the arbitrator would attend the plenary sessions of the mediation (but not participate in caucusing) and then render an award if the mediation is unsuccessful with or without additional hearings and documents, depending on the particular circumstances.

The vast array of techniques used domestically and internationally is a reflection of parties' desire to forge the most appropriate mechanism for resolving their disputes, and in some cases, maintaining their business relationship. The list of ADR techniques is extensive, and includes variants such as mediation (facilitative, evaluative, transformative, rights-based, interest-based, binding, shadow), early neutral evaluation, mini-trials, summary trials, expert determination, executive appraisal, private judging, adjudication, dispute adjudication or review boards, early case evaluation, case management, arbitration (bracketed, last offer, final offer, bifurcated FOA, baseball, night baseball, non-binding), Med-Arb, Arb-Med, Arb-Med-Arb, Eval-Med-Arb, Co-Med-Arb, braided Med-Arb and MEDALOA.

The focus here is limited to the most common forms, namely, Arb-Med, Med-Arb, and, as related to the latter, Arb-Med-Arb and MEDALOA.²⁴

²³ Some institutions, such as the ICC or DIS have established case management strategies to make the process more flexible and efficient.

²⁴ For a more exhaustive description of different ADR processes, see Michael McIlwrath and John Savage, *International Arbitration and Mediation, A Practical Guide*, available at <http://www2.americanbar.org/calendar/the-3rd-annual-conference-on-the-resolution-of-cis-related-disputes/Meeting%20Materials/State%20and%20State%20Entities%20as%20Parties%20to%20Arbitration/International%20Arbitration%20and%20Mediation.pdf>.

ARB-MED

Between Med-Arb and Arb-Med, Arb-Med could be considered the lesser of the alleged evils, as it raises fewer ethical concerns. It also may be the preferred option in countries where enforceability might be an issue.

Under this approach, the arbitration is conducted, and then the tribunal drafts the award but does not disclose it to the parties. The arbitrator then goes on to mediate the dispute and help the parties come to their own resolution, rather than accepting the award, which will be favorable to only one of them. Often, the award is placed in a sealed envelope, (sometimes on the table in front of the parties) as an incentive for them to reach an amicable settlement. This process is particularly useful when the parties have an ongoing relationship they would like to pursue and when they want some degree of control and particularly finality, without the additional risks of Med-Arb.

The main caveat in Arb-Med is that after the tribunal has made its determination and drafted the award, the arbitrator turned mediator, should be extremely careful not to use evaluative techniques or a mediator proposal, as in such a case the parties may feel coerced into accepting a resolution to which they do not fully subscribe. A facilitative, interests-based approach is the preferred technique, as the purpose of this hybrid is to allow the parties to forge their own settlement, rather than accept the decision of the arbitrator.

The downside to this combination is that, while the parties exercise their freedom of choice, the costs of the arbitration have already been incurred, so it is less efficient from that point of view.²⁵

MED-ARB

Parties choose this combination when they want an opportunity to first settle some or all of the issues through mediation, but also desire finality in the form of a binding decision, without having to start from scratch with a new neutral (in this case an arbitrator) who would then need to be educated about the dispute. In this way, if the mediation is not successful or there are certain unresolved issues, the mediator can switch hats and go on to arbitrate the remaining dispute.

²⁵ For an extremely interesting account of a case where parties wanted mediation with the finality of a resolution and chose Arb-Med for confidentiality concerns, authored by the participant themselves, see M. Leathes, B. Bulder, W. Kervers, & M. Schonewille, 'Einstein's Lesson in Mediation', *2006 IBA Arb. & ADR News*. LEXIS 64.

Med-Arb allows for a more expeditious resolution of a dispute with greater time and cost efficiency. The mediation component in this alternative should focus on business interests not rights, which should be left for the arbitration. More so than with Arb-Med, the neutral must take extreme care to refrain from being evaluative, lest that be interpreted as the tenor of the determination he or she will make in a subsequent arbitration proceeding if settlement fails.

Even for its proponents, there are concerns with Med-Arb, some ethical, but others related more to the enforceability of an award rendered following this process. The single most problematic issue relates to caucusing. Caucusing, the private discussions with each of the parties, is considered a key tool for mediation. It is more often in caucusing that the mediator gleans the information on the parties' real needs and interests that enables him or her to bring about a settlement. When the parties know that the mediator may decide the case as the arbitrator if the mediation fails, they might be less forthcoming during caucusing and more reluctant to reveal their true settlement positions, which could have a negative impact on the mediation process. This risk is mitigated fortunately—or unfortunately—by the fact that mediation, with a hybrid or stand-alone process, is increasingly legalistic and lawyer-controlled, making it difficult for the parties to speak candidly while under the watchful supervision of their counsel, who often censor their clients if they feel they might disclose something too damaging.

Another risk is that counsel will try to persuade or 'spin' the mediator to influence his or her decision in the event the mediation is unsuccessful and an arbitration award is subsequently rendered. Yet lawyers do this regardless, in an attempt to advance their client's case so that the mediator will push for a settlement more favorable to that party. Consequently, mediators and arbitrators in all types of processes need to see through the posturing to understand the real facts of the case. Then there is the danger that a mediator who knows that he or she is going to become an arbitrator can try to force a settlement. The parties may feel coerced into settling, for fear of being penalized in the arbitration award. Another compelling question is whether arbitrators who have acted as mediators in the same dispute will be able to ignore the confidential information they have heard and render a decision solely on the facts and law presented by the parties during the arbitration itself. Those who suggest that a neutral can't remain neutral when changing hats from mediator to arbitrator, rely on the notion that one cannot unring the bell. However, judges and juries do this regularly, without their decisions or verdicts being considered tainted with bias. Finally, if an arbitrator appears to be biased because of information conveyed confidentially in the mediation process, the losing party may challenge the award alleging actual or apparent bias, the result of which would be to completely vitiate the process of its time and cost saving advantages.

This indeed is the overarching threat inherent in the process: the use, disclosure or non-disclosure of confidential information obtained during caucusing.

Common law principles of procedural fairness²⁶ require that parties have an adequate opportunity to respond to the case against them. If, during caucusing, one party discloses facts that the other party is unaware of and has no opportunity to respond to, and that other party believes that such facts were instrumental or even considered in the arbitrator's decision, then that party could claim that it was denied the right to properly respond to the case against it, that it was denied due process, and might seek to overturn the award on that basis. To address this problem, in certain jurisdictions, such as Hong Kong, Singapore and South Africa, an arbitrator is required to disclose all confidential information he or she deems material to the arbitration proceedings to the other party, prior to commencing the arbitration stage of the hybrid process. The purpose of this is to protect the arbitrator against claims for actual or apparent bias, but it also places the onus of determining what is material or not on the neutral, for whom it might be more convenient to simply disclose everything. It remains to be seen if this will put a damper on caucusing in these jurisdictions and diminish the effectiveness of the mediation arm of the process or not.

Another related process is Arb-Med-Arb. While at first glance it seems as if it would be a more drawn-out process due to the three phases, it can be streamlined to combine the advantages of Med-Arb and Arb-Med and limit some of the pitfalls. In the initial stage, the pre-mediation statements and briefs can be combined and the proceedings conducted in a condensed, fast-track manner, before initiating the mediation. Moreover, it has more built-in flexibility as the arbitrator, who is deemed to be in the best position to determine the most appropriate time for mediation, can create mediation 'windows' to dispose of issues as they are raised, thus helping to further streamline the process. Unlike Arb-Med, the award is not written in advance, but if the mediation is not completely successful, the neutral resumes the arbitral proceedings using either the initial or new terms of reference, to allow, for example, witnesses, experts or cross-examination, so as to not affect the parties' right to be heard. Naturally, the same precautions must be taken by the neutral in shifting from mediator to arbitrator as in Med-Arb. This process—or a simplified version—should be favored in jurisdictions where the timing of the appointment of the tribunal can impact the enforceability of consent awards.

MEDALOA is also a variation on Med-Arb, which like the latter starts with mediation and is followed by arbitration, but in this case the arbitration part is what is commonly known as baseball, or last offer arbitration (LOA). In LOA, each party submits a final offer to the arbitrator, who chooses one of them. That offer then becomes a binding arbitration award. The advantage of MEDALOA is that the

²⁶ Procedural fairness, natural justice and due process are essentially the same principle, although different countries use one or the other term to describe it.

parties are less prone to inflate their offer lest it not be chosen and the risk of bias is reduced, since the arbitrator does not decide alone but chooses a resolution in essence proposed by the parties.

Despite these presumed inherent dangers, many parties still prefer to control the process and avail themselves of Med-Arb, which, even if the effectiveness of the mediation component may be slightly diminished if there is no caucusing or when there is mandatory disclosure of private discussions, it may still be a better choice than a more costly step proceeding.

HOW MED-ARB OR ARB-MED-ARB CAN ENHANCE MSA ENFORCEABILITY

Another advantage of mediation combined with arbitration is the ability to have a settlement enshrined as an agreed or consent award. Although with the expansion of mediation globally, rules are being adopted for the enforcement and recognition of mediated settlement agreements (MSAs), which are often the outcome of mediation (or Med-Arb if some, but not all, of the issues are resolved through mediation) coupled with an arbitration award for those disputes finally determined by arbitration. In some jurisdictions MSAs are assimilated to contracts, requiring subsequent litigation for enforcement.²⁷

As a general rule, consent or agreed awards handed down by an arbitral tribunal are enforceable under the New York Convention and the rules of major arbitral institutions such as the ICC, ICSID and CIETAC. Additionally, Article 31 of the UNCITRAL Model Law on International Commercial Arbitration expressly provides for their recognition.

This can be of relevance when choosing the appropriate hybrid procedure. Parties often choose Med-Arb to obtain the finality that mediation alone may not provide. Depending on the jurisdiction, counsel should take care to ensure that the outcome of the Med-Arb process is memorialized as a consent or arbitral award, and not an MSA, whether some or all of the issues in dispute are resolved prior to arbitration. It can be crucial to have the tribunal render an arbitral award irrespective of the prior proceedings.

This is particularly important to bear in mind when selecting a forum and governing law either at the contractual phase or when drafting a med-arb agreement after a dispute has arisen. For example, jurisdictions such as New York and Brazil require that the arbitral tribunal be constituted prior to the settlement

²⁷ In E.U. Member States, settlement agreements are enforceable pursuant to the 2008 European Directive on Mediation, Directive 2008/52/EC available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:EN:PDF>.

of the dispute. Therefore, choice and timing can be everything. Arb-Med-Arb, although more cumbersome a process, is a possible solution. Another suggestion is for the MSA to be governed by the law of a jurisdiction that permits an arbitrator to be appointed after a settlement and mediation.²⁸

The subsequent sections on consent and waiver set out precautions that can and should be taken to address these risks and safeguard the process.

DESIGNING A PROCESS THAT PROVIDES ADEQUATE SAFEGUARDS

Perhaps the safest process would be one with different neutrals for each step, but location, time constraints and culture often favor a single-neutral process. This could begin with mediation and only if all issues are not settled, proceed to arbitration (which could potentially result in a considerable savings of cost and time). Another possibility is to avoid caucusing altogether and conduct the mediation portion of the process exclusively in joint session.²⁹ The issue is one of choice. Sophisticated parties want to control and manage the process. Their goal is efficiency and preserving a business relationship. However, parties also want finality. In order to achieve finality, the process must be designed in a way that prevents, or at least limits, challenges to awards. Parties and counsel should decide on the best process on a case-by-case basis, depending on the specific issues and interests of each matter.

CONSENT, WAIVER AND RENEWED CONSENT

Informed consent at every step of the way is vital to avoiding ethical pitfalls and potential challenges. As vital, is ensuring that not only counsel, but especially the parties, provide clear and informed written consent and that they are aware of the changing role and risks inherent in this type of process, with particular emphasis on waiver and questions of confidentiality. The parties must be cognizant of the fact that they may be waiving their right to procedural due process, which is why single-neutral hybrid options are better adapted to sophisticated parties.

The formalities required to provide adequate safeguards are inversely proportionate to the flexibility of the process itself. Whether it is in the form of a

²⁸ For an article that provides a comprehensive analysis and discussion of MSAs and their enforceability, see Edna Sussman, *The New York Convention Through a Mediation Prism*, in *Dispute Resolution Magazine*, vol. 15, No. 4, Summer 2009.

²⁹ In some European countries, mediation or conciliation is conducted exclusively in plenary sessions.

stipulation, a clause or a Med-Arb or Arb-Med agreement, the consent must be in writing and comply with a number of specific factors to ensure award enforceability. A pre-mediation or arbitration conference with the parties present to discuss the ADR options and set guidelines for the procedure is an effective way of ensuring that all parties understand their choices prior to setting their consent forth in writing.

Consent should be clear with respect to caucusing and indicate whether the parties agree to the single neutral meeting with each party privately. If caucusing is permitted, then it must also be specified whether the neutral should disregard any confidential information obtained individually from the parties or disclose such information and provide the other party with an opportunity to comment in the arbitration.³⁰ In the latter case, the parties should sign a confidentiality waiver for the disclosure of the information shared in private meetings.

Furthermore, there must be a clear delineation between the processes. Even when the parties have provided written consent from the outset, such consent should be reiterated in writing each time the process shifts from mediation to arbitration or *vice versa*. It is indispensable to obtain renewed consent from the parties after the mediation is over and prior to beginning the arbitration phase, as with hindsight, they may change their position regarding disclosure and this must be probed by the neutral before changing hats.³¹

To protect the enforceability of the award, it is imperative that the parties waive their right to challenge it for bias or lack of neutrality.

Parties should be careful not to try and abuse this process. They must timely object to any alleged lack of impartiality or risk waiving their right to challenge the award on that basis at a later stage. For example, the IBA Rules on Conflicts of Interest allow a party 30 days to raise an objection, failing which the party will be deemed to have waived the right to object.³² This is a warning to parties who wait for the award and only then attempt to have it vacated on the grounds of bias if they end up being the losing party.³³

³⁰ Disregarding confidential information may not be an option in all jurisdictions, as some require disclosure of material information, such as Hong Kong, Singapore and South Africa.

³¹ This is of greater significance in processes where separate issues may be resolved through mediation at different intervals in the arbitration process.

³² IBA Guidelines on Conflicts of Interest in International Arbitration (adopted 2004) <http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx> accessed 26 July 2010.

³³ For cases in support of this principle, see *Gao Haiyan and Xie Heping v. Keeneye Holdings Limited and New Purple Golden Resources Development Limited*, Judgment of the Hong Kong Court of Appeal dated December 2, 2011 (CACV 79/2011); See also for US court decisions, Edna Sussman, *Developing an Effective Med-Arb/Arb-Med Process*, N.Y.

OPTING OUT—A NECESSARY POSSIBILITY FOR PARTIES AND THE NEUTRAL

Allowing parties or an arbitrator to opt out will no doubt result in a loss of efficiency, but it is necessary to uphold the integrity of the process and more importantly the award in the event that either the neutral or the parties are convinced that the neutral can no longer act impartially. This would generally be due to the fact that the arbitrator has been privy to confidential or private information during caucusing that might adversely affect his or her decision.³⁴

If this occurs, the process can revert to a classic step process, with a new, independent arbitrator who will render the award.

A FEW OTHER CAVEATS AND PROPOSALS

Jurisdictional concerns can take on a new significance when using single-neutral hybrid processes. Parties and counsel should be mindful of local and institutional rules to ensure enforceability under the New York Convention when drafting ADR and arbitration clauses, selecting a process after a dispute has arisen, enshrining the choice in a procedural agreement and executing consents or waivers.

In drafting step clauses, arbitration should not be contingent on mediation. Clauses should include language to the effect that all disputes, including those relating to conditions precedent or failure to comply with any part of the arbitration agreement are arbitrable. If an MSA is envisaged, that too should be governed by arbitration.³⁵

Another means of ensuring enforceability is for the arbitrator to draft an award that is reasoned, clear and states the parties' consent to the combined process and, perhaps even the content of the waivers.

Dispute Resolution Lawyer, Vol. 2, No. 1 (Spring 2009), 71; Jon Lang 'Med-Arb, An English Perspective', *NYSBA New York Dispute Resolution Lawyer* 2, No. 1 (Spring 2009), 98.

³⁴ The IBA Guidelines on Conflicts of Interest require an arbitrator who feels that his or her independence or impartiality is compromised as a result of the role as mediator to resign. CEDR also encourages resignation in such a case.

³⁵ Bearing in mind that there is no standard clause or stipulation for this type of process, for some examples, see Gerald Philips, *Same-Neutral Med-Arb: What Does the Future Hold?*, 60 *Dispute Resolution Journal* No. 2, 24 (ABA May 2005) (available at <http://www.allbusiness.com/legal/mediation/1014899-1.html>); Claude R. Thomson, *Med-Arb—A Fresh Look*, Newsletter of the Mediation Committee of the Legal Practice Division of the International Bar Association, July 2007, Vol. 3, No. 1, 2007, p. 5.

CHOICE OF NEUTRAL

It is often said that the process is only as good as the neutral. In Med-Arb, the most important factor in this choice is ensuring the neutral has the complete trust of both parties. It is also essential for the neutral to have experience in both mediation and arbitration and a clear understanding of the differences between the two. In many countries, legal practitioners (and non-lawyers) are trained, and act, as neutrals in both mediation and arbitration in the course of their practice.³⁶

CONCLUSION

Party autonomy is the cornerstone of international arbitration and ADR. If parties knowingly and voluntarily consent to having the same neutral mediate and arbitrate, then they must believe that the benefits outweigh the risks.

To quote Alan Limbury, “The challenge for the legal profession . . . is not simply a matter of adopting less adversarial practices in attitudes but also being skilled in being able to move elegantly between adversarial and consensual or collaborative approaches.”³⁷

Advocates and neutrals in the international arbitration and mediation community have a duty to be the gatekeepers of these processes and to assist parties in crafting their dispute resolution systems to meet their objectives in as efficient and safe a manner as possible.

³⁶ One example of such trust is when parties, in the U.S. for example, consistently ask a mediator to provide a mediator’s proposal.

³⁷ Alan L. Limbury, *Med-Arb:—getting the best of both worlds*, available at <http://www.strategic-resolution.com/documents/Med-Arb%20%20getting%20the%20best%20of%20both%20worlds%202010.pdf>.