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Med-Arb: If the Parties Agree

by Carol A. Ludington, CPA, CFF, CLP, ACIArb[*]

"The single biggest problem in communication is the illusion that it has taken place."[1]

Abstract

This paper discusses the importance of a clear, detailed med-arb agreement (a process in which the same neutral acts as both mediator and arbitrator in a dispute), issues to be considered, and approaches to minimizing the impact of these challenges. It is concluded that a clearly articulated and detailed med-arb agreement is important to ensure that there is a mutual understanding, to inform the process and to minimize any adverse impact of potential issues.

I. Introduction

"If the parties agree…"

Although the rules of many dispute resolution organizations place certain restrictions on the use of med-arb, they generally provide for this hybrid process "if the parties agree." But what does an agreement to utilize med-arb really mean?

Existing rules, practices and cultures often do not clearly address issues that can arise in med-arb, and in the absence of a clear agreement between the parties regarding how these issues will be handled, the potential benefits of med-arb may not be realized and effectiveness of the process may be undermined. Thus, to maximize the benefits of med-arb, it is important to understand its potential challenges, to carefully design the process, and to clearly document and communicate the parties' agreement.

II. Definitions

Med-arb and arb-med-arb are hybrid dispute resolution processes in which the same person acts as both an arbitrator and mediator in the same dispute.

Med-Arb: This process starts with mediation. If the mediation does not result in settlement of the dispute, arbitration is conducted, with the mediator then acting as an arbitrator. In one form of med-arb, the parties agree in advance that a neutral will act first as mediator and subsequently, if needed, as arbitrator. If agreement is reached in mediation, the parties sign a binding settlement agreement or the neutral may, by consent, as arbitrator, convert their intended settlement into an arbitral award.[2]

Arb-med-arb: This process is similar to the med-arb process described above, except that the arbitration is started, then a mediation is conducted part-way through the arbitration (with

[1] George Bernard Shaw

[2] Alan L. Limbury, Hybrid Dispute Resolution Processes – Getting the Best while Avoiding the Worst of Both Worlds?, delivered at the second Chartered institute of Arbitrators Mediation Symposium (expanded version), October 29th, 2009, London, 5.

either a break in the arbitration or concurrently). If no mediated settlement is reached, the arbitration is then completed.

For ease of reference, in this paper "med-arb" will refer collectively to both med-arb and arb-med-arb.[3]

III. Advantages of med-arb

Hybrid dispute resolution techniques, such as med-arb, may increase the likelihood of a conciliated agreement, increase efficiency, and enhance enforceability. Combining mediation and arbitration with the same neutral provides timing flexibility to capitalize on settlement opportunities as they arise. Even if a conciliated agreement is not reached, med-arb can increase efficiency by eliminating duplication of efforts related to informing two separate neutrals (a mediator and an arbitrator). Also, in international disputes, an arbitration award may be entered by an arbitrator based on a settlement agreement, enhancing enforceability under the New York Convention.[4]

IV. Can the same neutral act as both arbitrator and mediator?

Whether the same neutral can act in the dual role of both arbitrator and mediator in the same dispute depends on the rules or laws of the applicable institution and/or jurisdiction, and on the parties' agreement.[5] Although the rules differ from one institution to another, it is not uncommon for this dual role to be allowed, as long as the parties agree (preferably in writing).

For example, ICC Mediation Rules provide that the same person shall not act as both arbitrator and mediator, "unless all of the parties agree otherwise in writing" as follows:[6]

> "*Unless all of the parties agree otherwise in writing*, a Mediator shall not act nor shall have acted in any judicial, arbitral or similar proceedings relating to the dispute which is or was the subject of the Proceedings under the Rules, whether as a judge, an arbitrator, an expert or a representative or advisor of a party." (emphasis added)

SCC rules contain a similar provision, as follows:[7]

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[3] Other hybrids include arb-med (in which an arbitration is conducted, the award is written but not submitted), then a mediation is conducted. If the mediation does not result in settlement, the arbitration award is then submitted. Although this approach avoids some of the issues related to med-arb, it raises a different potential issue. If, in the course of the mediation, the neutral learns something that causes him or her to conclude that the previously-prepared-but-not-yet-submitted-arbitration award should be changed, what should the arbitrator do? For example, should the arbitrator submit the award as previously written, revise the award, resign as arbitrator without rendering an award, or do something else? These questions are beyond the scope of this paper, but do highlight the type of considerations inherent in this hybrid approach.

[4] Enforceability of conciliated agreements in international disputes is currently being addressed by UNCITRAL Working Group II.

[5] Despite the increasing popularity of med-arb, many arbitration rules are silent regarding the acceptability of this dual neutral role.

[6] Mediation Rules of the International Chamber of Commerce In force as from 1 January 2014, Article 10(3).

[7] Mediation Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) adopted by the Stockholm Chamber of Commerce and in force as of 1 January, 2014, Article 7(2).

> "*Unless the parties have agreed otherwise*, a Mediator may not act as arbitrator in any future arbitrations relating to the subject matter of the dispute." (emphasis added)

A number of other organizations' rules similarly provide for a neutral's involvement in both arbitration and conciliation if the parties agree. For a comparison of these provisions, see the CEDR Commission on Settlement in International Arbitration Final Report, November 2009, Appendix 4.

Although these rules address the availability of med-arb, they are often silent regarding the impact of this dual role on such topics as impartiality and confidentiality, or how to address these issues.

V. Should the same neutral act as both arbitrator and mediator?

Assuming that the same neutral *can* act in the dual role of mediator and arbitrator, the question remains as to whether he or she *should*. As is often true, the answer to this question is "it depends." It depends on a number of factors, such as the qualifications of the neutral, the ability of the parties and the neutral to agree to the terms of the med-arb, the balance between the benefits and challenges of this hybrid process, and the parties' agreement.

A. Qualifications of the neutral

Being an effective mediator requires a different skill set and different training than being an arbitrator. A mediator's role has been described as using many of the skills of a psychologist, while the arbitrator's role has been described as requiring use of many of the skills of a judge.[8] Many, but not all, neutrals possess both skill sets, so it is important to determine whether a proposed neutral has the necessary skills and training to act as both an arbitrator and a mediator.

B. Ability of the parties and the neutral to agree to the terms of the med-arb

As discussed below, an effective med-arb agreement should address a number of topics (preferably in advance of beginning a med-arb process). Spending the time and energies that may be necessary to negotiate these terms may be well worth the effort. Although it may seem easier to simply avoid these discussions until, and if, an issue arises during med-arb (in hopes that the issue will not surface), these issues may be more difficult to resolve, and the ramifications may be greater, than if they are dealt with up front. For example, if part-way through the med-arb process an issue arises that results in the neutral's inability to continue in the dual role of mediator and arbitrator, appointing another neutral at that time may result in delay, inefficiencies and additional expense. Instead, addressing these issues at the outset, and memorializing these details in the parties' med-arb agreement, may avoid a later problem and allow the neutral to complete the med-arb. In those instances where agreements on these issues cannot be reached, it may be preferable to appoint a separate mediator and arbitrator at the outset and avoid the difficulties associated with later problems.

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[8] Edna Sussman, Developing an Effective Med-Arb/Arb-Med Process, NYSBA New York Dispute Resolution Lawyer, Vol. 2 (Spring 2009), No. 1, 73.

C. Balance between the benefits and potential issues created

While med-arb can provide benefits, as discussed above, it can also raise issues, such as potential impact on the neutral's impartiality, confidentiality, and reliance on information obtained in the mediation.

1. Independence and impartiality

Impartiality of the neutral is fundamental to both arbitration and mediation, and arbitration and mediation rules clearly describe this obligation. For example, the IBA Guidelines on Conflicts of Interest in International Arbitration includes the following among its General Principles:[9]

> "Every arbitrator shall be *impartial* and *independent* of the parties at the time of accepting an appointment to serve and shall remain so until the final award has been rendered or the proceedings have otherwise finally terminated." [emphasis added]

Similarly, ICC Mediation Rules include the following requirement:[10]

> "Before appointment or confirmation, a prospective Mediator shall sign a statement of acceptance, availability, *impartiality* and *independence*. The prospective Mediator shall disclose in writing to the Centre any facts or circumstances which might be of such a nature as to call into question the Mediator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the Mediator's impartiality. The Centre shall provide such information to the parties in writing and shall fix a time limit for any comments from them." [emphasis added]

Can these obligations for independence and impartiality, which continue throughout the mediation and arbitration, be met in med-arb? One criticism of med-arb is that allowing an arbitrator to confidentially receive representations from each party during the mediation may bias the arbitrator in fact, and/or create the appearance of bias.[11] If the neutral develops doubts as to his or her ability to remain impartial or independent due to information received during the mediation, or for other reasons, the neutral should resign, unless the applicable rules *or the parties' agreement* allows the neutral to continue under these circumstances.[12] If the neutral must resign, the efficiencies anticipated by the med-arb process will likely not be realized.

What is the intent of the parties regarding the med-arb neutral's ongoing impartiality? Do the parties intend to waive this impartiality requirement and agree to allow the neutral to continue under these circumstances? Do the parties desire that the mediation be conducted in a way

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[9] IBA Guidelines on Conflicts of Interest in International Arbitration, Adopted by resolution of the IBA Council on Thursday 23 October 2014, Part 1(1).

[10] Mediation Rules of the International Chamber of Commerce in force as from 1 January 2014, Article 5 (3). Similarly, SCC Mediation Rules state, "A Mediator must be impartial and independent.", Article 7(1).

[11] Alan L. Limbury, Hybrid Dispute Resolution Processes – Getting the Best while Avoiding the Worst of Both Worlds?, delivered at the second Chartered institute of Arbitrators Mediation Symposium (expanded version), October 29th, 2009, London, 9.

[12] For example, the CEDR Commission on Settlement in International Arbitration Final Report in November 2009 Section 4.3 states, "If, as a consequence of his or her involvement in the facilitation of settlement, any arbitrator develops doubts as to his or her ability to remain impartial or independent in the future course of the arbitration proceedings, that arbitrator should resign."

that minimizes potential impartiality concerns (e.g., conducting the mediation without caucus sessions or other confidential communications between the mediator and a party)?

2. Confidentiality

How will confidential information shared with the neutral during mediation be handled if the dispute does not settle and arbitration ensues?

It is common for a mediator to have private (ex parte) communications with the parties, including caucus sessions in which the mediator meets with each party separately. Information exchanged with the mediator during these caucus sessions is typically confidential and not intended to be shared with the other party without the agreement of the disclosing party.

For example, SCC Mediation Rules state as follows: [13]

> "The Mediator may not disclose information to a party that the Mediator has obtained in separate discussions with another party, unless the disclosing party has authorized such disclosure."

Other institutions' rules contain similar provisions.[14]

While these confidentiality obligations are well-established in mediation, in med-arb it may be unclear how to treat this confidential information if there is no settlement and the dispute proceeds to arbitration. In the absence of disclosure to the other party, the arbitrator will be in possession of information that the opposing party has been unable to rebut. In this scenario, one or both parties may be inclined to use the mediation process as a way to influence the arbitrator, the parties may be less inclined to be candid with the mediator, questions may arise regarding the neutral's impartiality, and the integrity of the med-arb process may be undermined.

To address these concerns, some rules require that prior to commencing the arbitration, information shared with the neutral, but not the other party, during the mediation, must be disclosed.

For example, the Singapore Arbitration Act requires as follows:[15]

> "Section 17 (2)
> An arbitrator or umpire acting as conciliator-

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[13] The Mediation Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, 2014, Article 3(2).

[14] For example, LCIA Mediation Rules, Article 5, states as follows:
"5.2 The mediator may communicate with the parties orally or in writing, together, or individually, and may convene a meeting or meetings at a venue to be determined by the mediator after consultation with the parties."
5.3 Nothing which is communicated to the mediator in private during the course of the mediation shall be repeated to the other party or parties, without the express consent of the party making the communication."

[15] Singapore International Arbitration Act (as amended in 2002), Section 17(2)(a) and (b) and 17 (3), and CEDR Commission on Settlement in International Arbitration Final Report, November 2009, Appendix 4. Similar language also appears in the Hong Kong Arbitration Ordinance, available at http://www.legislation.gov.hk/eng/home.htm, Sections 2B(2) and 2B(3).

(a) may communicate with the parties to the arbitral proceedings collectively or separately; and
(b) shall treat information obtained by him from a party to the arbitral proceedings as confidential, unless that party otherwise agrees or unless subsection (3) applies,

Section 17 (3):

Where confidential information is obtained by an arbitrator or umpire from a party to the arbitral proceedings during conciliation proceedings and those proceedings terminate without the parties reaching agreement in settlement of their dispute, the arbitrator or umpire shall before resuming the arbitral proceedings disclose to all other parties to the arbitral proceedings as much of that information as he considers material to the arbitral proceedings."

Alternatively, some rules discourage caucus sessions or other private communications between the mediator and a party. For example, in its 2009 report, the CEDR Commission on Settlement in International Arbitration advised against private meetings or exchanges of information between the arbitral tribunal and one of the parties, as follows:[16]

> "In assisting the parties with settlement, the tribunal should not act in such a way as would make its award susceptible to a successful challenge. Specifically, the tribunal should not meet with any of the Parties separately, or obtain information from any Party which is not shared with the other Parties, unless such practices are acceptable in the courts of all the jurisdictions which might have reason to consider the validity of the tribunal's award or unless the Parties explicitly consent to this approach and its consequences."

In its report, the CEDR Commission recognized that this principle would discourage use of a med-arb process because of the restriction on mediation caucus sessions.[17]

What is the parties' agreement regarding sharing confidential information with the neutral during mediation? If the dispute does not settle and arbitration ensues, will any confidential information be disclosed to the other party? If so, will the other party be given an opportunity to respond to or rebut that information? If there is no disclosure of this information, is the neutral able to continue as arbitrator?

3. Reliance on information obtained in mediation

Will information obtained by the neutral during the mediation be relied upon in a subsequent arbitration?

Information provided to a mediator during mediation is generally not to be considered as evidence in a subsequent arbitration. For example, LCIA Mediation Rules state as follows:[18]

> 10.4 "All documents or other information produced for or arising in relation to the mediation will be privileged and will not be admissible in evidence or otherwise

[16] CEDR Commission on Settlement in International Arbitration Final Report, November 2009, Section 2.4.3.
[17] The Commission did not specifically recommend med-arb, but it did identify safeguards that can be used in order to minimize the issues involved with such an approach, as set out in Appendix 2 of The CEDR Report.
[18] LCIA Mediation Rules effective 1 July 2012, Article 10.4, 10.5 and 10.6.

> discoverable in any litigation or arbitration, except for any documents or other information which would in any event be admissible or discoverable in any such litigation or arbitration."
> 10.5 "There shall be no formal record or transcript of the mediation."
> 10.6 "The parties shall not rely upon, or introduce as evidence in any arbitral or judicial proceedings, any admissions, proposals or views expressed by the parties or by the mediator during the course of the mediation."

Similarly, the CEDR Rules for the Facilitation of Settlement in International Arbitration state as follows:[19]

> "The Arbitral Tribunal shall not take into account for the purpose of making an award, any substantive matters discussed in settlement meetings or communications, unless such matter has already been introduced in the arbitration. Further, the Arbitral Tribunal shall not judge the credibility of any witness on the basis of either the witness having been a party representative during settlement discussions, or anything said by or about, or attributed to, the witness during settlement discussions."

Is it realistic to expect that a med-arb neutral will ignore information learned during the mediation if a subsequent arbitration ensues? There is often skepticism about the ability of a neutral to disregard inadmissible information, and that skepticism was supported by at least one study that determined that judges struggled to accomplish this mental task; and some types of highly relevant, but inadmissible information (including demands disclosed during a settlement conference) influenced judges' decisions.[20] Hence, the potential exists that a neutral may learn information in a mediation that is difficult to ignore in a subsequent arbitration.

If a med-arb neutral concludes that information gleaned from mediation may impact his or her impartiality or decision despite efforts to ignore that information, the neutral may need to withdraw from the arbitration, unless the parties agree to waive this restriction.

What is the parties' intent regarding the use of information shared with the neutral during mediation if there is no settlement and arbitration ensues? What do the parties intend happen if the neutral is unable to ignore this information (e.g., can the neutral continue with the arbitration, or does the neutral need to withdraw)?

VI. Carefully draft written med-arb agreements

The parties' ability to craft a process and terms that they choose is consistently recognized in arbitration and mediation rules and practice, as long as the parties agree (preferably in writing), as discussed above. Hence, at least a basic written agreement to med-arb is typically expected. Moreover, a carefully drafted med-arb agreement that clearly identifies the parties' agreement with sufficient detail to address potential issues, such as those discussed above, can help overcome many of the concerns surrounding med-arb, increases the potential that the neutral will be able to complete the med-arb, allows the process to be conducted in a way that is consistent with the parties' expectations, avoids disagreements, and improves enforceability.

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[19] CEDR Rules for the Facilitation of Settlement in International Arbitration, Article 3(5).
[20] Andrew J. Wistrich, Chris Guthrie, and Jeffrey J. Rachlinski, Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding, Cornell Law Faculty Publications, (2005) Paper 20.

A. Do it early

The med-arb agreement should be completed as early in the process as possible (preferably before the mediation or arbitration commence)[21] to avoid uncertainty, disagreements and problems as the mediation and arbitration proceed, and to ensure informed consent by the parties before embarking on med-arb.

B. Include sufficient detail to describe the parties' agreement

The med-arb agreement should be sufficiently detailed to avoid ambiguity.

Sample med-arb clauses published by dispute resolution organizations typically identify the administering organization, agreement to utilize both mediation and arbitration, and agreement that a mediator involved in the parties' mediation may also serve as the arbitrator.[22] Are these sample clauses sufficient? Although they provide a basic agreement to utilize med-arb, the devil is in the details, and sample med-arb clauses typically do not address those details. Without a more detailed med-arb agreement, it may not be clear what the parties have agreed upon, future disputes may occur, and enforceability of a subsequent award may be impacted.

Instead, a detailed written med-arb agreement avoids ambiguity, demonstrates the parties' informed consent, minimizes future disputes regarding the med-arb process, and minimizes the impact of potential issues such as confidentiality and impartiality. For example, a detailed written med-arb agreement could address some or all of the questions discussed above regarding impartiality, confidentiality and reliance on information obtained in mediation. These topics were addressed by The CEDR Commission on Settlement in International Arbitration, which recommended that to minimize risks associated with med-arb, the parties' consent to the following be documented in writing:[23]

- Consent to the mediator/conciliator resuming as arbitrator;
- Consent as to the way in which the arbitrator is to deal with information learned in confidence by the arbitrator during the mediation/conciliation;
    - Whether the arbitrator will disclose any such information to all parties and provide them with an opportunity to comment on it; or
    - Whether the arbitrator should disregard any confidential information that may have been disclosed during private meetings, and he or she should be under no duty to disclose it;
- Consent to the arbitrator meeting with each party privately during the mediation/conciliation phase and either:
    - The arbitrator is under no obligation to disclose information obtained in confidence but should disregard it for the purposes of an arbitration award; or
    - The arbitrator is under a duty to disclose any information obtained relevant to a potential arbitration award so that the other party may comment.

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[21] CEDR Commission on Settlement in International Arbitration Final Report, November 2009, Appendix 2.

[22] For example, see sample med-arb clauses in the New York City Bar Compilation of Sample Mediation Clauses, June 8, 2016 and American Arbitration Association Drafting Dispute Resolution Clauses, A Practical Guide.

[23] CEDR Commission on Settlement in International Arbitration Final Report, November 2009, Appendix 2.

- Consent that the parties will not at any later time use the fact that the arbitrator has acted as a mediator/conciliator as a basis for challenging the arbitrator or any award which the arbitrator may make (either alone or as part of a tribunal).

Express waiver by the parties that they will not use the fact that the arbitrator acted as a mediator, or other issues raised above is also addressed in the IBA Guidelines on Conflicts of Interest, as follows:[24]

> "An arbitrator may assist the parties in reaching a settlement of the dispute, through conciliation, mediation or otherwise, at any stage of the proceedings. However, before doing so, the arbitrator should receive an express agreement by the parties that acting in such a manner shall not disqualify the arbitrator from continuing to serve as arbitrator. Such express agreement shall be considered to be an effective waiver of any potential conflict of interest that may arise from the arbitrator's participation in such process, or from information that the arbitrator may learn in the process. If the assistance by the arbitrator does not lead to final settlement of the case, the parties remain bound by their waiver."

Similarly, the CEDR Commission on Settlement in International Arbitration addressed the waiver of challenges to an arbitrator or an award, as follows:[25]

> "The Parties agree that the Arbitral Tribunal's facilitation of settlement in accordance with these Rules will not be asserted by any Party as grounds for disqualifying the Arbitral Tribunal (or any member of it) or for challenging any award rendered by the Arbitral Tribunal."

Regardless of the parties' agreed terms, articulating the details in their written agreement reflects their understanding and minimizes future disagreements.

VII. Conclusion

"The single biggest problem in communication is the illusion that it has taken place."[26]

Due to differing med-arb rules, practices, and cultures, an agreement to employ med-arb may be more of an illusion than a clear communication of each parties' understanding of the agreement.[27] Instead, carefully articulating and documenting a detailed med-arb agreement ensures that the agreement is clearly communicated, reflects the parties' informed consent, and minimizes issues associated with med-arb.

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[24] IBA Guidelines on Conflicts of Interest, General Standard Section 4(d).
[25] CEDR Rules for the Facilitation of Settlement in International Arbitration, Article 3(3).
[26] George Bernard Shaw.
[27] This illusion is magnified by the absence of clear med-arb rules and practices to address issues such as confidentiality and impartiality, as discussed above.

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