Arb-Med: Workable or Worrisome?

By Richard H. Silberberg and Anthony P. Badaracco

You are the sole arbitrator in a vigorously contested proceeding. You have heard four days of testimony during an evidentiary hearing anticipated to last 10 days. At the outset of the fifth day, the parties' attorneys advise you that their clients would like to try to settle. You respond by offering to contact the tribunal administrator to request a list from which the parties can choose a suitable facilitator to assist them in resolving the dispute. The parties' counsel inform you that is not what their clients had in mind. Rather, the parties have asked that you suspend the taking of testimony so that *you* can assume the role of mediator, with the understanding that if the case is not settled, you will put your arbitrator hat back on and decide the case.

You politely but firmly inform the parties' counsel of the significant risks associated with the process that their clients have proposed, and you strongly recommend that they select another neutral as their mediator. But the parties are steadfast. They do not want to spend the time or the fees that would be necessary to get another neutral "up to speed"; they tell you that your knowledge of the facts and your familiarity with the dynamics of the parties' relationship uniquely qualifies you to assist them in settling the case. And they express confidence in your ability to decide the case fairly and without bias if the mediation is unsuccessful.

What should you do? Should you (i) reject the parties' request out of hand; (ii) offer to serve as their mediator, but only after first resigning from your position as arbitrator; or (iii) honor their request and initiate mediation discussions, but only after having the parties and their counsel execute a suitable consent and waiver? The thesis of this article is that the correct answer is: "It depends." In our view, how a neutral responds to the parties' request that she serve in a dual capacity should be guided in the first instance by the neutral's overall approach to ADR processes and her determination as to whether she is comfortable undertaking the role envisioned by the parties.

Strategic decisions about models are often not as simple as choosing to mediate or arbitrate. Mixed-mode dispute resolution is becoming more common as parties endeavor to structure processes that provide optimal (and sometimes multiple) opportunities to resolve disputes. There are many different ways to structure mixed-mode dispute resolution processes.[1]

The use of the "Med-Arb" model has been prevalent for some time.[2] In this model, the parties first engage in mediation. If the mediation is successful and the dispute is resolved, that is the end of the process. If the mediation fails to produce a settlement, the parties proceed to arbitration before a different neutral who has not been privy to the mediation proceedings.[3]

Much rarer, at least in the United States,[4] is "Arb-Med" (or "Arb-Med-Arb," with the mediation stage sometimes referred to as the "mediation window"). The "Arb-Med" model generally involves the same neutral serving in both roles. The arbitration commences and proceeds to a point at which the parties wish to mediate; if the mediation discussions do not produce a settlement, the neutral resumes her role as arbitrator and decides the case.

Unlike "Med-Arb," for which the procedures are generally agreed to in advance and memorialized in the parties' dispute resolution agreement, "Arb-Med" is typically an ad hoc procedure. The parties may seek to suspend the arbitration and proceed to mediate any time before the final arbitration award is issued, provided that the arbitrator is agreeable to switching hats mid-stream. Parties that incorporate "Med-Arb" in their dispute resolution protocols have made a conscious decision to include arbitration as their "Plan B" in the event that mediation proves to be unsuccessful. By contrast, parties that resort to "Arb-Med" generally enter the process with every expectation that arbitration will lead to a final and binding resolution of the dispute, and only turn to mediation in the event that unforeseen circumstances arise during the arbitration.

There are a number of reasons why parties engaged in arbitration may wish to switch to mediation mode before the arbitration is concluded. One such reason is the prospect of reducing the parties' costs by asking a neutral already familiar with the relevant facts and evidence

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to attempt to facilitate a settlement. Another is that the "Arb-Med" procedure allows each party "to evaluate its arbitration case compared to that presented by the opponents, possibly recognizing strengths or weakness that could allow common ground during mediation"—but without needing to start the process from scratch with another neutral.[5] If it turns out that the dispute cannot be settled in mediation, "the neutral is presumably already educated as to the facts and circumstances involved in the case."[6]

Risks Associated with "Arb-Med"

To be sure, there are risks associated with having an arbitrator pause the arbitral proceedings for the purpose of participating in mediation discussions. If the mediated negotiations result in a settlement, the arbitrator turned mediator is a hero. By facilitating a mutually acceptable settlement, the neutral has, at a minimum, saved the parties significant expense, which will be manifest when the parties receive a pro rata refund of the arbitrator compensation deposits that they previously advanced. But what if the mediation discussions do not produce a settlement? That can cause headaches.

The risks of having the same neutral act in the dual capacity of adjudicator and neutral facilitator arise from the concept that "[t]he principles underlying the legal system's protection for confidentiality in mediation are undermined if the neutral learns information in mediation that she carries over to affect her decision in arbitration . . . cognitive psychology teaches that even when a neutral thinks that she is setting aside this information it becomes incorporated into her thinking."[7] That is a very real concern and goes a long way toward explaining the reluctance of many, if not most, neutrals to perform both roles in an "Arb-Med" process.

In our view, regardless of the enthusiasm that the parties may have for turning from arbitration to mediation prior to the conclusion of the arbitral process, the arbitrator should carefully consider whether she is comfortable doing so. If the arbitrator concludes that she could not resume her arbitral duties if mediation were to fail without being biased or otherwise influenced by information she learned during the mediation discussions, the arbitrator should respectfully decline to participate.

Minimizing the Risks of "Arb-Med"

Given the risks associated with the same neutral serving as both arbitrator and mediator, why should an arbitrator even consider agreeing to participate? Attorneys are well known to be risk averse, and those serving as arbitrators likely would not characterize Arb-Med as a "safe" course of action.

One response is that arbitration is the *parties'* process and is a creature of contract. If the parties agree that a particular dispute resolution protocol (in this case "Arb-Med") will make it more likely than not that they will achieve a mutually-desirable result, and the parties are prepared to expressly waive any known and unknown risks associated with that process, the arbitrator should, in our view, at least explore the possibility of carrying out the parties' wishes. As stated earlier, if the arbitrator is not comfortable with performing dual roles in an "Arb-Med" protocol, that should be the end of the inquiry.

If, however, the arbitrator is confident in her ability to resume her arbitral duties following a failed mediation without being biased or otherwise influenced by information she learned during the settlement negotiations, the arbitrator should inquire of the dispute resolution provider selected by the parties whether the provider will continue to administer the case under such circumstances.[8] If the provider is willing to do so, the arbitrator should proceed to consider, with input from the parties, steps that could be taken to ameliorate the risks presented by "Arb-Med." Not surprisingly, these risk-minimizing steps involve trade-offs that could potentially impair the effectiveness of the mediation process, or jeopardize the potential for significant cost savings that may have motivated the parties' desire to pivot from arbitration to mediation.

Such steps should be carefully vetted to ensure that the parties have had the opportunity to craft an "Arb-Med" process that is fundamentally fair and that satisfies their mutual needs and expectations. Even if one accepts the threshold premise that the same neutral can serve in the dual roles of arbitrator and mediator, the details of the process matter. If the procedure appears one-sided or otherwise procedurally unfair, the parties are not likely to come away from the process feeling satisfied.[9]

Among the procedural choices to be considered by the parties, with the input of the arbitrator, are the following:

> Deferring mediation discussions until after the arbitral proceedings have been completed and the arbitration award has been written and executed. The signed award can be placed in a sealed envelope, only to be issued in the event that the ensuing mediation fails to produce a settlement. While this procedure prevents the arbitrator's decision from being influenced by information she learned during the mediation discussions, it requires that the arbitration be completed before the mediation can begin, thus sacrificing the cost savings that could be realized by engaging in an "Arb-Med" process.
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> Conducting all mediation discussions with all participants present, eliminating private caucusing from the mediation process. While this procedure similarly

obviates the possibility that the arbitrator's decision will be influenced by information she learned in circumstances where some participants were absent, eliminating private caucuses during which the neutral can speak candidly with each side deprives the neutral of an important tool for facilitating a settlement.[10]

Conducting private caucuses, but requiring that information elicited by the neutral during a caucus with one party be shared by the neutral with the other party. While this procedure would maintain a level playing field, it would also have a chilling effect upon the parties' candor with the neutral, thereby jeopardizing the effectiveness of the mediation discussions.

Documenting the "Arb-Med" Process

Regardless of what specific steps are taken to minimize the risks of "Arb-Med," it is essential that full disclosure of those risks, and the parties' decision to proceed with full knowledge of such risks, either be (i) memorialized in a writing executed by the parties, their counsel, and the neutral, or (ii) otherwise stated on the record in the arbitration and expressly consented to by all participants.[11] Our standard protocol for documenting the parties' agreement to pursue an "Arb-Med" process involves having all participants sign a written Consent and Waiver, following a full explanation of its terms and conditions. The essential elements of that Consent and Waiver consist of the following explicit acknowledgments:

With an arbitration hearing underway, the parties have requested a pause in the arbitral proceedings to pursue mediation.

The parties have specifically requested that the arbitrator act as the mediator.

If the mediation phase does not result in a settlement, the neutral will resume the arbitration (assuming that it has not been completed) and proceed to decide the case and issue an arbitration award.

During the mediation phase, the neutral may meet privately with each party and its counsel, and may receive confidential information that the absent party believes to be false (assuming that the parties have agreed to private caucuses). The parties understand that in an arbitration hearing, it would be improper for an arbitrator to receive such information in the absence of the other party.

The parties waive their right to have the arbitrator's decision be based solely upon information received in the presence of the other party (again, assuming that the parties have agreed to private caucuses).

The parties have been informed of the disadvantages of having the same neutral serve as arbitrator and mediator, including that the parties may reveal to the neutral their respective settlement positions and their views of the strengths and weaknesses of their positions on the merits.

The parties understand that, if at any point during or following mediation the neutral no longer feels able decide the case impartially, the neutral may step down.[12]

The parties have had an opportunity to consult with independent counsel of their choice concerning the process and to appoint another neutral to serve as the mediator of the dispute.

The parties' counsel attest that they have fully informed their clients of the risks associated with the process.

Neither the dispute resolution provider nor the arbitrator shall be liable for any act or omission arising out of the arbitrator's service as the mediator of the parties' dispute. No claim against the provider or the arbitrator can be made based upon the arbitrator's dual service, and no challenge to the arbitration award can be predicated upon such dual service.

Conclusion

With full disclosure, express consent, and implementation of steps to minimize risks, "Arb-Med" can be an effective procedure for the resolution of disputes.

Endnotes

1. *See* Barbara A. Reeves, *Hybrid Proceedings: Resolving Disputes by Integrating Arbitration and Mediation*, 11 N.Y. Dispute Resolution Lawyer No. 2 (Fall 2018) at 36–37 (highlighting four examples of disputes successfully resolved in mixed-mode proceedings, each of which was structured differently from the others).

2. *See*, *e.g.*, Thomas J. Stipanowich and J. Ryan Lamare, *Living With "ADR": Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Corporations*, 19 Harv. Negot. L. Rev. 1 (2014) (reporting that more than half of in-house counsel at large companies responded that their company had used "Med-Arb" in the previous three years); *see also* David J. McLean & Sean-Patrick Wilson, *Compelling Mediation in the Context of Med-Arb Agreements*, 63-Oct. Disp. Resol. J. 28, 30 (Aug.-Oct. 2008) (noting expanded use of "Med-Arb").

3. "Med-Arb" is often found in contractual dispute resolution provisions as part of a three-step process. The first step consists of negotiations between the parties (sometimes explicitly stated to be at the executive-to-executive level) followed, if necessary, by mediation and then arbitration.

4. "In China, arb-med is widely used in local and international arbitration cases. At least twenty to thirty percent of arbitral awards are based on disputing parties' settlement agreements," Stipanowich, Yang, Welsh, Qiming, Robinson, Jinghui, Guang, Kichaven, Madigan, Hongsong, and Jianhua, *East Meets West: An International Dialogue on Mediation and Med-Arb in the United States and China*, 9 Pepperdine Dispute Resolution L.J. 2 at 398 (2009).

5. Richard Fullerton, *The Ethics of Mediation-Arbitration*, 38 The Colorado Lawyer 31, 36 (2009).

6. Kristen M. Blankley, *Keeping a Secret From Yourself? Confidentiality When the Same Neutral Serves Both as Mediator and as Arbitrator in the Same Case*, 63:2 Baylor L. Rev. 317, 326 (2011).

7. Ellen E. Deason, *Combinations of Mediation and Arbitration with the Same Neutral: A Framework for Judicial Review*, 5 Arb. L. Rev. 218, 220 (2013); *see also* Edna Sussman, *Developing an Effective Med-Arb/Arb-Med Process*, 2 N.Y. Dispute Resolution Lawyer 71, 72 (2009).

8. The American Arbitration Association will continue to administer a case in which an arbitrator suspends the arbitration to serve as a mediator and then re-assumes her role as arbitrator if the mediation discussions are unsuccessful provided that (i) the parties have agreed that the case should proceed in that manner, and (ii) there has been full disclosure and waiver, in a signed writing or on the record of the hearing, of the risks associated with allowing the arbitrator to mediate the dispute.

9. *See* Mark Goodrich, *Arb-Med: Ideal Solution or Dangerous Heresy?*, Alert (2012), *available at* https://www.whitecase.com/sites/whitecase/files/files/download/publications/articles-IALR-2012-Arb-med-solution-or-dangerous-heresay.pdf (tracing extensive litigation over the enforceability of an arbitral award in the case of *Gao Hai Yan & Another v. Keeneye Holdings Ltd & Others* (2011), HKEC 514 and HKEC 1626), where allegedly unfair and coercive mediation procedures were employed after an arbitration hearing had begun).

10. One tool that is not available during the mediation discussions where the same neutral serves as both arbitrator and mediator is the neutral's ability to comment on the types of arguments that an arbitrator is likely to find persuasive or not persuasive. The neutral loses that tool because she cannot reveal how she is likely to rule on the dispute if the mediation discussions fail to produce a settlement and she must decide the case. *See* comments of Jay Welsh in Stipanowich *et al.*, 9 Pepperdine Dispute Resolution L.J. 2, at 408.

11. In one case, after mediation failed and the neutral pivoted back to arbitration and entered an arbitral award, a court concluded that in issuing the award the neutral had improperly relied upon information he obtained in his role as mediator. The court invalidated the award as "arbitrary and capricious" on its face. *See* Edna Sussman, *Developing an Effective Med-Arb/Arb-Med Process*, 2 N.Y. Dispute Resolution Lawyer 71, 72 (2009). There is no indication in the opinion that the parties had executed a consent and waiver before embarking upon mediation discussions with the neutral's participation.

12. *See* Edna Sussman, *Med-Arb: an Argument for Favoring Ex Parte Communications in the Mediation Phase*, 7 W. Arb & Med. R. 421 (2013).