

Developing an Effective Med-Arb/Arb-Med Process

By Edna Sussman

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Bowden v. Weickert

The buzz is all about whether arbitration has become too much like litigation. Regardless of whether this query is based in reality for the vast majority of arbitrations and regardless of whether it is the arbitrators or the lawyers/clients who are the cause of some arbitrations having taken on a litigation-like process, there is no question that mediation is on the rise. As parties search for a more expeditious and less costly means for resolving their disputes, attention is increasingly being paid to hybrid processes—to combinations and permutations of arbitration and mediation that can serve the parties’ needs and best fit the forum to the fuss. These combined processes are not new. Arbitrators attempting to settle cases (arb-med) and mediators serving as arbitrators if settlement is not achieved (med-arb) have been the subject of learned articles for many years¹ and have been part of the local culture in many parts of the globe for generations.²

The two-fold concerns raised most frequently as to the use of a hybrid process are applicable only if the same neutral serves as both arbitrator and mediator, a practice which serves the parties’ purpose of maximizing efficiency and minimizing expense. First, it is generally accepted that the confidentiality of mediation is an essential element to successfully conducting a mediation as parties reveal their true interests and perspectives on the dispute. It is argued that if the parties know that the mediator will be the arbitrator if the mediation fails, they will not confide in the mediator and will instead try to “spin” the would-be arbitrator to achieve a better result in the arbitration. Second, there is concern, on the other hand, that the mediator will be privy to confidential information derived from private caucus sessions with the parties and the opposing party will not know what was said and will not have the opportunity to rebut the information in the arbitration phase, a breach of concepts of natural justice and due process. Some argue that these concerns are insurmountable and that a hybrid of mediation and arbitration jeopardizes both processes. Others argue that these issues can be dealt with in various ways and that, in any case, the parties should be able to design their own process and contract for the one that suits them best.

The Combinations and Permutations

The mediation and arbitration processes have been combined in a variety of ways. These include: (a) Med-

arb: If an unbreachable impasse is reached, the same person serves as the arbitrator; (b) Arb-med or arb-med-arb: The appointed arbitrator attempts to mediate (or conciliate) the case but failing resolution returns to his or her role as arbitrator; (c) Co-med-arb: The mediator and the arbitrator hear the parties’ presentations together but the mediator then proceeds to attempt to settle the dispute without the arbitrator, who is only called back in to enter a consent award or to serve as an arbitrator if the mediation fails; (d) MEDALOA (Mediation and Last Offer Arbitration): If the mediation fails, the mediator-now-arbitrator is presented with a proposed ruling by both parties and must decide between the two, as in a baseball arbitration.

Techniques to implement a combined arbitration-mediation process have been developed to avoid the problems identified with same neutral med-arb and arb-med. For example, the mediation can be conducted without caucus sessions, thus assuring that all parties are aware of the information being presented to the neutral with full opportunity to respond.³ Or the arbitrator can complete his or her award following the hearing, but seals it and keeps it confidential pending an attempt to mediate the dispute between the parties. Or the parties can be allowed to opt out of the same neutral serving as the arbitrator after the mediation fails. Or two party appointed arbitrators can co-mediate the dispute without the chair, who is held in reserve for the hearing untainted by having been privy to confidential communications in case no settlement is reached. These and other process refinements can serve to ameliorate the difficulties presented in combining arbitration and mediation, but party consent may be viewed as overcoming all objections.

Can Consent Overcome Later Challenges?

While the case law in this area is still emerging, the courts in the United States that have had occasion to address med-arb have uniformly endorsed the ability of the parties to design a med-arb process to suit them. However, the courts caution that informed consent is essential. Absent informed consent, the arbitration award rendered in the med-arb or arb-med-arb context will not be confirmed. The devil here may be in the details. What must the consent include to effectively bar challenges to any arbitral award that may ultimately be rendered?

The court in *Bowden v. Weickert*⁴ dealt with an arbitrator who attempted to mediate the dispute. Upon failure of the mediation process, the arbitrator returned to his role as arbitrator and rendered his award. The court reviewed the med-arb process and delineated the nature of the agreement necessary for such a hybrid:

The mediation-followed-by-arbitration proceeding engaged in by the parties in this case is sometimes referred to as a combined, or hybrid, “med-arb” proceeding. Such proceedings, when properly executed, are innovative and creative ways to further the purpose of alternative dispute resolution. However, given the confidential nature of mediation, the high degree of deference enjoyed by an arbitrator, and the high probability that both proceedings are likely to be employed before their disputes are resolved, it is essential that the parties agree to certain ground rules at the outset. At a minimum, the record must include clear evidence that the parties have agreed to engage in a med-arb process, by allowing a court-appointed arbitrator to function as the mediator of their dispute. The record must also contain: (1) evidence that the parties are aware that the mediator will function as an arbitrator if the mediation attempt fails; (2) a written stipulation as to the agreed method of submitting their disputed factual issues to an arbitrator if the mediation fails; and (3) evidence of whether the parties agree to waive the confidentiality requirements imposed on the mediation process ... in the event that their disputes are later arbitrated.⁵

Finding that the arbitrator had relied on information obtained in his role as mediator in violation of statutory protections of mediation confidentiality and that there had been no explicit agreement by the parties regarding the use of confidential information, the court found that use of the same neutral as arbitrator and mediator rendered the arbitrator’s decision “arbitrary and capricious” on its face.⁶

In *Gaskin v. Gaskin*,⁷ the court noted that the mediation process encourages candid disclosures, including disclosures of confidential information, to a mediator, creating the potential for a problem when the mediator, over the objection of one of the parties, becomes the arbitrator of the same or a related dispute. The court concluded that it would be improper for the mediator to act as the arbitrator in the same or a related dispute “without the express consent of the parties.”⁸

Where the parties have consented, the use of confidential information by the arbitrator in the arbitration decision should not serve to provide a basis for vacating the award. In *U.S. Steel Mining Company v. Wilson Downhole Services*,⁹ the parties had agreed to have the mediator serve as the arbitrator if the mediation failed to lead to a resolution and empowered the mediator, now arbitrator, to select between the parties competing proposals in a baseball arbitration. The parties expressly authorized the mediator-arbitrator to rely on confidential mediation disclosures in reaching his decision. The parties’ agreement provided:

The Parties anticipate that *ex parte* communications with the Arbitrator will occur during the course of the mediation. The Parties agree that the Arbitrator, in evaluating each Party’s best and final offer, may rely on information he deems relevant, whether obtained in an *ex parte* communication or otherwise, in making the final Award.¹⁰

In attacking the award, the challenging party claimed fraud in the presentation of information in the mediation. The court held that such evidence of fraud had to be clear and convincing and no such finding could be made on the facts presented in the face of the consent given.

In an analogous case, in *Conkle and Olesten v. Goodrich Goodyear and Hinds*,¹¹ the court reviewed a challenge to an arbitration award where the party had waived disclosure by the arbitrator and did not know that the arbitrator had previously mediated a closely related case. The court refused to set aside the award finding that the “waiver was direct and unequivocal.”¹² The court said that to adopt an “absolutely-cannot-waive-disclosure rule would give one party the unilateral right to repudiate any arbitration it didn’t like.”¹³

Nor will the court necessarily vacate the award even absent express consent on use of confidential information in limited circumstances. In *Logan v Logan*,¹⁴ the loser in the arbitration sought to set aside the award on the grounds that the mediator-arbitrator referred to confidential information from the mediation in his arbitral award. The court noted that:

if there was an improper reference to the mediation in the arbitration proceedings, this would constitute grounds for vacating or modifying the arbitration order and subsequent judgment, if the reference materially affected appellants’ substantial rights.¹⁵

However, on the facts before it, the court refused to set aside the award, stating that no showing had been made that the reference in the arbitration order to matters that

occurred at the mediation “materially affected substantial rights.”¹⁶

Care must be taken in designing the process, crafting the consent document and in the terminology used if an enforceable award is to be achieved. In *Lindsay v. Lewandowski*,¹⁷ the parties agreed to “binding mediation” by the mediator upon the conclusion of a failed mediation. The court refused to enter judgment on the stipulated settlement agreement, which included provisions determined in “binding mediation” on unresolved terms following a mediation by the same neutral. The court noted the confusion that would result from allowing the development of myriad alternative dispute resolution processes such as “binding mediation” for which no legal guiding principles existed:

If binding mediation is to be recognized, what rules apply? The arbitration rules, the court-ordered mediation rules, the mediation confidentiality rules, or some mix? If only some rules, how is one to choose? Should the trial court take evidence on the parties’ intent or understanding in each case? A case-by-case determination that authorizes a “create your own alternate dispute resolution” regime would impose a significant burden on appellate courts to create a body of law on what can and cannot be done, injecting *more* complexity and litigation into a process aimed at less.¹⁸

Clarity as to the nature of the roles to be played and the use of constructs and terminology with which the law is familiar and as to which legal principles already exist are important in drafting the contract language establishing the process to be used.

Thus the court in *Lindsay v. Lewandowski* expressly recognized that such a combined process could be developed by the parties. The court stated that it did not preclude the parties from agreeing, if the mediation fails, to proceed to arbitration with the same neutral. But the court warned that whether or not this arbitrator (*née* mediator) may consider facts presented to him or her during the mediation would also have to be specified in any such agreement. As confirmed in the concurring opinion, “only a clearly written agreement signed by the parties can set forth a process whereby an unsuccessful settlement conference (or mediation) morphs into a *de facto* arbitration. The key to approval of such agreement is clarity of language and informed consent.”¹⁹

As the courts have held, the success of the hybrid mediation/arbitration process depends on the efficacy of the consent to the process entered into by the parties. A sample of a consent form for consideration by the reader was developed by Gerald Phillips, a well-known Cali-

fornia mediator and arbitrator and a strong supporter of med-arb, which addresses many of the concerns.²⁰

Do You Have the Right Neutral?

The differences between the demands of the job and the skill sets required for an arbitrator versus a mediator were summed up in an anecdote by a world-class neutral who reported that his wife always knew whether he had arbitrated or mediated that day. If he arbitrated he came home in time for dinner with energy for companionship and conversation. If he mediated he came home very late, emotionally drained, and went immediately to bed.

Arbitration and mediation are two entirely different processes. In arbitration the arbitrator is charged with managing the proceeding efficiently, providing a fair opportunity to each side to present its case and analyzing the facts and the law based on the evidence to arrive at the ultimate award. The mediator is charged with working with the parties to craft a process most likely to lead to a resolution, uncover the parties’ interests, understand their relationship and their motivations, explore the strengths and weaknesses of the respective positions, assist in developing workable solutions and help parties overcome psychological barriers to settlement. Bottom line: The mediator’s role requires use of many of the skills of a psychologist, while the arbitrator’s role requires use of many of the skills of a judge.

The trainings offered for each discipline bear little resemblance to one another. For example, a good deal of attention is devoted in arbitration training to how to manage the pre-hearing process efficiently, while in mediation training significant attention is devoted to how to overcome impasse. The good mediator and good arbitrator employs a completely different approach and set of tools in each role. Not every arbitrator is qualified to be a good mediator and vice versa.

In selecting the neutral, it is not only important to consider the qualifications of the neutral for each role but to select someone with a strong reputation for integrity who the parties can trust and respect to handle appropriately the special challenges associated with combining the roles of arbitrator and mediator.

Conclusion

Combining mediation and arbitration in a hybrid process with the same neutral can be an effective mechanism for reducing costs, increasing efficiency and maximizing the possibility of achieving the win-win result that optimizes the position of all parties and arrives at the best resolution of a dispute. If the parties are fully informed and consent knowingly to same neutral mediation and arbitration, party autonomy should be respected and the resolution derived from the process should be honored.

Endnotes

1. See, e.g., Barry C. Bartel, *Med-Arb as a Distinct Method of Dispute Resolution: History, Analysis and Potential*, 27 Willamette L. Rev. 661 (1991); John T Blankenship, *Developing Your ADR Attitude*, 42-NOV Tenn. B. J. 28 (2006); Harold I. Abramson, *Protocols for International Arbitrators Who Dare to Settle Cases*, 10 Am. Rev. Int'l. Arb. 1 (1999); James T. Peter, *Med-Arb in International Arbitration*, 8 Am. Rev. Int'l. Arb. 83 (1997).
2. For a review of institutional rules on combined neutral functions around the world, see Francesco Anchini, "Concination:" *The Ultimate Example of ADR*, 13 World Arb. & Mediation Rep. 162 (2002).
3. Indeed, a no-caucus model is the basic premise of the understanding-based model of mediation. See Gary Friedman and Jack Himmelstein, *Challenging Conflict: Mediation Through Understanding*, American Bar Association and Harvard Program on Negotiation (2008). The book is reviewed in this issue of *New York Dispute Resolution Lawyer*.
4. *Bowden v. Weickert*, No. S-02-017, 2003 WL 21419175 (Ohio App. 6 Dist. June 20, 2003). The case went back for a second arbitration; see *Bowden v. Weickert*, No. S-05-009, 2006 WL 259642 (Ohio App. 6 Dist. Feb. 3, 2006).
5. *Id.* at *6.
6. *Id.* at *7.
7. *Gaskin v. Gaskin*, No. 2-06-039-CV, 2006 WL 2507319 (Tex. App.-Fort Worth, Sept. 21, 2006).
8. *Id.* *2 (citations omitted). See also *Wright v. Brockett*, 150 Misc. 2d 1031, 571 N.Y.S. 2d 660 (Sup. Ct., Bronx Cty. 1991); in reflecting on a proposal to expand the use of med-arb, the court cautioned that careful study was required before full implementation "to insure that there is a legally sufficient written 'plain language' consent by the parties both to the arbitration of the dispute and the specific procedures to be employed." *Id.* at 150 Misc. 2d at 1039.
9. *U.S. Steel Mining Company v. Wilson Downhole Services*, No. 02-00CV1758, 2006 WL 2869535 (W.D. Pa. Oct. 5, 2006).
10. *Id.* at *5.
11. *Conkle and Olesten v Goodrich Goodyear and Hinds*, Nos. G033972, G034063, 2006 WL 3095964 (Cal. App. 4 Dist. Nov. 1, 2006).
12. *Id.* at *12.
13. *Id.* at *12. See also, *Estate of McDonald*, No. B189178, 2007 WL 259872 (Cal. App. 2 Dist. Jan. 31, 2007) where the parties entered into a settlement agreement following a mediation and agreed to a binding decision by a retired judge on disputed items; the court refused to set aside the decision, holding that the challenger was estopped from challenging the procedural settlement mechanism she had accepted.
14. *Logan v. Logan*, No. F051606, 2007 WL 2994640 (Cal. App. 5 Dist. Oct. 16, 2007).
15. *Id.* at *1.
16. *Id.* at *3. See also, *Society of Lloyd's v. Moore*, No. 1:06-CV-286, 2006 WL 3167736 (S.D. Ohio Nov. 1, 2006) where the party attempted to set aside an award rendered by an arbitrator who heard the case, wrote the award and sealed it while he unsuccessfully attempted to mediate the case based on a communication by the arbitrator/mediator in the course of the mediation. The court held that the communication was protected by mediation confidentiality and was not admissible.
17. *Lindsay v. Lewandowski*, 139 Cal. App. 4th 1618, 43 Cal. Reprtr. 3d 846 (Ct. Appeals, 4th Dist. Div. 3, 2006).
18. *Id.* at 43 Cal Reprtr. 3d at 850.
19. *Id.* at 43 Cal Reprtr. 3d at 853. See also, *Weddington Productions Inc. v. Flick*, 60 Cal. App. 4th 793, 71 Cal. Reprtr. 2d 265 (Ct. Appeals, 2d District, Div. 2, 1998).
20. Gerald F. Phillips, *Same Neutral Med-Arb: What Does the Future Hold?* 60- Jul Disp. Resol. J. 24 (May-July, 2005). This article is reprinted in this issue of *New York Dispute Resolution Lawyer*.

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