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Chapter 18

Combinations and Permutations of Arbitration and Mediation: Issues and Solutions

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1. INTRODUCTION

The growth of mediation over the past fifteen years has been exponential, a tribute to the success of the process. Settlement rates in mediation are said to be on the order of 85% to 90% and are achieved long before the traditional ‘court house/ arbitration hearing steps’ at a significant saving of cost, time and disruption for the parties. User satisfaction is high because parties retain control and tailor their own

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solution in a less confrontational setting that preserves relationships and results in a win–win instead of win–lose.

Multiple drivers are at work to further the already resounding success of mediation as a tool for dispute resolution. There are now literally thousands of court-sponsored mediation programmes around the world. Business lawyers are increasingly inserting ‘step clauses’ in contracts which require an attempt at mediation before an arbitration or litigation can be commenced. Ethical obligations requiring that attorneys advise their clients about the availability of resolution through alternative dispute resolution (ADR) are on the rise.¹ Some government processes make an attempt at mediation a prerequisite to filing suit. Corporations are increasingly trying mediation as is exemplified by the signature by many thousands of corporations of ‘mediate first’ pledges that commit signatories to trying mediation before filing suit in a dispute with another signatory.² Deal mediation, settlement counsel and other innovative uses of expert facilitation are emerging. The European Union (EU) mediation directive of 2008 called on all Member States to enact legislation and to take steps that will foster mediation.³ The Chinese Supreme People’s Court issued in 2009 Opinions on Establishing and Improving a Dispute Resolution System to enable mediation settlements achieved outside the auspices of CIETAC or the Chinese courts to gain recognition.⁴ The long traditions of harmony and conciliation of many cultures will inevitably influence the resolution of disputes in our increasingly global economy and advance the use of mediation. Finally, just as arbitration developed in part to avoid expensive and protracted court proceedings, mediation is now viewed as a useful additional tool to counter the perceived increase in cost and delay in arbitration.

The widespread use of mediation and its continuing expansion is well deserved and is a natural consequence of the many benefits and successes achieved by mediation. As parties search for ways to decrease disruption to their business, maintain relationships and find 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

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1. See, e.g., The England and Wales Solicitors Code of Conduct, Rule 2.02(1)(b), guidance, 1 Jul. 2007 (the solicitor ‘should discuss whether mediation or some other alternative dispute resolution (ADR) procedure may be more appropriate than litigation, arbitration or other formal processes’.)
 2. See, e.g., the International Institute for Conflict Prevention and Resolution ADR Pledge, to which more than 4,000 corporations and 1,500 law firms have subscribed, available at <www.cpradr.org/AboutCPR/TheCPRADRpledge/tabid/74/Default.aspx>.
 3. Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 On certain aspects of mediation in civil and commercial matters (‘EU Mediation Directive’).
 4. Several Opinions on Establishing and Improving a Dispute Resolution System and the Linking of Litigation and Alternative Dispute Resolution Mechanism, 24 Jul. 2009. See discussion in F. Peter Phillips, ‘Recent Developments in Commercial Mediation in China’, *New York Dispute Resolution Lawyer* 3, no. 1 (Spring 2010), 67.

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arbitrators if settlement is not achieved (med-arb) have been the subject of learned articles for many years⁵ and have been part of the local culture in many parts of the globe for generations. Indeed, ‘in the ancient Greek world, including Ptolomaic Egypt, arbitration was normal and in arbitration the mediation element was primary’.⁶ There has been renewed interest and attention devoted to the subject in recent years in response to user complaints about litigation and arbitration.⁷

This chapter addresses two issues that deal with the interstices between mediation and arbitration. The first discussion reviews the questions that arise in connection with an arbitrator serving as a mediator in a dispute after the mediation fails and discusses such a dual role under US law. The second discussion reviews the question of whether a mediation settlement agreement can be recorded as an arbitral award by a mediator who has succeeded in the task of facilitating the settlement and whether such an award would be enforceable under the New York Convention.

2. DEVELOPING AN EFFECTIVE MED-ARB/ ARB-MED PROCESS

The concerns as to the use of a hybrid process are generally raised only if the same neutral serves as both arbitrator and mediator, a practice that best serves the parties’ purpose of maximizing efficiency and minimizing expense. Same-neutral mediation and arbitration processes have been combined in a variety of ways. These include: (1) med-arb: if an unbreachable impasse is reached the same person serves as the arbitrator; (2) 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; (3) 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; (4) 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.

5. See, e.g., Barry C. Bartel, ‘Med-Arb as a Distinct Method of Dispute Resolution: History, Analysis and Potential’, 27 *Willamette Law Review* 661 (1991); John T. Blankenship, ‘Developing your ADR Attitude’, 42 *Tennessee Bar Journal* 28 (2006); Harold I. Abramson, ‘Protocols for International Arbitrators who Dare to Settle Cases’, 10 *American Review of International Arbitration* 1 (1999); James T. Peter, ‘Med-Arb in International Arbitration’, *American Review of International Arbitration* 8 (1997), 83; Thomas J. Brewer & Lawrence R. Mills, ‘Combining Mediation and Arbitration’, *Dispute Resolution Journal* 54 (1999), 32, 34.

6. Derek Roebuck, ‘The Myth of Modern Mediation’, *Arbitration* 73, no. 1 (2007), 105 at 106.

7. See, e.g., CEDR Rules for the Facilitation of Settlement in International Arbitration (2009), available at <www.cedr.com/about_us/arbitration_commission/Rules.pdf>.

2.1. ISSUES AND SOLUTIONS FOR SAME-NEUTRAL
MEDIATOR AND ARBITRATOR

Although several questions have been raised as to procedures that employ the same neutral as both mediator and arbitrator, including whether the arbitrator's impartiality will be jeopardized and whether the parties may feel coerced into settlement by the ultimate adjudicator,⁸ two objections are the most serious and most frequently expressed. These objections arise from tension between the confidentiality expected in mediation and fundamental principles of due process.

First, it is generally accepted that the confidentiality of mediation is an essential element to most successfully conducting a mediation as parties reveal their true interests and perspectives on the dispute without fear that the opposing party will hear about their concerns or that the arbitrator may use that information against them if the matter goes to adjudication. Many mediators believe that without the tool of confidentiality a critical tool would be missing from their toolbox. It is also argued that if the parties know that the mediator will be the arbitrator if the mediation fails, they might not only refrain from sharing their interests and true analysis of the case but 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, a breach of the concepts of natural justice and due process. Furthermore, there is concern that the mediator (now arbitrator) will be unable to isolate in his or her mind information derived in private sessions and ignore it in rendering the award.

Techniques to implement a combined arbitration-mediation process have been developed to avoid or at least ameliorate some of the problems identified with same neutral med-arb and arb-med-arb. 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. Although some may view that as a less than optimal mediation format, others believe it to be the best way to ensure party self-determination and mutual understanding and enables the parties to reach their own compromise.⁹ Or, the arbitrator can disclose what he or she has learned in confidential caucuses to the opposing party after the mediation session if continuing as the arbitrator.¹⁰ Or, the arbitrator can complete his or her

8. See Gabrielle Kaufmann-Kohler, 'When Arbitrators Facilitate Settlement: Towards a Transnational Standard', *Arbitration International* 25 no. 2, (2009), 187, at 197–201.

9. Indeed, a no-caucus model is the basic premise of the understanding-based model of mediation. See Gary Friedman & Jack Himmelstein, *Challenging Conflict: Mediation Through Understanding*, American Bar Association and Harvard Program on Negotiation publishers (2008).

10. This is the solution in Hong Kong, see Kaufmann-Kohler, *supra* n. 8, at 199, and has been recommended for adoption in South Africa, see Barney Jordaan, *Hybrid ADR Processes in South Africa*, *NYSBA New York Dispute Resolution Lawyer* 2, no. 1 (Spring 2009), 117.

award following the hearing but seal it and keep it confidential pending an attempt to mediate the dispute between the parties.¹¹ Or, two party-appointed arbitrators can co-mediate the dispute without the chair, who is held in reserve for the hearing and 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 with the same neutral serving as both mediator and arbitrator.

But the question remains whether informed party consent can be viewed as overcoming all objections to a design of the process negotiated by the parties and permit the mediator to continue as the arbitrator even if separate sessions were held, as long as information not shared is not used in rendering the arbitration award.¹² Although such a course may be fraught with dangers, should we disable the parties from designing their own process? If the parties can choose not to continue with the same person as mediator and arbitrator after the mediation falters, the arbitrator is free to withdraw at that juncture and the parties, understanding the two processes, are made aware of the risks and knowingly consent to such a dual procedure, should they be able to employ such a process?

On this question there is no consensus. Some argue that the concerns inherent in such a dual approach are insurmountable and that a hybrid of mediation and arbitration utilizing the same neutral jeopardizes both processes.¹³ 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.¹⁴ The guidelines and rules issued by the International Bar Association,

The articles cited in this chapter from the *NYSBA New York Dispute Resolution Lawyer* 2, no. 1, which contained a compendium of articles about med-arb and arb-med from around the world are all available on line at <www.nysba.org/AM/Template.cfm?Section=New_York_Dispute_Resolution_Lawyer&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=26825>.

11. For a discussion of this technique see Haig Oghigian, *Perspectives from Japan: A New Concept in Dispute Resolution the Mediation/Arbitration Hybrid*, *NYSBA New York Dispute Resolution Lawyer* 2, no. 1 (Spring 2009), 110.
12. This is the solution in China, see Kaufmann-Kohler, *supra* n. 8, at 198–199. For a discussion of the successful use of such a process see Mercedes Tarrazón, ‘Arb-Med: Reflection à Propos of a Bolivian Experience’, *NYSBA New York Dispute Resolution Lawyer* 2, no. 1 (Spring 2009), 87.
13. See, e.g., Jon Lang, ‘Med-Arb, An English Perspective’, *NYSBA New York Dispute Resolution Lawyer* 2, no. 1 (Spring 2009), 98; Jeff Kichaven, ‘Med-Arb Should be Dead’, *NYSBA New York Dispute Resolution Lawyer* 2, no. 1 (Spring 2009), 80. 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.
14. See, e.g., Alan Limbury, ‘Making Med-Arb work in Australia’, *NYSBA New York Dispute Resolution Lawyer* 2, no. 1, (Spring 2009), 84. Barry Leon & Alexandra Peterson, ‘Med-Arb in Ontario: Enforceability of Med-Arb Agreement Confirmed by Court of Appeal’, *NYSBA New York Dispute Resolution Lawyer* 2, no. 1 (Spring 2009), 92; 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; Nabil N. Antaki, ‘Muslims’ and Arabs’ Practice of ADR’, *NYSBA New York Dispute Resolution Lawyer* 2, no. 1 (Spring 2009), 113. For a discussion of an interesting analog to med-arb used for decades in Italy and other European countries, see 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.

recognizing the divergence in local rule and law, do not preclude a dual role.¹⁵ A number of arbitral rules and law encourage the arbitrator to attempt to mediate the dispute.¹⁶ Some jurisdictions expressly bar having the same person serve as the mediator and the arbitrator¹⁷ and some jurisdictions may not recognize a waiver of procedural fairness.¹⁸

The difficulty in developing a single rule to govern such a hybrid process across borders is exemplified in the Centre for Effective Dispute Resolution (CEDR) work on the subject. The CEDR Commission on Settlement in International Arbitration recommended a rule that provided that:

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 jurisdictions which might have reason to consider the validity of the tribunal's award.¹⁹

The Commission provided guidance in its report on how the arbitrator should approach the matter if he or she chooses to conduct separate caucus sessions in the mediation phase.²⁰ However, the final rule issued by CEDR simply provided that the arbitrator shall not meet separately with the parties or obtain information that is not shared with the other parties.²¹

Although the CEDR rule is certainly the safer course, it may not always be the course that best serves the parties in maximizing the prospects of a successful mediation and may not accord with the parties' wishes. Thus, in some cases in which optimizing the chances of success in mediation while at the same time containing costs are the paramount concerns, the parties may choose to examine the laws of the jurisdiction in which enforcement might be sought and make an

15. The IBA Guidelines on Conflicts of Interest in International Arbitration (2004) s. 4(d) recognizes that an arbitrator may assist the parties in reaching settlement but requires express informed consent. The IBA Rules of Ethics for International Arbitrators (1987) s. 8 provides that on request or consent of the parties the arbitral tribunal may make proposals for settlement but the tribunal should point out that it is 'undesirable' to discuss settlement terms in the absence of the other party; however it further states that 'any procedure is possible with the consent of the parties'.

16. For a review of law and rules on combined neutral functions in multiple jurisdictions around the world, see *CEDR Commission on Settlement in International Arbitration, Final Report of the Commission* (CEDR Commission Report) Appendix 4, 9 Nov. 2009, available at <www.cedr.com/about_us/arbitration_commission/Arbitration_Commission_Doc_Final.pdf>; see also, Francesco Anchini '“Concentration:” The Ultimate Example of ADR', *World Arbitration & Mediation Report* 13 (2002), 162.

17. *Ibid.*

18. For example, the U.K. Human Rights Act of 1998 may be viewed as precluding a waiver of procedural fairness.

19. See CEDR Commission Report, *supra* n. 16, Draft Rule 2.43 and 2.5.

20. CEDR Commission Report, *supra* n. 16, Appendix 2 entitled 'Safeguards for arbitrators who use private meetings with each party as a means of facilitating settlement'.

21. CEDR Rules, *supra* n. 8 Art. 5 (2).

informed decision as to which course to follow. Protecting the award is always of crucial importance, but other considerations may in specific cases be of even greater importance.²²

2.2. US CASE LAW: CAN CONSENT OVERCOME LATER CHALLENGES?

Although the case law in this area is still emerging and no High Court has ruled on these issues, the lower courts in the United States have had occasion to address med-arb and seem to have so far 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*,²³ 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

22. For statistical data on voluntary compliance, enforcement and settlement in arbitration, see PriceWaterhouse Coopers and Queen Mary School of International Arbitration, *International Arbitration Corporate Attitudes and Practices 2008* at 2 ('84% of the participating corporate counsel indicated that, in more than 76% of their arbitration proceedings, the non-prevailing party voluntarily complies with the arbitral award; in most cases, according to the interviews, compliance reaches 90%'). See also, Loukas Mistelis, 'Special Section on the 2008 Survey of Corporate Attitudes Towards the recognition and Enforcement of International Arbitral Awards: The Settlement-Enforcement Dynamic in International Arbitration', *American Review of International Arbitration* 19 (2008), 377.

23. *Bowden v. Weickert*, No. S-02-017, 2003 WL 21419175 (Ohio App. 6 Dist. 20 Jun. 2003). The case went back for a second arbitration, see *Bowden v Weickert*, No. S-05-009, 2006 WL 259642 (Ohio App. 6 Dist., 3 Feb. 2006).

(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.²⁴

Finding that the arbitrator had relied on information obtained in the 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.²⁵

In *Gaskin v. Gaskin*,²⁶ 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'.²⁷

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 if protocols are properly established. In *U.S. Steel Mining Company v. Wilson Downhole Services*,²⁸ 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.²⁹

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.

24. *Bowden v. Weickert*, No. S-02-017, 2003 WL 21419175 (Ohio App. 6 Dist. 20 Jun. 2003). The case went back for a second arbitration, see *Bowden v. Weickert*, No. S-05-009, 2006 WL 259642 (Ohio App. 6 Dist., 3 Feb. 2006). at *6.

25. *Ibid.*, at *7.

26. *Gaskin v. Gaskin*, No. 2-06-039-CV, 2006 WL 2507319 (Tex. App.-Fort Worth, 21 Sep. 2006)

27. *Ibid.*, *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.

28. *U.S. Steel Mining Company v. Wilson Downhole Services*, No 02:00CV1758, 2006 WL 2869535 (W.D. Pa., 5 Oct. 2006)

29. *Ibid.*, at *5.

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In an analogous case, in *Conkle and Olesten v. Goodrich Goodyear and Hinds*,³⁰ the court reviewed a challenge to an arbitration award in which 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’.³¹ 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’.³²

Nor will the court necessarily vacate the award even absent express consent on use of confidential information in limited circumstances. In *Logan v. Logan*,³³ 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.³⁴

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’.³⁵

Care must be taken in designing the process and crafting the consent document, as well as in the terminology used, if an enforceable award is to be achieved. In *Lindsay v. Lewandowski*,³⁶ 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

30. *Conkle and Olesten v. Goodrich Goodyear and Hinds*, Nos. G033972, G034063, 2006 WL 3095964 (Cal. App. 4 Dist., 1 Nov. 2006).

31. *Ibid.*, at *12.

32. *Ibid.*, at *12. See also, *Estate of McDonald*, No. B189178, 2007 WL 259872 (Cal. App. 2 Dist., 31 Jan. 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.

33. *Logan v. Logan*, No. F051606, 2007 WL 2994640 (Cal. App. 5 Dist., 16 Oct. 2007)

34. *Ibid.*, at *1.

35. *Ibid.*, at *3. See also, *Society of Lloyd’s v. Moore*, No. 1:06-CV-286, 2006 WL 3167736 (S.D. Ohio, 1 Nov. 2006), in which 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.

36. *Lindsay v. Lewandowski*, 139 Cal. App. 4th 1618, 43 Cal. Repr. 3d 846 (Ct. Appeals, 4th Dist. Div. 3, 2006).

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.³⁷

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 is 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 this arbitrator (previously the 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’.³⁸

As these courts held, without appropriate and specific consent a hybrid mediation/arbitration process cannot be upheld, but, properly executed, party choice will likely be honoured. A sample of a consent form for consideration by the reader was developed by Gerald Phillips, a prominent California mediator and arbitrator and a strong supporter of med-arb, which addresses many of the concerns.³⁹

2.3. IMPORTANCE OF SELECTING THE RIGHT NEUTRAL

The differences between the demands of the job and the skill sets required for an arbitrator versus a mediator was 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

37. *Lindsay v. Lewandowski*, 139 Cal. App. 4th 1618, 43 Cal. Repr. 3d 846 (Ct. Appeals, 4th Dist. Div. 3, 2006) at 43 Cal Repr. 3d, at 850.

38. *Ibid.*, at 43 Cal Repr. 3d, at 853. See also, *Weddington Productions Inc. v. Flick*, 60 Cal. App. 4th 793, 71 Cal. Repr. 2d 265 (Ct. Appeals, 2d District, Div. 2 1998).

39. Gerald F. Phillips, *Same Neutral Med-Arb: What Does the Future Hold?* 60-Jul Disp. Resol. J. 24 (May–July 2005).

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 analysing 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 the use of many of the skills of a psychologist, whereas the arbitrator's role requires use of many of the skills of a judge.

The training offered for each discipline bears 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, whereas in mediation training, significant attention is devoted to how to overcome impasse. The good mediator and good arbitrator employ 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 whom the parties can trust and respect to handle appropriately the special challenges associated with combining the roles of arbitrator and mediator.

With a neutral skilled in both mediation and arbitration, med-arb 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.

3. MEDIATED SETTLEMENT AGREEMENTS AS ARBITRAL AWARDS UNDER THE NEW YORK CONVENTION

The first section of this chapter discussed the issues raised by the same neutral serving as both mediator and arbitrator where the mediation has failed. This section discusses what happens with a successfully mediated dispute by a mediator who has not previously been appointed as an arbitrator. What if a party ultimately fails to comply with the mediated settlement agreement? Should the opposing party be forced to pursue a contract claim to enforce that agreement in a court proceeding, precisely the process the parties sought to avoid through the mediation? Or should a mediated settlement agreement be capable of entry as an arbitration award by an arbitrator appointed after agreement is reached and be enforceable under the New York Convention? As the use of mediation grows, these questions merit serious attention, particularly in international disputes.

3.1. THE NEED FOR AN ENFORCEMENT MECHANISM

A question that requires further exploration if the growth of mediation is to be fostered is whether and how an agreement reached in mediation can be enforced. A mediated resolution is typically achieved much more quickly and cheaply than one in arbitration or litigation, but mediation does require an effort by the parties, with preparation, attendance by counsel and principals at the mediation (which often in international cases requires a significant travel commitment) and sometimes continued discussions over a period of months. Thus, whereas typically there is an expenditure of significantly less time and money in a mediation than in a litigation or arbitration, mediation is not cost-free, and if the settlement agreement reached is not complied with, a great deal of time and money can be lost.

There was a strong effort by those working on the UNCITRAL Model Law on International Commercial Conciliation⁴⁰ to develop a uniform enforcement mechanism. Notwithstanding the effort made, that goal was not achieved. Instead, Article 14 provides that a settlement agreement reached in mediation is enforceable but leaves the enforcement mechanism to the enacting states. The comments to Article 14 recognized that:

many practitioners put forth the view that the attractiveness of conciliation would be increased if a settlement reached during a conciliation would enjoy a regime of expedited enforcement or would for the purposes of enforcement be treated as or similarly to an arbitral award.⁴¹

The desirability of an enforcement mechanism for mediated settlement agreements was confirmed in a survey conducted recently by the International Bar Association's Mediation Committee. The survey results on this issue were summarized by the committee:

(T)he enforceability of a settlement agreement is generally of the utmost important' and 'in international mediation . . . reinforcement is more likely to be sought because of the potential of expensive and difficult cross-border litigation in the event of a failure to implement a settlement'.⁴²

3.2. AVENUES FOR ENFORCEMENT

The avenues for enforcement of mediation settlement agreements (MSAs) are not as robust as they should be if we are to maximize the utility of this dispute resolution tool. Parties can, of course, attempt to enforce the MSA under contract law

40. UNCITRAL Model Law on International Commercial Conciliation, (2004).

41. *Ibid.*, at 55.

42. International Bar Association, Mediation Committee, Sub-Committee on the UNCITRAL Model Law on International Commercial Conciliation, Singapore, October 2007, at 14, available at <www.ibanet.org/ENews_Archive/IBA_November_2007_ENews_MediationSummary.aspx>.

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principles subject to the usual contract defences.⁴³ Typically, however, a contract is what the parties started out with, and litigating a contract again in another posture was not what the parties contemplated when they entered into the mediation and successfully resolved the dispute.

MSAs can be entered as a judgment in some jurisdictions. For example, the EU Mediation Directive expressly contemplates such court action in providing that Member States 'shall ensure that it is possible for the parties, or one of them with the explicit consent of the others, to request that the content of the written agreement be made enforceable . . . by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the Member State where the request is made'.⁴⁴

If a lawsuit has been filed before the mediation has commenced, it is possible in many jurisdictions to have the court enter the settlement agreement as a consent decree and incorporate it into the dismissal order. The court may, if asked, also retain jurisdiction over the court decree.

Even if there is no court proceeding, in some jurisdictions the courts are available to enter a judgment on the MSA. For example, in the United States the Colorado International Dispute Resolution Act was enacted to further the policy of encouraging parties to international transactions to resolve disputes, when appropriate, through arbitration, mediation or conciliation. To foster that goal, the statute provides that a settlement agreement reduced to writing and signed by the parties may be presented to the court as a stipulation and, if approved, shall be enforceable as an order of the court.⁴⁵

However, such court action is not available in all jurisdictions, and historically court judgments and decrees have not been accorded the deference shown to arbitral awards that are recognized and enforced in the more than 140 countries that are signatories to the New York Convention.⁴⁶ Thus, even if a judgment or court decree can be obtained, the difficulties of enforcing a foreign judgment in an international matter often presents significant obstacles to enforcement and renders the judgment of diminished utility.⁴⁷ This difficulty could be obviated if the MSA could be entered as an arbitral award and recognized under the established enforcement mechanisms of the New York Convention.

43. See Edna Sussman, 'Enforcing Mediation Settlement Agreements In the United States', International Bar Association, *Mediation Committee Newsletter* 2, no. 1 (2006).

44. EU Mediation Directive, *supra* n. 3, Art. 6.

45. Colorado R.S.A. § 13-22-308, 13-22-505.

46. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 Jun. 1958, 21 U.S.T. 2518, 330 U.N.T.S. 38.

47. It should be noted that the Hague Convention on Choice of Court Agreements, 30 Jun. 2005, 44 I.L.M. 1294, if and when acceded to as widely as the New York Convention, would enhance the utility of judgments in the international arena because it accords recognition to judgments of courts of a contracting state designated in an exclusive choice of court agreement, available at <www.hcch.net/index_en.php?act=conventions.text&cid=98>.

3.3. ENTRY OF AN ARBITRATION AWARD BASED ON
MEDIATION SETTLEMENT AGREEMENTS

Some jurisdictions expressly provide for the entry of an arbitration award to record an agreement reached in mediation. For example, Article 12 of the Rules of the Mediation Institute of the Stockholm Chamber of Commerce provides:

Upon reaching a settlement agreement the parties may, subject to the approval of the Mediator, agree to appoint the Mediator as an Arbitrator and request him to confirm the settlement agreement in an arbitral award.

Some states in the United States have made similar remedies available for international disputes. For example, the California Code of Civil Procedure provides:

If the conciliation succeeds in settling the dispute, and the result of the conciliation is reduced to writing and signed by the conciliator or conciliators and the parties or their representatives, the written agreement shall be treated as an arbitral award rendered by an arbitral tribunal duly constituted in and pursuant to the laws of this state, and shall have the same force and effect as a final award in arbitration.⁴⁸

Although the enactment of such provisions would seem to be a useful avenue for MSA enforcement, such an appointment after the dispute is settled may be difficult to effect in many jurisdictions because under local law there must be a dispute at the time the arbitrator is appointed. For example, the English Arbitration Act of 1996 provides in its definition of an arbitration agreement in section 6(1) that an 'arbitration agreement' means 'an agreement to submit to arbitration present or future disputes'. Similarly, New York state law provides that an 'agreement to submit any controversy thereafter arising or any existing controversy to arbitration' is enforceable.⁴⁹ As there is no 'present or future dispute' or 'controversy thereafter arising or . . . existing' once the dispute is settled in mediation, such provisions may be construed to mean that it is not possible to have an arbitrator appointed to record the settlement in an award.⁵⁰ Thus, it could be argued that any arbitral award issued by an arbitrator appointed after the settlement would be a nullity and incapable of enforcement under the laws of those jurisdictions.

It may be possible in many jurisdictions to avoid this problem by appointing the arbitrator before the mediation is commenced and having the mediation conducted as an 'arb-med-arb', either by the appointed arbitrator with a carefully

48. California Code of Civil Proc. Title 9.3. Arbitration and Conciliation of International Commercial Disputes, § 1297.401.

49. New York Civil Practice Law and Rules § 7501.

50. A similar result would obtain in Brazil if the settlement is reached before the arbitrator is appointed. 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.

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worded document executed by the parties consenting to such a process⁵¹ or by a separately appointed mediator. Although this may be satisfactory to some, there are many cases in which the party is willing to go to mediation but prefers a court solution to an arbitration if the mediation does not result in resolution.

It should be possible to circumvent this problem by specifying in the MSA that it is governed by the law of a jurisdiction that permits the appointment of an arbitrator after the settlement is achieved. Such a provision should circumvent any attack on the award based on the appointment of the arbitrator after the settlement when there is no longer a controversy.⁵²

Thus, it appears that if the MSA is carefully drafted, parties should be able to mediate and then upon successful resolution appoint the mediator as an arbitrator to record the settlement as an arbitral award. However, the question of whether such an award would be enforceable under the New York Convention remains. Can an award be enforced under the New York Convention if the arbitrator is appointed after the dispute is resolved in mediation? Without this enforcement mechanism, such an arbitration award in an international dispute would be less than sufficient to meet the parties' needs.

3.4. ARBITRAL AWARDS BASED ON PARTY AGREEMENT UNDER THE NEW YORK CONVENTION

In analysing the question of whether an arbitral award entered by an arbitrator appointed after the parties have resolved their differences based on the resolution achieved in mediation can be enforced under the New York Convention, one must first recognize that that it is widely accepted that an arbitrator may enter an 'agreed award'. If the parties reach an agreement during the arbitration, an agreed award is generally just a reflection of the agreement of the parties and does not reflect the arbitrator's own analysis and conclusions as to the dispute. The United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration adopted by UNCITRAL in 1985, amended in 2010, expressly permits such awards and their recognition. Article 31 provides

51. See discussion *supra*, § I.

52. For example, the U.S. Supreme Court decision in *Volt Information Service v. Leland Stanford Junior University*, 489 U.S. 468 (1989) has been construed to mean that parties can agree to abide by state rules of arbitration. Accordingly, parties should be able to agree to the appointment of an arbitrator in an MSA that is to be governed by the laws of a jurisdiction that permits it. Thus, in California such a process should be possible. Although California, like New York, defines an arbitration agreement as one governing 'an existing controversy or a controversy thereafter arising', California Code of Civil Proc. Title 9.3. Arbitration and Conciliation of International Commercial Disputes, § 1281, the specific grant by statute in California of the right to have the mediator/conciliator enter an arbitration award based on a mediated settlement agreement in international disputes should be construed to override any objection based on the general definition of the arbitration agreement. See *Bulova Watch Company v. United States*, 365 U.S. 753, 758 (1961) ('a specific statute governs over a general one').

that: 'such an [agreed] award has the same status and effect as any other award on the merits of the case'. Similar provisions giving full deference to 'agreed awards' are found in the rules governing the International Chamber of Commerce (ICC), International Centre on Dispute Resolution (ICDR) and International Centre for Settlement of Investment Disputes (ICSID) arbitration and the arbitration laws of many countries.

Most would agree that such agreed awards rendered by an arbitrator appointed before the settlement of the dispute are governed by the New York Convention and enforceable. Whether the same result holds if the arbitrator is appointed after the settlement of the dispute as a result of mediation, such as can it seems be achieved in California and under the Stockholm Rules, is less certain. Commentators who have analysed this question have come to differing conclusions. Some have concluded that it is not enforceable.⁵³ Others have concluded that it is.⁵⁴ Others, yet, conclude that the result is not clear.⁵⁵

The relevant portion of the New York Convention provides in Article I(1) that the Convention applies to the recognition and enforcement of awards 'arising out of differences between persons'. The language of the New York Convention does not have the precise temporal element of such local arbitration rules as set forth in the definitions of an arbitration agreement found in English or New York law that require a 'present or future' dispute or a 'controversy thereafter arising or . . . existing'. The reference to a 'difference' in Article I(1) of the New York Convention does not specify when that 'difference' had to exist in time in relation to the time of the appointment of the arbitrator. Thus, the Convention language does not seem to expressly bar recognition of an award rendered by an arbitrator appointed after resolution of the dispute. Nor would enforcement seem to otherwise be barred by other provisions of the Convention. It could be argued that that even if the law of the country where enforcement is sought would not permit the entry of an award by an arbitrator appointed after resolution of the dispute, such a legal difference ought not to rise to the level of being contrary to such a fundamental public policy of any country as would preclude enforcement of such an award under the public policy exception of Article V(2)(b) of the Convention.⁵⁶

53. Christopher Newmark and Richard Hill, 'Can a Mediated Settlement Agreement Become an Enforceable Arbitration Award?' *Arbitration International* 16, no. 1 (2000), 81; James T Peter, 'Med-Arb in International Arbitration', *American Review of International Arbitration* 8 (1997), 83, 88.

54. Harold I. Abramson, 'Mining Mediation Rules for Representation Opportunities and Obstacles', *American Review of International Arbitration* 15 (2004), 103.

55. See, Ellen E. Deason, 'Procedural Rules for Complimentary Systems of Litigation and Mediation – Worldwide' *Notre Dame Law Review* 80 (2005), 553, fn. 173.

56. See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth*, 473 U.S. 614, 629, 639 (1985) ('concerns of international comity, respect for the capacities of foreign and transnational tribunals and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, *even assuming that a contrary result would be forthcoming in the domestic context*'). [Emphasis added.]

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Increasing attention is being directed to the meaning of the New York Convention as it relates to the issuance of an arbitration award based on an MSA.⁵⁷ The differences of opinion as to the applicability of the Convention to MSAs suggest that the Convention is at least ambiguous. It is time to review the issue and consider providing interpretive guidance to the courts. An analysis of the underlying policy issues would inform a conclusion as to the optimal interpretation of the Convention. Questions such as whether there is a principled basis on which to distinguish between an agreed award, which is widely accepted as enforceable, and an award rendered by an arbitrator appointed following a mediated settlement must be explored. Whether there is a need to preserve contract defences to ensure self-determination in agreements between parties of unequal bargaining power should be reviewed. The importance of providing an effective enforcement mechanism in the international context should be weighed.⁵⁸

UNCITRAL recommendations are one available mechanism for clarifying the meaning to be given to the New York Convention's language.⁵⁹ A UNCITRAL recommendation could clarify the applicability of the Convention to international arbitration awards entered into with the consent of both parties as a result of a mediation by an arbitrator appointed after the conclusion of the mediation.

With the recent fiftieth anniversary of the New York Convention in 2008, many scholars and practitioners have discussed whether and how the Convention should be amended to address issues that have arisen with respect to certain articles of the Convention. The New York Convention has proven to be of tremendous value in achieving its purpose of fostering international trade. To capitalize on the enforcement mechanisms available under the New York Convention, those reviewing it should not only look backward for past problems but also forward in assessing how and whether the Convention should be reshaped in the context of mediation settlement agreements.

The Convention was drafted long before mediation's current acceptability and usage. It can and should be reviewed with an eye toward keeping it current and enhancing its relevance to the realities of today's dispute resolution world. Consideration should be given to recommending an interpretation clarifying the applicability of the New York Convention to an award issued by an arbitrator appointed after a mediated settlement agreement is reached that reflects such an agreement.

57. For a comprehensive discussion of enforcement of an MSA under the New York Convention, see Brette L. Steele, 'Enforcing International Commercial Mediation Agreements as Arbitral Awards Under the New York Convention', *UCLA Law Review* 54 (2007), 1385.

58. For a discussion of these issues, see Deason, *supra* n. 55, 80 *Notre Dame Law Review* (2005), at 580–592.

59. For example UNCITRAL adopted a recommendation in July 2006 that Art. II(2) be applied 'recognizing that the circumstances described therein are not exhaustive' in recognition of the fact that the writing requirement in the New York Convention might be too limiting in light of the development of modern technology. Text available at <www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2006recommendation.html>.

Edna Sussman

4. CONCLUSION

The issues raised by combinations and permutations of arbitration and mediation are not simple or easy to resolve. But we live in an age of constant innovation in all spheres. Those engaged in endeavouring to develop and deliver optimal dispute resolution processes to parties and clients should embrace the opportunity to further explore the possibilities afforded by these hybrid approaches.