

Hybrid Dispute Resolution Processes – Getting the Best while Avoiding the Worst of Both Worlds?

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The litigation climate is changing. “Just, cheap and quick” is the objective. Courts are beginning to streamline their processes. Unless arbitrators willingly facilitate settlement, arbitration will become less attractive than litigation. One option is to entertain the use of hybrids such as Med-Arb and Arb-Med in appropriate cases. Although these processes offer flexibility, speed and economy, they give rise to significant concerns which inhibit their widespread use, especially in common law countries. These concerns can be overcome. Hybrids offer significant advantages over both mediation alone and arbitration alone. Their wider acceptance may enable arbitration to withstand competition from the courts.

You have just been approached by the in-house counsel for Macros*ft UK Co. Limited (“Macros*ft”), who wants you to mediate a complicated case involving a claim for infringement of the MACROS*FT® trademark through the importation of alleged “grey goods”, ie. goods produced in other countries with the authority of the owner in those countries of the identical trademark. If the mediation is unsuccessful, he wants you to issue an arbitral award as to infringement and damages that will be binding on Macros*ft and the defendant.

This is a new process, both for you and for Macros*ft’s counsel. The idea came from the defendant’s counsel. The defendant is an authorized distributor of Macros*ft’s overseas parent company, supplying goods under the MACROS*FT® mark in other parts of the world, in accordance with the territorial restrictions of its licence agreement. It claims that it is not responsible for any imports that find their way into your country and that the litigation amounts to an abuse of the plaintiff’s market power in violation of applicable competition law. Alternatively, it contends that, on the true construction of the licence agreement, it is authorized to supply goods bearing the mark into your country. The defendant is adamant that the plaintiff is acting in bad faith. The defendant’s CEO is also becoming increasingly unhappy at the lawyers’ fees generated in preparation for hearing. Her counsel believes settlement is in the best interests of all involved, but is not confident this can be achieved through assisted negotiation. Thus, counsel has obtained her client’s agreement to abide by an arbitrator’s ruling in the event that mediation doesn’t work.

Above all, both sides want the matter resolved, one way or another, within 3 months. If this timetable can’t be arranged by agreement, they will both be better off using the new “Fast Track” procedures introduced by the Federal Court of Australia for *inter alia* trademark and competition law cases, which involve case summaries instead of pleadings, substantial reduction in the volume of discovery, a “chess clock” trial and

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judgment within 5 to 10 months of commencement and within 6 weeks of the hearing, and even sooner in urgent cases.²

In your past life as an Intellectual Property and Competition lawyer you litigated extensively in such cases and are familiar with the issues. You have been mediating full-time for ten years. You have also arbitrated frequently during the last eight years and have been recognized as a Fellow of the Chartered Institute of Arbitrators in both mediation and arbitration. However, you have never conducted a Med-Arb process.

What do you do?

Before addressing this question, you may wish to survey some ADR processes.

The hallmark of arbitration, mediation and other ADR processes is self-determination, also called party autonomy. Whether the process is directed at an agreed or an imposed outcome, the parties determine for themselves to embark on their chosen process. Thereafter their degree of control will differ depending on the process chosen³. No wonder that ADR offers a rich variety of processes designed to suit all types of disputes and all types of disputants.

The processes considered in this paper are known as hybrids because they combine elements of otherwise self-contained processes. You are of course familiar with them in their stand alone form:

Mediation

All attempts to define mediation involve one or more neutral persons trying to help disputants reach their own uncoerced agreement. There are many ways in which this may be done and much argument about the "right" way and the "wrong" way, for example:

- (a) the mediator might take an "evaluative" approach, expressing opinions as to who is right or wrong and who is likely to win or lose if the dispute were litigated or arbitrated. The aim is primarily to settle the dispute and, if not, to improve understanding of the issues and to narrow them. By focusing on the problem, this approach may not necessarily address underlying issues, of which the problem may be merely a symptom;
- (b) the mediator might take an "interests-based" or "facilitative" approach, seeking to clarify the interests of the parties that underlie their respective positions, so as to explore possible options for agreement that would satisfy those interests sufficiently on all sides. When employed in the context of a dispute, the aim is primarily to resolve the dispute in a way which addresses the underlying issues and may also enable the parties to deal better with their differences (and those of others) in the future; or

² See http://www.fedcourt.gov.au/how/fast_track_list.html.

³ This paper does not address the extent (if any) to which the principle of self-determination may be said to be eroded where courts order arbitration or mediation over the objection of one or more of the parties.

- (c) the mediator might take a “transformative” approach, which treats conflict as an opportunity for moral growth and transformation, focusing on enhancing the parties’ relationship by empowering them to handle their own situations better and to recognize each other’s concerns. The aim is to empower the parties to deal better with differences in future, even though today’s dispute may remain unresolved. According to the leading proponents of transformative mediation, Robert A. Baruch Bush and Joseph P. Folger⁴, the empowerment and recognition gained by the parties in transformative mediation often do enable them to achieve a mutually agreeable outcome, whereas (as they see it) the settlement- and resolution-oriented mediation processes followed by evaluative and interests-based mediators ignore relationship issues and may not lead to empowerment and recognition.⁵

It follows from the variety of approaches that choice of mediator is a question of “horses for courses” and that there is no single approach suitable for all cases and all disputants.

There is also variety in procedure. Some mediators move almost immediately into separate private meetings with the parties (caucuses) and keep them separated while shuttling to and fro’. Some virtually never hold a caucus, preferring to keep the parties together. Many prefer to hold a caucus at least once with each side either before or during the mediation session(s) because until they have done so, they cannot be sure they understand all the parties’ interests that any settlement agreement would need to meet. Also, sometimes it may be better for the parties to vent about each other to the mediator than to each other.

One important feature of interests-based mediation is that parties are encouraged to disclose their innermost confidences privately to the mediator, secure in the knowledge that the mediator may not use or disclose them unless all concerned agree or unless compelled by law⁶ and that the mediator’s role is simply to help them seek an agreed outcome.

This has important implications for your consideration of hybrid processes.

⁴ See *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (1994), Jossey Bass.

⁵ Most facilitative mediators regard addressing relationship issues as very important.

⁶ The extent to which mediation is or should be confidential is a hot topic which it is not the purpose of this paper to address. See Mr. Justice Briggs, *Mediation Privilege?*, 159 *New Law Journal* 506 and 550, April 2009. See also my papers *Whither confidentiality? - Some thoughts prompted by Brown v. Rice and Patel [2007] EWHC 625 (Ch) (14 March 2007)*, Chartered Institute of Arbitrators Mediation Seminar *The Experts Speak*, London, 11 June, 2007 and *Should there be a distinct ‘Mediation Privilege’?* Chapter III, Newsletter of the Law Council of Australia Federal Litigation Section, March 2009, Vol.2.

Arbitration

Arbitration likewise has many forms but (unless ordered by a court) necessarily involves the parties agreeing to have their dispute resolved by a person or persons chosen by them (or by a process chosen by them) rendering what is usually a binding⁷, enforceable decision which may be set aside by the courts only on very narrow grounds.

American arbitration processes include 'Hi-Lo' arbitration, in which the parties set limits on the outcome so as to contain possible arbitrator excess; 'Baseball' or 'Final Offer' arbitration, in which the arbitrator must choose between the parties' best monetary offers; and 'Night Baseball' arbitration, in which the arbitrator is unaware of the parties' best offers before making a decision and must then make the award conform to the offer of the party whose best offer turns out to be closest to the arbitrator's decision.

The supervision which courts may exercise imposes important constraints on the arbitrator's conduct of the proceedings. Awards may be set aside where there has been misconduct by the arbitrator or where the award has been improperly procured. An arbitrator may be removed for misconduct or incompetence or where undue influence has been exercised in relation to the arbitrator. 'Misconduct' includes corruption, fraud, partiality, bias and a breach of the rules of natural justice⁸. The last three are particularly relevant to your consideration of hybrids.

In international commercial arbitration, awards may be set aside by the courts in the country in which the arbitration takes place and enforcement may be refused wherever the award was made if, among other things, the arbitral procedure was not in accord with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place;⁹ or if the recognition or enforcement of the award would be contrary to the public policy of that country.¹⁰

With that background, you will now wish to consider the hybrids.

Med-Arb

Although many believe Med-Arb to be relatively novel, Professor Derek Roebuck has traced its use back to the ancient world:

*"Everywhere in the Ancient Greek world, including Ptolemaic Egypt, arbitration was normal and in arbitration the mediation element was primary"*¹¹.

⁷ One form of arbitration is non-binding, in which case the neutral's decision is advisory only.

⁸ For discussion of the term 'misconduct' see e.g. *London Export Corp. Limited v. Jubilee Coffee Roasting Co. Limited* [1958] 1 WLR 27 and *Sea Containers Ltd. v. ICI Pty. Ltd.* [2002] NSWCA 84.

⁹ UNCITRAL Model Law, Articles 34(2)(a)(iii) and 36(a)(iv) and New York Convention, Article V(1)(d).

¹⁰ New York Convention, Article V(2)(b).

¹¹ Roebuck, D *The Myth of Modern Mediation* (2007) 73 *Arbitration* 1, 105 at 106.

In one form of Med-Arb, the parties agree in advance that (either in any disputes that may arise between them or in a particular dispute that has arisen) 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. It is important, especially in international commercial disputes, that the process should formally begin as an arbitration. Otherwise, if the dispute is settled at mediation, there will be no “dispute” on foot entitling the parties to an enforceable consent award.¹² If the mediation does not produce agreement on all issues, the mediator becomes arbitrator and hears and determines the remainder. The award may be non-binding or binding depending upon the agreement entered into by the disputants.

Another form involves different neutrals fulfilling the roles of mediator and arbitrator¹³. The feature that has attracted the most criticism is having both roles played by the same person.

Other variants of Med-Arb include Non-Binding Med-Arb (rarely used because there is no certainty of resolving the dispute); Med-Arb Show Cause, in which a tentative award is made to give the parties an opportunity to show cause as to why the dispute should not be so resolved; and MEDALOA (Mediation and Last-Offer [aka Baseball] Arbitration) in which the arbitrator does not reach an independent decision on the merits but instead must choose between the parties’ final offers.

Unlike mediation alone and arbitration alone, Med-Arb has the advantage of offering both the possibility of resolution by the parties’ own agreement and, failing such agreement, the certainty of resolution by the binding decision of the arbitrator. Where the neutral has the skills necessary to conduct both processes, there is a saving in both time and money in combining them, since the neutral is already “up to speed” when changing from one role to another and may gain insights during the mediation that could contribute to a more appropriate award.

Arb-Med

This is the reverse of Med-Arb. The arbitrator’s award is sealed and is not revealed while the arbitrator proceeds to mediate. If the mediation is successful, the settlement agreement between the parties governs the resolution of the dispute and the award is never unsealed. However, if mediation fails to settle all issues, the arbitrator-mediator will unseal the arbitral award and deliver it to the parties to resolve the dispute.

Arb-Med has been used in South African union management relations in the auto and steel industries and in the United States in police and firefighter arbitrations. As Michael Leathes has demonstrated in a fascinating DVD, Arb-Med was used successfully in a strictly time-controlled way to enable the price to be determined (in the mediation phase, as it happened) for the transfer of intellectual property.

¹² See Newmark C and Richard H *Can A Mediated Settlement Become An Enforceable Arbitration Award?*(2000) 16 *Arbitration International* 8.

¹³ This is the approach recommended by the Singapore Mediation Centre. See http://www.mediation.com.sg/Med-Arb_what_is.htm

Arb-Med has been proposed for use in the United States in the airline industry, where Med-Arb led to the average negotiation period (including mediation) to renew a standard airline contract taking more than a year. To negotiate an initial contract took over 2½ years. It was suggested that Arb-Med would remedy this situation because there would be a rapid arbitration with a final and binding decision, to be followed by mediation during a finite time period, which may be shortened if the arbitrator serves as the mediator¹⁴.

Advantages of these hybrids

Apart from relative speed and economy, both Med-Arb and Arb-Med ensure certainty that, either by agreement or by award, the dispute will be resolved. The parties are at liberty to put a time limit on that in their Med-Arb or Arb-Med agreement. If they use only mediation, they run the risk of not settling all the issues in dispute. If they use only arbitration, they know that all the issues will be resolved but they deprive themselves of the creative options their own negotiated settlement agreement might provide.

In the mediation phase of these hybrids, any “suggestions” by the mediator may carry more weight than in mediation alone: in Med-Arb the mediator will have the final say as arbitrator if the dispute is unresolved and in Arb-Med the parties might take the mediator’s suggestions as providing a glimpse of the already sealed award, and may thus be helpful in enabling them to reach agreement.

One study reported in 2002 in the *Journal of Applied Psychology* examined the impact of Med-Arb and Arb-Med on various dispute outcomes involving three disputant structures (individual v. individual, individual v. team, and team v. team). The authors found that disputants in the Arb-Med procedure settled in the mediation phase more frequently and achieved settlements of higher joint benefit than did disputants in the Med-Arb procedure. They concluded that Arb-Med may have broader applicability than originally imagined¹⁵.

Another study investigated the effects of these hybrid procedures on parties’ perceptions of procedural and distributive fairness. In the first experiment, three variables were manipulated: procedure (Med-Arb v. Arb-Med), concession making during the mediation phase (concessions v. no concessions), and role (labor v. management). Participants viewed Med-Arb as fairer than Arb-Med. In the second experiment, the factors manipulated were third-party procedure (Med-Arb v. Arb-Med), whether confidential information was revealed during mediation (confidential information revealed v. not revealed), and arbitration outcomes (winning v. losing).

The results suggested that when no confidential information was revealed, Med-Arb was seen as a significantly fairer procedure than Arb-Med, but if confidential information was revealed, then both procedures were seen as equally fair. This

¹⁴ Zack AM *The Quest For Finality In Airline Disputes: A Case for Arb-Med*, *Dispute Resolution Journal*, Nov 2003-Jan 2004.

¹⁵ Conlon DE, Moon H, Ng KY *Putting the cart before the horse: The benefits of arbitrating before mediating*, *Journal of Applied Psychology*. 2002 Oct Vol 87 (5) 978-984.

conclusion may come as a surprise to mediators. Not surprisingly however, winning the dispute increased fairness ratings.¹⁶

Criticisms of Arb-Med

The most frequently made criticism of Arb-Med is that, if the dispute is settled in the mediation phase, the possibly considerable time and money spent on the preceding arbitration phase will have been wasted. Michael Leathes and his opposite number overcame this by stipulating that the arbitration phase last only one morning, while the mediation phase occupy the afternoon. (The award was written over lunch).

Another criticism of Arb-Med, the obverse to the advantage mentioned above, is that where suggestions by the mediator in the mediation phase are taken as hints as to the content of the already sealed arbitral award, the parties will be inappropriately coerced into settlement.

However, Arb-Med does have the advantage that it avoids the criticisms of the Med-Arb process mentioned below.

Criticisms of Med-Arb

The potential to save time and money for disputants needs to be weighed against the numerous criticisms of Med-Arb, to the effect that linking mediation and arbitration in the same third party neutral threatens to distort both aspects of the process, inhibiting disputants' bargaining creativity and forthrightness, tainting the Med-Arb practitioner's interventions, and threatening the validity and enforceability of the arbitral award.

Behavioral criticisms of Med-Arb include:

- (i) disputants are likely to be inhibited in their discussions with the mediator if they know the mediator might be called upon to act as arbitrator in the same dispute. They will be wary of disclosing what they really care about (as opposed to what they claim to care about in their legal papers) and this unwillingness to reveal their underlying needs and interests will thwart the mediator's ability to detect points of synergy or common ground. Moreover, they are unlikely to let the mediator know their "bottom line" if they think that may turn up in any subsequent award;¹⁷
- (ii) it is easier to let a third-party sort things out rather than engage in the hard work of dialogue, disclosure and compromise. Presenting disputants with arbitration as an end-point might lead them to treat the mediation phase as a mere prelude to arbitration, thereby rendering

¹⁶ Ross WH, Brantmeier C, Ciriacks T *The impact of hybrid dispute-resolution procedures on constituent fairness judgments*, Journal of Applied Social Psychology, 2002, 32.

¹⁷ Redfern & Hunter *Law and Practice of International Commercial Arbitration* 4th Ed. 1-82.

more likely the failure of the mediation and an arbitrated result all the more inevitable;

- (iii) mediators often make suggestions or try to persuade a party to make or accept an offer. In the context of Med-Arb, this may be taken as pressure, in the form of an implied threat to make an adverse decision as arbitrator if the party is perceived as unreasonable during the mediation.

You know from experience that even in stand-alone mediation, disputants will be only as forthcoming and hard-working with the mediator as they think appropriate. If no mediated agreement is reached, the dispute will still be resolved by arbitration within the pre-arranged time. The mediator can avoid the problem of implied coercion by being careful to avoid making suggestions and exerting significant pressure on either party to proffer or accept a particular settlement. Adopting a more facilitative – as opposed to evaluative – stance in mediation will obviously go a long way to alleviate perceived coercion and pressure. Ensuring wholehearted disputant participation in the mediation phase of Med-Arb is often a matter of discerning case-selection. Choosing the kind of dispute most conducive to private discussion with the mediator about issues other than who is right and who is wrong may be critically important here. More on this point later.

Other criticisms focus on the requirements of procedural fairness in proceedings culminating in binding decisions imposed by judges and arbitrators. Unlike mediation, where disputants retain decisional autonomy, disputants accord to judges and arbitrators the power to determine the outcome of their disputes, while retaining certain procedural rights, including the right to be heard, to know the case they have to meet and to be judged by an unbiased, impartial decision-maker.

Procedural fairness criticisms of Med-Arb include:

- (i) allowing an arbitrator to be privy to private representations made during the mediation phase creates an appearance of bias and may actually bias the arbitrator when determining the dispute;¹⁸
- (ii) procedural fairness requires that arguments be made in the presence of the opposing party and be subject to rebuttal. In Med-Arb, the mediator-turned-arbitrator is usually bound to keep strictly confidential all private disclosures made in the mediation phase.

Although these are potent criticisms, many courts and legislatures recognize that parties may validly consent to these encroachments and thereby waive their procedural rights. Given the importance of ensuring, for the purposes of Article V(2)(b) of the New York Convention, that an international arbitral award made at the end of the Med-Arb process will be valid and enforceable in the country or countries concerned, an important contribution to the learning in this field would be research identifying those New York Convention countries in which waiver of the right to procedural fairness is or is likely to be regarded as contrary to public policy.

¹⁸ *The Duke Group Ltd (In Liq.) v. Alamain Investments Ltd & Ors*, [2003] SASC 272.

How to make Med-Arb work?

Some possible ways of avoiding the difficulties with Med-Arb while retaining private caucus in the mediation phase include:

- having different people conduct the two different phases, while sitting together in the open sessions, so that the person who may later officiate as arbitrator is brought up to speed but is not exposed to communications in caucus which could give rise to a perception of bias, while the person mediating has available the full range of mediation techniques conducive to settlement. While providing some time saving and ensuring certainty of resolution, there is of course the additional cost of having a second person present;
- giving the parties an opportunity, after the mediation phase, to choose someone else to arbitrate. This raises the possibility that the economy and efficiency sought to be secured by the process will not be attained and does not adequately address the procedural fairness issue if the parties choose to continue with the same person;
- the parties could agree, either at the outset or before each stage that the arbitrator need not observe the rules of procedural fairness when mediating, thus enabling private meetings, and that no objection of bias or otherwise will be made to the conduct of the arbitration based on anything that occurred during the mediation; and
- the Med-Arb agreement could require the arbitrator, at the start of the arbitration phase, to provide a report to the parties setting out all the rebuttable facts and points of law as then understood by the arbitrator, giving the parties an opportunity to object to the admissibility of any of the facts. Admitted facts would provide a starting point for the arbitration phase. This could reduce the risk of the arbitrator relying on confidential information and enable the desired economies to be realized. Of course, in preparing such a report, the arbitrator would need to avoid use of any confidential information.

Unless the parties agree otherwise, the arbitrator in Med-Arb may not take into account anything disclosed in confidence during the mediation.¹⁹

While a competent 'Med-Arbiter' can exclude from consideration confidential information in the same way as a competent arbitrator or judge can exclude from consideration evidence he or she has heard but ruled inadmissible, there is an important difference between the two situations: all parties in arbitration are aware of the evidence that has been ruled inadmissible, while in Med-Arb only one party knows what confidential information it has confided in the Med-Arbiter.

¹⁹ For an example of a case in which the proceeding went off the rails in this respect and "produced a result that is precisely what alternative dispute resolution is designed to prevent", see *Bowden v. Wiekert*, Ohio Court of Appeals, No. S-02-017 (June 20, 2003).

Despite the difficulties inherent in the attempt to combine these two totally different processes, some success has been reported. Med-Arb has long been used in the United States in labour and family disputes, including post-decree disputes concerning children. Research conducted in Canada in 2000 into the use of Med-Arb in Crown employee grievances in Ontario²⁰ came to some interesting and controversial conclusions:

- the success of Med-Arb in solving labour disputes is highly dependent on the med-arbiter, whose skill and experience are essential;
- many critics of Med-Arb are actually expressing concerns about possible abuse of the process by the med-arbiter, rather than about the process itself;
- experienced med-arbiters are able to move from one role to the other and ensure that arbitration is not adversely affected by information learned during mediation;
- med-arbiters are careful not to go beyond their role as facilitators and the possibility of arbitration is not used as a threat during mediation, although med-arbiters do refer at times to the outcome of similar cases;
- Med-Arb works best when the parties choose the process voluntarily and when they choose the med-arbiter with whom they are comfortable, thus creating conditions most conducive to the success of mediation; and
- the success of Med-Arb is evident in the fact that very few cases progressed to the arbitration stage.

It was concluded that the research fails to support the usual criticisms. This may be unsurprising since the research surveyed med-arbiters rather than disputants or their lawyers!

In Australia, section 27 of the (domestic) *Commercial Arbitration Act (NSW) 1984* and its state and territory counterparts provides that parties to an arbitration agreement may authorize an arbitrator to act as a mediator between them before or after proceeding to arbitration. Unless the parties otherwise agree in writing, an arbitrator is bound by the rules of natural justice (aka procedural fairness²¹) when seeking a settlement by mediation. If the dispute is not settled in the mediation, no objection shall be taken to the conduct by the arbitrator of the subsequent arbitration proceedings solely on the ground that the arbitrator had previously acted as mediator in the dispute. The parties may waive their right to procedural fairness in the

²⁰ Telford ME *Med-arb: a viable dispute resolution alternative*, Industrial Relations Centre, 2000.

²¹ A doctrine of the common law which attaches to the exercise of public power, subject to any statutory modification of the common law in that regard: see *Kioa v West* (1985) 159 CLR 550 at 576, 581, 632; *Annetts v McCann* (1990) 170 CLR 596 at 598; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 574-575; *Attorney General (NSW) v Quin* (1990) 170 CLR 1 at 57. The doctrine includes the right to know the case one has to meet and to be given an opportunity to be heard before a decision is made affecting one's interests.

mediation phase, thereby allowing private sessions, but procedural fairness must be observed in the subsequent arbitration phase. By contrast, the international arbitration legislation of both Hong Kong²² and Singapore²³ requires the arbitrator, before proceeding with the arbitration phase, to disclose any relevant information obtained in confidence from the other party during the mediation phase.

In Australia, where the parties agree that private sessions may be held during the mediation, no objection may be taken to the conduct of the arbitration or the content of the award on the ground of bias or the appearance of bias merely because the arbitrator held private meetings as mediator. Nor may any objection be taken that the parties were not informed as to what occurred privately in the mediation.

Apart from statute, the South Australian *Duke Group* case²⁴ and the UK case of *Glencot v. Barrett*²⁵ confirm that the mere holding of private sessions in the mediation phase creates the appearance of bias in the arbitrator. However, those and other cases also establish that an objection on that ground may be waived. The judge in the *Duke Group* case cited the following relevant principles:

*"It would be inconsistent with basic notions of fairness that a judge should take into account, or even receive, secret or private representations on behalf of a party or from a stranger with reference to a case which he has to decide".*²⁶

*"...save in the most exceptional cases, there should be no communication or association between a judge and one of the parties (or the legal advisers or witnesses of such a party) otherwise than in the presence of or with the previous knowledge or consent of the other party".*²⁷

Note the words "or consent", clearly indicating that, apart from statute, the law will allow private communications with a judge [read 'arbitrator'] where the parties consent beforehand.

The idea that parties should consent before a mediator may turn arbitrator accords with the important principle in arbitration of party autonomy.

Article 12 of the UNCITRAL Model Law on International Commercial Conciliation (2002) (in which conciliation is defined to include mediation) adopts a similar approach:

²² See sections 2A-2C of the *Arbitration Ordinance* (Cap 341) (Hong Kong).

²³ See section 17 of the *International Arbitration Act* (Cap134A) (Singapore), which followed the Hong Kong Arbitration Ordinance in this regard.

²⁴ *The Duke Group Ltd (In Liq.) v. Alamain Investments Ltd & Ors*, [2003] SASC 272.

²⁵ *Glencot Development & Design Ltd v Ben Barrett & Son (Contractors) Ltd* [2001] EWHC Technology 15 (13th February, 2001).

²⁶ *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 350 per Mason J.

²⁷ Per McInerney J in *R. v. Magistrates' Court at Lilydale; Ex parte Ciccone*[1973] VR 122 at 127, cited with approval by Gibbs CJ and Mason J in *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 346 and 350.

“Unless otherwise agreed by the parties, the conciliator shall not act as an arbitrator in respect of a dispute that was or is the subject of the conciliation proceedings ...”

The accompanying Guide describes this as ‘a default rule subject to party autonomy’ and comments:

“In some cases, the parties might regard prior knowledge on the part of the arbitrator as advantageous, particularly if the parties think that this knowledge would allow the arbitrator to conduct the case more efficiently. In such cases, the parties may actually prefer that the conciliator and not somebody else be appointed as an arbitrator in the subsequent arbitral proceedings. The provision poses no obstacle to the appointment of the former conciliator provided the parties depart from the rule by agreement— for example, by a joint appointment of the conciliator to serve as an arbitrator.”²⁸

Some UK cases have suggested that the *Human Rights Act 1998*, which implemented the European Convention on Human Rights, may preclude waiver of the right to procedural fairness guaranteed by Article 6 of the Convention²⁹. However, this may apply only to court proceedings, since other cases have held that “parties to a consensual arbitration waive their Article 6 rights in the interests of privacy and finality.”³⁰

The Victorian Law Reform Commission recently reported³¹:

“The Commission believes “hybrid” dispute resolution processes should be included in the list of ADR options available to the parties. The US experience suggests that hybrid processes can be very effective in the right circumstances and offer parties another alternative to conventional dispute-resolution approaches”.

The Australian branch of the Chartered Institute of Arbitrators is about to launch a set of Med-Arb Rules under which a party to a contract which refers a relevant dispute to Med-Arb in accordance with those Rules must notify the dispute to the branch, which will appoint two neutrals to resolve the dispute. The first will accept appointment as an arbitrator (thus attracting the operation of the *Commercial Arbitration Act*) and then proceed to mediate and, unless the parties otherwise agree, will hold private sessions. If the mediation does not resolve the dispute entirely, the first neutral will proceed to arbitrate but only if:

²⁸ <http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/ml-conc-e.pdf> at paragraphs 78 – 81.

²⁹ See eg. *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576 (11 May 2004) and *Glencot Development & Design Ltd v Ben Barrett & Son (Contractors) Ltd.* [2001] EWHC Technology 15 (13th February, 2001).

³⁰ *North Range Shipping Ltd. v Seatrans Shipping Corp.* [2002] EWCA Civ 405 (14th March, 2002), cited with approval in *ASM Shipping Ltd of India v. TTMI Ltd of England*, [2006] EWCA Civ 1341 (16 October, 2006). See also *Nordström-Janzon v Netherlands* (28101/95, 6 27th November 1996).

³¹ VLRC Civil Justice Review Report (2008) at p.235.

- (a) both parties expressly authorise the first neutral to do so and waive any objection on the grounds that he or she may have received private communications during the mediation; and
- (b) the first neutral agrees to act as arbitrator.

If these conditions are not met, the Branch will ask the second neutral to determine the dispute by arbitration.

A recent important initiative in the UK by the CEDR Commission on Settlement in International Arbitration, co-chaired by Lord Woolf and Professor Kaufmann Kohler, involved a world-wide consultation on ways to include more settlement efforts in arbitration³². The Commission's Report proposes, as a general principle, that the arbitral tribunal should facilitate a negotiated settlement unless the parties otherwise agree³³. Except in jurisdictions where the courts consider it to be a common and accepted practice for arbitrators to engage in interest based mediation involving private meetings with the parties, the Commission discourages Med-Arb with private meetings because of the risks to the validity and enforcement of any award. Nevertheless the Commission has formulated suggested safeguards designed to minimize those risks. These involve:

- (a) explaining the risks to the parties beforehand;
- (b) raising the possibility of another neutral conducting the mediation;
- (c) obtaining in writing at each stage (as distinct from a compendious consent in advance):
 - (i) consent to the arbitrator mediating;
 - (ii) consent to the holding of private meetings during the mediation:
 - either stating that the arbitrator is under no obligation to disclose information obtained in confidence but should disregard it for the purposes of an arbitration award;
 - or stating that the arbitrator is under a duty to disclose any information obtained relevant to a potential arbitration award so that the other party may comment;
 - (iii) consent to the arbitrator resuming as arbitrator after the mediation;
- (d) obtaining a waiver of any objection that the arbitrator has acted as a mediator as a basis for challenging the arbitrator or any award which the arbitrator may make (either alone or as part of a tribunal); and

³²

See

http://www.cedr.com/about_us/arbitration_commission/Arbitration_Commission_Doc_Final.pdf.

³³

Paragraph 2.4.2.

- (e) requiring the arbitrator to resign if, as a consequence of having mediated, he or she develops doubts as to his or her ability to remain impartial or independent in the future course of the arbitration.

You may think these are sensible safeguards. It should be noted, however, that one option which some parties may find attractive is expressly to permit the arbitrator to rely on any confidential information received at mediation, without disclosing it. This happened in a Med-Arb described by Professor Mordehai (Moti) Mironi:

*“Special provisions were added to the agreement to protect the mediators and their award against a party’s attempt to quash our decision for lack of neutrality. The provisions stipulated that the parties had selected the mediators as arbitrators knowing that we had acted previously as mediators, had conducted private caucuses and had received confidential information. The parties agreed that we would use all this confidential information for our decision, waiving any right they had to attack the award for that reason”.*³⁴

The CEDR Commission’s suggestion requiring resignation whenever the arbitrator is in doubt as to his or her impartiality or independence may be too inflexible an approach. It should be sufficient that when unable to maintain the required degree of independence or impartiality, the arbitrator should promptly take such steps as may be required in the circumstances, which may include resignation. This standard, which the Practice and Standards Committee of the Chartered Institute of Arbitrators is presently contemplating incorporating in the Institute’s Code of Professional and Ethical Conduct, has sufficient flexibility to allow the parties, upon being informed of the arbitrator’s concerns, to lower the required standard of independence or impartiality and thereby permit the neutral to continue to officiate.

In commenting on the (recent) success of mediation, one of the UK’s leading mediators, Philip Naughton QC, has said:

*“Perhaps the next step will be the recognition that this new process³⁵ need not be fenced off from arbitration so that at least any fencing should be interrupted by some well-placed gateways”.*³⁶

You may think that in the 21st century, finding the right place for a gateway to Med-Arb will benefit disputants in terms of time, money and satisfactory outcomes and will benefit neutrals by encouraging them to bring together in the same person the skills of both mediator and arbitrator. The Macros*ft case may be a good place to start.

How will you respond to the in-house counsel’s invitation in the Macros*ft case?

³⁴ Mironi M *From Mediation to Settlement to Final Offer Arbitration: an Analysis of Transnational Business Dispute Mediation* (2007) *Arbitration* 1, 52 at 58.

³⁵ His remarks were made before publication of Professor Roebuck’s debunking of the ‘Myth of Modern Mediation’ in (2007) 73 *Arbitration* 1 at 105.

³⁶ Naughton P *The Rôle of Arbitrators and Arbitration Institutions in the Use of Alternatives for the Settlement of Disputes*, (2007) 73 *Arbitration* 1, 31 at 37.

You might accept the appointment on the basis that the CEDR approach would provide a practical and workable framework. You would proceed with the understanding that, with the consent of the parties, mediation followed by arbitration by the same person would not be objectionable unless you manifest apparent or actual bias in the arbitration phase or in the award. You would ask the parties to enter into an arbitration agreement at the outset, appointing you arbitrator.

So long as the parties consider and have an opportunity to be advised as to whether any award flowing from such a procedure would be valid and enforceable, they should be free to adopt such a process. This builds in the opportunity for both the parties and for you to opt out of having you conduct the arbitration after having mediated, once all concerned have considered how the mediation went. It nevertheless still commits the parties to an arbitrated outcome within the previously agreed or any extended time, at the cost of bringing a new arbitrator up to speed.

Affording everyone an opt-out opportunity is in line with the CPR Ground Rules for Mediation, which provide:

“If a resolution is not reached, the mediator will discuss with the parties the possibility of their agreeing on advisory or binding arbitration, “last offer” arbitration or another form of ADR. If the parties agree in principle, the mediator may offer to assist them in structuring a procedure designed to result in a prompt, economical process. The mediator will not serve as arbitrator, unless all parties agree.³⁷”

Of course, if you manifest bias during the arbitration phase or in the content of the award, the court will set aside the award and/or disqualify you as arbitrator. Accordingly, unless the parties agree otherwise, you will need to ensure that no reliance is placed on anything learned in confidence during the mediation. This could be assisted if you were to provide at the outset of the arbitration phase a written statement of what you then apprehend to be the issues to be determined and the facts as then understood, and invite the parties to comment on it.

Given the serious concerns as to how parties will behave in Med-Arb, there is not much point in crafting a suitable Med-Arb agreement and securing the parties' attendance at the mediation, if they either clam up in caucus or spend all their time trying to persuade the mediator they are right. One approach to this problem may be to choose the kinds of dispute that are best suited to Med-Arb. The ideal is the kind of case in which there appear to be possible outcomes involving arrangements which only the parties can make (such as continuing or adjusted business relations) or parties' needs that an arbitration cannot address, thereby making it more likely that they will discuss their interests and needs frankly with the mediator in caucus and confine their submissions as to their rights to the subsequent arbitration phase. You may believe there are very many such kinds of case waiting to be identified.

³⁷ International Institute for Conflict Prevention and Resolution Challenge Protocol, April 1, 1998, Rule 8, “Failure to Agree”.

As a facilitative mediator (one who tests the parties respective positions strongly while seeking to clarify their interests but who, unlike an evaluative mediator, refrains from expressing an opinion on the merits) you may be influenced in agreeing to take this case as a Med-Arb by the anger and hostility the defendant feels towards the plaintiff and possibly her own lawyer or the legal system in general. Many cases that seem to be only about money often have undercurrents revealed in mediation. That great English critic Malcolm Muggeridge once said:

"No dispute is ever about what it's about".

Many mediators have had the experience of one party saying to the other:

"You know, when I came in here I thought this was only about money but now I realize that I betrayed you and I'm sorry" ...

...and leaving with 100% of his claim, while the other left with the apology he needed before he was willing to pay.

Such a result is unlikely in evaluative mediation, where people tend to settle for a percentage of their claim based on an evaluation of their chances of success in litigation or arbitration (never put as high as 100%), minus the anticipated cost involved, including the value of their time. Although a 100% monetary result is possible in arbitration and litigation, it would come only at much higher cost to both sides. And apologies in litigation and arbitration are few and far between.

In the Macros*ft case there may be a degree of frustration felt by Macros*ft that its market is being eroded despite the careful arrangements put in place to prevent the importation of grey goods. Likewise, there may be a degree of frustration felt by the defendant's CEO at what she may perceive to be inconsistent conduct of Macros*ft's parent in granting the licence (as she interprets it) and these proceedings for infringement. She may want some reassurance that other distributors won't be treated in the same way. These frustrations may need to be given expression before the parties may be able to focus on solutions. If the parties can see each other as acting in good faith, they might then take a different view as to what is a fair settlement. In particular, if the demand for grey goods in this country can be met by some kind of trading arrangement between the parties which would eliminate imports attributable to the defendant yet leave both parties profitable, the issues of infringement and breach of competition laws would disappear. Such creative solutions can best be discussed in mediation, either in private or open session, while any subsequent arbitration, if required, can focus on issues that need not be addressed at all in the mediation phase.

If we put in place the kind of arrangement suggested above, you will feel as comfortable as any putative Med-Arbiter could in embarking on the process. The statement of issues you would provide (with accompanying facts as then understood) might include the ownership of the trademark, the proper interpretation of the licence agreement, the conduct of the defendant and whether it amounts to infringement and whether the proceedings violate competition law.

How will you decide whether any confidential information you received in caucus prevents you from continuing as arbitrator?

There's no litmus test that can be applied in such a situation because everything depends upon the particular circumstances and the personalities involved. As a mediator, you attempt somehow to be impartial, neutral and empathetic even when facing people whose values and habitual behaviour appear completely antithetical to yours. Balancing engagement with neutral detachment, you strive to remain simultaneously involved yet sufficiently detached to be helpful in bringing the parties to a meeting of the minds. This should stand you in good stead when you have to decide whether you can proceed to arbitrate, a wholly different process but one which also requires detachment.

You will have to consider the nature of what had been imparted to you confidentially in the mediation phase, the extent to which it related to the issues for determination in the arbitration phase and whether it is likely to affect the way in which you would perceive relevant witnesses and their credibility or has otherwise left you feeling uncomfortable about the prospect of ensuring a fair hearing and providing an unbiased award. If you felt uncomfortable, you may prefer to say so rather than go on and risk showing bias later, however unconsciously. A comforting safeguard is the right of any party itself to opt out even if you feel you can stay in.

If, for example, the defendant's CEO had told you in caucus that the goods she was selling into this country were not genuine MACROS*FT® goods, you would appreciate that that might predispose you to find infringement irrespective of the interpretation of the licence agreement and to dismiss the defence of violation of competition law. The statement of issues would not avoid the possibility of bias as a consequence of receiving such information. You might feel uncomfortable arbitrating unless the defendant's CEO agrees that you may disclose that statement as one of the relevant facts accompanying the statement of issues. If she does not agree, you might opt out of the arbitration.

In sum, with opt-out provisions both for you and for the parties built into the process, you might be prepared to proceed as Med-Arbitrator in this case.