Switching Hats: Should the Same Neutral Act as Mediator and Arbitrator?

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Outline

• **Answer = PARTY AUTONOMY**
  (In small print speak = “Sometimes ... It depends on a new vision of conflict resolution, the neutrals, the institution, the parties, the counsel, the circumstances, etc. etc. etc.”)

• Current cultures and approaches to Conflict Resolution

• Of Cheese, Icebergs, Ballet Dancers & Knives

• And finally the topic! Should the same person really switch hats?

• The issue is not the Neutral switching hats but our approach to conflict resolution.
The “Old World” Paradigm
The “New World” Paradigm

The Internet: This graph is by far our most complex. It is using over 5 million edges and has an estimated 50 million hop count. We will be producing more maps like this on a daily basis. We still have yet to fix the color system, but all in due time.

Source: http://www.opte.org/maps/
The “new world” requires kaleidoscopic vision

Source: http://bindweed.com/magicmirror/kaleidoscope-collage.gif
But how have we “evolved” in dealing with conflicts?


Source: M. Rushton, Legal Business Arbitration Report 2008 p. 20
What is the purpose of private dispute resolution systems?

- Party autonomy (i.e., more choice)
- Flexibility (non-rigidity)
- Pragmatism
- Ongoing control (especially over costs)
- Outcomes, not processes
- Efficiency (in cost and in time)
- A sense of fairness/due process (especially with hindsight)
- Business certainty (enforceability)
- Reaching closure (business-wise and psychologically)
- Confidentiality?

Have we gone “off-track”?
How we design the process is part of the problem.
A New Focus is Needed: Substantively & Procedurally

Source: J. Kalowski
The Iceberg of Conflict Resolution

A dispute is never about what it is about ...

The Facts
The Law(s)
The Positions

Misunderstandings
Perceptions
Emotions
Interests
Concerns
Feelings
Beliefs
Values
Needs
Fears

Although the “objective” aspects of the dispute may be apparent ...

... the “subjective” aspects remain to be discovered.
Arbitration & Litigation = a rights-based approach

THE LEGAL SYLLOGISM (an algorithm):

Facts (past & present) + Applicable law(s) = Outcomes (« conclusions »)

“We have to rely only on objective facts”. “Arbitrators have a “sacred duty” to establish the truth.”
But “Facts” depend on unconscious biases & perceptions

The Right Brain vs Left Brain test ... do you see the dancer turning clockwise or anti-clockwise? If clockwise, then you use more of the right side of the brain and vice versa. Most of us would see the dancer turning anti-clockwise though you can try to focus and change the direction; see if you can do it.

LEFT BRAIN FUNCTIONS
uses logic
detail oriented
facts rule
words and language
present and past
math and science
can comprehend
knowing
acknowledges
order/pattern perception
knows object name
reality based
forms strategies
practical
safe

RIGHT BRAIN FUNCTIONS
uses feeling
"big picture" oriented
imagination rules
symbols and images
present and future
philosophy & religion
can "get it" (i.e. meaning)
believes
appreciates
spatial perception
knows object function
fantasy based
presents possibilities
impetuous
risk taking

All disputes are like a piece of cheese ...

Perceptions = 9/10 of reality

“It isn’t that they can’t see the solution, it is that they can’t see the problem” Gilbert K. Chesterton
Mediation + Arbitration = more choice & better outcomes?

Current thinking:

Med
Arb
Med-Arb
...?

The Facts
The Law(s)
The Positions

Misunderstandings
Perceptions
Emotions
Interests
Concerns
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Beliefs
Values
Needs
Fears

Arbitration or litigation

The “big picture”: a more complete dispute resolution process?
The ICC: A Leader in “Amicable Dispute Resolution”

SUGGESTED ICC ADR CLAUSES

OPTIONAL ADR

The parties may, at any time, without prejudice to any other proceedings, seek to settle any dispute arising out of or in connection with the present contract in accordance with the ICC ADR Rules.

OBLIGATION TO CONSIDER ADR

In the event of any dispute arising out of or in connection with the present contract, the parties agree in the first instance to discuss and consider submitting the matter to settlement proceedings under the ICC ADR Rules.

OBLIGATION TO SUBMIT DISPUTE TO ADR WITH AN AUTOMATIC EXPIRATION MECHANISM

In the event of any dispute arising out of or in connection with the present contract, the parties agree to submit the matter to settlement proceedings under the ICC ADR Rules. If the dispute has not been settled pursuant to the said Rules within 45 days following the filing of a Request for ADR or within such other period as the parties may agree in writing, the parties shall have no further obligations under this paragraph.

OBLIGATION TO SUBMIT DISPUTE TO ADR FOLLOWED BY ICC ARBITRATION AS REQUIRED

In the event of any dispute arising out of or in connection with the present contract, the parties agree to submit the matter to settlement proceedings under the ICC ADR Rules. If the dispute has not been settled pursuant to the said Rules within 45 days following the filing of a Request for ADR or within such other period as the parties may agree in writing, such dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration.

Combined ADR-ARB Model Clause:

‘In the event of any dispute arising out of or in connection with the present contract, the parties agree to submit the matter to settlement proceedings under the ICC ADR Rules. If the dispute has not been settled pursuant to the said Rules within 45 days following the filing of a Request for ADR or within such other period as the parties may agree in writing, such dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration.’
Amicable settlement is a desirable solution for business disputes and differences. It can occur before or during the litigation or arbitration of a dispute and can often be facilitated through the aid of a third party (the ‘Neutral’) acting in accordance with simple rules. The parties can agree to submit to such rules in their underlying contract or at any other time.

**Article 1**

Scope of the ICC ADR Rules

All business disputes, whether or not of an international character, may be referred to ADR proceedings pursuant to these Rules. The provisions of these Rules may be modified by agreement of all of the parties, subject to the approval of ICC.
Why not aim for “Holistic Dispute Resolution”? 

The drivers:
- Costs
- Time
- Outcomes

1. Is one integrated “hybrid” process possible?
2. Can one neutral do it all?
3. Should we use two neutrals?
4. Can the neutrals work as one team?
Combinining ADR Processes

Think Global! Think Case-by-Case!

- New tools exist
- New processes should become possible
The Process: **Appropriate Dispute Resolution (ADR)**

- **Least Evaluative**
  - Least Structured
  - Least Formal

- **Negotiation**

- **Mediation**

- **Independent Expert Appraisal**

- **Conciliation**

- **Neutral Evaluation**

- **Arbitration**

- **Adjudication**

- **Consensual**
  - Parties in control

- **Adversarial**
  - Third party in control

Source: J. Kalowski, JOK Consulting

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Arbitration ...

Resolution

P1

A

P2

Source: Joanna Kalowski
... Conciliation ...

Resolution

Source: Joanna Kalowski

Precedent

Justice

Statute

Objective Fairness

P1

P2

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... Mediation

Resolution

P1

M

P2

SUBJECTIVE FAIRNESS

Source: Joanna Kalowski
**Process Design Considerations**

### Sequential
- Med-Arb
- Arb-Med
- Arb-Med-Con-Med-Arb
- Consent awards

### Parallel
- Med//Arb
- Carve-outs
- Windows
- Shadow mediation
- Partnering

### Hybrid
- MEDALOA
- Co-“medarbiters”
- ???

### Factors
- Parties
- Certainty of outcome
- Costs
- Time & deadlines
- Applicable law(s)
- Languages
- Skill sets
- Venue & distances
- Institutional rules
- Nationalities/cultures
- Counsel
- Neutrals (roles & no.)
- Availabilities
- Advisors & Experts
- Confidentiality
- Discovery
- Implementation
- Enforcement

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### Mediation + Arbitration: fundamentally compatible

<table>
<thead>
<tr>
<th>Criteria</th>
<th>Compatibility YES</th>
<th>Compatibility NO</th>
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<td>Degree of Regulation</td>
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<td>Legal Relationship Neutral/Parties</td>
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<td>Acceptance Third Persons/Lawyers</td>
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<td>Formal Basis of Procedure</td>
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<tr>
<td>Place, Language, Applicable Law</td>
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<tr>
<td>Caucus</td>
<td>Needs special consideration</td>
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<tr>
<td>Challenge of Neutral</td>
<td>Needs special consideration</td>
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<td>Result</td>
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<tr>
<td>Appeal/subsequent Court Proceeding</td>
<td>Needs special consideration</td>
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<td>Enforcement</td>
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Switching Hats: Example 1 -- Arb-Med

• Goal: Create a pressure cooker to reach an agreement in case negotiations reach an impasse.

• A 3-part process in one day:
  - arbitration (3 hours)
  - lunch (2 hours, parties only without the neutral), and
  - mediation (3 hours)

• The same neutral swapped hats (although it could have been done by two neutrals with 1 hat each)
  1. The neutral issued his arbitral decision during the lunch break (and placed it in a sealed envelope)
  2. The neutral met the parties after lunch as their mediator, and worked with them to reach a facilitated outcome (which was achieved, due to the pressure of the envelope)

• The sealed envelope was prominently displayed on the table throughout the mediation. It would have been opened after 3 hours and the parties would have been bound by the award in it.


Example:

BAT
Valuation of IP assets for M&A deal
Example 2 -- MEDALOA (Hybrid Med-Arb)

MEDALOA = Mediation and Last Offer Arbitration
French = « Arbitrage sur dernières offres »

- Goal: to create another pressure cooker, more psychological this time as there is no “sealed envelope” from a third party.
- Combination of mediation + arbitration, conducted over several sessions
- Involves the same neutral for both phases (B. Sambeth Glasner in this case), which is a necessity for MEDALOA.
- The final arbitration stage is triggered by a deadline having been reached. The neutral acts as a “med-arbiter” who can only choose between two final last offers (one from each party). There can be oral argument as to which offer the neutral should choose.
- Possible variations
  - «Baseball arbitration» («final offer arbitration»)
  - «Night baseball arbitration» (neutral’s suggestion is drafted and compared to the binding offer).

Example:

Skyguide
Averting a strike that would have closed down Swiss airports
Hybrids? We Still Have a Way to Go! (e.g., ICC ADR Rules)

As an amicable method of dispute resolution, ICC ADR should be distinguished from ICC arbitration. They are two alternative means of resolving disputes, although in certain circumstances they may be complementary. For instance, it is possible for parties to provide for ICC arbitration in the event of failure to reach an amicable settlement. Similarly, parties engaged in an arbitration may turn to ICC ADR if their dispute seems to warrant a different, more consensual approach. The two services remain distinct, however, each administered by a separate secretariat based at ICC headquarters in Paris.

Guide to ICC ADR, Part 1 Introduction: “‘ADR’, as used by ICC, therefore does not include arbitration but only proceedings which do not result in a decision or award of the Neutral which can be enforced at law.”
Is Med-Arb possible for ICC Consent Awards?

Article 13
Transmission of the File to the Arbitral Tribunal
The Secretariat shall transmit the file to the Arbitral Tribunal as soon as it has been constituted, provided the advance on costs requested by the Secretariat at this stage has been paid.

Article 26
Award by Consent
If the parties reach a settlement after the file has been transmitted to the Arbitral Tribunal in accordance with Article 13, the settlement shall be recorded in the form of an Award made by consent of the parties if so requested by the parties and if the Arbitral Tribunal agrees to do so.

The ICC Rules are unclear on this: What happens if the parties wish New York Convention enforceability to their settlement agreement? Was a settlement reached “after the file was transmitted to the Arbitral Tribunal” if a draft or unsigned version of the settlement agreement existed beforehand?
Should swapping hats depend on the process?

NEW CONSIDERATIONS FOR THE FUTURE

Combining ADR methods and examples

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<tr>
<td>Critical question: Using the same Neutral?</td>
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<td>Mediation Window: Leave some issues for mediation in the course of arbitration. Result: Consent Award?</td>
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<tr>
<td>MEDALOA or Baseball Arbitration: Exotic and less used alternative? Same neutral required.</td>
<td>European Directive on Mediation: Door-opener for new mediation processes in the EU?</td>
<td>Dispute Resolution Panels or Dispute Resolution Boards. How many hats?</td>
</tr>
</tbody>
</table>

Source: R. Dendorfer
The ICC’s Starting Point on “Switching Hats”

Article 7.3: General Provisions

“Unless all of the parties agree otherwise in writing, a Neutral shall not act nor shall have acted in any judicial, arbitration or similar proceedings relating to the dispute which is or was the subject of the ADR proceedings, whether as a judge, as an arbitrator, as an expert or as a representative or advisor of a party.”

Guide to ICC ADR, Part 2: Analysis of the Rules: Article 7(3) deals with whether the Neutral may act as a judge, arbitrator, expert or representative of a party in other proceedings related to the dispute submitted to the ICC ADR proceedings. It provides that it is entirely permissible for a Neutral to act in such capacities if all of the parties to the ICC ADR proceedings agree thereto in writing. However, it is not permissible without such an agreement.
The Lawyers & Institutions’ Perspective
The Neutral’s Perspective

• “We already do it!” (i.e., conciliation)
• But Conciliation ≠ Mediation
• Danger of overconfidence
• Need to think it through
  - What knowledge can be used/shared as arbitrator?
  - Avoid caucusing?
  - Use written waivers to demarcate clear sequential steps (= sounding the horn)?
  - Need to avoid worst case scenarios and retain the parties’ trust in the process
The User’s Perspective

**PROS**

- Neutral(s) sees the whole picture
- Less time
- Less money
- Better outcomes?
- Greater freedom to innovate
- Greater control over process?

**CONS**

- Confusion of roles
- Can I trust the neutrals not to use this information in case of arbitration?
- Can this slip off track?
- Less certainty of enforceability?
- Do we all know what we’re doing?

Co-Medarbiters? “The truth begins in pairs” (Michael Lukas Moeller)
IMI: Forging a global mediation profession ... a 1\textsuperscript{st} step

International Mediation Institute

www.IMImediation.org

New processes will require new international skills. Please log on and become involved!