

CHAPTER 7.0

PRACTICE GUIDELINES FOR SITUATIONS IN WHICH A MEDIATOR CHANGES ROLES TO FUNCTION AS ARBITRATOR, OR AN ARBITRATOR PERFORMS THE FUNCTIONS OF A MEDIATOR (SINGLE-NEUTRAL MED-ARB, ARB-MED AND ARB-MED-ARB), OR ENGAGES IN SETTLEMENT-ORIENTED ACTIVITIES¹

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Table of Contents

7.1	Introduction; Med-Arb, Arb-Med, Arb-Med-Arb; Arbitrators Engaged in Settlement-Oriented Activities	3
7.2	How and When: Scenarios in Which Neutrals “Switch Hats”	6
7.3	Varying Practices and Perspectives; The Influence of Different Cultural and Legal Traditions on the Question of Switching Hats and on Arbitrators Engaging in Settlement-Oriented Activities	9
7.4	Impetus / Rationale for Shifting Roles	14
7.5	Concerns Associated with Shifting Roles	17
7.6	An Emerging View: Creativity, Risk and Effective Problem-Solving	23
7.7	Introduction: The Special Requirements of Med-Arb, Arb-Med, and Arb-Med-Arb	26
7.8	Careful, Informed, Independent Reflection by Parties and Counsel	26
7.9	Ensuring Parties' Mutual Understandings Regarding Roles of Mediator and Arbitrator	27
7.10	Decision-Making Regarding Switching Hats – The Role of Parties and Neutral.....	28
7.11	Neutral’s Competency, Availability, Independence, Impartiality	28
7.12	An Agreement in Writing.....	31
7.13	Particular Process Options Where Med-Arb, Arb-Med (or Arb-Med-Arb) is Contemplated, or Discussed, Prior to the Start of Mediation.....	32
7.14	Process Options Where Med-Arb is Contemplated During Mediation	37
7.15	Variations on Med-Arb	37
7.16	Arb-Med: Considerations for Parties Contemplating Arb-Med	38
7.17	The Need to Capture Meaningful Accounts and Data Points from of Our Successes and Failures	41
	WORKS CITED	41
	APPENDIX - Summaries of Switching Hats Practices in Selected Countries	55

7.1 Introduction; Med-Arb, Arb-Med, Arb-Med-Arb; Arbitrators Engaged in Settlement-Oriented Activities

7.1.1 *The phenomenon of switching hats.* Should an arbitrator ever take on the role of mediator during the course of resolving a commercial dispute? Should a mediator agree to assume the role of arbitrator and render a binding award if mediation is unsuccessful in resolving all issues in a dispute? How commercial advocates and counsel, dispute resolution professionals and business parties answer these questions vary depending on circumstances, personal preferences, and the influence of culture and legal traditions.² In the current environment of commercial dispute resolution, moreover, many professional arbitrators have also developed skills and experience as mediators³; similarly, commercial advocates have garnered experience with mediation as well as arbitration. Hence, it should not be surprising that many dispute resolution professionals have had experiences playing multiple roles in the course of resolving disputes.⁴

Despite these realities, no authoritative, comprehensive, widely-accepted guidance regarding med-arb, arb-med, or settlement-oriented activities by arbitrators has yet been developed for international practice.⁵ The following practice guidelines are intended to bridge this gap; to provide business parties and counsels, commercial advocates, dispute resolution professionals and dispute resolution provider institutions with critical assistance in regard to arrangements for neutrals to switch hats.

Historically speaking, the seeding bed of switching hats, primarily in the form of med-arb, was in what is referred to in the labor law literature as interest or economic non-legal collective labor disputes. These are non-justiciable disputes over contract negotiation or formation. In contrast, the focus of the following guidelines is on legal disputes between parties to business transactions, including long-term commercial relationships. If not resolved amicably by the parties, these disputes may be subject to adjudication by the courts or in arbitration. Presently an increasing number of these legal disputes are dealt with by privately run consent-based (e.g. mediation, conciliation) and adjudication-

² Including traditions in which the role of arbitrator often includes helping facilitate negotiated settlement. Examples of such traditions include China [7.3.1] and Germany [7.3.2].

³ In a survey of experienced U.S. arbitrators conducted by the Straus Institute for Dispute Resolution and the College of Commercial Arbitrators, about 84% of respondents indicated that their dispute resolution practice included mediating cases. Stipanowich & Ulrich, *Arbitration in Evolution*.

⁴ In a survey of experienced U.S. arbitrators conducted by the Straus Institute for Dispute Resolution and the College of Commercial Arbitrators, nearly 46% of respondents had served as both a mediator and an arbitrator in the same dispute. In a subsequent survey by the Straus Institute of International Academy of Mediators members, 61% of 124 respondents indicated experience with dual roles during the course of resolving a dispute. Stipanowich & Ulrich, *Commercial Arbitration and Settlement*.

⁵ Previous efforts to formulate guidance for med-arb and other dual-role arrangements include the Final Report of the CPR Commission on the Future of Arbitration, released in 2001 in book form. See COMMERCIAL ARBITRATION AT ITS BEST (including guidelines for arb-med and arb-med-arb, and for arbitrators facilitating settlement discussions). CEDR COMMISSION, Final Report.

based procedures (e.g. arbitration) or by mixed-mode and hybrid dispute resolution processes combining consent-based and adjudication-base procedures by the same neutral.

7.1.2 *A caveat regarding basic terminology.* Different understandings of what we mean by “mediation,” “arbitration,” and other terms denoting dispute resolution processes are a major obstacle to developing meaningful international practice guidance. Perspectives and practices may vary among legal traditions and cultures, or even different transactional settings and circumstances. Before proceeding with our discussion, it is critical to point out some definitional issues.

.1 “*Mediation.*” As their role is generally understood in the context of commercial dispute resolution, mediators facilitate discussions between the parties in order to promote settlement of issues in dispute by engaging with the parties in joint sessions and/or in caucuses (meetings with individual parties in which at least some communications are understood to be made in confidence).⁶ In some cases, mediation may result in the restoration or improvement of relationships.⁷

In some cultures or contexts, “mediation” is understood to involve a third party assisting the parties engage in an “interest-based and forward-looking discourse” in which the mediator “delve[s] into the disputing part[ies]’ emotions, feelings, needs, aspirations, resources, [and the like]” in order to promote creative solution or improved relationships, but does not involve right-focused evaluation of the case by the third party.⁸ In places like the U.S., however, mediation may have a very different or broader meaning comprising a whole range of strategies and styles, including rights-focused case evaluation; mediators tend to have wide berth in their choice of strategies and methods, including some or all of the following⁹:

- exploring with the parties underlying personal or organizational interests, agendas, values, emotional factors that might need to be addressed in the course of settling the dispute;
- helping the parties consider what, if any, additional information or other steps might be necessary in order to set the stage for settlement;
- helping parties develop, consider, and/or communicate proposals that may lead to settlement;
- assisting the parties in restoring or improving their relationship(s) or their ability to communicate more effectively;
- helping the parties consider and develop other procedures, to resolve their dispute(s), including evaluative and adjudicative approaches;

⁶ See Hopt & Steffek, *Mediation*.

⁷ See Guillemin, *Reasons*.

⁸ Mironi, *From Mediation to Settlement*; Hopt & Steffek, *Mediation* (outlining various legal traditions that disfavor evaluative mediation).

⁹ See Straus Institute, *International Academy of Mediators Survey*.

- evaluating the legal and factual elements of the parties’ positions regarding the issues in disputes;
- predicting the potential consequences if the issues in dispute are adjudicated in court or in arbitration;
- putting forward to the parties their own proposals for agreement;

.2 “*Conciliation.*” The term “conciliation” is sometimes used in domestic or international dispute resolution practice to embrace certain settlement-oriented activities by arbitrators or other third-party neutrals.¹⁰ In many cases, the term is used interchangeably with the term “mediation”; however, it may also refer to a form of non-binding evaluation by a third party, or an evaluative form of mediation.¹¹

.3 “*Arbitration.*” It is generally understood that the primary responsibility of an arbitrator or arbitral tribunal is to adjudicate disputes and produce a binding and enforceable award.¹² For the purposes of our present discussion, however, it should be noted that different legal and cultural traditions vary with respect to the role of arbitrators in regarding to settlement. [See 7.1.4.]

7.1.3 *Med-arb, arb-med, arb-med-arb.* Switching hats arrangements or phenomena generally fall within one of the following categories: med-arb, arb-med, and arb-med-arb.¹³

- .1 *Med-arb.* As used here, “med-arb” refers to a dispute resolution process in which a neutral first attempts to mediate the dispute and, if mediation is unsuccessful in fully resolving the dispute, switches to the role of arbitrator in order to render a binding decision (award) fully and finally addressing the remaining issues in dispute. One of the variations on med-arb is mediation followed by last-offer arbitration (MEDALOA) [7.15.2]
- .2 *Arb-med, arb-med-arb.* “Arb-med” refers to a dispute resolution process in which an appointed arbitrator takes on the role of mediator at some point during the arbitration process. If mediation is unsuccessful in fully resolving

¹⁰ Conciliation is a method traditionally referred to in Public International Law. It also features in the International Convention for Settlement of Investment Disputes. Some legal systems like Switzerland and Brazil include in their civil procedure law a separate set of rules for mediation and conciliation.

¹¹ See Stipanowich & Fraser, *The International Task Force*; Stipanowich, *supra* note 1. See Appendix, Summary of Practices in India, Japan, South Africa (discussing mediation and conciliation).

¹² In the course of fulfilling this obligation, arbitrators will supervise the prehearing process, during which the case is made ready for adjudication; conduct a hearing in which the parties present evidence and arguments on the issues in dispute; and render a decision (award) on the issues in dispute that will be legally binding on the parties. This is an expanded version of the arbitral function as described in CEDR COMMISSION.

¹³ Occasionally, parties devise other labels or rubrics for arrangements involving a neutral playing dual roles, such as “binding mediation.” These labels may lead to confusion regarding the nature of the process and raise questions regarding enforceability of any resolution achieved. See Stipanowich, *supra* note 1, at 21 (citing Lindsay v. Lewandowski). As discussed in 7.1.4, the term “conciliation” is sometimes employed in reference to a settlement-oriented activity by third parties in dispute resolution. It may be employed as a synonym for “mediation,” or may denote a form of non-binding evaluation (perhaps including the making of settlement proposals).

the dispute, the parties may have agreed that the arbitrator-turned-mediator will revert to the role of arbitrator in order to render a binding decision (“arb-med-arb”).

- 7.1.4 *“Settlement facilitation by an arbitrator.”* Perspectives and practices differ regarding the arbitrator’s proper role, if any, regarding negotiated settlement of the issues in dispute during the arbitration proceeding, reflecting differences in culture and legal tradition as well as the customs, personalities and preferences of arbitrators, parties, and counsel. [See 7.3.]

7.2 How and When: Scenarios in Which Neutrals “Switch Hats”

- 7.2.1 *Prior agreement.* Disputants may engage in med-arb, arb-med or analogous approaches as a result of a prior agreement between the parties, perhaps incorporating existing institutional rules or procedures. Such agreements may be made prior to the existence of disputes, or post-dispute but prior to the commencement of dispute resolution proceedings.

- .1 *Parties agree to med-arb or arb-med prior to commencement of dispute resolution.* Occasionally, business parties will agree to a process which contemplates the possibility that the third party they appoint to resolve their disputes will change roles at some point during the course of dispute resolution. For example, in a survey of members of the International Academy of Mediators, about forty-eight percent of respondents indicated that they had been engaged by the parties pursuant to an agreement that they would attempt to mediate a dispute and, failing a resolution through mediation, they would switch to the role of arbitrator (med-arb).¹⁴ An agreement to engage in med-arb may be connected with the selection of a particular dispute resolution professional whose “branding” includes med-arb. Some dispute resolution professionals now promote “med-arb” or “arb-med-arb” among their specialties in practice.¹⁵
- .2 *Impact of cultural traditions and related institutional rules.* As discussed below in 7.3, culture and legal tradition may set the stage for a role shift, or envision a proactive role for arbitrators in helping promote settlement. *Arbitrator as mediator (or conciliator) (arb-med)—Chinese model.* The rules of leading Chinese arbitration institutions have enshrined the practice of “mediation (‘conciliation’) within arbitration,” as illustrated by the rules of official arbitration commissions such as the China International Economic and Trade Arbitration Commission (CIETAC)¹⁶ and the Beijing

¹⁴ Straus Institute, *International Academy*.

¹⁵ See, e.g., Tom Arnold, *MEDALOA*; Thomas Stipanowich, *The Arbitration Penumbra*.

¹⁶ CIETAC ARB. RULES art. 47.

Arbitration Commission (BAC)¹⁷—a process sometimes referred to as “arb-med.”¹⁸ [See 7.3.1.]

Arbitrator as settlement facilitator (or “conciliator”)—*German model*. In a number of civil law countries, arbitrators may act as settlement facilitators (or perhaps as “conciliators”) during the course of arbitration proceedings. [See 7.3.2.]

7.2.2 *Agreements during the course of dispute resolution*. In jurisdictions where mixed roles are not widely embraced by lawyers and dispute resolution professionals, a shift of roles from mediator to arbitrator, or vice versa, is often triggered by agreements made during the course of dispute resolution.¹⁹

Where mediation has reached an impasse, for example, parties may come to the mutual conclusion that the best way to resolve the dispute may be for their mediator to switch to the role of arbitrator and render a binding award—a solution that produces a final resolution with a modicum of efficiency. One neutral explains:

During the course of mediating a longstanding federal court case involving claims against an insurer involving experienced commercial counsel and parties, I sought to overcome impasse by asking each of the parties if they might employ final offer arbitration (with another neutral) as a way of resolving their dispute. Each of the parties expressed interest in the idea and after meeting together the parties approached me about conducting the final offer arbitration. After discussing the pros and cons, I agreed to do so. We jointly set up the procedure and I rendered an arbitration award on the basis of one of the offers. The defendant complied with the award.²⁰

Opportunities for negotiation (with or without a mediator) may arise at any time before, during or after adjudication, and many arbitrators have observed higher rates of settlement in arbitrated cases in recent years.²¹ In some cases, parties seeking a negotiated resolution may conclude that engaging their arbitrator to help them reach an informal settlement is more beneficial than reaching out to another mediator. An illustrative scenario was reported by another dispute resolution professional:

¹⁷ BAC ARB. RULES art. 42.

¹⁸ See *infra* Section 7.3.2.

¹⁹ In a survey of members of the International Academy of Mediators, about 39% of respondents indicated that one or more times during mediation, they had been asked by parties to switch from the role of mediator to an arbitral role. About 36% of respondents indicated that one or more times during arbitration, they were asked by the parties to switch to the role of mediator. See Straus Institute, *International Academy*.

²⁰ See Stipanowich, *supra* note 1.

²¹ See Stipanowich, *supra* note 1.

I was appointed arbitrator in a case involving two investors in a business dispute. During the pre-hearing stage, counsel for both parties asked if I would be willing to act as mediator, to see if the case could be settled rather than arbitrated. Through the case management team, I confirmed that counsel wished me to remain as arbitrator in the event the case did not settle. I prepared and the parties signed a med-arb Stipulation, and we mediated the case over the course of a long day. During mediation I met separately with both sides and offered some evaluations of the parties' claims and defenses. I eventually made a mediator's proposal; one side accepted, the other did not. Months later, when the arbitration hearing was about to commence, counsel asked me again to attempt to mediate the case to conclusion. I suggested we take the morning to mediate, break for lunch, then start the hearing if the case hadn't settled. Counsel confirmed the continuing effect of the previous stipulation. The case settled by noon for an amount very close to the mediator's proposal made in the earlier mediation.

As illustrated by the scenario, a successful mediation may obviate the need for the neutral to resume the role of arbitrator. As discussed below, however, concerns about the impact of information shared confidentially in mediation on a subsequent arbitration award by the same neutral often discourages parties from engaging in med-arb or arb-med-arb, or causes them to consider process options that address these concerns. [See 7.5.4]

In one form of arb-med, participants agree that the arbitrator will mediate after concluding arbitration hearings and writing the award, but before its publication (arbitration followed by post-hearing mediation).²² One advocate of the process explains:

The process starts as an arbitration, often on an accelerated basis. The neutral makes the award, but instead of immediately announcing it to the parties, seals it in an envelope and keeps it secret. Then the neutral (who could be the same or a different person) becomes a mediator, facilitating the parties to come to a negotiated settlement. The parties agree beforehand that if they are unable to settle (say by a certain time, or if they stop the mediation phase) then the envelope is opened and the parties are bound by that outcome.

The advantage of a "sealed envelope" arb-med is that the parties know that at the end of the day they will reach an outcome and closure. At the same time, the uncertainty of what the envelope contains motivates them to find a negotiated outcome rather than risk opening Pandora's Box. Arb-med can be used to break deadlocks in mediations and even in negotiations (for example, where parties cannot agree on an

²² See Michael Leathes, *Dispute Resolution Mules*.

amount of money to change hands).²³

Another commentator suggests:

In order to expedite the process, an alternative approach would be to relax the requirements regarding an arbitration award. For example, to agree that the sealed award only needs to contain the operative part of the award, or only the conclusions to each of the issues being disputed.

Reflecting on several successful applications of the process in disputes between Japanese and U.S. parties engaged in ongoing commercial relationships, another experienced neutral emphasizes that the approach allows the parties to avoid a win-or lose outcome, to be more focused on settlement with “less grandstanding and belligerence,” and permits the neutral to be “assertive (in a positive sense) and somewhat opinionated without ruffling feathers or risking the possibility that someone could claim bias.”²⁴

7.3 Varying Practices and Perspectives; The Influence of Different Cultural and Legal Traditions on the Question of Switching Hats and on Arbitrators Engaging in Settlement-Oriented Activities

7.3.1 *Differing perspectives and practices.* Perspectives and practices differ regarding the arbitrator’s role in negotiated settlement of disputes—reflecting differences in culture and legal tradition as well as the customs, personalities and preferences of arbitrators, parties, and counsel. Participants in international commercial disputes should be aware of several possible perspectives on the role of arbitrators regarding negotiated settlement of disputes:

- .1 *Arbitrators regard settlement as no concern of theirs, and outside the scope of their role.* In many circumstances, arbitrators may be reluctant to play any role in parties’ attempt to reach a settlement regarding all or part of the issues that were brought to arbitration. In the U.S., for example, many arbitrators believe that they should not concern themselves with settlement, but should focus entirely on their role as adjudicators.²⁵ Similarly, some arbitrators may be unwilling to incorporate the terms of the parties’ negotiated settlement into a consent award.

²³ *Id.* This process is often used by seasoned arbitrators in India. See Appendix, Summary of Practices in India.

²⁴ Haig Oghigian, *A New Concept*.

²⁵ In a survey of experienced U.S. arbitrators in the College of Commercial Arbitrators by the Straus Institute, 54% of respondents indicated that they were never concerned with informal settlement of the cases before them. See Stipanowich & Ulrich, *Commercial Arbitration*. Similar views are common among Indian arbitrators. See Appendix, Summary of Practices in India.

- .2 *Arbitrators “set the stage” for settlement through prehearing management, routine rulings.* It is frequently understood that by engaging in certain activities that are routine elements of their adjudicative role, arbitrators may influence parties’ perspectives on and prospects for a negotiated settlement. For example, many U.S. arbitrators acknowledge that their management of the prehearing process at least sometimes plays an important role in helping settle cases prior to arbitration hearings.²⁶ Their rulings regarding discovery or their summary disposition of issues may prompt informal settlement.²⁷
- .3 *Arbitrators take steps to encourage or to accommodate mediation with a different neutral (e.g., “mediation windows”).* Arbitrators may also be asked/expected to take steps to encourage the parties to continue settlement negotiation during the arbitration proceedings,²⁸ or to accommodate efforts to use mediation (utilizing a different neutral) during the course of arbitration.²⁹ Arbitrators may include mediation on the checklist of topics to be addressed at the preliminary hearing or prehearing conference, and the procedural timetable for arbitration may include one or more “windows” during which the parties may engage in mediation.³⁰ Moreover, where the parties have agreed to mediate prior to arbitration, it may fall within the authority of arbitrators to direct the parties to comply with the obligation to mediate.³¹ Finally, arbitrators may consider parties’ previous offers to settle as well as relative contribution to settlement negotiations in the course of allocating costs of arbitration.³²
- .4 *Arbitrators engage directly in facilitation of settlement.* As a general rule, activities described in subsections .1, .2, and .3 above are viewed as falling within the arbitral traditional role. In addition, some legal traditions and related international guidelines envisage arbitrators playing a more direct and active role in facilitating settlement.³³ For example, the CEDR Rules for Facilitation of Settlement provide that in the absence of contrary agreement arbitrators may “provide all Parties with preliminary views on the issues in dispute . . . and what the Arbitration Tribunal considers will be necessary in

²⁶ *Id.*

²⁷ *Id.* A large majority of experienced arbitrators in the U.S. acknowledged the connection between such activities and settlement of disputes during arbitration.

²⁸ See BUHRING-UHLE ET AL., ARBITRATION (survey results indicate significant experience with and approval of arbitrators suggesting settlement negotiations).

²⁹ For an example, see Rule 21 in International Institute, *CPR Rules for Administered Arbitration* (“Settlement and Mediation”).

³⁰ Stipanowich & Fraser, *The International Task Force*.

³¹ See Stipanowich, *Multi-Tier Commercial*.

³² See CEDR COMMISSION, Final Report.

³³ See Stipanowich, *supra* note 1, Part III.B., C; BUHRING-UHLE ET AL., ARBITRATION (summarizing survey data indicating relatively greater experience with or support among German and other civil law respondents for arbitrators hinting at possible case outcomes, rendering a case evaluation if requested by the parties, proposing a settlement formula (at parties’ request) or participating in settlement negotiations (upon request)).

terms of evidence from each Party in order to prevail on those issues,”³⁴ or may “provide all Parties with preliminary non-binding findings on law or fact on key issues in the arbitration.”³⁵ The CEDR Rules also provide that, if the parties make a joint request in writing, “[arbitrators may] chair one or more settlement meetings attended by representatives of the Parties at which possible terms of settlement may be negotiated,”³⁶ or “may offer suggested terms of settlement.”³⁷

In some traditions mixed roles are disfavored,³⁸ and private caucusing with a mediator who may later switch to an arbitral role if all issues in dispute are not settled in mediation is a focus of special concern. The widely used International Chamber of Commerce (ICC) Mediation Rules provide:

Unless all of the parties agree otherwise in writing, a Mediator shall not act nor shall have acted in any judicial, arbitral or similar proceedings relating to the dispute which is or was the subject of the Proceedings under the Rules, whether as a judge, an arbitrator, an expert or a representative or advisor of a party.³⁹

There may even be laws prohibiting mixed roles or requiring disclosures of information received from individual parties during mediation.⁴⁰ Such limitations may support a challenge to the appointment of arbitrators or to her/his continued service or to the enforceability of an award.

7.3.2 *Different cultural and legal traditions*

- .1 *Mixed roles as established process (e.g., China)*. In China, it is customary for arbitrators to facilitate settlement discussions if the parties consent⁴¹—a reflection of traditional practices,⁴² overlaid by recent governmental policies, a process sometimes referred to as arb-med.⁴³ If the discussions do not resolve all of the issues in dispute through amicable settlement, the neutral may resume the arbitral role if the parties have no objection.⁴⁴ This mixed-

³⁴ See CEDR, RULES.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ See Stipanowich, *supra* note 1, Part I.D. See, for example, Appendix, Summary of Practices in India.

³⁹ ICC MEDIATION RULES Article 10(3) (2014).

⁴⁰ See Stipanowich, *supra* note 1, Part III.

⁴¹ On the practice of arb-med in China, see Kaufmann-Kohler & Kun Fan, *Integrating Mediation into Arbitration*; Kun Fan, *An Empirical Study*; Kun Fan, *Arbitration in China*.

⁴² On the legal tradition of non-adversary method of dispute resolution in China, see Kun Fan, *Glocalization of Arbitration*; Kun Fan, *Glocalization of International Arbitration*.

⁴³ See Minzner, *China’s Turn*; Fu, *The Politics of Mediation*; Fu & Cullen, *From Mediator to Adjudicator*.

⁴⁴ CIETAC ARB. RULES art. 47(7). It should, however, be noted that Article 48(8) also provides for the possibility of parties who wish to conciliate their dispute, but do not wish to have the same neutral arbitrate and conciliate their dispute, may request CIETAC to facilitate settlement of their dispute. CIETAC ARB. RULES art. 47(7); BAC ARB. RULES art. 67(2).

role process is reflected in the rules of leading Chinese arbitration institutions. In one study, 30% of surveyed arbitrators working in East Asia with a large majority practicing in China reported “actively participating in settlement negotiations (at the request of both parties).”⁴⁵ There are reports that twenty to thirty percent of CIETAC arbitration cases are resolved through mediation.⁴⁶

It is apparent that during the mediation process, arbitrators may conduct *ex parte* private caucuses with parties, and may conceivably be exposed to confidential information of potential prejudice to an opposing party. There is explicit procedural protection for arbitration proceedings following unsuccessful mediation in the form of rules that make communications made during mediation inadmissible as evidence in arbitration;⁴⁷ however, some express concern that it is inconceivable to see about how a conciliator-turned-arbitrator may eliminate such information from his or her mind. Moreover, the provisions are silent as to whether the arbitrator is allowed to use any confidential information, including any statement, opinion, view or proposal made in conciliation either in joint or private session, to form the basis of the arbitration award.⁴⁸

Regarding concerns about due process and natural justice, Chinese arbitrators, for example, tend to believe the problem of caucusing is much less serious in practice than it is in theory. They believe that the parties are not very likely to reveal facts to the mediator during the mediation phase that the mediator/arbitrator could not have found out himself by a thorough study of the file. A few CIETAC arbitrators stated that the information obtained during the caucus would not affect their view on the merits if they later had to make a binding decision, as this would be based solely on proven facts. The view is that caucusing is not the only situation in which the arbitrator has to disregard information received. There are cases where improperly submitted documents or arguments are rejected or discarded after the arbitrators have taken cognizance of them. There are occasions when jurors

⁴⁵ ALL, RESOLVING DISPUTES IN THE ASIA PACIFIC. Statistics compiled by the Beijing Arbitration Commission are summarized in Appendix, Summary of Practices in China. According to a survey conducted and published by CIETAC, between 2014 and 2016, between 41 and 65% of cases were settled through med-arb. In 2017, the rate was 29%.

⁴⁶ See Mason, *Follow-Up Note (citing Ross, Med-Arb)* (“Whether true or not, according to the GAR, the Secretary-General of the China International Economic and Trade Arbitration Commission, Yu Jianlong, said that 20% to 30% of CIETAC’s caseload is resolved by this method each year.”).

⁴⁷ CIETAC ARB RULES art. 47(9); BAC ARB. RULES art. 42(5).

⁴⁸ CIETAC ARB. RULES art. 47(9) and SHIAC ARB. RULES art. 41(8) only prohibit *parties* to invoke “any opinion, view or statement, or any proposal or proposition expressing acceptance or opposition” made in the process of conciliation in the subsequent arbitral proceedings. It is not clear whether such obligation does extend to the conciliator-turned-arbitrator when rendering the award. According to two Chinese commentators: “The Law is further silent on whether arbitrators are restricted from using their knowledge of such information when deciding the case afterwards.” They further reported that “many mainland Chinese med-arbitrators are found to have heavily relied on such information in making the award.” Gu & Zhang, *The Keeneye Case*. For supporting views, see Kun Fan, *The Risks of Apparent Bias*; Cao, *Combining Conciliation*; Thirgood, *A Critique*.

need to make a decision after having heard inadmissible evidence. Arbitrators are legally trained to make a decision based on proven facts according to applicable law, and their brains should be less likely to be contaminated than the juries who are layman.

- .2 *Active arbitrator engagement in settlement (e.g., Germany)*. There is a long tradition in German civil procedural laws and understanding that judges – and arbitrators – have to guide the parties for a mutual settlement even in the advanced stages of adjudication. The German Constitutional Court (Bundesverfassungsgericht) ruled in its judgement dated 14 February 2007 (file number 1 BvR 1351/01): “Even in a constitutional state, dealing with an initially controversial problem through an amicable solution is generally preferable to a judicial dispute decision.” The traditional proactive role of judges in Germany has strongly influenced the practice of German arbitrators. Some German arbitrators offer, upon the consent of the parties, their preliminary views about the parties’ case. Article 27.4 of the 2018 Arbitration Rules of the Deutsche Institution für Schiedsgerichtsbarkeit (DIS) (German Institution of Arbitration) directs arbitrators to discuss, among other things, measures to promote procedural efficiency including “[p]roviding the parties with a preliminary non-binding assessment of factual or legal issues in the arbitration, provided all of the parties consent thereto.” In addition, if the parties agree, German arbitrators may take other steps in order to promote amicable settlement. Article 26 of the DIS Arbitration Rules provides, “Unless any party objects thereto, the arbitral tribunal shall, at every stage of the arbitration, seek to encourage an amicable settlement of the dispute or of individual disputed issues.”⁴⁹ Although practices among arbitrators vary, some may go so far as to propose terms of settlement to the parties.⁵⁰ DIS Conciliation Rules contemplate, moreover, that “[t]he parties in conciliation proceedings may, at any stage in the proceedings, agree in writing that the conciliators continue with their mandate in the function of arbitrators.”⁵¹ Such practices form the background for modern “soft-law” guidelines or rules for arbitrators such as the CEDR Commission on Settlement in International Arbitration Final Report (2009)⁵² as well as the Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules).⁵³ Such practices may also have influenced the drafting of the original International

⁴⁹ DIS ARB. RULES.

⁵⁰ Raeschke-Kessler, *The Arbitrator*; see Email from Jan K. Schäfer (“German arbitrators tend to align with judges and, for instance, the rules of arbitration of the German Institution of Arbitration contain a rule similar to the statutory rule for judges that encourages arbitrators to seek a settlement.”).

It is recognized that this practice of German arbitrators creates severe discomfort among common law lawyer counterparts. Ehle, *The Arbitrator as a Settlement Facilitator*.

⁵¹ DIS CONCILIATION RULES art. 14.

⁵² CEDR COMMISSION, Final Report (noting the influence of “the approach prevalent in Germany and Switzerland where arbitrators are generally willing at an early stage in the proceedings to provide the parties with an indication of their preliminary views on the issues in the case.”).

⁵³ Prague Rules, *Rules on the Efficient Conduct*

Bar Association (IBA) Rules of Ethics for International Arbitrators in 1987.⁵⁴

Although practitioners in Germany and other countries in which arbitrators engage in such activities may reasonably characterize such functions as normal aspects of the arbitral role, those in other jurisdictions (such as the U.S. and some other common law countries) might categorize some or all of these activities as falling outside the realm of the arbitrator; from their perspective, such functions are normally associated with mediation.⁵⁵

.3 *Cautious acceptance of mixed roles.* In the United States and some Commonwealth jurisdictions, as well as Hong Kong and Singapore, med-arb is cautiously accepted in commercial dispute resolution practice.⁵⁶ Although a majority of experienced U.S. arbitrators and mediators have had no experience with med-arb or arb-med and some strongly disfavor mixed roles, it is probable that more than forty percent of experienced neutrals have at least some actual experience with such mixed practices.⁵⁷ In Europe contractual clauses referring disputes to mixed-mode especially med-arb, and arbitral awards resulting from med-arb procedures are recognized as valid and enforceable.⁵⁸

.4 *Legal prohibition of med-arb (e.g., Brazil).* Although Brazilian law is supportive of promoting consensual settlement, legislation regulating mediation includes an explicit prohibition of med-arb.⁵⁹

7.4 Impetus / Rationale for Shifting Roles

Those who support the concept that a neutral third party should be able to function in dual roles (such as where a mediator switches roles and becomes an arbitrator of a dispute, or vice versa), may perceive several benefits of the mixing of roles in a single individual:

7.4.1 *Prioritizing amicable resolution and societal harmony.* In some cultures and legal traditions, great emphasis is placed on amicable resolution of conflict by consent and the avoidance of adversarial and confrontational judicial proceedings. In China, for example, long-standing emphasis on the stability and harmony of the society has underpinned a tradition of mediated negotiation.⁶⁰
[See 7.3.2.1.]

⁵⁴ See IBA RULES, Rule 8 (“Involvement in Settlement Proposals”).

⁵⁵ See COMMERCIAL ARBITRATION AT ITS BEST (report of CPR Commission on the Future of Commercial Arbitration).

⁵⁶ See Stipanowich, *supra* note 1.

⁵⁷ See *supra* note 4 and accompanying text.

⁵⁸ Bas van Zelst, *European Perspectives on Enforcement of Med-Arb Clauses and Med-Arb Awards* 1 CORP. MED. J. 12, 18-19 (2018).

⁵⁹ See Stipanowich, *supra* note 1.

⁶⁰ Gu, *The Delicate Art*.

- 7.4.2 *Promoting efficiency and economy.* Having a single neutral serve in both roles permits the parties to avoid having to educate two separate neutrals, with attendant savings of time and cost.⁶¹ There may be circumstances, for example, where both parties regard the need for a final resolution as paramount; having their mediator transition to an arbitral role, or vice versa, may be viewed as the simplest and best way of meeting their mutual needs. This is most likely to be true in circumstances where, for example, an arbitrator has heard much of the evidence and is well-acquainted with the issues in dispute, and may be able to shift to a mediator role immediately, with none of the delays and costs associated with engaging another mediator. If the process ends with the rendering of an arbitration award, moreover, a degree of finality is assured.
- 7.4.3 *Promoting business solutions, maintaining or improving relationships and increasing psychological satisfaction.* Unlike arbitration, negotiated or mediated settlement discussions may afford parties the opportunity to craft integrative and creative solutions that better achieve business priorities.⁶² As many skilled mediators know, moreover, even if facilitated discussions do not lead directly to resolution of substantive disputes, the mediation process may permit the structuring of customized approaches that lead to a final resolution, including refined or nuanced formats for binding arbitration.⁶³ The prospect of a quicker and more efficient process combined with the opportunity to jointly structure business solutions or customized processes for final resolution augurs well for the maintenance or improvement of underlying business and personal relationships.⁶⁴ Finally, knowing that the med-arbitrator availed herself/himself of a broader information base than would be obtained through more formal arbitration hearings (e.g. parties' future and subjective interests) is alleged to assure greater psychological satisfaction in the outcome,⁶⁵ causing parties to be more accepting of the results, thus increasing voluntary compliance and sustainability of outcomes.
- 7.4.4 *Addressing special interests of parties, changed circumstances.* Having a neutral shift roles may sometimes be a natural response to changed circumstances during the dispute resolution proceedings or emerging process oriented needs and priorities of parties. [See 7.6.1.]
- 7.4.5 *Taking advantage of rapport with, trust in neutral.* A mediator who has successfully won the confidence and trust of the parties may be viewed as the ideal third party to adjudicate the dispute if the parties are unable to reach a negotiated settlement. For similar reasons, parties may look to an arbitrator to take on the role of mediator if there is reason to believe a dispute may be resolved

⁶¹ COMMERCIAL ARBITRATION AT ITS BEST.

⁶² See, e.g., NIGMATULLINA, COMBINING at 43 (describing scenario in which neutral's efforts in arb-med-arb eventually led to the parties negotiating "a constructive forward-looking agreement." (quoting Sawada, *Hybrid Arb-Med*)).

⁶³ See *supra* Part I.B.2.a. (providing actual example).

⁶⁴ Gu, *The Delicate Art*.

⁶⁵ Dendorfer & Lack, 84.

amicably before the conclusion of arbitration. In addition to being a convenient choice, the sitting arbitrator may also have extensive familiarity with the issues and the evidence. Having had an opportunity to observe the arbitrator manage arbitration proceedings, including supervising aspects of the pre-hearing process and hearings, the parties may have developed a level of rapport with that person and trust in their integrity. This may permit them to feel comfortable with that person playing a more direct role in negotiations, including perhaps offering preliminary views or serving as a facilitator/mediator.

- 7.4.6 *Greater impetus to settle—the “big stick.”* Med-arb (or arb-med-arb) also offers parties the prospect of a final resolution if mediation fails to achieve settlement.⁶⁶ Moreover, it is sometimes said that if the parties are aware that their mediator will render a final and binding decision in the absence of a settlement, they may feel additional pressure to settle their disputes in mediation. In other words, the mediator’s ultimate arbitral authority functions as a “big stick” to settle the case⁶⁷ starkly emphasizing the opportunity to reach a mutually acceptable resolution and avoid the risks of a third party decision.⁶⁸ At least one study indicates that med-arb with a single neutral may promote more problem-solving, reduce hostility and competitiveness between parties, and lead to more concessions.⁶⁹ One experienced neutral reports:

When I am appointed as a mediator in a dispute involving less than \$500,000, I offer the parties a hybrid ADR option. In the first phase of the hybrid ADR procedure, I act as a mediator to attempt to facilitate settlement of the dispute. If the parties are not ready for settlement, I identify, and narrow the scope of, disputed issues. I will engage in private caucuses, but I warn the parties not to disclose anything that they are uncomfortable with the decision-maker knowing. I was successful in settling a very contentious case between two feuding members of a limited liability company using this med-arb approach. Counsel later said that the fact that I was going to be the decision maker gave me credibility and respect among the parties when I was acting as mediator.

- 7.4.7 *Opportunity to set the stage for a consent award.* Arbitrating parties may see special benefits in informally settling disputes prior to the rendition of an award so that the settlement may be incorporated in a “consent” arbitration award, thus laying the groundwork for enhanced enforcement. Having the arbitrator play a more direct role in negotiated settlement is one way of increasing the likelihood that a settlement will occur, with the added benefit that the arbitrator who is being

⁶⁶ Blankenship, *Developing*.

⁶⁷ See Bartel, *Med-Arb* (discussing early empirical studies on med-arb); COMMERCIAL ARBITRATION AT ITS BEST. This phenomenon is sometimes referred to as “mediation with muscle” or “mediation with clout”.

⁶⁸ Blankenship, *Developing*.

⁶⁹ See, e.g., NIGMATULLINA, COMBINING.

asked to issue the consent award may be more familiar with the details of and circumstances surrounding the settlement.

7.5 Concerns Associated with Shifting Roles

In countries where mediation has developed as a distinct professional role in commercial dispute resolution, including common law jurisdictions including the U.S. and Commonwealth countries, conventional opinion has tended to disfavor a neutral shifting from the role of mediator to that of arbitrator during the course of resolving a dispute.⁷⁰ Even in many civil law jurisdictions, concerns regarding med-arb (especially when the mediation stage involves the mediator conducts separate, confidential meetings, or “caucuses,” with individual parties) have resulted in legal limitations on the use of med-arb procedures, including scenarios in which arbitrators shift to the role of mediator and then return to the arbitral role if mediation is unsuccessful.⁷¹ There are a number of reasons for this traditional caution regarding mixed roles for neutrals, especially situations where a neutral arbitrates after mediating.

7.5.1 *Fundamental incompatibility of mediative and arbitral roles.*⁷² The mediative and arbitral roles are in a sense diametrically opposed. The arbitrator’s interaction with the parties is confined to adversary hearings in which parties formally present evidence and contest opposing evidence before the arbitrator, who is charged with adjudicating the dispute; *ex parte* communications between arbitrators and parties are generally strictly limited. Mediation, on the other hand, may involve an informal and open discourse as well as an extensive *ex parte* communications between the mediator and individual parties in the form of separate, private caucuses involving confidential communications—all with the goal of helping the mediator facilitate a consensual resolution of the dispute..

7.5.2 *Concerns about party autonomy.* Some fear that the “big stick” wielded by a mediator who is expected to arbitrate a dispute if mediation fails to achieve settlement will undermine party self-determination and prevent a negotiated

⁷⁰ The Final Report of a CPR-sponsored commission comprised of more than fifty leading arbitration counsel and arbitrators state:

The majority of Commission members generally discourage parties from entering into pre-dispute or even post-dispute arrangements before a mediation in which the same individual is assigned the roles of mediator and arbitrator.

COMMERCIAL ARBITRATION AT ITS BEST. However, the Commission’s report went on to offer cautious guidance for med-arb and arb-med-arb. *See id.* One early U.S. critic was Lon Fuller, who addressed med-arb in the context of dispute resolution under collective bargaining agreements. *See Fuller, Collective Bargaining.* Similar concerns predominate in India. *See Appendix, Summary of Practices in India.*

⁷¹ CPR ARB. RULES, (noting that where arbitrators arrange for mediation during the proceedings, the “[m]ediator shall be a person other than a member of the Tribunal ... Tribunal.”); and (“The Tribunal will not be informed of any settlement offers or other statements made during settlement negotiations or a mediation between the parties, unless both parties consent.”).

⁷² *See* COMMERCIAL ARBITRATION AT ITS BEST; Stipanowich & Ulrich, *Commercial Arbitration* (summarizing reasons given by some mediators responding to International Academy of Mediators survey for not engaging in med-arb or arb-med-arb).

settlement from truly representing the will of the parties.⁷³ This is particularly true if the neutral “telegraphs” a personal perspective on the issues.

Similar concerns may arise if an agreement by disputing parties to have their neutral switch roles appears to be driven by the neutral, as exemplified by this scenario:

An experienced mediator with little arbitration experience was appointed by a state court to arbitrate a large, complex commercial dispute involving hundreds of millions of dollars under the terms of an ad hoc arbitration agreement. During arbitration hearings, the neutral repeatedly asked the parties to allow him to mediate the dispute. This caused great consternation on the part of one of the parties due to concerns that if they did not agree to a shift in roles they might be penalized by the arbitrator in his final award.

7.5.3 *Less candid and open communications; increased incentive to “spin” the mediator.* Parties who know that the mediator reserves the arbitral role should mediation fail may be less forthcoming in their own dialogue as well as in their communication with the mediator, thereby compromising the transformative aspect of the mediation process and the ability of the mediator to serve the parties effectively. In other words, the med-arbitrator may in some cases have less reliable information at her/his disposal than a “pure” mediator. Moreover, parties and counsels may feel additional incentive to manipulate the mediator in ways favorable toward their positions, with both sides putting on a performance of sorts to shape the neutral’s view, which will prevail when (s)he becomes the arbitrator—the ultimate decision-maker.⁷⁴ Finally, the neutral who knows that (s)he may be required to issue a binding decision if mediation fails, may act more cautiously (e.g. refrain from providing a “reality check”). As one U.S. lawyer reported:

I went through a thirteen-session mediation where the neutral was supposed to fill a dual role, first mediating and, if that didn’t work, acting as a special master who would make findings of fact for the court. What ended up happening in the mediation was that both parties were putting on a performance of sorts to shape his view as the ultimate fact finder. Wearing multiple hats can produce a very murky process where roles are unclear, and people are dancing around and posturing. It’s very risky.⁷⁵

One experienced German mediator observes:

⁷³ COMMERCIAL ARBITRATION AT ITS BEST.

⁷⁴ COMMERCIAL ARBITRATION AT ITS BEST.

⁷⁵ *Id.*

According to my experience with mixed roles in mediation, the dynamic is influenced if the parties assume or know that the mediator will have the power to decide on behalf of the parties. Not only that the parties are less open in their communication with the mediator, they are also less willing to strive for a solution. It seems to be easier to rely on the decision-making of the mediator – later arbitrator.

- 7.5.4 *Due process concerns.* Mediation usually involves extensive confidential *ex parte* communications between the mediator and individual parties. If mediation is unsuccessful, there is always the possibility that the mediator-turned-arbitrator’s view of the issues has been affected by information shared in *ex parte* discussions. This may include information which is not directly relevant to the issues contested in arbitration, and is never tested by cross-examination or rebuttal in the arbitration hearing—but which nevertheless colors a neutral’s view of the parties or their positions on the issues in conflict. How, some ask, can a mediator turned arbitrator purge his mind of facts and positions learned in confidence?⁷⁶ How can a party protect itself against arguments or statements of which it is unaware? As one Task Force member explains,

*I find this the most compelling argument against a combination of a proper mediation procedure (including caucuses) with an arbitration procedure. An arbitrator fulfills a quasi-judicial function. In order for an arbitration to qualify as a juridical process, such process needs to meet the minimum standards of ensuring compliance with the right to be heard of the parties, equal treatment of them and the independence and impartiality of the decision maker. The right to be heard entails in my understanding the entitlement to know all what the other party has communicated to the arbitrator in order to be put in a position to react to it, according to the adversarial principle. In my view, this mandatory requirement is the big stumbling block for combining arbitration and proper mediation with caucusing in one procedure and one person. This does, however, not mean that an arbitrator should not be able to make use of other techniques known from mediation, except for *ex parte* communication.*

- 7.5.5 *Expectations raised by mediator communications, evaluation.* Although critiques of med-arb nearly always emphasize what parties share with mediators in private caucus, concerns may also be raised by what mediators communicate to the parties—or how what mediators say and do is perceived by parties.⁷⁷ Communications between mediators and parties tend to be exceptionally free-flowing, and may include vague or ambiguous statements (which are often

⁷⁶ *Id.*

⁷⁷ See Nappert & Flader, *A Psychological Perspective*; Blankley, *Keeping a Secret*; Stipanowich & Ulrich, *Commercial Arbitration*.

employed by mediators to raise doubts and start a process of self-reflection by a party). What a mediator thinks or/and say and what a party thinks they heard may be two very different things. These dynamics are of particular concern in regard to case evaluations. A mediator's guarded evaluation of elements of a case or prediction of what might happen in arbitration might be interpreted or remembered as setting a floor of expectations for an award they might make at the conclusion of arbitration hearings. In other words, communications made by the mediator during mediation, including case evaluations or predictions offered during caucus, may raise in one or both parties specific expectations regarding a future award by the mediator-turned-arbitrator, as exemplified by the following scenario.

Two subcontractors were in the process of negotiating a merger. One of the companies was involved in a pending claim at the time of the merger negotiations. In many respects it was a fairly common sort of claim. The subcontractor was seeking additional compensation for post-contract changes that delayed its work and made the work more expensive. The general contractor counterclaimed for delay damages alleging the subcontractor's work delayed project completion.

Senior management for both potential merger partners participated in mediation; one as the owner of the company with the claim, the other as an observer. The subcontractor was represented by experienced construction counsel. During the course of the mediation the subcontractor team (both CEOs and counsel) interpreted the mediator's comments during private sessions as being highly supportive of the subcontractor's position; so much so that the subcontractor team readily agreed to allow the mediator to serve as the sole arbitrator when the matter did not settle in mediation. A separate arbitration hearing was held.

Between the date of the mediation and the date of the arbitration the two subcontractors agreed to go forward with their merger, based in part on their joint expectation that the arbitration would result in a positive cash recovery. This expectation on the part of the subcontractor team was so strong that they "booked" the award to be entered in the pending arbitration as an asset on the merger balance sheet.

Expectations are often unfulfilled. The arbitrator found in favor of the general contractor. Most disturbing to the subcontractors was that information shared by the subcontractors in a private mediation caucus, but not addressed in the arbitration hearing itself, was used by the mediator/arbitrator as part of the basis of the arbitration award.

*The balance sheet asset was transformed into a joint liability of the recently-merged companies. The two CEOs fell out and litigation was instituted to unwind the merger. The merger was unwound, the situation snowballed, and the subcontractor with the original claim in mediation ultimately declared bankruptcy.*⁷⁸

- 7.5.6 *Unsuitability of some neutrals for one role or the other.*⁷⁹ Experience and competence as a mediator does not automatically qualify an individual to perform the role of arbitrator and vice versa. Some excellent mediators may not have the temperament, managerial skills or procedural knowledge to be effective arbitrators. Similarly, many arbitrators lack the ability to be effective mediators.
- 7.5.7 *Lack of clarity regarding role(s) of neutral and other concerns affecting enforceability of result.* Because legal frameworks for arbitration and mediation tend to be “siloed”—that is, developed and regulated separately and independently—in many countries,⁸⁰ having a neutral engage in both activities during the course of dispute resolution may raise questions about the nature of the process, the neutral's expected code of conduct and the enforceability of the results under applicable law(s).⁸¹

For example, efforts to structure a suitable, workable, and enforceable resolution are sometimes undermined by a lack of precision, preventing a reviewing court from determining whether it is being asked to enforce a mediated settlement agreement or an arbitration award. Such an issue may be particularly acute when a single individual is assigned multiple roles, or where the neutral's role may be characterized in more than one way. Lack of clarity in delineating the boundaries between a neutral's activities as mediator and as arbitrator may create problems for any party seeking to enforce a resolution reached through the process. These concerns are illustrated by *Ex parte Industrial Technologies* (Ala. 1997),⁸² a court decision resulting from an agreement to refer a dispute to an out-of-court process described as “mediation or arbitration” with a retired circuit judge as “mediator/arbitrator.” The parties subsequently disagreed about the nature of the process and the outcome, and the subsequent legal dispute ultimately reached a state supreme court which determined that both the parties' agreement and the subsequent process were fatally flawed since there was no meeting of the minds regarding the precise nature of the procedure, the neutral's role, or the final result. While the participants had the opportunity to overcome their lack of precision in tailoring the original ADR agreement during the subsequent negotiation and

⁷⁸ E-mail from David Ratterman.

⁷⁹ COMMERCIAL ARBITRATION AT ITS BEST. For related sources from the labor arena, see *Bartel, Med-Arb*.

⁸⁰ See Stipanowich, *supra* note 1, Part II.A. (discussing evolution of arbitration and mediation in U.S.); Part IV.A., B. (discussing legal framework in Brazil, Singapore).

⁸¹ See Deason; Stipanowich, *supra* note 1, Part III (discussing legal framework in various countries).

⁸² See, e.g., *Ex parte Industrial Technologies*, (Ala. 1997), discussed in FOLBERG, RESOLVING DISPUTES.

drafting of their final “stipulation of agreement,” they instead merely exacerbated their earlier mistakes.⁸³

Moreover, the perceived fundamental dichotomy between mediation and arbitration—their diametrically opposite orientation toward *ex parte* discussions—may give rise to procedural grounds for motions to disqualify an arbitrator or overturn arbitration awards.⁸⁴ As discussed below, parties who want a neutral to serve in mixed roles must be very clear about the resolution of the foregoing issues and should address pertinent waiver issues (such as parties’ waiver of the right to challenge any resulting arbitration award on grounds of *ex parte* contact).⁸⁵ In some other jurisdictions, additional strictures on dual roles may create other procedural hurdles for parties.⁸⁶

Another concern relates to the potential impact of the New York Convention on resolutions reached through med-arb, where arbitral jurisdiction may not have attached prior to mediation. If it can be proven that all issues in dispute were settled prior to the arbitration, the award may be quashed, or denied enforcement, on jurisdictional grounds because there was no “difference” between the parties at the commencement of the arbitration.⁸⁷ The neutral should be especially vigilant in cases where [s]he has reason to suspect the dispute is not genuine.”

7.5.8 *When does the mediation stage under a med-arb arrangement end?*⁸⁸ If parties agree to med-arb or arb-med prior to commencement of dispute resolution, who decide that mediation has been exhausted? An important difference between med-arb and regular mediation is that under med-arb a disputant may not just walk away of the process. In absence of an opt-out provision, the disputant must proceed to arbitration. This may raise the question when the timing for switching hats can be established and by whom? Theoretically, parties may agree on one of the following three options: (1) Either party may end the mediation at any time and for any reason; (2) Parties need to mutually agree that the mediation phase has been exhausted; and (3) To entrust the med-arbitrator with the authority to decide on the commencement of the arbitration proceedings. This last option echoes the practice which finds expression in standard mediation entry agreement which stipulate that the mediator has a full discretion to end the mediation.

⁸³ Lack of clarity regarding neutral role(s) was also a factor in the non-enforcement of a stipulated settlement agreement reached through a process described as “binding mediation.” See *Lindsay v. Lewandowski*, discussed in Sussman, *Combinations*.

⁸⁴ Concern about the enforceability of arbitration awards is a central theme of recommendations made by the CEDR Commission on Settlement in International Arbitration. See Stipanowich, *supra* note 1, Part V.B; see also COMMERCIAL ARBITRATION AT ITS BEST.

⁸⁵ See Stipanowich, *supra* note 1, nn.307, 333, 393, 407.

⁸⁶ Some of these hurdles are exemplified by the laws of Brazil, Singapore, Hong Kong and Australia. See Stipanowich, *supra* note 1, Part IV.

⁸⁷ New York Convention, Article II(1).

⁸⁸ This aspect was highlighted by Bas van Zelst, 15-16.

7.6 An Emerging View: Creativity, Risk and Effective Problem-Solving

For the foregoing reasons, many lawyers and dispute resolution professionals eschew process options involving mixed roles for neutrals. As noted above, however, recent studies indicate that today many neutrals do switch hats from time to time;⁸⁹ moreover, some have established such services as a part of their professional brand. One of the latter explains,

*I have embraced [mixed roles] because I view myself, above all else, as a “problem solver,” rather than just an arbitrator and a mediator, and because I think being an effective problem solver requires exercising some creativity and involves taking some risk. I strongly believe that mixed mode dispute resolution is the wave of the future of our field.*⁹⁰

In 2001, a Commission sponsored by the New York-based CPR Institute for Dispute Resolution first propounded guidance for business parties considering med-arb and arb-med.⁹¹ Although recognizing that mixed-role processes might prove beneficial in some cases, the emphasis was on the various risks and how they might be addressed. Twenty years later, the experience of neutrals who have since developed a specialization in mixed roles reinforces the notion that such roles can be more fully, if selectively and carefully, embraced. We may glean a number of tentative conclusions from their collective experience.

7.6.1 *There may be strong reasons for the parties to have a neutral switch hats, including changed circumstances.* As some of the illustrative anecdotes reveal,⁹² employing separate individuals to mediate and arbitrate a dispute may not always be practical or preferable. As one neutral puts it:

*In each instance [where I participated in arb-med], the parties had one or more compelling reasons, some of a highly personal nature, why they wanted me to switch hats and mediate. . . . In each instance, the designation of a different neutral to mediate the dispute would not have accommodated or been responsive to the stated concerns that motivated the parties to ask me to switch hats.*⁹³

Another experienced mediator and arbitrator identified multiple priorities supporting one med-arb scenario:

⁸⁹ See *infra* note 188 and accompanying text; see also COMMERCIAL ARBITRATION AT ITS BEST.

⁹⁰ E-mail from Richard Silberberg.

⁹¹ COMMERCIAL ARBITRATION AT ITS BEST (Report of CPR Commission on the Future of Arbitration). The sponsoring organization is now known as the International Institute for Conflict Prevention & Resolution. Relevant aspects of the CPR Commission Report are discussed in Stipanowich, *supra* note 1, Part V.A.

⁹² See Stipanowich, *supra* note 1, Part II.B.2.

⁹³ E-mail from Richard Silberberg.

A dispute between a large private firm which has been in the business of manufacturing car batteries for many years and its union. The firm was facing a fierce competition from Chinese products and had to cut 50% of its costs in order to stay competitive and survive.

I was appointed as a mediator. Nonetheless, since the firm needed to act urgently, it was agreed in advance that all unresolved issues would be decided by me as an arbitrator and that whether the dispute would be resolved by mediation or arbitration the outcomes would be put in a form of an arbitration award.

In retrospect, it was a very wise decision. After a 20-hour marathon session we were able to reach an agreement on all issues and to reverse the firm's decision to close its business. I wrote a lengthy arbitration award and registered it.

Later I learned that union officials and employees' representatives were fiercely attacked by their constituency for what was perceived as a major deterioration in working conditions and loss of job security and that the arbitration award was used by them as a shield.

These situations often include changed circumstances, including the impact of the coronavirus pandemic, which came on during a hiatus between arbitration hearings:

The Claimant was unemployed, and the Respondents, . . . suddenly found that there was no demand for their services. The parties' counsel informed me that they wished to mediate the dispute rather than schedule additional hearing days. I encouraged counsel to . . . line up a mediator, but they rejected that suggestion, indicating that it "only made sense" to mediate if I would agree to serve as the mediator. Counsel explained that they did not have the inclination to get another neutral "up to speed" nor did their clients wish to expend the money to do so. . . . Counsel further commented that I had heard enough testimony to see where the case was going and that the additional fact testimony remaining to be heard was unlikely to change my view of the case (whatever that might be). I explained to counsel at some length the risks that would be involved if I were to switch hats and serve as the parties' mediator (particularly if the case were not settled), but the parties expressed very little concern about those risks and readily agreed to execute the written arb-med consent form that I use in such circumstances. The parties' counsel had concluded that "our clients need the case to be over so they can get back to the business of preserving their livelihood during the

pandemic,” and “we view you as our best chance to get that done.”⁹⁴

As previously noted, there may be situations where an arbitration award simply won't serve the parties' goals:

I had a case in which all arbitrators in the deliberations felt that deciding the matter according to the law would not result in a commercially sensible solution. The key focus was not on a cash award but quite complex and intertwined declaratory relief requests relating to IP rights, the scope of which was disputed. Both parties only needed parts of these rights for their own products but they were tied together in an exclusive license setting under a long-term license agreement which prevented them from working with other partners in exploiting the IP rights. All knew that the IP rights had great potential for new products but the parties did not want to engage together in developing them and at the same time blocked each other. When deciding the case, only a black-and-white solution was possible, namely either concluding that the exclusive long-term license agreement was validly prematurely terminated or not. Any creative solutions on how to reshape a cooperation between the parties and including further parties into the mix, could not be the mission of the arbitral tribunal. After a hearing, the arbitrators considered to suggest to the parties that the wing-arbitrators would assume the roles of proper (joint-) mediators with the opportunity to speak to the parties ex parte, while the chairman would not be involved and not privy to the mediation. The plan was that the chair continues as a sole arbitrator had the mediation not been successful.

7.6.2 *The risks of some mixed-role processes may be overstated.* Some experienced repeat players insist that many of the concerns about mediators shifting to the role of arbitrators after having been exposed to prejudicial information in *ex parte* discussions with the parties, is overblown.⁹⁵ One frequent med-arb neutral argues that there is an over-emphasis on what happens if mediation fails and a neutral becomes arbitrator, instead of focusing on the key priority and normal conclusion of the process: a negotiated settlement in mediation.⁹⁶ Another dispute resolution professional points out,

I have engaged in arb-med-arb approximately ten times during the course of my career as a neutral, each time at the request of both

⁹⁴ E-mail from Richard Silberberg. In other cases, the role change was motivated in an international dispute by the parties' belated recognition that their best chance to reach a negotiated settlement would be when they were all together in the same city for arbitration hearings.

⁹⁵ See Appendix, Summary of Practices in China.

⁹⁶ Blankenship Memo.

sides’ counsel on an ad hoc basis. Fortunately, I have only had to proceed to the second “arb” stage on one of those ten occasions.⁹⁷

7.6.3 *Med-arb may involve multiple role transitions.* Arrangements for switching hats may entail more than one role transition. In the course of resolving one transnational commercial dispute, one experienced neutral began in the role of non-evaluative mediator and, in a second stage, transitioned to a more evaluative role focused on party rights and positions. The issues were eventually resolved through final offer arbitration with the same neutral issuing a binding award.⁹⁸

Practice Guidelines for Med-Arb, Arb-Med, Arb-Med-Arb

7.7. Introduction: The Special Requirements of Med-Arb, Arb-Med, and Arb-Med-Arb

Experienced mixed-role neutrals remain highly attentive to the pervading concerns associated with switching hats, and emphasize that effectively changing hats depends on a confluence of several factors including a relationship of significant trust and confidence between neutral and parties; a neutral with a range of pertinent skills and abilities, as well as comfort with taking on multiple roles; autonomous, consensual decision-making by parties who are informed of the known and unknown risks of mixed-role arrangements, as well as procedural options to avoid or minimize risks; a written agreement clearly setting forth the parties’ understandings and incorporating appropriate waiver language.

Such elements will be considered more fully in the following Practice Guidelines. [Sections 7.8 through 7.16.]

7.8 Careful, Informed, Independent Reflection by Parties and Counsel

Any decision by parties to employ neutrals in dual roles (med-arb, arb-med or arb- med-arb) or to have an arbitrator engage directly in helping facilitate settlement should be the product of careful, informed, and independent reflection and discussion by all concerned.⁹⁹ In most cases, the parties’ priorities will be best achieved by employing different third party neutrals in the roles of arbitrator and mediator, either sequentially or in parallel. There may be situations, however, where business parties and counsel consider the matter before or during dispute resolution and conclude that the prospective benefits of dual roles, or of arbitrator engagement in settlement discussions, outweigh the risks.

Ultimately, the success of such arrangements depends upon: (1) mutual understanding between the participants as to their expectations regarding mediation and arbitration; (2) the ability of parties and counsel to understand the concerns associated with mixed roles

⁹⁷ E-mail from Richard Silberberg.

⁹⁸ Mironi, *From Mediation to Settlement*.

⁹⁹ See Brewer & Mills, *Combining Mediation*.

and then to employ the process in the most effective, mutually acceptable manner; (3) the involvement of a neutral who is willing and is qualified by background and experience to handle the anticipated dual role, and who has established a relationship of rapport and trust with the parties; and (4) an agreement that integrates the mutual understandings and expectations of all participants¹⁰⁰ and develops organically from the circumstances.¹⁰¹

The best approach is for parties and counsel to think carefully about all of these factors in advance, or in the early stages of dispute resolution.¹⁰² This may involve discussions during the process of contract negotiation and drafting or after disputes have arisen, either before or after the retention of a mediator or arbitrator(s). Although it is important that parties and counsel have the opportunity to exercise independent judgment regarding mixed roles or arbitral engagement in settlement, it will be critical for the parties to engage the neutral(s) in the discussion to receive their input and to ensure their comfort with and commitment to the process. This might occur either at the time they are retained or in initial planning for the dispute resolution process—such as, for example, during an initial prehearing management conference in arbitration.¹⁰³ Indeed, the parties’ faith and trust in the ability of a neutral to “thread the needle” of a dual role may be the single most critical element in submitting to such arrangements.

As discussed below, these mutual understandings should be integrated in an agreement.

7.9 Ensuring Parties' Mutual Understandings Regarding Roles of Mediator and Arbitrator

7.9.1 *Clarifying expectations regarding basic role(s) of mediators.* In any particular situation, the scope and nature of a mediator’s activities may be determined or limited by the skills, attributes, and preferences of the mediator; the nature of the dispute; the understandings and preferences of the parties and counsel; and other surrounding circumstances. Moreover, perspectives and practices regarding the mediator’s role(s) are often heavily influenced by prevailing law or cultural tradition. Given these variances, it is especially critical for participants in international dispute resolution—parties, counsel, and dispute resolution professionals—to anticipate that there may be different expectations among parties from different legal traditions, and to take responsibility for parties ensuring that there is a mutual understanding and true meeting of the minds regarding the role and functions of mediators. [See 7.1.2.1.] Similar diligence is

¹⁰⁰ For a discussion of consent issues, *see* NIGMATULLINA, COMBINING; Sussman.

¹⁰¹ As one neutral with considerable experience with med-arb notes, “As always, the parties should fashion the process to the dispute, not the dispute to some preordained process.”

¹⁰² The Task Force recognizes that proactive, pre-dispute discussions about mixed roles for neutrals are relatively rare. It may be that parties and counsel may benefit more from a post-dispute facilitated discussions about such options. For example, DIS, a leading German dispute resolution institution, has introduced the role of a conflict manager whose services can be used when a dispute arises. The conflict manager would discuss with the parties the most appropriate and a tailor-made dispute resolution mechanism. Despite some good marketing efforts, it is not accepted in practice.

¹⁰³ *See, e.g.,* CEDR, RULES.

due with respect to usages of “conciliation” and the functions of conciliators.¹⁰⁴
[See 7.1.2.2.]

7.9.2 *Clarifying expectations regarding the role of arbitrators in facilitating settlement.* As discussed above, for a variety of reasons including cultural and legal traditions and other circumstantial factors, parties may enter into dispute resolution with very different expectations regarding the role of arbitrators in settlement and single-neutral med-arb, arb-med, and arb-med-arb. For this reason, efforts should be made to clarify and understand these expectations.

7.10 Decision-Making Regarding Switching Hats – The Role of Parties and Neutral

Ideally, a decision to have a neutral change roles from mediator to arbitrator or from arbitrator to mediator during the course of resolving a dispute should be left to the parties' own initiative and volition. Although the neutral's input and commitment to switching hats may eventually be critical, such decision should not normally be prompted or initiated by the neutral.¹⁰⁵ In the absence of shared expectations regarding the matter, discussing the arrangements for a neutral to play dual roles (med-arb, arb-med, or arb-med-arb) or for an arbitrator to engage directly in settlement discussions should be left to the parties. Once appointed and while the proceedings are under way, proposals or suggestions to the effect that the mediator should switch to the role of arbitrator, or vice versa, or requests to discuss with the neutral the pros, cons, and options for such an approach, should preferably be made jointly by both/all parties after they have discussed the matter outside the presence of the neutral.¹⁰⁶ This is probably the best way to protect parties; autonomy and avoid undue pressure on parties and prevent efforts at “one-ups-man-ship” in the presence of the neutral. It also affords decision-makers on all sides time and space to reflect and deliberate. At some point, however, the neutral's input should be brought to bear during parties' discussion and planning.

7.11 Neutral's Competency, Availability, Independence, Impartiality

7.11.1 *Considerations for med-arb, arb-med, arb-med-arb.* A mediator should be authorized to shift to the role of arbitrator in the course of resolving a dispute, or

¹⁰⁴ Both internationally and in domestic settings, the term “conciliation” is often used as a synonym for mediation. See Stipanowich & Fraser, *The International Task Force*. In some circumstances, however, conciliators focus on some or all of the following activities: evaluating the legal and factual elements of the parties' positions regarding the issues in disputes; predicting the potential consequences if the issues in dispute are adjudicated in court or in arbitration; or putting forward to the parties their own proposals for agreement. *Id.* (discussing different usages of the term in different commercial and relational settings).

¹⁰⁵ Under some standards, an arbitrator is constrained from suggesting that he serve as a mediator, although, if appropriate, the arbitrator may encourage the parties to consider mediation with a different neutral. For an example, see section III.B. JAMS, *Arbitration Ethics*.

¹⁰⁶ See COMMERCIAL ARBITRATION AT ITS BEST (“In no event . . . should parties be requested to make a decision regarding choice of process [of med-arb] or of the [mediator's shift to the role of arbitrator] . . . in the presence of the neutral.”).

vice versa, only if the parties are confident of the neutral’s fitness for both roles.¹⁰⁷ The qualifications for the roles are significantly different; moreover, it may not be possible for a neutral to effectively shift to the role of arbitrator after having served as mediator, or vice versa. Before agreeing to have a neutral change roles, or potentially take on both roles, the parties should ensure that a neutral has the following:

- 7.11.2 *Requisite competence and capability.* Competence and capability may mean very different things depending on one’s neutral role. Mediation and arbitration require very different skill sets. If the parties wish to have the same neutral acting in both roles of a mediator and arbitrator, he or she must be trained in the ethics, norms and techniques of each process. Highly effective mediators may not have the skills, experience, or disposition to be good arbitrators; the reverse is also true. Parties should make discrete evaluations of a neutral’s process management skills and preferences, temperament, and relevant substantive knowledge or subject matter expertise as well as experience. Moreover, many neutrals may be uncomfortable playing both roles and/or shifting from one role to another, which entail special dynamics and challenges.¹⁰⁸

In order to assess an individual’s ability to fulfill the role of mediator, it is important to understand what that role is likely to entail. For example, where there is a possibility that a mediator will be shifting to an arbitral role, a mediator might not engage in overt evaluation of parties’ positions,¹⁰⁹ arguments and the likely outcome if the dispute ends up in court, or might engage with the parties jointly and eschew private caucusing.¹¹⁰

At least as critical, however, is the degree of confidence and trust that parties repose in their neutral, or the latter’s ability to gain and maintain a high level of rapport during the various stages of complex processes. While these elements are always important to success in mediation, they may be paramount in the mixed-mode context.

- 7.11.3 *Availability.* Dual roles for neutrals may raise particular concerns regarding availability. For example, when a mediator shifts over to an arbitral role, it is probable that a greater time commitment will be required for lengthy hearings and drafting the arbitration award. In such circumstances, the parties should ensure that their reasonable expectations of for a timely proceeding can be met.

- 7.11.4 *Independence and impartiality.* Although independence and impartiality are often regarded as important considerations in the selection of mediators, in

¹⁰⁷ See COMMERCIAL ARBITRATION AT ITS BEST. at 23–24. Essential requirements for service as a mediator or arbitrator are catalogued in leading ethical and practice standards. For an example see IBA RULES OF ETHICS FOR INTERNATIONAL ARBITRATORS. (“Fundamental Rule” and “Acceptance of Appointment”).

¹⁰⁸ See Blankenship Memo.

¹⁰⁹ See *id.* (noting need for great care in evaluating during mediation phase of med-arb, and concerns about implying predisposition toward a particular outcome in the arbitration phase).

¹¹⁰ See Stipanowich, *supra* note 1, nn.307, 330, 398 and accompanying text.

arbitration they are often of paramount significance given the fact that arbitrators are empowered to render legally binding decisions with limited judicial oversight. If a mediator is persuaded that he or she is willing and fully able to undertake the role of arbitrator, the mediator should disclose in writing any circumstances currently known to the mediator which are likely to give rise in the mind of any party to any justifiable doubts as to his or her impartiality or independence, or any other facts that might raise questions about his or her ability to effectively perform the arbitral role. One may assume that the disclosure obligations for arbitrators may be stricter or more expansive than those for mediators under applicable law or procedures. If the parties have agreed to arbitrate under specific published arbitration rules, then any disclosure should be in accordance with those rules.

Moreover, with regard to impartiality, the obligation to disclose prior to serving as an arbitrator may be broadened if the mediator engages in private caucuses with individual parties during the mediation stage of med-arb. For example, in the event the parties are considering med-arb after mediation has begun, they should consider (in addition to other factors) any information or arguments to which the arbitrator was exposed during mediation, especially during caucuses, and any communications the mediator made with the parties in regard to evaluation of their cases or predictions respecting results in arbitration.

One task force member observes:

As I understand, the requirement of independence and impartiality applies to the neutral continues not only at the time of its appointment, but throughout the procedure until its function is discharged. However, I do not believe this requirement (particular impartiality) inhibits the neutral to form its views on the merits of the case as the proceeding develops, based on the submissions (of arguments and evidence) made by the parties (and quite the contrary this is what is expected especially for arbitrators, who are expected to ultimately render an award).

7.11.5 *Confidentiality.* Legal and ethical rules or standards as well as parties' and counsel's expectations regarding the nature and scope of confidentiality may vary greatly between mediation and arbitration. Parties should be aware to the fact that in contrast to arbitration, in almost all legal systems the confidentiality of mediation is strictly protected by law. Moreover, protecting the confidentiality of settlement-related communications during mediation—particularly communications between the mediator and individual parties during *ex parte* caucuses—are usually a primary concern of parties in mediation. Where the mediator shifts to the role of arbitrator, however, such concerns must be weighed against countervailing concerns about the viability of any award by the mediator-turned-arbitrator (mediator-cum-arbitrator).

In any event, parties and counsel who worry as to whether the confidentiality

obligations of the mediator and the mediation process applies also when the mediator shifts to the arbitrator role, should take additional measures to maximize confidentiality of the arbitral proceedings (such as confidentiality agreements, possibly embedded in the ADR process agreement).

7.12 An Agreement in Writing

The agreement of the parties for med-arb (or arb-med-arb), including agreements providing for a currently-serving mediator to shift to the role of arbitrator, should be in writing, and should be clearly and carefully drafted. Such agreement is essential not only when parties agree to switching hats arrangement in advance or at the beginning of the dispute resolution proceedings. It is not less important when the decision to transfer from mediation to arbitration and vice versa are taken ad-hoc while the proceedings are under way. In both instances the agreement should include:

- 7.12.1 *Clear demarcation of phases or stages; scope of settlement discussions.* The agreement should include a clear demarcation of the respective phases or stages of the process, using clear and concise language to separately identify and delimit mediation and arbitration. The agreement should avoid conflating roles (such as “mediator/arbitrator” or “binding mediator”) and be precise in describing how and when an arbitrator shifts to the role of mediator, or vice versa. Where some but not all of the matters in dispute are the subject of settlement discussions, care should be taking in delineating the scope of what will and will not be addressed.
- 7.12.2 *Reasonable allocation of time.* When parties opt in advance for switching roles, reasonable time should be allocated to each phase in the process. One experienced practitioner insists that in order to place appropriate emphasis on the mediation phase of med-arb, efforts should be made to avoid unduly rushing the process in order to hasten the arbitration phase.
- 7.12.3 *Clear description of the character of mediation and arbitration.* As noted above, parties have a number of choices regarding process options, including the format for mediation and the scope of activity of the mediator; understandings regarding specific process options should be included in the agreement. This is particularly important when parties and/or counsel come from legal traditions with different expectations of mediator roles.

If necessary, the agreement may also include a clear description of the scope of evidentiary hearing in arbitration, rules governing arbitrator disclosures and challenge, the format for the award, arbitration timetable, and other appropriate procedural elements. If the agreement incorporates the published rules and procedures of an institutional provider of arbitration services, it may be appropriate to consult that institution regarding procedural questions. The provider institution may offer a template for med-arb or arb-med-arb.

- 7.12.4 *Waiver language.* The agreement should include a provision to the effect that the neutral’s participation in prior settlement discussions as well as her/his exposure

to *ex parte* communication will not be asserted by any party as grounds for challenging the appointment of the neutral as arbitrator or any arbitration award rendered by the neutral.¹¹¹

7.12.5 *Partial agreement.* When the decision to transfer from mediation to arbitration is taken ad-hoc while the proceedings are under way and only part of the issues in dispute were settled, the disputants may want to draw up a partial agreement. Such agreement may include two parts – substantive and procedural. The substantive part relates to those issues that were resolved and stipulates what was agreed upon by the parties; the procedural part delineates certain aspects agreed upon by the parties with the help of the mediator regarding the arbitration process. Note that this partial agreement will be binding irrespective of the arbitration process and as a matter of rule becomes part of the arbitration award, as a consent award.¹¹²

7.13 Particular Process Options Where Med-Arb, Arb-Med (or Arb-Med-Arb) is Contemplated, or Discussed, Prior to the Start of Mediation

If, prior to the commencement of mediation, the parties are considering med-arb or arb-med-arb, any of the following process options may be explored and discussed between the parties and by the parties with a prospective mediator. Such provisions should be incorporated in the parties' written agreement. Perhaps the two most consequential choices to be made by the parties are: first, the scope of the neutral's role as mediator/facilitator of settlement—specifically, whether the neutral will engage in case evaluation or offer proposals for settlement; and, second, whether settlement discussions should include private caucus sessions with individual parties

7.13.1 *Evaluation / no-evaluation option for mediation phase.* Parties contemplating dual roles for neutrals should carefully consider whether and to what extent the neutral should engage in evaluation of parties' positions and arguments during the mediation phase, as such communications could create certain expectations regarding the neutral's possible rulings as arbitrator.¹¹³ As we have seen, standards differ in this area: the CPR Commission raised serious concerns about evaluation in the context of mixed roles, while the CEDR Commission approved the practice, at least in the context of settlement discussions involving both parties in joint sessions.¹¹⁴

Given the diversity of views respecting evaluations in this context and the potentially significant impact of evaluation, it will be advantageous for neutrals and advocates with relevant experience to share details of approaches that have

¹¹¹ Article 60(1) of the Japan Commercial Arbitration Association Interactive Arbitration Rules provides a good guidance on this point. See Appendix, Summary of Practices in Japan.

¹¹² Dendorfer & Lack, 83.

¹¹³ See Stipanowich, *supra* note 1, nn.110–111 and text accompanying.

¹¹⁴ See Stipanowich, *supra* note 1, nn.306, 322–329 and text accompanying.

proven effective, either in stimulating negotiated settlement or in permitting the neutral to preserve the trust and confidence of the parties when shifting to the role of arbitrator when settlement efforts do not resolve disputes. Such experience would provide a starting point for discussion of process options when the possibility of dual roles is raised by the parties. Despite the expressed concern about arbitrators telegraphing views of the parties' cases during settlement discussions, evaluations may be an important stimulus for settlement;¹¹⁵ problems may arise, however, when the neutral subsequently shifts roles and renders an arbitration award.¹¹⁶ Much more needs to be understood about how and why this is the case.¹¹⁷

For example, one U.S. neutral who has successfully engaged in arb-med-arb on multiple occasions tries not to communicate strong perspectives on the merits during the mediation phase. Nevertheless, he recognizes the difficulty of completely avoiding conveying impressions regarding the legal merits of the dispute.¹¹⁸ Another neutral explains:

*Extreme care must be employed by the mediator in whether and how an evaluation will be offered in a med-arb. In my view, this is the most challenging aspect of the med-arb process. I do not think the mediator can offer the same kind of evaluation during med-arb as he/she can in stand-alone mediation. It goes without saying that the mediator cannot say or even imply how he/she is going to rule, thus improperly coercing a party to settle. However, with the right set up, including the assurance that you are giving evaluations to the other side, and being careful to say that your statements are in no way to be viewed as an indication of how you are going to rule if the matter goes back to arbitration, an evaluation can be skillfully made. However, I still think the better practice, in most cases, is to reframe your evaluation in the form of a question, such as: "What if I were to find . . . ?" "How would you respond or deal with a finding that your key position fails because . . . ?"*¹¹⁹

Our efforts to understand more about the dynamics of evaluation in these

¹¹⁵ See Stipanowich, *supra* note 1, n.65 and accompanying text.

¹¹⁶ See Stipanowich & Ulrich, *Commercial Arbitration*; E-mail from David Ratterman.

¹¹⁷ David Rivkin's exposition on a "town elder" model offers a glimpse of how an arbitrator might engage in an evaluative manner in settlement discussions. See Rivkin, *Towards*.

¹¹⁸ He explains,

Parties and lawyers keep trying to figure out my evaluation and continually tried to make inferences from the questions I asked them. Some of my questions in caucus were, of course, designed to allude to risks (no matter which way I was going to decide in the final arbitration phase). I do not allow anyone to keep notes of our confidential sessions and I ceremonially destroy my notes with theirs after each private session.

Email to author (Apr. 23, 2020) (name withheld).

¹¹⁹ Blankenship Memo.

circumstances should include not only evaluation during caucuses, but also during joint session—especially since this may be a widely-used mode for arb-med-arb in international dispute resolution.¹²⁰

- 7.13.2 *No-caucus option for the mediation phase.* Under some circumstances it may be possible for mediators to engage effectively with parties in joint meetings and settle disputes without *ex parte* caucuses. Because *ex parte* communications during the mediation phase are at the root of many of the frequently expressed concerns regarding med-arb or arb-med-arb [see 7.5], this option should always be among those considered prior to commencing dispute resolution proceedings. One experienced U.S. neutral recounts:

I was serving as arbitrator of a case involving issues associated with the breakup of a business relationship. The proceedings were bifurcated; the first phase of arbitration was focused on valuation of business assets, and the second phase on breach of contract issues. After several days of hearings on valuation, counsel for both parties announced that they were making good progress toward a negotiated settlement of the valuation question, and wondered if I could assist them in reaching a final agreement.

After discussing the concerns associated with my acting as mediator, we modified the agreement of the parties to permit me to serve in that role. It was agreed, further, that the parties would waive any right to challenge any subsequent arbitration award on the grounds of my serving as mediator. We also agreed that the entire mediation process would be conducted as a joint session with no caucuses. Within a couple of hours, the mediation produced an amicable agreement on the valuation issue; the settlement was incorporated into an arbitration award. I subsequently served as arbitrator on the phase two issues; those latter hearings proceeded in normal fashion to an award.

It must be observed, however, that some mediators and parties will be reluctant to engage in mediation without the opportunity to caucus.

- 7.13.3 *Options for med-arb (or arb-med-arb) where mediation involves separate ex parte caucuses.* Should the parties elect to conduct med-arb with caucuses during mediation, consideration should be given to what, if any, provisions should be included in their agreement to address concerns that might arise if mediation fails and the neutral shifts to the role of arbitrator. One dispute resolution professional with multiple experiences switching roles recalls:

¹²⁰ See Stipanowich, *supra* note 1, n.344 and text accompanying (CEDR Commission appears to support evaluation by arbitrator in the course of assisting with settlement negotiations, but not in caucus). See Blankenship memo (describing one scenario in which the neutral offered an analysis of parties' positions after presentations by both sides, and offered a proposed range of values for settlement).

I've engaged in dual roles in several matters involving sophisticated clients represented by self-secure, experienced counsel. In one dispute involving the purchase of a regional software business by a large international corporation, I was initially appointed as solo arbitrator under well-drafted one-off agreements and had supervised part of the pre-hearing process when I was approached jointly by counsel with creative ideas for suspending arbitration for an interim mediation involving various technical issues relating to ongoing software development and support and a transitional role for the seller. I helped flesh out an agreement clearly expressing the parties' consent to the interim steps in spite of specified concerns about potential problems the interim steps might create for my arbitral decision-making; counsel offered written joint guidance on what I could and could not do during the interim mediation. After a successful mediation, I resumed the role of arbitrator to rule on past damages; attorney fees were awarded based on a last-offer arbitration model.¹²¹

A number of specific procedural options might be considered.

- .1 *Arbitrator's award must be dependent solely on evidence and arguments presented during arbitration proceedings.* The parties are well advised to include a provision to the effect that if mediation is unsuccessful and mediator becomes the arbitrator (or, in arb-med-arb, returns to the role of arbitrator), the arbitration award shall be based solely on the evidence and arguments presented during arbitration proceedings and not on communications made during mediation.
- .2 *Before changing to the role of arbitrator, mediator must disclose confidential information that the mediator considers material to the arbitration proceedings.* Several national laws regarding med-arb require that neutrals make disclosures of confidential information received from parties during mediation prior to proceeding with arbitration.¹²² Such draconian requirements, however, are likely to discourage parties from sharing confidential information with mediators and perhaps from using caucuses or even from employing med-arb. On the whole, if parties are truly concerned about the danger of *ex parte* communications affecting the arbitration award, the *ex post* approach seems substantially less desirable than a simple agreement to avoid private caucuses during the mediation process. Nevertheless, some parties may choose to employ such provisions.

¹²¹ E-mail to author (April 21, 2020) (name withheld).

¹²² See CAA AUSTRALIA art. 27D (requiring arbitrators to disclose all material information gained from mediation proceedings before beginning arbitration).

The arbitration statutes of Singapore include similar provisions. See SINGAPORE ARB. ACT, § 63(3); SINGAPORE INT. ARB. ACT, § 17(3).

- *Option A. The mediator shall disclose to the parties as much of the confidential information (s)he received during the mediation as (s)he considers material to the arbitration proceedings. [This is similar to language employed in the Australian Commercial Arbitration Act and some other laws.]*
 - *Option B. The mediator shall disclose to the parties as much of the confidential information (s)he received or provided during the mediation as (s)he believes might be material to the his or her decision-making process in arbitration. [This version includes communications by the mediator to parties as well as confidential information conveyed by the parties.]*
- .3 *Parties consent to med-arb with full awareness that arbitration award will be influenced by information received in ex parte caucus in mediation phase. A diametrically opposite approach from those above [7.11.3.1, .2] would be for the parties to acknowledge the likelihood that any award produced in med-arb will be influenced by private ex parte communications during the mediation phase.¹²³ This may be satisfactory in some instances, especially where both parties have especially great faith in the neutral; in other situations, it is possible that disputants may be reluctant to accept the risks inherent in such an approach.*
- .4 *Parties confer regarding continued service of neutral at the conclusion of mediation. The parties may wish to include a provision that they will meet and confer outside the presence of the neutral after the mediation phase of med-arb to determine whether they remain in agreement regarding his or her serving as arbitrator. This may be tied to a provision requiring neutral disclosures after the mediation phase and/or to a requirement of written consent to the continued service of the neutral.*
- .5 *Requirement of a separate written consent for arbitration after mediation; post-mediation opt-in or opt-out. Parties may wish to incorporate a provision (similar to that set forth in Australia's Commercial Arbitration Act) to the effect that an arbitrator who has acted as mediator may not resume the role of arbitrator without the written consent of all parties given after mediation has terminated.¹²⁴ Along the same lines, provision might be made for either party to opt-out of post-mediation arbitration in case that at the time of switching hats either party has doubts as to the mediator's continued ability to be neutral and impartial as an arbitrator.*

¹²³ See, e.g., JAMS, *Draft Arbitration Stipulation*.

¹²⁴ (4) An arbitrator who has acted as mediator in mediation proceedings that are terminated may not conduct subsequent arbitration proceedings in relation to the dispute without the written consent of all the parties to the arbitration given on or after the termination of the mediation proceedings. CAA AUSTRALIA art. 27D (2010).

- .6 *Recusal of neutral.* At some point before or after the mediation phase, a neutral may determine that as a result of being exposed to certain information during the mediation, the neutral is incapable of rendering an impartial decision during the arbitration phase. For this reason, the parties may want to provide that the neutral has an obligation to recuse herself from the role of arbitrator.¹²⁵

7.14 Process Options Where Med-Arb is Contemplated During Mediation

If the parties are contemplating the use of med-arb after mediation has commenced, it may be impractical or impossible to employ some of the process options set forth above (such as, for example, the no-caucus option for mediation). (The same applies to scenarios in which parties contemplate a return to the role of arbitrator for a neutral during the mediation phase of arb-med (arb-med-arb).

7.15 Variations on Med-Arb

7.15.1 *Opportunities for creative process guidance.* Even when mediation is not successful in resolving substantive issues in dispute, mediators may be able to help set the stage for a dispute resolution process, including among others a particular design of the arbitration model that is customized to more effectively suit the circumstances and serve the needs of the parties.

7.15.2 *Mediation and last-offer-arbitration (MEDALOA).*¹²⁶ The MEDALOA is an acronym for MEDIation And Last Offer Arbitration. It involves traditional mediation followed by a process in which each party submits a written final or “last offer” to the arbitrator. The arbitrator proceeds to pick the last offer (s)he considers most equitable, or most appropriate under the standards established by the parties. Although this process choice often occurs during mediation, it may be agreed to beforehand.¹²⁷

In some cases, MEDALOA is a means of breaking an impasse in a mediation, particularly where the parties repose great trust in the mediator. In such cases, the mediator is likely to become the arbitrator; after some form of hearing (perhaps short, trial-type summations of the parties’ cases), the mediator-turned arbitrator chooses the “last offer” which s/he regards as most just or reasonable. The choice becomes the basis of an arbitration award. An example of MEDALOA is described above [7.2.2].

¹²⁵ See COMMERCIAL ARBITRATION AT ITS BEST; CEDR, RULES.

¹²⁶ See generally COMMERCIAL ARBITRATION AT ITS BEST; Arnold, *MEDALOA* (detailed monograph by well-known arbitrator with considerable experience in the intellectual property field); Sussman & Gleason, *Putting Final Offer*.

¹²⁷ Mironi, *From Mediation*.

A variation of the decision-making process would be where the parties exchange written last offers but do not disclose their offers to the neutral. The parties agree that the award will be the offer closest to the arbitrator’s number.

7.15.3 *Mediation followed by bracketed or bounded arbitration.*¹²⁸ Another variation on med-arb would be where the parties exchange written last offers, but do not disclose the offers to the neutral. After a hearing, the neutral, acting in the role of arbitrator, makes a ruling. If the ruling is between the two offers, the arbitrator’s number becomes the award. If the arbitrator’s ruling is below the low offer, the low offer becomes the award. If the arbitrator’s number is above the high offer, the high offer becomes the award.

7.15.4 *Mediation followed by arbitration with “open last offer.”* Another variation of the process would be where the neutral shares with the parties their respective written irrevocable last offers, allowing a limited time to negotiate a settlement in the shadow of the final offers. If they reach deadlock the arbitrator issues an arbitration award based on respective offers.

7.16 Arb-Med: Considerations for Parties Contemplating Arb-Med

7.16.1 *Generally.* As discussed above [7.1.2], an individual appointed as arbitrator may agree to switch to the role of mediator at some point in the arbitration process—early on [7.2.1], midway through the process [7.2.2], or after drafting an award but prior to its publication [7.2.2]. The switch is likely to be prompted by the parties’ belief that with the help of the neutral, a negotiated settlement is achievable. An added advantage is that the neutral’s initial arbitral appointment will facilitate the conversion of any mediated settlement agreement into a consent arbitration award. As discussed above, any switching of roles requiring careful, informed, and independent reflection by parties and counsel [7.8], cooperative joint decision-making by the parties [7.10] and consideration of the neutral’s pertinent skills and attributes [7.11.2].

7.16.2 *What happens if mediation fails to end the dispute? Arb-med-arb?* A critical issue should be what happens if mediation does not resolve the dispute. Should the neutral resume the role of arbitrator? If so, under what conditions? If “arb-med” becomes “arb-med-arb,” of course, all of the concerns associated with med-arb will come into play, and careful consideration of related process options.

7.16.3 *“Eleventh-hour” arb-med.* On occasion, it is agreed that an arbitrator will take on the role of mediator after rendering a final award but prior to its publication [see 7.2.2]. Such an approach may have appeal for parties who are anxious about the risks of defaulting to a third-party decision. For effect, the completed award is placed, unopened in a sealed envelope, on the table in full view of the parties

¹²⁸ COMMERCIAL ARBITRATION AT ITS BEST; Sussman & Erin Gleason, *Putting Final Offer*.

like a Damoclean sword. Moreover, the neutral has the benefit of full information regarding the dispute and the strengths and weaknesses of the parties' cases.¹²⁹

On the other hand, eleventh-hour settlement lacks some of the benefits of an earlier resolution. The parties have already gone to considerable time, trouble, and expense of completing the entire arbitration process. From a psychological point of view, moreover, one wonders if parties who have just endured a complete adjudicative process in which they played adversary roles will be attuned to engage in bargaining—especially the collaborative kind—unless they are committed to an ongoing commercial relationship. Moreover, unless the arbitrator is in a position to finalize an award immediately upon the close of hearings, mediation might have to await the completion of the award. Finally, one must wonder about the parties' expectations of an arbitrator-turned-mediator in such a situation: one would think that the parties would be scrutinizing the neutral's words, facial expressions, tone, etc., for any hint of how s/he ruled. It is likely that the only circumstances in which a process of this kind would make sense is where the parties are both very concerned about the risks associated with the arbitration award, where they remain committed to a mutual relationship, or where they have come rather belatedly to the mutual realization that a negotiated resolution may permit the crafting of arrangements beyond the rather limited remedial scope of arbitral awards.

7.16.4 *Mediation and last-offer-arbitration (MEDALOA)*. Med-arb in which med-arbitrator has less discretion and is obliged to select one of the two simultaneous and non-reversible last offers is claimed to address much better the concern regarding *ex parte* communication than med-arb culminating in conventional arbitration.¹³⁰

7.16.5 *Med-arb, arb-med-arb with a tribunal*. If parties have agreed to arbitration with a three-member tribunal, discussions about arb-med or arb-med-arb should consider which members of the tribunal should engage in dual roles.¹³¹ Having all three arbitrators acting as mediators might end up being overly cumbersome. Two options are readily apparent: having the chair of the arbitration panel act as a mediator, or, alternatively engaging the two wing arbitrators as co-mediators.¹³² A variant of the latter approach might involve each wing arbitrator being authorized to meet separately (caucus) with the party that appointed him or her during the course of mediation—although the downside of this approach would be to reinforce concerns about the independence and impartiality of the respective wing arbitrators. An alternative would be to have wing arbitrators caucus with

¹²⁹ Oghigian, *A New Concept*.

¹³⁰ Dendorfer & Lack, 82.

¹³¹ See NIGMATULLINA, *COMBINING* (discussing various permutations).

¹³² “Wing arbitrators” refer to the two members of a three-member arbitration tribunal who in some cases are appointed by the parties. Although it is common in international commercial arbitration for such “party arbitrators” to be independence of their appointing parties and to be impartial, in some circumstances such arbitrators may be partisan.

the party that did *not* appoint them. In international proceedings, the cultural backgrounds of the arbitrators may be an important factor.

7.17 Switching Hats - Further Considerations for Parties Contemplating Med-Arb, Arb-Med and Arb-Med-Arb¹³³

7.17.1 *Switching hats and costs.* Generally speaking, switching hats is considered a cost effective dispute resolution procedure for several reasons: First, if parties need or want to move from mediation to arbitration or from arbitration to mediation, there is no need to educate another neutral; second, even though all substantive issues were not resolved through mediation in a med-arb context, at least the issues remaining in dispute were narrowed down and the med-arbitrator can help the parties to reach a procedural agreement setting up a simpler, quicker and most cost-effective arbitration procedures and stipulating the issues and agreed upon facts.¹³⁴ All of the above is premised on the assumption that the neutral is applying an hourly or daily rate for both services, i.e. as a mediator and as an arbitrator. Switching hats might be less cost effective when the neutral's fees are based on a lump sum and when the parties engage a higher profile and more expensive neutral in order to assure her/his versatility and in anticipation that s/he will eventually act as a final arbiter.

7.17.2 *Switching hats in an administered dispute resolution context.* Parties to an international business dispute who prefer or are required to use an administered dispute resolution procedures either under the auspices of a dispute resolution provider or an arbitral institutions might face difficulties in using mixed processes like med-arb, arb-med or arb-med-arb. First, certain dispute resolution providers or arbitral institutions limit the selection of neutrals to a pre-determined list or a panel. Often there are two separate lists one for arbitrators and one for mediators with little or no overlap between the two. A good example is the CAS – The Court of Arbitration for Sports; second, in some cases the dispute resolution providers' or the arbitral institutions' rules do not allow issuing a consent award or an Award on Agreed Terms; Third, since the final work-product of the mixed-processes is often an arbitration award, it may still be subject to the scrutiny of the arbitral institution which might want to take an independent view, disregarding the fact that the disputants already agreed on its terms.

7.18 Switching Hats - Further Considerations for Neutrals

An arb-med model of switching hats has a potential of putting the neutral in a difficult ethical or moral position once she/he discovers during the mediation stage facts or subjective interests that renders her/his sealed ruling incorrect or inappropriate.¹³⁵

¹³³ This section was added following a comment made by Jan Schaefer.

¹³⁴ Dendorfer & Lack, 83.

¹³⁵ Dendorfer & Lack, 88.

Neutrals who act as both mediators and arbitrators under mixed-mode or switching hats arrangements might face concerns that are particularly challenging in the international context. First, the standard waiver that parties often sign when a neutral switches from mediation to arbitration may be challenged primarily but not exclusively by a third party attempting to resist awards as well as by the court exercising its powers to act *sua sponte*. Second, since a consent or agreed upon award plays a major role in switching hats or mixed-mode processes there is always a risk that parties actually elicit the neutral's help for abusing the ADR processes to further illicit aims.¹³⁶

7.19 The Need to Capture Meaningful Accounts and Data Regarding Our Successes and Failures

The insights, and especially the exemplary personal anecdotes, offered in these guidelines are intended to illustrate not only the issues and concerns surrounding dual roles for neutrals and arbitrator engagement in settlement, but also the potentially rich store of data that might be drawn upon to develop more authoritative international and domestic guidance for business clients and counsel, dispute resolution professionals, international institutions, and lawmakers. As a practical matter, cultural and legal traditions channel our perspectives and practices in powerful ways, establishing expectations that may limit our thinking about what is possible or practical. Only by collecting and sharing meaningfully detailed accounts of our experiences—good and bad—with med-arb, arb-med, and arbitrator engagement with settlement will we be in a position to overcome our varied predispositions in favor of more deliberate and functional approaches. Moreover, because culture as well as legal tradition and regulation play such an important role in understanding these dispute resolution processes our guidelines could benefit from much more empirical (domestic as well as international) and comparative "law in action" research. Only by this means may we come to appreciate the potentialities and limits of different forms of third-party engagement during the settlement process, including the use of private caucusing, forms of evaluation, putting forth specific proposals for settlement, and other formats that are often subjects of controversy. Finally, such research may help in educating the potential users of ADR, their legal advisors / advocates, neutrals, and dispute resolution providers as to how to use different switching hats models synergistically for the benefit of the parties and society.

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APPENDIX
SUMMARIES OF SWITCHING HATS PRACTICES IN SELECTED
COUNTRIES

SUMMARY OF SWITCHING HATS PRACTICES IN CHINA

Prof. Kun Fan

1. Legal and Ethical Framework of Switching Hats

In China, given the long mediation tradition, Chinese judges customarily promote settlement to relieve the heavy judicial caseload and to reduce judicial costs. The legal basis for the judges to mediate the disputes can be found in the Civil Procedure Law, which provides that ‘when adjudicating civil cases, the people’s courts may mediate the disputes according to the principles of voluntariness and lawfulness. If a mediation agreement cannot be reached, the courts shall render a judgment without delay’. Following court practice, promotion of settlement by arbitrators is also admissible and encouraged under the Arbitration Law. Article 51 of the Arbitration Law provides that “the arbitral tribunal may carry out mediation prior to giving an arbitral award. The arbitral tribunal shall conduct mediation if both parties voluntarily seek mediation. If mediation is not successful, an arbitral award shall be made promptly (emphasis added).” Now most arbitration institutional rules expressly allow the combination of mediation and arbitration.

For concerns about possible impact on the neutral’s impartiality, both CIETAC and BAC rules provides that "If the mediation fails to lead to a settlement, neither party shall be permitted to adduce evidence of or to refer to or use any statements, opinions, views or proposals expressed by the other party or by the Arbitral Tribunal during the mediation in support of any claim, defense, or counterclaim in the subsequent arbitral proceedings, or as grounds in any judicial or other proceedings.” The BAC rules also allow the parties the option to choose the stand-alone mediation to be conducted by the mediators of the Mediation Center in accordance with the Mediation Rules of the Mediation Center of the BAC (Article 44 of the BAC Rules). Another effort to address the concern on the neutral’s impartiality is to allow the parties to request the replacement of an arbitrator on the ground that the outcome of the award may be affected by the mediation proceedings upon the termination of unsuccessful mediation proceedings (article 67 of the BAC Rules).

Despite such rules prohibiting the use of information obtained in subsequent proceedings, it can still contaminate the arbitrators’ brain. That concern, however, does not arise solely during arb-med or med-arb proceedings. There are cases where improperly submitted documents or arguments are rejected or discarded after the arbitrators have taken cognizance of them. There are occasions when jurors need to make a decision after having heard inadmissible evidence. A number of the interviewed Chinese arbitrators believe that arbitrators are legally trained to make a decision based on proven facts according to applicable law, and their brains should be less likely to be contaminated than the juries who are layman.

2. Case Law

The cases involving med-arb is the Gao Haiyan v Keeneye Holdings Ltd., [2010] H.C.C.T. ; Gao Haiyan v Keeneye Holdings Ltd., [2011] C.A.C.V., which you have already referred to in the draft. (See Kun Fan, “The Risks of Apparent Bias When an Arbitrator Act as a Mediator - Remarks on Hong Kong Court’s Decision in Gao Haiyan, “Yearbook of Private International Law, Vol. 13, pp. 535-556, 2011)

The conduct of the arbitrators in Gao Haiyan was quite extreme, and does not appear to be consistent with the general practice expressed by the Chinese arbitrators. They not only conveyed a settlement proposal but also asked the related third party to “work on” the Respondents. The CFI viewed such conduct as inappropriate, which raised concerns that the mediators were actively pushing for the settlement proposal. Even though CFI’s decision was reversed by the Court of Appeal, the CFI’s warnings are particularly important for all potential arb-mediators or med-arbitrators to note, so as to minimize the risk of apparent bias.

In light of the risks of apparent bias surrounding the debates in Gao Haiyan, it may be most prudent for the arbitrator to refrain from expressing his or her opinion on the merits, unless both parties request such an evaluation, which may be common practice in certain jurisdictions. The arb-mediators or med-arbitrators must ensure at all times that nothing is said or done in the mediation which could convey an impression of bias.

3. Episodes of Switching Hats (Quoted in Kun Fan, *Arbitration in China: A Legal and Cultural Analysis*, 2013, p.242)

I observed a successful arb-med in an ICC arbitration conducted by a tribunal consisting of an American chairman, with Chinese and German co-arbitrators (I was the secretary for the tribunal), relating to a disputes between a Chinese and a German party. Before the first hearing, the parties agreed that the tribunal would conduct mediation on the first day, and that if no settlement was reached the arbitrators would resume their role and the arbitration hearing would start on the second day. During the mediation day, the tribunal first explained to the parties the procedure and reconfirmed the parties’ consent, then verified the participants’ authority to settle. When meeting the parties separately, the tribunal tried to convey to each of them the strengths and weaknesses of their case. At the end of the mediation day, no settlement was reached, as the claimant’s final offer did not reach the maximum at which the respondent was authorized to settle. However, the differences were substantially narrowed.

The next day, the arbitration hearing started, and the tribunal members emphasized that they were ‘shifting their hat back as arbitrators’ and repeated that what had been heard during the mediation proceeding the day before could not be used in the arbitration proceedings. The hearing lasted one whole day, and then the parties were invited to exchange further submissions. Interestingly enough, during the dinner after the hearing (all of the parties and the arbitral tribunal stayed in the hotel where the hearing was held), the parties were voluntarily sitting at the same table and presumably some negotiation discussions continued during dinner. A few months later, a settlement was eventually reached between the parties themselves and the arbitration claims were withdrawn.

In this case, the arb-med did not result in a settlement itself, but played a positive role to narrow down the disputes and let the parties understand the weakness of their case. It has encouraged the parties to start direct settlement discussions after the arbitration hearing, which eventually led to a settlement.

Legal and professional culture also played a role. Interestingly, because it is part of a court's mission to promote settlement in the Romano-Germanic tradition (The DIS rules also provides that the arbitral tribunal to seek to encourage amicable settlement of the disputes), arbitrators facilitating settlement is easily acceptable by the German arbitrators and parties. The Chairman is an American, but a leading Chinese scholar who understand very well the Chinese mediation tradition and speaks perfect Chinese. His effective handling of the mediation process involving Chinese parties also benefited from his familiarity of the Chinese culture.

SUMMARY OF SWITCHING HATS PRACTICES IN CHINA

EXPERIENCE OF BEIJING ARBITRATION COMMISSION / BEIJING INTERNATIONAL ARBITRATION COMMISSION

Dr. Fuyong Chen

1. Legal and Ethical Framework

Article 51¹³⁷ of the Arbitration Law of the People’s Republic of China provides the legal regime of arb-med-arb. Instead of prohibiting arb-med-arb procedure, the legal principle and tradition in China tend to encourage the use of mediation in an arbitration proceeding. For this reason, mediation is widely used in domestic arbitration proceedings in China. You can see the statistics of the BAC/BIAC in the following chart to see the chance of success of arb-med-arb proceedings under the BAC/BIAC.

Year	Concluded arbitration cases	Concluded by mediation of the arbitral tribunal	Percentage
2020	5274	821	15.57%
2019	5868	1,072	18.27%
2018	4125	631	15.30%
2017	3520	527	13.18%
2016	2917	375	12.86%

It is well known that Chinese parties are used to the combination of mediation and arbitration, or mediation and litigation for a long history. To have mediation within adjudication procedure seems quite natural and common to Chinese parties. It is also worth mentioning that more and more foreign-invested companies in China are willing to use arb-med-arb to resolve their disputes.

For international users, we do understand there might be some concerns on the use of arb-med-arb since the legal tradition might be quite different. To resolve such concerns, the Article 67¹³⁸ of the BAC/BIAC Arbitration Rules provides that a party may request the replacement of an arbitrator on the ground that the outcome of the award may be affected by the mediation proceeding. To some extent, we hope this regime could bring parties with more safety to try different options to resolve their disputes in a single proceeding.

¹³⁷ Article 51 of the Arbitration Law of the People’s Republic of China: “the arbitral tribunal may carry out conciliation prior to rendering an arbitral award. The arbitral tribunal shall conduct conciliation if both parties so wish. If conciliation is unsuccessful, an arbitral award shall be rendered in time. If conciliation leads to a settlement agreement, the arbitral tribunal shall make a conciliation statement or make an arbitral award in accordance with the result of the settlement agreement. A conciliation statement and an arbitral award shall have equal legal effect”.

¹³⁸ Article 67 of the BAC/BIAC Arbitration Rules: “If, upon the termination of unsuccessful mediation proceedings, all parties request the replacement of an arbitrator on the ground that the outcome of the award may be affected by the mediation proceedings, the Chairperson may approve such request. The resulting additional costs shall be borne by all the parties”.

2. Case Summary

In the year of 2019, the BAC/BIAC cooperated with the CCPIT Mediation Center and successfully resolve a dispute through med-arb procedure. The following case summary provides some details on how the procedure was initiated and worked in practice.

The Dispute

An architectural design company (“Company A”) and an equipment company (“Company B”) had a dispute over the design fees and intermediary service fees of a construction project in Côte d’Ivoire. The parties did not conclude any written contract but had always had a good business relationship. Both parties agreed to submit the dispute to CCPIT Mediation Center for mediation.

The Mediation Process

The two parties reached a mediation agreement with the assistance of a mediator, Zhang. Pursuant to the agreement, the CCPIT Mediation Center issued a settlement agreement. Since it would take a long time to execute this settlement agreement, the parties wished to confirm the settlement agreement in the form of an arbitral conciliation statement, which the parties may enforce in Chinese courts. After learning about the arrangement between CCPIT Mediation Center and BAC on the arb-med coordination mechanism, the parties decided to enter an arbitration agreement regarding the aforesaid dispute and submitted it to BAC for arbitration. Both parties agreed in the arbitration agreement to jointly appoint Zhang as the arbitrator. BAC confirmed the parties’ joint appointment of Zhang as the sole arbitrator after accepting the arbitration application. Zhang held a hearing to assist the parties to further specify the arrangements of the settlement agreement to make sure the terms are definite and clear for future enforcement. Zhang subsequently issued an arbitral conciliation statement based on the revised settlement agreement.

Conclusions and Lessons

This is the first application of the “arb-med coordination mechanism,” after BAC and CCPIT signed a Strategic Cooperation Agreement in July 2018. To date, the term “arb-med coordination mechanism” has no clear definition. In this case, the parties submitted the settled dispute to an arbitration institution. After the hearing, the arbitral tribunal rendered an arbitral conciliation statement or a consent award based on the revised settlement agreement or the mediation agreement, so as to ensure the enforceability of the terms reached. One important consideration when parties choose among dispute resolution approaches is whether the settlement agreement can be enforced in case of non-performance. The current judicial confirmation system set forth by the Civil Procedure Law cannot dispel the parties’ doubts. On the one hand, the judicial confirmation system gives no clear definition of the scope of the settlement agreements for which it may apply, and the practical steps on how to confirm a settlement agreement are also unclear. On the other hand, even if a Chinese court endorses the settlement agreement by judicial confirmation, it cannot fulfill the needs of parties in cross-border disputes for extraterritorial enforcement.

The leverage of the “arb-med coordination mechanism” is that it can provide the parties with an arbitral conciliation statement, which is of the same legal effect as an arbitral award in China. If

the parties so stipulate, the arbitration institution/arbitral tribunal may render a consent award according to the result reached by the parties under the settlement agreement. This type of consent awards can be recognized and enforced outside of China pursuant to the New York Convention. The success of this case provides a new approach for combining commercial mediation and arbitration to better meet the needs of the parties in dispute resolution.

This case is worthy of reference in future practice. First, the parties can simplify the arbitration procedures by making the best use of the “autonomy of will” principle. In this case, the parties agreed in the arbitration agreement to simplify the arbitration process and managed to conduct a cost-effective hearing. The parties agreed to waive all the time limits under the Beijing Arbitration Commission Arbitration Rules in the arbitration agreement, authorized the sole arbitrator to hear the whole case regardless of the amount in dispute and to arbitrate based on documents only without hearings. The parties jointly appointed the former mediator who knew about the case as the arbitrator. All these stipulations greatly accelerated the arbitration procedures, as it took only a total of nineteen days from the acceptance of the arbitration application to the constitution of the arbitral tribunal, the hearing, and the issuance of the final award. Second, although this case concluded with an arbitral conciliation statement pursuant to the agreed terms of the parties, they could also ask the tribunal to issue a consent award accordingly since the statement is to be performed in Côte d’Ivoire. The consent award can help ensure the terms of the settlement agreement remain enforceable outside of China.

It should be noted that the “arb-med coordination mechanism” may face some challenges in broad application. The approach needs further examination in future practice. The first challenge is the service charge mechanism. Generally, arbitration institutions will take an arb-med coordination case as an independent arbitration case, which means that the parties will have to pay the service fees according to the standard of costs for independent arbitration cases, after having paid for mediation already. Accordingly, the “arb-med coordination mechanism” will increase the parties’ cost in dispute resolution, which will directly affect the practicality of the mechanism. To solve this problem, the arbitration institutions and the mediation institutions may consider arranging of joint service fee standards. The parties may also avoid extra costs by agreeing on adjudication on documents or paying the arbitrator on an hourly rate. Second, even if the parties have properly settled through mediation, the arbitral tribunal should still pay special attention to whether there is any false arbitration risk or damage to the interests of a third party in the settlement agreement, so as to avoid cases where the parties seek illegal interests by means of arb-med coordination. Third, the terms in the settlement agreement, especially those concerning performance, are often uncertain for enforcement. If the language in arbitral conciliation statement or the arbitral award completely repeats the settlement agreement, it might include some ambiguity, which can lead to difficulty in the later enforcement proceedings. Therefore, it is necessary for arbitrators to be prudent in dealing with arb-med coordination cases.

SUMMARY OF SWITCHING HATS PRACTICES IN INDIA

Prachi Mehta

Broadly, mediation has taken two pathways in India. The first is through court annexed mediation centres, through which cases filed in those courts are referred to mediation. The second is conciliation undertaken at the option of the parties. The Supreme Court of India has distinguished the first process as mediation, and the second as conciliation.¹³⁹

Arbitration and conciliation are regulated by the Arbitration and Conciliation Act, 1996 (“the Act”). Section 30 of this Act provides an arbitration tribunal with the flexibility of using “mediation, conciliation or other procedure” at any time during the proceedings to encourage settlement.

Settlements may be recorded by the arbitral tribunal in the form of an arbitral award on agreed terms. This has the same status and effect as an arbitral award made on a determination on the substance of the dispute.

In situations where an arbitration is converted into a settlement process, the arbitrator is the one who usually dons the hat of the mediator/ conciliator. Rarely is a third neutral brought into the process for this purpose. However, a majority of arbitrators do not propose or make the parties aware of the possibility or even existence of an option for settlement under the law. There are several reasons for this. Arbitrators may be motivated by monetary considerations, since there is the prospect of receiving more fees for a complete arbitral procedure. Moreover, a majority of arbitrators in India are retired judges who find an adjudicative roles easier for them and the delicate nuances of switching the hats to becoming a mediator/ conciliator are not easy for them to don. In addition, neutrals and parties are often concerned about what happens if a mediation is unsuccessful and the neutral must switch back to the role of arbitrator, since there may have been confidential information exchanged during private caucuses which has not been shared.

Anecdotally, we understand that where arbitrators act as conciliators in the same dispute, this is done once the arbitration process is over and an unsigned award is ready. If the settlement discussions fail, the arbitrator will sign and issue the award. This switching of hats into that of the arbitrator role is fairly risk-free and welcomed by the parties. However, the difficulty is mostly faced in a scenario where such pre-drafted and sealed award doesn’t exist. We generally see the parties become skeptical due to the exchange of confidential information in private caucuses or otherwise during the settlement discussions.

India has adopted the UNCITRAL Conciliation Rules 1980, but makes a departure in the rules stipulating that a conciliator cannot thereafter act as an arbitrator. Under the Act, this is possible with the consent of the parties.

Another challenge which many arbitrators and mediators perceive as a concern associated with shifting of roles is the timeline which has been set by the statute (1 year with a possible extension

¹³⁹ *Salem Advocate Bar Association, Tamil Nadu v Union of India*, (2005) 6 SCC 344; Chitra Narayan, *Mediation Policy and Practice*, Oakbridge, 2021.

of 6 months) for concluding an arbitration, does not allow time for attempting conciliation. However, in practice, this is only a perceived hurdle but not a real one. If parties are agreeable, courts encourage settlements and extend the timeline for conclusion of an arbitration where they are informed of the possibility of a settlement. This takes away the statutory burden to finish the arbitration proceeding within a fixed timeline and gives the arbitrator enough time to explore settlement options and possibilities.

The Act, in Explanation I to section 34(b)(ii) – allows for challenge of the award on grounds of breach of section 75 or 81, as being an award made in violation of public policy. Sections 75 and 81 provide for confidentiality in conciliation, and the inadmissibility of certain information from conciliation in any arbitral or judicial proceedings.

Other statutory frameworks stipulate mixed mode dispute resolution by the same neutral. Settlement conferences, or judicial settlements (recognized under s.89 of the Code of Civil Procedure, 1908 in India) contemplate the judge hearing the case making efforts at settlement.

The following are other examples of statutory provisioning for switching hats in India:

- Micro Small and Medium Enterprises Development Act, 2006
- Ombudsman Rules (insurance, banking, securities disputes)
- Permanent Lok Adalats under the Legal Services Authorities Act, 1987

Except the Arbitration and Conciliation Act, 1996, the other mixed mode dispute resolution processes are statutorily mandated and parties do not have a choice in these processes or their structuring.

SUMMARY OF SWITCHING HATS PRACTICES IN ISRAEL

Prof. Moti (Mordehai) Mironi

1. General

The practice of switching hats is undeveloped and unknown in Israel. Switching hats is only used by the courts, if at all, and for completely different reasons than those stated in these guidelines.

2. Switching Hats in the Courts

In a comparative study conducted in 2004, Israel ranked first out of seventeen countries in the number of court filings per capita. The average number of new filings per 1000 citizens in the seventeen countries was 89.56, while the number in Israel was almost double – 184.15. Since the country's judiciary has always been relatively small, the yearly number of new cases per judge was 2335. Consequently, the explosion of litigation explosion and resulting court backlog have been a persistent problem in the administration of the courts.

Under mounting criticism of excessive delays in litigation, the courts adopted a strategic goal of docket-clearing, which meant expanding and upgrading the courts' own case settlement services through in-court alternative dispute resolution (ADR) or mediation substitutes. Case statistics and judges' productivity (in term of cases cleared) have become the single most important criterion in internal evaluation of judges, which means that each individual judge's incentive structure is heavily biased toward clearing cases as quickly as possible.

Given the unreasonably heavy judicial caseload and the emphasis put on judges' productivity and case statistics, it is no wonder that Israeli judges, including the Supreme Court Justices, customarily promote settlement. The legal basis for this proclivity for settlement can be found in the Civil Procedure Regulations, which provides that courts should attempt to settle legal claims at any stage of the proceedings when adjudicating civil cases. In addition, the Ombudsman for Public Complaints against Judges issued directives for presiding judges engaged in informal case settlement activities. The directives distinguish between two types of settlement – substantive and procedural. A settlement agreement reached through a regular or substantive case settlement ends the litigation by a consent judgment. An agreement reached through procedural case settlement does not bring the case to an end. Instead, the case is referred by consent to resolution through another ADR process, such as arbitration.

The second switching hats practice which has been used by presiding judges for speedy docket-clearing is an innovative ADR process called "compromise judgment," a hybrid method combining procedural case settlement, expedited arbitration, med-arb and adjudication – all performed by the presiding judge. This hybrid process was introduced for general civil litigation in 1992. It is applied when a trial or appellate judge's efforts to settle the case are unsuccessful. The judge may then try to persuade the litigants to forgo a full-fledged trial. If the parties agree (under a procedural case settlement), the case is decided in summary fashion by the same judge, who issues a compromise judgment. The judge is not required to apply substantive law, and the reasoning behind the decision does not have to be explained. While in theory a compromise judgment is appealable, in practice there is almost no possibility for appeal.

3. Switching Hats outside the Courts

In a sharp contrast to the courts, the practice of promoting settlement by arbitrators has never taken root as an acceptable practice in Israel. The law regulating the arbitration process is premised on the Common Law tradition. As a result, settlement activities by the arbitrator or during the arbitration proceedings are not mentioned at all in Israeli Arbitration Law and are not expected or welcomed by parties.

The legal regime which regulates mediation allows only a restricted version of med-arb. Regulation 5(h) of the Courts Regulations (Mediation) 1993 stipulates that a mediator may not be part of the mediation agreement and the latter may not impose on the mediator any duty and may not entitle the mediator to any right that is connected directly or indirectly with the dispute. Regulation 5(h) allows two exceptions. At the end of the mediation the disputants may agree that the mediator will provide a case evaluation or become an arbitrator.

As a result, a switching hats agreement under which the mediator will become arbitrator (med-arb) can be agreed upon only after mediation was terminated. A standard pre-dispute or post-dispute type med-arb agreement is not allowed.

4. Case Law

Since switching hats arrangements are hardly used and by-and-large unknown in Israel, there are only a handful of court decisions regarding such arrangements. The Supreme Court has dealt with switching hats arrangements only twice. The two cases involved arb-med-arb procedures that were agreed upon ad-hoc while the arbitration process was underway. In both instances, parties were unable to settle all remaining issues in dispute during the mediation stage and the court was asked to block the med-arbitrator from returning to the arbitrator seat. In the first case the court refused the petition. The court based its decision on the ground of efficiency and ruled that the conducting separate meetings (caucus) during the mediation stage was not a sufficient reason to remove the med-arbitrator from office. In the second case, the court accepted the petition on the ground that the arb-med-arb agreement included an opt-out provision.

SUMMARY OF SWITCHING HATS PRACTICES IN JAPAN

Tatsuhiko Makino

1. Litigation

Under Japanese law, “[i]rrespective of the extent to which litigation has progressed, the court may attempt to arrange a settlement or have an authorized judge or a commissioned judge attempt to arrange a settlement.” (Article 89 of the Code of Civil Procedure (Act No. 109 of 1996, as amended). This provision authorizes the court or (an authorized or commissioned) judge to be involved in settlements. There is no limitation provided with respect to ex parte communications, and it is indeed common in practice for the court or (an authorized or commissioned) judge to meet with each of parties in turn when facilitating settlement discussions.

An English translation of the Code of Civil Procedure could be found in the URL below (although I note that this translation may not necessarily reflect the latest amendments):

<http://www.japaneselawtranslation.go.jp/law/detail/?id=2834&vm=&re=>

Partly due to such facilitation by the court, a significant number of cases filed in court are concluded by settlement. According to the judicial census of 2019 for civil and administrative cases, at chart 20, within the total 131,560 cases concluded in the court of first instance this year, while 57,543 cases were concluded by judgment, 50,620 cases were concluded by settlement (the remaining 23,391 cases were concluded due to “other” causes).

<https://www.courts.go.jp/app/files/toukei/347/011347.pdf> (in Japanese)

One District Court judge of the civil disputes branch explained to the author:

Although the statute provides for the court’s power to facilitate parties’ settlement “[i]rrespective of the extent to which litigation has progressed”, in practice, they are usually conducted after examination of evidence (including witness examination) is concluded. At that point of time, the court would have the judgment (or at least a range of possible quantum, if any) in mind, and hence, anything disclosed by the parties during the facilitation process would not affect our judgment.

In addition to the above, the court also has the power to refer the case to mediation (which is translated as “conciliation” but in essence has the same meaning), and “process the case itself” (meaning that the court itself is involved in that mediation). This power is provided in Article 20 (1) of the Civil Conciliation Act (Act No. 222 of 1951, as amended). If the court itself is involved in the mediation, the chief of the mediation panel will be selected from the member judges of the court, per Article 20 (3) of the act. An English translation of Article 20 of this act is as follows:

Article 20

- (1) When the court in charge of the case finds it appropriate, it may, by its own authority, refer the case to conciliation and process the case itself or have the case processed by a court with jurisdiction; provided, however, that this shall not apply to cases if the parties do not agree thereto after the completion of proceedings to arrange the issues and evidence of the case.
- (2) If the case is referred to conciliation pursuant to the provision of the preceding paragraph, and the conciliation is successful or an order set forth in Article 17 becomes final and binding, the action shall be deemed withdrawn.
- (3) If the court in charge of a case carries out the conciliation process itself pursuant to the provision of paragraph (1), notwithstanding the provision of Article 7, paragraph (1), the chief conciliator shall be designated by the court in charge of the case from among the judges assigned thereto.

(English translation is accessible at:

[http://www.japaneselawtranslation.go.jp/law/detail/?id=2732&vm=&re=\)](http://www.japaneselawtranslation.go.jp/law/detail/?id=2732&vm=&re=)

This scheme allows the court to add mediators with expert knowledge to the mediation panel, while continuing to be involved in the mediation process itself. The scheme is particularly useful in mediating disputes with expert knowledge involved, such as software/ programmer disputes.

2. Arbitration

The curial law of Japan is found in the Arbitration Act (Act No. 138 of 2003, as amended). Article 38 (4) and (5) of this act provides as follows:

Article 38

..(omitted)...

- (4) If the consent of both parties has been obtained, an Arbitral Tribunal or one or more arbitrators who have been appointed by the Arbitral Tribunal may attempt to arrange a settlement for the civil dispute which has been referred to an arbitral procedure.
- (5) The consent set forth in the preceding paragraph or the revocation thereof shall be made in writing, unless otherwise agreed by the parties.

(English translation is accessible at:

[http://www.japaneselawtranslation.go.jp/law/detail/?id=2784&vm=&re=\)](http://www.japaneselawtranslation.go.jp/law/detail/?id=2784&vm=&re=)

Here, it is provided that the arbitrator's power to be involved in a settlement requires the parties' written consent, and in the sense, it could be said that such power is derived from party autonomy rather than the curial law itself. However, it is notable that the curial law explicitly refers to a "switching hat" of an arbitrator, unlike the Article 30 of the UNCITRAL Model Law (original text of 1985), which this curial law has been based on.

In January 1, 2019, the Japan Commercial Arbitration Association published its “Interactive Arbitration Rules (the “JCAA IA Rules”). Article 60 of these rules pushes the idea of “switching hats” under the curial law by specifically providing for a procedure where an arbitrator “switches hats” and acts as mediator. I will quote Article 60.1 and 60.2, which I particularly find insightful:

Article 60 Special Rules for the CMR if an Arbitrator serves as Mediator

(1) Notwithstanding Article 59.1, the Parties may agree in writing to appoint an arbitrator assigned to the same dispute as a mediator, and refer the dispute to mediation proceedings under the CMR. If the Parties do so, the Parties shall not challenge the arbitrator based on the fact that the arbitrator is serving or has served as a mediator.

(2) Notwithstanding Article 22.1 of the CMR, an arbitrator who serves as mediator in regard to the same dispute shall not consult separately with any of the Parties orally or in writing, without the agreement of the Parties in writing. The arbitrator shall disclose to all other Parties, in each instance, the fact that such consultation has taken place, excluding the contents thereof.

The full text of the JCAA IA Rules could be found at:

https://www.jcaa.or.jp/common/pdf/arbitration/Interactive_Arbitration_Rules2019_en.pdf

It should be noted that the JCAA IA Rules is a set of rules that is separate from the Japan Commercial Arbitration Association’s Commercial Arbitration Rules. For this reason, for Article 60 of the JCAA IA Rules to apply, the parties to the arbitration need to agree specifically to the JCAA IA Rules (as provided in Article 1 thereof).

SUMMARY OF SWITCHING HATS PRACTICES IN SOUTH AFRICA

Prof. Barney Jordaan

In South Africa, mediation has had a rich history. The country was a pioneer with the use of mixed mode processes in employment-related disputes between 1985 and 1995 when mediation and arbitration in employment matters were dealt with by private mediators and arbitrators operating under the banner of private dispute resolution bodies. The primary one at the time, of which I was a member, was the Independent Mediation Services of South Africa (IMSSA) which has since morphed into a body called Tokiso Dispute Settlement (Pty) Ltd. I was involved in a number of med-arb, arb-med and arb-med-arb processes and can fully associate myself with the examples, cautions and proposals made in your document.

After 1995 much of the dispute settlement work in individual and collective employment disputes has been taken over by a body formally established in terms of labour legislation, the Commission for Conciliation Mediation and Arbitration (CCMA). The legislation provides statutory support for hybrid processes in employment law disputes: it (the Labour Relations Act of 1995) makes provision for so-called disputes of right to be resolved through conciliation first and, if that fails, through either arbitration or adjudication. Conciliation, in terms of the Act, includes mediation, fact-finding and the making of an advisory award. In practice, conciliation is a fairly robust evaluative mediation process, with commissioners not afraid to express their views about the merits of a matter to the parties in private, and sometimes even in open session to achieve resolution. Because of dispute cost-saving and case load reducing needs, commissioners are under pressure to settle as many disputes as possible through conciliation. Mediation by the CCMA (in the proper sense of the term) happens mostly in collective bargaining disputes as a precursor to possible industrial action.

Whether a dispute has to be arbitrated or adjudicated if conciliation is not successful depends on the nature of the issue in dispute with some disputes destined for adjudication by a specialist court and others - the vast majority - resolved through arbitration by the CCMA. Two hybrid processes are available to commissioners of the CCMA, 'arb-con-arb' and 'con-arb'.

'Arb-con-arb' and 'con-arb'

The Act provides that a commissioner who has been appointed to arbitrate a dispute of right may, with the consent of the parties, attempt to conciliate the dispute. This can happen at any stage of the arbitration process, i.e. prior to arbitration or in the course thereof. Failing settlement, the arbitration continues with the same commissioner.

'Con-arb' and 'con-lit'

Con-arb is the default process for most employment-related disputes (barring collective ones and disputes destined for the Labour Court, mostly those dealing with discrimination complaints). However, any party to the dispute may object in writing prior to the event to the arbitration proceeding immediately after conciliation. In the latter event, the CCMA is obliged to split the processes and to conduct the arbitration at a later date before the same or a different commissioner.

It has become standard practice for lawyers acting for clients in those cases where legal representation is allowed at the CCMA, as a matter of course to lodge an objection to con-arb. This is partly due to the fact that such processes are normally scheduled to take place fairly soon after the dispute had been lodged, in some cases as soon as 15 days of a referral. This obviously places an enormous amount of pressure on legal representatives in terms of preparation time. Employer advisors, in particular, also often advise clients against opting for the combined process because of a fear of possible bias on the part of the conciliating commissioner. Where con-arb does take place, it is the norm for the same commissioner to conduct both processes, with arbitration following immediately after conciliation has failed to produce a settlement. However, any party may object in writing and within a given time frame to the same person fulfilling both roles.

As far as commercial disputes are concerned, proposals for review of an arbitration Act dating back to 1965 include statutory provision for med-arb and arb-med process to alleviate the expense of commercial arbitration. Apart from the fact that arbitrations can be protracted and very expensive, another policy reason informing the proposals was the fact that mediation as a method of dispute resolution is more in keeping with traditional African methods of dispute resolution than the adversarial procedure of the (English) common law.

Certain safeguards were recommended to address concerns about ‘hybridisation’ of dispute resolution processes:

- Parties must expressly agree to med-arb or arb-med;
- If the parties fail to appoint a mediator, one can be appointed for them by a court or other body with the necessary authority;
- Where an arbitration agreement provides for med-arb or arb-med, a party to the agreement may not object to the appointment of the mediator as arbitrator, or to that person's conduct of the arbitral proceedings, solely on the ground that such person has previously acted as a mediator in connection with some or all of the matters referred to arbitration;
- The mediator must, where a party has chosen to disclose confidential information to the him or her during mediation proceedings, and before proceeding to act as arbitrator, disclose to all other parties to the arbitral proceedings as much of that information as the mediator considers material to the arbitral proceedings;
- To counteract delaying tactics, if the mediation proceedings fail to produce a settlement acceptable to the parties within 28 days from the date the mediation proceedings started, or such other period agreed to by the parties, the mediation proceedings must terminate. The parties may, however, agree to extend the process;
- Where an agreement provides for the arbitrator to act as mediator, he or she may communicate with the parties collectively or separately;
- Settlement agreements arrived at through mediation are enforceable by the courts as an award on agreed terms; and

- Arbitrators enjoy certain indemnities, also when acting as mediators.

As far as my knowledge goes, the amendments have not been passed yet.