
"Mixing and Matching" Dispute Resolution Models

Med-Arb or Arb-Med ?

Exploring Arbitration - Mediation Interplay in Resolving Complex Disputes

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"Speak softly and carry a big stick."¹

Every society faces conflicts. Conflict is an integral part of life and human interactions. Conflicts are also a normal part of doing business: conflicts with and among employees, vendors, partners, conflicts with government institutions, consumers, etc. The potential for conflict is increased when corporations do business across national and cultural borders. However, the way how a conflict is handled and managed will determine if it will also present an opportunity for development and improvement in the organizational policies and procedures, or it will impede the organization's development, strain human relations, drain resources, and, eventually bring the organization to its knees.

Today, there are is a variety of methods for resolving conflicts before they escalate to become legal disputes that often require the use of lawyers and a neutral forum in order to reach a resolution. Multiple dispute resolution options have been developed to resolve legal disputes and modern lawyers must be familiar with available alternatives for dispute resolution.² In this aspect a distinction between adjudicative and non-adjudicative dispute resolution process might help us create a map of various options. On the least formal end of the spectrum, there is direct negotiation between the parties in a dispute, while court litigation is on the very opposite. They naturally differ in the level of party control, formality, as well as escalation, and effect they have on the party relationship. Between these two extremes there is a whole spectrum of dispute resolution processes used to resolve legal disputes.³

¹ Theodore Roosevelt.

² Folberg, Golan, Stipanowich, Kloppenberg, *Resolving Disputes: Theory, Practice and Law*, 2nd Ed (2010)

³ American Bar Association, Section of Dispute resolution, *What are the different Types of Dispute Resolution Processes: Arbitration, Case Evaluation, Collaborative Law, Cooperative Practice, Divorce Coaching, Early Neutral Evaluation, Facilitation, Family Group Conference, Litigation, Mediation, Mini-Trial, Multi-Door Program, Negotiation, Neutral Fact-Finding, Ombuds, Parenting Coordinator, Pro Tem Trial, Private Judging, Settlement Conferences, Special Master, Summary Jury Trial, Unbundled Legal Services*

Some of these methods are particularly suited for commercial disputes that normally arise in connection with business activities, or disputes that arise from commercial relations of legal entities and entrepreneurs. The most common commercial disputes are related to trade in goods and services, but disputes in construction, banking, insurance, trade disputes referred to representation and advocacy, intellectual property protection and the like, are also very common. These disputes may arise both from contractual and non-contractual relationships, they may differ in complexity and duration. The necessity of resolving these disputes quickly and efficiently, however, is underlined by a significant burden and inefficiency of many national judicial systems, partly caused by the complexity of the court proceedings, which often unnecessarily complicate and delay the possibility of finding solutions.⁴

Globalization and the nature of international commercial transactions have added to increasingly complex disputes, often too complicated and unsuitable for jurisdiction of national courts, and surpassing the competences of traditional judicial national and international forums. One of the consequences of increasing globalization of the world trade and investment was a creation and harmonization of arbitration forums and practices around the world.⁵ That is why arbitration, along with mediation, has become one of the primary conceptual frameworks for third-party intervention in the resolution of international commercial disputes.⁶

Still, the need is evident for the development of relevant processes most appropriate for the resolution of complex, international disputes. Some of the options from the available spectrum of dispute resolution methods presented above are particularly suited for "mixing and matching", and may be described as "mixed mode scenarios"⁷, combining adjudicative with non-adjudicative dispute resolution methods, in order to tailor the best process to suit particular dispute. Recently, an international Task Force on Mixed Mode Dispute Resolution was

⁴ B. Nedic, J. Arsic, *White Paper on the use of Mediation to Improve Business Practice in Serbia*, Partners for Democratic Change Serbia (2012)

⁵ Redfern and Hunter on *International Arbitration*, 6th Ed. p. 1, Oxford University Press (2015)

⁶ Stipanowich, *Living the Dream of ADR: Reflections on Four Decades of the Quiet Revolution in Dispute Resolution* (Symposium Keynote) (2017)

⁷ Stipanowich, Fraser. *The International Task force on Mixed Mode Dispute Resolution: Exploring the Interplay between Mediation, Evaluation and Arbitration in Commercial Cases* (2017).

established jointly by the International Mediation Institute, the College of Commercial Arbitrators and the Straus Institute for Dispute Resolution, Pepperdine School of Law, to answer *"a critical and growing need for dialogue and deliberation and dialogue among practitioners and thinkers from different cultural and legal systems regarding the management and resolution of conflict in both public and private spheres and the roles of third party interveners"*.⁸ In a recent article, a number of questions was raised concerning the interplay between different commercial dispute resolution processes.⁹

The aim of this paper is to further analyze some of the raised questions, primarily by exploring the combination of the two most dominant international commercial dispute resolution processes - arbitration and mediation. It will discuss (I) several variations of "mixing and matching" arbitration and mediation in the international commercial dispute resolution arena, (II) look at the international statutory framework for these "hybrid" processes, and finally discuss some (III) ethical, as well as, (IV) enforcement questions, relating to their application.

I. Variety of Mixed-Mode Processes

A variety of dispute resolution models can be characterized as a "mixed-mode"¹⁰ processes, while another common term is "hybrid" or "combined" forms of dispute resolution.¹¹ Out of all possible dispute resolution options¹², numerous combinations of arbitration and mediation are the

⁸ Joint International Task Force on Mixed Mode Dispute Resolution, IMI International Mediation Institute, <http://www.imimmediation.org/about-imi/who-are-imi/mixed-mode-task-force/> (4 Dec. 2017)

⁹ Ibid, note 6, p. 4-5. *"..In what circumstances, if ever, should mediators engage in forms of non-binding evaluation...; in what ways might...mediators help "set the stage" for arbitration; ...should arbitrators be more deliberate about helping to set the stage for potential settlement?; Under what circumstances, if any, might it be appropriate for a mediator to "switch hats" and become arbitrator or judge, or an arbitrator or judge to become a mediator...; What is the proper protocol for arbitrators... to convert a settlement agreement into an arbitration award?; In what ways, if any, might mediators and other "non-adjudicative neutrals" and adjudicative neutrals appropriately communicate in the course of resolving disputes...."*

¹⁰ Stipanowich, Fraser, *The International Task Force...*, supra. note 7.

¹¹ Jeremy Lack, *Appropriate dispute Resolution (ADR): The Spectrum of Hybrid Techniques Available to the Parties in ADR in Business: Practice and Issues Across Countries and Cultures*, Vol. II, 339 (Arnold Ingen-Housz ed.) (2010)

¹² Supra, note 3.

most common. This combination may assume variety of forms, as these two models of dispute resolution feature some similarities, conducive of combination, but also certain distinguishing elements. For example, both methods include neutral third parties in the resolution of disputes, mediator(s) or arbitrator(s), often jointly referred to as "neutrals".¹³ Both offer a high level of flexibility and privacy of the process. Another one of the common issues is confidentiality, which, in turn, might create controversies in practice, discussed further in this text. In terms of the process, mediation is a more informal, albeit, structured process, while the arbitration, although flexible, includes a much more formal and defined procedure. Among the key distinguishing features are the role of a neutral and enforceability. Mediation is a consensual process, where the neutral assists the parties to reach a mutually acceptable resolution, and as such it requires a high degree of self determination both in reaching and implementing the decision. Arbitration in turn, is an adjudicative process where a decision is made by one or more arbitrators, and it is binding and typically enforceable, usually with the assistance of a court.

Hybrid dispute resolution processes are usually suitable where application of only one of these methods, mediation or arbitration, is unlikely to ultimately resolve all conflicting issues, and where the parties believe that an individual or forum is available who has the skills necessary to enact more than one process, with a consequent saving of time and expense.¹⁴

Med-Arb.

Med-Arb is probably the most common combination of mediation and arbitration. In med-arb, the parties submit their dispute to mediation with understanding that the mediator will arbitrate any unresolved issues through binding arbitration.¹⁵ Med-arb shares a common two-step process. First, a third-party neutral mediates the dispute with the participants in an effort to reach a voluntary agreement. Second, if the participants are unable to resolve the dispute by voluntary agreement in mediation, then a third-party neutral renders a binding decision on the unresolved

¹³ See, e.g. Neutral, Dictionary of Conflict Resolution (Douglas H. Yarn, ed, 1999).

¹⁴ Honeyman, Christopher. "*Hybrid Processes.*" *Beyond Intractability*. Eds. Guy Burgess and Heidi Burgess. Conflict Information Consortium, University of Colorado, Boulder. Posted: July 2003

¹⁵ Amy L. Greenspan, ed., *Handbook of Alternative Dispute Resolution* 2d § 9.2, at 134 (1990).

issues.¹⁶ The med-arb is a “technique that fuses the ‘consensuality’ of mediation with the ‘finality’ of arbitration.”¹⁷ An elaborate description of Med-Arb can be found in the "Mediation Dictionary"¹⁸, as *"a variation of the arbitration procedure in which an impartial or neutral third party is authorized by the disputing parties to mediate their dispute until such time as they reach an impasse.... In some cases, med-arb utilizes two outside parties - one to mediate the dispute and another to arbitrate any remaining issues after the mediation process is completed. This is done to address some parties' concerns that the process, if handled by one third party, mixes and confuses procedural assistance (a characteristic of mediation) with binding decision making (a characteristic of arbitration)."*

There are several variations of the med-arb models used in the international commercial dispute resolution arena, allowing participants to tailor the process according to the specificities of the particular dispute.

The Med-Arb (Same) model is the most basic form in that the same person acts as mediator and arbitrator.¹⁹ The main advantage is the power of a mediator to bring the final resolution to the matter if the parties are unable to reach a mutually agreeable solution. This model also saves time and money, as the same neutral completes the entire process. The concern with this model is that parties might be less likely to disclose necessary information for a settlement or are more likely to present extreme arguments during the mediation stage if they know that the same third party will ultimately make a decision on the dispute.

In the Med-Arb (Diff) model the mediator and arbitrator are different persons. Advocates of Med-Arb Diff complain that Med-Arb Same gives the med-arbiter too much power and that mediation is bad preparation for arbitration because mediators may become biased in favor of one solution, a danger avoided by the use of two persons.²⁰ Med-Arb Diff is more costly and

¹⁶ Sherry Landry, *Med-Arb: Mediation with a bite and an effective ADR model*, 63 Defense Counsel Journal 263, April, 1996

¹⁷ Christine B. Harrington, *Shadow Justice* 126 (1985).

¹⁸ See, *Mediation Dictionary*, <http://www.mediationdictionary.com/M.html> (Nancy Peterson)

¹⁹ *Supra*, note 16.

²⁰ *Id.*

time consuming than Med-Arb Same, and it does not “allow for further attempts to mediate once the process reaches arbitration.”²¹ However, if the parties may be alarmed by the potential lack of neutrality of the "same" mediator-arbitrator, then Med-Arb Diff is a possible alternative.

Med-Arb Diff-Recommendation model is similar to Med-Arb Diff in that if the participants fail to reach a voluntary agreement during the mediation phase, the mediator makes a recommendation to the arbitrator, who is a different person. Although the arbitrator is free to reject the mediator’s recommendation, usually the recommendations are followed.²²

In the Non-binding Med-Arb model, a neutral first acts as a mediator, but if the participants reach impasse, then the mediator-arbitrator provides them with a non-binding opinion. In this model the parties cannot obtain a binding decision from the same person. This model is very similar to the traditional "evaluative-narrow" definition of mediation²³, and the north-west corner of the "Riskin Grid" where a mediator makes a non-binding resolution proposal to the parties.

The Med-Arb-Show Cause model uses the same person as mediator and arbitrator, but that person renders only a tentative decision with an order to show cause why it should not become final. If the participants can demonstrate flaws in the decision, the mediator-arbitrator will correct the decision. The disadvantages of this model are that is not appropriate for complex disputes, and a release of a preliminary award, might create additional resistance and unwillingness of the parties to cooperate with the mediator - arbitrator.²⁴ Because Med-Arb-Show Cause lacks one of the most fundamental characteristics of the med-arb method, finality, its participants are unlikely to be satisfied with a process that encourages further disagreement after the “resolution.”²⁵

MEDALOA (Mediation and Last Offer Arbitration) is an ADR hybrid combining mediation with last-offer arbitration. The participants first attempt voluntary settlement through mediation,

²¹ Barry Bartel, Med-Arb as a Distinct Method of Dispute Resolution: History, analysis and Potential, 27 Willamette L. Review (1993).

²² J. Folberg, A. Taylor, Mediation, 277-80 (1984)

²³ Leonard Riskin, Mediator Orientations, Strategies and Techniques, 12 Alternatives 111 (1994)

²⁴ Lon Fuller, Collective Bargaining and the Arbitrator, 1962, Nat’l. Acad. Arb 8, reprinted in Dispute Resolution 12 (1985).

²⁵ Supra, note 15.

but if they reach impasse, then they submit their final offers to an appointed arbitrator, who is limited to adopting one of the parties' final offers in the award.²⁶ MEDALOA encourages parties to negotiate in good faith and if unable to agree on the mutually acceptable solution, make a reasonable final offer, they hope will be selected by the arbitrator. This process reduces the risk that the losing party may attempt to challenge the arbitrator's decision. After such a process, the losing party is unlikely to try to appeal the award in court.²⁷

Critics argue, however, that MEDALOA is inflexible and flawed precisely because the mediator-arbitrator's decision is narrowly limited to the submitted final offers. Such criticism, however, is itself flawed. If the participants have reached impasse and a binding decision must be rendered, inevitably at least one participant will be dissatisfied with the outcome. Simple logic dictates that if a decision would please all participants, then the participants would have agreed to it voluntarily, and arbitration would not be necessary.²⁸ Also, the fact that the arbitrator must pick one of the parties' positions reduces the risk of any decision being outside the negotiated range, and at the same time forces the parties to make very reasonable final offers, because the mediation phase will significantly narrow the issues in dispute, the final offers often end up being very close.”

Finally, it should be pointed out that the American Arbitration Association²⁹ and JAMS³⁰ do not recommend same-neutral med-arb “*except in unusual circumstances because it could inhibit the candor which should characterize the mediation process and/or it could convey evidence, legal points or settlement positions ex parte improperly influencing the arbitrator.*”³¹ However, it is important to note that the Association will administer a case using same-neutral med-arb if that is what the parties want.

Arb-Med

²⁶ Commercial Arbitration at its Best. Successful Strategies for Business Users, Section 1.8 (Thomas Stipanowich & Peter Kaskel, eds) (2001)

²⁷ ADR in the News: AAA Offers MEDALOA Option, 49 Disp. Resolution Journal, 3, 4 (1994).

²⁸ Supra, note 16.

²⁹ <https://www.adr.org/>

³⁰ <https://www.jamsadr.com/>

³¹ AAA Handbook on Mediation, 2nd Edition, p. 79 (2010)

There is also a reverse process mixing arbitration and mediation, called arb-med, whereby the parties initiate an arbitration, but later, during the course of the arbitration, the dispute is referred to mediation for settlement negotiations.³² One variation of the arb-med process can be described as a "**Sealed Envelope**" arb-med. When the arbitration process is finalized, the arbitrator deposits a decision in an envelope. The parties are then offered a possibility to reach a mediated settlement, having benefited from the discovery and adjudicative process of arbitration, but still under the uncertainty about the outcome of the arbitrator's decision.³³

Arb-Med-Arb

Arb-Med-Arb is a process where a dispute is first referred to arbitration before mediation is attempted. If parties are able to settle their dispute through mediation, their mediated settlement may be recorded as a consent award. The consent award is generally accepted as an arbitral award, and, subject to any local legislation and/or requirements, is generally enforceable in approximately 150 countries under the New York Convention. If parties are unable to settle their dispute through mediation, they may continue with the arbitration proceedings.

In 2014, the Singapore International Arbitration and Mediation Center³⁴ introduced hybrid proceedings known as "arb-med-arb", whereby the parties would first initiate arbitration, to be temporarily suspended while the parties attempt mediation. If the mediation is successful the mediated agreement is submitted to the standing arbitration panel for a consent award, or if unsuccessful, the arbitration proceedings are continued.³⁵

Finally in this section, it may seem that the mere definition of the terminology is superficial at this level of the party' sophistication, nevertheless, as a recent ruling of the Appellate Division of

³² Dendorfer, "*Med-Arb or Arb-Med Proceedings, Implications, Advantages and Disadvantages*," International Arbitration and Dispute Resolution/Litigation Conference, Salzburg, Austria (2004).

³³ Robert N. Dobbins, *The Layered Dispute Resolution Clause: From Boilerplate to Business Opportunity*, 1 *Hastings Business Law Journal* (2005). See also M. MicIlwrath, J. Savage, *International Arbitration and Mediation: A Practical Guide* 186 (2010).

³⁴ *Infra*, note 42.

³⁵ Hinchey, Harris, 1:13. *Construction dispute resolution processes related to arbitration - Med-arb*, *International Construction Arbitration Handbook*, June 2017 update; For more details see *Infra*, note 18.

the New Jersey Superior Court in *Marano v. The Hills Highlands Master Association, Inc.*³⁶ shows, it is sometimes still useful to define the terms of the dispute resolution process in question.³⁷

II. International Framework for Mixed-Mode Processes

Almost all international commercial arbitration instruments recognize the interplay between mediation, conciliation, arbitration and other dispute resolution methods as a viable option in international dispute resolution. Some of them will be briefly presented here, while the others will be mentioned in the Section IV of this text under the discussion about enforcement and legality of the consent awards.

UNICTRAL Model Law on International Commercial Arbitration³⁸ has a provision that a consensual agreement can be entered as an arbitration award on the agreed terms if the parties so request and if the tribunal does not object. Such award shall have the same force as any other arbitration award on the merits of the case.

³⁶ <http://pbnlaw.com/media/982827/a5538-15.pdf>

³⁷ The case was a dispute about flooding between the Maranos, the homeowners, and their homeowners' association at the Hills Highlands. In March 2014, the Maranos' attorney wrote to the association demanding "arbitration," and in response, the association's attorney disputed the allegations and asserted that it was not required to participate in arbitration, but was willing to "participate in ADR." A retired County Superior Court judge, Feldman, was retained to handle the matter. The uncertainty, unfortunately, arose after the retired judge forwarded a form titled "civil mediation agreement." The proceedings involved witnesses, and Feldman ultimately issued an "Award In Arbitration," ordering the association to pay for repairs and to advance repair funds to other property owners affected by the flooding, according to the decision. In 2015, the Maranos filed an action in Somerset County Superior Court seeking confirmation of Feldman's award. The association opposed it, claiming that the parties engaged in nonbinding mediation, not binding arbitration. Superior Court Judge Yolanda Ciccone issued a letter opinion noting that the parties at times had used "arbitration" and "mediation" interchangeably, but clearly engaged in binding arbitration. The association appealed. In a per curiam decision, Appellate Division Judges Clarkson Fisher Jr., Thomas Sumners and Scott Moynihan affirmed, finding "no evidence in the record on appeal to suggest that the Association ever asserted that the parties were merely mediating and were not arbitrating their disputes."

³⁸ UNCITRAL Model Law on International Commercial Arbitration, Art. 30: (1) If, during arbitral proceedings, the parties settle the dispute, the tribunal shall terminate the proceedings, and if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms."

UNCITRAL Arbitration Rules in Article 36, para. 1, have similar formulation on the consent award as the Model Law, adding that the tribunal shall not be obliged to give reasons for such award.³⁹ ICC Rules of Arbitration have a similar "Award by Consent" provision.⁴⁰

UNCITRAL Notes on Organizing Arbitral Proceedings, adopted in 2016, in the form of a revised set of rules, called *Notes*, aim at further defining procedural details of the arbitration process. In the Preamble, it is noted that *the purpose of the UNCITRAL Notes on Organizing Arbitral Proceedings is to list and briefly describe matters relevant to the organization of arbitral proceedings and that the Notes, prepared with a focus on international arbitration, are intended to be used in a general and universal manner, regardless whether the arbitration is administered by an arbitral institution.*⁴¹ Para. 72 of these Rules deals with settlement attempts conducted within the arbitral proceedings, and provides that the arbitration tribunal may raise a possibility of a settlement with the agreement of the parties, while in some jurisdictions, if permissible by the applicable law, the tribunal may even assist the parties in their negotiations.⁴²

CEDR Rules for the Facilitation of Settlements in International Arbitration Proceedings, Article 5, provides that upon a request of all parties, arbitration tribunal may adjourn arbitration proceedings or insert a "mediation window" in order to enable assisted negotiations between the parties, or offer the terms of settlement, and chair settlement meetings.⁴³

³⁹ UNCITRAL Arbitration Rules, Art. 36, para. 1: If, before the award is made, the parties agree on a settlement of the dispute, the arbitral tribunal shall either issue an order for the termination of the arbitral proceedings, or, if requested by the parties, and accepted by the arbitral tribunal, record the settlement in the form of an arbitral award on the agreed terms. The arbitral tribunal is not obliged to give reasons for such an award.

⁴⁰ ICC Arbitration Rules, Art. 32. If the parties reach a settlement after the file has been transmitted to the arbitral tribunal in accordance with Article 16, the settlement shall be recorded in the form of an award made by consent of the parties, if so requested by the parties and if the arbitral tribunal agrees to it.

⁴¹ 2016 UNCITRAL Notes on Organizing Arbitral Proceedings, preamble.

⁴² *Id.*, note 15, para. 72: *In appropriate circumstances, the arbitral tribunal may raise the possibility of a settlement between the parties. In some jurisdictions, the arbitration law permits facilitation of a settlement by the arbitral tribunal with the agreement of the parties. In other jurisdictions, it is not permissible for the arbitral tribunal to do more than raise the prospect of a settlement that would not involve the arbitral tribunal. Where the applicable arbitration law permits the arbitral tribunal to facilitate a settlement, it may, if so requested by the parties, guide or assist the parties in their negotiations. Certain sets of arbitration rules provide for facilitation of a settlement by the arbitral tribunal.*

⁴³ CEDR Rules for the Facilitation of Settlement in International Arbitration Proceedings, art. 5

In addition to these statutory instruments, the "mixed-mode" provisions can also be found in contractual clauses between the parties, as stipulated modes of dispute resolution within the original contractual agreements. These multi-mode clauses are sometimes referred to as "step" or "escalation" dispute resolution clauses, and their focus in this Section will be on the contractual clauses providing for "mixed-mode" processes.

California Practice Guide on Alternative Dispute Resolution offers this med-arb clause: *“All disputes not resolved by mediation shall be determined by arbitration administered by [ADR provider] in accordance with its applicable rules. The mediator shall serve as arbitrator unless the parties agree to select a different person as arbitrator”*.⁴⁴

Singapore International Arbitration and Mediation Center (SIAC-SIMC) Arb-Med-Arb model clause stipulates that parties wishing to take advantage of this tiered dispute resolution mechanism as administered by SIAC and SIMC, may consider incorporating the Arb-Med-Arb clause in their contracts.⁴⁵

1. Unless otherwise agreed by the Parties in writing, the Arbitral Tribunal may, if it considers it helpful to do so, take one or more of the following steps to facilitate a settlement of part or all of the Parties' dispute: ... 1.3. where requested by the Parties in writing, offer suggested terms of settlement as a basis for further negotiation; 1.4. where requested by the Parties in writing, chair one or more settlement meetings attended by representatives of the Parties at which possible terms of settlement may be negotiated ... 3. The Arbitral Tribunal shall: 3.1. insert a Mediation Window in the arbitral proceedings when requested to do so by all Parties in order to enable settlement discussions, through mediation or otherwise, to take place; 3.2. adjourn the arbitral proceedings for a specified period so as to enable mediation to take place when requested to do so by a Party in circumstances where the contract in dispute contains a mandatory mediation provision which requires the Parties to mediate any relevant dispute, and the Parties have failed to do so before the time the issue is raised in the arbitration (provided that such failure was not due to the action or inaction of the Party requesting the adjournment).

⁴⁴ Judge H. Warren Knight *et al.*, *Alternative Dispute Resolution (The Rutter Group California Practice Guide) Form 17*, p. 35. Thomson West (2003).

⁴⁵ SIAC - SMC model clause: *Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration administered by the Singapore International Arbitration Centre (“SIAC”) in accordance with the Arbitration Rules of the Singapore International Arbitration Centre (“SIAC Rules”) for the time being in force, which rules are deemed to be incorporated by reference in this clause.*

III. Ethical Issues in Mixed-Mode Processes

There are two main ethical or conflict of interest difficulties surrounding the mixed-mode dispute resolution models. The first involves situations where the same person performs different roles in the process. This issue of one person switching between roles of arbitrator and mediator produces an ongoing debate in the arbitration and ADR community. Of all hybrid dispute resolution processes, none has started more debate than when a neutral mediator, who was originally hired to assist the parties in a settlement oriented processes "changes hats and becomes an adjudicator, or vice-versa."⁴⁶ The other issue of contention is general enforceability of the mixed-mode decisions and awards, and in particular the enforceability of the consent awards, where the parties may attempt to ensure enforceability of some potentially illegal agreements, as consent awards.

The main arguments in favor of the "same neutral" approach in hybrid processes are that a single neutral improves efficiency and saves costs as the parties do not have to educate two separate persons, and organize two separate processes, and also that if the parties are aware that the person engaged as a mediator will be able to render a binding decision following unsuccessful mediation, they may be more encouraged to resolve the issue in mediation.⁴⁷

However, the key question, in particular, is whether the neutral can act impartially and not let what she may have learned in the mediation influence her decision if later required to rule on the matter.⁴⁸ The critics of the neutrals "switching hats" approach claim that the roles of the mediator and arbitrator are fundamentally incompatible.⁴⁹ The arbitrator(s) conducts hearings, extracts evidence and supervise discovery under the rules applicable to adversarial processes. On the other hand, a mediator engages in privileged communication with the parties, designed to reveal their underlying interests and needs. In arbitration there will normally be no *ex parte*

⁴⁶ T. Stipanowich & Z. Ulrich, Commercial Arbitration and Settlement: empirical Insights into the Roles Arbitrators Play, 6 Yearbook on Arbitration and Mediation 1, 2014.

⁴⁷ Supra, note 1, Folberg et al, p. 605.

⁴⁸ Norton Rose Fulbright, "A Role for Mediation in Arbitral Proceedings," (March 2010)

<http://www.nortonrosefulbright.com/knowledge/publications/26634/a-role-for-mediation-in-arbitral-proceedings>

⁴⁹ Id.

communication, while the private discussions between a mediator and a party are confidential and may not be communicated to the adversary unless the disclosing party agrees. This raises a clear conflict as the parties may be reluctant to share confidential information with the neutral as it can influence her ultimate decision as an arbitrator. Furthermore, the information disclosed in mediation, that can subsequently be used to influence the arbitrator's decision, was never subjected to any cross-examination or rebuttal.⁵⁰ In addition, in a private caucus a party may tell the mediator something that would not be admissible in a subsequent litigation.⁵¹

In the international commercial dispute resolution arena, solutions vary as to the role of a single neutral in mixed-mode process, and are heavily influenced by culture and legal traditions.⁵² In the US, the *California ADR Practice Guide* contains an acknowledgment of the ethical problems caused by having a mediator become the arbitrator in the same case.⁵³ It also requires the parties to acknowledge that the arbitrator might be influenced by confidential information learned in the mediation and sign a waiver giving up the right to disqualify the arbitrator and vacate the award on account of this.

This should be contrasted with the practice in China, of "*conciliation within arbitration*", as stipulated by the Rules of the China International Economic and Trade Arbitration Commission (CIETAC)⁵⁴, and the Beijing Arbitration Commission (BAC)⁵⁵. In China, an emphasis on the "collectivism", social harmony and deference to authority, have underpinned the practice of conciliation by arbitrators and judges.⁵⁶

⁵⁰ Supra, note 1, Folberg et al, p. 606.

⁵¹ Gerald F. Phillips, Same-Neutral Med-Arb: What Does the Future Hold?, 60 Dispute Resolution Journal 24, July 2005.

⁵² Supra, note 7, Stipanowich, Fraser

⁵³ California ADR Practice Guide "*The parties understand that this process will likely cause the arbitrator to receive information that might not otherwise have been received as evidence in the arbitration and to receive information confidentially from each of the parties that may not be disclosed to the other side.*"

⁵⁴ CIETAC, Arbitration Rules, Art. 47 (2014).

⁵⁵ BAC Arbitration Rules, Art. 39 (2014).

⁵⁶ Wang Wenying, The Role of Conciliation in Resolving Disputes: a PRC Perspective, 20 Ohio St. J. on Disp. Res. (2005)

The position that civil and common law jurisdictions take on this issue, also differs. Arbitration laws in civil law countries often provide that arbitrators are allowed to participate in the settlement attempts, whereas in common law jurisdictions, judges and arbitrators may suggest that parties attempt to settle the dispute, but are not supposed to play an active role.⁵⁷ In order to prevent any subsequent challenge to the award, some commentators suggest that arbitration tribunals should obtain an express consent from the parties, waiving their rights to challenge the award for the reasons of arbitrator's involvement in any settlement discussions.⁵⁸

According to IBA Guidelines on Conflict of Interests in International Arbitration, arbitrators may assist the parties in reaching a settlement of the dispute, through conciliation, mediation or otherwise. However, if, as a consequence of the involvement in the settlement process, the mediator develops doubts as to her impartiality and independence in the future arbitration, she should resign.⁵⁹

IV. Enforceability and Legality of Mixed-Mode Awards

Another issue of controversy to be discussed is enforceability of arbitration awards, in particular if they were entered on the basis of settlement agreements. This discussion will also include settlement agreements that potentially may include illegal or unethical considerations.

Some authors claim that consent awards should not be enforceable under the New York Convention because, strictly speaking, they do not represent arbitral awards.⁶⁰ In some

⁵⁷ Christopher Koch & Erik Schafek, *Can it Be Sinful for an Arbitrator Actively to Promote Settlement?*, 1999 ARB. & DISP. RESOL. L.J. 147, 155 (1999).

⁵⁸ Kryvoi, Davydenko, *Consent Awards in International Arbitration: From Settlement to Enforcement*, 40 Brooklyn Journal of International Law (2015).

⁵⁹ IBA Guidelines on Conflict of Interest in International Arbitration, General Standard 4 (d):

An Arbitrator may assist the parties in reaching a settlement of the dispute, through conciliation, mediation, or otherwise, at any stage of the proceedings. However, before doing so, the arbitrator should receive an express agreement by the parties that acting in such a manner shall not disqualify the arbitrator from continuing to serve as arbitrator... However, consistent with General Standard 2(a) and notwithstanding such agreement, the arbitrator shall resign if, as a consequence of his or her involvement in the settlement process, the arbitrator develops doubt as to his or her ability to remain impartial or independent in the future course of arbitration.

⁶⁰ Brette Steele, *Enforcing International Commercial Mediation Agreements as Arbitral Awards under the New York*

jurisdictions, the enforcement of an award that contains mediated agreement, may not be possible if the dispute has already been settled *before* the arbitrator was appointed. English Arbitration Act, for example, stipulates that only "*present or future disputes*" may be submitted to arbitration.⁶¹ Similarly, New York state law provides that only arbitration agreements dealing with controversies "*existing or thereafter arising*" shall be enforceable, which suggests that enforceability may not apply to the arbitration awards where an arbitrator has been appointed *after* the issues in a dispute has already been settled by the parties.

According to the prevailing practice in the world, and as already noted in the discussion about the statutory provisions regarding the mixed-mode processes above⁶², generally, consent awards can be enforced like any other arbitration award.⁶³ As already noted, UNCITRAL Model Law, provides that the "agreed on terms" award shall have the same force as any other award, providing that the settlement occurred "during the arbitral proceedings".⁶⁴

California Code of Civil procedure explicitly grants the same force to the consent agreements, providing that certain conditions have been fulfilled.⁶⁵ Similar provision is contained in the Rules of the Mediation Institute of the Stockholm Chamber of Commerce.⁶⁶ Arbitration Rules of the Korean Commercial Arbitration Board provide that if conciliation succeeds in settling the dispute under the agreement of the parties, the result of the conciliation shall have the same

Convention, 54 UCLA L. REV. 1385, 1399 (2007).

⁶¹ 1996 English Arbitration Act, Section 6(1).

⁶² *Supra*, Section II

⁶³ *See, e.g.*, William Craig, William Park, Jan Paulsson, International Chamber Of Commerce Arbitration 358 (2000).

⁶⁴ UNCITRAL Model Law, art. 30(2) An award on agreed terms shall be made in accordance with the provisions of article 31 and shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case.

⁶⁵ California Code of Civil Procedure, CA Civ Pro Code § 1297.401 (2013)

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

⁶⁶ Rules of the Mediation Institute of the Stockholm Chamber of Commerce, Art. 12.

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

effect as an arbitration award.⁶⁷ CIETAC Arbitration rules explicitly provide that the parties may submit a settlement reached *before* to the arbitration tribunal for entry as a consent award.⁶⁸

Furthermore, ICSID Arbitration Rules enable delivery and enforcement of consent arbitration awards⁶⁹, while similar provision exists in the ICC Arbitration Rules⁷⁰, again providing that the "file has already been transferred to the tribunal", that is if the settlement was attempted after the commencement of the arbitration proceedings.

The text of the 1958 New York Convention⁷¹, does not have a precise "temporal element" nor any provision barring recognition of awards by an arbitrator appointed after the resolution of the dispute.⁷² Still, it can be concluded that the general regime applied in almost 150 countries signatories of the Convention, is favorable to the enforcement of the consent awards, in the same manner as any other arbitral awards, providing the settlement discussions, or mediation have been conducted within the framework of the arbitration proceedings, or immediately after or parallel with the appointment of arbitrators. It is less certain if an arbitration tribunal would

⁶⁷ Korean Commercial Arbitration Board, Arbitration Rules, Art. 18 (3)

If the conciliation succeeds in settling the dispute, the conciliator shall be regarded as the arbitrator appointed under the agreement of the parties; and the result of the conciliation shall be treated in the same manner as such award as to be given and rendered upon settlement by compromise under the provision of Article 53, and shall have the same effect as an award.

⁶⁸ CIETAC Arbitration Rules, Art. 47.10.

Where the parties have reached a settlement agreement by themselves through negotiation or conciliation before the commencement of an arbitration, either party may, based on an arbitration agreement concluded between them that provides for arbitration by CIETAC and the settlement agreement, request CIETAC to constitute an arbitral tribunal to render an arbitral award in accordance with the terms of the settlement agreement. Unless otherwise agreed by the parties, the Chairman of CIETAC shall appoint a sole arbitrator to form such an arbitral tribunal, which shall examine the case in a procedure it considers appropriate and render an award in due course. The specific procedure and time period for rendering the award shall not be subject to other provisions of these Rules.

⁶⁹ ICSID Arbitration Rules, R. 43, Settlement And Discontinuance :

"If, before the award is rendered, the parties agree on a settlement of the dispute or otherwise to discontinue the proceeding, the Tribunal, or the Secretary-General if the Tribunal has not yet been constituted, shall, at their written request, in an order to take note of the discontinuance of the proceeding If the parties file with the Secretary-General the full and signed text of their settlement and in writing request the Tribunal to embody such settlement in an award, the Tribunal may record the settlement in the form of its award"

⁷⁰ Supra, note 37.

⁷¹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 U.N.T.S. 38 (1959)

⁷² Edna Sussman, *The New York Convention Through a Mediation Prism*, 15 no.4 Disp. Res. 10 (2009)

enter as a consent award a settlement agreement reached before and independently of any arbitration process.

However, since the arbitration is a private process, with a very effective international enforcement mechanism guaranteed by the New York Convention, a question may also arise about entering arbitration awards based on the party settlements in case a potential illegality in the private settlement agreement is suspected. As noted above, most arbitration rules give arbitral tribunal a degree of authority to decline recording a settlement agreement as a consent award if the tribunal has good reasons to believe that the agreement or contract is used for an illegal cause. These causes may include money laundering, smuggling, tax evasion, etc. In a case brought before an English Court (not based on a settlement agreement, but contract), enforcement of an arbitral award was refused in a contract between a father and a son that involved smuggling carpets from Iran, in breach of Iranian exports and tax laws.⁷³

In case of the consent awards, if one side to the agreement is involved in illegal acts, even if the settlement is entered as a consent award, the other side will be able to challenge the award in the same way as any regular arbitral award. However, if both parties are involved in illegal settlement agreement that is subsequently submitted to the tribunal for an agreed-on terms award, the situation is more complicated. Tribunal will have to look at the validity of the settlement agreement on two grounds: illegality according to the applicable laws, and element of the agreements that may be contrary to the public policy. In the absence of the agreement of the parties as to the applicable law, the tribunal will apply the law which it determines as appropriate.⁷⁴ It may be the law of the seat of arbitration, law governing the arbitration clause, law of the place of performance, etc. In determining if the settlement agreement is in accordance with the public policy, the arbitration tribunal will have to primarily look at the public policy of the seat of arbitration. The position is also supported by the UNCITRAL Model Law, permitting the court to set aside an award on these grounds.⁷⁵ Also, the award entered on the basis of a

⁷³ *Soleimany v. Soleimany*, 1999, QB 785.

⁷⁴ UNCITRAL *Arbitration Rules*, art. 35.1

⁷⁵ UNCITRAL Model Law, art. 34(2)(b)(ii) “*An arbitral award may be set aside by the court [in the seat of arbitration] only if: ... the court finds that ... the award is in conflict with the public policy of this State.*”

settlement agreement containing illegal provisions may be challenged on the public policy grounds in the jurisdiction where the enforcement of the award will be sought, in accordance with the provision of the New York Convention.⁷⁶

If the arbitration tribunal has grounds to believe that the settlement agreement is submitted for improper reasons, it has two options: decline jurisdiction without any examination of the settlement agreement and surrounding circumstances, or accept jurisdiction, assess the evidence, and then resign and terminate the proceedings if satisfied that the settlement agreement is entered into for improper reasons. The Chartered Institute of Arbitration stipulates that arbitrator should *refuse to issue an award if she knows or suspects that a request for an agreed award, is or may be, a prelude to an arrangement by which a criminal property is to be acquired, retained, used or controlled.*⁷⁷

⁷⁶ Supra, note 63, Article V.2.b.

⁷⁷ Chartered inst. of Arbitrators, Guideline 12: The Proceeds of Crime Act 2002: Guidance for Third-party Dispute Resolvers para. 4.3 (2007),

Conclusion

As indicated in the introduction of this paper, modern business practice requires various dispute resolution options in order to effectively manage conflicts incumbent in the global commercial field. Development of numerous variations of the mixed-mode mechanisms enriches the dispute resolution arena, and creates enabling environment for resolution of the most peculiar domestic and international commercial disputes. International dispute resolution practice has developed a variety of hybrid models facilitating the parties in finding the most appropriate dispute resolution model and process that would fit a dispute of every type, scope and complexity.

This brief analysis reveals that most of the international arbitration instruments and best practices in drafting international commercial contracts, enable the parties in arbitral proceedings to take advantage of various mixed-mode process, primarily focused on the combination of arbitration and mediation. "Consensuality" of mediation, and "finality" and "enforceability" of arbitration may present the most logical and appropriate choice for many disputants and conflicts, although there are other available combinations. Still, although this and other combinations aim to utilize "the best of both worlds", they inevitably carry some of the ethical challenges and legal controversies immanent to their hybrid nature.

The work of the International Task Force on Mixed Mode Dispute Resolution has provided an invaluable support to the increased improvement of understanding the dispute resolution perceptions and practices involving combined, hybrid, models all over the world. It is particularly encouraging that the presence and variations of the mixed-mode dispute resolution practices is visible, with geographical and cultural individualities, in almost all jurisdictions. It should be expected that the work of the International Task Force on Mixed Mode Dispute Resolution and other professionals, will contribute to additional collection and understanding of the best practices and systematization of guidelines in this field, in order to empower domestic and international entities and users to successfully and efficiently manage their conflicts and disputes.