DISPUTE RESOLUTION JOURNAL®

AMERICAN ARBITRATION ASSOCIATION®
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION®
AAA Mediation.org™

2022 | VOLUME 76 | NUMBER 1

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An Examination of Institutional Arb-Med-Arb Protocols and Practices

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From 2004 to 2014, arbitrators increasingly saw disputes settle before they issued an award—and not infrequently, even before the first arbitration hearing.[1] A recent survey suggests that mediation during arbitration is more likely than not to succeed—and by quite a healthy margin.[2]

This article proceeds in four parts by (i) reporting recent data on the success of the hybrid process of interweaving mediation into the arbitral

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[1]Thomas J. Stipanowich & Zachary P. Ulrich, *Commercial Arbitration and Settlement: Empirical Insights into the Roles Arbitrators Play*, 6 Y.B. on Arb. & Mediation 1, 17-18 (2014) (showing increasing settlement rates, both before the first arbitration hearing and before an award was issued, in the last five years, as opposed to the preceding five years).

[2]London Chamber of Arbitration and Mediation / Herbert Smith Freehills, *Mediation in Arbitration Survey Insights* (hereinafter "LCAM Survey"), slide 2 (on file with authors). *See also Mediation in Arbitration: Insights from the London Chamber of Arbitration and Mediation / Herbert Smith Freehills Survey*, https://hsfnotes.com/arbitration/2021/02/02/mediation-in-arbitration-insights-from-the-london-chamber-of-arbitration-and-mediation-herbert-smith-freehills-survey/ (last visited Aug. 17, 2021).

process; (ii) surveying some of the existing institutional rules regarding Arb-Med-Arb; (iii) setting forth goals and issues to consider when designing Arb-Med-Arb procedures; and (iv) considering best practices for institutional Arb-Med-Arb protocols.

I. The Documented Success of the Arb-Med-Arb Procedure

The combination of mediation and arbitration can take many forms and go by many names.[3] The form addressed here—the incorporation of a mediation window into the arbitral process and the recording of any negotiated settlement as an arbitral award—is most commonly referred to by its procedural sequence, Arb-Med-Arb.

If the parties are successful in resolving the entire dispute during the mediation window, the arbitration is reconvened simply to enter the negotiated settlement as a consent award. If the parties are unsuccessful, or successful only in part, then the arbitration is resumed to resolve remaining issues and to issue an arbitral decision and award.

This hybrid procedure—which "beg[an] to make an appearance" a decade ago[4]—has come to play an increasingly important role in alternative dispute resolution ("ADR"). In the 2021 International Arbitration Survey, which analyzed 1218 questionnaire responses and 198 interviews of in-house counsel, arbitrators, and private practitioners, among others, 59% of respondents chose international arbitration in conjunction with mediation and negotiation[5] as their preferred method of resolving cross-border

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[3] *See Multi-Tier Approaches to the Resolution of International Disputes: A Global and Comparative Study* (Anselmo Reyes & Weixia Gu eds., Cambridge University Press) (forthcoming Dec. 2021) (using "multi-tier dispute resolution" or "MDR" to refer to combinations of mediation and arbitration or litigation).

[4] Jeremy Lack, *Appropriate Dispute Resolution (ADR): The Spectrum of Hybrid Techniques Available to the Parties*, 2 ADR in Business: Practice and Issues Across Countries and Cultures 339, at 360 (2011).

[5] The survey used the term "ADR," including "adjudication, dispute boards, expert determination, mediation and negotiation, but exclude[d] litigation and arbitration." *2021 International Arbitration Survey: Adapting Arbitration to a Changing World*, at 5, available at https://www.whitecase.com/publications/insight/2021-international-arbitration-survey (last visited Aug. 17, 2021).

disputes, up from 49% in 2018, and from 34% in 2015.[6] By comparison, only 31% of respondents preferred international arbitration on its own.[7]

Another 2021 survey conducted by the London Chamber of Arbitration and Mediation and Herbert Smith Freehills ("LCAM Survey") confirmed that mediation during arbitration is particularly effective. Half of the surveyed mediators who had experience with mediation in arbitration responded that they successfully settled over 70% of their cases, and a majority of these had success rates over 80%. An additional 17% of mediators succeeded in 50-70% of their cases. In other words, two-thirds of mediators reported they were more likely than not to settle their cases with mediation in arbitration. Significantly, a majority of mediators settled cases with over £10 million in dispute.[8]

II. How Arbitral Institutions Have Implemented Arb-Med-Arb Procedures

Leading arbitral institutions acknowledge and govern the use of hybrid procedures to widely differing degrees in their own institutional rules. At the most basic end of the spectrum, institutional rules reference settlement only in mirroring Article 34 of the initial 1976 version of the United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules,[9] which provides that in the event of a settlement reached before the issuance of an arbitral award, "the arbitral tribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by both parties and accepted by the tribunal, record the settlement in the form of an arbitral award on agreed terms."[10] Some go one step further by referencing the possibility of a prior or concurrent mediation but do not outline any procedure for the two processes to work together. Most prominent on the formalized end of the spectrum is the Singapore International Arbitration Centre ("SIAC") and Singapore International Mediation Cen-

[6] *Id.* at 1, 5.

[7] *Id.* at 5.

[8] LCAM Survey, *supra* note 2, slides 3, 5.

[9] In the most recent UNCITRAL Arbitration Rules (2013), it is Article 36.

[10] UNCITRAL Arbitration Rules (1976), Art. 34.

tre ("SIMC") Arb-Med-Arb Protocol (the "SIAC-SIMC AMA Protocol"), launched in November 2014.[11]

Under the SIAC-SIMC AMA Protocol, parties submit disputes to SIAC pursuant to an Arb-Med-Arb dispute resolution clause, or based on agreement by the parties to submit their dispute under the Protocol, which can happen before or during arbitration.[12] Under the Protocol, parties agree that any settlement reached at SIMC falls within the scope of their arbitration agreement.[13] The party commencing arbitration files a Notice of Arbitration with the Registrar of SIAC (the SIAC administrator).[14] Within four working days of the commencement of arbitration (or agreement by the parties to mediate), the Registrar of SIAC informs SIMC and sends to SIMC the Notice of Arbitration.[15] SIAC constitutes the arbitral tribunal, and, after the tribunal receives the Response to the Notice of Arbitration, it stays arbitration proceedings and informs the Registrar of SIAC that the case can be submitted for mediation at SIMC.[16] Upon SIMC's receipt of the Notice of Arbitration and the Response, SIMC informs the Registrar of SIAC when mediation commences.[17] The mediator will generally be a different person (*i.e.*, not one of the arbitrators), independently appointed by SIMC, unless the parties agree otherwise.[18]

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[11]SIAC-SIMC AMA Protocol, available at http://simc.com.sg/v2/wp-content/uploads/2019/03/SIAC-SIMC-AMA-Protocol.pdf (last visited Aug. 17, 2021). The Vietnam International Arbitration Centre and Vietnam Mediation Centre also have a formalized Arb-Med-Arb Protocol, in which the two proceedings occur concurrently. *See Arb-Med-Arb Protocol*, VIAC, https://www.viac.vn/en/arb-med-arb-protocol (last visited Aug. 17, 2021).

[12]SIAC-SIMC AMA Protocol, *supra* note 11, Art. 1. *See also Arb-Med-Arb*, SIMC, https://simc.com.sg/dispute-resolution/arb-med-arb/ (last visited Aug. 17, 2021).

[13]SIAC-SIMC AMA Protocol, *supra* note 11, Art. 1.

[14]*Id.*, Art. 2.

[15]*Id.*, Art. 3.

[16]*Id.*, Arts. 4-5.

[17]*Id.*, Art. 5. The SIAC-SIMC AMA Protocol does not include an explicit time limit for the commencement of mediation from this notification. The protocol refers to "all documents lodged by the parties" and the "case file." Presumably, this includes additional documents in the event the parties agree to Arb-Med-Arb in the middle of arbitration.

[18]*Arb-Med-Arb*, *supra* note 12.

Parties must conclude mediation within eight weeks of commencement,[19] unless that time is extended through consultation between the Registrar of SIAC and SIMC.[20] At the conclusion of mediation or when the time has expired, SIMC informs the Registrar of SIAC of the outcome of the mediation.[21] If the dispute has not been settled, the Registrar of SIAC then notifies the tribunal that the arbitration proceeding shall resume as of the date of the Registrar's notification.[22] If the dispute was successfully settled in mediation, the parties may request the tribunal to record their settlement as a consent award, which the tribunal may render.[23] Thus, "[p]arties can achieve finality whether through the mediation process or arbitration process."[24]

The International Centre for Dispute Resolution ("ICDR"), the international division of the American Arbitration Association ("AAA"), adopts a less formalized process but a stronger stance on mediation. Article 6 of the ICDR Arbitration Rules expressly provides, "the parties *shall* mediate their dispute pursuant to the ICDR's International Mediation Rules concurrently with the arbitration" (emphasis added), subject to any contrary agreements between the parties or the right of any party to opt out of mediation.[25] Mirroring UNCITRAL, the parties may record any settlement in the form of a consent award.[26]

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[19] According to one source, "most mediations under the Protocol are completed within 1 to 2 days[.]" Aziah Hussin, Claudia Kuck & Nadja Alexander, *SIAC-SIMC's Arb-Med-Arb Protocol*, 11 N.Y. Disp. Resol. Law. 85, 86.

[20] SIAC-SIMC AMA Protocol, *supra* note 11, Art. 6.

[21] *Id.*, Art. 7.

[22] *Id.*, Art. 8.

[23] *Id.*, Art. 9.

[24] *Arb-Med-Arb*, *supra* note 12.

[25] Other rules also tend to encourage mediation. Articles 2 and 3 provide that a party's Notice of Arbitration or response to that Notice may optionally include whether they are "willing to mediate the dispute prior to or concurrently with the arbitration." After these documents are exchanged but before the tribunal is constituted, Article 4 allows the Administrator to "conduct an administrative conference . . . to facilitate party discussion and agreement on issues such as . . . mediating the dispute[.]" ICDR Int'l Disp. Resol. Procs. (2021), available at https://www.icdr.org/sites/default/files/document_repository/ICDR_Rules_1.pdf (last visited Aug. 17, 2021).

[26] *Id.*, Art. 35.

The International Chamber of Commerce ("ICC") takes a similar, but softer approach. The ICC published its 2021 Arbitration Rules as a single document with its 2014 Mediation Rules "in answer to the growing demand for a holistic approach to dispute resolution techniques."[27] In that vein, Appendix IV to the ICC Arbitration Rules, which lists permissible case management techniques, notes that the tribunal may "encourag[e] the parties to consider settlement of all or part of the dispute either by negotiation or through any form of amicable dispute resolution methods such as, for example, mediation under the ICC Mediation Rules."[28] In addition, if either ICC Mediation or ICC Arbitration is preceded by the other, the administrative expenses for one will offset those expenses for the other.[29] The model clauses provided by the ICC also contemplate either parallel proceedings, or mediation followed by arbitration.[30] As usual, settlements may be recorded as consent awards at the parties' request.[31]

The Centre for Effective Dispute Resolution ("CEDR") in London likewise encourages settlement, but does not mandate mediation, through its "Rules for the Facilitation of Settlement in International Arbitration." Those rules envision a more proactive role taken on by the arbitral tribunal in encouraging parties to settle, for example by providing the tribunal's preliminary views or non-binding findings on the merits and what types of evidence it would need to see, "offer suggested terms of settlement as a basis for further negotiation," and/or chair one or more settlement meetings. The arbitral tribunal may not have *ex parte* meetings.[32]

The Hong Kong International Arbitration Centre ("HKIAC") does not affirmatively call for encouraging settlement but contemplates the possi-

[27]ICC Arb. Rules & Mediation Rules (2021), at 1, available at https://iccwbo.org/content/uploads/sites/3/2020/12/icc-2021-arbitration-rules-2014-mediation-rules-english-version.pdf (last visited Aug. 17, 2021).

[28]*Id.* at 68.

[29]*Id.* at 59, 96.

[30]*Id.* at 99-100.

[31]*Id.* at 38 (Art. 33).

[32]CEDR Rules for the Facilitation of Settlement in Int'l Arb., Art. 5, available at https://www.cedr.com/wp-content/uploads/2021/03/Rules-Settlement-Arbitration.pdf (last visited Aug. 17, 2021).

bility of a mediation window. Article 13.8 provides, "Where the parties agree to pursue other means of settling their dispute after the arbitration commences, HKIAC, the arbitral tribunal or emergency arbitrator may, at the request of any party, suspend the arbitration or Emergency Arbitrator Procedure, as applicable, on such terms as it considers appropriate. The arbitration or Emergency Arbitrator Procedure shall resume at the request of any party to HKIAC, the arbitral tribunal or emergency arbitrator." HKIAC likewise allows for the recording of settlements as a consent award, upon request by the parties.[33]

The London Court of International Arbitration ("LCIA") Rules contain the typical provision mirroring the UNCITRAL rule on consent awards but otherwise do not address hybrid proceedings.[34]

The JAMS International Arbitration Rules take the same approach as LCIA,[35] but in addition, as of June 1, 2021, it issued a "Mediator-in-Reserve Policy for International Arbitrations," which allows either party to an already-commenced arbitration to request assistance in selecting a Mediator-in-Reserve.[36] Upon such request, JAMS provides a list of recommended mediators, and parties are encouraged to select one from that list who will be placed "in reserve" for "any time in the course of the arbitration proceedings" if the parties all agree to mediate.[37] Parties do not incur fees until they actually utilize the mediator.[38] Interestingly, JAMS does not inform the mediator or the panel that the parties have reserved

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[33] HKIAC Administered Arb. Rules (2018), Art. 37, available at https://www.hkiac.org/arbitration/rules-practice-notes/hkiac-administered-2018 (last visited Aug. 17, 2021).

[34] LCIA Arb. Rules (2020), Art. 26.9, available at https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx (last visited Aug. 17, 2021).

[35] JAMS Int'l Arb. Rules & Procs. (2021), Art. 38, available at https://www.jamsadr.com/international-arbitration-rules/english (last visited Aug. 17, 2021).

[36] *JAMS Mediator-in-Reserve Policy for International Arbitrations*, available at https://www.jamsadr.com/mediator-in-reserve/ (last visited Aug. 17, 2021).

[37] *Id.*

[38] *Id.*

a mediator.[39] The mediator only knows once the parties actually request services, and the arbitral panel is never informed.[40]

The Arbitration Rules promulgated by the China International Economic and Trade Arbitration Commission ("CIETAC") envision the "Combination of Conciliation[41] with Arbitration" in Article 47. These rules address conciliation by the arbitral tribunal directly, though the parties may also conciliate on their own or with assistance from CIETAC. The parties may not use any statements during the conciliation process in the arbitral proceedings. CIETAC also allows parties to provide a settlement agreement reached prior to the commencement of arbitration to form the basis of an arbitral award.

Smaller arbitral institutions similarly take a variety of approaches to hybrid proceedings.[42]

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[39] *Id.*

[40] *Id.*

[41] To understand possible distinctions between conciliation and mediation processes, *see* Lack, *supra* note 4, at 352-53.

[42] *See, e.g.*, Korean Com. Arb. Bd. ("KCAB") Int'l Arb. Rules, Art. 39, available at http://www.kcabinternational.or.kr/common/index.do?jpath=/contents/sub020101 (last visited Aug. 17, 2021) ("Award by Consent"). *But see* Bryan Hopkins, *A Comparison of Recent changes in the Arbitral Laws and Regulations of Hong Kong, Singapore and Korea: With the Focus on Korea's Current Reputation as a Regional Arbitration Center and Recommendations for Improvement*, 3 KLRI J. of L. and Legis. 281, at 304 ("it is not uncommon for judges and arbitrators to 'change hats' and act as mediators on occasion, regardless of whether an ordinance [allowing mediation during the arbitral process] exists or not."). Indeed, the KCAB Domestic (rather than International) Arbitration Rules provide for mediation "at any time during arbitral proceedings," upon the parties' request. KCAB Domestic Arb. Rules 2016, Art. 39, available at http://www.kcabinternational.or.kr/common/index.do?jpath=/contents/sub0202\&CURRENT_MENU_CODE=MENU0009\&TOP_MENU_CODE=MENU0007 (last visited Aug. 17, 2021). The arbitrators cannot serve as the mediators. *Id. See also* Centre de Médiation et d'Arbitrage de Paris ("CMAP") Arb. Rules (2012), Art. 31 ("Mediation") (allowing for suspension of arbitration for immediate mediation, with no member of the arbitral tribunal serving as mediator); Vienna Int'l Arbitral Centre Model Arbitration Clause including Arb-Med-Arb, available at https://www.viac.eu/en/arbitration/content/viac-rules-of-arbitration-and-mediation-2021-arbitration-clause (last visited Aug. 17, 2021).

III. Goals and Issues to Consider When Designing Arb-Med-Arb Procedures

A. Enforceability and Confidentiality

Combining the arbitration process with the mediation process presents obvious areas of opportunity and concern. Mediation affords the parties the ability to retain control over the terms of any mediated outcome, including its confidentiality. However, unless mediated settlements become enforceable awards, much of the benefit is lost, as mediation settlements are enforceable only in the sense that any contract is enforceable, according to its terms. Generally, the parties agree to arbitrate in order to benefit from the confidentiality and efficiency of the ADR process, while ensuring that the arbitral award will be enforceable.[43] The trick to designing an appropriate Arb-Med-Arb protocol for arbitral institutions is to ensure that the parties will be able to enjoy the benefits of the ADR process whether or not the mediation succeeds.

By interweaving mediation with arbitration, the parties can capitalize on the confidentiality and flexibility of mediation while also enjoying the finality and international enforceability of arbitration. Arbitration enjoys widespread enforceability as a result of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the "New York Convention," which gives force to arbitral awards in 168 member states, subject to limited challenges.[44] Although a similar convention exists for mediation settlement agreements (the 2018 Convention on International Settlement Agreements Resulting from Mediation, known as the "Singapore Convention"),[45] it currently has just 54 signatories, only

[43] An essential component to enforceability is that the arbitrator has no conflict of interest and remains unbiased. The difference in the roles and obligations of mediators and arbitrators is discussed in more detail below.

[44] *Contracting States*, New York Arb. Convention, available at https://www.newyorkconvention.org/list+of+contracting+states (last visited Aug. 17, 2021).

[45] Robert Butlien, *The Singapore Convention on Mediation: A Brave New World for International Commercial Mediation*, 46 Brooklyn J. of Int'l L. 183, 188, 191 (2020) ("The Singapore Convention on Mediation looks to be for mediation what the New York Convention was for arbitration: a boon. It should, however, be noted that the success of the New York Convention did not happen overnight.").

six of which have entered the convention into force.[46] Even if the Singapore Convention follows in the New York Convention's footsteps, it may be decades before it is sufficiently widely adopted for mediation settlement agreements to be reliably enforceable.[47] Until then, Arb-Med-Arb provides assurances that those agreements, issued as consent awards, will have teeth across borders.[48]

That said, once in Arb-Med-Arb, parties will not generally have the option of allowing mediation to fail and returning to the status quo, because walking away from mediation means walking directly into arbitration. Therefore, if the parties envision more flexibility or engaging in more relaxed mediation (*e.g.*, to preserve relationships), then Arb-Med-Arb may be too blunt a tool.

B. Efficiency (Timing, Costs, and Duration)

Combining arbitration and mediation into a streamlined process, such as that contemplated by the AAA-ICDR rules, can result in both time and cost efficiencies as compared to separate mediation and arbitration procedures.[49] An early settlement can also save business relationships.[50] The

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[46] *Status: United Nations Convention on International Settlement Agreements Resulting from Mediation*, UNCITRAL, available at https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status (last visited Aug. 17, 2021).

[47] Ten years after the New York Convention was adopted, it was in effect in only 32 countries. Lucy Greenwood, *A New York Convention Primer*, Disp. Resol. Magazine, Sept. 12, 2019, available at https://www.americanbar.org/groups/dispute_resolution/publications/dispute_resolution_magazine/2019/summer-2019-new-york-convention/summer-2019-ny-convention-primer/ (last visited Aug. 17, 2021).

[48] Enforceability considerations also partially explain why the Arb-Med-Arb process begins with the commencement of arbitration. If parties start with a successful mediation and commence arbitration solely to memorialize their settlement agreement as a consent award, the award may be vulnerable to a challenge based on the lack of "dispute" at the time the arbitration was commenced. *See* Eunice Chua, *The Singapore Convention on Mediation and the New York Convention on Arbitration: Comparing Enforcement Mechanisms and Drawing Lessons for Asia*, 16(2) Asian Int'l Arb. J. 113, 129 (2020) ("The Arb-Med-Arb process avoids the problem that Med-Arb presents because arbitration is commenced in the traditional way, while 'differences' still remain between the parties that can be submitted to arbitration. Enforceability is therefore Arb-Med-Arb's greatest advantage.").

[49] ICDR Int'l Disp. Resol. Procs., *supra* note 25, Art. 6.

[50] Sarah R. Cole, et al., 1 Mediation: L., Pol'y & Prac. § 17:17 ("Mediation Windows in the Arbitration House"); Chua, *supra* note 48, at 129.

degree of these savings depends in large part on when the mediation window opens (and of course, whether it settles). Mediators' experiences reflect parties' desire to settle as early as possible.[51] The fact that a sizeable minority of disputes settle even after submissions or after disclosure suggest that any protocol should allow for mediation to take place at any time during the course of an arbitration under prescribed situations that ensure against unwarranted delay.[52]

Mediation during the pendency of an arbitration may have benefits in terms of efficiencies gained, even if the mediation is unsuccessful. Parties will have much more insight into their exposure both in terms of time to a resolution and expenditure of legal fees.[53] This efficiency is often lost where mediation is required prior to the commencement of arbitration.

C. Delay

Any arbitration requires administrative effort to enforce timely hearings and timely awards. Parties may have reasons to delay arbitration hearings, and arbitrators are not endowed with the same powers as a presiding judge to force adherence to schedules.[54] This concern requires sensitivity when designing protocols respecting the timing and duration of the mediation

[51] 65.7% of mediators report success settling matters prior to commencement of arbitration; 45.7% report success with settlement after commencement but before submissions, 25.7% after submissions but before disclosure, 25.7% after disclosure but before the arbitration hearing, and only 5.7% after the arbitration hearing. LCAM Survey, *supra* note 2, slide 2.

[52] Bobette Wolski, *Arb-Med-Arb (and MSAs): A Whole which is Less than, not Greater than, the Sum of its Parts?*, 6(2) Contemp. Asia Arb. J. 249, 267-68 (2013) ("[I]f mediation is held too early, such as immediately after agreeing to arbitration and appointing an arbitrator, the parties may miss the potential benefits that flow from preparing for an arbitration hearing. It is possible that the parties will be motivated to settle once they have thought about and articulated the strengths and weaknesses of their respective cases."); *see also Mediation in Arbitration*, *supra* note 2 ("[I]n some arbitrations the parties will want to see what comes out of the document production phase before embarking on mediation. This is probably particularly likely in the highest value arbitrations.").

[53] Taylor Wessing, *Arb-Med-Arb: A Mechanism for Dispute Resolution Not Used Enough*, Lexology, May 27, 2020, available at https://www.lexology.com/library/detail.aspx?g=d5676201-c8a2-4f3c-9ccf-e3dd52895fdf (last visited Aug. 17, 2021); Cole, *supra* note 50.

[54] *See, e.g.*, UNCITRAL Model Law on International Commercial Arbitration (2006), Art. 18 ("The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case."), available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf (last visited Aug. 17, 2021).

component of an Arb-Med-Arb procedure. Creating guardrails for the mediation window avoids indefinite delay, which can be abused. On the other hand, flexibility should be acknowledged in any protocol, because strict time limits may interfere with a mediation that is progressing toward settlement.

D. Confidentiality and Neutrality (Identity of Neutral)

Confidentiality and neutrality are two essential elements of any ADR proceeding. Whether an arbitration may convert to a mediation raises the issue of whether the same neutral can wear both hats.[55] The cost and time efficiencies of a single neutral are obvious, and some jurisdictions, like Germany and China, have historically blended the two roles.[56] That said, there are serious differences in the two roles for achieving their respective goals. Indeed, a mediator's obligation to disclose potential conflicts are materially different than for an arbitrator.[57]

The manner of conducting a mediation is also different than an arbitration. Mediations typically involve *ex parte* submissions and/or caucuses with each party,[58] or "shuttle diplomacy." The success of a mediation relies on the mediator's assurance that they will treat as confidential all information provided by a party during the proceeding, unless the disclosing party

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[55] *See, e.g.*, Lack, *supra* note 4, at 373 ("The greatest issue that arises when combined ADR processes are considered is whether the same neutral can or should act as mediator, conciliator and/or arbitrator and swap hats during proceedings.").

[56] Thomas J. Stipanowich & Véronique Fraser, *The International Task Force on Mixed Mode Dispute Resolution: Exploring the Interplay Between Mediation, Evaluation and Arbitration in Commercial Cases*, 40 Fordham Int'l L. J. 839, 855–56 (2017).

[57] *See, e.g.*, ICDR Int'l Disp. Resol. Procs., *supra* note 25, Rule M-5 (requiring mediators to disclose "all actual and potential conflicts of interest that . . . could reasonably be seen as raising a question about the mediator's impartiality," "any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest," and "any circumstance likely to create a presumption of bias") *and* Art. 14 (requiring arbitrators to disclose "any circumstances that may give rise to justifiable doubts as to an arbitrator's impartiality or independence").

[58] *See, e.g.*, Lack, *supra* note 4, at 374. For example, the international mediation rules set forth by the ICDR note, "The mediator may conduct separate or *ex parte* meetings and other communications with the parties and/or their representatives, before, during, and after any scheduled mediation conference." ICDR Int'l Disp. Resol. Procs., *supra* note 25, Rule M-9.

gives authorization to share it.[59] *Ex parte* communications are integral to the mediation process. These *ex parte* caucuses provide an opportunity for parties to inform the mediator what drives their negotiation position so that the neutral, theoretically with a window into the soul of each party, can facilitate a compromise more likely to be accepted by everyone. The ability to speak openly and frankly with the mediator, with the assurance that the information will remain confidential from the counterparty and will not otherwise be used against the party in a subsequent proceeding,[60] is critical to the productivity of these sessions.[61] The mediator's goal is resolution above all else. To the extent the mediator expresses any view of the merits of the parties' claims, it is a means to settlement and not an end in itself.

Arbitration, by contrast, is solely concerned with objectively evaluating the parties' legal claims on their merits. That evaluation must be impartial, without influence from any subjective interests or motivations, and with each party fully able to refute any material assertions of fact. To that end, arbitrators are not permitted to have *ex parte* communications with the parties, as this would raise an issue of due process.[62]

These two neutral roles act in pursuit of distinct goals facilitated by distinct processes tailored for those goals.[63] Indeed, the process for each runs nearly counter to the goal of the other. Because these processes are

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[59] *See, e.g.*, Edna Sussman, *Developing an Effective Med-Arb/Arb-Med Process*, 2(1) N.Y. Disp. Resol. Law. 71, 71 ("[I]t is generally accepted that the confidentiality of mediation is an essential element to successfully conducting a mediation as parties reveal their true interests and perspectives on the dispute.").

[60] *See, e.g.*, ICDR Int'l Disp. Resol. Procs., *supra* note 25, Rule M-12(1) (mediator's obligation to maintain confidentiality) and Rule M-12(3) (parties' obligations to maintain confidentiality).

[61] Lack, *supra* note 4, at 373; Michael Leathes, *Dispute Resolution Mules: Preventing the Process from Being Part of the Problem*, at 2, available at https://www.imimediation.org/wp-content/uploads/2017/11/dispute-resolution-mules-final-.pdf (last visited Aug. 17, 2021).

[62] For example, Article 14(6) of the ICDR rules governing international arbitration provides, "No party or anyone acting on its behalf shall have any *ex parte* communication relating to the case with any arbitrator, or with any candidate for party-appointed arbitrator," except to describe the dispute in general terms during the process of selecting the arbitrator. ICDR Int'l Disp. Resol. Procs., *supra* note 25. *See generally* Cole, *supra* note 50.

[63] *See generally* Stipanowich, *supra* note 1, at 25-26.

in such tension, it can be difficult for a single neutral to wear both hats without sacrificing the efficacy or legitimacy of one or both proceedings. Specifically, a party faced with a mediator who may become an arbitrator must decide whether or not to share confidential information that could be useful in achieving resolution but detrimental in an evaluation on the merits. On the other hand, an award issued by an arbitrator who was once a mediator may cast a shadow of doubt as to whether confidential *ex parte* information played some improper role in the arbitrator's decision-making. Of course, parties can agree to various protections against these issues, such as mediating without *ex parte* communication, disclosing any *ex parte* information prior to resuming arbitration, replacing an arbitrator who has acted as a mediator, and/or waiving challenges to any arbitrator for having acted as a mediator,[64] among others, but these solutions concede much of the benefits of one or both proceedings.

IV. Best Practices for Arbitral Institution Arb-Med-Arb Protocols

There are numerous competing considerations that arbitral institutions are equipped to handle if the Arb-Med-Arb protocols are properly designed.

The considerations we have identified include:

- The need to ensure enforceability of a consent award.
- The ability to maximize efficiency in administering both procedures.
- The need for flexibility in creating a window for mediation while an arbitration is pending—in terms of both the timing and duration of the mediation.
- The differing disclosure obligations for mediators and arbitrators.
- The risk that confidential mediation communications could taint an arbitrator and render an award unenforceable.

[64]At least one commentator has written that this can be a waivable right. Alan L. Limbury, *Hybrid Dispute Resolution Processes: Getting the Best While Avoiding the Worst of Both Worlds?*, at 8, available at https://www.imimediation.org/wp-content/uploads/2017/11/AlanLimbury-HybridDisputeResolutionProcessesArticle.pdf (last visited Aug. 17, 2021).

These considerations are best served if two essential provisions are adopted by the arbitral institution, akin to those promulgated by the SIAC-SIMC AMA Protocol.

First, the arbitral institution should require that the arbitrators and mediator are selected from its panel of neutrals, and that the mediator be different than the arbitrators. Second, the arbitral institution should maintain administrative responsibility over the Arb-Med-Arb protocol.

With separate neutrals, parties in mediation are not incentivized to withhold information with one eye toward arbitration, for fear that the information may be disclosed to the other party or that it might lead to bias in a subsequent arbitral decision. Having separate mediators and arbitrators also removes a claim that an award should not be enforced because of taint or bias. Although there is some cost and time efficiency lost, the benefits of each procedure working to its full potential and each neutral acting in full accordance with their distinctive goals are worth the trade-off.

When the arbitral institution is responsible for the administration of both the arbitration and the mediation, the administrator will be in a position to balance the need for the arbitration to proceed in a timely and efficient manner and the need for the mediation to proceed organically so that it has the best chance to achieve settlement. The administrator will be able to assess the parties' needs and determine the timing and duration of mediation.[65] At the same time, the administrator will be in the best position to avoid abusive delay and can terminate mediation after consultation with the parties, the arbitrators, and the mediator.

One possible modification to the SIAC-SIMC AMA Protocol is to allow parties greater autonomy over the timing of the mediation. Under the Protocol, it appears that parties must choose between (i) mediating pursuant to an existing Arb-Med-Arb dispute resolution clause, in which case the dispute is referred to mediation four days after the commencement of arbitration; or (ii) separately agreeing to refer a dispute to mediation

[65] An arbitral institution could consider going beyond the prescriptions in the SIAC-SIMC AMA Protocol to allow the administrator to suggest postponing or resuming a mediation at a later stage of arbitration proceedings if the initial efforts are deemed to be premature.

during an already-commenced arbitration. On the other hand, the JAMS Mediator-in-Reserve Policy's more flexible approach risks loss of efficiency by having both mediations and arbitrations proceed simultaneously. A better solution might call for the parties to retain autonomy to decide when opening the mediation window is most likely to lead to settlement based on the context of the particular dispute, subject to the administrator's oversight.