Working Group 5 of the Mixed Mode Task Force

"Switching Hats": Developing International Practice Guidance for Single-Neutral Med-Arb, Arb-Med, and Arb-Med-Arb

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Suppose you are the sole arbitrator in a commercial dispute. While hearings are in progress counsel for the parties come to you and explain that circumstances have changed and both parties need a quick and informal resolution of their dispute; they ask you, in whom they have great faith, to assume the role of mediator. Would you agree to "switch hats," and, if so, under what conditions? How dispute resolution professionals, commercial advocates and counsel, and business parties respond to these questions varies depending on circumstances, personal preferences, culture and legal tradition. While in China and some other countries mixed roles are broadly accepted, in countries like the U.S. lawyers, arbitrators and mediators tend to be skeptical about a neutral changing roles during the course of resolving disputes. Some other countries have statutes regulating or even prohibiting single-neutral "med-arb."

Given the growing use of "mixed mode" approaches in which both settlement-oriented and adjudicative approaches are employed and the expanding competencies of arbitrators and mediators, it is not surprising that a high percentage of dispute resolution professionals now have some experience playing multiple roles in the course of resolving disputes. 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. In order to bridge this gap, a working group of the International Task Force on Mixed Mode Dispute Resolution set itself the task of creating new *Practice Guidelines for Situations in Which a Mediator Changes Roles to Function as an 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 Activities*.[1]

Concerns Regarding Mixed Roles

Much has been written about the potential problems associated with a neutral changing roles midstream. It is

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often said that due to the fundamental incompatibility of the roles of arbitrator and mediator, performing both roles in turn may work to the detriment of each—most notably in scenarios where a neutral switches to the role of arbitrator after attempting to mediate. Being aware that their mediator may become a binding decision-maker, parties may be substantially less candid during settlement discussions, and instead concentrate on trying to "spin" the neutral or look for hints about how she might judge their case. If a mediator offers—or is perceived to offer—such hints about the decision she might render, one or both parties may form undue expectations regarding the latter. When a mediator-turned-arbitrator adjudicates, parties may have concerns that a final decision may be influenced by information shared by the other party confidentially—information they will have no opportunity to hear and confront. Ex parte communications during the mediation phase could also form the basis for challenges to a mediator-turned-arbitrator or for a motion to vacate an arbitration award or for fending off a motion to enforce a final award.

Why Switch Hats?

Why, despite these concerns, do some parties agree in advance or post-dispute on a mixed mode process or ask neutrals to consider shifting roles, and why do a significant percentage of experienced dispute resolution professionals believe that in appropriate cases and if approached with due care and caution, switching hats may be a valuable component of their toolbox. Mixed roles may be the best way of addressing parties' special needs and accommodating varied (or changing) agendas in dispute resolution. They may offer a flexible means of accommodating rapid "lane-shifting" between adjudication and negotiation, enhancing procedural efficiency and economy and offering the prospect of a more tailored result led by a trusted third party. The potential to use arbitration as an add-on to mediation for the unresolved issues assures finality and may enhance outcomes acceptability and sustainability. Finally, empowering a mediator to act as an arbitrator may also facilitate the crafting of a mediated resolution along with enhanced enforceability of a "consent" arbitration award.

All this said, engaging with mixed roles is not for beginners. It requires deliberate planning, a seasoned neutral who enjoys the trust of the parties, a good judgment, an educated consent and careful contractual drafting. As explained below, mediator evaluations and the handling of confidential communications in ex parte "caucuses" are areas of particular concern that require thoughtful handling. In the international commercial realm, moreover, the picture is further complicated by national or regional variations in attitudes and practices.

Varying Perspectives and Practices in the International Landscape

Those contemplating or performing mixed neutral roles in the resolution of international commercial disputes are confronted by a variegated landscape of cultures and legal traditions that embrace different perspectives and practices when it comes to mediation, arbitration, and mixed roles. These variances are mirrored in national laws respecting domestic and international arbitration and dispute resolution; rules and procedures governing arbitration and dispute resolution; ethical standards; and non-binding "soft law" norms.

On one end of the spectrum is Brazil, which prohibited the practice of med-arb in its 2015 law governing mediation. Some jurisdictions with common law affiliations such as Hong Kong, Singapore and Australia have legislated procedural strictures on med-arb.

A wholly different reality prevails in China, where mediation is not traditionally a discrete professional activity, but is tied to other roles, such as government administrator, judge or arbitrator. Today, arbitrators, like judges, regularly offer to "change hats" to help parties explore settlement during the course of adjudicating disputes. In Germany, the traditional strong and proactive role of judges in promoting settlement has strongly influenced the practice of arbitrators. Some German arbitrators may upon the consent of the parties offer their preliminary views about the parties' case. In addition, if the parties agree, German arbitrators may also propose the terms of settlement. The Chinese and German traditions influenced soft-law standards produced by CEDR's report—Commercial Arbitration at Its Best—as well as the more recent Prague Rules for international arbitration.

The United States stands somewhere in the middle. In the United States, there is neither a tradition nor an outright prohibition on neutrals switching hats. Furthermore, if not carefully managed such practices may result in vacatur of an arbitration award or a court's refusal to enforce the product of a dispute resolution process. Leading arbitration and mediation providers tend to discourage such practices but permit agreement to med-arb or arb-med. Reflecting prevailing views, the CPR Commission on the Future of Arbitration Report emphasizes the dangers of pre-dispute or even post-dispute arrangements in which the same individual is assigned the roles of mediator and arbitrator and offers cautious guidance for employment of mixed neutral roles. Meanwhile, there is evidence that a sizable minority of experienced neutrals have engaged in med-arb or arb-med.

In view of the above, there remains a need for a widely accepted, authoritative set of practice guidelines for the use of single neutral med-arb or arb-med in the resolution of international commercial disputes, as well as domestic practice. It is this need that the International Task Force on Mixed Mode Dispute Resolution hopes to address

through the development of new *Practice Guidelines*, now in working-draft stage.

New International Practice Guidelines: A Working Draft

Drawing on our collective experience, the work of previous study groups, and the reflective observations of scholars and practitioners from around the world, an international working group is in the process of developing new *Practice Guidelines for Situations in Which a Mediator Changes Roles to Function as an Arbitrator, or an Arbitrator Performs the Functions of a Mediator.* Key elements of the current working draft are briefly summarized here.

(1) *Need for 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 the parties. Notwithstanding, at some point 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. 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.

(2) *Ensuring Parties' Mutual Understandings Regarding Roles of Mediator and Arbitrator.* Given the diversity in perspectives and practice in different parties of the world, it is 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 cultures and legal traditions, and to take responsibility for ensuring mutual understanding and true meeting of the minds regarding the roles and functions of mediators and arbitrators.

(3) *Neutral's Competency, Availability, Independence, Impartiality*. A mediator should be authorized to shift to the role of arbitrator in the course of resolving a dispute, or vice versa, only if the parties are confident of the neutral's fitness for both roles. The qualifications for the roles are significantly different. Moreover, since the standards of impartiality and independence are higher it may not be possible for a neutral to effectively shift to the role of arbitrator after having served as mediator.

(4) *An Agreement in Writing.* Any ex-ante arrangement regarding mixed neutral roles or an ad-hoc agreement regarding switching roles should be integrated in a written contract. Among other things, 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.

The agreement should include some form of waiver—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.

(5) *Key Process Options.* 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 (1) the scope of the neutral's role as mediator/facilitator of settlement—that is, whether the neutral will engage in case evaluation or offer proposals for settlement; and (2) whether settlement discussions should include private caucus sessions with individual parties.

If a mediator is expected to switch to an arbitral role if settlement is not achieved, there is always the possibility of avoiding private caucuses and conducting the entire mediation process in joint session—an approach some neutrals have successfully employed to settle disputes, thus avoiding arbitration. If, as is often the case, the participants prefer to use private caucuses during the mediation phase, a number of process options are available, including the following:

- An agreement that if med-arb proceeds to arbitration, the neutral arbitration award must be dependent solely on evidence and arguments presented during arbitration proceedings, and not on any other communications or information conveyed during mediation.
- An agreement that the parties consent to med-arb with full awareness that information received in ex parte caucus in mediation phase may be taken into account by the mediator turning arbitrator in formulating her/his arbitration award .
- A requirement that, at the conclusion of mediation and before arbitration, the neutral shall disclose to

the parties as much of the confidential information she or he received [or provided] during the mediation as (s)he considers material to the arbitration proceedings.

- An agreement that at the conclusion of mediation and before arbitration, the parties will confer regarding the continued service of neutral.
- A requirement for separate written consent by the parties to have the neutral arbitrate after the conclusion of mediation, or an agreement that either party may opt out of the process at that stage.
- An agreement permitting neutrals to recuse themselves at the conclusion of mediation.

(6) *Variations on Med-Arb.* Even where mediation is not successful in resolving all substantive issues in dispute, mediators may be able to help set the stage for a dispute resolution process, including facilitating arbitration procedures that are customized to more effectively suit the circumstances and serve the needs of the parties.

One variant of med-arb is Mediation and Last-Offer-Arbitration (MEDALOA), in which traditional mediation followed by a process in which each party submits a written final or "last offer" to the neutral. As arbitrator, the neutral proceeds to pick the last offer she or he considers most equitable, or most appropriate under the standards established by the parties. Although this process sometimes occurs during mediation, it may be agreed to beforehand.

(7) *Considerations for Parties Contemplating Arb-Med.* An individual appointed as arbitrator may agree to switch to the role of mediator at some point in the arbitration process. 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. Of course, any arrangement struck by the parties should address what happens if mediation fails to fully resolve disputes.

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. (Accounts of such proceedings describe a process in which the completed award is placed, unopened in a sealed envelope, on the table in full view of the parties.) Such an approach may have appeal for parties who are anxious about the risks of defaulting to a third-party decision and may overcome the concerns that ex-parte communication received during the mediation would influence the arbitration award. Moreover, in her or his role as a mediator, the neutral has the benefit of full information regarding the dispute and the strengths and weaknesses of the parties' cases.

(8) *Med-Arb, Arb-Med-Arb With a Tribunal.* Although engaging an entire tribunal in the mediation phase of med-arb is likely to be 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. A variant of the latter approach might involve each wing arbitrator being authorized to meet separately (caucus) with the party that appointed her/him during the course of mediation. 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 the party that did *not* appoint them.

(9) *Capturing Meaningful Accounts and Data.* 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. 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.

Endnote

1. Working Group 5 is co-chaired by Professors Mironi and Stipanowich, and includes participants from Australia, Belgium, Brazil, Canada, China / Hong Kong, Germany, India, Japan, The Netherlands, Singapore, South Africa, the United Kingdom, and the United States. Much of the material in the current working draft recommendations was adapted from Thomas J. Stipanowich, *Arbitration, Mediation and Mixed Modes: Seeking Workable Solutions and Common Ground on Med-Arb, Arb-Med, and Settlement-Oriented Activities by Arbitrators*, 26 Harvard Negotiation Law Review (forthcoming 2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3689389.