Working Group 7 of the Mixed Mode Task Force

Considerations for Allowing Communications Between Arbitrators and Mediators Appointed to the Same Dispute

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Introduction

Working Group 7 (hereinafter "WG7" or "the Group") was charged with the task of examining scenarios focusing on the types of communications between arbitrators and mediators who are not the same persons but are appointed to the same case. Why would they communicate with each other, would the communications impact the proceedings, and what role would the parties play in setting the parameters of the communications?

WG7 found that there are international examples of rules and procedures where the appointment of different persons as arbitrators and mediators on the same matter is contemplated.[1] Notably, while the number of such rules and procedures is growing,[2] none of them seem to provide for the sharing of information between the neutrals serving different roles. Nor was the Group able to identify examples in practice where arbitrators and mediators appointed to the same matter actually worked together in the manner proposed by the Group.

In the absence of rules and procedures or examples from practice, the Group could not identify "generally accepted principles" or "best practices" in relation to the examined scenarios. As a result, the Group based its investigation on discussions with practitioners and academics and on role-playing some of the scenarios. This allowed the Group to formulate a framework that provides some guidance on how to combine mediation and arbitration in ways that would allow the mediator and the arbitrator to communicate with one another in the interests of seeking faster, less expensive, and/or better outcomes than allowing each process to progress independently.

Conceptual Framework for Communication Between Arbitrators and Mediators When Combining Mediation and Arbitration

When arbitrators and mediators communicate, a central tension may arise because the "rules of engagement," between parties and arbitrators on the one hand and parties and mediators on the other, may differ starkly. To parties, an arbitrator may be viewed as an authoritative figure who makes binding decisions that may dramatically affect their business. A mediator may be thought of as a trusted person who respects confidences, who may or may not have any authority, and is guided by procedural principles and sometimes substantive principles, such as not providing an evaluation. Mediators are, thus, likely to be more flexible and they need not be as explicit as arbitrators.

Rather than leaving the coordination of communication between arbitrators and mediators to chance or to the appreciation of each neutral, caution dictates that neutrals, parties, and counsel should first discuss what rules and principles may exist. Particular attention should be paid to the procedural rules that apply to the different processes when deciding what and how the two neutrals may communicate, and who should take the lead.

The Group suggests that a number of factors need to be considered when arbitrators and mediators come together and communicate with each other. These include:

- careful consideration of the risks of tainting the arbitration process or the outcome of an arbitral award in such an arrangement;
- a strategy for managing those risks;
- an informed determination by all the participants to proceed;
- well-documented consent; and
- well-defined contingency arrangements as well as risk mitigation structures and policies.

Regardless of the scenario as identified below, the Group recommends that the parties and neutrals select

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one of the following modes of communication between the neutrals:

- mediators and arbitrators are free to consult with one another without advance notice to the parties; or
- mediators and arbitrators are free to consult with one another without advance notice to the parties, but are confined to specified purposes or subject matter; or
- mediators and arbitrators may only consult with one another after seeking and receiving specific all-party authorization in a given instance, possibly confined to a specified subject matter; or
- mediators and arbitrators may only consult in the presence of the parties and their counsel.

The parties and neutrals should explicitly agree, among other issues, on the selected mode of communication and that the neutrals remain bound by their retention agreements and any ethical codes of conduct contained within the retention agreements.

(3) *Shadow Mediation:* the parties wish the arbitrator to take the lead and to involve the mediator on selected topics only (e.g., to clarify certain rules or discuss issues relating to discovery or witness testimony), where the arbitral tribunal would prefer not to know or have to take certain topics into consideration;

(4) *A Mosaic:* the parties wish the neutrals to take the lead through a series of sequential or parallel proceedings where greater emphasis is placed at different stages of a process as it evolves (*e.g.*, in time, or on certain topics, starting off with arbitration, and then creating a "mediation window," reverting to arbitration if the dispute is not fully resolved or if a consent award is required); and

(5) *An Integrated Process:* the parties wish the neutrals to sit together as a team and consult with one-another and the parties at all stages, carving out exceptions (*e.g.*, where an arbitrator's ability to render a binding and dispositive award on a finding of fact or law may be compromised if the arbitrator overhears what happens in a caucus).

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Scenarios Where Communication Between Arbitrators and Mediators May Occur When Combining Mediation and Arbitration

The Group identified five different scenarios where communication between arbitrators and mediators may occur:

(1) *Structure Development*: the parties wish the neutrals to help posit and set procedural rules, without deciding initially who between the neutrals should lead on communications, which can result in a decision on what topics the arbitrator and the mediator should lead on, respectively;

(2) *Shadow Arbitration:* the parties wish the mediator to be the primary neutral and to involve the arbitrator only on certain key dispositive issues where binding evaluative input is needed (*e.g.*, findings of fact, determinations of liability or quantum on specific points);

The Group focused its work on the first three scenarios above. The remaining areas will be examined in future work of the Group.

WG7 looked to the work of Working Group 2 for issues to address when designing the first scenario. *Structure Development* needs to be established early in the proceedings by analyzing the different procedural and substantive principles that the parties and the counsel think may or should apply. If parties are not in a position to generate their own structure, they might consider relying on the central principles for both arbitration and mediation like the investigation of relevant facts, fairness in process and outcome, and achievement of agreement or final outcome.

When kicking off the *Shadow Arbitration* scenario, the mediator may first wish to discuss any sensitive issues with the parties and their counsel to ensure they know what not to raise or discuss in the shadow arbitrator's presence. In consultation with the parties on the one hand

and the arbitrator on the other hand, the mediator should clarify and document taboo topics not to be raised in any joint meeting. The parties would then identify key dispositive issues that the shadow arbitrator needs to resolve including issues of causation, liability, and quantum to name a few. Safeguards should be put in place to ensure that the arbitrator does not receive information that might prejudice binding findings of fact or law especially, for example, dispositive decisions on statute of limitations or limitations on liability.

When the parties wish to proceed in the *Shadow Mediation* mode, the arbitrator takes the lead to ensure that all procedural and substantive rules are addressed to achieve binding and enforceable findings of fact and law, as well as a binding and enforceable arbitral award. The arbitrator and mediator may work simultaneously but need not be appointed simultaneously. The arbitrator retains primary control over what the arbitrator determines to be important to issuing a binding award. It is helpful for the arbitrator, the mediator, the parties and their counsel that the arbitrator identify areas that may or may not be discussed in the arbitrator's presence. The shadow mediator should be given free access to observe the arbitration proceedings, in part, to be informed of what has occurred in arbitration without having to have this information repeated in mediation sessions. The first action of the shadow mediator should be to facilitate a discussion between the parties about the role of the shadow mediator going forward, including those topics where rules do not apply or the arbitrator does not wish to dispose of them, and what the permitted scope of interaction between the arbitrator and the shadow mediator is.

The expanded WG7 article details considerations that the parties and neutrals should address in each of these scenarios. The topics include dos and don'ts, qualifications for neutrals being considered for these assignments as well as recommended default party agreements and practices for neutrals.

Conclusion

While we have little to no experience with arbitrator(s) and mediator(s) appointed to the same case communicating with each other, there is evidence that this tactic will increase. The work of this Group will serve as a guide to parties and counsel seeking to develop a structure that meets their needs and will promote the efficient and fair resolution of their dispute.

Endnotes

1. *See, e.g.*, a combined set of "Simultaneous Mediation and Arbitration Rules" offered by the Chamber of Mediation and Arbitration of Paris at https://www.cmap.fr/notre-offre/les-autres-modes-alternatifs-de-resolution-des-conflits/ or the Rules on med-arb and arb-med procedure of the European Center for Dispute Resolution at http://www.ecdr.si/index.php?id=119 and http://www.ecdr.si/index.php?id=120.
2. *See, e.g.*, the 2019 Beijing Joint Declaration of Belt and Road Initiative Arbitration Institutions (signed by 47 institutions) supplemented in 2020 with the "Working Mechanism under the Beijing Joint Declaration" to expedite arbitrations through coordinated mediations.