

MED/ARB – a viable ADR vehicle?

Nuances of Med/Arb—A Neutral’s Perspective

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Although arbitration as an alternative dispute resolution mechanism has existed for centuries, within the last several hundred years it has become ingrained into the dispute resolution conscience of several industries, such as labor and construction. More recently it has made significant inroads in other areas, including the securities and employment sectors. While encountering fairly vocal opposition from certain consumer groups, the continued growth of arbitration proves both its need and its popularity among users of all types.

By contrast, the use of mediation, which also has a long, yet somewhat undefined history, has exploded in the last several decades. In the private commercial sector, especially in the construction industry, which has incorporated a mediation step into widely used form documents, mediation is often selected as the ADR process of choice. In many if not most areas of the United States, a litigated case cannot be set for trial without first undergoing mediation, in many instances so ordered by the court. It can fairly be said that mediation has changed the face of ADR in the United States.

Given the undeniable success of both arbitration and mediation, it was inevitable that these two processes would attempt to be merged into what has been referred to by some as a “hybrid” procedure.² The singular point of definition of mediation/arbitration (med/arb)³ is

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² D. Van Duch, *Do ‘Hybrids’ Compromise ADR Benefits?*, NAT’L LAW J., Mar. 2, 1998.

³ Other combinations exist, including “arb-med,” shadow mediation and concilio-arbitration, each of which has their own distinctive characteristics. They are beyond the scope of this article, which focuses on standard med/arb.

that the same neutral acts as both the mediator and if need be, the arbitrator. The end result of this process is that there is no question the dispute will be resolved; moreover it will be resolved more quickly than if an arbitration with a different neutral were to follow an unsuccessful mediation. The question to be answered is should these two distinct processes be merged?

Is combining the two processes desirable? The answer will depend on the perspective of the opinion-giver. While there is more recent literature on the med/arb process, mostly from the theoretical perspective, field studies are still largely anecdotal. Some have criticized the combination because of ethical issues raised by the dual role of the neutral and have charged that the process is flawed.⁴ While these views certainly have merit, as more fully discussed below in my view, largely on my own experience as both a client/advocate and as a neutral in med/arb proceedings, the negatives of med/arb are outweighed by the positives. The most important factor in deciding the question of the viability of this hybrid process is the level of its understanding by the actual participants. If the parties and their counsel understand the pros and cons of merging the two processes and the other nuances that result from their combination, med/arb can be an extremely effective method of resolving disputes.

⁴ See n. 2 *supra*.

A Single Neutral

At first blush, it seems logical to have the same person act as both mediator and arbitrator. Yet, the concept is a radical departure from “true” arbitration philosophy. Ethical rules governing arbitration prohibit an arbitrator from discussing or interacting in any way with the parties, except in an administered conference in which both parties and counsel are in attendance. There should be no *ex parte* communication with the arbitrator. In practice, an arbitrator being considered for appointment is usually requested to disclose prior knowledge of the case and contacts with the parties or their counsel. This is to prevent the purity of the arbitration process from being tainted by possible partiality on the arbitrator’s part.

But in med/arb, because the arbitrator also acts as the mediator, the neutral *will* meet with each side independently in private sessions out of the presence of the other party. Conceivably, discussions on significantly important issues can take place between the neutral and one of the parties and not be subjected to cross-examination. The mere thought of a decision-making neutral discussing the facts of a dispute privately with one disputant is a major reason why the process receives less than universal support.

Yet, the process can give parties the chance they need to fashion a resolution on their own terms in mediation, and the assurance that if mediation fails, a rapid award will be obtained from a neutral with intimate knowledge of the dispute. Prior experience as a general counsel has convinced me that while the ultimate outcome of a particular ADR process is important to users, almost equal in importance is the ability to bring finality to the situation in a relatively inexpensive and time-efficient manner. Said another way, while the parties want to win, they want to do so in the most efficient, cost effective way. The med/arb process without question favorably satisfies the desires of timely resolution and, if properly done, cost efficiency. In that regard, some would say that med/arb combines the best of both mediation and arbitration.

Med/Arb Procedures

The parties may agree to participate in med/arb either before or after a dispute arises. Parties who agreed to arbitrate may choose to participate in a prior mediation with the arbitrator serving as mediator; similarly, parties who agreed to mediate may ask the mediator to become the arbitrator and decide their dispute.

In med/arb, the parties generally create the methodology that will be followed. As an example, the mediation portion of the proceeding may be scheduled for a definitive time period. A complete mediation can be scheduled for half a day, or one or more days, and a separate arbitration can be scheduled for a later time. More commonly, however, the arbitration immediately follows the mediation portion of the process. Thus, in a one-day med/arb, a half-day arbitration immediately follows a half-day mediation; in a two-day schedule, the first day is devoted solely to mediation and the second, if necessary, solely to arbitration.

The arbitration hearing may be a “standard” arbitration, with a full presentation of evidence, including witness testimony. The parties should determine in advance of the med/arb whether a full evidentiary hearing will take place at the arbitration stage. In many if not all cases, such a hearing will not be necessary. Typically, after the mediation session runs its course (assuming no resolution was reached), the parties, having fairly presented their case to the neutral in the mediation phase, are content with either a summary presentation of the case or simply closing arguments for the arbitration portion of the process. It is very important for the parties, who are the designers of the med/arb process, to reach agreement on methodology and to memorialize their agreement prior to the commencement of the med/arb. It is also critically important for both parties and counsel to fully understand nuances, imperfections and ethical issues associated with the process. Not every case is appropriate for med/arb, and many parties or counsel will not wish to accept the imperfections inherent therein.

Pros and Cons

Med/arb's most appealing attribute is the certainty that the dispute will come to an end, one way or the other, in relatively quick fashion. Ideally, the parties will resolve the dispute to their mutual satisfaction during the mediation, making arbitration unnecessary. If agreement does not occur, however, the mediator will put on the arbitrator's hat and ultimately issue an award, following whatever arbitration procedures the parties have previously agreed upon. The dispute ends at that point, allowing the parties to move on to other business.

Confidentiality. The speed and decisiveness of the med/arb process is not without sacrifices, however. One such sacrifice relates to confidentiality on the part of the mediator. In the mediation process, any statement made by a party to the neutral mediator is absolutely confidential unless the party has authorized its disclosure. This is a cornerstone of the mediation process. Further, in most jurisdictions, the entire mediation process is cloaked with confidentiality, such that the neutral cannot be subpoenaed to testify to what was heard or discussed with either party in the mediation. Concern regarding confidentiality in mediation is so great that some jurisdictions are in the process of creating ethical rules for mediators, and there has been some case law on the subject, most of which center around the issue of confidentiality. These rules, if violated, might lead to penalties being inflicted on the neutral.

How is confidentiality affected in the med/arb process? Essentially, the neutral's responsibilities relative to confidentiality do not change. Confidential information related by a party to the neutral during the mediation phase must be held in confidence by that neutral throughout the entirety of the process, including the subsequent arbitration, if any.

The difficulty arises, of course, when the neutral dons the arbitrator's hat and decides the issue, while in full possession of the confidential information. This information, if not brought forth by the party itself during the arbitration, will not be subject to challenge or cross-examination. This raises concerns about the information influencing the arbitrator's deliberation of the merits of the case, particularly since the information may be unreliable or, at least, untested.

As a practical matter, once a fact is put into the universe, the law of human nature usually dictates that it will be considered on some level.

Because the arbitrator conducts private caucuses during the mediation phase of med/arb and may come into possession of information, even critical information, not known by the other party, there is a risk the arbitrator's decision may be based in part on that information. This risk cannot be stressed enough. However, because *both* parties will get to "*ex parte*" the mediator, so to speak, the playing field is somewhat leveled. The import of this particular issue must be clearly understood by all parties involved.

My experience, both as a neutral but perhaps more importantly as a client in the med/arb process leads me to the conclusion that the parties themselves (less so their counsel) have little fear of impropriety in this regard. Most parties are comfortable with the strength of their own case and in their own fact gathering so as to be relatively unconcerned with the positions and "potential trickery" of the other side. The "trust factor" in the neutral also plays an important role. Parties usually trust an experienced neutral to be able to cut the wheat from the chaff. Still, the issue of compromised confidentiality is a main reason why some commentators and practitioners do not accept the med/arb process as a legitimate vehicle for alternative dispute resolution.⁵

Withholding of Information. A by-product of the concern that the arbitrator may be influenced by confidential information is that the parties, who usually feel more comfortable confidentially discussing the weakness of their case in the typical mediation, will be loath to do so during the mediation phase of the med/arb proceeding. It is simply human nature not to readily discuss any weakness with a potential ultimate decision maker.

One of the main activities of pure mediation is the honest and candid give and take regarding the strengths and weaknesses of the case in a confidential setting with the mediator. The mediator's ability to perform "reality testing" with the parties is a key ingredient of successful mediation, and one of the tools every competent mediator uses to help the parties seek common ground. This activity is compromised in the

⁵ See R. Fullerton, *The Ethics of Mediation-Arbitration*, 38 Colo. Law. 31 (May 2009), for an excellent article relative to several ethical issues presented by med/arb.

med/arb process, and as a result the mediation part of the process may be more difficult, and ultimately may be unsuccessful.

The neutral should discuss these confidentiality-related issues fully with the parties in order to allow them to make an informed decision about what is potentially being compromised. After such a discussion, the parties may be content to compromise this issue for the sake of a speedy and decisive resolution. A well-drafted med/arb agreement covering the confidentiality issues is highly recommended.

Nuances

Neutral Selection. Another issue to be considered is the ability of the neutral who will act both as mediator and arbitrator. Successful mediation techniques include an ability to obtain the confidence of the parties, hear what they have to say, and discuss the potential weaknesses of their positions. These skills can be critical to achieving a resolution at mediation.

In arbitration, the neutral should be able to sift through the critical facts and render an award based on fact and/or law.

The ideal med/arb neutral should have the necessary skills to perform both roles. There is always the possibility, however, that the individual selected may have more of an aptitude in one ADR process than in another. Parties may even desire a neutral with greater skills in one process.

Mediator Conduct. Combining mediation and arbitration may affect the mediator's own conduct. Whereas the typical mediation involves the reality-testing discussions referred to above, some neutrals may question whether to engage in opinion giving when they may become the ultimate arbiter of the case.

After acting as the neutral in numerous med/arb proceedings, I believe it is not appropriate for the neutral to opine on particular issues during the mediation, and as a result I have become less probative and opinionated during the mediation phase of med/arb. It is certainly possible and some would argue somewhat easier for a neutral in this process to "steer" the parties to a resolution, given the neutral's ultimate power as the arbitrator. While giving opinions or suggestions actually

may hasten a mediated settlement, I would rather the parties mediate the case to a resolution based on their own feelings and understandings about the dispute, rather than mine, particularly in the med/arb process. Because of this “chilling effect” on both the parties and the mediator, the success rate of resolution in the mediation phase is, predictably, not as high as in the “standard” mediation context. This information should also be shared and understood by all parties prior to agreeing to use the med/arb process. So that the neutral in a pure mediation may avoid conduct that could later taint an arbitration of the dispute, it is imperative, in my opinion, for the parties and the mediator to agree up front as to whether the mediator will later become the arbitrator in the case. I personally refuse to become an arbitrator in a case in which I acted solely as the mediator. I do not want the parties to misinterpret my discussions with them as a mediator, as my intent was solely to gain voluntary settlement.⁶

Effect on Costs. Because in med/arb, a relatively short, binding arbitration by a neutral already fully familiar with the dispute will quickly follow a mediation that has not produced a settlement, the parties generally will not be worried about how long it will take to resolve the dispute or how much it will cost should the mediation not succeed. This distinguishes med/arb from pure mediation, where the mediator typically raises the specter of incurring these costs and expenses, and the time it will take to resolve the dispute through litigation or arbitration, in order to encourage the parties to settle during the mediation. The inability of the mediator to use this oftentimes successful mediation technique makes it all the more difficult for a resolution to be reached during the mediation phase of med/arb. However, what needs to be emphasized in this context is the actual savings of resources, both time and money, using the med/arb process. It’s inherent efficiency in that regard is the very reason many end users have no difficulty deciding to sacrifice the protections available in separate mediations and arbitrations.

Procedural Modifications. The ethical concerns raised by the combining of the mediation and arbitration processes are real and should not be easily dismissed. While not a complete cure for the limitations to

⁶ I have routinely, however, used mediator’s proposals as a way of reaching an agreed compromise between parties at a mediation. The difference being that the parties are still free to accept or reject the proposal, as opposed to a binding arbitrator’s award.

the med/arb process, adding yet another recognized ADR concept might ease some of those concerns. Last offer or so called “baseball” arbitration, is an accepted procedure where both parties submit their best and final offer to the arbitrator, who then hears the evidence and decides which of the two offers will be the final arbitral award. While there are some variations to this process, the concept is that the arbitrator is limited to picking only one of these final two suggested numbers.

The theory behind this procedure is that the disputants are “forced” to submit their very best final numbers in the hope that the arbitrator will see their number as much more reasonable than the opposition. In practice, at least in the world of Major League Baseball (which uses the process to determine salaries for qualified players under a collective bargaining agreement, hence the name “baseball arbitration”) very often the “best” numbers submitted by the player side and the owner side are close enough to allow the parties to reach an agreed upon settlement, as opposed to having the arbitrator decide.

Incorporating this procedure into the med/arb process (again, only by agreement of the parties), while not solving the ethical issues discussed herein, may give the parties their best opportunity to resolve the case in the mediation phase, and also has the virtue of “limiting” the award that can be given by the neutral, if the process goes to the arbitration phase. Using this additional method in med/arb would more than likely result in the parties putting their best settlement foot forward in the mediation phase of the proceeding. The process would have to allow for the neutral to continue mediation after the best offers are submitted to see whether agreed upon compromise could be reached. However, incorporating baseball arbitration methodology into the med/arb process has its own limiting issues, such as the relative inability to solve the dispute by something other than strictly monetary terms.

Conclusion

Despite its inherent issues and the legitimate criticisms the process has received, med/arb should be looked upon as what it is: a singular alternative dispute resolution process that gives the parties the chance to resolve the issues on their own terms. It should not be considered “unsuccessful” simply because the parties were unable to resolve their dispute during the mediation phase. While both practitioners and academics in the ADR community are divided in their views on the process, parties themselves generally have a very favorable view. While theoretical views should never be discounted (and especially so in this instance) should not the opinion of the end user be given paramount importance? The ultimate goal of any ADR mechanism is resolution of the dispute. Med/arb, either by mediated settlement or arbitral award, will mete out an efficient resolution, which is a primary goal of most parties. The debate will surely continue.