



USE OF MEDIATION WITH ARBITRATION

This is the sixth in our series of **ADR practical guides**, designed to provide clients with essential practical guidance on various processes falling under the banner of "alternative dispute resolution" (ADR), with a particular focus on mediation.

This guide provides a brief description of how mediation and other ADR processes can be used with arbitration and some key points to consider at the stage of drafting dispute resolution clauses and during the arbitration process.

INTRODUCTION

Arbitration is sometimes characterised as a form of ADR, on the basis that it is a method of resolving a dispute outside a state court system. It is also similar to many other ADR methods in the sense that it requires contractual agreement between the parties. The arbitrators, like a mediator, are independent and impartial.

However, arbitration bears far more similarity to court processes than other ADR methods. In particular, arbitration produces a legally binding determination (an "award", rather than a court judgment). Further, the non-binding outcome of a mediation may not focus on legal responsibility for past conduct, whilst in an arbitration the tribunal must reach a reasoned decision on the facts, evidence and the law and cannot order a creative, commercial "solution".

Arbitration and mediation are often used to complement one another as part of a sequential dispute escalation process. The processes may equally be used in parallel. In some jurisdictions, they can be used as part of a hybrid dispute resolution process with an arbitrator taking a role in facilitating settlement.

Whichever approach is adopted, the potential benefits of mediation in terms of a quick, confidential, flexible and forward looking resolution are available to the parties to the arbitration as they would be to parties litigating in national courts. Put another way, nothing about the choice of arbitration by parties prevents them from using mediation or other ADR processes and the choice of arbitration should not be seen as excluding other ADR options.

WHAT IS ARBITRATION?

By way of overview, arbitration:

- is a private and non-national system of dispute resolution
- requires an agreement to arbitrate by the parties
- provides for the fair resolution of disputes by an impartial tribunal
- gives the parties relative autonomy to agree the procedure by which they resolve their dispute - they often adopt the rules of procedure of an international arbitration institution ("institutional rules")
- usually involves minimal national court intervention
- delivers an award which is final and binding, typically with very limited rights of appeal
- delivers an award that can be enforced, in most cases, domestically and abroad

The tribunal is in an adjudicative role and its function is to decide the outcome of the dispute. Once the parties have agreed to arbitration, they cannot unilaterally withdraw from the process or refuse to accept the tribunal's award.

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HOW ARBITRATION IS USED WITH OTHER ADR METHODS

By prior agreement of the parties: an “escalation” or “multi-tiered” clause

By far the most common way in which arbitration is used with other ADR methods is where there is an “escalation” or “multi-tiered” clause included in the relevant contract(s), whereby the parties agree that attempts should be made to resolve the dispute by a number of methods sequentially. Where the parties agree to try to resolve disputes by ADR methods, they should include a default position whereby a decision-making body will resolve the dispute in a final and binding way which does not require further agreement between the parties, ie, by state court or by arbitration.

A typical escalation clause providing for ADR and arbitration may look like this:

“Any dispute, controversy or claim (“Dispute”) arising out of or in relation to this contract, including any question regarding its existence, validity, invalidity, breach or termination or any dispute regarding any non-contractual obligations arising out of or in connection with it shall be resolved in accordance with the procedure in this clause []:

The party raising any Dispute shall first serve written notification of the Dispute to the other party (a “Dispute Notice”). Within [30] days of the service of a Dispute Notice one director or other senior representative of each party with authority to settle the dispute shall meet to seek to resolve the dispute. If within [30] days of service of the Dispute Notice no meeting has taken place or the Dispute has not been resolved, the Dispute shall be referred to mediation by the party which served the Dispute Notice, in accordance with clause [] below.

If the Dispute is not resolved in accordance with clause [] above, the parties shall attempt to settle it by mediation in accordance with [a mediation procedure or set of

mediation rules]. Unless otherwise agreed between the parties, the mediator will be nominated by [institution]. To initiate the mediation the party which served the Dispute Notice shall give notice in writing (“ADR Notice”) to the other party/ies to the Dispute requesting a mediation. The mediation will commence not later than [30] days after the date of service of the ADR Notice. If the Dispute has not been resolved through mediation within [60] days of the date of service of the ADR Notice, either party shall be entitled to refer the dispute to arbitration in accordance with clause [] below.”

Any dispute which is not resolved in accordance with clause [] above shall be referred to and finally settled by arbitration under the [NAME INSTITUTION] Rules, which Rules are deemed to be incorporated by reference into this clause. The number of arbitrators shall be [one/three]. The seat, or legal place of arbitration, shall be [City]. The language to be used in the arbitration shall be []. The law of the arbitration agreement shall be the law of [typically the law of the seat but could be the law of the agreement].”

Escalation clauses must be drafted carefully. If an arbitral tribunal finds that the provisions of an escalation clause have not been complied with, it may find that it does not have jurisdiction to determine the dispute, on the basis that such procedures are a condition precedent to arbitration. Similarly, a party may seek to challenge any eventual award on the basis that the tribunal lacked jurisdiction because the ADR steps were not complied with. (This contrasts with the position in some state courts where the primary consequence of any failure to comply with an escalation clause relates to costs, not the court’s jurisdiction.)

To avoid this risk, an escalation clause must therefore:

- define the parties’ rights and obligations regarding the ADR processes with sufficient certainty
- use mandatory language to indicate that steps must be taken to satisfy the clause
- include clear time limits and time scales so it can be established whether the steps have been complied with

A mediation “window” during arbitration proceedings

i) Timing

The parties may consider that there are one or more suitable occasions for mediation during the course of arbitration proceedings (see our [ADR Practical Guide No 3: When to mediate in a dispute](#)). When it is envisaged by the parties that a dispute being arbitrated may be able to be settled by mediation, it is sensible to consider this before the first procedural conference or case management hearing in the arbitration, at which the tribunal will usually fix the procedural timetable for the arbitration culminating in a hearing on the merits of the dispute. This timetable should therefore accommodate the possibility of a mediation of the dispute.

The tribunal may remind the parties that they are free to mediate disputes or ask the parties whether they wish to set aside time for mediation. Alternatively, the tribunal may be more proactive in suggesting that the parties seek to mediate all or parts of their dispute, depending on the procedural law of the arbitration, the institutional rules (see further below), the parties’ arbitration agreement and the cultural background of the arbitrators.

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ii) Who to appoint as mediator

Whilst appointing an arbitrator with full knowledge of the issues in dispute as a mediator may be more cost effective and efficient, arbitration involves the fair resolution of a dispute by an impartial tribunal and, in many jurisdictions, unilateral contact between the tribunal (or one arbitrator on a tribunal of three) and a party concerning the matter in dispute is regarded as compromising the fairness of the process, which in turn exposes the tribunal's eventual award to the risk of challenge. This would usually preclude the arbitrator-mediator from engaging with the parties separately in caucus sessions. A mediator appointed during the arbitration is therefore usually a separate individual, independent of the tribunal. There are exceptions whereby the parties have agreed to hybrid procedures, either expressly or in by incorporation of institutional rules that permit the tribunal to facilitate settlement (see further below).

iii) Institutional rules

Most institutional rules do not expressly require the parties to mediate their dispute. As arbitration is a private system of dispute resolution, some of the considerations underlying the promotion of mediation as an alternative to domestic court proceedings – for example, the preservation of scarce public resources in the court system – do not apply. However, institutional rules often do some provisions relating to resolution of disputes by way of ADR (including provisions dealing with what happens if the parties settle their dispute – see further below).

Examples of institutional rules addressing ADR:

- **International Chamber of Commerce (ICC) Arbitration Rules** (Appendix IV - Case Management Techniques):
 - the tribunal may inform the parties that they are free to settle all or part of their dispute by any form of amicable dispute resolution methods such as mediation under the ICC ADR Rules; and
 - where agreed between the parties and the tribunal, the tribunal can take steps to facilitate settlement of the dispute, provided that every effort is made to ensure that any subsequent award is enforceable at law.
- **Rules of the International Center for Dispute Resolution** (the ICDR, the international division of the American Arbitration Association):
 - permit the ICDR to invite the parties to mediate in accordance with the ICDR's Mediation Rules; and
 - parties are also able to agree to mediate in accordance with the ICDR Mediation Rules. Unless otherwise agreed, the mediation will run concurrently with the arbitration and the mediator shall not be a member of the tribunal.
- **American Arbitration Association (AAA) Commercial Arbitration Rules** (applying mostly to domestic US commercial disputes)
 - where the claim or counterclaim exceeds US\$75,000, Rule 9 requires the parties to mediate their dispute, although any party may unilaterally opt out of the rule by notifying the AAA and the other parties; and
 - mediation is conducted pursuant to the AAA's Commercial Mediation Procedures and runs concurrently with the arbitration. The mediator must not be appointed as the arbitrator.
- **DIS (German Institution of Arbitration) Arbitration Rules:**
 - at every stage of the proceedings, the arbitral tribunal should seek to encourage an amicable settlement of the dispute or of individual issues in dispute.

iv) If the mediation is successful - getting an agreed or consent award

If the mediation is successful, the parties will reach an agreement resolving their dispute. The agreement itself is generally not enforceable¹ in the same way as an arbitral award. The obligations under a settlement agreement are enforced in the same way as any contract, whereas an arbitral award is enforceable through applicable enforcement treaties such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

In order to allow ease of enforcement of a settlement agreement (mediated or otherwise) reached during arbitration:

- the parties should agree in their settlement agreement that:
 - they will sign a draft **agreed or consent award** in a form appended to the settlement agreement; and,
 - they will take all necessary steps to ensure that the award is made by the tribunal as soon as practicable;
- all pertinent terms of the settlement agreement must be recorded in the operative part of the agreed or consent award, requested by the parties (or one of them) and issued by the tribunal.

Where the parties have agreed in their arbitration agreement to resolve their dispute in accordance with the rules of an arbitral institution, it is important to check whether those arbitration rules refer to the tribunal's power to issue an agreed or consent award.

A consent award issued in arbitration proceedings conducted under the English Arbitration Act 1996 has the same status and effect as any other arbitration award.

¹ In the EU, mediated settlements of cross-border disputes between parties in different Member States are capable of enforcement in national courts of Member States.

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Implications of not engaging in mediation or other negotiated settlement during arbitration

Unless agreed by the parties (expressly or by adoption of institutional rules) or by virtue of a provision in the procedural law of the arbitration, an arbitral tribunal is not authorised to order that the parties submit to ADR procedures.

However, there is usually scope for tribunals to factor any refusal to engage in settlement discussions (and, potentially, mediation) into an award on costs - for example, where one party has made an offer "without prejudice save as to costs" and an offer to engage in settlement discussions and/or mediation which has not been discussed in any meaningful way by a party who is later wholly or partially unsuccessful in the arbitration.

Hybrid processes: med-arb and arb-med

Hybrid dispute resolution processes involve mediation (or sometimes conciliation) and arbitration with the same person acting as mediator and arbitrator. They take a number of forms, including:

- Traditional "med-arb" - the dispute is first mediated, but if the dispute is not resolved, the mediator converts into an arbitrator - and proceeds through arbitration to a binding decision. The parties may be able to go backwards and forwards between mediation and arbitration
- Arb-med variant - arbitration of an initial point of dispute and mediated resolution of outstanding issues based on an initial binding award with the arbitrator then acting as mediator

A number of institutional rules accommodate an arbitrator-facilitated settlement - either involving settlement discussions or mediation. They usually require the agreement of all parties. Examples can be found in the rules of the China International Economic and Trade Arbitration Commission (CIETAC) and the Swiss Chambers' Arbitration Rules. Some national arbitration laws provide for arbitrators to mediate disputes (the laws of Hong Kong and Singapore, for example).

It is important to remember that:

- there is no transnational consensus on whether it is acceptable for an arbitrator to also act as a mediator or to otherwise facilitate settlement of a dispute;
- any hybrid process (even if permitted by institutional rules or the procedural law of the arbitration) should be approached with caution, on the basis that the acceptance of a dual role by the arbitrator may affect the enforceability of any award resulting from the arbitration; and
- safeguards should be put in place to limit this risk. For example, consider including an express agreement dealing with whether information disclosed in a mediation can be relied on in subsequent arbitration proceedings. Consider also including an agreement precluding challenge of an award based on the arbitrator's dual role as mediator, or which cites the arbitrator's involvement in trying to facilitate a settlement.

Arb-Med-Arb

The Singapore International Mediation Centre (**SIMC**) and the Singapore International Arbitration Centre (**SIAC**) launched an Arb-Med-Arb Protocol (**AMA Protocol**) in November 2014. This includes several important procedural variants on other hybrid processes.

First, under the AMA Protocol, parties commence arbitration under the auspices of SIAC, and then proceed to mediation quickly with SIMC. The arbitrator(s) and mediator(s) are separately and independently appointed by SIAC and SIMC respectively. To ensure impartiality, the arbitrator(s) and mediator(s) are different individuals, unless otherwise agreed by the parties. This represents a departure from traditional hybrid process where arbitration and mediation proceedings are conducted by the same person.

Second, if the mediation is successful, the settlement is taken back to the arbitral tribunal to be recorded as a consent award. A consent award is an arbitral award and so is generally enforceable in the approximately 150 New York Convention member states. Any non-justiciable elements of the mediated settlement (for example, settled disputes that fall outside the scope of the arbitration agreement and hence the tribunal's jurisdiction) would need to be recorded in a separate settlement agreement (which would not be enforceable under the New York Convention). Parties who cannot settle their disputes through mediation continue with the arbitration proceedings.

Parties can avail themselves of the AMA Protocol in two main ways. First, they may incorporate the model Arb-Med-Arb clause (**Model Clause**) into their contracts referring disputes to SIAC and SIMC for arbitration and mediation. Alternatively, parties who have already commenced arbitration at SIAC may separately refer their dispute to SIMC for mediation at any stage.

For more on mediation in general, see our [ADR Practical Guide No 2: "An introduction to mediation - what it is and how it works"](#).

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