Kluwer Arbitration Blog

Mediator-arbitrators: the perfect match or no love lost? (A Valentine's Day Blog)

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Should arbitrators be permitted to serve as mediators of the disputes they might ultimately determine? Instinctive reactions to this question are likely to be coloured by a party's legal background and cultural expectations. To those from common law traditions, the idea of combining the roles of mediator and arbitrator is rather alien, whereas in civil law jurisdictions, this is a relatively well-accepted practice.

There are certainly advantages of arbitrators seeking to facilitate the settlement of their disputes. Primary among these is the efficiency of disposing of those disputes amicably. Since an arbitrator will already be familiar with the case (as well as with the parties and their counsel), they should be well-placed and well-equipped with the sensitivity required to help settle the matters in dispute – including helping the parties to choose the most appropriate time at which mediation may be attempted. Considerations of management time and personal anguish aside, avoiding the significant legal fees incurred in substantive hearings by reaching early settlement is an enormous attraction to the mediation process. Moreover, a settlement reached during arbitral proceedings may be recorded in the form of a consent award – which may benefit from the enforcement regime under the New York Convention.

Balanced against these are a number of potential drawbacks to med-arb / arb-med. There is a (certainly perceived) risk that overseeing a mediation may threaten an arbitrator's impartiality. For example, it may be difficult for a mediator-arbitrator not to be influenced by the private communications he hears where a "caucusing" technique is adopted. Alternatively, if legislation dictates that a mediator-arbitrator must disclose all confidential information gathered during the mediation to the other parties, one of the key advantages of this form of ADR (i.e. that parties are free to discuss issues openly with the mediator) may be lost. On the other side of the enforcement coin, arbitral awards that are rendered following failed settlement efforts may be challenged on public policy grounds if the losing party contends that there was a lack of due process during the mediation. A recent preliminary decision of the Hong Kong courts illustrates this exact danger. In *Gao Hai Yan and another v Keeneye Holdings Ltd and others* HCCT 41/2010, enforcement of an arbitral award rendered in the PRC was challenged on the basis that a member of the tribunal and the General Secretary of the Xian Arbitration Commission had held an *ex parte* meeting with one of the parties to the arbitration.

So where can arbitrators turn for guidance on how best to conduct settlement proceedings? Few national laws address the acceptability and practice of med-arb / arb-med. Exceptions can be seen

though in certain Asian jurisdictions, such as Hong Kong and Singapore. Similarly, institutional arbitration rules are often silent on this issue, with CIETAC Arbitration Rules and German DIS-Arbitration Rules being notable exceptions. Article 40 of the CIETAC Arbitration Rules provides that "*the arbitral tribunal may conciliate the case during arbitration proceedings*" in the manner it considers appropriate, and Section 32 of the German DIS-Arbitration Rules requires that the arbitral tribunal should encourage settlement "[a]*t every stage of the proceedings*". The IBA Guidelines on Conflicts of Interest in International Arbitration may, however, be consulted for assistance. General Standard 4(d), for example, expressly provides for the possibility of med-arb / arb-med, although the Guidelines require that an arbitrator must resign if he feels that his independence or impartiality has been impaired as a consequence of the settlement proceedings.

Provisions in the new Hong Kong Arbitration Ordinance (Cap. 609) allowing for mediator-arbitrators are generating a great deal of debate at present (similar provisions exist in the Arbitration Ordinance (Cap. 341) currently in force in relation to "conciliators"). Section 33 of the new Arbitration Ordinance provides that, subject always to the consent of the parties, an arbitrator may act as mediator of a dispute once arbitration proceedings are underway – at which point those proceedings will be stayed to facilitate the settlement discussions. In aid of this practice, Section 33(5) of the new Arbitration Ordinance prohibits parties from objecting to the conduct of arbitral proceedings solely on the ground that the arbitrator acted as mediator of the dispute.

These provisions of the Hong Kong's new arbitration legislation have so far received a mixed reception from users of arbitration. Those accustomed to common law traditions have voiced apprehension at the combination of the functions of arbitrator and mediator – particularly in light of the obligations placed on arbitrators to disclose all confidential information material to the arbitration, and learned during mediation, to all of the parties to the dispute. Separately, a certain degree of hostility may arise from the failure rate of mediations in the context of Hong Kong court litigation – where many parties feel compelled to go to mediation by the Civil Justice Reform.

However, arb-med / med-arb should not be dismissed out of hand. In a recent arbitration we have seen, the tribunal's attempts at encouraging settlement ultimately resulted in the amicable settlement of a complex set of claims and counterclaims running into well over a hundred million dollars – ahead of what would have been an extremely costly evidentiary hearing. In this case, and with the parties' agreement, the three-member civil law tribunal gave a clear indication of what they saw as the strengths and weaknesses of the case, in plenary session with the parties. A short mediation followed and, whilst the parties did not settle on the day, they did so shortly thereafter. One downside to this approach is, of course, that the "potential loser" (and indeed both sides) may seek to better their case by tendering further evidence and argument in the event that mediation fails. In addition, the views of the "potential winner" regarding what it considers to represent a reasonable settlement sum may be galvanised upon learning that the tribunal essentially agrees with their case.

Certain practical issues must be considered when an arbitrator adopts the role of settlement facilitator. Express waivers should be obtained from the parties at the outset, confirming that they will not challenge the arbitrator or the award as a consequence of the mediation (as occurred in the example we describe above), in particular where national laws do not provide for this. Importantly, and related to this issue, justice must be seen to be done. For example, it is vital that, where "caucusing" is adopted, the arbitrator must give each party an equal opportunity to present their side and there must be absolute clarity as to the capacity in which the arbitrator / mediator is acting. The costs of the mediation must also be considered – including whether or not arbitrators

should be remunerated separately for the provision of “mediation services” or whether it should come out of any arbitration advance. Parties may also wish to consider whether receiving a “preliminary indication” of the likely success of their case would impact upon their decision to provide financial reserves on their balance sheet.

It is clear that there is room in international arbitration for arbitrators to serve as effective mediators of their disputes. However, guidelines addressing matters such as acceptable procedures (e.g. to ensure that due process is delivered), and the extent of disclosure following failed settlement proceedings, would be of assistance – particularly where this practice is less widely accepted at present.

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