Kluwer Arbitration Blog

2025 PAW: Transatlantic Views on Med-Arb/Arb-Med—Convergence or Chasm?

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As part of the 9th edition of the Paris Arbitration Week ("PAW"), the Dutch Arbitration Association ("DAA") and the International Centre for Dispute Resolution ("ICDR"), co-organised an event entitled "Transatlantic Views on Med-Arb/Arb-Med: Convergence or Chasm?"

The panel was moderated by Marcio Vasconcellos (King & Spalding LLP), and composed of Vanessa Alarcon Duvanel (King & Spalding LLP), Roelien van den Berg (Avizor Advocates & Arbitrators), Luis Martinez (ICDR), Nathan O'Malley (Musick Peeler), and Stan Putter (DAA and HBN Law & Tax). The panel thus included practitioners from the United States, the Netherlands, and Switzerland.

Med-Arb/Arb-Med—Hybrid Processes

The discussion was kicked off by Vasconcellos, who highlighted the exponential growth of mediation in the past decade, notably with the elaboration in 2018 of complementary instruments introduced by the United Nations Commission on International Trade Law ("UNCITRAL"), namely the Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, and the UN Convention on International Settlement Agreements Resulting from Mediation (more commonly known as the Singapore Convention on Mediation).

The growing interest in mediation paved the way for other flexible dispute resolutions options, with the introduction of hybrid mechanisms such as Med-Arb and Arb-Med proceedings in which mediation and arbitration are combined to form a new dispute resolution process. The panel examined several scenarios involving Med-Arb and Arb-Med to assess whether these hybrid mechanisms truly fulfil their reputation as adaptable and effective tools in alternative disputes resolution ("ADR").

Scenario A: Med-Arb Clause Leaves Mediation Requirement Unclear

In this first scenario, the panel looked at a dispute resolution clause that provided for mediation as a first step, and arbitration as a second, without clearly indicating whether mediation was a condition

precedent to the arbitration. This ambiguity often arises when permissive language is used for mediation (e.g., “the parties may mediate”) in contrast to mandatory language for arbitration (e.g., “in any event, the dispute shall be resolved by final and binding arbitration”).
Alarcon Duvanel highlighted that in Switzerland, the interpretation of any contractual clause, including a med-arb agreement, is based on the intent of the parties involved, rather than adhering to a rigid and literal interpretation of the language. In this scenario, unless factual evidence is provided showing that the parties intended mediation to be a mandatory first step, it will be considered optional. Van den Berg concurred, noting that under Dutch law, mediation clauses are interpreted in accordance with general principles of contract law, with emphasis on parties’ intentions.

Martinez added that such unpredictability is never desirable, advocating for mandatory mediation. He suggested that instead of relying on a step-clause, parties may also choose to proceed with mediation and arbitration simultaneously. The ICDR Arbitation Rules notably allow parties to concurrently mediate and arbitrate their dispute.

Scenario B: There is a Dispute Over Compliance with Mediation Terms in the Med-Arb Clause

In this second scenario, the panel examined dispute resolution clauses in which mediation is clearly mandatory but also includes additional requirements, such as the obligation to mediate in good faith, to involve the senior management, or to mediate for a minimum period of time. If the mediation fails on the first day and one of the party immediately initiates arbitration proceedings, the other party may argue that the arbitration is premature, as the conditions of the mediation have not been fully fulfilled.

O’Malley highlighted that one of the main issues relates to the requirement to proceed in good faith. He explained that under U.S. law, statements made during the mediation can be used to demonstrate that a party acted in bad faith during the mediation—this can be considered by the arbitrator when assessing jurisdiction and compliance with the first part of the Med-Arb clause. In his views, even if these statements cannot be used by the parties to later establish liability on the merits in the arbitration, arbitrators should nonetheless not rely on them as they are not relevant for assessing good faith.

Van den Berg noted that the Dutch Advocate-General advised the Dutch Supreme Court to uphold legally binding mediation clauses, even if parties are initially unwilling to mediate, as the process may still be beneficial (*see* Multi-Tiered Dispute Resolution Clauses: Can the Agreement to Mediate Prior to Commencing Arbitration Be Binding?). She added that in the Netherlands, arbitrators have jurisdiction once arbitration is initiated and will interpret the multi-tiered clause, often considering whether it is reasonable to stay arbitration proceedings for mediation. Outcomes, however, remain case-specific and difficult to predict.

Vasconcellos returned to the concept of good faith, noting that when a clause provides for a mediation period of several months, parties may adopt firm and strong initial positions as a strategic approach, gradually moving toward common ground. This does not necessarily indicate bad faith at the outset of the mediation.

Scenario C: Med-Arb Clause Mandates Mediation, but It is Considered Futile

In this third scenario, the panel focused on a situation where one party openly states that their terms are non-negotiable, and they will not change their position. The panel was asked to consider whether mandatory mediation could still be useful, or whether it would merely incur additional costs and delay the arbitration proceedings.

Van den Berg highlighted that in its decision of 12 July 2024, the Dutch Supreme Court ruled that the arbitral tribunal is not obligated to stay proceedings in order to compel parties to comply with a mandatory mediation agreement, particularly if the dispute is deemed too urgent, or if the mediation is considered futile.

Putter added that in certain jurisdictions, it may be crucial to initiate arbitration proceedings promptly to avoid the expiration of statutory limitation periods. Indeed, the commencement of mediation might not always suspend the limitation period against the opposing party. Delaying action for the sake of a potentially inconclusive mediation could result in irreversible consequences.

Martinez emphasised that parties should always attempt to mediate as it is rarely useless. On the contrary, it typically saves time and money by resolving the dispute or at least by narrowing the issues in contention. He noted that mediation can be more challenging in cases involving States, given the uncertainty related to changes in administration. Investors may feel more secure with an arbitral award in hand, which can be enforced in foreign courts. This is particularly relevant in times of populist movements and the rise in gorilla tactics.

O'Malley added that since American litigation is particularly burdensome and costly, especially with the extensive use of discovery, it is in the parties' best interest to try to negotiate a settlement. He believes that the burdens of American court litigation have helped increase the popularity of mediation. While acknowledging that court or arbitration proceedings can also be onerous in European jurisdictions, they still do not compare to the United States. This might also explain why mediation is more popular in the United States than in Europe—it is not necessarily due to inherent virtues of mediation itself.

Scenario D: The Same Individual Plays Both Mediator and Arbitrator Roles

In this fourth scenario, the panel examined a situation where a mediator, who has had access to mediation briefs and key evidence from both parties, then switches hats and serves as an arbitrator, or when the designated arbitrator also acts as the mediator during the arbitration proceedings.

O'Malley highlighted that American practitioners are particularly concerned with due process, and would therefore not agree to such an arrangement. Martinez followed up by noting that the ICDR does not encourage mediators to act as arbitrators in the same dispute. He added that as party autonomy prevails this scenario could still occur in practice, but it is generally discouraged.

Alarcon Duvanel pointed out the cultural differences, even within Switzerland. While this scenario would not occur in the French-speaking part due to due process concerns, arbitrators in the German-speaking part of the country are often asked to provide a preliminary assessment. Once the parties receive the tribunal's early views, they are better positioned to settle. The arbitrator can encourage the parties to pursue this option, without directly becoming a mediator.

Putter then discussed the possibility of a mid-stream settlement attempt during arbitration proceedings, with both parties agreeing to waive any claims and ensuring that the topics for settlement are well-defined. The arbitral tribunal can share its preliminary views, which helps the parties to assess their positions and then settle.

Van den Berg added that a med-arb scenario with the same individual acting as both mediator and arbitrator is not conceivable in the Netherlands, as confidentiality remains a key concern for parties when choosing arbitration. Parties would be reluctant to engage in mediation if they believe their views might be shared with the other side. However, she noted that other jurisdictions approach this differently, with CIETAC rules and the Hong Kong Arbitration Ordinance specifically providing for such scenarios.

Scenario E: "Arb-Med" with the Arbitrator Functioning as Mediator After Issuing the Award

The final scenario analysed by the panel involved a situation where mediation does not precede arbitration, the arbitrator drafts and signs the final award without delivering it to the parties, and then serves as a mediator.

All panellists, along with the audience, agreed that the situation is counterproductive. One of the main reasons for using mediation is to reduce costs associated with arbitration proceedings. It is rather counterproductive to go through a full arbitration process, with the arbitrator spending time drafting an award, and then introduce additional resources by attempting mediation. While panellists acknowledged that mediation does not necessarily have to occur prior to the arbitration, they noted that this scenario is unlikely to be beneficial to the parties.

Final Remarks

In concluding the session, the panellists agreed that clear drafting is always essential—whether for arbitration agreements, mediation agreements, or any other type of agreement. Parties should anticipate potential issues to avoid delays and costs, such as dealing with a dilatory or recalcitrant party. While the value of mediation is appreciated, arbitration still seems far from being replaced.

*This post is part of Kluwer Arbitration Blog's coverage of **Paris Arbitration Week 2025**.*

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