Med-Arb/Arb-Med: A More Efficient ADR Process or an Invitation to a Potential Ethical Disaster?

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The practice of combining arbitration and mediation into a single, hybrid process when the role of mediator and arbitrator is assumed by the same neutral raises a tidal wave of controversy. Certain detractors of Med-Arb/Arb-Med\(^1\) oppose it so fervently they consider it not only an ethical disaster, but heretical—a process that should be burned at the stake. On the other side of the spectrum, some of its devotees believe it is not only more efficient, but a panacea, encompassing the best of both worlds.

In fact, it is neither. There is no right solution. In some cases it is a more efficient option, in others, perhaps not. The potential ethical disaster lies not in using these processes, but in allowing them to develop without supervision, to the detriment of international arbitration, and not as a well-structured complement or integral part of it. The invitation, therefore, is one to arbitration and mediation practitioners to act as gatekeepers and help to establish safeguards to ensure that these single-neutral hybrid processes remain more efficient, ethical and afford finality.

The purpose of this article is to underscore the development and use of these methods because of the advantages they offer, identify and highlight some of their pitfalls and offer some suggestions to help ensure that these party-driven processes are structured and conducted successfully, and more importantly, lead to the finality that parties desire.

\(^1\) Med-Arb and Arb-Med as used in this paper generally refer to those processes with a single neutral.
THE SHIFT FROM ARBITRATION TO MEDIATION TO ADR HYBRIDS

Increasingly disenchanted with the fact that international arbitration has become as lengthy and costly as litigation, parties have been turning to mediation as an alternative.²

However, as mediation has gained in popularity, lawyers have become increasingly involved as counsel and often as mediators. As a consequence, the mediation process has become more adversarial—less interests-based and more rights-based—particularly with the practice of mediator evaluation and mediator proposals. As arbitration is often referred to as the new litigation, so mediation has now been coined the “new arbitration”.³

On the international front, the use of same neutral Med-Arb/Arb-Med has been predominantly in the Far East. Today, with the increasing importance of Asia as an arbitral and ADR hub, these processes, used domestically in specific sectors in many countries, are experiencing a renaissance. As a result, institutions and countries, even those that do not actively promote or agree with these techniques, are adapting their rules and laws to grant parties the flexibility to adopt them as appropriate. This trend suggests that they must be more efficient, at least in certain circumstances, otherwise parties would not choose them. That said, these hybrid dispute resolution methods are hardly new: they date back to the ancient Greeks, were even codified by the Ottoman Empire and have been traditionally used in Latin America.⁴

² A number of institutions have responded to this problem by creating fast-track and expedited procedures for arbitration to control time and cost in international arbitration, such as the ICC, SIAC and AAA (ICDR), for instance.