Law Council of Australia

Med-Arb Commentary

A Guide for Legal and ADR Practitioners

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Introductory note

The Law Council of Australia (**Law Council**) has produced this commentary, drawing upon existing domestic and international literature, legislation and guidance, to assist legal practitioners in utilising the hybrid process of mediation-arbitration (**med-arb**).

Med-arb is a flexible yet complex dispute resolution process which does not fit all cases or circumstances. The aim of this resource is therefore to provide guidance to the legal profession in identifying the advantages, risks and challenges of med-arb by:

- defining the term 'med-arb' and other key concepts;
- describing the process of med-arb as a method of hybrid dispute resolution;
- comparing the utilisation of med-arb internationally and domestically;
- considering the relevance of the development of med-arb to Australian practitioners; and
- identifying the key competencies and ethical considerations for those who wish to conduct med-arb.

This commentary is based on the work of the below members of the Federal Litigation and Dispute Resolution Section's Alternative Dispute Resolution Committee (**Committee**) and the Law Council Secretariat.[1]

Committee members

- Ms Mary Walker OAM (Chair)
- Mr Nussen Ainsworth
- Ms Geri Ettinger
- Mr Michael Hollingdale
- Mr Anthony Nolan KC
- Ms Joanne Staugas
- Professor Peta Spender
- Mr Philip Theobald

Committee Secretariat

- Ms Chelsea De Silva

The information in this document is current to August 2022.

[1] The Committee acknowledges the assistance of the Law Council's Policy Division in the development and drafting of this commentary, particularly Mr Nathan MacDonald, Deputy Director of Policy and Ms Natalie Cooper, Research Officer.

Definitions and key concepts

Med-arb refers to the melding of two well-established processes for dispute resolution into one hybrid process.

The development of med-arb reflects the broader societal trend that has increasingly linked judicial procedure with various forms of often less formal, more expedient processes for resolving conflict, collectively known as alternative dispute resolution (**ADR**).[2]

Like the court process, the practice of arbitration has been subject to calls for more expeditious alternatives for resolving disputes. The formalities of both court adjudication and arbitration have been often criticised as slow, expensive, formalistic and unnecessarily adversarial. The introduction of mediation in the 1970s and its extension to a wide range of commercial disputes since the mid-1990s – particularly in courts, commissions and tribunals – has resulted in a growing interaction between arbitration and mediation.[3]

Med-arb is the natural extension of this trend, where in a dispute resolution environment when mediation and arbitration typically occur in sequential order, exploration of the use of the same third-party practitioner (**neutral**) performing both functions has developed.[4] The development of med-arb has therefore provided an opportunity for parties to reach their own agreements, while also guaranteeing a binding decision if the opportunity for a negotiated agreement fails.[5]

Defining med-arb

Med-arb is not a precisely defined term as it has many practice variations.[6]

As this is not a 'one-size-fits-all' process, each med-arb procedure should be tailored to the circumstances of the dispute and the needs of the parties. Parties and practitioners may choose to modify:

- the number of neutrals involved;
- sequencing of the mediation and arbitration phases;
- the use of private discussions (**caucusing**) during the mediation phase;
- the timing of the parties' election to proceed from mediation to arbitration; and
- the neutral's use and disclosure of confidential information.[7]

In Australia, med-arb was not defined by the National Alternative Dispute Resolution Advisory Council (**NADRAC**) before it concluded its operations in 2013. However, it was referred to in NADRAC's definition of '**Combined or hybrid dispute resolution processes**':

> *Combined or hybrid dispute resolution processes are processes in which the dispute resolution practitioner plays multiple roles. For example, in conciliation and in conferencing, the dispute resolution practitioner may facilitate discussions, as well as provide advice on*

[2] Mark Batson Baril and Donald Dickey, 'MED-ARB: The Best of Both Worlds or Just a Limited ADR Option?', (January 2017) 3.
[3] Ibid.
[4] Ibid.
[5] Nancy A. Welsh, 'Switching Hats in Med-Arb: The Ethical Choices Required to Protect Process Integrity', in *Mediation Ethics: A Practitioner's Guide* (Omer Shapira ed., 2021) 213, 239.
[6] Ibid 214.
[7] Ibid 215.

the merits of the dispute. In hybrid processes, such as med-arb, the practitioner first uses one process (mediation) and then a different one (arbitration).[8]

The Australian Centre for International Commercial Arbitration Rules 2021 also do not contain specific provisions for med-arb.[9]

The med-arb process

In Australia, the process of med-arb typically consists of mediation in a facilitative mode, followed by binding arbitration, often – but not always – before the same neutral.[10] It is important to note at the outset that the mediator does not evaluate the strength of the parties' cases during the mediation phase, and the arbitrator might be a different person than the mediator.[11]

If the mediation ends in an impasse, or if issues remain unresolved, the process is not over. At this point, parties can move to arbitration by mutual consent or via the terms of a dispute resolution clause. The mediator can assume the role of arbitrator (if they are qualified to do so and the parties agree) and render a binding decision based on their judgment, either on the case as a whole or on the unresolved issues. Alternatively, a different neutral can take over the case as an arbitrator by consent of the parties.

The most common variation of med-arb is when the same individual serves as both mediator and arbitrator. This process may be referred to as '**pure med-arb**' or '**classic same-neutral med-arb**'.[12] While this specific method will be the focus of this commentary (and is the focus of most related literature and legislation), there are many other practice variations, including, but not limited to:[13]

- **Sequential med-arb**: involving two neutrals, with one neutral serving as a mediator and, if the parties do not reach a mediated settlement, the other neutral stepping in to serve as arbitrator.
- **Overlapping med-arb**: involving two neutrals, with one neutral serving as mediator and the other, who will serve as arbitrator, attending and observing the joint sessions of the mediation phase.
- **Standby mediator**: involving two neutrals, beginning with arbitration and with the mediator reading the arbitration briefs, observing the arbitration hearing, and available to serve as mediator at any time.
- **Braided arbitration**: involving a single neutral, beginning as arbitrator but pausing at various points to serve as mediator.

[8] National Alternative Dispute Resolution Advisory Council, 'Dispute Resolution Terms', Trove (September 2003).
[9] Australian Centre for International Commercial Arbitration, 'ACICA Rules: 2021 Edition', (March 2021).
[10] Alan Wein and Jessica Rogers, 'The Med-Arb Model Dissected and Analysed in existing Academic and Practitioner Papers', Wein Mediation (March 2020) 49.
[11] Ibid.
[12] Nancy A. Welsh, 'Switching Hats in Med-Arb: The Ethical Choices Required to Protect Process Integrity', in *Mediation Ethics: A Practitioner's Guide* (Omer Shapira ed., 2021) 213, 214.
[13] Ibid 215-6.

Other key concepts

Arbitration

Arbitration is a process in which the parties to a dispute present arguments and evidence to an arbitrator who makes a determination.[14] The arbitrator may have specialist knowledge and expertise in the subject matter of the dispute.[15]

The key features and advantages of arbitration are:

- the neutral determines the dispute;
- there is a guaranteed decision and finality;
- the process is often faster than litigation; and
- the process is confidential.

The major disadvantages of arbitration include that the process can be costly and time consuming and has the potential for the resurfacing of conflict and at least one dissatisfied party.[16] Also, most arbitrations are binding with limited ability to appeal the arbitral decision.

Mediation

Mediation is a process in which the parties to a dispute, with the assistance of a mediator, identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. Mediation may be undertaken voluntarily, under a court order, or subject to an existing contractual agreement.[17]

The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted. Parties engage in a negotiating process managed by the mediator, where the parties themselves decide what the solution is.[18]

The key features and advantages of mediation are:

- it is an interest-based negotiation;
- the parties make final decisions;
- the process saves time with no arbitration;
- the process is confidential; and
- there is potential for long-term satisfaction with agreements.[19]

The major disadvantage of mediation is that parties may not come to an agreement, so time and money may be wasted participating in this process.[20]

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[14] National Alternative Dispute Resolution Advisory Council, 'Dispute Resolution Terms', Trove (September 2003).
[15] Micheline Dewdney, 'Hybrid Processes', (December 2006) 5 *The Arbitrator & Mediator* 145, 149.
[16] Ibid.
[17] National Alternative Dispute Resolution Advisory Council, 'Dispute Resolution Terms', Trove (September 2003).
[18] Mark Batson Baril and Donald Dickey, 'MED-ARB: The Best of Both Worlds or Just a Limited ADR Option?', (January 2017) 8.
[19] Ibid.
[20] Ibid.

Conciliation

Conciliation is a process in which the parties to a dispute, with the assistance of a neutral conciliator, identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, but not a determinative role.[21] In some referrals to conciliation under statutory schemes, a conciliator may also have the capacity to determine remedies.[22]

The conciliator may advise on, or determine, the process of conciliation whereby resolution is attempted. They may make suggestions for terms of settlement, give expert advice on likely settlement terms, and encourage the participants to reach an agreement.[23]

The distinction between mediation and conciliation is rarely clear. The terms have been previously used interchangeably, although the term 'conciliation' has since fallen out of favour in the United States and has been replaced by 'mediation'. Similarly, in some Australian programs, such as the Health Conciliation Registry in New South Wales, the process can barely be differentiated from mediation as the conciliator has no advisory or determinative role.[24]

Concilio-arbitration

Concilio-arbitration is a hybrid process combining conciliation and arbitration, although definitions of the method vary (as for all ADR processes).[25] The process is typically described as a continuous, informal process where parties are consistently encouraged towards an agreed resolution of their dispute. If they cannot reach agreement, the same neutral moves from the conciliation to the arbitration phase. As the parties are involved in all stages of the process, conducting private sessions with each of the parties and their representatives may be inappropriate.[26]

The utilisation of med-arb

There is no authority, either domestically or internationally, to the effect that the process of combining mediation and arbitration is not acceptable.[27] Rather, the acceptance and utilisation of med-arb appears to be somewhat polarised along geographical and jurisdictional lines.[28]

Med-arb internationally

As the world of dispute resolution becomes more global, the extent to which practitioners from different jurisdictions are comfortable with certain methods and processes achieves particular significance.[29]

The strongest critics of med-arb processes are typically from common law or Western backgrounds. For instance, jurisdictions in the United Kingdom and Europe have generally

[21] National Alternative Dispute Resolution Advisory Council, 'Dispute Resolution Terms', Trove (September 2003).
[22] See, for example, Historical Fair Trading NSW Conciliation Schemes.
[23] National Alternative Dispute Resolution Advisory Council, 'Dispute Resolution Terms', Trove (September 2003).
[24] Micheline Dewdney, 'Hybrid Processes', (December 2006) 5 *The Arbitrator & Mediator* 145, 149.
[25] Ibid 150.
[26] Ibid.
[27] Campbell Bridge SC, 'Med-Arb and Other Hybrid Processes: One Man's Meat is Another Man's Poison', (September 2014) 2 *The Arbitrator & Mediator* 133, 136.
[28] Ibid.
[29] Ibid 133.

expressed scepticism regarding the effectiveness of this process,[30] particularly due to the potential conflicts perceived to be inherent in the dual mediator-arbitrator role.[31] This contrasts with other jurisdictions, particularly in Asia, where there is substantially more cultural acceptance of – and interest in – med-arb.[32]

United States of America and Canada

In the United States, some combinations of arbitration and mediation are controversial – and less popular – largely because the potential for conflicts of interest within these hybrid processes is perceived to be too great to overcome.[33]

While some state statutes and court rules authorise the use of med-arb in certain contexts,[34] generally med-arb is only used in the United States on an ad hoc basis or due to its incorporation into dispute resolution clauses in contracts.[35] Nonetheless, med-arb practitioners are offered by major dispute-resolution service providers, such as the American Arbitration Association and Judicial Arbitration and Mediation Services,[36] perhaps indicating a broadening acceptance of the practice.

Canada has indicated a willingness to use med-arb more widely, with the Alternative Dispute Resolution Institute of Canada launching new med-arb rules, accreditation criteria and a med-arb template in November 2019.[37]

United Kingdom

Med-arb is not addressed in the legislation which regulates arbitration in England, Wales and Northern Ireland.[38] However, the courts in the United Kingdom have considered the implications of resuming arbitration or adjudication in the event of unsuccessful mediation by the same appointee.[39]

As a safeguard against the risk of prejudice on the part of the arbitrator, the 2001 High Court case of *Glencot Development & Design Ltd v Ben Barrett & Son (Contractors) Ltd*[40] held that the objective test to apply is whether "circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger … that the tribunal was biased."[41]
The arbitrator's decision was therefore held to be unenforceable. By merely conducting private discussions in the mediation phase, the adjudicator's impartiality had been compromised and his decision was affected by apparent bias.[42]

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[30] Matthew Finn, 'Remaining the dispute resolution epicentre: is Med-Arb in Europe's Future?', International Bar Association (March 2021).
[31] Adam Firth et al., 'All right, Stop! Mediate and Listen: Guidance on the Use of Med-Arb in Australia', Ashurst (16 July 2018).
[32] Nancy A. Welsh, 'Switching Hats in Med-Arb: The Ethical Choices Required to Protect Process Integrity', in *Mediation Ethics: A Practitioner's Guide* (Omer Shapira ed., 2021) 213, 218.
[33] Weixia Gu, 'Hybrid Dispute Resolution beyond the Belt and Road: Toward a New Design of Chinese Arb-Med(-Arb) and its Global Implications' (December 2019) 29(1) *Washington International Law Journal* 117, 119.
[34] Nancy A. Welsh, 'Switching Hats in Med-Arb: The Ethical Choices Required to Protect Process Integrity', in *Mediation Ethics: A Practitioner's Guide* (Omer Shapira ed., 2021) 213, 218.
[35] Ibid.
[36] Nancy A. Welsh, 'Switching Hats in Med-Arb: The Ethical Choices Required to Protect Process Integrity', in *Mediation Ethics: A Practitioner's Guide* (Omer Shapira ed., 2021) 213, 220-221.
[37] Matthew Finn, 'Remaining the dispute resolution epicentre: is Med-Arb in Europe's Future?', International Bar Association (March 2021).
[38] *Arbitration Act 1996* (UK) s 2(1).
[39] Weixia Gu, 'The Delicate Art of Med-Arb and its Future Institutionalisation in China', (Spring 2014) 31(2) *UCLA Pacific Basin Law Journal* 97, 114.
[40] [2001] BLR 207.
[41] Ibid [86].
[42] Ibid [23]-[25].

New Zealand

It appears that med-arb in its pure form is not part of the ADR mainstream in New Zealand,[43] with a general wariness of the process perhaps influenced by the precautionary observations of Fisher J in the 2003 case of *Acorn Farms Limited v Schnuriger* (***Acorn Farms***).[44]

The judgment offers five precautions for anyone contemplating combining mediation and arbitration:

a) It must be made clear to the parties from the beginning that if there is no agreement, the mediator-arbitrator will be imposing a binding solution.

b) The mediator-arbitrator may not receive information without the knowledge of both parties.

c) The parties must be warned from the outset that anything said to the mediator-arbitrator could be used against that party as the basis for an award, including offers and confidential information disclosed for negotiating purposes.

d) The mediator-arbitrator must avoid the expression of final views until all evidence and argument is complete.

e) If the process moves into arbitration mode, both parties must be given full opportunity to present their cases.

For some mediators, the possibility of caucusing is at the very heart of the process, and these requirements (particularly precaution (b)) rule this out.[45]

It should also be questioned whether, and to what extent, a mediator can truly perform their role under these parameters, such as having first warned the parties that anything they say may be used against them.[46]

There is limited case law beyond the *Acorn Farms* decision in New Zealand, although there are several statutes that contemplate a similar type of process,[47] including:

- Mediators acting under section 150 of the *Employment Relations Act 2000* can be given authority to decide disputes (although there are several conditions).
- Dispute Tribunal referees are obliged under section 18 of the *Disputes Tribunals Act 1988* to assess whether it is appropriate to assist the parties to negotiate a settlement in every case.
- An arbitrator may not make a determination relating to access disputes under section 68 of the *Crown Minerals Act 1991* until they have brought, or used their endeavours to bring, the parties to a settlement acceptable to all of them.

None of the above examples clarify whether, or to what extent, the legislation will protect any final decision that is imposed on the parties against a claim of actual or apparent bias (or other breach of natural justice) arising out of a caucusing process.[48]

[43] Royden Hindle, 'Is Med/Arb an Oxymoron?', (2013) 6.
[44] [2003] 3 NZLR 121.
[45] Royden Hindle, 'Is Med/Arb an Oxymoron?', (2013) 4.
[46] Ibid.
[47] Ibid 5.
[48] Royden Hindle, 'Is Med/Arb an Oxymoron?', (2013) 5.

Asia

Med-arb is a common form of dispute resolution in Asia,[49] reflecting a broader trend that parties in this continent tend to be more litigation-averse and comfortable with the process.[50] Med-arb is specifically contemplated in the arbitration legislation of Hong Kong, Japan and Singapore, in addition to the procedural rules of some of the arbitration and mediation centres in those jurisdictions.[51]

Hong Kong and Singapore

Hong Kong and Singapore are the two most frequently chosen jurisdictions for international arbitration in Asia.[52] Unlike China (where med-arb is mostly regulated by the rules of arbitration institutions), legislation plays a crucial role in regulating med-arb in both Hong Kong and Singapore.[53] In this respect, it should also be noted that in contrast to China, Hong Kong and Singapore are common law jurisdictions. The significant differences between the common law and civil law systems should be borne in mind when considering the institutionalisation of med-arb in various jurisdictions in Asia.[54]

In light of the typical concerns held regarding due process during med-arb (outlined below) and the potential impact of these on the enforceability of an arbitral award if made, legislation in Hong Kong and Singapore enables an arbitrator to act as a mediator only if all parties consent in writing and no party has withdrawn such consent.[55]

Caucusing is also addressed by the legislation, which reflects concerns in common law jurisdictions relating to the confidentiality of information provided to the neutral. When the mediation stage fails, the Hong Kong Arbitration Ordinance forces the neutral to disclose any confidential information that is material to the case given to the neutral by a party during mediation.[56] Singapore's *International Arbitration Act 2002* requires the same, in nearly identical language.[57]

There is limited international jurisprudence arising from med-arb proceedings, so it is worth noting the 2012 decision in *Gao Haiyan v Keeneye Holdings* (***Keeneye***).[58] *Keeneye* addresses fundamental questions with respect to whether combining mediation with arbitration is acceptable. Significantly, this case indicates that there is nothing wrong in principle with med-arb. The real issue in this case was the way in which the actual mediation was conducted – not the process of med-arb in general.

[49] Adam Firth et al., 'All right, Stop! Mediate and Listen: Guidance on the Use of Med-Arb in Australia', Ashurst (16 July 2018).
[50] Campbell Bridge SC, 'Med-Arb and Other Hybrid Processes: One Man's Meat is Another Man's Poison', (September 2014) 2 *The Arbitrator & Mediator* 133, 133.
[51] Adam Firth et al., 'All right, Stop! Mediate and Listen: Guidance on the Use of Med-Arb in Australia', Ashurst (16 July 2018).
[52] Weixia Gu, 'The Delicate Art of Med-Arb and its Future Institutionalisation in China', (Spring 2014) 31(2) *UCLA Pacific Basin Law Journal* 97, 111.
[53] Ibid.
[54] Ibid.
[55] *Arbitration Ordinance*, (Hong Kong, cap 609, 2019) s 33(1); *Singapore International Arbitration Act* (Singapore, cap 143A, 2002 rev ed) s 17(1).
[56] *Arbitration Ordinance*, (Hong Kong, cap 609, 2019) s 33(4).
[57] *Singapore International Arbitration Act* (Singapore, cap 143A, 2002 rev ed) s 17(3).
[58] *Gao Haiyan v Keeneye Holdings Ltd & Anor (No 2)* [2011] HKCA 459.

Gao Haiyan v Keeneye Holdings Ltd (2012)

- The Hong Kong Court of Appeal allowed the enforcement of a mainland Chinese arbitral award, reversing the decision of Reyes J in the Court of First Instance to refuse enforcement on the grounds of public policy.
- In allowing the appeal, the Court of Appeal approved the enforcement of the award in Hong Kong on two principal grounds:
    a) the respondents had waived their right to complain about the procedure of the mediation by choosing to continue with the arbitration proceedings and not raising any objection during the proceedings;[59] and
    b) there was no apparent bias on the part of the mediator-arbitrator.[60]
- The Court of Appeal also emphasised the principle that it is not open to a party to keep a complaint regarding an impropriety of bias "up its sleeve" for potential use at a later point.[61]

China

In China, rules of individual arbitration institutions are the main instruments regulating med-arb procedures, rather than arbitration legislation.[62] Despite this, med-arb procedures appear to be particularly popular in mainland China and in arbitrations with Chinese involvement.[63]

While reliable statistics on med-arb are difficult to find, such process may be occurring in nearly half of the arbitrations taking place in China.[64] Since 2015, the China International Economic and Trade Arbitration Commission and the China Academy of Arbitration Law have compiled and published statistics on arbitration cases concluded by mediation in the preceding year.[65] This data suggests that the average percentage of cases which concluded by successful mediation is 47%, and this data does not include cases where mediation attempts were futile.[66]

The current popularity of med-arb is partly attributable to China's tradition of dispute resolution and current social policy, which encourages the settlement of disputes through amicable negotiation.[67] In practice, arbitrators systematically take initiative in asking the parties if they want the tribunal to assist them in reaching an amicable solution. Chinese parties are familiar with this practice and are generally willing to cooperate to avoid leaving the tribunal with an impression that they are uncooperative.[68]

In addition, the rapid economic development of China has become a driving force in the development of med-arb, in which China has experienced an unrivalled growth in the

[59] Ibid [69].
[60] Ibid [106].
[61] Ibid [53].
[62] Weixia Gu, 'Hybrid Dispute Resolution beyond the Belt and Road: Toward a New Design of Chinese Arb-Med(-Arb) and its Global Implications',(December 2019) 29(1) *Washington International Law Journal* 117, 153.
[63] Matthew Finn, 'Remaining the dispute resolution epicentre: is Med-Arb in Europe's Future?', International Bar Association, March 2021.
[64] Weixia Gu, 'Hybrid Dispute Resolution beyond the Belt and Road: Toward a New Design of Chinese Arb-Med(-Arb) and its Global Implications',(December 2019) 29(1) *Washington International Law Journal* 117, 123.
[65] Ibid.
[66] Ibid 124.
[67] Weixia Gu, 'The Delicate Art of Med-Arb and its Future Institutionalisation in China', (Spring 2014) 31(2) *UCLA Pacific Basin Law Journal* 97, 121.
[68] Ibid.

volume of commercial transactions, and consequently a dramatic increase in commercial disputes.[69]

The Chinese Arbitration Law has remained largely stagnant since its enactment in 1994. Due process safeguards, such as a requirement of separate consent allowing the same neutral to mediate and arbitrate the dispute, are absent from China's statute.[70] Further, no statutory safeguards targeting caucusing are available in Chinese law.[71] While several Chinese arbitration institutions are adopting these safeguard procedures, there is no indication whether such procedures will be followed by others or adopted into law.[72]

Japan

As a civil law jurisdiction, Japan's dispute resolution tradition and culture bears a high resemblance to China's.[73] Med-arb is developing quickly in Japan, with a 2009 empirical study indicating that in about 40% of Japan Commercial Arbitration Association tribunals, the tribunal attempted mediation with the consent of the parties.[74]

Notably, this research suggested significant differences between the practice of arbitrators from common law backgrounds and those from civil law backgrounds.[75] Where all three arbitrators were from civil law backgrounds, the tribunal attempted to mediate in about 57% of the cases, but where at least one arbitrator was from a common law background, med-arb was not adopted in any of the cases.[76]

Japan's Arbitration Law has a 'double consent' mechanism, in which arbitrators must obtain consent from the parties for mediation to take place and the parties must also consent separately in writing in order for the arbitrator to attempt to mediate the dispute.[77] However, unlike statutes in Hong Kong and Singapore, Japan's Arbitration Law does not address the conduct of the neutral. Instead, institutional rules filled this gap to provide the due process standards for med-arb.

For instance, Japan's Arbitration Law does not govern the confidentiality of information given to the neutral or disclosed during mediation. Provisions governing this are found in the Japan Commercial Arbitration Association's Commercial Arbitration Rules, which forbid the neutral from caucusing without written consent from the parties and imposes a duty on the neutral to disclose at each instance that an *ex parte* communication has occurred.[78]

Europe

Regulation of med-arb at the national level is limited in mainland Europe.[79] Civil procedure legislation tends to address mediation during litigation, but not med-arb. For instance, the French Code of Civil Procedure and the Swiss Federal Civil Procedure Code do not mention

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[69] Ibid 122.
[70] Weixia Gu, 'Hybrid Dispute Resolution beyond the Belt and Road: Toward a New Design of Chinese Arb-Med(-Arb) and its Global Implications', (December 2019) 29(1) *Washington International Law Journal* 117, 154.
[71] Ibid 139.
[72] Ibid 154.
[73] Weixia Gu, 'The Delicate Art of Med-Arb and its Future Institutionalisation in China', (Spring 2014) 31(2) *UCLA Pacific Basin Law Journal* 97, 111.
[74] Ibid 112.
[75] Ibid.
[76] Ibid.
[77] *Chlsaiho* [Arbitration Law], Law No. 138 of 2003 (Japan) arts 38(1), 38(4) (Japan).
[78] Japan Commercial Arbitration Association Commercial Arbitration Rules 2019 (Japan) 59(2).
[79] Weixia Gu, 'Hybrid Dispute Resolution beyond the Belt and Road: Toward a New Design of Chinese Arb-Med(-Arb) and its Global Implications', (December 2019) 29(1) *Washington International Law Journal* 117, 156.

mediation in combination with arbitration, but provide for mediation during litigation.[80] Further, although French courts are empowered to conduct mediation,[81] judges rarely mediate a case themselves.[82] This indicates a view held in much of Europe that mediation and arbitration should be kept separate to maintain the neutrality of the proceedings.[83]

However, Germany's Code of Civil Procedure mentions med-arb and provides that if parties settle a dispute via a mediation process during arbitration, the arbitration proceedings end. If the parties request, the arbitral tribunal "shall record the settlement in the form of an arbitral award."[84]

Most med-arb cases involving German practitioners see members of the arbitral tribunal (often the chairperson) playing the dual role of mediator, and such practice is consistent with German court procedures, where judges may also act as mediators.[85] Accordingly, entrenched customs combining litigation and mediation may predispose German practitioners to feel more comfortable with the neutral acting as both the mediator and arbitrator.[86]

The German experience demonstrates that judicial practices can affect the willingness of practitioners to accept med-arb as a legitimate dispute resolution method. As the German judiciary's mediatory role forms part of the court's duty to settle disputes, it is not uncommon for an adjudicative neutral to subsequently 'switch hats' and take on a more conciliatory role.[87] This suggests that the prevalence of judicial mediation could be a contributing factor to the broad acceptance of med-arb in China, where judges regularly perform judicial mediation as part of their duties.[88]

Med-arb in Australia

The use of med-arb in Australia remains relatively low, although there are indications it is increasing in popularity.[89]

There has been little, if any, experience of med-arb involving two neutrals, despite the perceived benefits of this model in addressing practitioners' skepticism. As for the actual prevalence of med-arb in Australia, much like in other jurisdictions, the confidentiality that attaches to these dispute resolution processes makes it difficult to gauge how often they are being used, separately or together.[90]

Some examples of med-arb procedures in tribunals include the Australian Capital Territory Civil and Administrative Tribunal (**ACAT**), referred to as a 'conference and immediate determination' which applies to claims of less than $3,000 – most commonly boundary (fencing) matters.[91] A similar procedure is provided for under the Victorian Civil and

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[80] *Code Civil* [Civil Code] (France) arts 1442-1507; *Schweizerische Zivilprozessordnung* [Civil Procedure Code] (Switzerland) 19 December 2008, SR 272, art 214.
[81] *Code Civil* [Civil Code] (France) art 1460.
[82] Weixia Gu, 'Hybrid Dispute Resolution beyond the Belt and Road: Toward a New Design of Chinese Arb-Med(-Arb) and its Global Implications', (December 2019) 29(1) *Washington International Law Journal* 117, 158.
[83] Weixia Gu, 'The Delicate Art of Med-Arb and its Future Institutionalisation in China', (Spring 2014) 31(2) *UCLA Pacific Basin Law Journal* 97, 114.
[84] *Zivilprozessordnung* [Code of Civil Procedure] (Germany) 2005 § 1053.
[85] Weixia Gu, 'Hybrid Dispute Resolution Beyond the Belt and Road: Toward a New Design of Chinese Arb-Med(-Arb) and its Global Implications', (December 2019) 29(1) *Washington International Law Journal* 117, 157.
[86] Ibid.
[87] Ibid.
[88] Ibid 158.
[89] Leon Chung et al., 'NSWCA Highlights 'Med-Arb' Pitfalls', Herbert Smith Freehills, 8 April 2019.
[90] Royden Hindle, 'Is Med/Arb an Oxymoron?', (2013) 1.
[91] ACAT, 'Conference and immediate determination', 2021.

Administrative Tribunal's (**VCAT**) Fast Track Mediation and Hearing Process, which is suitable for small civil claims disputes of up to $10,000.[92]

Many ADR processes, including hybrids, moved to audio-visual link (**AVL**) and telephone communications in response to restrictions imposed due to the COVID-19 pandemic.

Legislative recognition

Commercial Arbitration Acts

Domestically, med-arb operates primarily in commercial settings, where there have been significant reforms to arbitration legislation and systems which may contribute to its increased acceptance.

The uniform *Commercial Arbitration Acts* (**CAA**) regulate the use of med-arb for domestic arbitrations and as of 2017, all states and territories have adopted respective CAA legislation. The CCA contemplates the arbitrator fulfilling the dual roles of arbitrator and mediator and provides that arbitrators can only act as a mediator if the governing arbitration agreement allows for this arrangement, or if every party has consented.[93] The term 'mediator' is defined broadly in the uniform legislation to include reference to a conciliator or other non-arbitral intermediary.[94]

The *International Arbitration Act 1974* (Cth) governs international commercial arbitration in Australia.[95] The regulation of med-arb, as included in the CAA, is not included in the international arbitration regime in Australia.[96]

Section 27D

Section 27D of the CAA provides for several procedural safeguards where an arbitrator acts as a mediator, resembling various provisions in Hong Kong and Singapore's respective legislation:

a) Arbitrators can only act as mediators under the CAA if the arbitration agreement allows for such an arrangement, or if each party has consented to the arbitrator so acting.[97]

b) Arbitrators may communicate with the parties collectively or separately only if the parties consent.[98]

c) The arbitrator is required to treat information obtained from a party with whom they communicate separately in the mediation as confidential, unless that party otherwise agrees or unless the arbitration agreement provides otherwise.[99]

In addition to these general safeguards, the CAA also provides that an arbitrator who has acted as a mediator in the mediation proceedings may not conduct subsequent arbitration

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[92] VCAT, 'Fast track mediation and hearing', 2021.
[93] Weixia Gu, 'Hybrid Dispute Resolution beyond the Belt and Road: Toward a New Design of Chinese Arb-Med(-Arb) and its Global Implications', (December 2019) 29(1) *Washington International Law Journal* 117, 159.
[94] *Commercial Arbitration Acts* s 27D(8).
[95] *International Arbitration Act 1974* (Cth) pt I.
[96] Weixia Gu, 'Hybrid Dispute Resolution beyond the Belt and Road: Toward a New Design of Chinese Arb-Med(-Arb) and its Global Implications', (December 2019) 29(1) *Washington International Law Journal* 117, 160.
[97] See *Commercial Arbitration Act 2010* (NSW); *Commercial Arbitration Act 2011* (SA); *Commercial Arbitration Act 2011* (Vic); *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT); *Commercial Arbitration Act 2011* (TAS); *Commercial Arbitration Act 2012* (WA); *Commercial Arbitration Act 2013* (QLD); *Commercial Arbitration Act 2017* (ACT) ('***Commercial Arbitration Acts'***) s 27D(1).
[98] *Commercial Arbitration Acts* s 27D(2)(a).
[99] Ibid s 27D(2)(b).

proceedings without the written consent of all the parties given upon, or after, the termination of the mediation proceedings.[100] This is a unique feature of the CAA, with no equivalent provision in Hong Kong or Singapore's legislation.[101]

This mechanism helpfully provides the parties with a further opportunity after the termination of mediation to consider whether to retain the same arbitrator(s). If the arbitrator's conduct or attitude gives any party the impression that their neutrality may be affected, one or both of the parties can choose to appoint a substitute arbitrator.[102]

This provision was tested in 2018 before the New South Wales Supreme Court in the 2018 case of *Ku-ring-gai Council v Ichor Constructions* (***Ku-ring-gai***).[103] Implied consent from both parties was ruled to be insufficient to meet the statute's requirement that the neutral must seek written consent before resuming arbitration after a failed mediation or where mediation efforts are futile.[104]

Ku-ring-gai Council v Ichor Constructions Pty Ltd (2018)

- Ku-ring-gai Council and Ichor were parties to an arbitration, where the arbitrator asked, "off the record",[105] if the parties would consent to a proposal for settlement from him "under the cloak of mediation".[106]
- Written consent for the arbitrator to act as a mediator was expressly given by both parties under section 27D of the *Commercial Arbitration Act 2010* (NSW). The arbitrator, in 'mediator mode', proposed that each party walk away from the arbitration. The proposal was not accepted and the arbitration subsequently resumed.[107]
- Subsection 27D(4) of the CAA provides that, on or after termination of a mediation, an arbitrator who has acted as a mediator may not thereafter conduct an arbitration in relation to the dispute unless the parties give their written consent.
- Four days after the last day of the arbitration hearing, Ichor sent a letter to the arbitrator, arguing they did not have a mandate to subsequently resume the arbitration following the mediation because the parties did not provide their written consent. The Council subsequently commenced proceedings in the Supreme Court of New South Wales.[108]
- McDougall J held that the parties did not consent to the arbitrator acting as mediator and then resuming as an arbitrator, despite him doing so.[109] It was held that that the arbitrator did not have a mandate to resume the arbitration because the parties had not provided their written consent pursuant to section 27D of the CAA.

[100] Ibid s 27D(4).
[101] Weixia Gu, 'The Delicate Art of Med-Arb and its Future Institutionalisation in China', (Spring 2014) 31(2) *UCLA Pacific Basin Law Journal* 97, 115.
[102] Ibid.
[103] (2018) NSWLR 610.
[104] Ibid.
[105] Ibid [7].
[106] Ibid [31], [33] and [42].
[107] Ibid [15].
[108] Ibid [48].
[109] Ibid [48].

- What is required to satisfy the requirement for written consent is a "written expression of consent signed for or by, or otherwise attributable to, the parties whose written consent is required"[110] and the writing must make clear that each party consents to whatever it is that cannot happen without written consent.[111]
- An appeal to the NSW Court of Appeal was unsuccessful.[112]

The *Ku-ring-gai* decision provides useful guidance on the use of med-arb in Australia under the CAA. Given the due process and impartiality concerns which arise in respect of med-arb, practitioners and parties should be aware of the potential advantages and disadvantages of this process, as well as the strict requirements of the CAA when considering its use to resolve a dispute.[113]

Ku-ring-gai notably demonstrates that Australian courts will strictly construe the requirement for written consent and that an arbitrator who has acted as a mediator may not commence arbitration proceedings unless the parties have expressly provided such consent.

Failure to comply with the procedural requirements of the CAA is likely to mean that any arbitral award will be vulnerable on the basis that the arbitrator lacked a mandate to give the award in the first place.[114]

Land and Environment Court Act 1979 (NSW)

A form of med-arb has legislative recognition in the *Land and Environment Court Act 1979* (NSW) where conciliation in the Land and Environment Court is undertaken by a commissioner or registrar of the Court.

Sections 34 and 34AA provide for a combined or hybrid process involving conciliation first, and then – if the parties do not agree to resolve the dispute at conciliation – adjudication.[115] No caucuses or private sessions are held in the conciliation phase.

The power for a commissioner of the Court to dispose of the proceedings bears a close resemblance to a determinative ADR process, such as arbitration. In their capacity to adjudicate upon the information provided at mediation, the commissioner is acting in a somewhat hybrid capacity through a 'concilio-arbitration' process.

Case study: What dispute resolution process do disputants want in Australia?

An empirical 2014 study into the high-density housing sector formed the basis for a simulation that was empirically tested on 252 university students in Victoria.[116] The research compared three types of third-party intervention in a simulated owners corporation dispute.[117]

[110] Ibid [56].
[111] Ibid.
[112] See *Ku-ring-gai Council v Ichor Constructions Pty Ltd* [2019] NSWCA 2.
[113] Adam Firth et al., 'All right, Stop! Mediate and Listen: Guidance on the Use of Med-Arb in Australia', Ashurst, 16 July 2018.
[114] Ibid.
[115] *Land and Environment Court Act 1979* (NSW) ss 34, 34AA.
[116] Peter Condliffe and John Zeleznikow, 'What Process do Disputants Want? An Experiment in Disputant Preferences', (2014) 40(2) *Monash University Law Review* 305, 312.
[117] Ibid.

Participants in the simulations participated in one of three processes as follows:[118]

- **Choice 1:** Arbitration followed by mediation (**Arb-med**).
- **Choice 2:** Mediation followed by arbitration by the same person (**Med-arb same**).
- **Choice 3:** Mediation followed by arbitration by a different person (**Med-arb diff**).

The findings demonstrated that participants preferred the med-arb procedure over arb-med, with 'med-arb same' (Choice 2) by far the most preferred process.[119] That is, the ability to mediate a matter first to potentially deny the imposition of the arbitration option was highly preferred. This was highly consistent across the experimental conditions.

The participants distinguished between the three processes in terms of control elements, and it was apparent that the presence of an adjudicatory process in the initial stages of a third-party process (such as arb-med in Choice 1) diminishes the sense of party control, at least before the intervention has occurred.[120] The results accordingly indicated that disputants prefer procedures where they feel they will have more control and autonomy.[121] However, participants' subjective rationales for choosing a particular process were largely based upon fairness perceptions. Party role, gender or status of residence seemed to have little impact upon the preferences made or the reasons for those preferences.[122]

Accordingly, dispute resolution processes where the same person performs multiple roles appears to be a feature that disputants may see as enhancing their control and thus increasing their potential acceptance of the process.[123]

Advantages of med-arb

Finality and efficiency

An important attribute of med-arb is the certainty of a final decision, which is also the essential attribute of arbitration.[124] Regardless of whether the outcome of the med-arb results entirely from mediation or both mediation and arbitration, it becomes the entire arbitral settlement, which is binding and enforceable as law.[125]

Med-arb also can save time and money (compared to sequential, separate phases of mediation and arbitration) in two important respects:

- If the mediation phase does not reach settlement, the parties and their representatives do not need to hire another neutral who is unfamiliar with the case, and then prepare for arbitration.[126]
- The issues in dispute are frequently narrowed during the mediation phase and this progress can carry over directly into the arbitration, creating more efficiencies in the subsequent arbitration process.[127]

[118] Ibid 314.
[119] Ibid 305.
[120] Ibid.
[121] Ibid 333.
[122] Ibid 305.
[123] Ibid 334.
[124] Mark Batson Baril and Donald Dickey, 'MED-ARB: The Best of Both Worlds or Just a Limited ADR Option?', (January 2017), 4.
[125] Ibid.
[126] Ibid.
[127] Ibid.

This is a particular advantage for smaller, less complex disputes, where parties seek to be as pragmatic as possible and wish to participate in an expedient and cost-effective process.[128]

Flexibility

The unique flexibility inherent in med-arb allows the process to be modified to fit the dispute and the parties' interests. While med-arb may not be suitable for every dispute, it is a key example of 'adaptive ADR' where different forms of ADR are combined and tailored to individual circumstances and preferences.[129]

By way of illustration, parties to an ongoing business relationship have a mutual interest in being able to resolve inevitable disputes expediently, privately and in a fair way so that they can move forward amicably. Accordingly, med-arb can be a sensible option for disputes that the parties view as 'irritants' to a valuable commercial relationship, where both sides recognise that their continuing relationship is of greater importance than the stakes involved in such disputes.[130]

Perceptions of justice and control

Disputing parties are often motivated to seek control of the dispute resolution process and outcome.[131] Med-arb gives parties an ability to feel in control and participate in decision-making, which contributes to an understanding that the process is 'just'.[132] Med-arb also allows for the incremental relinquishment of party control when the parties are unable to reach agreement by themselves.[133]

Due to the inclusion of mediation (typically at the commencement of the process), med-arb may be perceived as more familiar and is likely to be trusted by the parties, although this is dependent upon the processes being appropriately implemented.[134] Where such trust is established, there is less likely to be inter-party hostility and more willingness to follow the directions of the neutral compared to other dispute resolution methods.[135]

Risks and challenges of med-arb

By its very nature, med-arb is a hybrid procedure designed to blend the advantages of both mediation and arbitration. It cannot be expected that these distinct dispute resolution methods can merge without some form of compromise being made and risks arising.[136]

Some med-arb variations are more likely than others to avoid, or substantially mitigate, the risks identified below.[137] The majority of concerns with med-arb arise from the idea that the same neutral must 'switch hats' to perform the roles of mediator and arbitrator throughout the process. Accordingly, the forms of med-arb involving two or more neutrals (such as

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[128] Alan Wein and Jessica Rogers, 'The Med-Arb Model Dissected and Analysed in existing Academic and Practitioner Papers', (March 2020), Wein Mediation, 3.
[129] Mark Batson Baril and Donald Dickey, 'MED-ARB: The Best of Both Worlds or Just a Limited ADR Option?', (January 2017) 4.
[130] Ibid.
[131] Peter Condliffe and John Zeleznikow, 'What Process do Disputants Want? An Experiment in Disputant Preferences', (2014) 40(2) *Monash University Law Review* 305, 317.
[132] Ibid 308.
[133] Ibid 324.
[134] Ibid.
[135] Ibid.
[136] The Hon. Justice Clyde Croft, 'Alternative Dispute Resolution in Arbitration: Is arb-med really an option?', Supreme Court of Victoria, November 2014, 4.
[137] Nancy A. Welsh, 'Switching Hats in Med-Arb: The Ethical Choices Required to Protect Process Integrity', in *Mediation Ethics: A Practitioner's Guide* (Omer Shapira ed., 2021) 213, 233.

sequential or overlapping med-arb) may not raise these issues to the same extent as pure med-arb.

Of course, any process involving multiple neutrals will likely require additional time commitments and expenses for the parties,[138] potentially negating some of the previously outlined benefits of this method. Nonetheless, if the dispute is sufficiently large or complex, engaging an additional neutral may be appropriate, noting the two processes may run concurrently.[139]

Procedural concerns

Med-arb has been subject to criticisms of a procedural nature which question the neutrality and fairness of the arbitration, particularly where the arbitrator may have received private representations from either of the parties when previously acting as the mediator.[140] These concerns are primarily in relation to the dual roles that the neutral is able to perform as part of the pure med-arb process.

Confidentiality

A key criticism of the same neutral fulfilling the roles of mediator and arbitrator during med-arb is that the person has likely been privy to confidential information revealed by the parties during caucusing in the mediation phase.[141] Once arbitration begins, this may cause parties to perceive possible bias on the part of the neutral and a denial of procedural fairness.[142]

The concept of procedural fairness requires that arguments be made in the presence of the opposing party and subject to rebuttal. This concept creates an unavoidable dichotomy between the confidentiality of private disclosures made during caucusing against the transparency of arbitration.[143] Further, an arbitrator may appear to be (and may actually be) biased if they have received private representations from the parties while acting as the mediator.[144]

Abstract discussions in the existing literature as to whether it is possible for the neutral to successfully 'disregard' confidential information gained in mediation for the purpose of arbitration must also be tempered by the parties' *perception* of the neutral's fairness and even-handedness in a specific case.[145]

Mitigation measures

The significance of the need for confidentiality during med-arb will primarily depend on the circumstances of a specific dispute.[146] Regardless, an arbitrator should not be put in the position where they have formed an opinion on a matter in controversy prior to hearing evidence and argument.[147]

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[138] Ibid 234.
[139] Ibid.
[140] The Hon. Justice Clyde Croft, 'Alternative Dispute Resolution in Arbitration: Is arb-med really an option?', Supreme Court of Victoria, November 2014, 3.
[141] Anne Ardagh, 'Med-arb in disputed child matters: an exploration of some relevant considerations', (September 2012) 4.
[142] Ibid.
[143] The Hon. Justice Clyde Croft, 'Alternative Dispute Resolution in Arbitration: Is arb-med really an option?', Supreme Court of Victoria, November 2014, 3.
[144] Ibid 4.
[145] Mark Batson Baril and Donald Dickey, 'MED-ARB: The Best of Both Worlds or Just a Limited ADR Option?', (January 2017) 5.
[146] Ibid.
[147] The Hon. Justice Clyde Croft, 'Alternative Dispute Resolution in Arbitration: Is arb-med really an option?', Supreme Court of Victoria, November 2014, 4.

Depending on the dispute and the preferences of the parties, possible ways to mitigate concerns regarding confidentiality during the pure med-arb process may include:

- the neutral not holding confidential private sessions with either party;
- the parties agreeing that if they consent to arbitration by the mediator, that the mediator may use all the information they have acquired (in joint and/or private sessions); or
- the parties consenting to the neutral revealing all relevant confidential information.[148]

Another mitigation option is to enable each party to 'opt out' of having the same neutral continue from the mediation phase into the arbitration phase.[149] The potential loss in efficiency from shifting to standalone arbitration may be justified by the peace of mind provided to the disputing parties, as well as the incentive it creates for the neutral to consistently maintain an appearance of impartiality.[150]

In addition, the procedural steps set out in section 27D of the CAA (outlined above) can operate to alleviate parties' concerns relating to confidentiality and maintain integrity in the broader arbitral process.[151]

Behavioural concerns

Diminished forthrightness and creative problem-solving

A frequent behavioural concern with med-arb is that disputants are likely to be inhibited in their discussions with the neutral if they expect that the mediator will arbitrate the same dispute.[152] This can impede any forthrightness or bargaining creativity that a party may ordinarily display during the mediation phase, and parties may not feel comfortable advising the mediator of which settlement proposals they are prepared to accept.[153]

Another commonly raised concern with med-arb is that if arbitration is the known end-point of the dispute resolution process, this may lead parties to treat any mediation as merely preparation for the arbitration.[154] This could lead to an erosion of any creative problem-solving that can arise from the dialogue, disclosures and compromises within the mediation phase, defeating the very purpose of the mediation.[155] Further, if parties know their dispute may go to arbitration, the mediation process may be affected by the parties trying to gain the sympathy or favour of a decision maker early.[156]

It is noted, however, that should the parties fail to be as forthcoming in the mediation as they may otherwise be, to the point that the mediation fails, the dispute reverts to arbitration for final resolution.[157] As such, it could be alternatively argued that med-arb increases the likelihood that parties will participate in good faith during the mediation stage. This is

[148] Anne Ardagh, 'Med-arb in disputed child matters: an exploration of some relevant considerations', (September 2012) 4.
[149] Mark Batson Baril and Donald Dickey, 'MED-ARB: The Best of Both Worlds or Just a Limited ADR Option?', (January 2017) 4.
[150] Ibid.
[151] The Hon. Justice Clyde Croft, 'Alternative Dispute Resolution in Arbitration: Is arb-med really an option?', Supreme Court of Victoria, November 2014, 4.
[152] Ibid 2.
[153] Ibid.
[154] Ibid.
[155] Ibid.
[156] Mark Batson Baril and Donald Dickey, 'MED-ARB: The Best of Both Worlds or Just a Limited ADR Option?', (January 2017) 6.
[157] The Hon. Justice Clyde Croft, 'Alternative Dispute Resolution in Arbitration: Is arb-med really an option?', Supreme Court of Victoria, November 2014, 3.

because the parties are aware that should the mediation fail, they will lose control over the outcome of the dispute,[158] and will face the additional time and cost involved in arbitration.[159]

Coercive influence

When mediation and arbitration are combined, it can conceivably create a dynamic where the mediator places coercive pressure on the parties during the mediation via the threat of impending arbitration.[160] The associated concern for some commentators is that what appears to be a negotiated resolution may be perceived by the parties as an imposed one, thus diminishing the degree of satisfaction and commitment at the conclusion of the process.[161]

However, it should be acknowledged that the imminent power of the neutral to render a decision does not, by itself, mean that a party will feel 'pressured' by how the negotiation was facilitated during mediation.[162] Additionally, any concern with a 'coerced' decision loses force when it is considered that the parties made a voluntary and informed choice to participate in med-arb, a process that explicitly authorises the third-party neutral to impose a final binding decision.[163]

The potential for coercion also exists in traditional mediation if the neutral allows it to happen. This risk – in both med-arb and other dispute resolution methods – is heavily dependent on the behaviour and communication style of the neutral and any pressure tactics they may employ. This does not mean that the process of med-arb is inherently or inevitably coercive.

Guidance for practitioners

Med-arb is not 'one size fits all'

The advantages and disadvantages of med-arb depend upon the goals and values of the parties.[164] What one party may see as a strength of the med-arb process, such as the leverage of the neutral during mediation, may be viewed by another as a flaw, being the power that contributes to potential pressure tactics and 'coercion' of a mediated settlement.[165]

Educate parties and obtain necessary consents

It is important that practitioners give clients sufficient understanding and information about the med-arb process, including the roles of the neutral in each phase, the specifics of the med-arb variation being used, any relevant risks and the obligation to act in good faith.[166]

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[158] Matthew Finn, 'Remaining the dispute resolution epicentre: is Med-Arb in Europe's Future?', International Bar Association, March 2021.
[159] Nancy A. Welsh, 'Switching Hats in Med-Arb: The Ethical Choices Required to Protect Process Integrity', in *Mediation Ethics: A Practitioner's Guide* (Omer Shapira ed., 2021) 213, 234.
[160] Mark Batson Baril and Donald Dickey, 'MED-ARB: The Best of Both Worlds or Just a Limited ADR Option?', (January 2017) 6.
[161] Ibid 5.
[162] Ibid 6.
[163] Ibid 5.
[164] Ibid 3.
[165] Ibid.
[166] Nancy A. Welsh, 'Switching Hats in Med-Arb: The Ethical Choices Required to Protect Process Integrity', in *Mediation Ethics: A Practitioner's Guide* (Omer Shapira ed., 2021) 213, 237.

Providing this information enables the parties to make well-informed decisions about the risks and trade-offs inherent in this choice of process,[167] and will minimise the risk of confusion around the timing and nature of the mediator-arbitrator's change of role.[168]

Ensuring the parties' informed consent to med-arb is essential,[169] and the med-arb agreement should be sufficiently detailed to avoid ambiguity.[170] The Centre for Effective Dispute Resolution (**CEDR**) Commission on Settlement in International Arbitration recommended that to minimise risks associated with med-arb, the parties' consent to the following should be documented in writing:

- Consent to the mediator resuming as arbitrator.
- Consent as to the way in which the arbitrator is to deal with information learned in confidence during the mediation.
- Consent to the arbitrator meeting with each party privately during the mediation phase and whether the arbitrator is under an obligation to disclose that information.
- Consent that the parties will not, at a later time, use the fact that the arbitrator has acted as a mediator as a basis for challenging the arbitrator or any award which is made.[171]

While gaining the parties' informed consent to the neutral's dual service is a precondition for med-arb to commence, it is not sufficient in and of itself to overcome certain violations of neutrals' ethical obligations and to protect the integrity of the mediation and arbitration processes.[172]

Compliance with professional obligations

A properly skilled professional should manage and minimise concerns regarding the med-arb process (outlined above) so that the parties can benefit from the advantages of this process which neither mediation nor arbitration can individually offer.[173]

There are no rules of ethics that apply specifically to neutrals providing med-arb services. However, because the process combines mediation and arbitration, the obligations that apply to each of those two processes are relevant.[174] These include:

- oral or written agreements entered into to conduct the mediation and/or arbitration;
- relevant legislation, such as the Australian Consumer Law;
- professional standards;

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[167] Mark Batson Baril and Donald Dickey, 'MED-ARB: The Best of Both Worlds or Just a Limited ADR Option?' (January 2017) 3.
[168] Alan Wein and Jessica Rogers, 'The Med-Arb Model Dissected and Analysed in existing Academic and Practitioner Papers' (March 2020) Wein Mediation, 56.
[169] Nancy A. Welsh, 'Switching Hats in Med-Arb: The Ethical Choices Required to Protect Process Integrity', in *Mediation Ethics: A Practitioner's Guide* (Omer Shapira ed., 2021) 213, 237.
[170] Alan Wein and Jessica Rogers, 'The Med-Arb Model Dissected and Analysed in existing Academic and Practitioner Papers' (March 2020) Wein Mediation, 72.
[171] Ibid 71-2.
[172] Nancy A. Welsh, 'Switching Hats in Med-Arb: The Ethical Choices Required to Protect Process Integrity', in *Mediation Ethics: A Practitioner's Guide* (Omer Shapira ed., 2021) 213, 237.
[173] Mark Batson Baril and Donald Dickey, 'MED-ARB: The Best of Both Worlds or Just a Limited ADR Option?', (January 2017) 6.
[174] Nancy A. Welsh, 'Switching Hats in Med-Arb: The Ethical Choices Required to Protect Process Integrity', in *Mediation Ethics: A Practitioner's Guide* (Omer Shapira ed., 2021) 213, 222.

- additional obligations imposed by holding a practising certificate and rules of conduct issued by lawyers' professional associations; and
- if the practitioner is a barrister, Barristers' Rules published by Bar Associations in various jurisdictions.[175]

Practitioners may be assisted by the Law Council's Trilogy of Guidelines for mediation.[176] Practitioners remain responsible for making independent judgments regarding whether they can fulfill their ethical obligations – to be impartial, avoid conflicts of interest, protect the integrity of both the mediation and arbitration phases, and conduct a fair arbitration hearing.[177] In making such judgments, it is up to neutrals, not the parties, to protect public trust in the mediation and arbitration professions and processes.[178]

Skills and training

Dispute resolution practitioners who wish to conduct a resolution process as a mediator-arbitrator should be suitably and adequately skilled in both facilitative mediation and arbitration, notwithstanding that these are vastly different skills and mindsets.[179]

To create a productive and fair process, the practitioner must be able to:

- understand the requirements and standards for both mediation and arbitration and have experience in both roles;
- move from a facilitative role to an evaluative, decision-making one;
- disregard the information and positions of the parties learned during the mediation; and
- gain and keep the trust of the parties and establish and maintain credibility for the process.

The neutral's personality, substantive expertise and experience all play significant roles in creating and promoting this trust.[180] In addition, the following general competencies are of particular importance for a mediator-arbitrator:

- possessing good passive and active listening skills without being tempted to offer premature opinions or advice;
- being at ease with not playing an active or predominant role at all stages of a session and not needing to constantly focus on solutions;
- facilitating direct communication between the parties and providing them with opportunities to express their opinion;
- summarising and paraphrasing abilities, to ensure the neutral has correctly heard the parties and understood their positions;
- reframing skills and patience to create a constructive, rather than an adversarial and/or emotional atmosphere;

[175] Polina Kinchina, 'Much Obliged: When could a lawyer mediator be liable for breaching their obligations?', LexisNexis, 2020.
[176] Law Council of Australia, 'Guidelines for Parties in Mediations', (May 2019); 'Guidelines for Lawyers in Mediations', (May 2019); 'Ethical Guidelines for Mediators', (May 2019).
[177] Nancy A. Welsh, 'Switching Hats in Med-Arb: The Ethical Choices Required to Protect Process Integrity', in *Mediation Ethics: A Practitioner's Guide* (Omer Shapira ed., 2021) 213, 237.
[178] Ibid.
[179] Alan Wein and Jessica Rogers, 'The Med-Arb Model Dissected and Analysed in existing Academic and Practitioner Papers', (March 2020) Wein Mediation, 58.
[180] Ibid 59.

- being at ease in needing to make a clear determination rather than only facilitating; and
- being sensitive to a witness' behavioural differences during a mediation session and as a witness in the hearing.[181]

Even with sufficient training, unless practitioners are comfortable in their roles as both a mediator and arbitrator, they will not effectively perform them. Parties may quickly become conscious of this, which can often jeopardise the potential for settlement.[182]

In addition, any strong-arm tactics by the neutral would likely cause a party to feel unheard, disrespected or unfairly treated, thereby impinging on that party's sense that 'justice is being done'.[183]

Conclusion

Given the right circumstances, med-arb has some significant advantages. This process also has significant drawbacks if applied to the wrong conflict,[184] or if the neutral does not have the appropriate technical and ethical competencies to fulfil the dual roles of mediator and arbitrator.

It is up to conflict resolution professionals to understand the options available to parties, the legal and ethical intricacies involved, and the ways to safeguard against the risks inherent in the med-arb process. It should be noted that section 27D of the CAA provides some support to employ med-arb without encountering the procedural problems that may otherwise arise.[185] Where appropriate, there is the option of engaging two neutrals to avoid the perceived risks of the arbitrator 'double-hatting'.

Despite the undeniable risks, med-arb is now an established practice in many jurisdictions.[186] The growth of med-arb internationally, particularly in Asia, cannot be ignored, and it is likely that the increasing links with Asian jurisdictions may result in med-arb being a more frequently used form of dispute resolution by Australian parties, both domestically and internationally.[187] Jurisdictions which are too slow to embrace med-arb risk being left behind in the resolution of international disputes.[188]

[181] Micheline Dewdney, 'Hybrid Processes', (December 2006) 5 *The Arbitrator & Mediator* 145, 150.
[182] Ibid.
[183] Mark Batson Baril and Donald Dickey, 'MED-ARB: The Best of Both Worlds or Just a Limited ADR Option?', (January 2017) 5.
[184] Ibid 7.
[185] The Hon. Justice Clyde Croft, 'Alternative Dispute Resolution in Arbitration: Is arb-med really an option?', Supreme Court of Victoria, November 2014, 5.
[186] Royden Hindle, 'Is Med/Arb an Oxymoron?', (2013) 8.
[187] Adam Firth et al., 'All right, Stop! Mediate and Listen: Guidance on the Use of Med-Arb in Australia', Ashurst, 16 July 2018.
[188] Matthew Finn, 'Remaining the dispute resolution epicentre: is Med-Arb in Europe's Future?', International Bar Association, March 2021.