Med-Arb and Other Hybrid Processes: One Man's Meat Is Another Man's Poison[1]

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Hybrid dispute resolution processes bring together the elements of both mediation and arbitration. The nature of the hybrid process can be both flexible and varied. Common examples are a mediation followed by arbitration ('**med–arb**') or an arbitration followed by mediation ('**arb-med**') or even a process whereby one goes from arbitration to mediation and then back to arbitration if the matter does not resolve ('**arb–med–arb**').

What is a Hybrid Process?

In a med-arb, the parties first attempt to resolve their dispute by mediation. Where the mediation does not result in a settlement, the parties will proceed to arbitration. Where the parties choose med-arb as their dispute resolution mechanism, they prescribe a fixed time frame during which they will retain control over how the dispute will be resolved and work towards a voluntary settlement with the other party. If no settlement ensues, they proceed to the arbitration phase and opt for a final binding determination of the dispute by a neutral person.

Geographical and Cultural Dividing Lines of Opinion

Few procedures in the world of dispute resolution attract as sharp a division of opinion about their validity, effectiveness, or ethical issues associated with them as hybrid processes. The lines of division of opinion among dispute resolution practitioners as to the merits of med-arb are often sharply drawn by reference to legal background and culture. The strongest critics of such processes are usually from common law backgrounds.

Those from civil law backgrounds tend to be far more comfortable with the process. Culture also influences an arbitrator's perception of the validity of the process. Surveys on this issue have demonstrated that, among Europeans, German lawyers are most positive.[3] In Asia such processes are widely accepted and utilised, with Japan probably most commonly utilising the process in a widespread way.[4]

1 This paper was originally presented to the 10th Anniversary Conference of the Asia-Pacific Regional Arbitration Group (APRAG) Conference held in Melbourne from 26-28 March 2014.

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3 Michael E Schneider, 'Combining Arbitration with Conciliation' (Paper presented at ICCA Congress Series No. 8, International Arbitration Conference, Seoul, 10-12 October 1996).

4 Tatsuya Nakamura, 'Brief Empirical Study on Arb-Med in the JCAA Arbitration' JCAA Newsletter no. 22 June 2009.

The rules of the arbitral body may provide that as a first step the parties endeavour to resolve their differences either on their own or with the assistance of a third party such as a mediator. Sometimes provision is made for the arbitral tribunal to participate in this process if the parties agree. The Indonesian National Board of Arbitration (BANI) Arbitration Rules contemplate not only a hybrid process but also, if agreed by the parties, the participation of the arbitrator in any pre-arbitration attempt at a negotiated settlement or a mediation.[5]

As the world of dispute resolution becomes more international (as evidenced by the rise of international arbitration and mediation), questions of the extent to which practitioners from different jurisdictions are comfortable with particular procedures achieves particular significance. One should not lose sight of the fact that, in general terms, in East and Southeast Asia only Singapore, Malaysia, and Hong Kong have their legal systems firmly rooted in the common law tradition.

Potential Advantages of Hybrid Processes

The theory underlying the benefit of hybrid processes is consistent with the often stated objective of making the world of dispute resolution by either litigation or ADR 'just, quick and cheap'.[6] Med-arb has the theoretical advantage of allowing the parties an opportunity to come to their own agreement without the time, expense and relationship-breaking exercise of a contested arbitration. If that fails, there is then the immediate certainty of resolution by way of a binding decision of an arbitrator. There are a number of significant procedural and more fundamental difficulties which must be addressed if embarking on such a procedure is to be a success.

Procedural Issues And Complexities

It is important to also bear in mind that there is a distinction between a settlement or compromise reached during an arbitration and the concept of converting a mediated settlement agreement into an arbitration award for the purposes of having an enforceable award. The UNCITRAL Arbitration Rules (2010) provide for settlement or compromise of the dispute during the course of the arbitration. Article 36(1) provides:

> *If, before the award is made, the parties agree on a settlement of the dispute, the arbitral tribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by the parties and accepted by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms. The arbitral tribunal is not obliged to give reasons for such an award.*

Alan Limbury advocates the proposition that the process should formally begin as an arbitration then revert to a formal mediation.[7] This is because if the dispute is resolved in the mediation phase without the formal commencement of arbitration there will be no 'dispute' entitling the parties to enforceable

5 BANI Arbitration Rules Article 20 Rule 1.

6 *Civil Procedure Act 2005* (NSW) s 56(1).

7 Alan Limbury, 'Getting the Best of Both Worlds with Med-Arb' (2010) 48 *Law Society Journal* 62.

consent award. If the proceedings do not resolve at mediation then the matter proceeds by reverting to arbitration and continues as if the mediation had not taken place.

As Anthony Connerty points out in a paper given to the Asian Mediation Association,[8] the issues which are raised in relation to salvaging a legally enforceable settlement from an agreement reached from a hybrid process are not without their difficulties. The various provisions contained in various rules to the effect that settlement reached during a mediation can be 'converted' into arbitration awards are wise given the provisions and benefits of the New York Convention. He advocates a similar solution to Alan Limbury.

Philosophical Issues and Problems

The specific objections of those opposed to hybrid processes also concern a number of fundamental questions which include whether one can hold an effective mediation given on the one hand the concept of full and frank disclosure during a mediation and on the other hand the constraints relating to keeping material confidential in a quasi-adversarial contest such as a contested arbitration. More fundamental questions arise when one comes to consider the natural justice implications of this conflict.

Opponents of such processes point to cases such as *Gao Hai Yan & Anor v. Keeneye Holdings Ltd & Ors*[9] (**Keeneye**) as supportive of the proposition that the use of such hybrid processes can be incompatible with the obligation of fairness in arbitration. It is suggested that the conduct of the arbitrators in the Keeneye case would be regarded as unsatisfactory by any reputable arbitration practitioner irrespective of their jurisdictional background and culture.

In the Keeneye case an arbitration under the Xian Arbitration Commission took place in China. In the dispute, Keeneye asserted that a share transfer agreement ('STA') was valid. Gao Hai Yan (**Gao**) said it was not. The arbitration occurred took place over several months. After the first sitting, the parties agreed to arb-med, the mediation somewhat unusually occurred during a dinner at the Xian Shangri-La Hotel. The dinner was attended by the Secretary General of the Xian Arbitration Commission, the arbitrator appointed by Gao; and a person related to Keeneye and regarded as 'friendly' with them.

At the dinner there was a proposal that the STA was valid but Keeneye pay RMB 250 million to Gao. The Keeneye associate was asked to 'persuade' Keeneye to accept the proposal as a mediated settlement. Keeneye and Gao both rejected the proposal. Gao also subsequently rejected it. The final award was quite different – the STA was found to be invalid and there was a non-binding recommendation that Gao pay RMB 50 million to Keeneye.

Keeneye appealed to the Xian Intermediate Court to set aside the award on a variety of grounds including bias on the part of the arbitration tribunal. The Xian Intermediate Court did not find any bias. In enforcement proceedings in Hong Kong, at first instance the Hong Kong court (Reyes J.) found, with some reservations, that the dinner in the hotel amounted to mediation. However enforcement was refused

8 Anthony Connerty, 'ADR as a 'Filter' Mechanism: The Use of ADR in the Context of International Disputes' (Paper presented at the Asian Mediation Association Alternative Dispute Resolution Conference, Singapore, 4-5 October 2012).

9 [2011] HKEC 514.

on the grounds of an apprehension of apparent bias. For the purposes of this paper, it is noteworthy that His Honour stated in unequivocal terms that 'there is nothing wrong in principle with med-arb'. The real problem was the way in which the 'mediation' was conducted.

On appeal, the Hong Kong Court of Appeal reversed the decision of Reyes J and held that the applicants could enforce the arbitration award. There was a finding of waiver by the respondents and they were not able to challenge the award on the basis of matters which they had failed to object to at the time.

Hybrid Processes are Here to Stay

For the purposes of the discussion on the subject of this paper, the real significance of the Keeneye case is that it addresses fundamental questions with respect to whether or not combining mediation with arbitration is acceptable. Despite the views of opponents of the process, there is no authority to the effect that such hybrid processes are not acceptable. At present the different sides to this debate appear to be somewhat polarised along geographical and common law/civil law lines.

Hybrid processes are recognised in legislation in a number of common law jurisdictions.[10] Legislation attempts to address the difficulties. It may not be a coincidence that such legislation exists most frequently in common law jurisdictions where both practitioners and the courts are culturally far less comfortable with hybrid processes than in civil law jurisdictions. The New South Wales approach is consistent with Article 12 of the UNCITRAL Model Law on International Commercial Conciliation (2002).

Enforceability and Finality

Both the Model Law[11] and the New York Convention[12] have provisions which impact upon whether an arbitral award is enforceable. Issues relating to enforcement under these provisions can be on a number of different bases including whether or not the award was made in accordance with the law of the country where the arbitration took place or whether recognition or enforcement in award is contrary to public policy in one jurisdiction or another.

The obvious advantage of any hybrid process is that there will be finality one way or another to the dispute. If the parties cannot agree in the mediation phase then there is the certainty of resolution by reason of the fact that the arbitrator will make a binding decision. If the same person is retained as both mediator and arbitrator there is potentially a significant saving in both time and money because that person will have numerous insights into the whole of the dispute. Theoretically at least, it is said that matters learned during the mediation phase will be of assistance if the matter is not resolved and moves into an arbitration. Thus the issue becomes whether the savings in time and money are justified given the significant natural justice or procedural fairness issues which are potentially extremely problematic.

10 *Arbitration Ordinance* (Hong Kong) cap 17, s 33; *International Arbitration Act* (Singapore, cap 143A, 2002 rev ed) s 17; Commercial Arbitration Act 2010 (NSW) s 27D.

11 Article 34(2)(a)(iii) and Article 38(a)(iv).

12 Article V(1)(d).

Who Should be Mediator and/or Arbitrator – Procedural Fairness Issues

If one is contemplating embarking upon a hybrid process in the context of a current arbitration, the next critical step is to determine whether or not the mediator should be someone other than one of the arbitrators. Some bodies (e.g. Singapore) strongly advocate the undesirability of the same person acting as both arbitrator and mediator in the same dispute, particularly where the mediation takes place before the arbitration.

Specific concerns of various learned commentators include the following:

(i) Real natural justice issues arise from the fact that the arbitrator may appear to be or may actually be biased as a result of the fact that he or she has received information in caucus when acting as a mediator. As contemplated by various pieces of legislation, it would seem that the rules of procedural fairness would require that there be a full disclosure to the parties of anything said in caucus session during the mediation which might have some bearing on how the arbitrator might come to a decision on the matter.

(ii) It is absolutely essential in my view that the mediator/arbitrator be highly skilled and completely non-evaluative. The suggestions made by mediator may be taken as a demonstration of bias, prejudging the issues or even an implied threat to make adverse decision if the arbitrator perceives a party to have been unreasonable during the mediation. It is for these reasons it is most important that the arbitrator not be evaluative.

(iii) The parties may well be significantly hampered in their ability to frankly disclose to the mediator matters which might normally to be disclosed in a conventional mediation.

(iv) The parties may also be unwilling to reveal their 'bottom line' if they think that it might have some impact on the subsequent award.

(v) Parties may treat the mediation as an evidence gathering exercise in relation to the arbitration.

Conclusion

Hybrid processes can be useful and do work. The structure of the process and the way in which it is carried out has many potential pitfalls. To succeed, any such procedure requires skilful practitioners – arbitrators and mediators who are expert in both processes.