



USE OF MEDIATION WITH ARBITRATION

This is the sixth in our **series of ADR practical guides**, designed to provide clients with guidance on alternative dispute resolution (ADR), with a particular focus on mediation. This guide explains how ADR can be used with arbitration.

Introduction

Arbitration is sometimes characterised as a form of ADR on the basis that it is a method of resolving a dispute outside the court system and requires contractual agreement between the parties. However it bears far more similarity to a court process, not least because it results in a legally binding determination (an "award", rather than a court judgment) based on the facts, evidence and the law.

Arbitration and mediation are often used to complement one another, either as part of a sequential dispute escalation process or in parallel. In some jurisdictions, arbitration and mediation can even be used as part of a hybrid dispute resolution process, with an arbitrator taking a role in facilitating settlement.

Whichever approach is adopted, the benefits of mediation in terms of quick, confidential, flexible and forward-looking dispute resolution are available to parties to an arbitration just as they would be to parties litigating in the courts. Nothing about the choice of arbitration by parties prevents them from using mediation.

WHAT IS ARBITRATION?

By way of overview, arbitration:

- is a private and non-national system of dispute resolution;
- requires an agreement to arbitrate by the parties;
- provides for the fair resolution of disputes by an impartial tribunal;
- gives the parties relative autonomy to agree the procedure by which they resolve their dispute – they often adopt the rules of procedure of an international arbitration institution ("institutional rules");
- usually involves minimal national court intervention;
- delivers an award which is final and binding, typically with very limited rights of appeal; and
- delivers an award that can be enforced, in most cases, domestically and abroad.

The outcome of the dispute is decided by a tribunal, usually comprising one or three arbitrators. Once the parties have agreed to arbitrate, they cannot unilaterally withdraw from the process or refuse to accept the tribunal's award.

USING ADR ALONGSIDE ARBITRATION

Escalation clauses

In the early stages of a dispute, ADR may be used because there is an escalation clause in the relevant contract. Escalation clauses provide for a multi-tiered process whereby disputes are typically first subject to meetings at which senior executives from each side attempt to resolve the dispute by negotiation. Failing this, there is a referral to mediation, before a final submission to arbitration. The aim is to reach some form of settlement before the parties commit to the time and expense of fully contesting the dispute.

Escalation clauses must be drafted carefully. If an arbitral tribunal finds that the provisions of an escalation clause have not been complied with, it may find that the claim is not admissible. To avoid this risk, an escalation clause must:

- define the parties' rights and obligations regarding the ADR process with sufficient certainty and by reference to objective criteria – there should be no need for any further agreement by the parties to be able to undertake the procedure;
- use mandatory language to indicate that steps **must** be taken to satisfy the clause; and
- include clear time limits so it can easily be established whether the steps have been complied with.

Timing

Mediation can be effective at a number of stages in the lifecycle of a dispute, although different dynamics will be at play at different times.

It is generally helpful to mediate at a point where the issues have crystallised and the parties understand the strengths and weaknesses of their respective cases, but before significant costs have been incurred and the parties have become entrenched in their positions. In a typical arbitration, this may be after the first round of submissions and before document production. It can be helpful for the procedural timetable for the arbitration to accommodate the possibility.

Some tribunals may be proactive in suggesting that the parties seek to mediate all or part of their dispute. This will depend on the procedural law of the arbitration, any institutional rules (see further below), the parties' arbitration agreement and the cultural background of the arbitrators.

See our **ADR Practical Guide No 3: "When to mediate in a dispute"** for more information.

Who to appoint as mediator

Appointing an arbitrator who already knows the issues to be the mediator may seem appealing, but it is unusual in practice. This is because arbitration involves the fair resolution of a dispute by an impartial tribunal, and unilateral contact between an arbitrator and a party concerning the matter in dispute may compromise the fairness of the process. This in turn may expose the tribunal's eventual award to the risk of challenge. Similar issues also arise regarding access to confidential information during a mediation. A mediator appointed during an arbitration is therefore usually a separate individual, independent of the tribunal. See our **ADR Practical Guide No 4: "Selecting your mediator and drafting the arbitration agreement "** for more information.

The exception is when parties have agreed to a hybrid procedure that combines arbitration and mediation, either expressly or by the incorporation of particular institutional rules - see further below. These hybrid approaches are popular in certain jurisdictions but may be prohibited or restricted under some institutional arbitration rules or at specific seats of arbitration so should always be approached with care.

Institutional rules

A number of arbitral institutions, such as the LCIA, the International Chamber of Commerce (ICC) and the SCC, have their own mediation rules which aim to facilitate mediation either separately or concurrently with arbitration under their auspices.

In addition, institutions are increasingly including specific provisions relating to ADR in their own institutional rules. For example:

- **ICC Arbitration Rules:**
 - The tribunal may encourage the parties to consider settlement of all or part of their dispute by any form of amicable dispute resolution method, such as mediation under the ICC Mediation Rules.
 - Where agreed between the parties and the tribunal, the tribunal can take steps to facilitate settlement of the dispute, provided that every effort is made to ensure that any subsequent award is enforceable at law.
- **Rules of the International Center for Dispute Resolution** (the ICDR, the international division of the American Arbitration Association): The parties are required to mediate their dispute pursuant to the ICDR's International Mediation Rules concurrently with the arbitration subject to (a) any agreement of the parties to the contrary, or (b) the right of any party to elect not to participate in mediation.
- **American Arbitration Association (AAA) Commercial Arbitration Rules**
 - Where the claim or counterclaim exceeds US\$100,000, the parties are required to mediate, although any party can opt out by notifying the AAA and the other parties.
 - Mediation is conducted pursuant to the AAA's Commercial Mediation Procedures and runs concurrently with the arbitration.

- **DIS (German Institution of Arbitration) Arbitration Rules:** At every stage of the proceedings, the arbitral tribunal should seek to encourage an amicable settlement of the dispute or of individual issues in dispute, including specifically discussing the possibility of mediation/ADR at the case management conference.

If the mediation is successful - enforcing the settlement outcome

If the mediation is successful, the parties will reach an agreement that resolves their dispute. There are three ways to enforce such an agreement:

- **Enforcing the agreement as a contract**
 - The obligations under a settlement agreement are generally enforced in the same way as any contract, by suing for breach.
- **Enforcing a consent award**
 - A settlement agreement can also be enforced via a consent award. The parties may agree in their settlement agreement that:
 - they will sign a draft **agreed or consent award** in the form appended to the settlement agreement; and
 - they will take all necessary steps to ensure that the award is made by the tribunal as soon as practicable.
 - All pertinent terms of the settlement agreement must be recorded in the operative part of the award.
 - Where the parties have agreed to resolve their dispute in accordance with institutional rules, always check the rules regarding the tribunal's power to issue an agreed or consent award.
 - A consent award issued in arbitration proceedings conducted under the UK's Arbitration Act has the same status and effect as any other arbitration award.

- **Enforcing a mediated settlement under EU rules and/or the Singapore Convention**

In the EU, mediated settlements of cross-border disputes between parties in different EU Member States are capable of enforcement in the national courts of Member States. State parties to the United Nations Convention on International Settlement Agreements Resulting from Mediation (the "Singapore Convention") have agreed to enforce international settlement agreements resulting from the mediation of a commercial dispute irrespective of where the mediation took place. The Singapore Convention is intended to ease the enforcement of mediation agreements in a similar way to its counterpart for arbitration, the New York Convention.

Failure to engage in mediation

Unless agreed by the parties (expressly or by adoption of institutional rules) or by virtue of a provision in the procedural law of the arbitration, a tribunal cannot order parties to submit to ADR. However there may be scope for a tribunal to take account of a refusal to engage in settlement discussions into an award on costs, for example where one party has offered to engage in settlement discussions and/or mediation, and the other has failed to take part in any meaningful way.

HYBRID PROCESSES

Med-Arb and Arb-Med

These hybrid processes combine mediation and arbitration, with the same person acting as mediator and arbitrator.

- Med-Arb – the dispute is first mediated. If mediation is unsuccessful, the mediator assumes the role of arbitrator and issues a binding award. The parties may be able to go backwards and forwards between mediation and arbitration.
- Arb-Med – the parties begin with arbitration. Before the award is delivered, they attempt a mediation. If a settlement is reached, the parties enter into a settlement agreement. This settlement can then be recorded as a consent award if the parties wish. If no agreement is reached, the arbitrator delivers the award, which is binding upon the parties.

A key benefit of such hybrid processes is having the same neutral briefed as both arbitrator and mediator on the matter, which should result in cost and time savings. However a potential drawback, especially for Med-Arb, is that parties might be less open in the mediation phase, being concerned that any concessions made could negatively impact their position when the neutral assumes the role of arbitrator.

There is also no international consensus on whether it is acceptable for an arbitrator also to act as a mediator. Med-Arb and Arb-Med are popular in certain jurisdictions, and some institutional rules expressly accommodate an arbitrator-facilitated settlement, usually with the agreement of all parties – see eg the rules of the China International Economic and Trade Arbitration Commission (CIETAC). Some national arbitration laws also provide for arbitrators to mediate disputes (eg the laws of Hong Kong and Singapore). However, under some institutional arbitration rules or at specific seats of arbitration such hybrid processes are prohibited or restricted. The primary concern relates to the mediator/arbitrator's access to confidential information during the mediation and the impact this could have on the impartiality and fairness of the arbitral process. Any hybrid process (even if permitted by institutional rules or the procedural law of the arbitration) should therefore be approached with caution, in case the acceptance of a dual role by the arbitrator affects the enforceability of any arbitral award.

Arb-Med-Arb

The Singapore International Mediation Centre (**SIMC**) and the Singapore International Arbitration Centre (**SIAC**) launched an Arb-Med-Arb Protocol (**AMA Protocol**) in 2014. Under the AMA Protocol, parties commence arbitration under the auspices of SIAC and then proceed to mediation with SIMC. The tribunal and mediator are separately and independently appointed by SIAC and SIMC. If the mediation is successful, the settlement is taken back to the arbitral tribunal to be recorded as a consent award. Any non-justiciable elements of the mediated settlement (eg settled disputes that fall outside the scope of the arbitration agreement) would need to be recorded in a separate settlement agreement, which would not be enforceable under the New York Convention but may be enforceable under the Singapore Convention. If the mediation fails, the arbitration continues.

Parties can make use of the AMA Protocol by incorporating a model Arb-Med-Arb clause into their contracts or, if they have already commenced arbitration at SIAC, by referring their dispute to SIMC for mediation at any stage.

For more information on mediation in general, see our **ADR Practical Guide No 2: "An introduction to mediation - what it is and how it works"**.

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