# Making the Case for Med-Arb

by
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*About the Author*

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The use of "med-arb" — mediation followed by arbitration if the case does not settle in mediation — has been one of the more controversial topics in the dispute resolution field.[i] The controversy centers on one specific form of med-arb — namely, those cases in which the same person serves as mediator and arbitrator. (For purposes of this article, the term "med-arb" refers to that form only.) The purpose of this article is to provide a brief overview of the advantages and disadvantages of med-arb, its use in various types of disputes, and recommendations for using med-arb effectively. My bottom-line conclusion is that there are many types of cases in which med-arb adds value and should be considered.

## 1. ADVANTAGES OF MED-ARB

The primary advantages of med-arb are:

a. **Efficiency** — If mediation does not resolve the case and the dispute needs to be arbitrated, the Parties are spared the time and expense of educating a second Neutral about the case and reiterating their arguments.

b. **Finality** — The Parties know that their dispute will be resolved in a final and binding manner, within the limits of enforceability of any arbitration award. Knowing that there will be a binding decision within a reasonably foreseeable time (as opposed to the extensive delays of litigation and appellate processes) often motivates settlement.[ii]

c. **Positive impact on negotiation and arbitration** — The Parties often negotiate more productively in med-arb[iii] — perhaps because they wish to be viewed as reasonable by the Neutral, who will ultimately be their decisionmaker if the case is not resolved with an agreement. In addition, the progress made in mediation may narrow the settlement gap that needs to be resolved in arbitration and may also streamline the case so that the arbitration is more focused on the issues that matter most.

## 2. DISADVANTAGES OF MED-ARB

The primary concerns about med-arb are:

a. **Ethical and due process concerns** — These concerns arise primarily if the mediation includes confidential caucus sessions — i.e., separate conversations involving the Neutral and one of the Parties (or a subset of the Parties in a multiparty case). Commentators have worried about whether the Neutral can truly ignore what was heard privately ("unring the bell," so to speak) if the case proceeds to arbitration. If such information cannot truly be ignored, there is a risk of unfairness since the opposing Party or Parties have not had a chance to respond to that information.

b. **Effectiveness** — Because of the above concerns, Neutrals in a med-arb case might be reluctant to conduct caucus sessions, thus limiting the effectiveness of the process. And, regardless of whether the Neutral uses caucuses during the mediation phase of the process, the Parties might be less candid with the Neutral concerning potential weaknesses in their case and about their true settlement positions because of the Neutral's role as arbitrator if mediation fails to resolve the matter.

c. **Role boundaries** — In the mediation phase of a med-arb case, as the Neutral learns more about the substance of the dispute, it is inevitable that s/he will begin forming a conclusion about how s/he will likely decide the case if arbitration is needed. As a result, the Neutral may try to influence the Parties' negotiation in the direction of his/her view of the case, thus encroaching on their self-determination and possibly impinging on the creative problem solving that mediation often provides.

## 3. USE OF MED-ARB

Despite the disadvantages described above, med-arb is widely used in the United States and internationally. In a 1997 survey of Fortune 1,000 companies conducted by Cornell University, 40% of respondents had participated in some form of med-arb procedures. Forms of med-arb are used in German, Swiss, Chinese and other nations' international arbitrations, and Brazil, China and Hong Kong have enacted arbitration laws that contain med-arb provisions.[iv] Med-arb has been used in a wide variety of cases, including labor-management contract disputes,[v] will contests,[vi] and ordinary commercial disputes.[vii]

The American Arbitration Association ("AAA") lists "Med-Arb" as one of its services on its website (see "AAA Statement of Ethical Principles" page). The AAA's "Drafting Dispute Resolution Clauses: A Practical Guide" states that using the same individual as both mediator and arbitrator is "not recommended," but the Guide goes on to provide sample contractual language for doing so.[viii] JAMS' website includes several articles about med-arb and also a discussion of med-arb in its ethical guidelines for mediators and arbitrators.[ix]

Articles by dispute resolution practitioners show that med-arb is used widely, albeit cautiously, by private mediators and arbitrators in cases where the Parties' desire for finality and efficiency outweighs other concerns. There is nothing in the Uniform Mediation Act, the Revised Uniform Arbitration Act, the Federal Arbitration Act, or the Model Standards of Conduct for Mediators (promulgated by AAA, the American Bar Association, and the Association for Conflict Resolution) that prohibits using the same Neutral in the med-arb process.

## 4. THREE SAMPLE CASES

The following three cases — taken from my own practice as a lawyer, mediator, and arbitrator — illustrate some of the reasons why dispute resolution professionals sometimes use med-arb.

a. **A Contract Case.** Several years ago, I was the mediator in a case in which the Parties and Counsel wished to resolve their dispute — a breach of contract claim between two taxi companies — by agreement. However, after more than a day of mediation, both sides became convinced that a definitive interpretation of their contract was needed, and they asked me to switch hats and arbitrate the dispute.[x] Strongly held views on both sides, as well as intense anger between the principals of the two companies, made it difficult for either party to consider settlement, but they did see the value, from a business standpoint, of having the dispute resolved privately.

b. **A Divorce Case.** I was appointed by a Court — on the basis of a stipulation from the Parties and Counsel — to serve as a mediator and arbitrator in a complex post-divorce case in which a large payment due from one Party to the other could only be paid by liquidating or refinancing a large number of properties from the Parties' real estate investments. Over the course of two years, more than 100 issues had arisen concerning the marketing and management of these properties, with approximately half of the issues resolved by agreement. But, many of these issues (50 to date) had required the issuance of an Order because the Parties and their Counsel were at an impasse. It would have been highly inefficient for these decisions to have been made by a separate individual because of the complexity of the post-divorce real estate transactions.[xi]

c. **A Personal Injury Case.** As counsel, I represented a young woman injured in a moped-auto accident, and unfortunately, the driver had only $100,000 of insurance coverage and no reachable assets. ADR made sense to all parties (plaintiff, defendant, and insurer) because of the limited resources available and because litigating the case in court would been too costly. Because of the factual complexity of the accident and the damages from my client's injuries (closed head injury leading to cognitive impairment), it was clearly less efficient to educate a mediator and then a separate arbitrator, and so the parties executed a med-arb submission agree-

ment. Mediation did not result in a settlement, but the arbitrator awarded the full amount of the insurance coverage.[xii]

## 5. RECOMMENDATIONS

Sweeping generalizations about dispute resolution processes are inherently flawed. There is no one process that is best for all cases. Nor, for that matter, would it be accurate to say that med-arb could never be an appropriate process for any case. "Fitting the forum to the fuss" is one of the key advantages of alternative dispute resolution.[xiii]

There are, however, four bedrock principles on which such decisions must rest:

a. **Competence.** Not every mediator is well qualified to be an arbitrator, and vice versa. Each of these two very different practices requires different skills. If the Parties and Counsel want their mediator to change hats and become their arbitrator, they need to consider whether s/he has the requisite experience to handle the assignment properly.

b. **Informed Consent.** Lawyer and Neutral must make sure that the Parties understand both the advantages and disadvantages of using med-arb.

c. **Clarity.** One of the challenging questions in using med-arb is whether the Neutral will use caucus sessions and, if so, whether s/he will ignore what s/he heard if s/he changes hats and becomes the arbitrator. An informal survey by this author of commercial mediators in the United States suggests that it is virtually a uniform practice for Neutrals in a med/arb process to insist on such a 'firewall' so as to protect the integrity and fairness of the arbitration phase of the process. Many commentators have noted that a Neutral's ability to ignore information communicated privately in caucus mediation sessions is akin to a judge's ability, in a bench trial (i.e., without a jury), to ignore testimony after a successful motion to strike the evidence from the record, or to rule on the admissibility of proffered evidence (such as documents) that the judge must see before ruling.

d. **Documentation.** Because of the complexity of the laws regulating the use of mediation and arbitration, as well as the differing ethical principles that apply to each (e.g., barring ex parte communications in arbitration, but not in mediation), lawyers and Neutrals must ensure that the specifics of their process are described in an agreement executed by the Parties and their Counsel. This will ensure that the Parties are giving their informed consent to the process, and also enhance the enforceability of any mediated agreement that the Parties may reach, and the enforceability of their arbitration award if one is needed. In addition, if arbitration

becomes necessary in a med-arb case, the Parties and Neutral should document the point in time when the process transitions from mediation to arbitration so that everyone involved understands that the statutory and contractual protections of mediation confidentiality are, for proceedings beyond that point, no longer applicable.[xiv]

## 6. VARIATIONS ON THE MED-ARB THEME

Lawyers and Neutrals may wish to consider the many variants of med-arb, which are discussed in the literature of this subject. For example, some practitioners and scholars have suggested that reversing the order – a process called arb-med – provides efficiency without the risks of confidential information affecting the arbitration award.[xv] Another variant allows either Party to opt out of using the same individual as arbitrator at the end of the mediation, which gives each Party the ability to prevent confidential information from affecting the arbitration if that became a concern. Both of these variants compromise the efficiency of the process, but are worth considering in appropriate cases.

Just as mediators are sometimes asked – in the middle of a mediation with no med-arb agreement – to change hats and decide all or part of a dispute, arbitrators are sometimes asked – while an arbitration is underway – to mediate the dispute. The first of these two variations is less risky than the latter. A mediation converted to an arbitration provides finality. However, if the Parties have made a substantial investment in the arbitration process, there is the risk that a failed mid-arbitration attempt at mediation could taint the arbitration and thus force the Parties to relitigate the case with another arbitrator. (In theory, the Parties would agree in writing to any such change of procedure, but it is not obvious that such an agreement could successfully foreclose a challenge to the arbitration process if the mediation took an unexpected turn of some kind.)

## 7. CONCLUSION

Lawyers and Neutrals often serve as process experts for our respective clients. It behooves us to be as knowledgeable as possible about all of the varieties of dispute resolution, and to be prepared to customize such processes when adaptation is needed. In a favorite New Yorker cartoon, a man admonishes his cat, while the two of them are standing beside a box of cat litter. "Never think outside the box," he says. In the world of dispute resolution, we have many opportunities – and perhaps the obligation – to think "outside the box," not only about substantive solutions but also about procedural innovations. ■

*References:*


[i] See, e.g., D.C. Elliott, "Med/Arb: Fraught With Danger or Ripe with Opportunity," 62 Alberta L. Rev. 164 (1995); Brian Pappas, "Med-Arb: The Best of Both Worlds May Be Too Good To Be True," 19 Disp. Resol. Mag. 42 (2013);

[ii] This objective can be achieved by specifying another individual as the arbitrator in the med-arb submission agreement, but doing so may reduce the efficiency of the process.

[iii] See N.B. McGillicuddy, G.L. Welton & D.G. Pruitt, "Third-party intervention: A field experiment comparing three different models, " 53 J. of Personality & Soc. Psych. 104 (1987).

[iv] See John T. Blankenship, "Developing Your ADR Attitude: Med-Arb, a Template for Adaptive ADR, 42 Tenn. B.J. 28 (2006).

[v] See Joshua M. Javits, "Better Process, Better Results: Integrating Mediation and Arbitration to Resolve Collective Bargaining Disputes," 32 ABA J. Lab. & Emp. L. 167 (2017).

[vi] Yolanda Vorys, "The Best of Both Worlds: The Use of Med-Arb for Resolving Will Disputes," 22 Ohio St. J. of Disp. Resol. 871 (2007).

[vii] See James Simon, "Med/Arb in Business Cases: Dispute Resolution Whose Time Has Come" (August 2017) (available at https://www.mediate.com/articles/SimonJ1.cfm).

[viii] American Arbitration Association, Drafting Dispute Resolution Clauses: A Practical Guide 33 (2013).

[ix] For example, the JAMS Arbitrators Ethics Guidelines state: "An arbitrator may encourage the parties to mediate their dispute but should not suggest that the arbitrator serve as the mediator. In the event that, prior to or during the arbitration, all parties request an arbitrator to participate in discussions of settlement or to combine the arbitration with another dispute resolution process, the arbitrator should explain how the arbitrator's role and relationship to the parties may be altered, including the impact such a shift may have on the willingness of the parties to disclose certain information to the arbitrator serving in the settlement-related role. Nothing in these guidelines is intended to prevent an arbitrator from acting as a neutral in another dispute resolution process in the same case, if requested to do so by all parties and if an appropriate written waiver is obtained. The parties should, however, be given the opportunity to select another neutral to conduct any such process."

[x] This sequence of events – in which a mediation morphs into a subsequent arbitration – is, in my experience, the most common way in which med-arb arises in private practice. This is understandable inasmuch as the mediation has given the parties and their counsel an up-close-and-personal view of the mediator and an ability to assess whether they think s/he will rule fairly on the remaining issue(s) in the case.

[xi] A sample med-arb submission agreement for divorce cases is available at www.blc.law by clicking on "Resources."

[xii] The sample Med-Arb Agreement used in that case is available at www.blc.law by clicking on "Resources."

[xiii] See Frank E.A. Sander and Stephen B. Goldberg, "Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure," 10 Negot. J. 49 (1994).

[xiv] See James Simon, "Med/Arb in Business Cases: Dispute Resolution Whose Time Has Come" (August 2017) (available at https://www.mediate.com/articles/SimonJ1.cfm).

[xv] The arb-med process has an ancient lineage: "During the earliest period of English legal history, legal documents show disputes being processed on a continuum that called upon arbitrators or judges to act as third-party decisionmakers and then to change hats – as judges often do in modern settlement conferences – serving as mediators who facilitate negotiated outcomes." Valerie Sanchez, "Towards a History of ADR: The Dispute Processing Continuum in Anglo-Saxon England and Today," 11 Ohio St. J. of Disp. Resol. 1 (1996).