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"Arb-Med-Arb: Save time and money in international commercial and intellectual property arbitration"

Time and money were the main objections to arbitration for disputes involving claims below $10 million in construction, according to Queen Mary, University of London's 2019 International Arbitration Survey. Respondents considered arbitration too costly and time-consuming and that this was a barrier to justice and a fair resolution of the dispute. Can anything be done about this state of affairs? The answer is a resounding yes: The so-called Arb-Med-Arb (Arbitration-Mediation-Arbitration) method can shorten the duration of an arbitration, particularly one involving international commercial or intellectual property, thereby saving costs. However, this practice is neither widely known nor used. Here, I wish to remedy this situation and show which significant steps should be taken to popularise this time-saving method.

What Arb-Med-Arb entails is moving an ongoing dispute in arbitration, whether administered or non-administered, from arbitration to mediation mid-stream. If the mediation does not result in a settlement within an agreed time period, the dispute returns to arbitration. This process seems like it would add time and costs to an on-going arbitration. But because the time to reach a mediated settlement is much quicker than the time needed to conclude an arbitration, many such cases save considerable amounts of time and money.

Arb-Med-Arb may not be suitable for large, complex cases with many pieces of evidence and many witnesses. But it is likely to be appropriate for smaller cases, or even larger cases where the issues are clear-cut and known to the parties. It could also benefit cases where the parties have a mutual interest in preserving a longer-term continuing relationship.

Unlike Med-Arb (Mediation-Arbitration), which often occurs where there is a "step clause" in the arbitration agreement, mandating the parties to conduct negotiations or a mediation prior to commencing arbitration, there are almost never any Arb-Med-Arb clauses in an arbitration agreement. This means that the process must be initiated by the tribunal, counsel or the institution in an institutional arbitration. However, unlike an obligatory Med-Arb clause, it cannot be enforced in court since the process is entirely voluntary.

The initial questions, therefore, are who will initiate the process of moving a dispute in arbitration to mediation and when that process will take place. To answer this, we must first look at five obstacles to this process taking place. The first is inertia. If an arbitration has already begun and the parties have held their first procedural conference and agreed on the schedule for the arbitration, they will, in many instances, have agreed on the dates for the submission of briefs or memorials and even the dates for the hearing. The parties, counsel and the tribunal will have fixed these dates in their schedules and be uninclined to budge. Secondly, there is the inherent belief of all parties in the arbitration that they are already proceeding on the right path and have the process completely under control. Thirdly, in relation to this, the prospect of moving the dispute to mediation may represent a loss of control over the process by

counsel and the tribunal, even if it may, in fact, be in the best interests of the parties. Fourthly, there will be a loss of income to counsel and the tribunal if the dispute is settled earlier than if the dispute had proceeded along its agreed course to the hearing and the rendering of an arbitral award. Fifthly, it is unclear who will initiate the process and when it will take place.

How to make Arb-Med-Arb appealing

The first way to make Arb-Med-Arb appealing is to win over the parties, counsel and the tribunal at the outset of the arbitration. Convince them that it may be desirable in the interests of saving time and resources to move the dispute from arbitration to mediation during the arbitration. The easiest way of doing this is through the arbitration institution which controls the arbitration process at the initial stages. Indeed, it would be useful if arbitration institutions built this Arb-Med-Arb route into their rules or procedures for the conduct of an arbitration. This would impose a duty on counsel and the tribunal to consider moving the dispute to mediation if that would shorten the dispute resolution process. In fact, the International Centre for Dispute Resolution (ICDR) International Arbitration Rules introduced such a measure on 1 March 2021, by creating Rule 6. This welcome change provides that

> subject to (a) any agreement of the parties otherwise or (b) the right of any party to elect not to participate in mediation, the parties shall mediate their dispute pursuant to the ICDR's International Mediation Rules concurrently with the arbitration.

Note, this is an opt-out procedure, and it also requires that the mediation is conducted concurrently with the arbitration.

Secondly, the question is when a move from arbitration to mediation should take place. Mediation often starts at the beginning of an arbitration, but, if you ask me, this is often too early. The parties and their counsel may be reluctant to entertain settlement proposals at that stage because many facts and issues may be unclear or unknown. I propose that a mediated settlement is more likely to be possible once the parties have exchanged briefs or memorials and possibly there has been an initial round of discovery or disclosure. Once all the facts and issues are to the parties and once all the documents relevant to the settlement are produced, mediation can get going.

Thirdly, there needs to be a mechanism for providing for rapid mediator selection. Naturally, they must be independent and impartial and unconnected with the tribunal. Singapore has an independent mediation institution, the Singapore International Mediation Centre (SIMC), based at Maxwell Chambers, which is also home to the Singapore International Arbitration Centre (SIAC). SIAC can easily refer a dispute to SIMC, thus enabling the swift selection of an independent mediator. The ICDR also has a set of newly-adopted International Mediation Rules and a roster of experienced mediators in place.

Fourthly, if the mediation does not begin concurrently with the arbitration but later in the arbitration process, the mediation should be time-limited. Cap it at a few weeks at most, and if a settlement is not achieved within that period, the dispute will return to arbitration. This relatively short opening should give comfort to counsel and the tribunal that they will not lose control over the case unless a quick settlement is found.

A point in favor of beginning the mediation at the same time as arbitration is that the mediator can shadow the arbitration. By the time the parties move into the mediation phase the mediator will therefore understand the issues and parties' positions. The downside is the additional costs of a mediator who may never be needed if the mediation phase is not reached.

If the dispute starts in arbitration and is settled through mediation, the settlement can be referred to the tribunal for incorporation in the final award. In this way it would benefit from the New York Convention for recognition and enforcement. Although the Singapore Mediation Convention, which provides for the cross border enforcement of mediated settlements, came into effect in September 2020, only a few states have ratified it. The New York Convention is sixty years old and ratified by over one hundred and fifty states. The advantages of incorporating mediated settlements into a final arbitral award rather than relying on the Singapore Mediation Convention thus carries a considerable advantage.

As a means of dispute resolution, arbitration is highly favoured, particularly in international commercial disputes and, increasingly, in international intellectual property disputes. It can provide confidentiality, autonomy for the parties and the option to choose arbitrators with an expertise in the topics at hand. However, there has been a growing aversion to arbitration among potential clients put off by the relatively high price tag. Arb-Med-Arb can offer savings in appropriate cases. While this flexible process of moving a dispute to mediation midstream during an arbitration is relatively unknown, the steps described here will help mainstream this process. This should benefit arbitration users, and make arbitration a more useful method of dispute resolution for international commercial disputes and international intellectual property disputes.