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# Med-Arb: Ethical Challenges and Effectiveness in Hybrid ADR

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## Abstract

*This paper delves into the contentious debate surrounding the integration of arbitration and mediation, specifically focusing on the single-neutral hybrid processes of Med-Arb, Arb-Med, and Arb-Med-Arb. The discussion revolves around the ethical and practical implications of having a single neutral party serve both as a mediator and arbitrator.*

*The paper examines the distinct features of mediation and arbitration, comparing their strengths and weaknesses. It explores the motivations behind combining these methods, emphasizing the need for enforceability in international disputes. The adoption of Med-Arb practices is explored globally, with a focus on Asia, Europe, Latin America, and North America. The analysis includes specific examples of countries and institutions adapting their rules to accommodate these hybrid processes.*

*The risks and benefits of single-neutral hybrid processes, such as Arb-Med, Med-Arb, and Arb-Med-Arb, are explored in detail. The variations in practice, including overlapping neutrals, plenary med-arb, braided med-arb, and optional withdrawal med-arb, are discussed along with their ethical implications. The paper concludes with suggestions for crafting effective and*

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*ethical med-arb processes, emphasizing the importance of consent, jurisdictional considerations, and the selection of a neutral. It highlights the role of party autonomy in shaping dispute resolution systems and underscores the responsibility of practitioners as gatekeepers in navigating the complexities of these evolving processes.*

***Keywords:*** *Mediation, Arbitration, Hybrid ADR, Med-Arb, Arb-Med, Single-Neutral Ethics.*

# Introduction

The integration of arbitration and mediation into a single hybrid process, where the same neutral party acts as both mediator and arbitrator, has ignited a contentious debate. Some staunch opponents of this approach view it as not only ethically problematic but even heretical, believing it should be vehemently rejected. Conversely, some fervent proponents see it as a panacea, combining the strengths of both methods for optimal results.

In reality, there is no one-size-fits-all solution. Med-Arb can be a more efficient option in some cases, while it may not be in others. The potential ethical issues do not lie in utilizing these processes but rather in their unchecked evolution, which could undermine international arbitration rather than complement it. Thus, it is imperative for practitioners of arbitration and mediation to act as gatekeepers and establish safeguards to ensure the efficiency, ethics, and finality of these single-neutral hybrid processes.

The dissatisfaction with the protracted and costly nature of international arbitration has led parties to explore mediation as an alternative. However, the increased involvement of lawyers as both counsel and mediators has transformed mediation into a more adversarial process, shifting from interest-based to rights-based, particularly with mediator evaluation and proposals. This phenomenon has led to mediation being referred to as the "new arbitration."

Globally, there is a noticeable surge in the adoption of a common arbitrator in Med-Arb processes, with the Far East leading this international trend. The increasing significance of Asia as a focal point for arbitration and alternative dispute resolution has breathed new life into these practices. Even entities and nations not explicitly advocating for these approaches are revising their rules and regulations to accommodate the parties' freedom to employ them when deemed

appropriate. This shift suggests that hybrid dispute resolution techniques must, in specific scenarios, offer enhanced efficiency to remain the preferred choice for disputing parties.[3]

# Overview of Mediation and Arbitration

## Mediation

Mediation serves as a non-binding approach to resolving disputes, employing the assistance of an impartial third party to facilitate negotiations between conflicting parties in pursuit of a mutually agreeable settlement. Often synonymous with the term "conciliation," this process places a strong emphasis on confidentiality. In the mediation setting, the mediator is not only permitted but encouraged to receive and safeguard private information, utilizing it strategically to aid in dispute resolution.

During mediation, the disputing parties engage in a collaborative negotiation, actively determining potential solutions under the guidance of the mediator. While the mediator lacks the authority to enforce a binding agreement, the effectiveness of mediation as an ADR process lies in its ability to foster a positive atmosphere for negotiation, handle and discreetly convey pertinent confidential information, strive for mutually beneficial outcomes, sustain the momentum of negotiations, and elucidate the rationale behind any resulting agreement.

The distinct advantages of mediation lie in its foundation as an interest-based negotiation, where the involved parties retain the authority to make final decisions. Notably, mediation is characterized by its confidentiality, time efficiency, and cost-effectiveness, culminating in the creation of enduring and mutually satisfying agreements among the disputing parties.

3 Leiden and Boston, "Contemporary Issues in International Arbitration and Mediation", Koninklijke Brill NV ISBN 978-90-04-26019-1, pg. 353, (2015), https://www.svamc.org/wp-content/uploads/2015/08/The-Fordham-Papers.pdf

## Arbitration

Arbitration serves as the means for resolving disputes by entrusting the judgment of one or more individuals, known as arbitrators, who, in the event of disagreements, typically enlist an 'umpire' to settle differences. This process serves as a means for resolving conflicts between two parties who have voluntarily selected arbitrators to address their dispute.[4]

As per the Black's Law Dictionary an arbitrator is an impartial individual tasked with settling disputes, particularly through formal arbitration. An arbitration clause, as defined, is a contractual stipulation that mandates arbitration, thus steering clear of litigation regarding the rights, duties, and liabilities of the contracting parties.

## Comparing Mediation and Arbitration

Arbitration and mediation serve as distinctive dispute resolution methods. Arbitration involves parties relinquishing control to an external arbitrator who decides the case's outcome, resembling a court process but with potential specialization and confidentiality. Despite some control retained by defining arbitration parameters, parties cede substantial influence. In contrast, mediation maintains party control throughout. Mediators refrain from rendering decisions and instead guide parties to self-determined resolutions. Operating on a continuum, mediation ranges from neutral facilitation to evaluative intervention. The essence lies in empowering parties to craft a mutually agreeable settlement, fostering a sense of ownership, in contrast to arbitration's external imposition, often leaving one or both parties dissatisfied.

# Reasons to Combine

The primary impetus for integrating mediation and arbitration lies in harnessing the advantageous dispute resolution characteristics inherent in both methods. This strategic fusion is akin to a 'one good, two betters' approach, where the combined synergy of the two methods yields outcomes superior to what either could achieve independently. While critics might dub

4 Paramjeet Singh Patheja v. ICDS Ltd., JT (2006) (10) SC 41.

it a 'one bad, two worse' scenario, the primary objective is to leverage arbitration's expeditious dispute resolution and cost-effectiveness compared to traditional court proceedings. By incorporating mediation, an even more cost-effective solution is sought, fostering outcomes that are likely to be mutually acceptable.

A secondary motivation for amalgamating mediation with arbitration revolves around procedural advantages rather than heightened prospects for settlement. Specifically, the emphasis is on enhanced enforceability, which is crucial in ensuring the reliability of mediated settlements. This does not diminish the value of the first category; it merely underscores the significance of secure enforcement of mediated settlements. However, the amalgamation of procedures reflects a recognition that international legal systems fall short in fully acknowledging mediation settlement agreements as independently enforceable awards.

In many jurisdictions, mediation is often regarded merely as a contractual agreement. While some jurisdictions permit a mediated settlement agreement to be recorded as a court judgment within an existing case, this necessitates a case being before the court, which then issues an award. The strategic coupling of mediation and arbitration addresses this limitation, enabling mediation to capitalize on the robust enforceability of arbitral decisions. By riding on arbitration's international enforceability, particularly through the New York Convention, this approach proves especially advantageous for international disputes.

For instance, in countries like India, foreign arbitral awards can be enforced as if they were decrees of a local court, regardless of whether they resulted from a decision by the arbitration panel or a settlement. England similarly facilitates the enforcement of foreign arbitral awards recognized under the New York Convention. Therefore, the procedural integration of arbitration serves as a supportive framework for mediation, allowing it to thrive under the protective umbrella of arbitration through processes like Arb-Med-Arb.[5]

5 Smith, David, "Commercial Arbitration: International Trends and Practices," Chapter 4, 1st ed., Thomson's Reuters, pg. 52-62, (2021).

# Institutional Rules and National Laws embracing Med-Arb

The adoption of hybrid dispute resolution processes has gained widespread interest and integration into global institutions and legal frameworks. Despite initial hesitations in some regions, these approaches have garnered support, primarily due to the principles of party autonomy and the ability of involved parties to make choices within institutional rules. Contrary to the perception that the preference for harmonious resolutions in Asian countries stems from a cultural aversion to conflict, a closer examination reveals a broader reality. While Asia has been at the forefront of implementing laws and institutional rules supporting hybrid methods, these practices are prevalent in various fields across civil and common law systems worldwide.

In Asia, countries like China and Japan have incorporated elements of conciliation and mediation into their arbitration frameworks. China's CIETAC Rules[6] and Arbitration Law permit arbitrators to engage in conciliation with party consent. Similarly, Japan's Arbitration Law and the JCAA Arbitration Rules empower arbitrators to mediate disputes, often integrating mediation settlements into arbitral awards.

Europe exhibits a similar trend. In Germany, Switzerland, Austria, Italy, and Sweden, there is a historical inclination towards settlement, employing various methods from evaluative mediation to early neutral evaluation.[7] Even France, though not strongly favouring same-neutral hybrid processes, acknowledges the validity of awards where a single-neutral serves as both mediator and arbitrator with the parties' consent.

Latin American countries also embrace hybrid processes. Like, the Brazilian Arbitration Act requires arbitrators to try conciliation at the outset of arbitration. In the US, states like California and Colorado allow single neutrals to mediate and then arbitrate, with New York courts recognizing awards from these techniques with proper waivers. In Canada, the Model

6 CIETAC Arbitration Rules, Art. 40, 2011.
7 DIS-Arbitration Rules, Section 32, 2018

Law forms the basis for international arbitration statutes, allowing mediation during arbitration proceedings in Ontario and Québec. Similarly, Hong Kong and Singapore permit arbitrators to serve as mediators, requiring written consent and disclosure of confidential information. South Africa follows similar disclosure requirements.

India, through its, The Arbitration and Conciliation Act, 1996 Act, grants arbitral tribunals the authority to utilize settlement, conciliation, or mediation, reflecting its tradition of employing dispute resolution similar to Med-Arb at the domestic level. Moreover, guidelines from the Model Law on International Commercial Conciliation[8] and various institutional bodies such as the CPR Institute, JAMS, ICC ADR, CEDR, and CIArb stress the need for explicit agreement from parties if a neutral is to act as both a mediator and arbitrator.

# The Risks and Benefits of Single-Neutral Hybrid Processes

## Arb-Med

Arb-Med, compared to Med-Arb, is seen as the more ethically sound approach and can be a preferable option in jurisdictions where enforcing arbitration decisions may be challenging. In Arb-Med, the arbitration process occurs first, with the tribunal crafting the award without revealing it to the involved parties. Subsequently, the arbitrator transitions into a mediator role, aiding the parties in reaching a mutually agreeable resolution, as opposed to merely imposing an award that may Favor one party. Often, the award remains sealed or placed before the parties, serving as an incentive for them to seek an amicable settlement. This method is particularly valuable in cases involving ongoing relationships and the desire for control and finality, minus the potential drawbacks of Med-Arb. However, the critical caveat in Arb-Med is that the mediator should avoid evaluative techniques or mediator proposals, as these may pressure parties into accepting a resolution against their full consent. A facilitative, interests-based approach is recommended, as the objective of this hybrid process is to empower parties

8 UNCITRAL (Model Law on International Commercial Arbitration), Art. 12, 2006.

to create their own settlement, rather than imposing the arbitrator's decision. The drawback to Arb-Med lies in the fact that the costs of arbitration are incurred before parties exercise their freedom of choice, making it less efficient in that regard.

## Med-Arb

MED-ARB is a combined approach chosen by parties seeking both mediation and arbitration. It offers an initial mediation phase to settle disputes, followed by binding arbitration if mediation fails. The mediator transitions to an arbitrator, streamlining the process and minimizing the need for a new neutral party. However, ethical and enforceability concerns arise. The pivotal issue revolves around caucusing, the private discussions where parties reveal crucial information. In MED-ARB, the risk of parties withholding information due to the mediator's potential role as an arbitrator exists, hindering candid dialogue and impacting the mediation process. Legalistic trends, lawyer control, and potential influence on the mediator further complicate this hybrid process.

The shift from mediator to arbitrator poses challenges. Concerns include potential coercion during mediation, the ability of neutrals to remain impartial, and the disclosure of confidential information. Some jurisdictions demand arbitrators disclose relevant confidential information before arbitration begins, aiming to prevent bias claims. This, however, places the responsibility on the neutral to decide what to disclose, affecting the efficacy of caucusing. The underlying threat in MED-ARB lies in managing confidential information and upholding procedural fairness. Balancing disclosure requirements and preserving the effectiveness of mediation remains a challenge, raising questions about the sustainability of this hybrid process.

## Arb-Med-Arb

Arb-Med-Arb, a three-phase process, uniquely merges the benefits of Med-Arb and Arb-Med while mitigating inherent drawbacks. It optimizes efficiency by consolidating pre-mediation documentation and swift proceedings, allowing the arbitrator to strategically introduce mediation opportunities. This approach offers flexibility, enabling prompt issue resolution.

Unlike Arb-Med, no predetermined award exists. If mediation is not fully successful, the neutral seamlessly transitions back to arbitration, ensuring the parties' rights to present evidence and be heard. This model demands caution during the mediator-to-arbitrator shift, similar to Med-Arb. This method, or a simplified variant, should be preferred in jurisdictions where tribunal appointment timing affects consent award enforceability.

### MEDALOA

MEDALOA, a variant of Med-Arb, involves mediation followed by last offer arbitration (LOA), also known as "baseball arbitration." In this method, each party presents a final offer to the arbitrator, who selects one, thereby establishing a binding arbitration award. MEDALOA minimizes inflated offers due to the risk of non-selection and decreases bias as the arbitrator chooses from proposals offered by the involved parties.

## Med-Arb Practice Variations

In an effort to address ethical issues within these combined methods, practitioners have sought to reorganize certain procedures to uphold essential standards more effectively. Various adaptations are being explored to assess whether these alterations successfully enhance ethical safeguards.

### Overlapping Neutrals

This particular Med-Arb variation involves employing separate neutrals, with each assigned to oversee a distinct phase of the process. Here, the arbitrator's role is as an observer during the joint discussions, while the mediator engages directly with the parties in private sessions. Throughout the mediation phase, the arbitrator witnesses the collective discussions and reviews shared documents but does not have access to private communications. If the mediation successfully resolves the dispute, an agreement is formulated, and the arbitration phase is discarded.

Should the parties be unable to achieve a resolution, the mediator withdraws from the process, and the arbitrator, who is already familiar with a substantial portion of the dispute, assumes control. The primary downside of this ADR method is that during mediation, the parties are under the watchful eye of the arbitrator, leading them to be cautious and refrain from engaging in private or confidential exchanges with the mediator, for fear of potentially tainting the arbitration decision.[9]

## Plenary Med-Arb

This specific form of Med-Arb entails a single-neutral individual adhering to the conventional procedures of Med-Arb. This approach prohibits the neutral from engaging in any private communication with the involved parties. Instead, the neutral exclusively relies on formal, open communication and the exchange of documents. By disallowing one-on-one communications, this format effectively eradicates concerns about contaminating the final decision.

However, the primary downside of this ADR method is that it directly challenges the core principles of mediation jurisprudence. It undermines the fundamental idea that candid and truthful private communication between parties and the mediator is crucial for a successful mediation process.[10]

## Braided Med-Arb

In this unique form of Med-Arb, a single neutral individual adheres to the established procedures of both mediation and arbitration. What sets Braided Med-Arb apart is the flexibility to interlace the arbitration phase with subsequent mediation attempts, permitting or encouraging the parties to actively seek a voluntary agreement. This approach grants parties the freedom to engage in mediation alongside the arbitration process. The sole drawback

9Goel, Shivam, "'Med-Arb': A Novel ADR Approach," pg. 08, SSRN, (June 26, 2016), http://dx.doi.org/10.2139/ssrn.2800693

10 Richard, "The Ethics of Mediation-Arbitration" Vol.38 No. 5, The Colorado Lawyer, (2009).

associated with this ADR method is the potential for parties to feel a certain degree of 'settlement pressure' exerted by the neutral.

### Optional Withdrawal Med-Arb

In this particular Med-Arb variation, a single neutral facilitator is utilized, affording the disputing parties the flexibility to withdraw from the resolution process following the mediation stage. The inclusion of an optional withdrawal provision upholds the fundamental principle of the parties' voluntary engagement. However, this Optional Withdrawal Med-Arb deviates from the usual practical benefit associated with Med-Arb, which is the definitive resolution of disputes between the parties involved.

This specific Med-Arb adaptation employs a single neutral, granting the disputing parties the freedom to exit the resolution process after the mediation phase. The provision for an optional withdrawal safeguards the principle of the parties' voluntary involvement. Nevertheless, this Optional Withdrawal Med-Arb detracts from the practical advantage that Med-Arb typically offers, which is the conclusive resolution of disputes between the involved parties.

## Suggestions for crafting effective and ethical Med-Arb Processes

### Designing a Process that provides adequate safeguards

While employing distinct neutrals for each stage is the most cautious strategy, practical considerations such as location, time, and cultural factors frequently lean toward a unified process with a single neutral. This may commence with mediation and, if necessary, transition to arbitration, potentially resulting in time and cost savings. Another option is to skip caucusing and conduct mediation entirely in joint sessions. The key is making choices that align with the parties' goals, which may involve sophisticated parties managing the process for efficiency and relationship preservation, while also aiming for finality by designing a process that limits challenges to awards. The best process should be determined on a particular case basis, considering the specific issues and interests involved.

## Consent, Waiver, and Renewed Consent

Obtaining informed consent is crucial to navigating ethical issues in alternative dispute resolution (ADR). Both counsel and parties must provide clear, written consent and understand the evolving roles and risks inherent in the process, especially concerning waiver and confidentiality. Parties should be aware that they might waive their right to due process, making single-neutral hybrid options more suitable for sophisticated participants. The level of formality required for safeguards varies inversely with process flexibility. Written consent, stipulations, or ADR agreements are essential for award enforceability. Conducting pre-mediation or arbitration conferences with parties helps clarify choices before obtaining written consent.

Consent should address caucusing preferences, specifying whether confidential information may be disclosed. A confidentiality waiver may be necessary for private meetings. Clear boundaries between mediation and arbitration phases must be maintained, with renewed written consent as roles shift. Parties should waive their right to challenge an award for bias to protect enforceability. Timely objections are crucial to avoiding waiver of the right to challenge impartiality, as per relevant rules, discouraging last-minute challenges after receiving an unfavourable award.

## Opting Out and Preserving Impartiality

Allowing parties or an arbitrator to have the option to withdraw may indeed lead to a decrease in efficiency. However, it is a necessary step in preserving the integrity of the arbitration process and, more importantly, the final award. This becomes crucial in situations where either the arbitrator or the involved parties become convinced that the arbitrator can no longer maintain impartiality. Such a loss of impartiality often arises from the arbitrator's exposure to confidential or private information during private discussions, which could potentially influence their decision. In such cases, the arbitration process can return to its traditional step-

by-step approach, with the appointment of a new, independent arbitrator responsible for delivering the final decision.

## Jurisdictional Considerations and Enforceability

When employing hybrid dispute resolution methods, particularly single-neutral approaches, being attentive to jurisdictional considerations is crucial. Parties and their legal representatives must remain cognizant of both local and institutional regulations to secure enforceability under the New York Convention. This involves careful attention during the formulation of ADR and arbitration clauses, the selection of a process subsequent to a dispute's emergence, solidifying the choice within a procedural agreement, and obtaining consents or waivers.

Moreover, the strategy for ensuring enforceability involves the arbitrator constructing an award that is transparent, logically reasoned, and explicitly outlines the parties' agreement to the combined dispute resolution process. It might even extend to detailing the specifics of any waivers.

## Crafting Effective Arbitration Clauses and Step Processes

In the crafting of step clauses, it is imperative not to make arbitration contingent on prior mediation. The clauses should expressly encompass all disputes, even those concerning conditions precedent or any potential failure to adhere to any aspect of the arbitration agreement, making them subject to arbitration. Moreover, in scenarios involving a multi-step ADR process, the inclusion of a Mediation Settlement Agreement (MSA), if envisaged, should also be subject to arbitration.

## Selection of Neutral

The effectiveness of the Med-Arb process heavily relies on the neutrality of the chosen mediator-arbitrator. The pivotal element in this selection is establishing unwavering trust from both involved parties towards the neutral. It is crucial for the neutral professional to possess extensive expertise in both mediation and arbitration, along with a deep comprehension of the

nuanced disparities between the two methods. In numerous countries, individuals, whether legal practitioners or not, undergo specialized training to serve as neutrals in both mediation and arbitration within their professional domain.

## Conclusion

Party autonomy stands as the cornerstone in the realm of international arbitration and alternative dispute resolution. When parties willingly and knowingly consent to entrust the same neutral party with both mediating and arbitrating their disputes, it reflects a belief that the advantages outweigh the risks. As Alan Limbury aptly puts it, the challenge for the legal profession is not just about embracing less adversarial attitudes but also about skilfully navigating between adversarial and consensual or collaborative approaches. In the international arbitration and mediation community, advocates and neutrals bear the responsibility of being the gatekeepers of these processes. Their duty lies in aiding parties in designing dispute resolution systems that align with their objectives efficiently and securely.

The primary advantage lies in the certainty of resolving the dispute, either through mediation or arbitration. However, the concept of "award contamination" is a notable drawback, raising concerns about the potential unfair use of information disclosed during mediation in subsequent litigation. This disadvantage, however, can be mitigated by providing disputing parties with the option to exit the Med-Arb process after the mediation phase. In such cases, if resolution remains elusive, either party has the right to pursue arbitration with a different neutral, avoiding the potential bias associated with the mediator.

While traditional mediation and arbitration processes have long been accepted with established histories and ethical standards, combining them in mediation arbitration poses risks to both parties and neutrals. Despite its limitations, some parties prefer the increased efficiency and finality of med-arb over the safeguards provided in traditional practices. While compromises may arise, an understanding of the complexities allows an experienced neutral to present med-arb as a valuable, albeit imperfect, dispute resolution alternative.

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