

A MODIFIED MED-ARB: A PROPOSAL TO REDUCE THE RISK OF MIS-USING CONFIDENTIAL INFORMATION OBTAINED IN MEDIATION

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PRIVATE AND CONFIDENTIAL

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In a quick survey of mediation rules, one will find that confidentiality is at the heart of mediation. Under confidentiality, one cannot disclose any information or documents disclosed by the other parties and the mediator in mediation to any third party or the Court, unless otherwise agreed by the other parties or disclosable in law. Its objective is to encourage the parties so far as possible to settle their disputes through free and frank exchange without fear that such exchange will be used to their prejudice in the subsequent legal proceedings, in the event that no agreement can be reached to settle the disputes. However, in practice, the confidentiality rule may not be effective in guarding against a party from mis-using the confidential information obtained in the mediation session.

ARB-MED

In order to avoid a party to mis-use confidential information obtained in mediation, there is a proposal¹ that the parties should first go through the arbitration process before taking part in mediation. This hybrid mechanism, Arb-Med, is differed from the Arbitration-Mediation-Arbitration (Arb-Med-Arb) mechanism proposed and adopted by the Singapore International Arbitration Centre (SIAC) and the Singapore International Mediation Centre (SIMC) in 2014. In the Singapore Arb-Med-Arb mechanism, after commencement of arbitration and constitution of the Tribunal, the Tribunal will stay the arbitration for mediation. If the mediation is successful, the Tribunal will issue a consent award. In the event the mediation fails, the disputes will be referred back to arbitration. This mechanism is in essence nothing different from the tradition approach that where the mediation is unsuccessful, the parties will refer their disputes to arbitration. Insofar as this article is concerned, this mechanism may not be able to prevent a party from mis-using the confidential information obtained in mediation in the arbitration.

In the Arb-Med mechanism, the parties will go through the whole arbitration process, including filing of claim submissions and defence submissions, exchange of documents and witness statements, and so forth. Depending on the complexity of the issues in dispute, the Tribunal will determine the disputes either on documents or after hearing of the parties' submissions and evidence. The Tribunal will write an award, but will keep it from the parties, pending the result of mediation. The parties will then proceed to mediation². If the parties fail to reach a settlement agreement, the Tribunal will release the award. This therefore prevents the parties from mis-using any information obtained in mediation. Since the parties should know the strength and weakness of their own case and their opponent's case after going through the arbitration, they will be more ready to make concessions in the mediation session. The availability of the award will also put pressure on the parties to reach a settlement agreement in order to avoid the unpredictability of the award.

Mediation is a type of alternative dispute resolution process, so that time efficiency and cost effectiveness are central to mediation. Although the Arb-Med mechanism can avoid the mis-use of confidential information, it has given up these two main advantages of mediation. The parties are required to spend time in both arbitration and mediation and incur two sets of costs. As it is the general rule that costs will follow the event, the losing party in arbitration may need to bear four sets of costs.

THE MODIFIED MED-ARB

It is proposed that a modified version of the traditional Med-Arb model may be adopted by the parties. Under this modified Med-Arb mechanism, the parties should first appoint a mediator. However, before commencement of the mediation, each party will prepare a statement setting out its case, including the issues in dispute and its position, as comprehensively as possible in point form and a list of documents relevant to the issues in dispute, in addition to the summary of brief background and issues in dispute which is generally filed with the mediator. Apart from filing their summaries, the parties will pass their statements in sealed envelopes to the mediator. The mediator will then conduct mediation as usual on the basis of the summaries filed by the parties.

If the mediation is successful, the mediator will return the statements to the respective parties. If the mediation is unsuccessful, the mediator will pass a party's statement to its opposing party. In other words, the statements will be exchanged between the parties. The parties will then proceed to arbitration. The parties will prepare their respective submissions on the basis of their statements. Each party may check the opposing party's submissions against the statement in hand. A party cannot change its position, other than admission, without giving good reasons and disclosing the source of the relevant supporting information and documents and the circumstances as to how it comes across these. Subject to the opposing party's agreement to the change, the Tribunal will determine whether the change of position is allowable. The parties may of course enter into an agreement, prior

¹ See the article "Med-Arb and its variants: Ethical issues for Parties and Neutrals" by Richard Fullerton, at pages 58 and 59 of the Dispute Resolution Journal (May October 2010).

² In the article stated in footnote 1, Richard Fullerton wrote that the neutral and impartial third party will conduct both the arbitration and the mediation. This may reduce the costs of mediation. However, the downside of this is that the impartiality of the mediator may have been tainted. It is proposed that a new mediator should be appointed to conduct the mediation.

to commencement of mediation, on the circumstances under which they are allowed to change their position from that as set out in their respective statements. With the knowledge that its statement is in the opposing party's hand, one will think twice before mis-using the confidential information and documents disclosed in the mediation session. While costs will be incurred in preparing the statements, the exercise will allow the parties to look at the strength and weakness of their cases more closely before mediation. In addition, as the parties are required to set out their cases in full in their respective statements, they will be more ready to engage in free and frank exchange in mediation. This will facilitate the parties' negotiation and the conduct of mediation. The costs will also not be wasted if the parties are required to proceed to arbitration.

CONCLUSION

Some people refuse to participate in mediation, fearing that they will have to disclose their case to the opposing party. Even if they agree to mediate, they may be hesitate to engage in free and frank exchange with their opponents. There may not be an ideal mechanism which can avoid all of the risks, particularly those being exploited by a party. What can however be done is to minimize or reduce the risks to an acceptable level. The modified Med-Arb mechanism proposed above is hopefully a step towards such goal, so that people will be more willing to take mediation as a means to resolve their disputes.

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