

The Interaction Between Arbitration and Mediation: Vision v Reality*

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Arbitration and mediation are two forms of dispute resolution that have existed for a long time but are rarely combined. This article seeks to explore some of the the reasons for this, and whether, in fact, a combination of both processes could further and improve both dispute resolution practices by providing new disciplines and options for each of these methods. It seeks to explore some common misapprehensions about how each of these processes is currently being used, the compatibility between mediation and arbitration, and exciting new possibilities that combined processes could bring to disputants and practitioners, by providing the certainty of outcomes that arbitration offers with the ability to take into account future-oriented and subjective interests of the parties that mediation entail.

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Introduction

For international business disputes, arbitration is still considered the best alternative to national court proceedings. Mediation¹ is seldom used – at least in Germany, France, United Kingdom and other European countries – as a ‘first choice’ to settle disputes in the commercial world.²

Besides the fact that the usefulness of mediation for settling commercial disputes is generally underestimated, mediation can also play an important role in conjunction with other dispute resolution processes,³ especially arbitration, for reaching the best possible outcome for the parties in dispute.⁴ This too, however, seems to be under-utilised, as mediation and arbitration tend to be viewed as competing processes, rather than synergistic ones.

It is continuously argued that *mediation* is already an *integral part of arbitration* and that there is no need for the appointment of a separate mediator. Arbitrators often consider themselves to be the promoters of a settlement,⁵ with their goal being to achieve an economically sensible and

1 For the purposes of this article, the authors revert to one of the first definitions of mediation, provided in J Folberg and A Taylor, *Commercial Mediation: A Comprehensive Guide to Resolving Conflicts without Litigation* (San Francisco: Jossey-Bass, 1984), which is as follows: ‘The process by which the participants, with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives and reach a consensual agreement that will accommodate their needs.’ For additional details regarding mediation, see: S B Goldberg, F E A Sander and N Rogers, *Dispute Resolution – Negotiation, Mediation, and other Processes*, 3rd edn (Gaithersburg, MD: Aspen Law and Business, 1999); R A B Bush and J P Folger, *The Promise of Mediation* (San Francisco: Jossey-Bass, 1994); P Lovenheim, *How to Mediate Your Dispute* (Berkeley, CA: Nolo Press, 1996); K K Kovach, *Mediation: Principles and Practice* (St Paul, MN: West Publishing, 1994); C Moore, *The Mediation Process: Practical Strategies for Resolving Conflict*, 2nd edn (San Francisco: Jossey-Bass Publishers, 1996); J E Beer and E Stief, *The Mediator’s Handbook*, 3rd edn (Gabriola Island, Canada: New Society Publishers, 1997); K P Risse, *Wirtschaftsmediation* (Munich: C H Beck, 2003); C Duve, H Eidenmüller and A Hacke, *Mediation in der Wirtschaft* (Frankfurt: 2003).

2 See the results of a survey by PricewaterhouseCoopers AG, Germany: *Commercial Dispute Resolution*, April 2005, which can be downloaded from (www.pwc.de). Although conciliation is often provided for in civil law jurisdictions, this is different from mediation in that it is typically an evaluative process, by which a neutral will assess the parties’ positions and help them to reach a solution based on the likely outcome of litigation proceedings, as opposed to their subjective needs and interests looking towards the future.

3 Not only other ADR-processes, but in the meantime also court proceedings: see the evaluation of court-annexed mediation in Germany, which can be downloaded from (www.mediation-in-niedersachsen.de).

4 Goldberg, Sander and Rogers, *Dispute Resolution*, pp 271 *et seq.*

5 K P Berger, ‘Das neue Schiedsverfahrensrecht in der Praxis: Analyse und aktuelle Entwicklungen’, RIW 2001, p 7 (16); F Nicklisch, ‘Schiedsgerichtsverfahren mit integrierter Schlichtung’, RIW 1998, p 169 (172).

interest-based result. On the other hand, it is argued by mediators that arbitration has too many elements resembling court proceedings and does not adequately consider the future and subjective needs and interests of the parties, which makes it impossible to include mediation as part of the role of the arbitral tribunal. In practice, *ADR-clauses* are often drafted as ‘multi-step’ or ‘escalation’ clauses, starting with negotiation, continuing with mediation if negotiation fails, and ending up with arbitration if mediation fails. For example, the WIPO Arbitration Center recommends the following *ADR clause*⁶:

‘Any dispute, controversy or claim arising under, out of or relating to this contract and any subsequent amendments of this contract, including, without limitation, its formation, validity, binding effect, interpretation, performance, breach or termination as well as non-contractual claims, shall be submitted to mediation in accordance with the WIPO Mediation Rules

If, and to the extent that, any such dispute, controversy or claim has not been settled pursuant to the mediation within [60/90] days of the commencement of the mediation, it shall, upon the filing of a Request for Arbitration by either party, be referred to and finally determined by arbitration in accordance with the WIPO Arbitration Rules.’

Such clauses, however, still treat mediation and arbitration as distinct proceedings. Few ADR regulations combine arbitration and mediation, known as Med-Arb or Arb-Med⁷ proceedings. For example, the DIS Mediation/Conciliation Rules⁸ use the following wording:

6 See: WIPO Arbitration and Mediation Rules, available under: (<http://arbitr.wipo.int>) or by contacting the World Intellectual Property Organization (WIPO) Arbitration and Mediation Center, 34 chemin des Colombettes, PO Box 18, CH-1211 Geneva 20/Switzerland.

7 Goldberg, Sander and Rogers, *Dispute Resolution*, pp 275 et seq. Rare exceptions to this are WIPO and the Centre de Médiation et d’Arbitrage de Paris (CMAP), which has model simultaneous Med-Arb rules on its website at (www.mediationetarbitrage.com/pdf/cmap_regl_medarb.pdf), but according to which the arbitration and mediation proceedings are kept completely separate.

8 DIS Mediation/Conciliation Rules, effective since 1 January 2002, available from (www.dis-arb.de) or contact Deutsche Institution für Schiedsgerichtsbarkeit e V (DIS), Beethovenstrasse 5-13, 50674 Köln.

'Section 14 follow-on arbitration

1. The parties in mediation/conciliation proceedings may, at any stage in the proceedings, agree in writing that the mediators/conciliators continue with their man-date in the function of arbitrators. In such case, the duty of confidentiality does not apply vis-à-vis participants in that arbitration (including possible witnesses, con-sultants etc.).

2. Unless otherwise agreed by the parties, the arbitration proceedings will be conducted pursuant to the DIS Arbitration Rules.'

The reality of mediation is that it is not competitive with, but complementary to arbitration. One commonly used form of dispute resolution, 'MEDALOA',⁹ which stands for 'Mediation followed by Last Offer Arbitration',¹⁰ combines arbitration and mediation such that the mediator (acting as an arbitrator) is asked to select which of two simultaneous offers made by the parties to one-another is to be accepted and act as a binding outcome.¹¹

This article compares arbitration and mediation as a first step, including some comments regarding the compatibility of these two forms of dispute resolution. It continues with a discussion of several possibilities for interaction between mediation and arbitration procedures. Further reasons for a greater integration of mediation skills into arbitration procedures conclude this article.

Comparison of arbitration and mediation

The comparison overleaf shows commonalities and differences between arbitration and mediation, including some remarks as to the compatibility of both methods.¹²

This comparison shows that there are no obstacles to an interaction between arbitration and mediation that cannot be overcome. On the contrary, the combination of both procedures, and their interaction (eg on procedural matters, or on how to handle or separate certain issues) could lead to an enrichment of both procedures and to better outcomes.

9 Risse, *Wirtschaftsmediation*, pp 534 *et seq*; J Schwarzmann and R Walz, *Formularbuch Außergerichtliche Streitbeilegung*, (Cologne: Otto Schmidt-Verlag, 2006), p 108.

10 Robert Coulson, 'MEDALOA: A Practical Technique for Resolving International Business Disputes' (1994) 11(2) *Journal of International Arbitration* 111 *et seq*.

11 This is expressly provided for as a possibility by Art 13(b) (iii) of the WIPO Mediation Rules.

12 This comparison is based primarily on German law however it should be relevant to other civil and common law jurisdictions as well.

Criteria	Arbitration	Mediation	Remarks regarding compatibility
Degree of regulation	High degree of regulation. This is justified by the fact that arbitral decisions are meant to be binding and non-appealable (even internationally). Regulated by codes, eg German Civil Procedure Code or by Rules for Arbitration, eg DIS-Schieds-ordnung; 1958 New York-Convention, ¹³ UNICTRAL Rules and Model Law, AAA Rules etc.	Lower degree of regulation: mediation does not result in any judgment. Therefore a lesser degree of regulation is needed. Few mediation codes exist in Europe ¹⁴ ; in the United States: Uniform Mediation Act. ¹⁵ Regulated by private organisations, which are non-statutory, although the European Union has recently introduced a voluntary Code of Conduct. ¹⁶	Depending on the conflict and its grade of escalation, as well as considering the needs of the parties, or the complexity of the issues, both procedures could be suitable alternatives for the parties. The situation can change in the course of the proceeding. At one stage more regulation may be necessary; at another stage the need for cooperative negotiation could become more important. The two processes are compatible.
Goals of the procedure	Resolution of the dispute by the decision of a third party (arbitrator); law-based, adjudicative solution. Focus: past, based on objective findings of fact and applicable laws.	Resolution of the dispute by the parties through facilitated negotiations; interest-based solutions. Focus: future, based on subjective needs and interests.	The techniques of interest-based negotiations could be useful for arbitration proceedings as well. The determination of objective findings of facts and exploration of subjective needs and interests are fully compatible.
Procedure	Legal procedural rules must be established and followed (eg evidentiary rules, discovery rules, filing deadlines, conduct of hearings, format of pleadings, etc).	No procedural rules: the phases of mediation will follow logical steps, but issues of process as well as substance can be constantly reassessed and revised.	The creativity of mediation, combined with the structured and binding decision-making process of arbitration are compatible and could be of additional value to the parties.
Confidentiality	Arbitration is confidential and not public.	Mediation is confidential and not public.	This provides a basis for the perfect compatibility of arbitration and mediation.

13 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards – the ‘New York’ Convention, New York, 10 June 1958.

14 eg. for Austria: *Zivilrechts-Mediations-Gesetz*, in force since 01.05.2004 or for Belgium: *Loi modifiant le code judiciaire en ce qui concerne la médiation*, dated 21.02.2005, see: M Kilian and B Dux, ‘La loi sur la médiation’ (2005) *ZKM: Zeitschrift für Konfliktmanagement*, pp 144 *et seq*. Geneva is the only canton to date to have adopted a law on civil mediation in Switzerland, although a new draft law on federal civil procedure that is currently in preparation provides for mediation in addition to conciliation.

15 Uniform Mediation Act (UMA), drafted by National Conference of Commissioners on Uniform State Laws and approved and recommended for enactment in all the States in August 2001.

16 See: (http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.htm).

Criteria	Arbitration	Mediation	Remarks regarding compatibility
Decisional powers	<p>Within a legal framework, based on legal norms and syllogisms: decision making remains with the parties provided they find mutual solutions. If they cannot agree, the arbitral tribunal decides. The arbitrators have complete authority when deciding on issues of process, fact and law.</p>	<p>Decision-making powers remain with each of the parties, 100% and at all times. The mediator remains without any decisional powers throughout the process.</p>	<p>Mediation is compatible with amicable settlements in arbitration (eg Consent Awards/Awards on Agreed Terms) because of the emphasis on the parties' self-determination. An arbitral award guarantees a binding and final decision at the end that is internationally enforceable.</p>
Voluntariness	<p>Arbitration is basically voluntary, but if chosen it leads to a binding process and result. The proceedings cannot be interrupted at the free will of one of the parties once started.</p>	<p>The main principle of mediation is the voluntary participation of the parties at all times. Any party can leave the mediation at any time, without having to provide any reason.</p>	<p>It is not incompatible that a party may leave the mediation, but cannot leave the arbitration. This is one of the reasons, in fact, why mediation may be a useful adjunct to arbitration.</p>
Impartiality, neutrality and independence	<p>The impartiality, neutrality and independence of arbitrators are a prerequisite for arbitration, failing which the arbitrators can be impeached and a decision annulled.</p>	<p>As in arbitration, this is a fundamental tenet of mediation: a mediator must be impartial, neutral and independent. The mediator must end the mediation if this principle is violated.</p>	<p>Both procedures are compatible insofar as they share these fundamental values. This is as much the case in mediation as in arbitration, even if the mediator has no decision-making powers.</p>
Qualifications of the mediator/arbitrator	<p>No special qualifications are required. Arbitrators are often lawyers or experts in a special field. Some knowledge of procedural rules is necessary, however.</p>	<p>No special qualifications are required. Some mediation organisations, however, require special training. Some minimal number of accredited hours of training may be required by national laws or regulations (eg in Germany for lawyers acting as mediators¹⁷).</p>	<p>Mediators need additional competencies in interpersonal communication skills and conflict management; whereas arbitrators need more knowledge about arbitration processes. The integration of communication and conflict management skills are not incompatible and are likely to be helpful for arbitrators.</p>
Legal relationship between parties and mediator/arbitrators	Contractual	Contractual	Both procedures are comparable as they are based on contract.

¹⁷ See Sec 7a BORA.

Criteria	Arbitration	Mediation	Remarks regarding compatibility
Acceptance of third persons/ lawyers within the process	Lawyers are admitted and present at all times, as a matter of legal right; other consultants can attend with the consent of the arbitrators.	Lawyers are not necessarily present but often will be. Depends on the desires of the parties. It can happen that lawyers are only involved at the end of mediation proceedings, to draw up a final settlement agreement.	The role and presence of lawyers or third parties, although different, are not incompatible. In reality it is the agreement between the parties as to who should attend that is important.
Formal basis of the procedure	Arbitration clause or arbitration contract, which must be in writing. Court proceedings are excluded if arbitration has been agreed to. Ad hoc arbitration is possible.	Mediation clause or mediation contract, which need not necessarily be in writing. Court proceedings may be excluded or stayed as long as mediation has not been tried – depending on applicable law or contract clauses. Ad hoc mediation is possible.	The formal bases are comparable. There is greater protection for the parties in the course of arbitration proceeding (eg the 1958 New York Convention) but this is not incompatible with mediation, which may benefit from such additional protection if combined with arbitration.
Place of arbitration/ mediation; language and applicable law(s)	Place of arbitration and language: these are often agreed by decision of the parties or of the arbitrators, if not imposed by the <i>lex fori</i> (the procedural laws of the country where the proceedings take place). Applicable law(s): this is often agreed to by the parties (eg in a contractual choice of law clause) or dictated by the facts or legal doctrine (eg the site where damage occurred or the place the contract was entered into) and can raise complex conflicts of laws principles, where two countries' interpretations of the applicable law may not be the same, which may need to be taken into account. This is often influenced by the <i>lex fori</i> , but arbitral tribunal often have to decide which of several competing applicable laws they must apply.	Place of mediation and language: these are agreed by decision of the parties and the mediator, and normally based on finding a venue and language that will be most conducive to creating trust and open communications between the parties and the mediator. Applicable laws are not of relevance (save insofar as benchmarking a negotiated outcome may be concerned) because the goal is an amicable settlement in the 'shadow of the law'. Mediation is particularly useful where more than one national law may apply to the same set of facts. ¹⁸ The parties can set the law aside and resolve any issues based on their mutual interests.	There are no substantive differences insofar as the place of arbitration and language are concerned (although the <i>lex fori</i> may impose that the judgment has to be rendered in a certain language etc). As far as applicable laws are concerned, there is more autonomy for the parties in a mediation procedure, as the applicable laws, and any conflicts between them will not be dispositive of any issues. The <i>lex fori</i> may be important however, even in the case of mediation proceedings, to protect the confidentiality and the suspension of any relevant statute of limitations periods in some cases. Neither of these issues, however, render arbitration and mediation incompatible.

18 eg, what are the applicable copyright laws and rules of co-authorship where two co-authors in different countries draft an academic paper over the internet, as was the case for this contribution?

Criteria	Arbitration	Mediation	Remarks regarding compatibility
Procedure	Procedure is fixed by laws, codes or rules, or is set by the arbitral tribunal through procedural orders.	Process of mediation depends on the parties and the mediator at all times, following the natural steps of any negotiation.	Inclusion of mediation within arbitration is not incompatible, but requires an appreciation of the procedural requirements of arbitration.
Caucuses (separate meetings between the neutral and the parties)	Not allowed, and may affect enforceability of the award if this has occurred during the arbitration process.	Often used in commercial mediations to 'reality test' positions and probe emotions or highly confidential interests. 'Shuttle Diplomacy' (mediation by caucuses) is commonly used in many countries.	Main difference between both procedures, but can be managed in combined Med-Arb cases by agreement, having separate mediators and arbitrators, or by avoiding the use of caucuses.
Challenge of arbitrator/mediator	Limited possibilities. Reasons and possibility for challenges are fixed by law.	Parties can interrupt the mediation at any time without any reason, including if one party believes the mediator not to be neutral or impartial. The parties are free to 're-contract' at any time (both on process and substantive issues).	Less formal grounds and more flexibility in mediation, based on subjective perceptions. Not incompatible, but must be considered if arbitrator is to act partly as mediator (eg without caucuses).
Result/end of the procedure	Arbitral award, usually no dissenting opinion (although this is possible in some cases). In some cases, the parties may reach a settlement and submit it to the tribunal for ratification as a 'Consent Award' or an 'Award on Agreed Terms'.	Final agreement by the parties is usually reached in the form of a written settlement agreement, but may be oral. The mediator has no decision-making power. In some countries the parties may ratify or 'homologate' a written settlement agreement, which provides some advantages for enforcement.	An arbitration that includes mediation must consider the different dynamics of these procedures. It is possible, however, for a mediation agreement to be converted into a Consent Award/Award on Agreed Terms in certain cases.
Appeal or subsequent court proceeding	In general: no appeal is possible and the matter is <i>res judicata</i> , preventing any subsequent national court proceedings on the same issue as between the same parties. The scope depends on whether the decision was rendered <i>erga omnes</i> or only <i>inter partes</i> .	If mediation fails, court proceedings are a probable fallback and a likely consequence. Even when a settlement agreement is reached, nothing prevents one of the parties from challenging it in court, just as any contract can be challenged in a court.	Lower degree of business certainty in mediation; possible higher risk of a court seeking confidential information or pre-trial discovery as to what happened in mediation (although this is often excluded by mediation rules). This is where arbitration following mediation may be a better alternative than national court proceedings.

Criteria	Arbitration	Mediation	Remarks regarding compatibility
Enforcement	Worldwide enforceable, either by local law or by 1958 New York Convention. Arbitral awards are in fact easier to enforce than foreign judgments issued by national courts.	Pure contract, therefore not enforceable by specific performance per se if damages are deemed to be a suitable remedy for breach of a settlement agreement provision. Specific performance may be stipulated but not guaranteed, and a settlement agreement will be construed by a national court or tribunal just like any other contract.	This is one of the key advantages of combined proceedings. A Consent Award/Award on Agreed Terms, resulting from a mediation that takes into account subjective interests as well as objective legal findings of fact and law would ideally combine the benefits of both systems. ¹⁹

¹⁹ For Germany see Sec 1053 para 1 Civil Procedure Code (Zivilprozessordnung); see also Article 65 of the WIPO Arbitration Rules ('Settlement or Other Grounds for Termination').

Possibilities for interaction between arbitration and mediation

There are several possibilities for an interaction between arbitration and mediation. Although some of these procedures are well known and documented in the USA, they are less commonly used in cross-border cases and should be considered more often.

Med-Arb and Arb-Med

The most typical methods of interaction between arbitration and mediation are ‘*Med-Arb*’ or ‘*Arb-Med*’ proceedings, which blend mediation and arbitration into one procedure or keep them as two separate procedures,²⁰ with different people usually being retained for the role of mediator and arbitrator.²¹ *Med-Arb* or *Arb-Med* are usually a *two-step dispute resolution process*.²² Although there seems to be increased variation and creativity in combining these two procedures as described below, the original debate regarding the compatibility of mediation and arbitration continues to this date.²³

Med-Arb: mediation followed by arbitration. In *Med-Arb proceedings*, the neutral functions first as a mediator, helping the parties reach a mutually acceptable outcome. If mediation fails or is only partially successful, the same neutral can then serve as an arbitrator, issuing a final and binding decision.²⁴

This raises serious concerns if the mediator has held caucuses with the parties separately, but if properly explained and managed, the parties may consent to this and waive any rights to object on these grounds in certain jurisdictions. The *issue of caucuses* is less sensitive in MEDALOA cases, where the mediator has limited discretion when acting as the arbitrator in the second stage of the proceedings, namely, selecting which of two simultaneous offers shall be accepted. The concerns regarding caucuses in *Med-Arb* proceedings can also be overcome by appointing a separate or additional arbitrator, or by using two people as co-mediators and co-arbitrators from the beginning, with the provision that any arbitral award must be by consensus decision only (although it is unusual to appoint only two people for arbitrations in case they do not agree).

20 Med-then-Arb or Arb-then-Med.

21 Schwarzmann and Walz, *Formularbuch Außergerichtliche Streitbeilegung*, pp 82 *et seq.*

22 M E Telford, *Med-Arb: A Viable Dispute Resolution Alternative* (Kingston, Ontario: IRC Press Queen’s University, 2000), p 2.

23 See: Dendorfer, *MedArb and ArbMed Proceedings: Implications, Advantages and Disadvantages*, Center for International Legal Studies (Salzburg: Yorkhill Law Publishing, 2004).

24 Schwarzmann and Walz, *Formularbuch Außergerichtliche Streitbeilegung*, pp 83 *et seq.*

Med-Arb offers the opportunity to take control of the dispute resolution process through mediation, with the assurance that, if the parties do not settle the dispute themselves, the 'Med-Arbitrator' will do it for them or can at least help to set up a simpler and more cost-effective arbitration that will only resolve those specific points that the parties could not agree to by themselves.²⁵ Knowing that the process includes binding arbitration as a follow-up assures the parties that the case will be resolved without ending up in court, and ensures certainty of outcome in any event, provided the independence and neutrality of the arbitrator are preserved, which may entail the appointment of separate arbitrators to resolve specific points. This is analogous to using experts within an arbitration process (eg to assess apportionment of joint liabilities, running of experiments to determine similarities of industrial processes, providing valuations on specific assets, etc), leaving the mediator free to work with the parties on the implications of the binding decisions on each respective point.

Like all mediations, the process involves an initial *joint meeting* between the disputants and the mediator. Parties will use this initial phase to air their views and to educate the neutral about the case. Following the initial joint meeting, the mediator continues with an *interest-exploration phase* either in a joint meeting or in caucuses. The sides will work on achieving a solution to their dispute that should mutually address their future interests. If all issues are resolved in mediation, an agreement is drawn up, signed by all sides, and the process is complete.²⁶ It may in certain circumstances, be converted into an Award on Agreed Terms or a Consent Award if arbitral formalities are retained and an arbitrator is capable of ratifying it, confirming that the award provides a just outcome and would not be illegal or against public policy.

If it is determined that the mediation will not resolve all issues, the disputants may draw up and sign a *partial agreement* that stipulates the issues that were settled and how they have been resolved, and leave the rest of the dispute for determination by arbitration on much narrower grounds, possibly even stipulating procedural issues (eg the scope of any discovery, the maximum number of witnesses to be heard or a date by which the arbitral tribunal must reach a decision). This partial agreement will be binding independently of the arbitration process (provided it does not contravene public policy) and it can still become part of the final ruling as a consent award.

25 R P Flake, 'The Med/Arb Process: A View from the Neutral's Perspective' (June 1998) *ADR Currents*, American Arbitration Association, p 3.

26 Schwarzmann and Walz, *Formularbuch Außergerichtliche Streitbeilegung*, pp 84 *et seq.*

An important *difference between Med-Arb and mediation on its own* is that a disputant may not usually walk away from the process at will once the arbitration process is commenced.²⁷ If mediation fails, disputants usually must proceed to binding arbitration.²⁸

The *arbitration phase in Med-Arb* is like any traditional arbitration, except that fact-finding and the education of the neutral have usually already been accomplished.²⁹ The parties will normally have been able to explore key events that occurred (often in a 'witness conference' setting, in a joint session) and will have reached consensus wherever possible on issues of fact to minimise the costs of the arbitration proceedings continuing.³⁰ Before the arbitration phase actually gets under way, the disputants can reiterate the precise issues to be considered during arbitration and try to resolve any issues that may arise as a result of caucuses having been used (eg by resorting to MEDALOA, or the appointment of additional neutrals). The Med-Arbitrator hears arguments on all remaining issues and renders a binding decision.

The central advantage of Med-Arb is that of *costs and efficiency* as well as a possibly greater *psychological satisfaction* in the outcome, knowing that the arbitrator has made his or her decision after taking into account the future and subjective interests of the parties, as well as the objective applicable law.³¹ In the event that mediation fails or was only partially successful and there were no caucuses (or any issues relating to caucuses have been satisfactorily explored and resolved), the parties need not educate another neutral. The neutral who has been serving as mediator already knows much,

27 *Ibid.*, p 85.

28 Alan Limbury has recently suggested a form of Med-Arb whereby a waiver could be explicitly requested in writing following the end of the mediation proceedings and before continuing with the arbitration phase of such a combined proceeding, allowing the parties in fact to opt out of the arbitration phase if either of them has any doubts at such time as to the mediator's continuing ability to be neutral and impartial as an arbitrator. (Presentation to the ICC, Paris, 19 February 2007.)

29 Flake, 'The Med/Arb Process', p 4.

30 It is not uncommon in a mediation for the parties to agree on matters of fact, or to narrow down the issues remaining for decision by a subsequent arbitrator. Even if the facts are not clearly ascertainable, the parties can agree through mediation, for example on ranges of possible findings of fact or remove certain issues from consideration (eg fraud, although the question of mistake vitiating consent may remain): The parties can allocate contributory risks, and then leave it to the arbitrator to determine matters of quantum. Sometimes it is not findings of fact per se, but a simple matter of giving a spread of risks, where the worst case scenarios can be excluded from consideration by the arbitral panel or to minimise the costs of further discovery. (For example, number of witnesses to be heard, or agreeing on a possible range of temperatures as being within the scope of certain specifications or patent claims.)

31 Flake, 'The Med/Arb Process', p 3; Telford, *Med-Arb*, p 2.

if not all the information she or he will need to make a decision, and will have a broader range of options to consider, given the focus on the future interests of the parties. She or he may have obtained even better information from the parties than would be obtained through more formal arbitration hearings.

Promoters of Med-Arb state that combining the two procedures makes mediation more likely to *produce a settlement* and – in case no settlement is reached – leads to earlier and more acceptable results in arbitration.³² According to Goldberg, ‘arbitration is the motor that makes mediation run’ because the threat of adjudication induces the parties to settle; this effect is called ‘mediation with muscle’.³³

Med-Arb also has all of the *advantages* commonly associated with mediation on its own. It can lead to an earlier solution, allows a less formal exchange of information and views, gives the parties the feeling of having been heard and has the capacity of achieving solutions which are more acceptable to all parties involved.³⁴ The parties focus on current issues and future interest-based solutions instead of solely discussing past events and the allocation of blame.

Med-Arb also provides means for a *quicker resolution of the dispute* if settlement is not reached. In short, the dispute will be resolved, one way or another.³⁵ Also, the Med-Arbitrator could render an interim advisory opinion, acting as a conciliator, suggesting what she or he deems could be a likely or a fair settlement, or based on the probable outcome of the arbitration. On the basis of this new input, the parties may be more amenable to reaching agreement during a final negotiation round.

If, finally, the Med-Arbitrator does proceed to arbitrate the case himself/herself, the previous negotiations will have served typically to *narrow down the issues remaining in dispute* and result in procedural measures (eg a third-party evaluation on key findings of fact) that could lead to more predictable and acceptable solutions.³⁶ Also, the Med-Arbitrator knows the case in detail and may be able to assess the strength of the parties’ positions better.

Med-Arb also produces – even if the entire conflict has been settled by a mutual agreement – a *directly enforceable instrument*, the Arbitral Award. An Arbitral Award on Agreed Terms or a Consent Award thus could improve

32 Telford, *Med-Arb*, p 3.

33 C Bühring-Uhle, Working Paper, Series 90-12, Program on Negotiation at Harvard Law School, March 1990, p 3.

34 *Ibid.*, p 86.

35 Flake, ‘The Med/Arb Process’, p 4.

36 Telford, *Med-Arb*, p 4.

the lack of *exequatur* or direct enforceability of mediation settlement agreements.³⁷

However, there are also essential *disadvantages* to Med-Arb-proceedings, as follows.³⁸

The *objective* of reaching a settlement is different from that of rendering an award. The facts relevant in the two cases may be different, or, although they may appear to be the same objectively, may be viewed from different *perceptions* or with a subjective bias once intentions or other private considerations are known. Thus, the mediator turned arbitrator may not be able to retain an objective assessment of the facts or issue a decision on the basis of the facts as elicited during the mediation stage, but may need to elicit additional evidence or arguments which may be coloured by what she or he has already heard. Still, this may be considerably more efficient than starting all over again to select another neutral, and educate that neutral from scratch, if the parties have identified and are willing to assume any such risks, placing their faith in the mediator's ongoing ability to act neutrally and impartially.

The *main concern* regarding Med-Arb is the assumption that the former mediator who acts later as arbitrator in the same case may *confuse both roles*.³⁹

Initially, disputing parties who know that the mediator may end up having decisional authority are likely to be *less candid* than they would be with a 'pure' mediator about such matters as their needs, and how they prioritise their interests. They will be unwilling to be fully transparent about these matters because they may fear that if no agreement is reached, the mediator turned arbitrator could be influenced, adversely, by their prior disclosures.⁴⁰

Because the Med-Arbitrator is likely to have *less information at her or his disposal* than a 'pure' mediator, she or he may be less likely to reach a solely mediated outcome. Additionally, the typical 'reality testing' that is a key element in many successful mediations may be somewhat compromised in the Med-Arb process, as this is normally done in caucuses. This could *weaken the effectiveness of the mediation process*.⁴¹

If, on the other hand, the parties have been candid in the mediation process but no agreement is reached, the mediator turned *arbitrator will*

37 Eidenmüller, RIW 2002, p 1 (5).

38 Schwarzmann and Walz, *Formularbuch Außergerichtliche Streitbeilegung*, pp 87 and 88.

39 Eidenmüller, RIW 2002, p 1 (10).

40 Telford, *Med-Arb*, p 4; Flake, 'The Med/Arb Process', p 6.

41 *Ibid.*, p 6; Eidenmüller, RIW 2002, p 1 (10).

possess information that she or he would not have acquired in a purely arbitral role.⁴² The neutral is bound to maintain that confidentiality throughout the entirety of the process, including a subsequent arbitration.⁴³ The danger that *confidential information* nevertheless influences the Med-Arbitrator must be discussed with the parties in order to allow an informed decision to be made on what is potentially being compromised. Also the Med-Arb agreement must cover these issues and the parties should be advised by their lawyers before undertaking such next steps.

An additional concern with Med-Arb is that the parties may try to *manipulate the mediation process* by influencing the 'arbitrator-to-be' instead of acting in good faith.⁴⁴ They will follow the natural 'desire to please' the arbitrator, and set the opposing party up to look as bad as possible, which may influence the neutral's objectivity.

However, if the parties have gained such a *strong confidence in the mediator* during the course of the mediation that they would actually prefer to have him or her arbitrate the remaining issues despite any caucuses or embarrassing revelations that may have been made, this choice should be respected, notwithstanding concerns about possibly confusing the roles. In any event, the mediator should still be able to work with another neutral and act as an expert, and identify certain key issues for independent determination as part of a more cost-effective future process.

Arb-Med: arbitration followed by mediation. *Arb-Med proceedings* usually involve only *one neutral* who wears two hats, first as an arbitrator and secondly as a mediator. This proceeding starts with an arbitration hearing, in which the neutral hears arguments from both sides, drafts his or her award, but stops short of issuing it. After the disputants argue their cases before the neutral, they enter mediation.⁴⁵ The arbitrator performs the mediation after the arbitration session but before the final binding decision is made known,⁴⁶ or can appoint another person to act as the mediator.⁴⁷

This can lead to interesting *psychological pressure-tactics*. For example, the neutral can come up with an appropriate valuation of the parties' positions but not disclose his or her assessment to the parties. Instead, the neutral

42 Telford, *Med-Arb*, p 4.

43 Flake, 'The Med/Arb Process', p 5.

44 Telford, *Med-Arb*, p 3.

45 *Ibid.*, p 2.

46 Schwarzmann and Walz, *Formularbuch Außergerichtliche Streitbeilegung*, p 97.

47 For a case study describing an Arb-Med procedure, see B Bulder, M Leathes, W Kervers and M Schonewille, 'Einstein's Lessons in Mediation', July/August 2006, *Managing Intellectual Property* (www.managingip.com), pp 23-6.

can place his or her decision in an envelope, place the envelope on the table in front of the parties, and then become (or appoint) a mediator. If, by a predetermined time, the parties cannot reach an agreement with the mediator's help, the envelope will be opened and the award it contains will become automatically binding, the parties having accepted that this would be so in advance.

The *merit* of the Arb-Med process over other options is that an *outcome is guaranteed* at the end of the day, and the parties have ample opportunity to control the outcome themselves by achieving an amicable arrangement.

On the other hand, this process may be *more time-consuming* than Med-Arb, or may lead to a less rigorous arbitration proceeding, on the grounds that the parties may be more willing to risk 'rough and ready' justice. There is also a risk that the Arb-Mediator may show his or her hand at some stage in the mediation proceedings, and inadvertently disclose what his other judgment contains (which is one of the reasons why appointment of a different mediator may be preferable). If this happens in caucus, it will give that party an unfair advantage over the other party in the mediation process. Some experts also believe that the initial, adversarial procedure can set a tone that makes it more difficult for the parties to compromise during later mediation, or that the arbitrator, with his or her mind already set, may subconsciously try to manipulate the parties in the direction of his or her decision.

In addition it must be questioned what happens if the mediation fails or is only partially successful, and the neutral discovers facts which would make his or her ruling incorrect or inappropriate. But even considering these concerns, the argument remains that the parties are free to decide finally how to proceed and whether they trust the neutral in a way which allows these changes in his or her role (assuming the same person fulfils both roles).

Many of these concerns can be resolved by appointing a new mediator, and using a different person as the sole arbitrator initially. The argument can also be raised, however, that it is important to have the same person act both as arbitrator and as mediator, because the mediation may uncover subjective interests that render the arbitration decision inappropriate or incorrect. If achieving a future-oriented outcome is just as important as getting a legally correct judgment, it may be an incentive to use the same person and simply accept the risks a combined process may entail.

Besides the possibilities of Med-Arb or Arb-Med there are *further alternatives* for the interaction of arbitration and mediation which can be summarised in the following section.

The mediation window

One further possibility is the idea of including mediation in the middle of an ongoing arbitration by using a *mediation window* with a separate mediator.⁴⁸ The Commercial Arbitration Rules and Mediation Procedures⁴⁹ of the American Arbitration Association (AAA) provide for the following in Rule R-8:

‘At any stage of the proceedings, the parties may agree to conduct a mediation conference under the Commercial Mediation Procedures in order to facilitate settlement. The mediator shall not be an arbitrator appointed to the case. Where the parties to a pending arbitration agree to mediate under the AAA’s rules, no additional administrative fee is required to initiate the mediation.’

The result could be an *Arbitral Award on Agreed Terms* or *Consent Award* which would confer full force and effect on mediation settlement agreements.⁵⁰ Furthermore, a mediation window could help to overcome the argument of some critics that arbitration is only focused on a decision by the arbitrators but not on an amicable settlement between the parties. Parallel proceedings⁵¹ and the danger of subsequent national court proceedings in case of breach of a mediation settlement agreement could be excluded by this interaction between arbitration and mediation.⁵²

The inclusion of mediation within arbitration can also support further *social learning by the parties*. They will be ‘forced’ to think about cooperative negotiation techniques and creative solutions. They will also be asked to consider their own interests and the interests of the other party as well as to focus on the future and on questions of relationships and possible emotions. ‘Stepping into the shoes of the other party’ helps to reach an understanding of the other side’s positions better and to brainstorm together to explore more interest-based solutions than would otherwise be found in the case of positional bargaining and decision making by a third party (ie the arbitral tribunal).⁵³

48 Eidenmüller, RIW 2002, p 1 (3).

49 Amended and effective 1 July 2003.

50 Berger, *International Economic Arbitration*, pp 581 *et seq.*

51 See Sec 2 para 3 New York Convention.

52 Eidenmüller, RIW 2002, p 1 (3).

53 A mediation window was recently used successfully by one of the authors in a complex joint venture dispute between an Eastern European company and an EU company. The dispute was submitted to international arbitration, and after four years of acrimonious proceedings, including national court proceedings (as the affiliate of one of the parties was not bound by the agreement to arbitrate), part of the dispute was ordered to mediation by the French courts. During the mediation, the issues in dispute could be consolidated

For parties with an *ongoing relationship*, it may be more important to learn how to reach mutually acceptable solutions without always having to revert to adjudicative procedures, or to create a precedent or rules of procedure which could be reapplied in the future to have any future disputes resolved in a better manner or more promptly (eg in a complex ongoing construction case, where several disagreements are likely to occur).

One *disadvantage* of a mediation window is the fact that the mediation is included in the context of arbitration, losing the cost and time advantages of 'pure' mediation and possibly excluding creative or interest-based solutions that are not legally posited.⁵⁴ In addition, the parties will probably not benefit from all of the characteristics of mediation but will consider mediation 'only' to be part of the arbitration, or may limit the role of the mediator to being one of a conciliator, who seeks to reach a compromise based on what the arbitral panel is likely to find.⁵⁵

Furthermore, the *integrity* of both mediation and arbitration may be placed at risk when the same person serves as both mediator and arbitrator.⁵⁶ For example, Article 12 of the UNCITRAL Model Law has the following rule:

'Unless otherwise agreed by the parties, the conciliator shall not act as an arbitrator in respect of a dispute that was or is the subject of the conciliation proceedings or in respect of another dispute that has arisen from the same contract or legal relationship or any related contract or legal relationship.'

The ICC ADR Rules⁵⁷ for amicable settlement contain the following wording at Article 7:

'Unless all of the parties agree otherwise in writing, a Neutral shall not act nor shall have acted in any judicial, arbitration or similar proceeding relating to the dispute which is or was the subject of the ADR proceedings, whether as a judge, as an arbitrator, as an expert or as a representative or advisor of a party.'

and resolved within a matter of weeks. The parties were able to link issues and terminate all arbitration and national court proceedings, while at the same time terminating their business relationship. Despite their disagreement and the hostility that existed between the companies, they shared a mutual interest in reducing costs, speeding up proceedings, and reaching an outcome that would provide business certainty moving forwards. Interestingly, the arbitral tribunal did not deem itself competent to order the parties into mediation, and the lawyers did not feel they could ask the tribunal to order this. Based on the facts of this case, it would have been appropriate to use mediation much earlier on in the arbitration proceedings, and the process could have been simplified for the arbitral tribunal as well, especially using shadow mediation, as described below.

54 Eidenmüller, RIW 2002, p 1 (6).

55 *Ibid.*

56 Goldberg, Sander and Roger, *Dispute Resolution*, p 227.

57 Available from (www.iccadr.org).

These rules do not seem to take into account the process of MEDALOA,⁵⁸ where the same neutral often acts as the arbitrator in selecting between two last offers.⁵⁹ The issue of integrity in this case may be less sensitive, since the neutral has no discretion to amend any portion of an offer and the parties have a psychological incentive to reach for middle ground, which the mediator is likely to deem to be fair (especially if she or he may already have given a non-binding evaluation before moving to ‘Last-Offer Arbitration’).

An arbitrator operating within a mediation window may also face the dilemma that she or he cannot increase the *effectiveness* of the parties’ settlement efforts without endangering the arbitration process. This is especially true if one considers what can happen in a *caucus*, or if there is a perception of disproportionate reality-testing by one of the parties, whether in joint session or in a caucus.⁶⁰ That is one of the reasons why an arbitrator should not be allowed to talk to the parties in private sessions unless she or he has already written her or his decision (eg as in Arb-Med).

Shadow mediation

Shadow-mediation is a variation on conducting separate mediation and arbitration proceedings in parallel, which may be especially effective in complex, multiparty cases. It involves separate neutrals for the mediation and arbitration phases. Unlike simultaneous but purely independent mediation and arbitration proceedings, where the arbitrators and mediators are not allowed to meet or be aware of one another’s procedures (as is currently proposed by CMAP’s combined Arb-Med rules), the mediator can attend and observe the proceedings during the arbitration phase and remain ‘on call’ or operate in the background in case either party wishes to suspend the arbitration process or explore new alternatives, depending on how the case is developing before the arbitral tribunal (or how costs and time may be ramping up).⁶¹ The tribunal may also wish to involve the mediator in addressing a particularly difficult issue, which the arbitral panel may not be able to resolve adequately by simple operation of law or which may require disproportionate costs or time to resolve (eg where complex consequences of co-ownership may arise, expensive and lengthy experiments need to be run, or the validity of intellectual property assets may be at stake, which are deemed to be non-arbitrable in certain countries).⁶²

58 See point III.4 for more details.

59 Schwarzmann and Walz, *Formularbuch Außergerichtliche Streitbeilegung*, p 108.

60 Eidenmüller, RIW 2002, p. 1 (2).

61 Schwarzmann and Walz, *Formularbuch Außergerichtliche Streitbeilegung*, p 108.

62 T J Stipanowich and P H Kaskell, *Commercial Arbitration at its Best: Successful Strategies for Business Users* (Chicago: American Bar Association, 2001), p 26.

Shadow mediation may be more expensive due to the use of two sets of neutrals, but if this accelerates the time to reach a judgment, or helps to achieve an outcome that is future-looking as well as based on past rights, the cost savings in large commercial cases could largely compensate for the additional fees of the neutrals (which the parties often share in any event). Furthermore, given the common use of three-person arbitral panels in commercial arbitrations, the cost of one or two additional mediators is unlikely to be significant, particularly if it helps to overcome some of the perceived disadvantages of using a mediation window or the same neutral for both proceedings, as described above.

MEDALOA

The exotic term 'MEDALOA' describes a *combination* of *Mediation* followed by *Last-Offer Arbitration* and has commonly been used in the sports industry (which is why it is sometimes referred to as 'Baseball' arbitration⁶³). It is argued that this method can help to overcome possible concerns that mediation may not be certain to resolve a commercial conflict.⁶⁴

In the event of last-offer arbitration the parties reduce the decision-making authority of the neutral and remove almost all discretion as to outcome. The Med-arbitrator can only consider each side's written offers and hear the parties' representations as to why their offer should prevail. The mediator cannot amend or alter any of the provisions of either offer, and must decide which offer is more reasonable overall, in which case this offer is deemed to have been accepted and the dispute is closed. The mediator's lack of power to modify an offer, suggest any changes, or propose any other solutions creates a psychological incentive on the parties to submit the offer they believe will be perceived by the Med-arbitrator as most fair.⁶⁵

A variation on this theme is '*night baseball arbitration*', so-called because it operates like baseball arbitration with the difference that the parties do not disclose their offers to the neutral but seal them in envelopes. The neutral then makes a decision that is disclosed to the parties, the envelopes are opened, and whichever party's offer is closest to the neutral's decision is the one that prevails.⁶⁶ The final arbitral award would include the 'winning offer' as the agreed terms of an award. One complication with this system is that it

63 This was how the salaries of major league baseball players were settled.

64 Risse, *Wirtschaftsmediation*, p 534.

65 Eidenmüller, RIW 2002, p 1 (9).

66 Stipanowich and Kaskell, *Commercial Arbitration at Its Best*, p 25. This works where a number (eg, salary or a quantum valuation) is required, as otherwise it may become a contentious point as to which offer is 'closest'.

raises the question of who will decide which of the two offers is closest to the Med-Arbitrator's opinion. This can readily be dealt with, however, for example by having the med-arbitrator make this determination him or herself.

MEDALOA raises the question, from an *arbitration perspective*, whether the use of last-offer techniques entails a *legal risk* that an arbitral award could be contested later on under Section V of the 1958 New York Convention, for example on the grounds that the Med-Arbitrator had no real authority to provide a final judgment, and had to compromise when selecting between two imperfect offers.

MEDALOA's usefulness may also be questioned from a 'pure' *mediation perspective* for several reasons. First, as mentioned above, it is questionable whether a mediator can suddenly switch roles and become a 'decision maker', or whether this may affect his or her behaviour or the parties' willingness to be fully transparent during the mediation process. Secondly, the process by which the mediator selects a final offer can be legally questionable: although she or he may decide which offer to accept based on reasoned principles, she or he may also leave the decision to chance (eg by flipping a coin) or base him or herself on subjective considerations (eg favouring a poorer or smaller party). Leaving the decision to chance or subjective 'extraneous' reasons could raise the question whether the mediator's decision should be final and binding, or provides grounds for appeal.

This risk can be addressed by having the Med-Arbitrator ask the parties to provide written submissions and make oral arguments prior to having to make a decision as to which of the offers should be chosen and why. The Med-Arbitrator could also explain in writing the reasons for his or her decision in favour of one offer over another (eg in 'reverse-night baseball arbitration' style, by stating which of these offers is closest to her or his perceived sense of what would be the fairest outcome). This extra-procedural layer could, however, be to the detriment of informality and speed.

When examined closely, the final step of using a 'last-offer' procedure can be construed as being a *contractual step* rather than an arbitral decision. There are two parallel offers that have been provided simultaneously and accepted automatically by the parties, but only one of these can be implemented. The task of the mediator is thus only to resolve the synchronicity of these two offers, and she or he has no standing to act as a true arbitrator.

MEDALOA should be considered primarily in situations where time is of the essence or another amicable settlement process is unlikely to have additional advantages. Otherwise there is a danger that parties to a MEDALOA procedure may focus too much on the decision-making of the

mediator and try to manipulate the process so that their final offer will look like the best one.⁶⁷

Mediation techniques as an advantage for arbitrators

Another way for greater interaction between arbitration and mediation is the use of *mediation techniques* by an arbitrator. Communication skills, interest-probing, calming skills, process designing, using principles of subjective fairness, exploring needs, dealing with impasse and emotions, bringing in creative techniques such as brainstorming or mind-mapping are all tools that could be used by an arbitral panel in conducting an arbitration hearing.⁶⁸

The use of mediation techniques can help an arbitrator to overcome barriers in arbitration which may hinder an amicable settlement between the parties, and cut through complex legal hoops. Examples of such barriers, which mediation techniques may help the parties overcome, are as follows:

Cognitive barriers. The term ‘cognitive’ refers to mental processes of perception, memory, judgment, and reasoning, as contrasted with emotional and volitional processes.⁶⁹ Parties to a conflict are often unable to consider the possibilities of different subjective perceptions, or understand underlying intentions or concerns that would provide new insights into past behaviours, which can create manifest barriers in competitive negotiations.⁷⁰ They often lead to ‘*cognitive illusions*’ by simplifying the existing facts and the decisions being at stake based on an error in perception.⁷¹

Selective perceptions. Parties often consider only one part of the facts, which can be difficult to reconcile with other facts, or the perception of the same facts by the other party. This selective perception is explained by the theory of cognitive dissonance, whereby people tend to avoid any anxiety that could result from allowing contradictory or otherwise incompatible attitudes, beliefs, or the like, to coexist.⁷² This can even occur as between the lawyers involved in a dispute. Common law and civil lawyers can have great difficulties in understanding the positions argued by the other side, based on fundamental differences between these two systems, and their unwillingness to accept that there may be two legal realities that coexist in the same

67 Risse, BB 2001 (Beilage), p 16 (19).

68 Goldberg, Sander and Rogers, *Dispute Resolution*, pp. 124 *et seq*; Kovach, *Mediation: Principles and Practice*, pp 30 *et seq*; Risse, *Wirtschaftsmediation* 2003, pp 212 *et seq*.

69 See (<http://dictionary.reference.com/browse/cognitive>).

70 Eidenmüller, RIW 2002, p 1 (7).

71 Walz in Schwarzmann and Walz, *Formularbuch Außergerichtliche Streitbeilegung*, p 21.

72 Duve, Eidenmüller and Hacke, *Mediation in der Wirtschaft*, p 28. See also (<http://dictionary.reference.com/browse/cognitive%20dissonance>).

circumstances, but that may lead to diametrically opposite results. The task of a neutral in this situation is to complete the information necessary for the parties and to correct their selective perceptions of 'reality'. In addition she or he can moderate the different opinions and create empathies for the other position, assisting in separating the people from the problem, and even use cognitive dissonances to help the parties reassess their perceptions (such as by separating the people from the problem).

Over-optimistic estimation of their own situation. Conflicting parties are often of the opinion that only their arguments are correct.⁷³ External information is often excluded and/or not adequately considered. The position can be exacerbated by lawyers or parties who, after having spent a considerable amount of time and money, have too much at stake or a reputation to protect to be able to reconsider their current position objectively. A neutral can help to balance this situation by asking for additional information and provide a 'face-saving' way of moving from a position. She or he can help the parties to avoid misunderstandings and to appreciate the other side's point of view and perception, or even consider the possibility that a judge or arbitral tribunal can get things 'wrong', and that an adjudicative outcome may not be preferable. If the arbitration proceeding is purely competitive, the dissonance created by legally-based opposing positions may be increased, and gridlock or an 'impasse' can ensue. By moving away from positions to interests, or by discussing the logical underpinnings behind these opposing positions, the mediator can help the parties to overcome such barriers.

Fear of loss. Although business people are mainly focused on economic and rational decisions and seek pragmatic outcomes, the fear of loss is very often stronger than the focus on profit or utilitarian metrics.⁷⁴ Because conflicts are often linked to perceived disadvantages or attributing exaggerated motives to the other party, conflicting parties may be prepared to accept higher risks in order to prepare for such extreme cases, as the 'status quo' may not be acceptable in view of what the opposing party's hidden agenda might be. Mediation techniques can help to identify alternative solutions and possibilities, expose the underlying intentions for a party's behaviour, and to interpret the subjective perceptions of each party in light of these fears and concerns, which could help to overcome such negotiation barriers.

⁷³ Duve, Eidenmüller and Hacke, *Mediation in der Wirtschaft*, p 29; Walz and Walz, *Formularbuch Außergerichtliche Streitbeilegung*, pp 21 and 22.

⁷⁴ Duve, Eidenmüller and Hacke, *Mediation in der Wirtschaft*, p 31.

Sunk costs. Conflicting parties are often driven by the goal to be compensated for all of the costs they have invested to date in lawyers' fees, expert witnesses, court fees or other expenses. Trying to obtain such compensation can be a significant barrier to a settlement, especially after the proceedings have been ongoing for a long while.⁷⁵ Knowing this barrier, neutrals could use mediation techniques of risk analysis or option generation to help the conflicting parties obtain a realistic understanding of their position, or better ways of being compensated (eg if it is likely that the losing disputant will go into bankruptcy or out of business).

Reactive devaluation. It is often the case that proposals are dismissed simply because they come from the other party. 'Reactive devaluation' refers to the fact that the very offer of a particular proposal or concession — simply because it comes from an adversary — may diminish its apparent value or attractiveness in the eyes of the recipient.⁷⁶ The devaluating party is looking for traps or hidden agendas.⁷⁷ In competitive negotiations and proceedings a reactive devaluation is often made, especially if the other party is suddenly willing to make concessions, which creates grounds for suspicion.⁷⁸ Reactive devaluations on the other hand can create the impression that pressure-tactics in negotiations will lead to more clear concessions from the other party, and promote competitive behaviour. Mediation techniques, such as active listening or reframing questions, can change this behaviour and create a more productive atmosphere.

Tense negotiation atmosphere. Competitive negotiations often create a tense and hard atmosphere, which make constructive communication almost impossible. The parties attack each other orally and tend to perceive the arguments of the other party as threats that have to be fought off. Recent neurophysiological research has established that the cerebral cortex in the brain, which is capable of rational thought, is 'short-circuited' by a 'fight-or-flight' instinctive reflex, when the amygdala (a more primitive and evolutionarily conserved ancestral part of the brain) has been triggered.⁷⁹ Communication skills such as active listening, 'looping', injecting humour into the discussions, asking open questions and exploring emotions and

⁷⁵ *Ibid.*, p 30.

⁷⁶ For a discussion of this, see Lee Ross, 'Reactive Devaluation in Negotiation and Conflict Resolution' at (www.law.stanford.edu/program/centers/scicn/papers/reactive_devaluation.pdf).

⁷⁷ Duve, Eidenmüller and Hacke, *Mediation in der Wirtschaft*, p 33.

⁷⁸ D Golan, *Mediation Legal Disputes* (Boston, MA: Little, Brown & Co, 1996), p 201.

⁷⁹ For a fuller discussion on this, see L Cozolino, *The Neuroscience of Psychotherapy* (New York: W W Norton, 2002), at ch 11, 'The Anxious and Fearful Brain', pp 235-6.

needs can help to subdue an antagonistic relationship and ‘re-boot’ brain function. By structuring the arguments of the parties as well as the discussions, and separating the people from the problem, arbitrators who are trained as mediators can help to overcome such cognitive barriers.

Conclusions

It is submitted that mediation should be increasingly considered as a tool in conjunction with arbitration, and indeed in all dispute resolution proceedings – especially in cross-border disputes, where cultural differences or misunderstandings can be at the root of the dispute. Arbitrators should be encouraged to use mediation techniques, and even to use such proceedings in parallel.

Every mediation involves a degree of ‘*social learning*’ for the participating parties. Even if ‘only’ a mediation window is considered within an arbitration procedure, it can help to create a *more productive atmosphere* and to change the perceptions of the parties as well as their behaviour. The parties can be encouraged to explain their subjective perceptions to one another, and focus on future interests rather than the reasons for their positions. The inclusion of mediation or mediation techniques within arbitration proceedings can lead to a better and more realistic estimation of each party’s chances and risks as well as provide an outcome that is more psychologically satisfactory to the parties, since it has taken into account their respective emotions, even in purely commercial disputes. This in itself can lead to faster, cheaper and ‘better’ outcomes.

The focus of mediation on *cooperative, interest-based and future-oriented solutions* can enhance the arbitration process, and remove many of the criticisms that are being aimed against it today (eg as being too formal, too costly, or too slow), creating innovative and value-added solutions that benefit all the parties. Mediation can in fact transform what was perceived as an acrimonious, slow and expensive dispute into a new business opportunity. By seeking options through which both parties can jointly address their needs, a mediator can ‘enlarge the pie’ and combine resources to create greater distributive value.

In addition, the inclusion of mediation in more arbitration procedures can help to catalyse the *use of mediation* in more complex commercial international disputes where arbitration on its own may be inadequate or too costly. Decision-makers in such commercial disputes will learn that mediation is a valuable and professional way of resolving disputes, especially in an international or cross-cultural context, without abandoning positions, losing ‘face’ or being considered as the ‘weaker’ party.

It is likely that mediation will be used increasingly in the future to resolve commercial disputes. This is primarily because clients are likely to request this, as decision-makers in the business world learn that mediation can lead to time and cost savings (as well as to the creation of new value). It is expected that mediation can be used to galvanise and advance arbitration, and that combined procedures will become more acceptable as dispute resolution strategies. By using mediation every commercial dispute can become a new opportunity, even in the context of arbitration. It is important that arbitrators and mediators start to tear down the hermetically sealed barriers that separate these two forms of procedures and learn to use them synergistically, in the best interests of the parties.