Vásquez Legal

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Some words about Mediation-Arbitration

In any business transaction, differences may arise between the parties, for instance, as a result of the interpretation of a legal instrument or the fulfilment of the obligations specified within it. The use of a third party, a neutral, to deal with disputes, offers the parties an alternative course to settle their differences instead of directly filing a claim before a domestic court. There are several kinds of alternative dispute resolution, which involve the intervention of a neutral who will either manage the conversation between the parties without making judgment of any kind, i.e. mediation; or will enter into a decision-making process issuing an award binding for both the claimant and the respondent, i.e. arbitration. These different mechanisms have the same purpose, that is, to settle a dispute. But, what would happen if these processes were to be mixed? Could the same neutral act as a mediator in the first stage and as an arbitrator in the second stage? The answer has been the motive of several discussions. Indeed the admissibility and appropriateness for an arbitrator to act as conciliator is among the most controversial issues among international practitioners. This mechanism is known as Mediation-Arbitration (Med-Arb).

This short essay will focus on answering what Med-Arb means and what the advantages and disadvantages are for this as an alternative in the settlement of international disputes.

The Med-Arb or mediation-arbitration process is a dispute resolution mechanism in which disputing parties and a third party neutral attempt to reach a voluntary agreement through mediation and then move to arbitration by the same third party, if it becomes necessary to resolve unsettled issues. The neutral imposes a binding settlement on the parties, whether at the mediation or the arbitration stage. Hence, the final decision combines any agreement reached in the mediation stage with the arbitrator's decision in the second stage. The key feature of the process is that the parties want the same neutral to serve as mediator and arbitrator.

Some Advantages

a) Time-saving and expeditious: This mechanism allows the neutral to advance without delay as a continuous procedure condensing both phases in just one process, saving time and granting the parties a certain resolution of their disputes within a reasonable time. If the settlement of the dispute fails at the conciliation stage, the arbitration phase starts. However, the appointment of an arbitrator is often time-consuming and the parties often take some time in choosing an arbitrator. By using Med-Arb considerable time could be saved by having the mediator become the arbitrator. As a result, a shorter period of time is required to initiate the arbitration phase.

b) Opportunity for the parties to keep control over the process: An arrangement reached by the parties is always better than an award imposed by a third party. Med-Arb offers the parties the opportunity to pursue a consensual settlement during the mediation phase but with the guarantee that if the attempted settlement fails whether totally or partially, the same neutral will issue a binding award putting an end to any unresolved pending disputes. In other words, the med-arb process gives parties an additional

opportunity to control the result themselves collectively and voluntarily before a tribunal imposes a result upon them.

c) Flexibility of the process: The Med-Arb process allows parties to resume mediation after the arbitration phase has commenced. This mechanism offers the parties the possibility to reach an agreement before the award is issued. Nevertheless, if the parties give mediation another try and still do not reach agreement over the disputed issues, the arbitrator is not impaired to issue a binding award.

d) Education of the neutral: One of the most interesting features of the Med-Arb process is the fact that after the first stage, namely, conciliation, the fact-finding process and the education of the neutral have already been accomplished. As Gerald F. Phillips have said "...in fact, with the same person as the arbitrator, there may not even need for a hearing. If the parties agree, the arbitrator can make an award based on the facts already presented in mediation" [1]. As we have noted, in a Med-Arb process it is unnecessary to reach an agreement of all the disputed issues at the conciliation stage. Some issues can remain pending decision. Thus, if the neutral has earned the confidence of the parties and is already familiar with the issues and arguments the parties may prefer to have the mediator decide the remaining issues over any other neutral. In that scenario, the same neutral will be in an advantaged position to decide the remaining controversies given that the collection and the processing of the information are already done.

e) Health of the commercial relationship: In the case of commercial transactions when often several disputes arise, the use of the Med-Arb process can be an attractive way to settle those disputes, especially in long term relationships. This process is an option in smaller cases, particularly when the parties are contracting parties who may view small disputes as irritants in a larger relationship.

f) Investor-State dispute settlement as an example of an international dispute: A provision of the investment Chapters in Free Trade Agreements, particularly by the United States of America and largely adopted by other countries, establishes that the parties *"should initially seek to resolve the dispute through consultation and negotiation"*[2] and if those negotiations fail, it is possible to activate arbitration. The Med-Arb process is an efficient and effective way to avoid unnecessary trials, giving the States the possibility to come to an arrangement or withdraw measures adopted or maintained by them at any stage of the process, as well as avoiding paying large sums of money in legal fees and shortening the time of the disputing process.

Some Disadvantages

a) Confidential information: Several authors point out that one of the most controversial issues in Med-Arb is confidentiality. In traditional mediation, the parties may reveal personal information about their case to the mediator. Critics of this process have concerns regarding the way that the neutral acquires information to settle the dispute. Fisher J, considered the Med-Arb process in *Acorn Farms Ltd v Schnuriger* [2003] NZLR 121 and stated that *"the mediator-arbitrator may not receive information without the knowledge of both parties."* Thus, the necessity of avoid "caucusing", namely "the admissibility for [a neutral] to meet a party in the absence of the others and discuss the case and a settlement with it"[3], is a challenge for the neutral. In fact, the UNCITRAL Conciliations Rules, in Article 8, states that *"when a party gives any information to the conciliator, subject to a specific condition that it be kept confidential, that information shall not be disclosed to any other party to the conciliation."* Then, this two-prong process can erode one of the cornerstones of the rule of law, namely, the due process of law by removing the right of the parties to respond directly to any accusations or information of the other party during a trial. Likewise, we must bear in mind the deliberation process during the arbitration phase. Confidential information obtained during the mediation phase may be used by, or influence the neutral during his or her deliberations as the arbitrator due to the inevitability of acquiring information during the early stages. Problems could arise throughout cross-examination in the arbitration phase, when a mediator who turned arbitrator makes use of the information disclosed during private meetings in the mediation stage.

b) Mediation as a preparatory hearing: Disputants may use the mediation phase as mere preparation for

arbitration, thereby making it more probable that the dispute will reach arbitration. Thus, it is likely that one or both parties may use the first stage of the process to get information about the other, aiming to prepare the memorials for the arbitration phase. Likewise, the mediation phase could become a long process where the parties spend important time attempting to justify and convince the neutral, about the facts, applicable law or jurisdiction problems, attempting to sway the mediator.

c) Neutral switching problem: Due to the different nature of a conciliation process compared to arbitration, the neutral appointed by the parties could have difficulty switching from being a problem solver to a decision maker. The role of a mediator consists in assisting the parties in their attempt to reach an amicable settlement of their dispute, but without the authority to impose a solution to that dispute upon the parties. By contrast, arbitrators tend to require the parties to stick to the relevant facts and rights of each party, with a view to making a decision. However, the techniques for both are different and becomes a challenge for a neutral who has to change caps, and must avoid, for instance, threatening the parties with a binding award at the conciliation stage or using confidential information acquired in the mediation phase, as main evidence for the award.

d) Drafting of the Med-Arb clause: Another disadvantage can be found looking at the drafting of a Med-Arb clause. When the parties consent to a Med-Arb clause they agree that before they begin an arbitration procedure they have to exhaust a mediation phase. Problems arise when the parties have not attempted or exhausted the mediation phase, yet start arbitration. Several procedural questions must be decided on before continuing the process, for instance, if the arbitration claim should be dismissed or, if the neutral has competence to amend such a mistake. In any case, there are many theories behind the answers to these questions.

Two points of view will be presented to support this reasoning.

Article 13 of the UNICIRAL Model Law on International Commercial Conciliation states that:
'Where the parties have agreed to conciliate and have expressly undertaken not to initiate during a specified period of time or until a specified event has occurred arbitral or judicial proceedings with respect to an existing or future dispute, such an undertaking shall be given effect by the arbitral tribunal or the court until the terms of the undertaking have been complied with...' This paragraph would support the mandatory observance of the Med-Arb clause.

On the other hand, a more flexible position can be found in the case L.E.S.I – DIPENTA v Argelia33 under ICSID which stated:

"The idea is that it would run counter to the rules of good faith if one of the parties to a contract were to open judicial or arbitration proceedings without having first attempted a settlement. In the spirit of a contract, it is up to the parties to settle their differences if they can. The rule must be interpreted in this context, and must not be taken too formally."

Thus, there is no unanimity over the outcome of a clause of this type. It still leaves room for interpretation and thus poses doubts about its effectiveness.

Conclusions

Med-Arb is an alternative dispute resolution mechanism that combines mediation and arbitration in the same process. The use of the same neutral carrying out both functions is one of the most controversial issues among international practitioners. Advantages and disadvantages can be found in its use as a mechanism to settle international disputes. Among the advantages are: the opportunity for the parties to keep control over the process, the flexibility of the process and the education of the neutral. Among the disadvantages are the use of confidential information by the same neutral and the use of the mediation phase as a preparation for the hearings at the arbitration phase. Different opinions can be found in literature that supports the use of a Med-Arb clause and encourage the parties to include this mechanism in their disputes resolution clauses. On the other hand, several authors have pointed out the risk of using such a clause. In fact the American Arbitration Association does not recommend same neutral Med-Arb, except in unusual circumstances34 but administers cases using same neutral if that is

what the parties want.35 The pros and cons of the Med-Arb process are clear and straightforward, and the process depends on the willingness of the parties to apply it.

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[1] Gerald F Phillips, 'Same-Neutral Med-Arb: What does the future hold?' (2005) May-Jul, 60, 2, Disputes Resolution Journal, New York 24 at 26.
[2] Chile- United States of America Free Trade Agreement, Chapter 'Investment' Article 10.14, in forced since 01 November 2004
[3] 'Med-Arb, How Risky Is It' (2007) May, New Zealand Law Journal at 361

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