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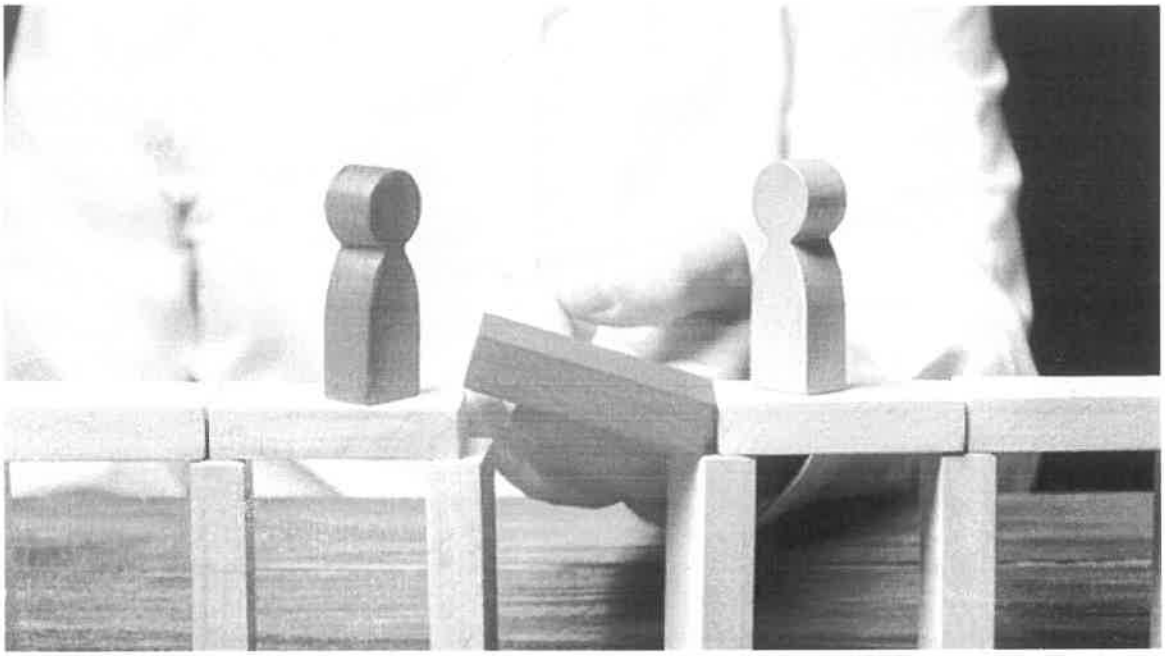
Med-Arb: Is It the Wave of the Future?

The pressure on the Alternate Dispute Resolution world to handle a dramatic increase in volume offers the opportunity to consider a third or hybrid process of dispute resolution known as Med-Arb, the melding of the two established conflict resolution processes—mediation and arbitration.

By **David B. Saxe** | November 20, 2020



The COVID-19 pandemic has caused tremendous stress to the litigation capabilities of our court system. Jury trials have been, for the most part, non-existent. Other aspects of the litigation world are now gradually emerging from their doldrums as motion practice resumes to some degree. It will be sometime before the court systems throughout the country are able to handle the pent-up litigation that exists. In the meantime, those of us committed to the world of Alternate Dispute Resolution (ADR) are beginning to see a huge influx of ADR requests as disputants, unable to gain traction with litigation, opt instead for ADR. It is more than likely that this trend will continue.

As just one example, I expect to see a huge spike in the number of matrimonial disputes headed to mediation—the result of the physical closeting of families during the pandemic and most probably the inability of the court systems to process the burgeoning number of litigated matrimonial cases, especially high net worth ones involving complicated financial positions (see David Saxe & Joaquin Ezcurra, *Online Mediation of Matrimonial Matters? It Works (https://www.law.com/newyorklawjournal/2020/10/05/online-mediation-of-matrimonial-matters-it-works/)*, NYLJ, Oct. 2, 2020) hence the resort to ADR. Other areas of litigation will likewise experience a significant increase in ADR interest—especially commercial litigation.

How will the current world of ADR handle this? The traditional fare offered up by ADR purveyors is generally either mediation or arbitration. A few general words about mediation and arbitration.

Mediation is a resolution method through which a mediator facilitates communication between the parties assisting them in resolving their dispute. It involves consensus building; the mediator does not impose a position but through informal discussions helps glide the disputants toward what is often termed a facilitated settlement.

Arbitration is an adjudicative process that mimics, in some ways, the process of court litigation. In an arbitration, an arbitrator listens to the arguments and evidence presented—similar to what a judge does and then renders a binding decision. Katie Shonk, *What Is Med-Arb? (http://What%20Is%20Med-Arb?)* Program on Negotiation, Harvard Law School, Aug. 24, 2020. The binding nature of the process or its finality is its predominant feature. Arbitration awards can be overturned in only the rarest of circumstances.

The pressure on the Alternate Dispute Resolution world to handle what I believe will be a dramatic increase in volume offers the opportunity to consider a third or hybrid process of dispute resolution known as Med-Arb, the melding of the two established conflict resolution processes—mediation and arbitration. In a nutshell, Med-Arb procedure involves parties to a dispute mutually agreeing to mediate the dispute with an understanding that if the dispute is not resolved at the mediation stage, the dispute will proceed to binding arbitration with the same third-party who has served as mediator, serving as the arbitrator. Med-Arb originated in the collective bargaining context because it combined the flexible approach of mediation with the guaranty of finality attendant to the final and binding aspect of an arbitral award. ADR providers such as NAM are able to offer this process at the party's request.

Med-Arb is a relatively familiar practice in civil law jurisdictions but is viewed with some suspicion in common law jurisdictions. *Med-Arb—an Alternative Dispute Resolution Practice (https://hsfnotes.com/arbitration/2012/02/28/med-arb-an-alternative-dispute-resolution-practice/)*, Herbert Smith Freehills, Feb. 28, 2012.

Med-Arb has significant benefits and certain pitfalls. Let's take a look at both categories. First of all, the possibility of an eventual arbitration may very well motivate the parties to successfully reach a settlement at the mediation stage. As stated in Mark Baril and Donald Dickey, *Med-Arb: The Best of Both Worlds or Just a Limited ADR Option?, (//www.mediate.com/pdf/V2%20MED-ARB%20The%20Best%20of%20Both%20Worlds%20or%20Just%20a%20Limited%20ADR%20Option.pdf)* www.mediate.com, "the central advantages of Med-Arb are the certainty of a defined outcome, greater efficiency in terms of time and money, and greater flexibility concerning process and timeline. (Brewer and Mills 34)." If the parties do not resolve their issues at the mediation, they do not have to hire a new neutral who obviously would be unfamiliar with the matter. Instead, the parties can proceed seamlessly to the arbitration segment of the process with the same neutral. Most Med-Arb cases are not surprisingly resolved at the mediation stage.

Additionally, sometimes the controversy can be narrowed during the mediation phase which can facilitate the arbitration Id. Some have referred to this process as "muscular mediation." Med-Arb may also tend to preserve the relationship that exists between the parties to the dispute who must deal with each other in the future. Id. The power and leverage of the mediator in Med-Arb may be seen as a benefit to some but as a flaw by others.

The principal disadvantage with Med-Arb arises from the power and leverage of the mediator. Most mediations involve private caucusing because the mediation process is a collaborative process involving situations where the parties divulge confidential information to the mediator. See generally John Bickerman, *Med-Arb: Maybe Not a Bad Idea*, www.americanbar.org (http://www.americanbar.org), April 4, 2018.

The integrity of the arbitral process may be compromised if during the mediation the neutral has been informed of some confidential information that may color his impression of the case and taint the arbitration. The process may also discourage openness in the mediation stage; if some helpful information that one side might consider divulging during a mediation might prove troublesome in a subsequent

arbitration, that party might not be so forthcoming at the mediation stage. The power to decide the dispute could result in the mediator pressuring the parties into settlement. This obviously presents ethical issues. The ultimate question in this regard then is whether the expectation that the mediator in the Med-Arb process can remain neutral and unbiased during the mediation stage is unrealistic in view of the fact that the mediator will have to make the final decision. (see Baril & Dickey, supra)

One possible solution is to use a different neutral for each stage of the Med-Arb process. This, of course increases the cost to the parties and lessens its over-all efficiency. It has been reported that successful Med-Arbitrations feature neutrals who commence the arbitration stage as if there had been no mediation, therefore building in a self-imposed ethical dividing line. Telford, *Med-Arb: A Viable Dispute Resolution Alternative*, Industrial Relations Center, Queens University Press, 2000, pgs. 1-17. One study reported that Med-Arbitrators were careful not to exceed the boundaries of their role as mediators, and that the possibility of arbitration was not used as a threat during mediation, although med-arbitrators did refer, at appropriate times, to the outcome of similar cases. They gave overt opinions about the strength of a position only if asked directly by both parties. Id.

A possible alternative is to flip the process—that is, start with the arbitration. This is referred to as Arb-Med in which the neutral, first functioning as the arbitrator writes an award but keeps it from the parties and then attempts to mediate the dispute. If the parties fail to reach a settlement, the award is unsealed. This process removes the concern over the use of confidential information during the mediation.

A disadvantage to this process is that it heightens the pressure on the parties to arrive at a mediated agreement. Further, if it happens that certain new facts are brought to the attention of the neutral during the arbitration segment, the arbitration award cannot be changed. It is possible then that the arbitrator may pressure the parties to reach a mediated agreement to avoid unsealing an award that the arbitrator now believes to be wrong. See Shonk, supra.

There are certain ethical dilemmas that probably cannot be overcome in the Med-Arb process. But the demands of Alternative Dispute Resolution call for increasingly innovative and practical solutions. Med-Arb and its hybrids are a potent answer. With a trained and skilled mediator/arbitrator, the attendant ethical issues can be minimized so that parties can benefit from this process. See Telford, supra.

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