

## NOTES & COMMENTS

### MED-ARB IN INTERNATIONAL ARBITRATION

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#### I. MED-ARB FORMATS

##### A. Introduction

Mediation is generally understood as a non-binding, voluntary (dispute) settlement process. It is still gaining in popularity in the United States and elsewhere. It is not a substitute for court adjudication, but it enhances the possibility that the parties will settle their dispute by way of mutually acceptable agreement, rather than by a binding third-party order. International arbitration, on the other hand, is considered a substitute for court adjudication. Its goal is primarily to overcome the dangers and problems related to international litigation. It is submitted that a combination of these processes should be aimed for in order to achieve the best of both systems in resolving international disputes.

Med-arb is the abbreviated term for mediation combined with arbitration. In the first part of this paper (Section I), I will discuss the goals and the possible problems of med-arb. It is important to keep the fundamental principles of "mediation" and "international arbitration" in mind in order to explore what med-arb in international arbitration is or should be. I will therefore start with a summary of the goals and ground rules of "mediation" and "international arbitration" and then explore the goals of a "med-arb" process. This will be followed by an examination of the format and the genuine problems of the med-arb process in its traditional meaning. That process shall be called the "original med-arb" process. Subsequently I will discuss various ways to combine mediation and arbitration and evaluate their advantages and disadvantages compared to the "original med-arb" process. The second part (Section II) deals with international arbitration practices, in which mediation is part of the process. To begin with, the *IBM/Fujitsu* case will demonstrate that mediation and arbitration can be combined and that mediation can change the merits of the arbitration process to the parties' advantage. Then the focus will turn to overseas practices, such as the Chinese med-arb practice and the Swiss/German arbitration

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practices. This discussion will allow the reader to see how the conciliation practice is already combined with arbitration in foreign international arbitration practices. But the examination shall also allow the exploration of weaknesses in order to improve existing practices.

In the conclusion it is submitted that the "original med-arb" process is not a desirable process format for international arbitration. This, therefore, implies that an alternative med-arb format should be used. Subsequently, it is further submitted that the mediation part of the process is used most efficiently when it serves to shift the rights arbitration to an interests arbitration or to streamline the arbitration process, if the dispute cannot be settled entirely by agreement. The conclusion will end in an evaluation of the alternative med-arb formats and suggest the format that best supports that goal.

### B. *The Nature and Goals of Mediation*

In defining mediation, it is more important to focus on the mediator's task and goals than on the process. There is no current unanimity among scholars or practitioners on the goal and the practice of mediation.<sup>1</sup> Unanimity may exist regarding the goal of mediation to facilitate negotiations between the parties<sup>2</sup> in order to help them reach a mutually acceptable agreement.<sup>3</sup> But there are many hidden motivations behind this purpose, such as: a) efficiency in terms of time and money;<sup>4</sup> b) party autonomy in contrast to adjudication;<sup>5</sup> c) reaching creative

<sup>1</sup> JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION*, 7 (1984) ("The practice of mediation falls along a spectrum that defies definition."). No distinction is made in this paper between "mediation" and "conciliation" since it is submitted that mediation is understood to cover all kinds of techniques. But even where such distinctions are made the difference is perceived negligible, see e.g., Erik Langeland, *The Viability of Conciliation in International Dispute Resolution*, DISP. RESOL. J., JULY/SEPTEMBER 1995, 34 ("The differences between the methods [in mediation and conciliation] are slight and the benefits or drawbacks accruing to either method seem negligible.").

<sup>2</sup> WILLIAM L. URY, JEANNE M. BRETT & STEPHEN B. GOLDBERG, *GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT*, 49 (1988) ("Mediation is negotiation assisted by a third party."). STEPHEN B. GOLDBERG, FRANK E. A. SANDER & NANCY H. ROGERS, *DISPUTE RESOLUTION - NEGOTIATION, MEDIATION, AND OTHER PROCESSES*, 103 (2d ed. 1992) ("Mediation is negotiation carried out with the assistance of a third party."). See also Tom Arnold, *Advocacy in Mediation*, 5 AM. REV. INT'L ARB. 169, 173 (1994).

<sup>3</sup> JACQUELINE M. NOLAN-HALEY, *ALTERNATIVE DISPUTE RESOLUTION IN A NUTSHELL* 56 (1992).

<sup>4</sup> The ability to settle a dispute through agreement rather than court adjudication or arbitration is the primary reward of mediation. Mediation works here as a means to overcome negotiation barriers. See Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 J. DISP. RES. 235, 248 (1993). It is, for the parties, usually cheaper and quicker. See e.g. ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION* 17 (1994); STEPHAN BREIDENBACH, *MEDIATION - STRUKTUR, CHANCEN UND RISIKEN VON VERMITTLUNG IM KONFLIKT* 120 (1995); NOLAN-HALEY, *supra* note 3, at 57.

<sup>5</sup> FOLBERG & TAYLOR, *supra* note 1, at 10; Tom Arnold, *Why ADR? Booby Traps in Arbitration Practice and How to Avoid Them*, 5 AM. REV. INT'L ARB. 179, 181 (1994). BREIDENBACH, *supra* note 4, at 123 *et seq.*; NOLAN-HALEY, *supra* note 3, at 54, 58. Cf. Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "the Law of ADR"*, 19 FLA. ST. U. L. REV. 1, 12 (1991).

solutions with win-win results;<sup>6</sup> d) empowerment;<sup>7</sup> and e) reconciliation.<sup>8</sup>

When we talk about "settlement" in mediation it is common to think of a final agreement, by which the parties dispose of their dispute.<sup>9</sup> However, the parties may also reach a partial agreement where they dispose of a part of the dispute. Similarly "settlement" could be an agreement wherein the parties simply define procedural issues.<sup>10</sup>

Many readers will have a different notion in mind when talking about mediation. So when the question arises as to what exactly the mediator should do when working towards agreement, the answers differ substantially among the mediators. The problems and concerns that may arise during the med-arb process, depend to some extent on how the mediator tries to achieve the goal. It is therefore important to keep in mind that there are different approaches among mediators and that the skilled mediator may use several approaches as perceived necessary. Riskin distinguishes between an evaluative<sup>11</sup> as opposed to a facilitative<sup>12</sup> approach on the one hand, and between a narrow<sup>13</sup> as opposed to a

<sup>6</sup> Mnookin, *supra* note 4, at 248; FOLBERG & TAYLOR, *supra* note 1, at 10.

<sup>7</sup> BUSH & FOLGER, *supra* note 4, at 20 (*passim*); FOLBERG & TAYLOR, *supra* note 1, at 8; Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEG. L. REV. 7, 20 (1996); NOLAN-HALEY, *supra* note 3, at 58. This goal makes this ADR device unique and even gives it a therapeutic touch.

<sup>8</sup> Lon Fuller, *Mediation - Its Forms and Functions*, 44 S. CAL. L. REV., 305, 325 (1971); Riskin, *supra* note 7, at 20. Transferred into commercial interests this goal serves to maintain a business relationship. Arnold, *supra* note 5, at 181.

<sup>9</sup> The idea of using mediation for reasons other than to facilitate dispute settlement negotiation will not be considered here since mediation in med-arb will always have a dispute as its reason.

<sup>10</sup> When mediation doesn't lead to an agreed settlement that disposes of the whole dispute, the mediator should be able to inform the parties about possible ways to go on from that point. Since the mediator is aware of the parameters of the dispute, he should be able to help the parties to agree on a streamlined arbitration that meets the needs of the parties. If this agreement could also limit the dispute by defining the issues and dispose of some undisputed facts or make the parties agree on some very important issues, for example the applicable law, it might already help them to overcome procedural and tactical fights, which can be crucial, especially in international conflicts. The outcome of such a negotiation could, for example, also include an agreement for a last offer arbitration, include terms of reference or any procedural rules. Even better would be an agreement by which the parties agree to resolve their dispute by a future-oriented perspective in which they put their dispute on a different level (like the Washington Agreement, *see infra* "Conclusion") where the distinction is drawn between two different styles of partial agreement.

<sup>11</sup> Riskin, *supra* note 7, at 24 ("The evaluative mediator assumes that the participants want and need [the mediator] to provide some guidance as to the appropriate grounds for settlement - based on law, industry practice or technology - and that she is qualified to give such guidance by virtue of her training, experience, and objectivity.").

<sup>12</sup> Riskin, *supra* note 7, at 24 ("The facilitative mediator assumes the parties are intelligent, able to work with their counterparts, and capable of understanding their situations better than the mediator and, perhaps, better than their lawyers. Accordingly, the parties can develop better solutions than any the mediator might create. Thus, the facilitative mediator assumes that his principal mission is to clarify and to enhance communication between the parties . . ."). Facilitative working mediators often believe that it is inappropriate for the mediator to give his opinion. Such opinions might impair the appearance of impartiality which would interfere with the mediator's ability to function. Also, the mediator might not know enough to give an informed opinion.

<sup>13</sup> Here, the emphasis is on the legal and factual questions as well as on the likely outcome at trial either before a court or in arbitration. *See* Riskin, *supra* note 7, at 28 *et seq.*

broad<sup>14</sup> problem definition by the mediator on the other hand. In combination, Riskin sees four different mediation techniques: The evaluative-narrow, the facilitative-narrow, the evaluative-broad, and the facilitative-broad technique.<sup>15</sup> Another distinction can be drawn between mediators who use private caucuses and those who do not or seldom do. A private caucus is where the mediator meets one of the parties in order to gather further information and to explore alternatives. The party is likely to disclose additional information in a private meeting because the caucus is intended to be confidential.<sup>16</sup> Additionally this confidentiality can be important for a search for creative settlement options.<sup>17</sup>

### C. *The Nature and Goals of International Arbitration*

International arbitration has to be distinguished from U.S. domestic arbitration. In domestic (commercial<sup>18</sup>) arbitration, "arbitrators (unlike judges) commonly do not write reasoned opinions attempting to explain and justify their decisions. [ . . . ] In addition, we do not in any event expect that an arbitrator will decide a case the way a judge does. We do not expect that an arbitrator will necessarily 'follow the law' [ . . . ]."<sup>19</sup> In international arbitration the procedure is different. Arbitrators are obliged to apply the law unless agreed to the contrary. Only where the parties grant the arbitrator the power to decide as "*amiable compositeur*" or "*ex aequo et bono*," is the arbitrator entitled to disregard non-mandatory rules of statutory law.<sup>20</sup> In international arbitration, the awards normally include a reasoned award,<sup>21</sup> although the New York-Convention,<sup>22</sup> which limits the grounds upon which a signatory country may refuse to recognize and execute a foreign award, does not preclude unreasoned awards from being enforced.<sup>23</sup> The fact that the arbitration award will usually be handed down with an opinion is perhaps one reason why international arbitration may

<sup>14</sup> The broad orientation goes beyond the narrow issues that define legal disputes. With this approach the mediator tries to reveal interests which lie beneath the positions that the participants assert, see Riskin, *supra* note 7, at 29 *et seq.* This is what FOLBERG & TAYLOR, *supra* note 1, at 7, mean when they say, "Mediation is first and foremost a process that transcends the content of the conflict it is intended to resolve."

<sup>15</sup> Riskin, *supra* note 7, at 26 *et seq.*

<sup>16</sup> FOLBERG & TAYLOR, *supra* note 1, at 276; KIMBERLEE K. KOVACH, *MEDIATION - PRINCIPLES AND PRACTICE* 127 (1994); ERIC GALTON, *REPRESENTING CLIENTS IN MEDIATION* 33 (1994).

<sup>17</sup> KOVACH, *supra* note 16, at 127.

<sup>18</sup> Not so in labor arbitration, JOHN S. MURRAY, ALAN SCOTT RAU & EDWARD F. SHERMAN, *PROCESS OF DISPUTE RESOLUTION - THE ROLE OF LAWYERS* 514 (2d ed. 1996).

<sup>19</sup> MURRAY, RAU & SHERMAN, *supra* note 18, at 514.

<sup>20</sup> CHRISTIAN BÜHRING-UHLE, *ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS: DESIGNING PROCEDURES FOR EFFECTIVE CONFLICT MANAGEMENT* 52 (1996). In any case, the arbitrator is bound by the imperative norms of the law (public policy), see W. LAURENCE CRAIG, WILLIAM W. PARK & JAN PAULSSON, *INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION* 138 (2d ed. 1990).

<sup>21</sup> See Alan Scott Rau, *Integrity in Private Judging*, 38 S. TEX. L. REV. 537 n.183 and n.188 (with several references). In civil law systems "unreasoned awards are often considered contrary to public policy and thus unenforceable." See MURRAY, RAU & SHERMAN, *supra* note 18, at 534.

<sup>22</sup> The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958 [hereinafter New York Convention].

<sup>23</sup> CRAIG, PARK & PAULSSON, *supra* note 20, at 328.

be more costly than domestic arbitration. In fact, international arbitration is not considered to be specifically more cost effective than court adjudication<sup>24</sup> although international litigation could easily become more expensive. International arbitration is "simply another form of litigation which is more suited to the needs of international commerce and avoids the pitfalls of litigation in national courts; and [ . . . ] it does not operate as, nor is it intended to be, a categorically different "alternative" kind of settlement procedure."<sup>25</sup> The advantages of international arbitration over court adjudication are somewhat different compared to those in domestic commercial arbitration. The main advantages are the following: a neutral forum can be chosen, there is easier enforcement of the awards abroad, confidential procedure, expertise of the arbitrators, finality of the decision, and limited<sup>26</sup> discovery.<sup>27</sup>

The fundamental and generally accepted principles of international arbitration are: the parties must agree to have the dispute arbitrated (contractual basis, arbitrability), the arbitrators are required to be impartial and neutral,<sup>28</sup> the due

<sup>24</sup> See the recent empirical study of BÜHRING-UHLE, *supra* note 20, at 145, 212.

<sup>25</sup> *Id.* at 135; there stated as a hypothesis and approved *id.* at 212.

<sup>26</sup> American lawyers may understand limited discovery as an advantage because it is less time consuming and therefore may be less cost intensive. Some civil lawyers, however, may look at this issue from the opposite perspective. Since there is no pre-trial discovery, and perhaps (depending on the country) no discovery at all, in their civil procedure, the alternative to "limited discovery" is maybe no discovery. The civil procedure in Germany generally does not allow a party to compel the opponent to disclose documents of any kind. See Dirk-Reiner Martens, in PRE-TRIAL AND PRE-HEARING PROCEDURES WORLDWIDE 114, 118 (Charles Platto ed. 1990) (The fundamental German rule is "that a party does not have to make available any material to its opponent which is not already available to the opponent.") There is just a limited right of this kind, based on the substantive law, § 424 BGB, which under no circumstances replaces a discovery right, see OTHMAR JAUERNIG, ZIVILPROZESSRECHT 199 (23rd ed. 1991). Now, if the Germans would call "limited" discovery an advantage, they may mean that having some discovery is better than having no discovery at all.

<sup>27</sup> See for example, BÜHRING-UHLE, *supra* note 20, at 140. These advantages indicate where the problems of international litigation are: difficulty in finding the appropriate forum; parallel litigation in different jurisdictions as well as collateral estoppel attempts; conflicting judgments etc. may ensue. The neutrality of the court may be in question and the enforceability of the judgment is unsure: For example the recognition of foreign judgments is, in the United States, a question of state law. Even though 22 states and the Virgin Islands have adopted the Uniform Foreign Money Judgments Recognition Act, several states still require reciprocity to enforce a judgment, see RUSSELL WEINTRAUB, INTERNATIONAL LITIGATION AND ARBITRATION: PRACTICE AND PLANNING 222, 224 (1994).

<sup>28</sup> Impartiality is not a sacred requirement. Its extent and outline is not quite clear. And due to its nature, it could never be understood in an absolute way which would exclude preconceptions, because "decision makers who have lived in the world at all will invariably come to a case with perspectives and beliefs and preconceptions that bear the stamp of their past experiences," see Rau, *supra* note 21, at 488. One can question whether the arbitrator should be held to the standards we demand of public judicial officers; see *id.* at 494: ("More often, however, it is blithely assumed that our expectations of arbitrators must be considerably more relaxed.") The author refers in footnote 30 to Justice White's concurring opinion in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 150 where he says: "The Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges." Justice White's opinion was necessary to build a majority. Therefore one may give his opinion the crucial deference although Justice Black said in his opinion in the same case: ". . . we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges."

In tripartite panels the "American rule" is that the party-appointed arbitrators are not subject to

process requirements must be met and the award should be enforceable.<sup>29</sup>

#### D. *Towards a Definition of Med-Arb*

##### 1. *Introductory Note*

There are two ways to describe med-arb. The first way is to describe the process known as "med-arb." The second is to focus on the goals and the elements of the process. Obviously the second method is broader. In this paper I will use the term "med-arb" in its general and broad sense. The process known as "med-arb" shall be called the "original med-arb" process.

The starting point will be a short description of the goals of med-arb. Subsequently, we shall take a closer look at the "original med-arb" process in order to understand the problems of combining mediation and arbitration.

##### 2. *Goals of Med-Arb*

a. Med-arb is a combination of mediation and arbitration. The process is intended to allow the parties to profit from the advantages of both dispute settlement procedures.<sup>30</sup>

b. A mediated agreement shall be as enforceable as an agreement recorded in an arbitral award. A mediated agreement in "pure" mediation is generally enforceable as a contract.<sup>31</sup> But such a settlement is neither covered by the FAA<sup>32</sup> nor by the New York Convention. Thus, courts will not give a mediated agreement the same deference they give an arbitral award. The question arises as

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the impartiality requirement. See AAA Commercial Arbitration Rules, Rule 19. See also very plastic *Finkelstein v. Smith*, 326 So 2d 39, 40 (Fla. App. 1976) ("Arbitrators appointed by disputants to a tripartite panel are expected by the disputants and should be understood by the courts to act as partisans - only one step removed from the controversy."). The international arbitration rule is that party-appointed arbitrators are expected to be independent and impartial, see CRAIG, PARK & PAULSSON, *supra* note 20, at 209; Rau, *supra* note 21 at 505, but allows the parties to waive that general rule, see CRAIG, PARK & PAULSSON, *supra* note 20, at 211. The ultimate question then arises, whether the parties have the power to agree up front to a potentially biased arbitrator, see Rau, *supra* note 21 at 509.

<sup>29</sup> The New York Convention is an important guideline to what objections an arbitral award may be exposed to when enforcement is sought. Most countries that are important for trade purposes have ratified the Convention. The enforceability of a final award should be assured for every country in which it may be sought. Although the New York Convention does provide uniform standards for the validity of arbitration agreements and the recognition of arbitral awards, the interpretation of the Convention remains with the national courts. And what is even more important, the Convention says the "[r]ecognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that [ . . . ] (b) the recognition and enforcement of the award would be contrary to the public policy of that country." Art. V (2)(b) New York Convention. The arbitrator has to take into account, when deciding, that an award can be challenged on public policy grounds in the country where enforcement is sought.

<sup>30</sup> For the goals of mediation, see *supra* Section B. For the goals of international arbitration, see *supra* section C.

<sup>31</sup> Some states address the enforceability of mediated agreements and may even restrict their enforceability under contract law. See the MINNESOTA CIVIL CODE or the UTAH CODE ANN., quoted in KOVACH, *supra* note 16, at 180.

<sup>32</sup> Federal Arbitration Act, 9 U.S.C. § 1 (1925).

to whether a mediated settlement in the med-arb process is enforceable like an arbitral award.<sup>33</sup> If the settlement agreement terminates an arbitration process already in progress, it is generally assumed, but not undisputed, that settlement agreements which are recorded in the award are enforceable under the New York Convention.<sup>34</sup> Assuming the court concerned with this question considers the New York Convention not to cover such settlement agreements, the enforcement thereof then depends on whether the national law of the country in which enforcement is sought recognizes such settlement agreements as a surrogate for an arbitral award. Many countries will enforce such settlement agreements as an arbitral award anyway.<sup>35</sup> But, it is rather unlikely that a mediated settlement agreement will be enforced other than simply as a contract if the mediation part of the proceedings occurs apart from and before the arbitration part of the process.<sup>36</sup> If the arbitration process has not started by the time the settlement has been reached, the settlement will not be integrated into an arbitral award. The settlement has to be reached during the lifetime of the arbitration process and it has to be recorded in the award in order to become binding. However, some jurisdictions provide for enforcement of the settlement agreement even if the mediation part is totally separate from the arbitration part.<sup>37</sup> Now, if mediation is just part of the whole arbitration process, a settlement reached during mediation can just be recorded in the arbitral award.

c. The med-arb process may gain in efficiency. If the parties do not settle their dispute through mutual agreement, the arbitrator does not have to start afresh since he is aware of the issues of dispute already.<sup>38</sup> This, however, is

<sup>33</sup> Sec. 30 of the UNCITRAL Model Rules recognizes the award on agreed terms.

<sup>34</sup> KLAUS PETER BERGER, *INTERNATIONAL ECONOMIC ARBITRATION* 582 (1993) and A. J. VAN DEN BERG, *XII YEARBOOK OF COMMERCIAL ARBITRATION* 26 (1987) call a settlement agreement enforceable under the New York Convention. Cf. CRAIG, PARK & PAULSSON, *supra* note 20, at 320. The opposite position is taken for Germany: PETER SCHLOSSER, *DAS RECHT DER INTERNATIONALEN PRIVATEN SCHIEDSGERICHTSBARKEIT* 669 (2d ed. 1989) and KARL HEINZ SCHWAB & GERHARD WALTER, *SCHIEDSGERICHTSBARKEIT (Kommentar)* 453 (4th ed. 1990).

<sup>35</sup> See Pieter Sanders, *ADR in Civil Law Countries*, 61 *ARBITRATION* 35, 36 (1995) (for civil law countries).

<sup>36</sup> CRAIG, PARK & PAULSSON, *supra* note 20, at 683.

<sup>37</sup> See e.g. Hong Kong Ordinance 2A (4) provides:

If the parties to an arbitration agreement which provides for the appointment of a conciliator reach agreement in settlement of their differences and sign an agreement containing the terms of settlement (hereinafter referred as the 'settlement agreement') the settlement agreement shall for the purposes of its enforcement be treated as an award on an arbitration agreement and may by leave of the Court or a judge thereof be enforced in the same manner as a judgment or order to the same effect and where leave is so given judgment may be entered in terms of the agreement.

See also Walter Sterling Surrey & Nancy J. Kellner, *International Arbitration in Hong Kong*, 405 *PLI/COMM* 205, 216 (1986). Similar also California (CAL. CIV. PROC. CODE) and in Canada: British Columbia (B.C. REV. STAT.) and Alberta (ALTA. REV. STAT.), see Linda C. Reif, *Conciliation as a Mechanism for the Resolution of International Economic and Business Disputes*, 14 *FORDHAM INT'L L.J.* 578, 625 (1990/1991).

<sup>38</sup> GOLDBERG, SANDER & ROGERS, *supra* note 2, at 226; David C. Elliott, *Med/Arb: Fraught with Danger or Ripe with Opportunity?*, 34 *ALBERTA L. REV.* 163, 164 (1995). Whether this is a viable argument in international arbitration depends also on the kind of procedure the parties pursue during

certainly true if the parties reach a partial agreement where they dispose of factual or legal issues during the mediation part of the proceedings. Even better than that is where the parties reach an agreement to settle their dispute in a cooperative manner.<sup>39</sup> Such an agreement changes the issues to be decided and may require the parties and the arbitrator to look into the parties' future. However, it shifts from a "rights arbitration" to an "interest arbitration."<sup>40</sup> Where the arbitration focuses on the parties' future relationship the efficiency argument becomes even more critical. The arbitrator must understand the relationship between the parties and prior knowledge of their respective underlying interests assists in finding an adequate resolution.<sup>41</sup>

### 3. "Original Med-Arb" Process<sup>42</sup>

Sam and John Kagel, of San Francisco, are credited with pioneering the med-arb process.<sup>43</sup> They employed it initially to settle a nurses' strike.<sup>44</sup> This process in domestic arbitration is most frequently used in public sector and labor disputes. For our purposes here I will not further explore experiences in those fields but rather focus on procedural issues which are important in commercial arbitration.

Here is how it works: A third-party neutral works with the disputing parties towards a settlement using the techniques of mediation. If this is unsuccessful the med-arbitrator<sup>45</sup> changes hats and becomes an arbitrator as a second step.<sup>46</sup>

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arbitration. If this looks more like a civil law process where written pleadings are submitted, it is doubtful whether there is remarkable gain in terms of time. The written submissions will have to be prepared whether there is the same or another person to decide the case. Also, if legally relevant factual statements are made during confidential caucuses they may not be regarded for decisional purposes if not stated during arbitration where the opponent has the possibility to challenge whatever is said unless the parties agreed to waive their due process rights. This again leads to redundant factual statements which question the efficiency argument. But, on the other hand, it is certainly true that where the arbitrator has to be educated about complex technical issues time is saved if this has not to be repeated.

<sup>39</sup> The Washington Agreement in the *IBM/Fujitsu* case is an example of such an agreement, see *infra* Sec. II.

<sup>40</sup> For the distinction between these two forms of arbitration, see MURRAY, RAU & SHERMAN, *supra* note 18, at 516 *et seq.*

<sup>41</sup> An in-house counsel who participated in the *IBM-Fujitsu* procedure (quoted in BÜHRING-UHLE, *supra* note 20, at 385), says: "... the main advantage of this form of med-arb is not so much the savings [in transaction costs] but the quality of the result because it is based on a much deeper understanding of the dispute and the underlying issues: no third party will know the facts and the issues as well as the parties themselves, unless he can get all the facts which for a standard arbitrator or judge is impossible . . ."

<sup>42</sup> See generally, Elliott, *supra* note 38; Barry C. Bartel, Comment, *Med-Arb as a Distinct Method of Dispute Resolution: History, Analysis, and Potential*, WILLAMETTE L. REV. 664 (1991); Karen L. Henry, Note, *Med-Arb: An Alternative to Interest Arbitration in the Resolution of Contract Negotiation Disputes*, 3 OHIO ST. J. ON DISP. RESOL. 385 (1988).

<sup>43</sup> ARNOLD ZACK, PUBLIC SECTOR MEDIATION 8 (1985); Henry, *supra* note 42, at 390; Bartel, *supra* note 42, at 664 n. 16.

<sup>44</sup> See Kagel, *Combining Mediation and Arbitration*, 96 MONTHLY LAB. REV. 62 (Sept. 1973).

<sup>45</sup> I will call the person who conducts the mediation and arbitration in combination a "med-arbitrator." The notion shall encompass also situations where several persons conduct the procedure.

<sup>46</sup> ZACK, *supra* note 43, at 8; Bartel, *supra* note 42, at 665.

This means that the mediation part occurs before the arbitration stage and that both stages are clearly distinct. Also the same person who conducts the mediation part becomes, if necessary, the arbitrator for the second part.

#### E. Problems with the "Original Med-Arb" Process

The validity of the "original med-arb" process has been challenged, because of the question whether the mediation and the arbitration parts of the process can both remain valid while conducted by the same person. The problem emerges because of the inherent differences between mediation and arbitration.<sup>47</sup>

These problems shall be examined in more detail in the following sub-sections since it is important to understand the problems before one can improve the process design.

##### 1. Partiality<sup>48</sup> of the Med-Arbitrator

First, there is the concern that the med-arbitrator becomes privy to confidential information which would never have been disclosed to a pure arbitrator, especially when private caucuses were used during the mediation stage.<sup>49</sup> The arbitrator is required to determine the law or at least to "do justice as he sees it, applying his own sense of law and equity to the facts as he finds them."<sup>50</sup> The latter is relevant to an arbitrator in a domestic dispute under American law where such arbitrator is not expected necessarily to follow the law, or in international arbitration, where the arbitrator is required to decide the issues as "*amiable compositeur*." In either case, the arbitrator should decide a case only on facts which are generally perceived as relevant for a decision. When a dispute is to be resolved by an arbitrator, the parties must present all the facts they deem relevant. Especially (but not exclusively), if the med-arbitrator engages in caucuses, he may invite the parties to discuss extraneous matters, for example, emotional issues which may not be understood as strictly relevant for resolution purposes, but these issues may be relevant for settlement purposes. It is difficult to believe that the med-arbitrator will remain unaffected as an arbitrator, after becoming privy to private, perhaps intimate, emotional, personal, and other "legally" irrelevant information<sup>51</sup> or compromise positions.<sup>52</sup>

<sup>47</sup> Lon Fuller, *Collective Bargaining and the Arbitrator*, WIS. L. REV. 3, 23 *et seq.* (1963); Bartel, *supra* note 42, at 679 *et seq.* For the same reason the International Center for Settlement of Investment Disputes, Rules of Procedure for Arbitration (ICSID) (1985), Rule 1(4) disqualifies anyone who has previously served as a mediator in the same dispute. See also Judith O'Hare, *Arbitration and Alternative Dispute Resolution: A Hong Kong Perspective*, 7 AM. REV. INT'L ARB. 1, 16 (1996).

<sup>48</sup> Most often impartiality and neutrality are used interchangeably. Although there are distinctions made between impartiality and neutrality or independence, for this paper's purpose there is no distinction made between these terms.

<sup>49</sup> Fuller, *supra* note 47, at 24 (calling private consultations with the parties wholly improper on the part of an arbitrator.) One of the biggest problems of private consultation is that it is "suspicion-arousing," see *id.*, at 28.

<sup>50</sup> In the Matter of the Arbitration between Silverman and Benmor Coats, Inc., 61 N.Y.2d 299, 308, 473 N.Y.S.2d 774, 779, 461 N.E.2d 1261, 1266 (1984).

<sup>51</sup> This can happen whether the med-arbitrator approaches the dispute by a broad or narrow

When engaging in such confidential matters with the parties, it is possible that the med-arbitrator will become (consciously or unconsciously) empathetic towards one of the parties or may become otherwise involved with the subject matter.<sup>53</sup> This may not be a problem while acting as a mediator, but when called on to make a decision as an unbiased arbitrator, one can hardly ignore information disclosed during the mediation stage. It may be true that even an arbitrator in pure arbitration is affected by what he sees and hears. But a med-arbitrator becomes privy to far more than an arbitrator would, because such information was exclusively told to the med-arbitrator for mediation purposes. The med-arbitrator is therefore more exposed to this danger than an arbitrator is. It has been argued that this argument challenging the "original med-arb" process is unconvincing because an arbitrator should be able to block out information like a judge does when applying the rules of evidence.<sup>54</sup> But, this is

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problem definition method. But it is more likely to happen if the mediator approaches the case by a broad problem definition. The mediator may, for example, engage in an option generation stage with the parties, CHRISTOFER W. MOORE, *THE MEDIATION PROCESS - PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 212 et seq. (1986), FOLBERG & TAYLOR, *supra* note 1, at 47 et seq., KOVACH, *supra* note 16, at 129 et seq., NOLAN-HALEY, *supra* note 3, at 65, 77, by which he may even use his own creativity, KAGEL & KELLY, *THE ANATOMY OF MEDIATION: WHAT MAKES IT WORK*, 132 et seq. (1989), which requires him to depart from the legal track. Although the option generation is primarily seen in mediation processes where the mediator approaches the dispute by a broad problem definition, it would be a desirable means even where a narrow problem definition approach is used, *see also* BÜHRING-UHLE, *supra* note 20, at 304. Elliott, *supra* note 38, at 166: "[I]n mediation, the mediator will surface the interests of the parties in dispute with a view to broadening the potential options for settlement. In arbitration, the last thing either party may want to expose is their underlying interests.") Fuller, *supra* note 47, at 24:

There is no way to define "the essential facts" of a situation except by reference to some objective. Since the objective of reaching an optimum settlement is different from that of rendering an award according to the contract, the facts relevant in the two cases are different, or, when they seem the same, are viewed in different aspects. If a person who has mediated unsuccessfully attempts to assume the role of arbitrator, he must endeavor to view the facts of the case in a completely new light, as if he had previously known nothing about them. This is a difficult thing to do. It will be hard for him to listen to proofs and arguments with an open mind. If he fails in this attempt, the integrity of adjudication is impaired.

<sup>52</sup> Paul Newman, *Mediation-Arbitration (Med-Arb) Can It Work Legally?*, 60 *ARBITRATION* 176 (1994).

<sup>53</sup> Bartel, *supra* note 42, at 685 et seq.; Elliott, *supra* note 38, at 167; J. Martin H. Hunter, *quoted in* BÜHRING-UHLE, *supra* note 20, at 209 ("[. . .] once an arbitrator has had any private discussion with a party regarding the evidence in a case it is clearly inappropriate - indeed impossible - for that arbitrator to resume his function in the case as an arbitrator."). Claude Reymond, *quoted in* BÜHRING-UHLE, *supra* note 20, at 205 ("[. . .] if for instance you have heard some information from the parties on the real grounds of the dispute, then it is very difficult to forget this and act impartially as a judge . . ."). Richard W. Hulbert, *quoted in* BÜHRING-UHLE, *supra* note 20, at 206 ("[. . .] it is hopeless, the arbitrator cannot be expected to banish from his mind things he heard as a mediator; it perverts arbitration . . ."). The opposite position is taken by Michael Thomas, *Mediation at Work in Hong Kong*, 58 *ARBITRATION* 29 (1992).

<sup>54</sup> Henry, *supra* note 42, at 397:

It is presumed that judges are able to render decisions based only upon such admissible evidence, and that they have learned to block out extraneous, yet potentially prejudicial, matters. Through proper training, there is no reason why med-arbiters could not be afforded the same presumption. Arguments challenging med-arb as compromising the adjudicative role are,

not a sufficient argument to overcome the partiality problem. The rules of evidence relate to legally relevant facts which can be consciously blocked out for decision purposes. The particular facts and their impact on the decision can be rationally determined. On the other hand, legally irrelevant information conveyed during mediation cannot be consciously blocked out because, unlike under the rules of evidence, such legally irrelevant information should not have an impact on the outcome of the case in the first place. Since there is no rational connection between such legally irrelevant information and the outcome of the decision, it is not possible to rationally insulate the information which should be blocked out.<sup>55</sup> For the same reason it is not even possible to exclude generally all information gained during mediation from being considered in arbitration. (This, by the way, would render the efficiency argument obsolete.) The problem lies in the fact that the med-arbitrator may (subconsciously and for whatever reason) become more understanding and supportive of a particular party's position once becoming aware of certain facts. If this is subconscious, then how can this information be consciously blocked out?

*Second*, if the med-arbitrator engages in case evaluation before being called to make a decision and render an award, he prejudices the case.<sup>56</sup> This raises concerns about impartiality for the remaining part of the process. Whenever an arbitrator has provided a legal opinion, or engaged in some other way in a dispute, for example, by expressing a personal case assessment, part of his "intellectual liberty"<sup>57</sup> is given up and impartiality is lost.<sup>58</sup>

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therefore, defeated by an understanding of the true nature of med-arb.

Similar also Arthur L. Marriott, *quoted in* BÜHRING-UHLE, *supra* note 20, at 206.

<sup>55</sup> Even if the med-arbitrator realizes that he is becoming biased because of what has been said during the mediation stage, there is no method available to "transform" the biased arbitrator into an unbiased arbitrator.

<sup>56</sup> BÜHRING-UHLE, *supra* note 20, at 204.

<sup>57</sup> J. Martin H. Hunter, *quoted in id.* at 204 ("[. . .] when conciliation fails and you have to render a decision your mind is not entirely free anymore because you have prejudged the case to a certain extent, and you have given up part of your intellectual liberty when you have expressed your advice or opinion to one of the parties or both . . .").

<sup>58</sup> Berthold Goldmann, *quoted in id.* at 204. *Id.* at 196:

. . . the only way for the arbitrators to mediate is that the entire tribunal, after having well understood the case, convenes the parties and explains to them what they regard as reasonable and lets the parties have a (not too inaccurate) feeling of what is going to be in the award; of course the tribunal has to make disclaimers and state that it still is completely open, but that will in reality *not* be realistic because *once the tribunal has acted in this manner and has created certain expectations, it will be difficult to move too far away from the positions expressed.* . . (emphasis added).

In other words the arbitrator not only binds himself intellectually, he also creates certain expectations on behalf of the parties which may not be disappointed unless there is a very good reason. *See also* CRAIG, PARK & PAULSSON, *supra* note 20, at 221:

While it is undoubtedly established that all ICC arbitrators must be independent, the definition of "independence" remains elusive. An arbitrator may be biased either intellectually or financially. The most classic case of the former is where the arbitrator has previously served as counsel to the party appointing him and has given a legal opinion on points in issue. Some commentators have viewed such participation as an absolute bar to serving as a party-appointed arbitrator, *even with the agreement of the other party*. Judge Pierre Bellet, former First

Impartiality is a standing rule for arbitrators, especially in international arbitration. It is not quite clear the extent to which the parties are allowed to waive the impartiality requirement. If it is not possible to obtain an arbitrator who is impartial at the time he (officially) decides the case, it may be questioned whether an agreement to an "original med-arb" process is admissible.<sup>59</sup>

## 2. Due Process Violation

Private sessions, which are supposed to be confidential,<sup>60</sup> violate the rules of due process because they deprive the other party of the opportunity to challenge whatever is said or presented as evidence to the med-arbitrator.<sup>61</sup> The question arises to what extent and at what stage the parties should be allowed to waive their due process rights, if the information provided during private caucus is intended to remain confidential.

## 3. Coercion

When the mediator has the power to decide the dispute he may coerce the

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President of the French Supreme Court, has said that it is a more serious obstacle to impartiality to have given a prior consultation in a case than to have ties of friendship with the party; ties of friendship may be disregarded as a matter of professional rigor, but pride in adhering to one's earlier opinion is a stronger emotion (emphasis added).

Although this opinion refers to evaluations given prior to and not during the arbitration process, it shows the nature of the concern. Newman, *supra* note 52, at 177: "Neither judge nor arbitrator should [ . . . ] express a view about the merits of the dispute: *Re Elliot ex parte South Devon Railway Company* (1848) 12 Jur 445." Rowlands Williams, *The Med-Arb Debate - Some Contributions*, 60 ARBITRATION, 179 (1994): "Bias might reveal itself in an 'evaluative mediation,' but this type of mediation is incompatible with Med-Arb because the 'neutral' must make up his mind before the arbitration stage is reached which would disqualify him as arbitrator, the conventional wisdom being that a mind made up is a mind closed."

<sup>59</sup> It has already been mentioned that the impartiality requirement can be waived for party-nominated arbitrators, *supra* note 28. Rau, *supra* note 21 at 509, discusses the question whether the parties can agree to a single arbitrator who is presumably biased and closely allied with one of the parties. If this would be permissible there would be no problem for the parties to agree to a med-arb process. But even if the national law or public policy excludes an agreement where a biased arbitrator should be appointed, it could still allow the parties to agree on med-arb, since the med-arbitrator is not biased at the outset of the process which guarantees a "process with equal opportunities" where no party has a better situation to start with. Also, it is not clear to what extent and for which side the med-arbitrator will become biased during the mediation process. But, if impartiality is required at the time the arbitrator decides, the med-arb process could be challenged because it does not guarantee impartiality of the med-arbitrator to that extent.

<sup>60</sup> See *supra* note 16.

<sup>61</sup> BÜHRING-UHLE, *supra* note 20, at 207, 209 et seq., see also Elliott, *supra* note 38, at 166. English lawyers, at least, assume that it would be not permissible for a med-arbitrator to convene private confidential caucuses and then decide the matter, see Alan Shilston, *Med-Arb - Can it Work?*, 60 ARBITRATION 2, 3 (1994); Philip Naughton, *The Med-Arb Debate-Some Contributions*, 60 ARBITRATION, 180 (1994). This makes the process vulnerable because it includes also the real danger that the award will be challenged. An attempt to overcome this problem is made by the Hong Kong Arbitration Ordinance (Amendment No.2-1989), *infra* Section II.B., where the procedure is designed to eliminate possible challenges based on the due process argument by removing the confidentiality rule if the mediation part fails to produce a settlement agreement.

parties into a settlement.<sup>62</sup> This may compromise the value of the mediation. "What appears to be a negotiated resolution may be perceived by the parties as an imposed one, thus diminishing the degree of satisfaction and commitment."<sup>63</sup> This kind of mediation then becomes "muscle-mediation." The desire that a settlement be the product of the "free will" of the parties, without the immediate pressure of a decision to one's disadvantage will not be satisfied. But, on the other hand, it may be questioned whether there can ever be a "free will," because every dispute settlement is to some extent the result of the parties' understanding that what they claim does not necessarily equal the outcome of an adjudicative process. This by itself may be perceived as some sort of pressure. But there are different degrees to the intensity of this kind of pressure. The better a party's understanding as to its chances of prevailing in court or in arbitration, the more such party is willing to agree to a settlement representing these perceived chances. At all times, a settlement agreement is nothing other than what the parties perceive to be a *better alternative to no agreement*. And, whether a party perceives a settlement to be a better alternative than no agreement, is to a large extent a question of *case evaluation*.<sup>64</sup> Case evaluation is predicting what the decision-maker will decide in terms of chances of prevailing. When a med-arbitrator evaluates a case, he makes the parties better aware of their chances of winning the case. He is able to evaluate their case more precisely than anyone else because of his position as decision-maker. As a matter of personal integrity, the case will be decided consistent with what the med-arbitrator suggested during the mediation stage.

The issue that consequently arises is that someone who does not have the power to decide the case may incorrectly assume how the decision-maker will decide the case. Since the law is not as precise as mathematics, a case evaluation will always have to take into account that several (legal and factual) issues can be perceived differently without being irrational or arbitrary. One may conclude accordingly that every case has a possibility of succeeding or losing. A sure "winner" is almost impossible to spot at the outset of an adjudicational process. But the difference between an "ordinary case evaluator" and the med-arbitrator is that the latter does not have to take into account how somebody else could decide the legal and factual issues of the very same case. The way he understands the issues is determinative as to how the case will be decided.

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<sup>62</sup> Fuller, *supra* note 47, at 27; Bartel, *supra* note 42, at 679-685; see also Philip Naughton, *supra* note 61, at 180.

<sup>63</sup> URY, BRETT & GOLDBERG, *supra* note 2, at 57.

<sup>64</sup> This is the basic knowledge every negotiator should have in mind. ROGER FISHER, WILLIAM URY & BRUCE PATTON, *GETTING TO YES* 97 et seq. (2d ed. 1991) (calling it the BATNA (Best Alternative to a Negotiated Agreement)). It is nothing else than anticipating what happens if the dispute will not be disposed by agreement. Here it means to predict the outcome of the arbitration process. See also LARRY L. TEMPLY, *LEGAL NEGOTIATION IN A NUTSHELL* 59 (1992). Truth is, that the case evaluation is not the only thing to be taken into account when evaluating one's BATNA. There are factors such as the psychic stress of a civil process in court or before the arbitrator, the money to pay in advance, the troubles caused by the uncertainty of the outcome until a enforceable decision is handed down, the status of the defendant's solvency, etc. But still, the case evaluation remains one of the most important part of the BATNA.

The above discussion leads to the conclusion that the med-arbitrator's evaluation by itself eliminates a substantial area of uncertainty. The case becomes more predictable upon the med-arbitrator conveying an opinion, either on factual or legal issues. This "elimination of uncertainties" is already part of the decision-making, even if this process is not consciously perceived as decision-making. Whenever the med-arbitrator indicates a perception, it is not just another opinion, it is part of the decision. If the med-arbitrator makes a settlement suggestion based on a legal evaluation, this is basically a pre-decision. The more indications the parties receive as to the likely outcome, the more their settlement will resemble that presumed decision. And since the prediction of the outcome will always be a strong desire of the parties,<sup>65</sup> the med-arbitrator's ability to do so can be considered a source of strength of the "original med-arb" process. But, the problem lies in the fact that *the med-arbitrator doesn't "evaluate," rather he "decides," or at least starts to decide.* By doing this, the predictability of the outcome is enhanced. But, this changes the value of the mediation phase because it resembles, in terms of its outcome, more adjudication than self-determined problem resolution. The goal here is exclusively to *dispose* of the dispute. But this method does not help the parties to find a better way to *resolve* their problem. The mere fact that the parties "agree" on these terms set forth by the med-arbitrator does not change the fact that the terms are the product of a third party's "decision-making" and therefore perceived as imposed.<sup>66</sup> But in terms of the admissibility of the process there is

<sup>65</sup> TEMPLY, *supra* note 64, at 59; Vincent Fischer-Zernin & Abbo Junker, *Arbitration and Mediation: Synthesis or Antithesis?*, J. INT'L ARB., March 1988, 21, 36 ("... the parties are often more likely to consider settlement negotiations when they have discovered the weaknesses of their own case, and the strengths of the opponent's case during the course of arbitration; . . ."). BÜHRING-UHLE, *supra* note 20, at 173:

The most frequently cited . . . [barrier] to settlement in arbitration was the discrepancy that frequently existed between the parties' assessments of the outcome of the procedure. Conflicting prognoses of the outcome are often a function of a systemic over-optimism that effects the judgment of the parties and frequently also their attorneys when confronting litigation. . . . The importance of uncertainty as a barrier to settlement is underlined by the fact that when the survey asked about the most important reasons for voluntary settlement in arbitration, the highest relevance was assigned to the gain in realism with respect to the chances of winning and to the transaction costs.

*Id.* at 181 (where Bühring-Uhle says that according to his survey "the most important factor contributing to the achievement of settlements in arbitration seems to be that, as the arbitral process unfolds, the parties are becoming more realistic about the outcome of the procedure.").

<sup>66</sup> In fact, the closer the settlement gets to the presumed decision and the less it is a product of a mutually developed problem resolution, the more it resembles (in terms of its outcome and satisfaction for the parties) an arbitral award. The agreement loses a lot of its spirit of a self-determined problem resolution. The mediation process changes from a "problem-solving settlement process" to a "predictive settlement process." (For the distinction between these two settlement procedure types, see Craig A. McEwen, *Pursuing Problem-Solving or Predictive Settlement*, 19 FLA. ST. U. L. REV., 77 (1991).) And it also remains on the win/lose-negotiation level, BREIDENBACH, *supra* note 4, at 308. In fact, the only motivation for the parties to agree on a settlement set forth by the med-arbitrator is under these circumstances to dispose of the dispute immediately and thus have fewer costs and time commitment to bear. But all the other goals mediation tries to reach will most probably not be achieved. And also, "if the parties in med-arb feel that a settlement has been

no problem: The med-arbitrator's function is ultimately to decide the dispute, if the parties do not reach settlement themselves. It makes no difference, in terms of the coercion issue, whether the parties agree to a "suggested" settlement, instead of having the med-arbitrator deciding the case on the merits consistent with that suggestion.

Another issue which on first sight appears to be a coercion problem, arises

. . . when an arbitrator puts himself in the position of recommending a settlement to the parties and one of them would feel obliged to say "no," that party goes through agony because the arbitrator - consciously or not - puts his ego behind a settlement that he has crafted: and if a party says "no" and the arbitral decision comes down against them they will be very often convinced of the fact that this was because the arbitrator resented their not accepting the settlement, and I don't think it's proper for an arbitrator to put parties in that position. . .<sup>67</sup>

This is also another face of the "impartiality" problem. Since the losing party does not believe the arbitrator will remain impartial once a case evaluation has occurred, that party will perceive an award as retaliation.

#### 4. *Parties are Less Open in Mediation*

In order for the mediator to guide the parties in exploring areas of mutual gain, he needs to know of their true intentions, underlying interests and preferences, and the business background. He therefore encourages them to be candid for this purpose. In arbitration each party focuses on persuading the decision-maker that its side is "right." By doing this, the parties will not reveal any weaknesses or let the med-arbitrator explore the background of the case. The result is that the parties are not as frank as they should be,<sup>68</sup> because they know that the med-arbitrator has decisional power and they fear that the med-arbitrator may use the disclosures against them.<sup>69</sup> In this way, one of the biggest advantages of mediation, namely the safe exploration of mutual gain without the risk of conveying confidential information to the party's own detriment, is substantially weakened.

#### 5. *Different Skills Required*

A further concern focuses on the skills of a med-arbitrator. The skills of a mediator are different from those of an arbitrator.<sup>70</sup> But this does not mean that these functions may not be combined; it is simply more difficult to find somebody who has the requisite knowledge and experience in both areas. This is merely a practical problem.

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imposed upon them, rather than voluntarily agreed to, they may be less willing to comply with that settlement," GOLDBERG, SANDER & ROGERS, *supra* note 2, at 227.

<sup>67</sup> Stephen R. Bond, *quoted in* BÜHRING-UHLE, *supra* note 20, at 203.

<sup>68</sup> GOLDBERG, SANDER & ROGERS, *supra* note 2, at 226; URY, BRETT & GOLDBERG, *supra* note 2, at 57; Brian W. Totterdill, *The Med-Arb Debate—Some Contributions*, 60 ARBITRATION 182 (1994).

<sup>69</sup> GOLDBERG, SANDER & ROGERS, *supra* note 2, at 226.

<sup>70</sup> Bartel, *supra* note 42, at 688 (referring to Ross, *The Med-Arb Process in Labor Agreement Negotiations*, in SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION: OCCASIONAL PAPER NUMBER 82-1, 10 (Feb. 1982)).

### 6. Summary

The discussion so far reveals that mediation and arbitration are two distinct dispute resolution processes, in which the third-party neutral has differing tasks. In mediation, the mediator helps the parties to resolve their problem on their own, without judging what happened. In arbitration, the arbitrator adjudicates the case based upon what happened in the past.<sup>71</sup> In the "original med-arb," the mediation phase or the arbitration phase may have disadvantages compared to its original counterparts: First, the settlement agreement is likely to resemble a decision more than a voluntary dispute resolution. Second, the parties are more reluctant to be candid with the med-arbitrator than with a mediator. Third, the arbitration part suffers from the possibility of a biased arbitrator.

### F. Alternative Med-Arb Formats

The simplest way to combine mediation and arbitration is to agree to mediate, and if that fails, to arbitrate the dispute. Since such an agreement keeps both processes apart, this combination will not be discussed as a med-arb format. A med-arb process is a process where the two procedures are combined into one process. The following med-arb formats are the result of the attempt to combine the virtues of mediation and arbitration without including the disadvantages of the "original med-arb" process.

#### 1. Med-Arb-Opt-Out

The "original med-arb" process may be modified so as to provide that once the mediation part is completed and before the arbitration part commences, each party is entitled to independently call for a different person to be appointed for the remaining arbitration part of the proceedings.<sup>72</sup> The interface between the two process parts would have to be defined in a way that makes it clear when the mediation part terminates. Accordingly, the process rules could provide for a time limit within which each party could give notice to reject the continued participation of the med-arbitrator in the role of arbitrator.

The advantage of this modification is that it gives each party the right to reject the med-arbitrator from functioning as an arbitrator, in light of the knowledge obtained through the mediation process. In this way the parties may express reservations as to the med-arbitrator's impartiality and ability to further adjudicate the matter.<sup>73</sup> It also increases the likelihood that the parties will be

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<sup>71</sup> This could be changed if the parties reach a partial agreement in which they change the merits of the arbitration and eventually focus on their future relationship.

<sup>72</sup> Similar see BÜHRING-UHLE, *supra* note 20, at 369 and Bartel, *supra* note 42, at 684. Additionally the med-arbitrator himself should also have the ability to quit after the mediation part, if he believes himself biased. The med-arbitrator's judgment may have become so poisoned by information gained in private meetings or a dislike or sympathy for a party may emerge requiring the possibility that a "self-determination" for the arbitrator should exist. See also Newman, *supra* note 52, at 178.

<sup>73</sup> But even with this possibility of rejection there is no guaranty that the med-arbitrator will remain unbiased once he is approved by the parties. This means, if public policy were to require absolute impartiality on the part of the arbitrator at the time he decides the case, the parties could

absolutely candid during mediation, as the parties are aware that in the event of an impasse, another person can be appointed as arbitrator.<sup>74</sup> Finally, there is no issue of coercion, as the parties have yet to determine whether the med-arbitrator will be retained at all as the arbitrator.<sup>75</sup>

The disadvantage of this format is that if a party opts for a new arbitrator, the process is nothing more than simple mediation followed by arbitration conducted by two different neutral third parties. This format loses its potential efficiency in terms of time and money as compared to the ordinary form of mediation followed by arbitration.<sup>76</sup>

## 2. Arbitration Followed by Mediation

The process could be reversed. The med-arbitrator could commence with an ordinary arbitration procedure. The med-arbitrator would hear the parties and allow them to present evidence. A decision would ultimately be rendered, which decision would then be sealed and mediation proceedings would ensue without disclosing the arbitration result to the parties.<sup>77</sup>

The advantage of this format is that any disclosure during the mediation process cannot create bias in the mind of the arbitrator, because the mediation occurs after a decision has been reached on the merits. The disadvantage is that the process loses its efficiency in terms of time and costs. In either case, an arbitration process will occur, irrespective of whether the parties reach a mutually acceptable agreement. Further, after having exhausted the arbitration process in attempting to convince the arbitrator on the merits of the case, it is unlikely that the parties will be willing to make the effort to subsequently engage in a mediation process. It requires substantial money and time to go through an entire arbitration process.<sup>78</sup> To engage at this point in a mediation process would mean having to spend even more time and money. Further, the

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not validly agree to this process. But, the right to opt-out provides at least for a conscionable consent to their arbitrator after going through the mediation part.

<sup>74</sup> BÜHRING-UHLE, *supra* note 20, at 369.

<sup>75</sup> The parties might rather depart from a narrow to a broad problem definition when the arbitrator has no more power to give an outlook on how he will decide the matter. If the med-arbitrator were still to give an evaluation, the result would be that the party who dislikes his view could use its right to opt-out in case of an impasse, to ensure having another arbitrator. And since the med-arbitrator should not unnecessarily jeopardize his ability to be the arbitrator, he might be even more reluctant to do some evaluation than an "ordinary" mediator would. Therefore the med-arbitrator might be very cautious when making an evaluation of the case and might refrain from trying to coerce a party into a settlement.

<sup>76</sup> But, unlike where the parties simply agree to mediate, and then (in case of an impasse) to arbitrate their dispute (by two different third-party neutrals), here the possibility that the parties may retain the same neutral for both stages is higher than if both would first have to agree on that.

<sup>77</sup> MURRAY, RAU & SHERMAN, *supra* note 18, at 751. Not quite the same is the idea of "post-settlements," where the parties try to improve the outcome of an arbitration by reaching a solution that both parties prefer over the award. See H. Raiffa, "Post-Settlements," 1 NEG.J. 9-12 (1985).

<sup>78</sup> The costs of international arbitration are generally very high. They seem comparable to what international litigation would be. Additionally, according to BÜHRING-UHLE, *supra* note 20, at 110, a large majority of cases take between two to three years from their initiation until the award is handed down.

incentive of eliminating a time-consuming and cost-intensive adjudicative arbitration process in the event that the parties reach a settlement agreement is lost. Additionally, it may be psychologically difficult to attempt to work through the issues together with the opponent, after having gone through the highly adversarial arbitration process. And finally, if a party believes the med-arbitrator decided in its favor, such a party would be less likely to want to engage in mediation.

An additional problem is the risk that the med-arbitrator may not be fully impartial as mediator<sup>79</sup> after he has decided the merits of the dispute one way or the other.

### 3. MEDALOA (*Final Offer Arbitration*)

MEDALOA is an abbreviation of the hybrid process of Mediation And Last Offer Arbitration. In fact it is just a modification of the "original med-arb" process. The difference lies in the arbitration part: If the parties do not settle through agreement, each party then submits a "final offer" to the med-arbitrator, and the latter chooses between one of the two final offers, which then becomes a binding arbitration award.<sup>80</sup>

"The most distinctive feature of this arbitration scheme is the limits it places on the discretion of the arbitrator."<sup>81</sup> The med-arbitrator is not entitled to decide what he believes to be the most appropriate solution for the parties. Rather he is bound to choose between the final offers. An important rationale behind this process is that in domestic arbitration, arbitrators tend to compromise and "split the baby."<sup>82</sup> If the parties assume the arbitrator will "split the baby," they may hesitate to make compromises during negotiation in order to gain the most whenever the arbitrator ultimately splits the baby.<sup>83</sup> MEDALOA has the opposite effect: the arbitrator is more likely to choose the last offer he deems the more reasonable, which compels the parties to make "reasonable" concessions.<sup>84</sup> The mediation skills of the med-arbitrator are less crucial here because the process itself forces the parties into settlement.<sup>85</sup> The decision of the med-arbitrator is merely to choose between two possibilities. Also, the attraction of this procedure increases the more the issue lacks well defined rights for decision purposes.<sup>86</sup>

<sup>79</sup> About impartiality (or neutrality) in mediation, see MOORE, *supra* note 51, at 281; KOVACH, *supra* note 16, at 99 et seq.; BREIDENBACH, *supra* note 4, at 169 et seq.

<sup>80</sup> See also MURRAY, RAU & SHERMAN, *supra* note 18, at 739 et seq.; Tom Arnold, *MEDALOA - The Dispute Resolution Process of Choice*, SB41 ALI-ABA 325 (1996).

<sup>81</sup> MURRAY, RAU & SHERMAN, *supra* note 18, at 740.

<sup>82</sup> *Id.* A survey conducted by the AAA seems to reject this contention. See WORLD ARB. & MEDIATION REP., October 1993 at 241.

<sup>83</sup> MURRAY, RAU & SHERMAN, *supra* note 18, at 740.

<sup>84</sup> URY, BRETT & GOLDBERG, *supra* note 2, at 57; MURRAY, RAU & SHERMAN, *supra* note 18, at 741.

<sup>85</sup> Each side must try to make the more reasonable offer in order to get the med-arbitrator to choose his offer. The parties will ask themselves what would the med-arbitrator deem a reasonable compromise? As long as the other side comes closer to that presumed point, further concessions will always be made. It is therefore very likely that the parties will settle the dispute before it gets into the arbitration stage.

<sup>86</sup> URY, BRETT & GOLDBERG, *supra* note 2, at 57.

A possible disadvantage of this model is that, if neither party submits a solution which seems satisfactory to the med-arbitrator, he is not allowed to settle the dispute in a way he believes is appropriate. This kind of situation is even more likely to occur where there is a multi-issue dispute at stake, although the arbitrator can influence the outcome in the way he conducts the process. In a multi-issue dispute he could, for example, require the parties to submit more than one "final" offer.

MEDALOA, however, functions primarily to move the parties towards compromise. The value of the process lies in its power to drive the parties towards a compromise settlement. Therefore the success of the mediation phase of the process is enhanced.<sup>87</sup> Since the arbitrator in international arbitration is bound by the law, and international arbitration is not intended to be an "alternative dispute resolution" means, but rather a surrogate for litigation,<sup>88</sup> it is less common that the med-arbitrator will "split the baby." This above mentioned danger, which keeps the parties in ordinary med-arb from compromising, seems therefore smaller in international arbitration. Thus, the main incentive to agreeing to MEDALOA in international arbitration loses weight. But still, there might be disputes which could be appropriate for MEDALOA. It appears difficult, however, to anticipate this prior to the time when the dispute arises. It would be more conceivable to agree on final offer arbitration once the dispute has emerged and the parties are willing to efficiently dispose of the dispute.

#### 4. *Co-Med-Arb*

In the "Co-med-arb" format the mediator and the arbitrator are different persons. They jointly conduct a fact-finding hearing which is then followed by mediation without the arbitrator. If the mediation part does not lead to a settlement, the arbitrator then takes over and ultimately issues a decision.<sup>89</sup>

This is, in fact, a somewhat streamlined process where the mediation part of the proceedings is followed by the arbitration part, with two different third-party neutrals participating. The idea is based on the perception that the process of mediation can be divided into two phases: an open phase and a confidential phase.<sup>90</sup> The advantage of this process format is that the joint session ensures that both parties are well prepared when entering the mediation session because they first go through a fact-finding hearing with the arbitrator. A further advantage of this model is that the problems of partiality, coercion and lack of openness of the parties may not occur. The process is streamlined as, if the parties do not settle the dispute during mediation, they do not lose further time because the arbitrator is already aware of the facts of the case. The first hearing therefore serves to instruct not only the mediator, but also the arbitrator.

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<sup>87</sup> Success means here merely that the dispute is disposed of through a settlement agreement. But since this procedure operates on a win/lose level, the outcome can hardly be considered a problem resolution where the underlying interests of the parties could become satisfied.

<sup>88</sup> See *supra* note 25.

<sup>89</sup> Christian Bühring-Uhle, *Co-Med-Arb Technique Holds Promise for Getting Best of Both Worlds*, 3 (1) WORLD ARB. & MEDIATION REP. 21 (1992).

<sup>90</sup> *Id.* at 22.

The disadvantage of this process is that it loses efficiency if the dispute can be resolved through mediation. The fact-finding process may easily become more intensive in arbitration than in mediation. And since the combined part should meet the requirements for both types of procedure, it would have to be adjusted to the rather more intense arbitration process. Thus, the parties may have spent more time and money than they might have, had they just engaged in a simple form of mediation. Also, the parties have had to pay for the arbitrator's time, despite the fact that no arbitration award was ultimately required.

#### 5. *Mediation Windows in Arbitration*<sup>91</sup>

A mediation window in arbitration is a figure of speech for a separate mediation process in the course of an on-going arbitration. In this format, mediation may take place at any time, and perhaps on more than one occasion; it may be conducted either by the arbitrator, or by a separate mediator.<sup>92</sup> Obviously if the arbitrator conducts the mediation, the same problems as already discussed for the "original med-arb" process arise; if the mediation window is conducted by an independent party, these problems are circumvented.

The advantage of this med-arb format is its flexibility as to whether and when mediation shall take place during the arbitration process. Since the mediation window can be held between hearings of the arbitration process, there should be no disruption of the latter.<sup>93</sup> In this way, mediation is not subject to abuse, in an attempt to prolong the process. A mediation window during the arbitration process also has the advantage that all parties are well prepared and aware of all the facts, because the adjudicative process has already commenced.

The disadvantage of this combination is that it emphasizes the arbitration part. Mediation is encouraged but (according to the process rules) need not necessarily be entered into.<sup>94</sup> The parties are merely encouraged to engage in mediation. There is, unlike with the other process formats, no pre-commitment by the parties to mediate their dispute.

Once the arbitration process has commenced, there may be a problem concerning the initiation as far as mediation is concerned, as the parties may hesitate to make the first move in this regard. They are often afraid to appear weak when seeking an amicable resolution.<sup>95</sup> It is therefore suggested that an arbitration rule be implemented which, as a matter of routine, obliges the arbitration institution or the arbitrator at a certain point to suggest mediation to the parties.<sup>96</sup>

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<sup>91</sup> See generally BÜHRING-UHLE, *supra* note 20, at 370 *et seq.*

<sup>92</sup> *Id.* at 370.

<sup>93</sup> *Id.*

<sup>94</sup> Since both parties have to agree to go forward with such a mediation window, the parties would not even need any kind of pre-existing arbitration rules which provide for such a window.

<sup>95</sup> BÜHRING-UHLE, *supra* note 20.

<sup>96</sup> *Id.*

## II. MED-ARB IN USE IN INTERNATIONAL ARBITRATION

A. *The IBM-Fujitsu Example*<sup>97</sup>

IBM alleged that Fujitsu had used IBM programs to develop IBM-compatible operating systems software for its own mainframes. IBM claimed several hundred million dollars in damages. The dispute resulted, in 1983, in a settlement which unfortunately was not sufficiently specific. Subsequent negotiations ensued between the parties to arrange a more operational agreement, but these failed. The original settlement agreement included an arbitration clause on the basis of which IBM initiated, in July 1985, arbitration proceedings under the "AAA" rules.<sup>98</sup>

The panel's first meeting resulted in a determination that all panel members should be and should remain neutral, which prohibited the panel members from communicating *ex parte* with the parties. This decision was confirmed by the parties. The two party-appointed arbitrators then engaged in mediation. The mediation process included private caucuses with each party.<sup>99</sup> The first opinion of the arbitral panel states that "[i]t has been the goal of the Panel from the outset of this arbitration to avoid becoming engulfed in an extensive adjudicatory fact-finding process with respect to hundreds of programs previously released by [Fujitsu]."<sup>100</sup> The mediation resulted in a framework agreement ("Washington Agreement," of February 1987) which laid the foundation for the subsequent process development.<sup>101</sup> The parties agreed to a unspecified lump sum ("paid-up license") for IBM covering past and future

<sup>97</sup> See American Arbitration Association, Commercial Arbitration Case No. 13T-117-0636-85 (Sept. 15, 1987 award [hereinafter Opinion 1]) and (Nov. 29, 1988 award [hereinafter Opinion 2]). For further discussion of the procedure see also Robert Mnookin, *Creating Value through Process Design*, J. INT'L ARB., MARCH 1994, 125; Karl Mackie, *ADR in Europe - Lessons from a Classic US Case: IBM v. Fujitsu*, 5 EIPR 183 (May 1992); Christian Bühring-Uhle, *The IBM-Fujitsu Arbitration: A Landmark in Innovative Dispute Resolution*, 2 AM. REV. INT'L ARB. 113 (1991); Shelley Albert, Comment, *An Alternative Approach to Computer Pirating Disputes, The Mnookin-Jones Settlement: IBM v. Fujitsu*, 3 TEMPLE INT'L & COMP. L.J. 113 (1989); Richard J. Graving, *The International Commercial Arbitration Institutions: How Good a Job are They Doing?*, 4 AM. U. J. INT'L & POL'Y 319, 340 et seq. (1989); Constance Hellyer, *Beyond Litigation*, STANFORD LAW., Spring/Summer 1989 at 5 (interview with Robert H. Mnookin); John V. O'Hara, Comment, *The New Jersey Alternative Procedure for Dispute Resolution Act: Vanguard of a "Better Way"?*, 136 U. PA. L. REV. 1723, 1747-51 (1988); Anita Stork, *The Use of Arbitration in Copyright Disputes: IBM v. Fujitsu*, HIGH TECH. L.J., 241 (1988); Robert Coulson, *Significance of the IBM-Fujitsu Software Award*, ARBITRATION & THE LAW, 1987-1988 224.

<sup>98</sup> John L. Jones, an American engineer and mathematician as well as computer industry executive, was appointed by IBM. Robert H. Mnookin, an American law professor with distinct knowledge in ADR, was chosen by Fujitsu. The two of them nominated a chairman who retired before the first award was handed down. The parties agreed not to replace the chairman and to give the two remaining party-appointed arbitrators the option in the event of a disagreement to call for a third arbitrator on an ad hoc basis to break the tie.

<sup>99</sup> Opinion 2, at 14.

<sup>100</sup> Opinion 1, at 11.

<sup>101</sup> Opinion 1, at 17 ("In the Washington Agreement the parties committed themselves to resolving all disputes."). Mnookin, *supra* note 97, at 129.

program use by Fujitsu. The parties agreed further to the idea of exchanging limited information under a Secured Facility<sup>102</sup> regime for which a fee would be paid.<sup>103</sup> And finally, the agreement granted the panel the power to resolve all of the parties' disputes.<sup>104</sup> After extensive interaction between the parties, including teams of technical experts, and the panel, which constantly gave guidelines on means to narrow the problems, the arbitrators rendered a framework for the creation of the "Secured Facility." A similar approach was taken by the arbitrators for ultimately determining the license fee. The few remaining issues were to be settled by "final offer arbitration," but the parties settled before the arbitrators were obliged to choose a proposal.

The two arbitrators used various ADR methods at different points during the process: "structured negotiations, mini-trial, mediation, final-offer arbitration, negotiated rule-making facilitated by the arbitrators, compliance monitoring by neutral experts, and ongoing dispute resolution by a standing panel of two arbitrators with an option to engage a third arbitrator on an ad hoc basis."<sup>105</sup>

At the outset there was simply an arbitration agreement which did not expressly provide for any mediation. Later the parties consented to allowing the arbitrators to use dispute resolution methods including mediation.<sup>106</sup> But, by engaging in mediation the parties reached a crucial agreement which laid the foundation for the regulation of the parties' future relationship and therefore allowed the arbitrators to continue on this track. The result was that the arbitrators did not have to examine the issue of fault, but rather were able to structure the negotiation around a detailed settlement of the entire dispute.

The result was obviously a gain for each side. Failing this result, the parties would have had the resources to dispute for years. But instead, they worked on a settlement which allowed both parties to "win." Fujitsu was assured of being able to maintain IBM compatibility, and IBM was assured that Fujitsu utilized only specified information for which Fujitsu was required to pay. Further, the resolution protected the consumer's program investments as well as promoted competition.<sup>107</sup>

What was it then that made possible the transformation from a classic international arbitration case to a model "med-arb" case? Some suggestions follow:

- The parties must be willing to involve themselves and cooperate to a substantial degree, which implies a certain degree of risk.<sup>108</sup> The claim reached an amount in dispute of several hundred million dollars. Thus, senior

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<sup>102</sup> The Secured Facility would be under the guidance of the arbitrators monitored by a neutral "Facility Supervisor," see Opinion 1, at 21, 33 n.23, and 35 n.25.

<sup>103</sup> IBM did not expect to exercise that right. See O'Hara, *supra* note 97, at 1748.

<sup>104</sup> In May 1987, the parties further agreed to a standing dispute resolution panel by extending the arbitrators' appointment for fifteen years, Opinion 1, at 33 n.20.

<sup>105</sup> BÜHRING-UHLE, *supra* note 20, at 385.

<sup>106</sup> Mnookin, *supra* note 97, at 128.

<sup>107</sup> Mnookin, *quoted in* Hellyer, *supra* note 97, at 43.

<sup>108</sup> Such as the abuse of the process by a party, failure and waste of time and money if no agreement at all can be reached, and also the above mentioned problems of med-arb.

corporate officers on both sides, including CEOs, participated. This involvement by senior corporate players, instead of simply legal counsel for the respective parties, assisted in reaching a creative solution. It happens frequently that where corporations are involved, neither the responsible manager nor the legal (in-house) counsel is willing to take on the responsibility of engaging in this kind of cooperative dispute resolution, because it may require the parties' high level management to become involved.<sup>109</sup> It is easier to delegate a legal counsel to fight in ordinary arbitration. In this way, nobody needs to make any decision since the arbitrator will ultimately render his decision and determine the outcome of the dispute.

- One of the arbitrators was an expert in alternative dispute resolution. Often the arbitrators lack the knowledge of such methods. Even if they have the knowledge, they do not necessarily assume that the parties want them to engage in ADR methods, unless the parties expressly agreed to do so in their arbitration agreement.

- Both parties must have confidence in the arbitrators in order to allow them to design the dispute procedure the way they did it in this case. The combination of the arbitrators' expertise, namely an expert in ADR and an expert in information technology, gave the parties confidence in the arbitrators.

- The dispute arose in a highly controversial legal field at that time, namely the copyright protection of computer programs. Additionally, the issue was not understood in the same way in the United States as in Japan.<sup>110</sup> This enhanced the uncertainty of the outcome in arbitration and enlarged the risks for both sides. This may make the desire to diminish risk by self-governing the dispute even greater.<sup>111</sup>

The *IBM/Fujitsu* case indicates that ADR is not just theoretical. The fact that there are so few cases involving international arbitration which combine mediation with arbitration in such a successful manner, seems to indicate that it is not easy to establish the conditions which allow the effective use of such a combination. But, in fact, the third-party neutral should always be able to find possibilities to shape a more efficient arbitration process.<sup>112</sup> Mediation is often perceived as a way to fully dispose of the dispute. But what we can learn from the *IBM/Fujitsu* case is that mediation does not merely have to be understood as a means to immediate settlement of the dispute. It might very well be used as a search for common ground to work out rules for a future relationship which may ultimately resolve the dispute. If this can be accomplished by agreement between the parties (as with the "Washington Agreement" in the *IBM/Fujitsu* case), the

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<sup>109</sup> For IBM to agree on a "Secured Facility," where Fujitsu is allowed to get certain insight knowledge of IBM developments, is a question with strategic importance. It is not possible to create win/win solutions without having the management with authority engaging in the process.

<sup>110</sup> Bühring-Uhle, *supra* note 97, at 114.

<sup>111</sup> See Ralf Rogowski, *Die aktive Rolle des Richters im Prozessvergleich*, in *ALTERNATIVEN IN DER ZIVILJUSTIZ - BERICHTE, ANALYSEN, PERSPEKTIVEN* 171, 179 (Erhard Blankenburg et al. eds., 1982).

<sup>112</sup> Cf. Mnookin, *supra* note 97, at 131.

agreement may not dispose of the dispute at that point, but it transforms the process from a "rights arbitration" into an "interest arbitration." The inside knowledge of the mediator-turned-arbitrator in such a situation is very valuable.<sup>113</sup> But, even if there is no common ground for an agreement addressing future relations, the mediation part should still be used to dispose of undisputed issues. Hence, the mediator should work with the parties towards an agreement by which they can streamline the subsequent arbitration process. By identifying and isolating disputed facts the parties should be able to narrow the issues in dispute. In this way, they may dispose of undisputed issues<sup>114</sup> and hence save time and money. The agreement could also include procedural guidelines. If an agreement can be reached, the mediation part will never be a waste of time, even if the arbitration part is conducted by another third-party neutral.

#### B. *Med-Arb in Chinese International Arbitration*

Mediation has a long-standing tradition in Chinese dispute resolution. In fact, there is "a general aversion to third-party adjudication and a predilection for conciliation."<sup>115</sup> "According to the Chinese way of thinking and according to Chinese tradition, law has always played, and still plays a secondary role."<sup>116</sup> The rules by which one measures the appropriateness of one's behavior lies in the rites or natural order,<sup>117</sup> and their enforcement could be called "informal social control." This "informal social control," as a phenomenon, is nothing special. It is to be found in every culture, even in Western cultures where the individual rights are paramount to the philosophy. But, a fundamental difference can be found in the fact that the natural order of the Chinese system, enforced by "informal social control," does not promulgate individual rights as Western law and society does.<sup>118</sup> As a long-standing tradition, disputes between Chinese

<sup>113</sup> See *supra* note 41.

<sup>114</sup> Either there are issues which have never been disputed and shall be excluded from becoming disputed through agreement or there are issues which have been in dispute but which may be disposed of through negotiation.

<sup>115</sup> MURRAY, RAU & SHERMAN, *supra* note 18, at 533. See also James A. R. Nafziger & Ruan Jiafang, *Chinese Methods of Resolving International Trade, Investment, and Maritime Disputes*, 23 WILLAMETTE L. REV. 619, 650 (1987).

<sup>116</sup> Johannes Trappe, *Conciliation in the Far East*, 5 ARB. INT'L 173, 176 (1989). Although, at least for Hong Kong it is said, the legal system has expanded remarkably in the last decades. See R. S. Peard, *Dispute Settlement and Arbitration in Hong Kong*, 406 PLL/COMM 143, 145 (1986), and Edward J. Fitzpatrick & Heidi C. Chen, *Licensing in Asia*, 454 PLL/PAT 381, 397 (1996).

<sup>117</sup> Trappe, *supra* note 116, at 176. These rules are called "Li" in contrast to "Fa" which means "Law" in a positivistic sense, see Nafziger & Jiafang, *supra* note 115, 623. "Li" is based on Confucius' belief in a perfect harmony between men which requires everybody to mutually support each other's nature. People have therefore "to preserve this harmony through ethical behavior," see Robert Perkovich, *A Comparative Analysis of Community Mediation in the United States and the People's Republic of China*, 10 TEMP. INT'L & COMP. L.J. 313, 314 (1996) (with further references).

<sup>118</sup> Trappe, *supra* note 116, at 176-7 ("Promulgating laws, therefore, is questionable, since they might induce men to enforce the rights created by that law and, in doing so, to neglect the traditional rules of behavior dictated by custom and moral rules.").

parties are preferably referred to conciliators.<sup>119</sup> The conciliator is supposed to "conduct mediation and urge parties to understand each other's position and reach an agreement."<sup>120</sup> The laws in China, while evident, are not viewed favorably if one seeks to enforce a law based primarily on personal right violation, without regard to the impact that this adversarial conduct has on society at large.<sup>121</sup>

In the growing international business field, arbitration is one of the principal methods used in China to resolve disputes.<sup>122</sup> It is not surprising that the Chinese tradition of mediation has found its way into the arbitration field. Mediation is accordingly an important part of China's arbitration practice.<sup>123</sup> Since CIETAC's (China International Economic and Trade Arbitration Commission<sup>124</sup>) inception it has encouraged the integration of mediation into its arbitration procedures.<sup>125</sup> Although mediation procedures are voluntary and not a precondition to arbitration,<sup>126</sup> "no express agreement of the parties is required to enable the

<sup>119</sup> Ren Jianxin, *Mediation, Conciliation, Arbitration and Litigation in the People's Republic of China*, 15 INT'L BUS. LAW. 395 (1987); Trappe, *supra* note 116, at 181; Peard, *supra* note 113, at 146; Reif, *supra* note 37, at 630; M. Scott Donahey, *Seeking Harmony-Is the Asian Concept of the Conciliator/Arbitrator Applicable in the West?*, 50 DISP. RESOL. J. 74 (1995). According to Lemoine D. Pierce, *Mediation Prospers in China*, ALT. DISP. RES. J., Oct. 1994, 19, 21 there were at that time approximately 10 million mediators and 15,000 lawyers in China which indicates a clear preference for mediation.

<sup>120</sup> Trappe, *supra* note 116, at 181. See Articles 97-102 of the Chinese Code on Civil Procedure quoted in *id.*, at 178 n.30. See also Jianxin, *supra* note 119, at 396.

<sup>121</sup> Trappe, *supra* note 116, at 177. The idea is comparable with: The team's interest is valued more highly than the player's interest.

<sup>122</sup> Stanley Lubman & Gregory C. Wajnowski, *International Commercial Dispute Resolution in China: A Practical Assessment*, 4 AM. REV. INT'L ARB. 107 (1993); Tang Houzhi, *Arbitration - A Method Used by China to Settle Foreign Trade and Economic Disputes*, 4 PACE L. REV. 519 (1984); Jianxin, *supra* note 119, at 396; K. Firsching, *Neue Wege im Recht der Volksrepublik China (VRC)*, IPRAX 1982, 36.

<sup>123</sup> Houzhi, *supra* note 122, at 521.

<sup>124</sup> CIETAC was established by the post-revolution government as Foreign Trade Arbitration Commission (then called FTAC) on May 6, 1954 under the supervision of the China Counsel for the Promotion of International Trade (CCPIT). The China State Council authorized FTAC on February 26, 1980, to change its name to the Foreign Economic and Trade Arbitration commission (FETAC) and enlarged its jurisdiction to a wider variety of arbitration cases. On June 21, 1988 the State Counsel once again changed the commission's name to the current China International Economic and Trade Arbitration Commission (CIETAC) and again extended its jurisdiction to cover all international economic and trade transactions. For more information on CIETAC's history, see Ge Liu & Alexander Lourie, *International Commercial Arbitration in China: History, New Developments, and Current Practice*, 28 MARSHALL L. REV. 539, (1995); N. KAPLAN, J. SPRUCE & M. J. MOSER, HONG KONG AND CHINA ARBITRATION: CASES AND MATERIALS, (1994) 306-8; CHEN DEJUN, M. J. MOSER & WANG SHENGCHENG, INTERNATIONAL ARBITRATION IN THE PEOPLE'S REPUBLIC OF CHINA: COMMENTARY, CASES AND MATERIALS, 1995, 6-25. The Arbitration Rules were then revised in 1994 and came into effect June 1, 1994. The third revision came into effect on October 1, 1995. For more information on these previous amendments, see M. J. Moser, *China's New International Arbitration Rules*, J. INT'L ARB., September 1994, 5-24.

<sup>125</sup> Houzhi, *supra* note 122, at 521. See also Jen Tsien-Hsin & Liu Shao-Shan, *National Report: People's Republic of China*, III YEARBOOK COMMERCIAL ARBITRATION 153, 155 (1978).

<sup>126</sup> Houzhi, *supra* note 122, at 521; HOZH, INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION, NATIONAL REPORTS: PEOPLE'S REPUBLIC OF CHINA, 12 (January 1994); Tsien-Hsin &

arbitrators to act as conciliators of the dispute."<sup>127</sup> They can take place anytime prior to, or after the commencement of an arbitration procedure.<sup>128</sup> The mediation proceeding is conducted by CIETAC if the arbitration tribunal is not yet formed. After the tribunal is formed, the tribunal itself will conduct the conciliation.<sup>129</sup> The conciliation method includes assisting the parties towards establishing and analyzing the facts, as well as the making of recommendations concerning the strengths and weaknesses of each side's case.<sup>130</sup> It remains unclear, however, "whether parties convey information to the [med-arbitrator] in confidence during the conciliation phase, and if so, how it is maintained."<sup>131</sup>

Another important and growing area for arbitration in China is Hong Kong. In the context of med-arb, the Hong Kong Arbitration Ordinance is of particular interest: Section 2A (2) of the Ordinance provides that

[w]here an arbitration agreement provides for the appointment of a conciliator and further provides that the person so appointed shall act as an arbitrator in the event of the conciliation proceedings failing to produce a settlement acceptable to the parties - (a) no objection shall be taken to the appointment of such person as an arbitrator, or to his conduct of the arbitration proceedings, solely on the ground that he had acted previously as a conciliator in connection with some or all of the matters referred to arbitration; (b) [ . . . ]<sup>132</sup>

This Rule corresponds to the "original med-arb" procedure where the same person who mediates also decides the case as arbitrator. And, like in the "original med-arb" process, the mediation part is clearly separated from the arbitration stage and takes place before the latter.<sup>133</sup> But the possibility of a partial agreement appears not to be taken into account: The provision foresees that if *no* settlement can be produced, arbitration will begin. This implies that a settlement would dispose of the dispute and hence no arbitration would be necessary. It says further in Section 2B concerning the mediation phase:

(1) If all parties to a reference *consent in writing*, and for as long as no party withdraws in writing his consent, an arbitrator or umpire may act as a conciliator.

(2) An arbitrator or umpire acting as conciliator-

(a) may communicate with the parties to the reference collectively or separately;

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Shao-Shan, *supra* note 125, at 155; Firsching, *supra* note 122, at 37.

<sup>127</sup> Donahey, *supra* note 119, at 76.

<sup>128</sup> Houzhi, *supra* note 122, at 521; Michael J. Moser, *CIETAC Issues New Arbitration Rules*, *WORLD ARB. & MEDIATION REP.*, July 1994, 154; Tsien-Hsin & Shao-Shan, *supra* note 125, at 155; Donahey, *supra* note 119, at 76.

<sup>129</sup> Houzhi, *supra* note 122, at 521.

<sup>130</sup> Nafziger & Jiafang, *supra* note 115, at 635; Reif, *supra* note 37, at 632; *see also* Perkovich, *supra* note 117, at 324, who is referring to community mediation in China. *See also* Thomas, *supra* note 53, at 29 (concerning Hong Kong).

<sup>131</sup> Donahey, *supra* note 119, at 77. *See also* Moser, *supra* note 124, at 154.

<sup>132</sup> Reprinted in Neil Kaplan, *The Hong Kong Arbitration Ordinance: Some Features and Recent Amendments*, 1 *AM. REV. INT'L ARB.* 34 n.15 (1990).

<sup>133</sup> Reif, *supra* note 37, at 622.

(b) shall treat information obtained by him from a party to the reference as confidential, unless that party otherwise agrees or unless subsection (3) applies.

(3) Where confidential information is obtained by an arbitrator or umpire from a party to the reference during conciliation proceedings and those proceedings terminate without the parties reaching agreement in settlement of their dispute, the arbitrator or umpire shall, before resuming the arbitration proceedings, disclose to all other parties to the reference as much of that information as he considers is material to the arbitration proceedings.

(4) No objection shall be taken to the conduct of arbitration proceedings by an arbitrator or umpire solely on the ground that he had acted previously as a conciliator in accordance with this section.

Sec. 2B(3) of the Ordinance suggests that the information gained by the med-arbitrator during the mediation will be disclosed to the other party if no agreement is reached and the med-arbitrator deems the information relevant. This rule renders the rule of 2B (2)(b) useless, since the party has no assurance that information revealed in caucus will be kept confidential. The Hong Kong Commission was aware of the fact that this rule might repress the candor of the parties, but "was of the opinion that this was a better alternative than compelling the arbitrator to attempt to ignore material information."<sup>134</sup> On the other hand this rule implies that the arbitrator(s) will use this "confidential" information for decision purposes.<sup>135</sup> The mediation stage, which should invite candor and openness, will no longer be a safe place to reveal the true interests of the parties, and may have "the potential for converting mediation's encouragement of open communication into a trap for the unwary."<sup>136</sup>

#### C. *Med-Arb in German and Swiss International Arbitration Practice* *Introductory Note*

The following discussion focuses on the *ordinary arbitration practice* in Germany and Switzerland which is by no means called "med-arb" in these countries. German and Swiss arbitrators are likely to engage in some kind of settlement conference at some point during the arbitration process before they decide the matter. Authors compare this practice with mediation<sup>137</sup> which leads to the conclusion that there is some kind of med-arb going on. This is why this practice shall be explored herein. But, because this process is not called and not understood as "real" med-arb process, there is no doubt that if the parties would agree to a formal med-arb process as discussed before, the importance of the mediation part would increase substantially and therefore change its face considerably.

<sup>134</sup> *Id.* at 623 (referring to the Law Reform Commission of Hong Kong, Report on the Adoption of the UNCITRAL Model Law on International Commercial Arbitration).

<sup>135</sup> Alan Scott Rau & Edward F. Sherman, *Tradition and Innovation in International Arbitration Procedure*, 30 TEX. INT'L L.J. 89, 108 (1995).

<sup>136</sup> *Id.* at 108.

<sup>137</sup> See, e.g., Trappe, *supra* note 116, at 187; Fischer-Zernin & Junker, *supra* note 65, at 22.

Arbitrators tend to conduct the arbitration proceedings in a manner similar to that of court proceedings in their "home" country.<sup>138</sup> It makes sense therefore to examine the civil procedure rules concerning possible settlement conferences to understand what the procedural background of such arbitrators is.

Section 279 of the German Code of Civil Procedure<sup>139</sup> allows the judge to engage in settlement discussions in order to dispose of the dispute through agreement.<sup>140</sup> "Conciliation attempts are made in close to one half of the cases; 50-60% of these interventions are successful in bringing about a settlement which leads to an overall rate of settlements in court of 10-20%."<sup>141</sup> German judges (and arbitrators<sup>142</sup>) may encourage settlement discussions at any time during the process. The judge will give his (temporary) case evaluation which includes, besides the legal issues, also his assessment of what still has to be proven and who bears the burden of proof.<sup>143</sup> But, as far as one can conclude from the few sources available, private meetings (caucusing) are not common for German judges nor for arbitrators.<sup>144</sup> And, it seems to be undisputed that if the parties convey additional information to the judge during a private meeting, this information cannot be treated confidentially.<sup>145</sup>

In Switzerland every canton has its own rules on civil procedure.<sup>146</sup> So when for example, an arbitrator has gained legal experience in Geneva he may approach matters quite differently from an arbitrator experienced in the laws of Zurich.<sup>147</sup> Swiss arbitrators do not, therefore, necessarily have the same "procedural" background. This discussion will be limited to the Canton of Zurich, but will be referred to therein in a general sense as Swiss arbitration. In the Canton of Zurich, the judge in civil cases has the power to summon the

<sup>138</sup> Fischer-Zernin & Junker, *supra* note 65, at 21, 23 and 34; BÜHRING-UHLE, *supra* note 20, at 91. This is even more understandable when knowing that in civil-law countries like Switzerland and Germany arbitration is understood to be rather a adjudicative procedure than a mere contractually governed relationship. It is therefore not unusual in these countries to refer to the rules of civil procedure when discussing issues of arbitration: See, e.g., Christian Borris, *Common Law and Civil Law: Fundamental Differences and their Impact on Arbitration*, ARB. DISP. RESOL. L.J. 92, 94 (1995).

<sup>139</sup> Section 279: "The court shall, during all stages of the procedure, consider efforts to reach an amicable solution to the dispute as a whole or individual contested issues." (Translation in BÜHRING-UHLE, *supra* note 20, at 26 n.67).

<sup>140</sup> See Trappe, *supra* note 116, at 187; Fischer-Zernin & Junker, *supra* note 65, at 22; Fritz Niklisch, *Alternative Formen der Streitbeilegung und internationale Handelsschiedsgerichtsbarkeit*, in FS KARL HEINZ SCHWAB (1990) 390 (believing it is even more emphatically a task for the arbitrator than for the judge to encourage and support settlement negotiations).

<sup>141</sup> BÜHRING-UHLE, *supra* note 20, at 278 n.57 (where he refers to Klaus Röhl, *Der Vergleich im Zivilprozess - Eine Alternative zum Urteil?*, in ALTERNATIVE RECHTSFORMEN UND ALTERNATIVEN ZUM RECHT 390, (Blankenburg et al. eds., 1980) 204-208).

<sup>142</sup> BÜHRING-UHLE, *supra* note 20, at 190-194.

<sup>143</sup> BREIDENBACH, *supra* note 4, at 311.

<sup>144</sup> BÜHRING-UHLE, *supra* note 20, at 192, 195 ("... despite the fact that about two-thirds of [the interviewed German arbitrators] (64%) had no objections against this settlement technique.").

<sup>145</sup> NIKLISCH, *supra* note 140, at 390; BREIDENBACH, *supra* note 4, at 308.

<sup>146</sup> But the whole body of substantive private law and the rules on international arbitration are embodied in federal law.

<sup>147</sup> See also Reymond, *Civil Law and Common Law Procedures: Which is the More Inquisitorial? A Civil Lawyer's Response*, 5 ARB. INT'L 357 (1989).

parties for a settlement negotiation pursuant to Section 62 of the Code of Civil Procedure.<sup>148</sup> A very efficient court in Zurich, in terms of settlement rate, is the court of commerce.<sup>149</sup> Accordingly this will be used as an example of how courts handle settlement conferences. Normally the court of commerce summons the parties together with their attorneys for a settlement conference, after each party has filed its first written argument.<sup>150</sup> During this settlement conference the presiding judge makes an evaluation of the case based on the first written pleadings. Since the civil-law system applies the principle "*iura novit curia*"<sup>151</sup> the judge is expected to make his own legal evaluation<sup>152</sup> based on the facts presented by the parties and his own perception of the law. He will take into account that some facts are subject to be proven. It is submitted that generally the judge makes a settlement suggestion and then randomly picks a party to determine whether such suggestion is acceptable. This practice has often been perceived by the attorneys as well as by their clients as some sort of coercion.

The Swiss and the German form of judicial settlement intervention lack established rules of procedure.<sup>153</sup> The process remains therefore vague and depends substantially on the judge himself. But, on a very general level, both the German and the Swiss intervention proceedings appear similar in that the judge tends to give a temporary evaluation of the case, but hardly ever intervenes in the negotiation process itself.<sup>154</sup> Because of this procedural background, Swiss and German arbitrators tend to understand a settlement intervention as part of their job. And if they do so, there is no need for the parties to expressly mandate the arbitrator to engage in settlement discussions.<sup>155</sup>

<sup>148</sup> Section 62: "The court may subpoena the parties at any time for a settlement conference. The settlement conference shall generally be held before the parties are requested to file replicatio and duplicatio."

<sup>149</sup> In German: *Handelsgericht*. See Oscar Vogel, *Fachrichter und Juris*, in F.S. RUDOLF E. BLUM 185 (1989); Werner Stieger, *Die Referentenaudienz/Vergleichsverhandlung am Handelsgericht des Kantons Zürich*, Address at the Internationale Fachtagung April 25-26, 1997, in Tübingen 5.

<sup>150</sup> Here is a very simplified overview of the Zurich civil procedure: Generally each party files a written argument twice (complaint, response, replicatio, duplicatio). Based on these written exchanges the judge may issue a ruling as to what each party has to prove, according to its burden of proof. Then the witnesses will be subpoenaed and eventually expert opinions are obtained. After each party has had a last chance to be heard (this time about the produced proof) the judges will decide the issue.

<sup>151</sup> "The judge knows the law." This means that whether the parties make any statements concerning the law governing the dispute or not, the judge is obligated to apply the law. He will therefore consider legal rules whether they are mentioned by the parties or not. See Section 57 of the Zurich Code of Civil Procedure.

<sup>152</sup> Mostly the judges try to keep their evaluation vague enough to keep open the possibility of changing their minds if unconsidered issues should come up.

<sup>153</sup> The doctrine says nothing about how a settlement conference should or does look: RICHARD FRANK ET AL., KOMMENTAR ZUR ZÜRCHERISCHEN ZIVILPROZESSORDNUNG. GESETZ ÜBER DEN ZIVILPROZESS vom 13. Juni 1976, § 62/63 and 118 (3d ed. 1997) (for Switzerland); Rogowski, *supra* note 111, at 171 (for Germany). See generally for the experiences with the court of commerce in Zurich, Stieger, *supra* note 149.

<sup>154</sup> BÜHRING-UHLE, *supra* note 20, at 202 (referring to arbitrators). According to Stieger, *supra* note 149, at 5, it depends mostly on the presiding judge.

<sup>155</sup> This at least emerges implicitly from the different remarks of German and Swiss practitioners.

As already mentioned, arbitrators may tend to be influenced by the court procedure in their "home" country. But it would be going too far to say every German<sup>156</sup> or Swiss arbitrator would engage in settlement attempts in the manner that has been described above, especially if the parties are reluctant to engage in such settlement discussions before the arbitrator. But, at the least it shows that their "home procedure" (background) recognizes a settlement conference as part of the decision-maker's job. A German or Swiss arbitrator may, therefore, not be reluctant to encourage the parties towards a settlement conference wherein a temporary case evaluation will be provided without having concerns about partiality.

The German/Swiss settlement intervention process has certain differences and limitations which set it apart from that which is generally understood by mediation, and is accordingly not what one used to the American practice would expect from a mediator.<sup>157</sup>

The main purpose of the German/Swiss arbitrator is to arbitrate, not to settle the case. To help the parties to settle is not the primary function and it is not mandated.<sup>158</sup> Whereas, in for example the "original med-arb," the "med" part is as important as the "arb" part because the latter only takes place in the event mediation fails to produce a settlement that resolves the entire dispute. It is submitted that a German or Swiss arbitrator believes the settlement conference part is not the main task but merely a "noble office."<sup>159</sup> Accordingly, this may be one reason for the rather "low-intensity form of mediation." Priority will always then be afforded to the rendering of an enforceable award and towards making sure that the arbitrator's impartiality is not questioned.<sup>160</sup>

There are also differences in what the Swiss or German arbitrator perceives the function of an arbitrator to be while trying to settle the dispute. The settlement intervention style used is highly evaluative in nature and approached by a narrow problem definition.<sup>161</sup> The judge or arbitrator focuses on the legal

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And it seems also to be criticized by some practitioners who had this kind of experience with German and Swiss arbitrators, see BÜHRING-UHLE, *supra* note 20, at 203 and 203 n.140.

<sup>156</sup> Although German authors seem to say that the settlement intervention is regularly practiced in German arbitration: Fischer-Zernin & Junker, *supra* note 65, at 30; Trappe, *supra* note 116, at 187.

<sup>157</sup> See BÜHRING-UHLE, *supra* note 20, at 201.

<sup>158</sup> It would be a mandated job if the parties agreed to mediate.

<sup>159</sup> *Id.* at 201.

<sup>160</sup> *Id.* at 201 (quoting an anonymous Swiss scholar and practitioner who gives as reason for the low intensity intervention (by Swiss arbitrators) that a high intensity intervention would lead to disqualification).

<sup>161</sup> Part of the reason is that many civil lawyers from these two countries seem to believe that their settlement assistance is what mediation is all about, see e.g. Fischer-Zernin & Junker, *supra* note 65, at 22 (they therefore conclude "... drawing a strict line between arbitration and mediation is superfluous and may even be counterproductive"); *id.* at 30 ("... the idea of mediation is inherent in the German concept of arbitration"); *id.* at 39 ("An important task of a mediator ... is to narrow the scope of the controversy, dispose of side issues and advise the parties on the possible outcome of the case if it comes to trial.") (author's emphasis) and do not consider that other goals than just helping the parties predict the outcome of the case may have advantages for the disputants. See also Jacques Werner, *Alternative Disputes Resolution?*, J. INT'L ARB., Dec. 1985, 5 ("I would like to submit here that what is needed in international trade is not new methods of conciliation -

issues<sup>162</sup> and is not trying to depart from that level in order to reveal underlying interest.<sup>163</sup> And, maybe the most important difference is that there is minimal, if any, intervention in the negotiation process.<sup>164</sup> Further, confidential private caucusing is not commonly used.<sup>165</sup>

The problem of due process does not arise as long as no private caucuses are carried on.

The issue that the arbitrator becomes biased because of what is disclosed by the parties is a little less problematic where no private meetings are held, because the other party hears what is said and cannot base arguments of partiality on what might have been said by the other party in confidence. But, even under these circumstances, it is possible for an arbitrator to become emotionally engaged or biased. Since the discussion hardly ever touches on the underlying business interests or personal matters, the partiality problem seems to be of lesser concern.

The problem of the arbitrator becoming biased because he prejudices the case, has yet to be considered a serious problem in Swiss or German proceedings.<sup>166</sup> There are a few reasons one could think of why this has never emerged as a problem.<sup>167</sup> And in any case, up to this point, it does not look like it will

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after all, commercial partners which really want to settle amicably their dispute always know how to do it.") See also Klaus Lionnet, *Arbitration and Mediation-Alternatives or Opposites?*, J. INT'L ARB., March 1987, 69, 73 ("... all mediation proceedings make the astonishing assumption that the parties are incapable of sorting out their affairs themselves or that they are represented by incapable advisers.") Again no consideration is given the possibility, for example, to reach a win/win solution. Hence he says, *id.* ("Each agreement which comes about as a result of assistance from a third party, will upset at least one of the parties, which could exercise an unfavorable influence on their business relations.") See also M. J. Kroll, *Success and Failure of Court-Based Arbitration in the Canton of Zurich, Switzerland*, ARB. DISP. RESOL. L.J., 24, 35 (March 1994) ("Efforts should ... not be directed at offering additional conciliation or other ADR services. They should be used to make the application of law more predictable. If this goal is not achieved, ADR will, in my opinion, not help very much in preventing cases reaching court.").

<sup>162</sup> BÜHRING-UHLE, *supra* note 20, at 202; BREIDENBACH, *supra* note 4, at 307, (referring to German judges); Stieger, *supra* note 149 at 11.

<sup>163</sup> The judge's or arbitrator's (main) job is to evaluate and finally decide the legal issues of a case and to dispose of the legal dispute. This is where the power for settlement interventions derive from. A broad problem definition would depart from that power: As judge the power must be conferred under democratic principles; as arbitrator the power is conferred by the parties under contractual principles. Cf. Sanders, *supra* note 35, at 36. Trappe, *supra* note 116, at 187 (seeing a difference in conciliation and settlement discussions within the frame of arbitration and recognizes that in the latter case emphasis is laid upon the law). Creative option generation or other ways to reach win/win solutions may not be expected to be found by the parties under such circumstances, see Rogowski, *supra* note 111, at 180.

<sup>164</sup> BÜHRING-UHLE, *supra* note 20, at 202. It is generally understood that mediation is a means to facilitate negotiation, see *supra* note 2 and 3. Here, the intervention is merely perceived as means to help the parties evaluate their chances to prevail before the arbitrator.

<sup>165</sup> See *supra* note 144.

<sup>166</sup> But see BÜHRING-UHLE, *supra* note 20, at 204-206 (citing not only arbitrators with a common law background who consider the pre-judgment (by evaluation) a problem).

<sup>167</sup> A) The local attorneys seem to like a pre-evaluation done by somebody who knows the law and has the power to decide. See Stieger, *supra* note 149 at 5. B) The practice is based on a long-standing judicial tradition, see e.g. BÜHRING-UHLE, *supra* note 20, at 202. C) The belief that the law

become a widely discussed problem in Switzerland or in Germany.

The bottom line is that the German or Swiss settlement approach, as far as it is conducted in a manner similar to the above-mentioned court approach, can hardly be called "mediation" because it is a far cry from what a mediator is expected to do. The settlement approach in Germany and Switzerland is merely intended to evaluate the case and thus to "help" the parties predict the likely outcome of the adjudication.<sup>168</sup> This settlement approach is not intended to help the parties overcome barriers to settlement by facilitating communication. It is therefore far from what a combination of mediation and arbitration could or should be able to bring as an advantage for the dispute resolution process. Also, the motivation for this kind of settlement approach is to dispose rather than resolve a problem.

### III. CONCLUSION

There are basically four different results which can emerge from the mediation part of a med-arb process:

#### A. Agreement Resolves Entire Dispute

This is obviously the preferred result. All points in dispute are resolved through final agreement. In fact, most of the discussion of mediation focuses exclusively on this possibility. It is and shall remain the main goal of the mediation part. But once it is evident that the parties will not be able to resolve all of the issues in dispute through agreement, the mediation process should (instead of calling it an impasse) focus on possible common ground and on areas where the subsequent arbitration process could become streamlined by

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allows just one outcome of a dispute seems to be even stronger among lawyers from civil-law than common-law countries. It leads to the axiom that the judgment is either right or wrong, *see e.g.* Fischer-Zernin & Junker, *supra* note 65, at 33 ("The court, after all, has to apply the law in a given case and not evaluate its sympathies for either party."). This view seems to suggest that, if the judge is wrong, one has not to deal with this as a problem of impartiality but as a reason to appeal. If the judge is right, there is no problem in the first place. Such an assumption would be undoubtedly wrong: "rules on disqualification of judges for conflict of interest 'would make no sense' in a world where there was consensus in the law and where legal reasoning was sufficiently transparent that judicial errors would readily be perceived and corrected." Rau, *supra* note 21 at 495, n.34 (referring to Richard Posner). D) By enacting the rule for settlement conferences the legislator wanted the judge to engage in such settlement conferences (Section 62 Zurich Code of Civil Procedure; Section 279 German Code of Civil Procedure). It seems to be understood that this includes the judge's pre-evaluation of the case. Since the legislator would not want the judges to do something that creates bias, this conduct presumably does not affect the judge's impartiality; it is, therefore, very unlikely that a reviewing court (in Switzerland or Germany) would call a judge or an arbitrator biased just because of a pre-evaluation of a case in order to help the parties find a settlement solution. *See also* Hans Jürg Nägeli, *Vergleichsverhandlungen*, Address at Seminar des Schweizer Verbandes der Richter in Handelssachen 4 (Oct. 23, 1997).

<sup>168</sup> Concerning the relationship between mere case evaluation and decision-making, *see supra* Section I.E.3. There it is said that it is no more just a "case-evaluation"; it becomes a decision-making where the parties get (psychologically) pushed to accept the predicted outcome as the basis for their settlement agreement.

eliminating conflict or potential conflict areas. In this way, the parties may reach a partial agreement.

**B. *Agreement on a Cooperative Concept to Resolve the Dispute***

This is represented by the Washington Agreement in the *IBM/Fujitsu* case. It is an agreement on which the rest of the process is based. It transforms the dispute from an ordinary rights arbitration, where the dispute is focused merely on the past, into an interest arbitration, where the dispute concerns the determination of that new contract. So, for example, the parties agree to an imposed license for which the fee has yet to be determined instead of quarreling over the damages. This transformation changes the content of the dispute: it diminishes the legal issues and emphasizes the business interests. Whether the arbitrator uses further ADR means (as the arbitrators did in the *IBM/Fujitsu* case) in resolving yet unresolved issues or proceeds on an "ordinary" adversarial arbitration basis, will depend primarily on the agreement.

**C. *Agreement on a Streamlined Procedure and/or Consensus on Factual and Legal Issues***

If the parties neither reach an agreement to dispose of their entire dispute nor find a way to transform the dispute into an interest arbitration, they may still agree on certain other issues. For example, they may agree on how to proceed to settle their dispute. Or, they may negotiate to remove certain disputed issues. Such an agreement could, for example, contain an agreement in terms of which the parties agree on how high the damages would be, but leave the question of liability open; or the parties leave open the question of whether a breach of contract occurred, to be decided by the arbitrator. Or, if the applicable law is in question, the parties could agree on a particular law to apply to the entire dispute or to a certain part thereof. The parties could also come up with procedural rules, such as "last offer arbitration" or "arbitration with a high and low limit for damages" as well as rules concerning the process style. This partial agreement can actually contain anything which is suitable to assist the parties while settling their dispute. Most times, it should help streamline the process.

**D. *No Agreement at All***

Unfortunately, this is too often perceived as the only alternative if the parties do not reach a settlement agreement that disposes fully of the dispute. The med-arbitrator (but also the mediator in general) should never let the parties "off the hook" once an impasse is evident. If this is the case, the med-arbitrator should work towards a partial agreement, as mentioned above in "B" and "C". If this attempt fails too, then the mediation process failed to result in an agreement at all; and the parties should start with the arbitration process.

Some med-arb formats do not even consider the mediation part as one to reach a result as mentioned above in "B" or "C". Such a partial agreement is

the best way to achieve the efficiency goal of the process. Since efficiency is one of the important benefits that the med-arb process can contribute to international arbitration, it is submitted that med-arb formats that encourage or at least allow such a use of the mediation part are more favorable than others.

In order to allow the mediation part to reach an agreement as mentioned in "B" or "C," it requires the mediation part to take place prior to the arbitration part. This already excludes the "arbitration followed by mediation" format as a useful process. The MEDALOA format streamlines the arbitration process, but at the same time it tends to limit the variety of possible outcomes during mediation because it pushes the parties to compromise an issue rather than to search for creative solutions. The "co-med-arb" format starts with an arbitration hearing. By doing this, the parties already start to focus on the arbitration process which determines (psychologically and technically) to a large extent what the dispute is all about and how its settlement should be approached. The probability that the parties then change the track they are already on, by agreeing to a settlement as mentioned under "B," is diminished to a considerable extent. Also, this format assumes that the parties will not want their mediator to arbitrate the dispute once they are unable to dispose of the dispute by agreement. And finally, the "mediation windows in arbitration" format appears to resemble traditional arbitration. The only difference is that the parties should be reminded and encouraged to engage in mediation. Although this is an extremely valuable way to combine mediation into arbitration, this format does not help the parties reach an agreement as mentioned under "B" or "C" because the process does not start with mediation. The mediation in this instance is rather thought to be a forum for settlements as described under "A."

The med-arb format that ultimately best allows the parties to reach an agreement (in the sense of A, B or C) is the "med-arb-opt-out" format. It does not have the limitations of the "original med-arb" process. The process begins with mediation. If the parties do dispose of the dispute during the mediation part, the settlement is enforceable as is a settlement reached during traditional arbitration. All the goals as mentioned in Section I.D.2. can be achieved with this process format.