ARB-MED-ARB- A PROMISING VARIANT FOR ARBITRAL PROCEEDINGS

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I. INTRODUCTION

For 97% of respondents[1] – the so-called "*users*" or "*stakeholders of the international arbitration community*" – of the Queen Mary Arbitration Survey, a regularly conducted, relevant international arbitration survey ("Queen Mary

[1] Cf. i.a. Art. 22(1) ICC-Arbitration Rules; Art. 15(7) und (8) Swiss Rules of Arbitration.

Arbitration Survey")[2], arbitration continues to be the predominant method of dispute resolution worldwide, whether on its own (48%) or in combination with various forms of alternative dispute resolution (ADR; 49%).[3]

However, commercial arbitration proceedings, especially international ones, can be long and expensive. The main cost drivers are not the fees of the arbitrators (sole arbitrators or members of a tribunal of three), but the costs associated with representing the parties,[4] i.e. the costs of the party lawyers, especially if larger teams of lawyers from large international law firms are involved, the expenses of in-house counsel and the employees of the companies involved who are further involved in the dispute, in particular in the preparation of the facts of the case. However, also the costs associated with witness statements as well as experts of any kind,[5] whether appointed by the parties or by the arbitral tribunal, may be hefty. Added to this are the costs for institutionally registered arbitration proceedings.

Accordingly, the dissatisfaction of the respondents with the costs and the excessive length of arbitration proceedings is also repeatedly voiced; the Queen Mary Arbitration Survey lists the costs in first place and "*lack of speed*" in third place.[6]

The arbitration practitioners and company representatives are very familiar with all this from their daily work.[7] They are also aware of the discussions and efforts that have been going on for some time now to at least partially

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[2] Queen Mary University of London, White & Case LLP, 2018 International Arbitration Survey: The Evolution of International Arbitration, 2018, http://www.arbitration.qmul.ac.uk/research/2018/ (accessed 12.3.2020).

[3] The International Dispute Resolution Survey: Currents of Change 2019 - Preliminary Report of the Singapore International Dispute Resolution Academy SIDRA of the Singapore Management University ("SIDRA Survey") also identifies international commercial arbitration as the most widely used form of international dispute resolution for the period 2016 to 2018, according to 74% of respondents: https://sidra.smu.edu.sg/sites/sidra.smu.edu.sg/files/documents/SIDRA2019_IDR_Survey_Preliminary_Report.pdf, 2019 (accessed 12.3.2020).

[4] The ratio of the costs of arbitrators to the costs of party representation is approximately 15-20% to 80-85% (see i.a. ICC, Commission Report: Decisions on Costs in International Arbitration, 2015, p. 3, https://iccwbo.org/publication/decisions-on-costs-in-international-arbitration-icc-arbitration-and-adr-commission-report/ (accessed 12.3.2020); ASA, Costs of Arbitration in Switzerland, 2017, https://www.arbitration-ch.org/en/asa-reference-series/english/index.html (accessed 12.3.2020).

[5] The increasing number of technical experts from all conceivable fields, damage calculators or quantum experts, delay experts, etc., as well as legal experts at international arbitration conferences in recent years confirms the volume of this market and, according to our own experience, that experts generally do not shorten arbitration proceedings – on the contrary. On the subject, also see i.a. SEBASTIANO NESSI, Expert Witness: Role and Independence, in: CHRISTOPH MÜLLER/SÉBASTIEN BESSON/ANTONIO RIGOZZI (Hrsg.), New Developments in International Commercial Arbitration 2016, Zürich 2016; MICHAEL E. SCHNEIDER, Technical Experts in International Arbitration, Introductory Comments to the Materials From Arbitration Practice, ASA Bulletin, Volume 11, No. 3, 1993, p. 446 – 465.

[6] Queen Mary Arbitration Survey, chart 4. The SIDRA Survey (f.n. 3) mentions a certain dissatisfaction with the costs of international arbitration, particularly at the corporate level, which is ultimately outweighed by the satisfaction with the enforceability and finality of arbitral awards.

[7] The most recent example from our own experience is a Provisional Timetable of an international arbitration procedure, which now comprises more than ten pages due to the various and partly parallel procedural steps decidedly desired by the party lawyers from common law jurisdictions, which led to harsh criticism by a director of a party to the proceedings who was also present at the corresponding Case Management Conference ("CMC").

reduce the costs and shorten the proceedings.[8] This will, however, not be dealt with further in this report. But, after all, a successful conclusion of the possibility of supplementing arbitral proceedings as described hereinafter usually has the not insignificant, elegant "side effect" that costs are actually saved.

However, the main motivation for the procedure variant discussed here is the possible settlement of the proceedings or dispute in the interest of the client within a useful or shorter period of time, which is also a guideline for the work of the (litigation) attorney[9] and that of the arbitrator[10] anyway.

The banality is that not every economic dispute can be tackled in the same way. Certain disputes have to be settled by arbitration or state court proceedings, either as a "one-stop case" or prejudicially, due to certain conditions or interests involved, accompanied by strong teams of lawyers and, among other things, the appearance of experts; these disputes require an enforceable decision. Unaccompanied negotiation attempts or (usually) accompanied alternative dispute resolution methods are not an option in this case. Also, cultural factors may conflict with mediation and ADR in general, and instead require a robust process with a winner and a loser.[11] Such cases are not the issue at hand, but all others potentially are.[12]

As is well known, the motives for not necessarily conducting a lawsuit and seeking a judicial or out-of-court settlement solution include, in addition to the arguments of "*costs and efficiency*", those of a possible future cooperation of the parties and, in general, the desire to avoid the psychological burden of arbitration or court proceedings and to reduce opportunity costs. A weaker case may sometimes also increase the willingness of a party to negotiate.

The combination of arbitration and mediation proceedings described here is the supplementation of arbitration proceedings with an "embedded" mediation procedure, commonly called Arb-Med-Arb or AMA.[13] Before this procedure is dealt with, however, the key points of mediation must be established, always with regard to the connection with arbitration proceedings which is the focus of attention in this article.

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8 E.g. the increasing addition of provisions for accelerated arbitration (Emergency Arbitration, Expedited Proceedings or Fast Track Arbitration) to institutional arbitration rules; general efforts to economize arbitration proceedings - early determination of the relevant topics of the proceedings, waiver of the second exchange of submissions and/or post hearing briefs, arbitration hearings, document productions, etc. Sometimes sole arbitrators are appointed instead of a tribunal of three, not only for smaller amounts in dispute. See also ICC, ICC Guide on Effective Management of Arbitration, 2017, https://iccwbo.org/publication/effective-management-of-arbitration-a-guide-for-in-house-counsel-and-other-party-representatives/ (accessed 12.3.2020), including the telling first chapter: "Settle-ment Considerations"). In this regards the SIDRA Survey also mentions the "opening up to online processes" and the Queen Mary Arbitration Survey in general the increased use of technical aids.

9 Although, according to the law and modern opinion, the lawyer no longer has the "overriding duty" to settle a dispute as amicably and expeditiously as possible per se, but he must of course strive to settle the dispute quickly and/or through a settlement solution if the client so wishes (see Art. 12 lit. a BGFA and KASPAR SCHILLER/HANS NATER, SJZ 115/2019, p. 49 III.4).

10 Cf. i.a. Art. 22(1) ICC-Arbitration Rules; Art. 15(7) and (8) Swiss Rules of Arbitration.

11 So several voices at a recent arbitration conference in the Arab world.

12 Including the 49% "ADR-Cases" according to f.n. 3.

13 The terms "Hybrid Dispute Resolution Mechanisms" or "Multi-Tiered Dispute Resolution Systems" are used as umbrella terms for these and other combinations of arbitration and mediation proceedings.

II. MEDIATION

1. Definition

Mediation is a voluntary, flexible and confidential process in which a trained neutral mediator actively assists the parties in structured negotiations to work towards a negotiated agreement on a dispute or controversy, while the parties retain ultimate control over the decision to settle and the terms of the resolution.[14] Like arbitration, mediation can be carried out on an ad hoc basis or institutionally administered[15] – with the known advantages and disadvantages (see below).

Although this definition generally also applies, for example, to family law or internal (workplace) mediation, the discussed cases – in connection with commercial arbitration proceedings – primarily concern business mediation, which is conducted for the purpose of resolving a conflict between companies or other exponents of business life (also known as business-to-business/B2B disputes[16]), which are usually external. Experience has shown that the parties should be represented at the mediation hearing by high-ranking representatives (CEO, CFO, business owner), i.e. decision-makers with the competence to reach a settlement, and, according to the view expressed here, naturally accompanied by the party lawyers.

The central cornerstones of mediation are confidentiality – with different arrangements for the mediator and the parties with their lawyers – and its voluntary nature – the latter understood in the sense that a corresponding clause in a contract may require the parties to conduct mediation proceedings, but the parties may in principle terminate the mediation at any time without a result and without adverse consequences (see also below). On the other hand, the mediator has a special role and performs special tasks. This will be discussed first, followed by a description of the normal course of a mediation procedure in the brevity required for the present text.

2. Mediator

The mediator conducts the proceedings as a neutral "*facilitator*". Like an arbitrator, the mediator must meet high standards of independence and integrity.[17] According to the view held here, the mediator should also have

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[14] The definition drawn up and revised by CEDR (Centre for Effective Dispute Resolution, London) over the years serves as a model: "*Mediation is a flexible process conducted confidentially in which a trained neutral mediator actively assists people and/or organizations to work towards a negotiated agreement of a dispute. Both parties are in ultimate control of the decision to settle and the terms of resolution.*" (s. https://www.cedr.com/commercial/whatismediation/ (accessed 12.3.2020) and CEDR, The CEDR Mediator Handbook, 7. A., London 2019).

[15] Among the numerous organizations, the Swiss Chambers' Arbitration Institution (SCAI, https://www.swissarbitration.org/Mediation) and the CEDR should be mentioned, as well as the International Chamber of Commerce (ICC, https://iccwbo.org/dispute-resolution-services/mediation/), the Chartered Institute of Arbitrators (CIArb, https://www.ciarb.org) and the Swiss Chamber of Commercial Mediation (SCCM, https://skwm.ch).

[16] Of course, business mediation can also involve disputes among business owners or on a board of directors and thus, as a rule, internal differences, as well as disputes concerning inheritance or matrimonial property law, etc.

[17] See e.g. the CEDR Code of Conduct for Third Party Neutrals, 2018 Ed. (https://mk0cedrxdkly80r1e6.kinstacdn.com/app/uploads/2019/11/Code-of-Conduct-for-Third-Party-Neutrals.pdf, accessed 12.3.2020).

(1) at least basic expertise of the underlying dispute and, especially for the Arb-Med-Arb procedure of interest, (2) sufficient knowledge of international arbitration proceedings[18], so that he can effectively and purposefully lead the discussion with the parties on par in material and formal aspects and gain the necessary acceptance from the arbitration practitioners involved.

The mediator works actively and intensively with the parties and their lawyers, creating space for them to broaden their perspective – moving away from the mere confrontation of positions towards the juxtaposition of interests – to re-evaluate their situation, to reassess their risks and opportunities and to consider various possible ways of settling the dispute.

Wherever possible, the focus of the discussion should not just be on settling the dispute and thus on coming to terms with the past but should be directed towards the future. If appropriate and desired by the parties, other topics in dispute or discussed between them, even if not directly related to the dispute at hand, may also be included. The mediator will use the negotiation techniques and strategies[19] he has learned and will use his professional skills and experience to help the parties negotiate effectively, all in view of reaching an agreement on terms acceptable[20] to them. Experience has shown that it is also possible to work with the emotions of the parties and to take them into account more than in "normal" settlement negotiations.

According to the view expressed here, the mediator strictly abstains from any own, even merely preliminary, assessment of the situation in this process, even if he is asked to express such by the parties. In addition, the mediator does not propose solutions, even if he thinks he has found a solution that is feasible for the parties[21],

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[18] Also an important criterion e.g. for the respondents of the SIDRA Survey (f.n. 3).

[19] Further, more detailed explanations of the requirements for the competencies and skills of the media gate can be found in DAVID RICHBELL, How to Master Commercial Mediation, 2015 and CEDR (f.n. 12); see also DANIEL GIRSBERGER/JAMES T. PETER, Extrajudicial Conflict Resolution, 2019 and BSK IPRG-HOCHSTRASSER/FUCHS, Einl. 12. Kap. IPRG N 326, in: PASCAL GROLIMUND/LEANDER D. LOACKER/ANTON K. SCHNYDER (eds.), International Private Law, Basler Kommentar, 3. A., Basel 2013 (cited BSK IPRG-HOCHSTRASSER/FUCHS).

[20] Correctly understood and carried out, namely business mediation is of course not just a non-binding discussion in an esoteric atmosphere of well-being, in the manner of a "*Far Eastern singing bowl massage*", but a demanding, targeted process, which is marked by an astonishingly high success rate (e.g. the CEDR currently lists "over 80% of cases referred to CEDR settle" on its website (https://www.cedr. com/commercial/whatismediation/ (accessed 12.3.2020); according to the eighth CEDR Mediation Audit, this results in a more precise "an aggregate settlement rate of 89% (2016: 86%)", with the additions: "*The proportion of cases that achieve settlement on the day of mediation has risen back to 74% after the previous audit's drop to 67%, and conversely, there has been a decrease in the proportion of cases that settle shortly after mediation, falling from 19% to 15%*" (see also CEDR, The Eighth Mediation Audit, 2018, p. 6, http://thepropertymediators.co.uk/trends/cedr-mediation-audit-2018/ (accessed 12.3.2020)). The author, as a "*dyed in the wool*" lawyer and arbitrator, also met mediation with great restraint and prejudice, which he has since discarded with conviction, however, with regard to the correctly conducted economic mediation.

[21] Experience has shown that it is not always easy for litigation lawyers and arbitration practitioners to comply with this restraint, but it is indispensable when filling the demanding position of a mediator.

nor does he provide legal advice.[22] The mediator is not a judge and has no decision-making power. Under his structured conduct and management of negotiations, the parties ultimately find a solution themselves or not. Of course, the mediator does not exert any pressure in this respect.

3. The Mediation Proceedings

Like arbitration proceedings, mediation proceedings are fundamentally characterized by party autonomy as well as flexibility and are generally privately organized. The mediator determines the course of the mediation procedure together with the parties at the beginning, with the possibility of adjustments in the course of the proceedings. There is a great deal of leeway for mediation proceedings, but experience shows that it is advisable to divide a business mediation into the following five phases[23].

a. Preparatory Phase

This serves the selection[24] of the mediator (or co-mediators[25]), the initial contact of the mediator with the parties and their lawyers, which often takes place only by telephone (or via e-mail). The procedure is then jointly determined with the conclusion and signing – now or in the subsequent phase – of the mediation agreement[26] and the exchange of the documents relevant to the mediation procedure (all comparable in principle to the usually more complex Case Management Conference/CMC or Organizational Hearing and Terms of Reference or Constituting Order in ICC or SCAI/Swiss Rules arbitration proceedings). In principle, these are only brief summaries of the parties' positions and claims, with few, if any, exhibits.

The legal documents already submitted in the "first arbitration part" of the Arb-Med-Arb procedure will not be brought into the mediation procedure. In contrast to arbitration proceedings, typically with two exchanges of written submissions and accompanying enclosures including – mainly in proceedings characterized by "common law" – pre-hearing briefs and a hearing bundle, in which the parties usually summarize their positions again and attach the most important enclosures, a mediation procedure is not "flooded" with documents. It goes

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[22] The difference between mediation and various other conflict resolution processes and the well-known "normal" out-of-court and in-court settlement negotiations is therefore obvious. For instance, the settlement negotiations during a so-called "*Referentenaudienz*", a hearing where the judge in charge of the case presents his preliminary, unprejudicial view of the case to the parties, before the Commercial Court of the Canton of Zurich, although in principle meaningful, are not mediations, even if they are sometimes referred to as such.

[23] See i.a. again CEDR (f.n. 14); RICHBELL (f.n. 19).

[24] As in institutionally administered arbitral proceedings, an advantage of an institutionally administered mediation procedure with a regulated procedure may be the established mechanism for the appointment of a mediator, even in the event that the parties cannot jointly agree on a mediator (see e.g. Art. 4 et seq. or 19(2) Swiss Rules of Commercial Mediation SCAI, valid as of July 1,2019 ("Swiss Rules of Mediation").

[25] Experience has shown that the assignment of two well-rehearsed co-mediators can be very useful, especially in more complex disputes. CEDR training, among other things, attaches particular importance to the co-mediation training facility.

[26] Example of the CEDR Model Mediation Agreement (CEDR, Model Mediation Agreement, 2020, https://www.cedr.com/commercial/resources/modelcontractclauses/, under "*Model agreement templates*" (accessed 12.3.2020).

without saying that neither witness statements or expert opinions are submitted in a mediation, nor witnesses or experts heard.

b. Opening Phase

For this and for subsequent phases, the parties and the mediator meet physically, for which, in principle, one to two days of negotiations at most are planned. The mediator's explanations of the procedure at the beginning include references to the procedure and his role (see above) as well as to confidentiality – "*what is discussed in the course of this mediation cannot be introduced into any subsequent arbitration proceedings without the consent of the other party*"[27] (for the mediator's special obligation of confidentiality, see c. and III.3. below) and the voluntary nature of the procedure – "*a break-off/walk away is possible at any time, but in view of the facts that one has concluded a mediation agreement and is now accordingly on the spot, it should not be lightly explained*". The mediator's explanations may also include advice to the parties' lawyers – especially if they are less familiar with mediation procedures – to exercise their role more cautiously (if possible "*more constructive rather than confrontational*"[28]) compared to arbitration or court proceedings.

After the subsequent brief opening remarks by the parties or typically by their lawyers on the respective presentation of the facts of the case, including the legal consequences, the mediator is responsible for initiating the discussion based on the points important to the parties and, above all, for letting it run. In this phase, the discussions are generally held in a plenary session.

c. Exploration Phase

The collection, identification and, where necessary, clarification of party positions, which, as already mentioned, can also be expanded to include party interests, now generally makes the discussion more focused. A further technique is now also the holding of separate, confidential meetings between the mediator and the parties (so-called private or caucus sessions). The mediator attempts to understand the party positions and interests even more precisely, and he also agrees with the respective party (if and) exactly what he may mention to the other party from these confidential meetings and when, either in the context of a multiple shuttle discussion or again in the plenary session.

With regard to the confidential information with which the mediator has been entrusted by one of the parties in individual sessions, the iron principle applies that the mediator may only disclose such information to the other party if the entrusting party has expressly authorized the mediator to do so.

d. Negotiation Phase

As the negotiations now generally become more concrete, the differences between the party positions and interests usually become clearer, which allows the mediator to work with the parties in a targeted manner, again,

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[27] See i.a. Art. 13(1) Swiss Rules of Mediation; Art. 9 ICC-Mediation Rules, valid from January 1, 2014.

[28] Further see BSK IPRG-HOCHSTRASSER/FUCHS (f.n. 19), Einl. 12. Kap. IPRG N 323 *et seq.*

either individually or in plenary, aiming to find a solution which can now at least be outlined. Various techniques, such as the setting up of hypothetical scenarios to test alternatives or the temporary isolation of certain points, but also their testing and/or a reality check, or the "mirroring" of certain proposals in the sense of a risk assessment, can help overcome negotiating deadlocks. Likewise, at the request of the parties, it may be advisable, as mentioned above, to "enrich" the dispute in question with any further points of discussion between the parties in order to achieve a solution within the framework of a full package.

e. Final Phase

If the parties succeed in making progress with the mediator, an attempt is now made to concretize the results of the negotiations and to formulate an agreement. This also includes an examination of the practicability of the solution(s) reached and of the completeness of all issues relevant between the parties, as well as of course of all points which, according to the expertise of the arbitration practitioners, belong specifically to the settlement agreement. Often the preparation of the detailed written agreement also requires separate follow-up work by the party lawyers. In this case, the mediator will at least ask the parties to sign a specific letter of intent or a memorandum of understanding (MOU[29]) at the meeting.

With regard to the follow-up work of the party lawyers, the mediator will usually try to stay informed regarding the progress and to keep control so that the almost completed negotiation process can be concluded successfully. If, on the other hand, no solution – not even a partial one – is found, the mediator can, if desired, try to maintain the momentum for any subsequent negotiation attempts by means of appropriate follow-up contacts. Alternatively, the mediator and the parties may jointly note the failure of the mediation and the matter is settled in this respect.

[29] As a "minimum solution", it is recommended that the parties sign the agreed elements recorded on a flipchart.

III. ARB-MED-ARB SPECIFICALLY

1. Requirements

The Arb-Med-Arb procedure is either carried out in accordance with an appropriate contractual clause[30] or the parties, e.g. at a CMC following the proposal of one of the parties, or, in particular, the arbitral tribunal, decide to proceed accordingly[31]. In the here assumed "practice scenario" of the Arb-Med-Arb procedure, arbitral proceedings have been initiated[32] and the arbitrator(s) has/have been appointed, the arbitral tribunal is thus constituted before mediation is commenced, and the arbitration procedure is suspended for the duration thereof[33].

2. Sequence of the Proceedings

Of the various opinions as to when mediation or a mediation window should be included in an arbitration procedure or, if there is no corresponding Arb-Med-Arb clause, considered , experience has shown that mediation should be conducted either (1) preferably after the exchange of the Notice of Arbitration and Answer to the Request for Arbitration or (2) at the latest after the exchange of the Statement of Claim and Statement of Defense.

If this happens later than (2), the arbitration could perhaps already be too far advanced and too many costs may have already been incurred, which may make it more difficult for the parties and their lawyers to invest additional money and time in mediation at such stage. If a mediation is conducted before (1), this could result in a

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[30] Example of a straightforward arbitration clause, combined with a mediation clause (wording by specialists in the individual case, of course, expressly reserved): "All disputes, controversies or claims arising out of or in connection with this contract, including its validity, invalidity, breach or termination, shall be settled by arbitration [under institutional or ad hoc arbitration rules]. The arbitral tribunal shall consist of [...] members [appointment of the co-arbitrators by the parties, of the chairman by the co-arbitrators]. The seat of the mediation shall be [. . .].The mediation shall be conducted in [. . .]. After commencement of the arbitration [after exchange of Notice of Arbitration and reply/after exchange of claim and reply and/or counterclaim] and constitution of the arbitral tribunal, a mediation procedure [under the Rules of an institution or ad hoc] shall be conducted with one mediator [or two co-mediators] [right of determination]. The seat of the mediation is [...]. The language of the mediation is [...]. The arbitration proceedings shall be suspended during the mediation. Any agreement reached in the course of the mediation shall be referred to the arbitral tribunal and may, under the agreed conditions, lead to an award with agreed wording. If the dispute, controversy or claim cannot be fully resolved by mediation within [...] days of the confirmation or appointment of the mediator(s), the arbitration shall continue." (See also Art. 18 of the Swiss Rules of Mediation and the "Singapore Arb-Med-Arb Clause" of the Singapore International Arbitration/Mediation Centre - "SIAC-SIMC": https://www.siac.org.sg/model-clauses/the-singapore-arb-med-arb-clause (accessed 12.3.2020).

[31] E.g. Art. 15(8) Swiss Rules of Arbitration in conjunction with Art. 19 Swiss Rules of Mediation; further https://www.swissarbitration.org/Mediation/Mediation-clauses under "*3.2 Suggested agreements to mediate when the parties are already involved in a dispute or problem*" (accessed 12.3.2020).

[32] Whereby, under Swiss law, the prescriptive period is directly interrupted in accordance with i.a. Art. 135 Ziff. 2 CO.

[33] With the option, existing since 1.1.2020 under Swiss law, to agree on the suspension of the prescriptive period (Art. 134 para. 1(8) CO): "*The prescriptive period does not commence and, if it has begun, is suspended: ... for the duration of settlement talks, mediation proceedings or any other extra-judicial dispute resolution procedure, provided the parties agree thereon in writing.*"

different sequence of the proceedings and a separate mediation independent of arbitration[34], respectively (not discussed), or a Med-Arb procedure (see also immediately).

With regard to the conduct of the mediation itself, reference can be made to the foregoing, in particular II.3. above.

In order to prevent mediation from leading to an undue prolongation of the proceedings, it is recommended that the duration of the mediation window of the Arb-Med-Arb procedure be set accordingly in advance[35].

3. No Personal Union Arbitrator - Mediator

According to the view held here, it is essential for an Arb-Med-Arb procedure that the mediator was not or is not an arbitrator/member of the arbitral tribunal. The functions of mediator and arbitrator are to be strictly separated.

Also other existing variants of combined processes such as (1) Med-Arb, in which the mediator becomes an arbitrator after unsuccessful mediation[36], (2) Med-Arb-Opt-Out, in which the parties may request that the arbitrator/mediator be replaced if the mediation conducted by an arbitrator is unsuccessful, or (3) Co-Med-Arb, in which the arbitrator(s) and the mediator conduct the CMC or the first arbitration hearing together, whereupon the mediator may continue the proceedings alone, etc., are rejected on the basis of these considerations. The two functions of "arbitrator - mediator" would overlap or at least intermingle and, in particular, with regard to the variant Med-Arb, set a ground for challenge of a later arbitral decision on the grounds of a violation of the right to be heard[37]. If the arbitrator/mediator has to be replaced in the case of the variant Med-Arb-Opt-Out, additional costs are incurred.

After an unsuccessful mediation in Arb-Med-Arb proceedings, an exchange of information between the mediator and the arbitral tribunal on the course of the mediation that goes beyond the mediator's report that the proceedings are now once again in the hands of the arbitral tribunal must also be rejected.[38] In this context, it should

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[34] This could, to the extent that this ever becomes an issue in relation to an agreement reached in mediation, cause enforcement problems in international relations: The so-called Singapore Convention on Mediation (United Nations Convention on International Settlement Agreements Resulting from Mediation, 2018, https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements (accessed 12.3.2020)), modelled on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), has so far been signed and ratified by only a number of states and is therefore still an inadequate tool for this purpose. Art. 16(5), 17(2) and (3) Swiss Rules of Mediation at least provide the possibility for mediation proceedings, institutionally registered by SCAI, to have the taking place of such proceedings and/or a settlement concluded in this way and/or its authenticity certified or authenticated by the Secretariat.

[35] See f.n. 30.

[36] Sometimes also called "*Med-Arbiter*"; also see for instance BSK IPRG-Hochstrasser/Fuchs (f.n. 19), Einl. 12. Kap. IPRG N 331.

[37] Esp., if the mediator has conducted confidential individual sessions. Cf. James T. Peter, Berner Kommentar zum schweizerischen Privatrecht, Band II, Art. 150–352 ZPO, Art. 400–406 ZPO, Bern 2012, Vorbemerkungen zu Art. 213-218, N 73.

[38] Institutionally regulated e.g. in Art. 13(1) Swiss Rules of Mediation.

also be pointed out that the mediator's right to refuse to testify about the content of the mediation in later arbitration proceedings, which is generally recognized by the institutions, is also applicable.[39]

Any appearance of overlapping and/or mixing of the two functions must be avoided, namely because of the applicable requirements for the mediator's neutrality and confidentiality as well as the consequences or potential risks resulting therefrom. If the two functions are not clearly separated, the recognition of Arb-Med-Arb procedures and their acceptance by the parties and their lawyers/arbitration practitioners may be impacted.

According to the author's understanding, this postulated, determined reservation cannot be attributed to the "*due process paranoia*"[40] of arbitrators in international arbitration, but has the formal and practical reasons described above.

The following is also central: An arbitrator cannot simply change hats and become a mediator and then become an arbitrator again, or vice versa, while maintaining his or her unconditional neutrality and meeting the very high standards of the mediator's specific confidentiality. Even the best practitioner would not be immune to considering information disclosed to him as a mediator (as mentioned above, perhaps in a caucus session under the seal of confidentiality, of which he may have never been explicitly released) when sitting at his desk as an arbitrator deliberating after an unsuccessful mediation and a subsequent confrontational arbitration. And even if he were actually able to do the "*splits*", such a mixed function with this inherent and even obvious problem is difficult to convey to the parties and their lawyers from the "arbitration scene".

Or how can you convince a party and its lawyers in a mediation procedure to be completely open under the protection of confidentiality and convince them that what they now entrust or should entrust the mediator with, will or can later be banned from his memory if no agreement is reached and the arbitration procedure continues with him as the arbitrator?[41] In this case, the basis of trust that is indispensable for mediation erodes or cannot even be properly established. However, if the parties in mediation do not act with the appropriate openness and keep important information to themselves, the decisive "*piece of the puzzle*" with which the mediator could work and reach a solution with the parties may be missing.

Thus, for the reasons explained above, it also applies that, according to the opinion expressed here, parties are expressly advised against concluding a party agreement themselves or institutionally, e.g. according to the exceptions of Art. 13(3) of the Swiss Rules of Mediation or Art. 10(3) of the ICC-Mediation Rules, according to which,

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[39] See i.a. Art. 10(4) ICC-Mediation Rules; Art. 13(5) Swiss Rules of Mediation.

[40] The Queen Mary Arbitration Survey 2015 defines these as "*a perceived reluctance by [arbitral] tribunals to act decisively in certain situations for fear of the award being challenged on the basis of a party not having had the chance to present its case fully*"; see also i.a. MICHAEL POLKINGHORNE & BENJAMIN AINSLEY GILL, Due Process Paranoia: Need We Be Cruel to Be Kind, Journal of International Arbitration 34, (no) 6 (2017), 935-946.

[41] For the sake of clarity, reference can be made once again to the "*Referentenaudienz*" with settlement discussions before the Commercial Court of the Canton of Zurich (cf. f.n. 22): anyone who has ever attended such a hearing with attorneys or lawyers from the common law judicial area knows about the difficulties of explaining this particularity to them and convincing them to take part in such a hearing.

for example, a mediator becomes an arbitrator in the same dispute, in this case within the framework of Arb-Med-Arb proceedings, after unsuccessful mediation proceedings.

The same recommendation applies with regard to the corresponding "Singapore Rules": The SIAC and the SIMC stipulate the separation of the arbitration and mediation proceedings administered there with a separate administration of the "arbitration part" by the SIAC and the "mediation part" by the SIMC, explicitly stating that the arbitrator and mediator of an Arb-Med-Arb procedure administered by these institutions "*will generally be different persons*". However, these institutions also allow the parties to agree otherwise[42], which brings us back to the same subject.

The Practice Guideline 7 of the Guidelines for Arbitrators on the use of ADR procedures of the CIArb has recognized the problems of a double role arbitrator/mediator. In para. 5.2 they emphasize the understandable reluctance of parties to disclose information to a mediator who may later become their arbitrator again. Clause 5.3, referring to Section 33 of the Arbitration Act 1996 of the United Kingdom[43] with respect to caucus sessions, then expressly states that "*the mandatory nature of Section 33 precludes a mediator who has conducted private caucusing with one or both of the parties from acting subsequently as an arbitrator in the same case*".[44] Although this provision is correct, the logical consequence is that an arbitrator acting in the same dispute should not act as a mediator at all, since this would otherwise deprive him of one of his most important "*mediation tools*", the conduct of confidential individual sessions.

Rules such as those contained in the new Mediation-Arbitration Rules of the Istanbul Arbitration Centre ("ISTAC"), according to which mediators, who, after a failed mediation, act as arbitrators in subsequent arbitration proceedings on the same dispute, may not use opinions and offers made by the parties in the mediation proceedings as evidence, attempt to formally solve the problem. However, according to the present opinion, these ISTAC regulations do not change the practical problem that the mediator will "remember" confidential information entrusted to him by the parties as an arbitrator in his deliberations on the judgment[45].

The approach of the Rules on the Efficient Conduct of Proceedings in International Arbitration (the so-called "Prague Rules"[46]) contains, in addition to the insoluble dilemma of the dual role of arbitrator/mediator, even greater potential for conflict or disruption: Art. 9.2 of the Prague Rules provides, with the prior written consent of the parties, that any member of the arbitral tribunal may also act as mediator to assist the parties in the amicable settlement of the case. If this mediation does not succeed within an agreed time frame, the mediator may, with the written consent of all parties, act as an arbitrator again (Article 9.3.a Prague Rules). However, if he

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42 http://simc.com.sg/dispute-resolution/arb-med-arb/ (accessed 12.3.2020); further see the SIAC-SIMC Arb-Med-Arb Protocol which contains fifteen provisions for Arb-Med-Arb procedures administered by these two institutions: http://simc.com.sg/v2/wp-content/uploads/2019/03/SIAC-SIMC-AMA-Protocol.pdf (accessed 12.3.2020).

43 http://www.legislation.gov.uk/ukpga/1996/23/section/33 (accessed 12.3.2020).

44 https://www.ciarb.org/media/4214/2011-adr-procedures-in-arbitration.pdf (accessed 12.3.2020).

45 See Art. 5(1) in conjunction with Art. 6(1a and 5) ISTAC Mediation-Arbitration Rules (https://istac.org.tr/wp-content/uploads/2020/01/ISTAC-Med-Arb-Rules-ENG.pdf; accessed 12.3.2020).

46 https://praguerules.com/upload/medialibrary/9dc/9dc31ba7799e26473d92961d926948c9.pdf (accessed 12.3.2020).

does not receive such consent, he must resign from his mandate as arbitrator in accordance with the applicable arbitration rules (Art. 9.3.b Prague Rules). This provision offers a party acting in bad faith the obvious possibility of significantly delaying the arbitration proceedings by engaging in mediation, allowing it to fail and then "*shooting down*" the mediator as an arbitrator, with the consequence that the arbitral tribunal must be reconstituted, with the corresponding cost and time consequences. But also honest parties to the arbitration can demand the replacement of the arbitrator conducting the mediation after it ends unsuccessfully, in the sense of the Med-Arb-Opt-Out variant described above, which also costs and delays the proceedings. We therefore clearly advise against this variant of the Prague Rules.

If the arbitrator and the mediator are not the same person, you do not have all these problems. The consistent attitude and modesty of the practitioners not to assume double functions in related arbitral and mediation proceedings will in the long run contribute to the acceptance of mediation in the arbitral environment and especially of the Arb-Med-Arb procedure (see concluding remarks in IV.).

4. Progress of the Proceedings After Mediation Has Been Concluded

The settlement or final mediation agreement signed after successful mediation can, for example, be recorded in the form of an arbitral award on agreed terms in accordance with Art. 34(1) of the Swiss Rules of Arbitration, if requested by the parties and accepted by the arbitral tribunal. The arbitral tribunal is not obliged to give reasons for such an arbitral award. Art. 33 of the ICC Rules also provides an award by agreement of the parties (Award by Consent) at their request and with the consent of the arbitral tribunal.[47]

Possible limitations may exist with regard to the conversion of a final mediation agreement into an arbitration award if the parties have not only resolved the dispute underlying the Arb-Med-Arb procedure but have also included other points in dispute between them in the agreement. In the course of arbitration proceedings, the arbitral tribunals are obliged to make an arbitral award in accordance with the substantive law applicable to the dispute and within the powers granted to the tribunal by the agreement of the parties under the applicable Arbitration Act. On a case-by-case basis, it is therefore conceivable to examine whether the parties also agree on non-arbitrable issues[48] in the final mediation agreement which cannot be included in an arbitral award[49]. One possibility to counter this risk is that the parties agree not to include these aspects in the arbitral award but to regulate them in a separate contractual form.[50] A mediator with expertise in arbitration will be able to advise the parties accordingly.

If the mediation is not successful, the arbitration proceedings suspended during the mediation will be resumed.

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47 With corresponding recognition and enforcement possibilities in the contracting states of the New York Convention.

48 See Art. 177 para. 1 PILA with reference to international and Art. 354 CPC with reference to national arbitration; BERNHARD BERGER/FRANZ KELLERHALS, International and Domestic Arbitration in Switzerland, 3. Ed, Berne 2015, N 210 *et seqq.*

49 MATTHIAS WIGET, Der Schiedsspruch mit vereinbartem Wortlaut im Schweizerischen Schiedsgerichtsrecht, ZZZ 23-24/2010, pp. 247, 249.

50 Also see JANET C. CHECKLEY/NADJA M. ALEXANDER, Arb-Med-Arb in cross-border disputes, Financier Worldwide, 12/2018.

IV. CONCLUDING REMARKS

Mediation should not and will of course not compete with commercial arbitration as the preferred form of international dispute resolution or even banish it. However, it can complement it, namely in the variant of the Arb-Med-Arb procedure described here, and thus counter various points of dissatisfaction of the "users" of arbitration, i.e. above all the parties and their exponents. Corresponding surveys show that current mediations cover a broad spectrum of disputes, some of them involving high amounts in dispute.[51] The time and cost savings are obvious when mediation and thus arbitration proceedings are successfully concluded.[52] Conversely, the additional time and costs for a one or two-day mediation with the corresponding, manageable preparation time is relatively low and, especially in complex arbitration proceedings with significant amounts in dispute, can be tolerated even if the mediation is unsuccessful.[53] Also the "*delay potential*" for a (bad faith) party who only engages in mediation in order to delay the proceedings (e.g. because they are obliged to do so under an existing Arb-Med-Arb clause), is - if the whole thing is correctly "*put on track*" as explained - relatively limited, especially since it is recommended to limit the mediation window in time.

The demand on the user side for a combination of arbitration and mediation in the sense of Arb-Med-Arb procedures in cases where the dispute is not to be taken to court is given and will continue to increase, as is repeatedly made clear[54] in direct discussions with entrepreneurs and in-house counsel or at specialist events.[55] As an arbitration practitioner and procedural lawyer – especially in Switzerland, but also in other highly developed European civil law countries – one should not ignore these facts, nor should one ignore the fact that mediation windows are already established in arbitration proceedings, particularly in the Anglo-Saxon and common law jurisdictions.[56]

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[51] The ICC Dispute Resolution 2018 Statistics, p. 17, for example, lists construction and engineering disputes as the most frequent cases, ahead of those relating to energy and telecommunications, with amounts in dispute between USD 250,000 and USD 860 million (https://iccwbo.org/media-wall/news-speeches/icc-arbitration-figures-reveal-new-record-cases-awards-2018/; accessed 12.3.2020).

[52] This statement also applies if co-mediation is conducted with two mediators.

[53] The ICC Dispute Resolution 2018 Statistics (f.n. 49) put the costs of the mediation procedures registered with the ICC (including administration costs) at an average of USD 18'500.

[54] Also see the preferences expressed in both surveys for combinations of arbitral proceedings with ADR or "*Hybridprocesses*" (f.n. 3).

[55] "*Mediation is banging on our door*" (Statement of a Swedish arbitrator at a recent arbitration conference in Scandinavia).

[56] See i.a. BSK IPRG-HOCHSTRASSER/FUCHS (f.n. 19), Einl. 12. Kap. IPRG N 329 *et seqq*. As well as the SIAC-SMIC Initiative (f.n. 30 a.E. and 42).

For these reasons it is advisable to make commercial mediation, as a variant[57] of dispute resolution, better known in this country[58] and elsewhere, to try to dispel any remaining doubts among arbitration practitioners as to the practicability and prospects of success of mediation, in particular within the framework of the combined variant of the Arb-Med-Arb procedure, by means of thorough clarification and to provide specific training.[59]

Possible skepticism about independent or stand-alone mediation per se, namely because of alleged lack of efficiency or because a final mediation agreement of independent mediation could not (yet) be enforced internationally at the end[60], can also be countered by referring to the advantages of a correctly structured Arb-Med-Arb procedure.

It is true, however, that there is not only international competition between places of arbitration [61], but also between jurisdictions as such, as is the case for many legal services internationally. This competition must also be actively addressed by offering different variants and alternatives for the resolution of disputes. As a first-class jurisdiction, Switzerland has all the necessary prerequisites for this. With the increased offer of the Arb-Med-Arb alternative, Switzerland's renowned place for arbitration can only benefit in the long run, and the corresponding potential should not, in the author's opinion, simply be left to other places for arbitration. This conclusion is also valid for other highly developed European civil law jurisdictions.

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[57] With regard to another alternative for arbitration proceedings, reference can also be made to the Zurich International Commercial Court project (see consultation of the Zurich International Commercial Court working group of the Zurich Bar Association in the ongoing revision of the CPC to create the corresponding federal legislative prerequisites, supported by the Ordre des avocats de Genève, which for its part is seeking to create a specialized court in Geneva); other jurisdictions know similar such specialized courts in different forms, e.g. the Netherlands: "*Netherlands Commercial Court*", Germany: "*Chamber for International Commercial Matters at Frankfurt Regional Court*", or Singapore: "*Singapore International Commercial Court*".

[58] See e.g. the two recent events of the SCAI/SCCM on October 1, 2019 and the ZAV specialist groups Arbitration and ADR/Mediation and ASA Local Group Zurich on November 12, 2019.

[59] The Swiss Arbitration Academy (https://www.cas-arbitration.org, accessed 12.3.2020), for example, also offers a module dealing with the Arb-Med-Arb procedure as part of its certified courses, including a CAS course.

[60] See f.n. 34.

[61] Also see e.g. the evidently slightly decreasing number of arbitration cases of SCAI in 2018 compared to 2015: https://www.swissarbitration.org/Statistics (accessed 12.3.2020).

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