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PUBLISHER AND PUBLISHING CONSULTANT

LexisNexis

LexisNexis
(A division of Reed Elsevier (Greater China) Ltd)
3901, Hopewell Centre,
183 Queen's Road East, Hong Kong
Tel: (852) 2965 1400 Fax: (852) 2976 0804
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ninehills media

Ninehills Media Limited
Level 12, Infinitus Plaza,
199 Des Voeux Road, Sheung Wan, Hong Kong
Tel: (852) 3796 3060 Fax: (852) 3020 7442
Email: enquiries@ninehillsmedia.com
www.ninehillsmedia.com

Publishing Editor
Julie Yao
julie@ninehillsmedia.com

Design
Portia Le

Advertising Contact
Tel: (852) 3796 3060

Abid Shaikh
abid@ninehillsmedia.com

Jennifer Luk
jennifer@ninehillsmedia.com

CO-PUBLISHER

HKIAC 香港國際仲裁中心 Hong Kong International Arbitration Centre

Hong Kong International Arbitration Centre
38/F, Two Exchange Square,
8 Connaught Place, Central, Hong Kong
Tel: (852) 2525 2381
www.hkiac.org

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EDITORIAL

This issue of *Asian Dispute Review* features a range of articles, covering a broad variety of topical issues. We begin with an article by **Gary Born**, who explores the right to arbitrate and its role in societies committed to the rule of law, from both an historical and a contemporary perspective. **William Stone** deals with the topical issue of third party funding and argues for increased regulatory arrangements by arbitral institutions. In the next article, the first in a two-part series, **Mauro Rubino-Sammartano** and **Shahla Ali** detail the internal review processes of the European Court of Arbitration and contrast it with the lack of such processes in commercial arbitration rules in Asia. **Julian Cohen** compares and contrasts construction arbitration in Dubai and Hong Kong in the following article, and **Rita Cheung** and **Chun Ho Lai** discuss whether arbitration agreements can limit the statutory right of members of a solvent company to petition a court for a winding up. The In-House Counsel Focus article by **Christopher Boog** discusses some problems with hybrid mediation and arbitration processes and considers the recently published joint protocol of the SIAC and SIMC.

A case note by **Albert Monichino QC** analyses a decision from the New Zealand Supreme Court in *Gallaway Cook Allan v Carr*, concerning the validity of a pathological arbitration agreement, and a book review follows from **Romesh Weeramantry**, on *Arbitration in China: A Legal and Cultural Analysis*.

Lastly, please note that beginning from this issue, the Editors can be contacted at the following new email address: asiandr-editor@hkiac.org.

General Editors

CONTRIBUTORS

Dr Christopher Boog
Schellenberg Wittmer
Singapore/ Zurich

Gary B Born
Wilmer Cutler Pickering Hale and Dorr LLP
London

Prof Rita Cheung
Chinese University of Hong Kong
Hong Kong

Chun Ho Lai
BCL at University of Oxford
United Kingdom

Julian Cohen
Barrister
Hong Kong

Albert Monichino QC
List A Barristers
Melbourne, Australia

Mauro Rubino-Sammartano
European Court of Arbitration
Strasbourg

Dr Shahla Ali
The University of Hong Kong
Hong Kong

William Stone SBS, QC
Commercial Arbitrator
Hong Kong

Romesh Weeramantry
Clifford Chance
Hong Kong

The New SIAC/SIMC AMA-Protocol: A Seamless Multi-tiered Dispute Resolution Process Tailored to the User's Needs

Dr Christopher Boog

This article discusses some problems of hybrid mediation and arbitration processes and introduces a recently published joint protocol of the Singapore International Arbitration Centre and the newly created Singapore International Mediation Centre for an arbitration-mediation-arbitration (Arb-Med-Arb) process.

Introduction

Parties to international commercial contracts regularly agree that any dispute deriving from them shall be resolved on a tiered basis. Multi-tiered dispute resolution clauses, also referred to as escalation clauses, serve multiple purposes. The main purposes are to achieve a settlement via a more informal process at an early stage and thus to save the parties the time and cost of having to resort to more formal arbitration or litigation. Other reasons for agreeing on an escalation clause may include placing alternative dispute resolution methods on both parties' agendas from the outset, without either party having to give up a perceived strategic advantage once a dispute has arisen.

The initial tiers of a multi-tier dispute resolution process can include an array of different methods, including inter-party negotiations involving higher management, as well as conciliation, mediation, adjudication, mini-trials or dispute boards, all of which entail, to some extent, the involvement of a third party in facilitating a settlement of disputes.

Among these different early-tier dispute resolution methods, commercial mediation is one of the most commonly agreed, often followed by arbitration in the event that mediation proves unsuccessful. Mediation is a form of dispute settlement whereby the parties seek to reach a settlement through the assistance of a third party neutral,

who does not have adjudicatory powers.[1] The outcome of a successful mediation is a mediated settlement agreement that contractually binds the parties.[2] There are, however, a number of practical issues with regard to 'classic' mediation, when used as a pre-tier to arbitration, which at times leave users dissatisfied with the process.

> "There are … a number of practical issues with regard to 'classic' mediation, when used as a pre-tier to arbitration, which at times leave users dissatisfied with the process."

The 'mediation dilemma'

Along with its many benefits, mediation comes with a number of pitfalls. For instance, parties often devote too little care and thought to drafting the mediation clause. If a dispute arises, this may later get them stuck in the initial stages of the dispute resolution process, ultimately prolonging instead of rendering that process more efficient.[3]

There is also the risk that parties (and their counsel, or at times even the mediator) will conduct the mediation like a 'mini-arbitration', rendering it almost as time and cost-consuming as fully-fledged arbitration or litigation. This is particularly frustrating for the parties if mediation is ultimately unsuccessful and they have to repeat the entire exercise in any ensuing arbitration or litigation. Although some of the work will already have been done, the parties will inevitably be left with the feeling of having wasted time and money by going through mediation first.

Finally, even if the mediation proves successful, the parties will 'only' end up with a mediated settlement agreement. The question is if, and how, such an agreement can be enforced in the event that one a party does not comply with it. Although, in practice, parties will often voluntarily comply with a mediated settlement,[4] it remains a fact that there is a feeling of unease and uncertainty among users as to the value of a settlement agreement in case a recalcitrant party should decide not to comply.

Some commentators argue that a mediated settlement agreement can be enforced by starting arbitration proceedings (to the extent agreed between the parties) with the sole purpose of 'enforcing' the agreement. The idea is to request the arbitral tribunal – which may be the mediator, who is then appointed as arbitrator for this sole purpose – to render a consent award in the terms of the settlement without reviewing the merits of the dispute.[5] Others, however, question whether such an 'enforcement mechanism' is indeed possible, mainly arguing that in order for an arbitral tribunal to assume jurisdiction, there needs to be a current dispute between the parties. If the dispute has already been resolved in mediation, there is no longer a dispute that can be brought before an arbitral tribunal.[6] Consequently, the party seeking 'enforcement' of a mediated settlement agreement may fail on the matter of the jurisdiction of the tribunal seized to 'enforce' the settlement. Even if that hurdle is surmounted, however, it is questionable whether a consent award rendered on the basis of a mediated settlement agreement concluded before an arbitration was initiated would be enforceable under the New York Convention or any other applicable enforcement regime.[7] In a worst case scenario, the parties to a mediated settlement agreement would be left with no option other than to litigate the dispute arising out of that agreement. This is most unlikely to have been the cost- and time-efficient process the parties had in mind.

These issues – which may referred to collectively as a 'mediation dilemma' – can evoke a significant amount of uncertainty in potential users of mediation. At times, this causes parties to shy away from including mediation clauses in their contracts at all. Where they do provide for mediation as a precursor to arbitration, it is not uncommon that the claiming party will seek to skip the mediation stage of a tiered dispute resolution mechanism once a dispute has arisen, arguing that it would be a waste of time and money to go through the formal process if a successful and enforceable outcome is unlikely.

Proposed solutions to the mediation dilemma

Different solutions to the mediation dilemma have been proposed in the past, and some are currently under discussion in various *fora*.

Suggested solutions include hybrid forms of mediation and arbitration, referred to as Med-Arb or Arb-Med, whereby one individual is entrusted both to mediate and arbitrate the parties' dispute. There is no standard definition of these processes and they have a number of variations. Generally speaking, 'Med-Arb' means that the mediator later assumes the role of arbitrator, an unsuccessful mediation concluding before the arbitration can commence.[8] 'Arb-Med' is understood as a process by which parties commence an arbitration and then choose to have at least one (or the sole) member of the arbitral tribunal mediate the dispute. If mediation fails, the arbitration will resume with the same arbitrator(s).[9] The Arb-Med process sometimes entails the arbitral tribunal drafting an award rather early on in the arbitral process, which is put under seal and only released to the parties in case the ensuing mediation is unsuccessful.[10] As Rosoff points out:

> "Med-Arb and Arb-Med both share the same problems associated with tasking one person to be both mediator and arbitrator."[11]

> "Where [parties] … do provide for mediation as a pre-tier process to arbitration, it is not uncommon that the claiming party will seek to skip the mediation stage of a tiered dispute resolution mechanism once a dispute has arisen, arguing that it would be a waste of time and money to go through the formal process if a successful and enforceable outcome is unlikely."

Indeed, both processes are subject to substantial scepticism in practice, particularly with respect to the impartiality of an arbitrator who has received confidential information in the mediation that a party might not necessarily have disclosed in arbitration – the more so if such information is disclosed in private caucus during mediation.[12] The **f** ipside of the coin is that parties are unlikely to disclose in mediation information or bottom lines for settlement to the same individual(s) who will later adjudicate the dispute in the event that mediation proves fruitless.[13]

Another possibility is to equate a mediated settlement with an arbitral award and to legislate to make such settlements directly enforceable in the courts. Such a system is already in place in such jurisdictions as Hong Kong, India, Bermuda and a number of US states. It is currently being discussed at UNCITRAL[14] and in a number of legislatures around the world, including Singapore.[15] To what extent such legislation will be enacted is, however, questionable at this point, just as it is questionable whether it is indeed advisable to set the contractually binding outcome of a mediation process, which is not subject to the same procedural safeguards and review, on the same footing as an arbitral award.[16]

The Singaporean solution: the SIAC-SIMC AMA Protocol

Against this background, the Singapore International Arbitration Centre (SIAC) and the newly created Singapore

International Mediation Centre (SIMC) have devised a creative solution that seeks to dispel many of the shortcomings of mediation discussed above. On 5 November 2014, to coincide with the official launch of the SIMC, they presented their joint Arbitration-Mediation-Arbitration ('Arb-Med-Arb') Protocol ('AMA Protocol').[17]

Application of the AMA Protocol

In a nutshell, Arb-Med-Arb under the AMA Protocol is a three-stage process. The first stage is the initiation of arbitration proceedings before the SIAC. The arbitration is then stayed and the case is submitted to mediation at the SIMC. In the third and final stage, the matter is referred back to arbitration and concludes with the issuance of an enforceable award.

The AMA Protocol applies either where the parties have so agreed in their contract, or where they have otherwise agreed to submit a dispute for resolution under it.[18] In other words, parties can agree to submit their disputes to the AMA procedure at any time, including after a dispute has arisen and even in cases where arbitral proceedings have already commenced.

The SIMC provides a model dispute resolution clause, the 'Singapore Arb-Med-Arb Clause',[19] for parties wishing to refer disputes under the AMA Protocol. It reads:

> "All disputes, controversies or differences ('Dispute') arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ('SIAC') for the time being in force.
>
> "The parties further agree that following the commencement of arbitration, they will attempt in good faith to resolve the Dispute through mediation at the Singapore International Mediation Centre ('SIMC'), in accordance with the SIAC-SIMC Arb-Med-Arb Protocol for the time being in force. Any settlement reached in the course of the mediation shall be referred to the arbitral tribunal appointed by SIAC and may be made a consent award on agreed terms."

This model clause – like most model clauses – provides for the bare necessities of an arbitration agreement; parties may therefore wish to consider amending it to suit the specific needs of their commercial transaction. In any event, parties are well advised to add language regarding the seat and language of the arbitration, as well as the number of arbitrators they wish to arbitrate their dispute. They may derive guidance in this regard from the model arbitration clauses available on SIAC's website.[20]

> "The SIAC-SIMC AMA Protocol … combines the efficiency of mediation and the certainty and enforceability of an arbitral award. It also provides for a seamless transition between the arbitration and mediation phases of the process, something that is not guaranteed by many other combinations of mediation and arbitration."

Procedural steps under the AMA Protocol

The main procedural steps under the AMA Protocol are as follows.

(1) In the event of a dispute, the AMA process is initiated by filing a notice of arbitration with the Registrar of the SIAC in accordance with either the UNCITRAL Arbitration Rules or the SIAC Arbitration Rules, where the parties have agreed that SIAC shall administer such arbitration.[21]

The SIAC shall inform the SIMC of the commencement of the arbitration and provide it with a copy of the notice of arbitration.[22]

(2) The SIAC shall constitute the arbitral tribunal in accordance with the relevant arbitration rules or the parties' agreement.[23]

(3) Once constituted, and after receipt of the response to the notice of arbitration, the arbitral tribunal shall stay the arbitration and inform the Registrar of the SIAC that the case can be submitted for mediation at the SIMC.[24]

(4) The SIAC will seamlessly turn the case over to the SIMC, under whose auspices the mediation shall be conducted, pursuant to the SIMC Mediation Rules. To ensure impartiality at all stages of the dispute resolution process, the mediator(s) will not be the same individual(s) as the previously appointed arbitrator(s).

(5) The mediation shall be completed within 8 weeks from its commencement, unless this deadline is extended.[25]

(6) If the parties settle their dispute (wholly or partially) in the mediation, they may request the previously constituted arbitral tribunal to record their settlement in the form of a consent award on the terms agreed to by the parties.[26] That way, the parties can rest assured that their settlement is enforceable in the same manner as an arbitral award.[27]

(7) If the mediation fails or the dispute is only partially settled, arbitration will resume before the already appointed arbitral tribunal.[28] The arbitral proceedings will also result in an enforceable arbitral award.

Concluding remarks

The SIAC-SIMC AMA Protocol initiative addresses issues that are truly relevant to the practice of international dispute resolution and is, as such, to be applauded. It combines the efficiency of mediation and the certainty and enforceability of an arbitral award. It also provides for a seamless transition between the arbitration and mediation phases of the process, something that is not guaranteed by many other combinations

of mediation and arbitration. The AMA procedure is also transparent and efficient in terms of cost. The SIMC – like the SIAC – offers competitive rates, which are published on its website. Moreover, the AMA Protocol provides rules on financial matters that co-ordinate filing fees and advances on costs for the arbitration and the mediation stages of the procedure.[29] For instance, a party initiating an AMA procedure will have to file only one case filing fee. The seamless transfer between the arbitration and the mediation stages can also be expected to foster cost-efficiency.

There do, however, remain issues which will have to be resolved in practice. An important one is whether and, if so, to whom a party requiring urgent interim relief during the mediation phase of the AMA process – during which the arbitration is stayed – should address a request for such relief. Ideally, such issues can be resolved within the framework of mediation. If the worst comes to the worst, a party can always terminate mediation in order to regain access to the arbitral tribunal for the purpose of seeking an order for interim relief.

The AMA Protocol does not expressly stipulate the extent to which parties are free to deviate from the standard process. It can, however, be expected that party autonomy will be given precedence, so that parties may agree to insert a mediation phase after the first or even the second round of full written briefs, or even after the arbitration hearing, instead of after the response to the notice of arbitration, should they deem that more appropriate in a given case. Similarly, it can be assumed that parties would also be able to agree at the very outset to submit their dispute under the AMA Protocol if the dispute has already proceeded past the stage of the response to the notice of arbitration.

It is expected that the SIAC-SIMC AMA Protocol will be fully embraced by users of international dispute resolution services. It appears to be tailored to their need for time- and cost-efficient dispute resolution, with a focus on finding mediated solutions to business disputes that look to the future rather than to the past. It may, therefore, be just what users have been waiting for.

1 D Spencer & M Brogan, *Mediation Law and Practice* (2006), p 3; M McIlwrath & J Savage, *International Arbitration and Mediation: A Practical Guide* (2010), para I-026.

2 See GB Born, *International Commercial Arbitration* (2nd Edn, 2014), p 272; JT Peter, *Med-Arb in International Arbitration*, 8 Am Rev Int'l Arb (1997) 88.

3 See A Lees, *The Enforceability of Negotiation and Mediation Clauses in Hong Kong and Singapore* [2015] Asian DR 16 for some helpful tips in drafting negotiation and mediation clauses.

4 See, for example, EE Deason, *Procedural Rules for Complementary Systems of Litigation and Mediation – Worldwide*, 80 Notre Dame L Rev (2005) 553, at 580.

5 See, for example, HI Abramson, *Mining Mediation Rules for Representation Opportunities and Obstacles*, 15 Am Rev Int'l Arb (2004) 108.

6 See, for example, C Newmark & R Hill, *Can a Mediated Settlement Become an Enforceable Award?* (2000) 16 Arb Int'l 81.

7 Newmark & Hill *op cit* (note 6 above).

8 See, for example, J Rosoff, *Hybrid Efficiency in Arbitration: Waiving Potential Conflicts for Dual Role Arbitrators in Med-Arb and Arb-Med Proceedings* (2009) 26 J Int'l Arb 89; R Hill, *MED-ARB: New Coke or Swatch* (1997) 13 *Arb Int'l 105;* B Wolski, *Arb-Med-Arb (and MSAs): A Whole Which is Less than, Not Greater than, the Sum of its Parts?* (2013) 6 Contemporary Asia Arbitration Journal 258.

9 Rosoff, *op cit* (note 8 above).

10 See, for example, JM Gaitis, CF Ingwalson Jr & VB Shelanski (Eds), *College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration* (3rd Edn 2014), p 351.

11 Rosoff, *op cit* (note 8 above).

12 See, for example, AJ van den Berg, *New Horizons in International Commercial Arbitration and Beyond* (2005), ICCA Congress Series No 12 (Beijing 2004), pp 572 *et seq.*

13 See, for example, N Blackaby, C Partasides, A Redfern & M Hunter (Eds), *Redfern and Hunter on International Arbitration* (5th Edn, 2009) para. 1.140; Born, *op cit* (note 2 above), p 281.

14 See the reports of UNCITRAL Working Group II at http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html.

15 See the report at http://simc.com.sg/singapore-launches-international-mediation-centre.

16 For a discussion of this topic, see the materials published by UNCITRAL at http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html.

17 The AMA-Protocol can be downloaded at http://simc.com.sg/our-rules/siac-simc-arb-med-arb-protocol.

18 AMA Protocol, para 1.

19 Available at http://simc.com.sg/model-clauses/the-singapore-arb-med-arb-clause.

20 See http://www.siac.org.sg/model-clauses.

21 AMA Protocol, para 2.

22 *Ibid*, para 3.

23 *Ibid*, para 4.

24 *Ibid*, para 5.

25 *Ibid*, para 6.

26 *Ibid*, para 9.

27 See, for example, Born, *op cit* (note 2 above), p 3026.

28 AMA Protocol, para 8.

29 *Ibid*, paras 10-15.