Current News

"Can or should the same person be mediator, or conciliator and arbitrator ?"

Examples from recent cases illustrate the problem as it arises in practice.

It is customary in international arbitration circles to refer to conciliation and mediation proceedings together with a number of "arbitration-light" proceedings under the label "ADR" for alternative dispute resolutions. However it is not possible to answer the question raised, i.e. "can or should the same person be mediator or conciliator and arbitrator", without some clarification of the terminology. This is true even if many practitioners will question the need for dogmatic definitions, the main effect of which is often to limit the tools looked at to resolve disputes rather than to assist the parties effectively.

For instance, most rules on commercial mediation will be restrictive and will not allow without special consent the same person to be mediator and arbitrator (see in particular the rules of the ICC[1], of the CMAP[2] in Paris, of the CEPANI[3] in Belgium, of the WIPO[4] Arbitration and Mediation Centre in Geneva, or of the Swiss Rules of Commercial Mediation of the Swiss Chambers of Commerce[5]). The same restrictions do not apply in relation to conciliation by an arbitrator. So we need to understand the difference between conciliation and mediation.

The conciliator, like the mediator, has normally no decision making power. The arbitrator, like the judge, has the power and the duty to decide once he has been appointed[6]. If the parties do not feel comfortable with the conciliator or mediator, they can terminate his mandate at their own will without negative consequences and without justification.

What distinguishes conciliators from mediators is the way they look at a dispute.

The conciliator, like the judge or the arbitrator, will normally start from the legal position taken by both parties as expressed in their litigation briefs. Starting from there, the conciliator will form a view as to who is more right and he will help the parties to bridge the gap between the respective positions following an evaluative approach. Sometimes this can be done at the outset, when the plaintiff has clearly stated his case and disclosed the related evidence; sometimes it can be done after the witnesses have been heard. This is why, in practice, in international disputes, arbitrators and conciliators are often the same person. I will therefore refer below to conciliation by arbitrators, as part of their duties as arbitrators.

In mediation the emphasis is completely different, because the purpose is not to determine who is right and who is wrong, nor is it in the first instance to narrow the gap in the positions adopted by the parties. The emphasis is on finding out the parties' best interest in the course of a facilitative process. This can go as far as having the party, who is unquestionably right from a strictly legal point of view, give up its position because its best interest may be to accept a solution in which said party does not prevail in the legal sense. The mediator must therefore be able to understand and perceive what the parties or their counsels may not be able or willing to express clearly. He may have to ensure that the other party really hears and understands what is being said, or the mediator will have to lead the parties to look at their problem beyond the scope of their initial approach. This goes well further than what a conciliator would normally do and for that purpose, briefs prepared for litigation are often either of no help, or even obstacles in the course of a mediation. Mediation| will therefore refer to proceedings separate from the arbitration (or court proceedings).

Creative thinking, even in procedural terms, is a quality very different from predictability and the two may even exclude each other to a certain extent! Normally arbitrators should be as predictable as possible. This includes applying the law and the procedural rules with a high degree of competence. Quite to the contrary, the mediator should be unpredictable, because he should be as creative as necessary leading the parties to look at their problem from an angle that neither they nor their counsels had envisaged. The mediator's main responsibility is to manage the procedure to get the parties to feel comfortable and to be able to express their perception and expectations in a better way than they could do by themselves, or to help get the message across to the other party more effectively. This requires specific training, in addition to special human qualities. It is therefore very difficult to get the best of both qualities, predictability and creativeness, in one and the same person.

The difference in the objectives of mediation on the one hand, and conciliation or arbitration on the other hand, explains the difference in the expected qualities of the neutral (arbitrator or mediator) in charge. The difference in the starting points for mediators and arbitrators as well as for conciliators does impact on the possibility for one and the same person to be mediator and arbitrator.

[1] *International Chamber of Commerce.*

[2] *Centre de Médiation et d'Arbitrage de Paris.*

[3] *Belgian Centre for Arbitration and Mediation.*

[4] *World Intellectual Property Organization.*

[5] *Swiss Rules of Commercial Mediation of the Swiss Chambers of Commerce and Industry (http://www.swisschambermediation.ch).*

[6] *A very comprehensive comparison between Arbitration and Mediation was published under the title "The Interaction Between Arbitration and Mediation: Vision vs. Reality" by Renate Dendorfer and Jeremy Lack in the German Arbitration Journal, SchiedsVZ 4/2007, p. 197.*

Let us look at some examples taken from experience to illustrate this point.

a) "The international sale" example

The dispute involved several deliveries of a commodity, the price of which had fluctuated considerably and the quality of which was challenged. The contract had been cancelled and damages resulted from the impossibility of selling the commodity on similar terms at the time when the cancellation was notified to the seller by the buyer.

The parties appointed an arbitrator but agreed to try mediation first.

For the purpose of the mediation, only a summary statement of facts was prepared and a two-day mediation session was held by a mediator in the presence of both parties and their counsels.

The mediator looked at the possibility of the parties doing new business and also tried to persuade the parties to make confidential disclosure of facts that were officially disputed[7].

However, ultimately no highly confidential information was disclosed despite several caucuses. The issue could not be resolved, but the mediation enabled the parties to sort out numerous issues and to agree on which facts were really relevant. The arbitrator had therefore only to establish the few decisive disputed facts and draw the obvious legal consequences to render his award.

A highly contentious and unclear situation was therefore clarified in only two days and the briefs for the subsequent arbitration could be kept short and to the point.

Since in that case the mediation "only" helped to prepare the subsequent arbitration proceedings without disclosure of confidential information to the mediator, the parties could have agreed to ask the mediator to go on as arbitrator. They did not do it because they had already chosen an arbitrator before the mediation. In practice, both parties felt more comfortable to have the arbitration before a person who had not been involved in the previous proceedings.

Noteworthy in this case is that the arbitrator attempted a conciliation after hearing all witnesses. He said that the evidence brought before him showed that the torts were not all on one side and that the parties should consider splitting the amount in dispute, because if he had to render an award it would have to be all or nothing for plaintiff, which would not be fair.

The arbitrator tried to bridge the gap before retiring to render his award. He offered therefore a last chance for settlement, but the parties wanted the relevant facts established by the arbitrator with the full consequences drawn from such facts. There was therefore no room for a late conciliation by the arbitrator.

The subject of the mediation proceedings was therefore clearly different from the arbitration and the attempted conciliation. It was obvious that if the mediation were to have any chance of success in a case where the parties were so reluctant to share confidential information which they feared might harm their chance of success in the arbitration, the mediation had to be conducted by a person who would not be the arbitrator.

However, since no sensitive facts were ultimately disclosed during the mediation, the parties could theoretically have asked the mediator to continue as arbitrator.

This is therefore an example where there would have been no absolute impediment to having the same person carry on as arbitrator. At the same time, there would have been no significant gain in having the same person acting as arbitrator after the failed mediation, since all relevant facts still needed to be established.

b) "The missing contractual base" example

In this case, the parties were already entangled in arbitration proceedings in Zurich, but after exchanging the first briefs, they had agreed to try mediation in Bern. Their arbitral pleadings could not be used for mediation purposes because they had been drafted with a different focus, i.e. to prove that they were right in taking the position they had adopted, rather than focusing on the parties' needs.

It was obvious from the mediation briefs and from the underlying documents that a situation had arisen which had not been contemplated in the initial contract. Yet the contract had not been adjusted, so that a few years later, both parties argued about their rights and obligations arising out of a document which was the only one available, but which was totally inappropriate to deal with the situation.

In one single mediation session, the parties imagined a fair contract for the future and then applied the solution retroactively.

In this example, the arbitrator could never have acted as mediator because to have a chance to succeed, the parties had to be willing to explore scenarios that could have been detrimental to their positions as expressed in the arbitration proceedings.

How could they have admitted before the arbitrator that the contract on the basis of which they had based their respective positions was simply not an adequate basis for their relationship? How could they have agreed before the arbitrator that their relationship was in fact governed by an unwritten agreement, the content of which was never agreed upon? This would simply have been unthinkable.

This "missing contractual base" example shows that mediation is much more than bringing two positions together or bridging the gap between what one party claims and what the other party offers to pay. It is really an organized process that requires a special preparation, enough time and the participation of management at the right level of competence to bind the parties. It cannot be delegated to lawyers, in-house or external, but of course such lawyers are essential when it comes to drafting the agreement reached by management.

[7] *See "Mediation: Confidentiality and Enforcement Issues and Solutions" by Eric. W. Fiechter, in Newsletter, Mediation, International Bar Association Legal Practice Division, April 2005, (http://www.stswiss.com/shared/publications/Mediation%20in%20Geneva.pdf).*

Conclusion

It is for good reasons that most mediation rules set the principle that **mediators may not act as arbitrators, unless all participating parties ask a mediator to arbitrate the dispute**[8].

In the cases where mediation failed, but the parties asked the mediator to continue as arbitrator, the agreed follow-up arbitration is likely to lead to a more efficient arbitration, if that is what the parties have jointly determined to be their Best Alternative To a Negotiated Agreement (BATNA).

The WIPO Mediation Rules even offer a complete shopping list of possible agreements in case there is a need to go beyond mediation.

> "[…] the mediator may so propose:
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> (i) an expert determination of one or more particular issues;
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> (ii) arbitration;
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> (iii) the submission of last offers of settlement by each party and, in the absence of a settlement through mediation, arbitration conducted on the basis of those last offers pursuant to an arbitral procedure in which the mission of the arbitral tribunal is confined to determining which of the last offers shall prevail; or
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> (iv) arbitration in which the mediator will, with the express consent of the parties, act as sole arbitrator, it being understood that the mediator may, in the arbitral proceedings, take into account information received during the mediation."

But exploring these avenues would exceed the scope of this overview.

In most cases, the parties will feel more comfortable if the mediator hands over the follow-up proceedings to an arbitrator, and the extra cost of having a new "neutral" involved will be negligible in comparison to the cost of the follow-up arbitration. Most international commercial mediations involve costs in the range of EUR 5'000.- to EUR 10'000.- including the administration fee for the mediation centre (WIPO, Swiss Chambers of Commerce, etc.), while the follow-up arbitration proceedings will invariably be a multiple of these figures.

The parties and their lawyers should always remember that the mediator should be as creative as possible, while the arbitrator should be as predictable as possible! And since the mediator's mandate can be terminated at will, even just because one of the parties does not like him, the mediator should not be selected like an arbitrator that cannot be removed once he has been appointed. It is not worth spending precious time arguing with the other party about the proposed mediator names. The proposal by the party that is most familiar with the mediators' circles should be accepted if it is a reasonable proposal. The key is to get the mediation going! The parties will not be disappointed.

Even the mediator selection process shows therefore that there is much to gain in keeping the functions of mediator and arbitrator separate!

Eric W. Fiechter, September 08.

[8] *The CEPANI rules do it in the following terms:*
"Unless otherwise agreed by the parties, the mediator shall not act as an arbitrator, representative or counsel of a party in arbitral or judicial proceedings relating to the dispute which was the subject of mediation."

The ICC ADR rules express the same principle in slightly different terms:
"Unless all of the parties agree otherwise in writing, a Neutral shall not act nor shall have acted in any judicial, arbitration or similar proceedings relating to the dispute which is or was the subject of the ADR proceedings, whether as a judge, as an arbitrator, as an expert or as a representative or advisor of a party."

The CMAP rules are also very restrictive in terms of having the mediator act as an arbitrator:
"le médiateur ne peut être désigné arbitre ni intervenir à quelque titre que ce soit dans le litige subsistant, sauf à la demande écrite de toutes les parties. "

[9] *WIPO Arbitration and Mediation Rules, Role of the Mediator, Article 13 (b).*