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# Ciarb Professional Practice Guideline on the Use of Mediation in Arbitration



# Professional Practice Guideline on the Use of Mediation in Arbitration (2021)

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## 1. Preamble

1.1 This guideline covers legal, practical and professional issues arising from the interaction between arbitration and alternative dispute resolution (ADR). It is meant to be used by practitioners conducting:

1.1.1 an arbitration where mediation might be used, and

1.1.2 a mediation between parties to an arbitration agreement.

The Guideline is also intended to be a useful reference guide for parties and their representatives in such disputes as well as for arbitrators and mediators.

It is aimed at readers already familiar with key ADR processes and the fundamentals of mediation and arbitration.

1.2 This Guideline explores the themes and issues in this area and offers practical guidance. It should not be treated as an authoritative statement of law, procedure or professional practice. Although the Guideline refers to the various “hybrid” procedures (Med-Arb, Arb-Med, etc) it is more concerned with the substance of the various processes and issues than with the particular terminology used, especially as there is no universal agreement on the precise range of processes that the various labels refer to.

## 2. Introduction

**2.1 Why issue this Guideline?** Ciarb recognizes that there are significant benefits to parties from the use of mediation within arbitration. As a consensual process, mediation fits well with the concept of party autonomy that is central to arbitration. The purpose of this guideline is to discuss the use of mediation in the context of arbitration proceedings, to identify legal and practical issues that may arise, and to point to potential options and solutions. The judicial systems of many jurisdictions already contain rules on the specific use of mediation where litigation has commenced.

2.2 Ciarb believes that by developing the ways in which arbitration practice accommodates the resolution of disputes through mediation, arbitration will become an even more effective process, and in turn an increasingly attractive means of resolving disputes in the modern business landscape.

**2.3 What about other forms of ADR?** Mediation is not the only form of alternative dispute resolution (ADR). But it is the most known and the most widely used, and like arbitration involves the participation of a neutral appointed by agreement of the parties. This Guideline focuses on the interaction between arbitration and mediation, while recognising that some of its content may also be of value when addressing the relationship between arbitration and other forms of ADR, such as conciliation. For the purpose of this guideline, conciliation is treated as closely akin to mediation, and references to “mediation” and “mediator” should be read as including “conciliation” and “conciliator”.

**2.4 How do arbitration and mediation interact?** Arbitration and mediation can interact in different ways and at different stages of an arbitrable dispute. For example:

- The parties may simply opt to go to mediation as their chosen or only dispute resolution method, without any expectation or any immediate intention to go to arbitration.

- The parties may refer a dispute to arbitration after first attempting to settle it by mediation. In some cases that may result from a “tiered” dispute resolution clause that requires the parties to mediate before commencing arbitration.

***[See below Section 4 on Mediation at the commencement of arbitral proceedings]***

- The parties may choose to mediate their dispute after commencing arbitral proceedings. That sometimes arises from a formal protocol under which the parties agree to commence arbitral proceedings, which are then immediately stayed so as to allow the parties to go to mediation. Equally, the parties may simply choose to go to mediation of their choice at any time during the arbitration process.

***[See below Section 5 on Settlement techniques short of mediation during the course of arbitral proceedings]***

- The parties may wish to run a mediation on some issues in dispute concurrently with arbitration on other issues, permitting the parties to use the two mechanisms to maximum efficiency, as they mutually agree is expedient to resolving the dispute.

***[See below Section 6 on Attempting mediation during the course of arbitral proceedings]***

- The parties may opt for mediation after the conclusion of an arbitration – for example, prior to receiving an award or subsequently if neither party is entirely satisfied with the award. ***[See below Section 10 on Post-award mediation]***

**2.5 What kind of issues do those interactions pose?** These interactions are sometimes described as “hybrid” processes and are known by various shorthand titles according to the sequence of processes – eg. “Med-Arb”, “Arb-Med” or “Arb-Med-Arb”. However, Ciarb stress that there is no necessity for an arbitral process to have been described as such. The absence of such a description will not prevent the parties choosing mediation.

2.6 Each scenario poses a number of common themes and issues:

- Where the parties have not already agreed to or attempted mediation, to what extent should an arbitrator proactively propel the parties towards mediation?
- What procedural steps should be taken within an arbitration to facilitate the mediation process, including enabling the arbitration to be stayed to allow for mediation and to enable the arbitration to resume if mediation fails to resolve the dispute?
- Where the parties mediate their dispute successfully, need the arbitration proceed to an award? Where it does, are there particular issues of enforceability to consider?
- Is it possible to mediate some issues and leave others for decision by the arbitrator?
- In what circumstances is it appropriate for the same person act as arbitrator and mediator in the same dispute? This is an issue of particular sensitivity in many jurisdictions, arising from the different nature of the roles of arbitrator and mediator.

**2.7 Further information and review.**<sup>1</sup> Ciarb intends to keep this Guideline under review as practice in this area develops. The Ciarb Practice and Standards Committee welcomes questions and comments.

### **3. Context: the functions and professional obligations of arbitrator and mediator**

3.1 The precise legal content of an arbitrator’s duty, and the exact way it is expressed, varies from jurisdiction to jurisdiction. But the essence of the role of arbitrator in every common and civil law jurisdiction that recognises arbitration as a method of dispute-resolution is to act as a neutral decision-maker, reaching a binding and (so far as possible) enforceable decision on the merits of the referred dispute, after giving each

<sup>1</sup> Readers seeking further information on mediation and arbitration processes are encouraged to consult our online resources (<https://ciarb.org/resources/>).

party a fair and reasonable opportunity to present its case and deal with the case presented by the opposing party.

3.2 The role of neutral decision-maker requires that the arbitrator act impartially throughout the proceedings. That includes refraining from expressing a concluded view on any issue (or what may appear to be a concluded view) until the time comes for making a decision or award on that issue.

3.3 Where the parties have agreed that the arbitration is to be conducted confidentially (as in most commercial arbitrations), the arbitrator is under a duty to keep all information relating to the arbitration confidential as regards the outside world. However, within the arbitration, there is generally no confidentiality of information imparted to the arbitrator by one party as against the opposing party. On the contrary, fairness generally requires that all information communicated to the arbitrator by one party relating to the proceedings should also be communicated to the opposing party at the same time.

3.4 The function of mediator is to endeavour as far as possible to promote a settlement of the dispute, or of issues within the dispute, with the consent of the parties. The mediator is a neutral facilitator, assisting the parties to reach a settlement, but not rendering an opinion or making a decision. Like an arbitrator, a mediator is generally under a duty to keep information relating to the mediation confidential as against the outside world. But, unlike an arbitration, the parties may – and typically do – agree that information imparted by a party to a mediator is to remain confidential between them unless and until that party agrees to its being communicated to the other party. That includes information imparted during private sessions (“caucusing”) with one party in the absence of the other.

3.5 Mediation may be “facilitative,” “evaluative” or “transformative”. In purely facilitative mediation, the mediator seeks to promote settlement without expressing a view on the merits of the dispute. In evaluative mediation, the mediator is invited by the parties to aid the process by challenging the parties on the merits of their claim or defense or, with the consent of the parties, expressing a view on the merits of the dispute or of particular issues. In transformative mediation, the mediator focuses on empowering the parties to resolve their conflict and encouraging them to recognise each other’s needs and interests. Equally, mediation may be a combination of two or all three of these principles.

3.6 The Ciarb's Code of Professional and Ethical Conduct for Members,<sup>2</sup> among other things, requires a member (whether acting as arbitrator or mediator):

- to maintain the integrity and fairness of the dispute resolution process, and to withdraw if that is no longer possible (Rule 2);
- to disclose all interests, relationships and matters which might reasonably be perceived as affecting the member's impartiality, and to "take such steps as may be required" – which may include resignation or withdrawal from the process – if incapable of maintaining the requisite impartiality;
- to communicate with those involved in the dispute resolution process "only in the manner appropriate to the process".

3.7 The Ciarb's view is that in general terms, arbitrators are entitled to promote amicable settlement of disputes referred to them, and are to be encouraged to do so subject to the overriding principle of "party autonomy". To that end, an arbitrator has a degree of flexibility in deploying techniques that may overlap with those used by mediators. For example:

- An arbitrator may identify and suggest to the parties issues that appear capable of agreement, and may suggest suitable procedural steps to enable the parties to explore the possibility of agreement.

That extends to directing the parties to seek to agree certain matters if at all possible. For example it is customary in some jurisdictions for arbitrators to direct parties to seek to agree "figures as figures".

3.8 Other steps designed to promote settlement may be open to an arbitrator. The principle of party autonomy dictates that so long as the parties freely consent to particular steps, they should be free to utilise those steps within their arbitration – so far as that is consistent with the law and procedural rules governing the arbitration, and mindful of the importance of ensuring that any award is considered valid in each territory where it is to be enforced. As the ICC Arbitration Rules 2017 put it:

"Where agreed between the parties and the arbitral tribunal, the arbitral tribunal may take steps to facilitate settlement of the dispute, provided that every effort is made to ensure that any subsequent award is enforceable at law."<sup>3</sup>

<sup>3</sup> October 2009 version.

<sup>2</sup> The International Chamber of Commerce (ICC) Arbitration Rules (2021), Appendix IV paragraph (h)(ii).

3.9 The remaining sections of this guideline examine particular situations where such issues may arise, and offer advice and guidance for handling them.

#### **4. Mediation at the commencement of arbitral proceedings**

4.1 An arbitrator to whom a dispute is referred may be faced with a “tiered” dispute resolution clause which envisages that certain attempts should be made to resolve the dispute amicably before commencing arbitral proceedings. That has the potential to give rise to questions of the arbitrator’s or the arbitral tribunal’s jurisdiction. A respondent may, in responding to a notice of arbitration, expressly raise an objection to jurisdiction on the basis that the steps prescribed by the arbitration agreement have not been taken. Even in the absence of an express objections, the material before the arbitrator may raise doubts as to whether the relevant requirements have been met. To avoid this, the “tiered” dispute resolution clause should clearly specify parties’ rights and obligations to satisfy the clause as well as define the time limits for compliance.

4.2 In that situation an arbitrator may, so far as consistent with the rules governing the arbitration, take the opportunity to enquire with the parties whether they wish to consider making attempts, or further attempts, at amicable resolution of their dispute. Any such enquiry should be expressly made without prejudice to any question of jurisdiction that may arise.

4.3 Where arbitration is commenced under an “Arb-Med-Arb” or similar protocol that sets out a framework for mediation within the arbitral proceedings<sup>4</sup> the protocol itself will normally set out the respective steps to be taken by the arbitrator, parties and arbitral institution. The protocol will deal with such matters as procedural orders (including a formal stay of the arbitral proceedings for a specified period), the steps to be taken if mediation does, or alternatively does not, result in settlement, and financial matters including responsibility for the arbitrator’s fees.

4.4 Where the parties seek to commence simultaneous or near-simultaneous arbitration and mediation outside the terms of a protocol, the arbitrator should consider what procedural steps should be taken, consistently with the applicable rules of arbitration, to facilitate the mediation, and seek the parties’ agreement to them so far as possible. The terms of an appropriate protocol may provide a useful starting point for such steps.

<sup>4</sup> See e.g. the Singapore International Arbitration Centre and the Singapore International Mediation Centre Arb- Med-Arb Protocol.



## 5. Settlement techniques short of mediation during the course of arbitral proceedings

**5.1 Facilitative assistance from the arbitrator.** A range of relatively uncontroversial facilitative steps are open to an arbitrator, with the agreement of the parties, to promote agreement. This does not involve referring to parties to a separate mediation process, but simply deploying within the arbitration familiar techniques borrowed from the ADR sphere. For example:

- An arbitrator may hold what may be called a “settlement conference” at which all parties are present. The conference can be designed to enable the parties to settle specific issues or even the whole dispute. Such a conference is most useful when the parties are themselves moving towards agreement, and the intervention of the arbitrator can sometimes help to bridge any remaining gap. So timing is likely to be important to the utility of such a step.
- In any such discussions the arbitrator may use mediation-like techniques to promote agreement. These may include appealing to the interests of the parties in reaching a non-adversarial outcome, avoiding expenditure of further time and costs, or preserving what remains of the commercial relationship. This may include discussing matters not central to the issues within the arbitration, but that may lead to a settlement of those issues. It can help if the principals involved in the dispute – not merely their representatives – are present at the conference.
- An arbitrator may take less formal steps, such as encouraging parties to take their refreshments together. There is a tradition of doing this in London maritime arbitration. Such steps may help break down the atmosphere of confrontation between the parties.
- Alternatively the arbitrator may encourage the parties to come up with an agreed list of issues, which they want the arbitrator to decide upon. This technique helps to reduce the number of matters for the arbitrator to decide and enhances the efficiency and reduces the cost of the proceedings.

**5.2 Evaluative assistance from the arbitrator.** An arbitrator may, subject to proper safeguards, assist the parties in evaluating the merits of the dispute or of particular issues. An arbitrator who seeks to promote settlement may be asked by one or both parties to give a preliminary indication of the arbitrator’s present views on the issue, or may offer to do so on his or her own initiative. If so asked, or if the offer is accepted, the arbitrator may properly give a provisional indication as to:

- what in his or her view are the more important issues to be decided;
- which party appears to have the stronger case on any issue.

5.3 The key safeguards are:

- As a general principle an arbitrator should only give an evaluation of merits of the dispute, or an issue, where both parties expressly agree in writing.
- The arbitrator should ensure that both parties understand the provisional nature of the view expressed.

It is sensible for the arbitrator to state expressly that his or her mind remains open, and that he or she is ready and able to continue with the case (in the absence of settlement) but if parties or a party has concerns, then another arbitrator should be appointed to determine the case if the attempt at settlement fails.

## 6. Attempting mediation during the course of arbitral proceedings

6.1 How proactive should an arbitrator be in suggesting mediation? There will be cases where the arbitrator considers it appropriate to suggest that the parties attempt mediation.<sup>5</sup> There is no inhibition on suggesting mediation as a means of promoting agreement at any stage of arbitral proceedings. The Chartered Institute encourages arbitrators to be alert for circumstances in which an attempt at mediation might be of assistance to the parties. That includes the situation where the arbitrator considers there is potential to resolve specific issues with the aid of mediation. That may reduce the overall time and cost consumed by the arbitral proceedings.

6.2 Unless the parties' dispute resolution clause makes specific provision requiring an attempt at mediation, when suggesting mediation an arbitrator should bear in mind that mediation is a voluntary process. Unless the parties agree the contrary, a valid reference to arbitration entitles the parties to a determination of their dispute. An arbitrator should take care not to be seen to pressure one or both parties into mediation, or into specific arrangements or procedures for mediation. But that does not prevent an arbitrator from seeking to explain the nature and potential benefits of mediation to an initially skeptical party.

<sup>5</sup> See e.g. The International Chamber of Commerce (ICC) Arbitration Rules (2021), Appendix IV, paragraph (h)(i): "encouraging the parties to consider settlement of all or part of the dispute either by negotiation or through any form of amicable dispute resolution methods such as, for example, mediation under the ICC Mediation Rules"

**6.3 Assisting the parties in the choice of mediator.** It is entirely proper for an arbitrator, if asked, to recommend or suggest one or more names of potential mediators or assist with the list procedure of appointing the mediator, or to refer the parties to a reputable institution that conducts or arranges mediation. However, the arbitrator should always disclose any relationship with any suggested individual or institution.

6.4 An arbitrator may also agree to appoint a mediator if the parties so wish. In that event the arbitrator should consult the parties on the proposed choice of mediator, and once more should disclose any relationship with the proposed appointee.

**6.5 Procedural steps to facilitate mediation.** Where the parties agree to attempt mediation, the arbitrator should give procedural directions to facilitate the process, where possible in terms agreed between the parties. The usual form of order will be for a stay of the arbitral proceedings for a specified period, with provision for the proceedings to resume either automatically or by way of a specified step (such as a notice or request by one party). See below, sections 9 and 10, for alternative forms of subsequent procedure according to whether mediation does or does not result in overall settlement of the dispute.

6.6 The order may include provision about the costs of this part of the arbitral proceedings. It may be sensible to make express provision stipulating, for example, whether or not the costs of the mediation, in the event it does not result in settlement, are to form part of the recoverable party costs of the proceedings.

6.7 The arbitrator should also explore with the parties whether it would be desirable to make any procedural direction, or reach agreement, about other issues that might prejudice the prospect of a successful mediation if left unresolved. For example:

- In many jurisdictions, exchanges between the parties in unsuccessful attempts at settlement are protected by “without prejudice” privilege from disclosure in subsequent judicial or arbitral proceedings. If, however, that is in doubt – for example because such privilege is absent or limited under the law of the seat of arbitration, or there is reason to doubt its applicability – the parties may wish to make an agreement to similar effect as part of the agreed terms of the mediation. Where appropriate that may be recorded in a procedural order by the arbitrator.
- As noted above, in a mediation any communication between one party and the mediator is generally to remain confidential as against the other party unless otherwise agreed. The mediation agreement will usually make provision to that effect. It would undermine confidence in mediation if such information were to become

the subject to an obligation of disclosure to the other party in subsequent arbitral proceedings. It will rarely be necessary to make an order or direction to be made to that effect, but it may sometimes be helpful for the arbitrator to issue a reminder that a party will not be ordered to disclose, or give evidence about, the content of confidential communications with the mediator.

**6.8 Arbitral proceedings concurrent with mediation.** There are circumstances where some issues may be carved out from the arbitration and mediated separately while the remaining issues remain subject to the arbitration. This can be done where, during the course of the pre-hearing process in the arbitration, particularly after full evidentiary disclosure, parties find that certain issues have a high likelihood of settlement. Parties may agree to mediate discrete issues and should inform the arbitral tribunal as soon as they are identified. The arbitrator(s) may also identify issues that have a high likelihood of settlement through mediation and raise this to the parties in the case management conference.

6.9 The arbitration and mediation in these circumstances will be conducted by different individuals. This permits parties to continue to explore settlement options throughout the arbitration process, which could in turn save parties time and costs. It also allows for process decisions to be assisted by a mediator so that only issues which cannot be resolved through mediation are determined by the arbitral tribunal. This in turn might remove blockages to settlement.

6.10 The advantage to this process over Med-Arb-Med is that the mediator and the arbitrator(s) always retain their respective roles and there is no conflict of interest concern that arises as mediation confidentiality is maintained. The process requires party consent, but otherwise the mediator and arbitrator(s), while coordinating process matters, will maintain separate functions.

## **7. Confidentiality**

7.1 The arbitrator(s) and the mediator should not discuss confidential information obtained in the mediation, but may discuss procedural matters with each other. Within the mediation the mediator may identify issues that cannot be resolved through the mediation process for resolution through the arbitration proceedings, while those issues amenable to resolution at mediation may be settled through a settlement agreement. Those issues resolved in the mediation process can be made the subject of a consent award in the arbitration proceedings. ***[See below Section 9 on Arbitral proceedings where mediation results in settlement of the entire dispute, paragraphs 9.1-9.2.]***

## **8. In what circumstances should arbitration and mediation of a dispute be conducted by the same person?**

8.1 The extent to which it is appropriate for a person to accept appointment as both arbitrator and mediator in the same dispute is a matter of lively debate. That is because if the mediation does not result in complete settlement of the dispute, a person who has acted as mediator may face difficulties in meeting the duty to act fairly and impartially in subsequent arbitral proceedings where (a) one side has communicated relevant information privately to the mediator which has not been disclosed to the other side, or (b) the mediator has given an evaluative opinion on the merits. This problem may arise either in the “Med-Arb” scenario (where mediation precedes commencement of arbitration) or in “Arb-Med-Arb” scenario (where mediation takes place once arbitration is underway).

8.2 However, the parties may have good reasons for wanting the same person to act as arbitrator and mediator: by definition they trust the person with their dispute; they wish to avoid duplication of the cost of acquainting separate individuals with the details of the case; and they are confident enough that they will receive a fair hearing even if the arbitrator has also stepped into the mediator. Party autonomy is at the centre of arbitration. This principle should be given primary consideration should parties express a mutual wish to proceed in this way.

8.3 The extent to which the difficulties identified above compromise the role of the arbitrator to the point where the arbitral proceedings would be regarded as legally defective may vary between jurisdictions. In many common law jurisdictions, the functions of mediator are likely to be viewed as incompatible with those of arbitrator to the point where the arbitrator is unable to meet the requirements of the applicable arbitration law.<sup>6</sup> Some jurisdictions, including a number of civil law systems, may take a less prescriptive view. However, a practitioner should take account not just of the legal requirements at the seat of arbitration, but the likely attitude and legal traditions of the courts in other territories where the award may have to be enforced. The business culture of the parties themselves may favour confidence in the arbitrator/mediator to reach a fair and impartial decision. But even where the parties expressly seek to waive any objection arising from the arbitrator’s participation in the mediation, it cannot be assumed that all relevant jurisdictions would treat the waiver as effective, despite the principle of party autonomy.

<sup>6</sup> See e.g. in England, Wales and Northern Ireland s. 33 of the Arbitration Act 1996.

8.4 A number of jurisdictions have attempted legislative workarounds under which an arbitrator is entitled to act as mediator and resume the arbitration as arbitrator subject to certain conditions. For example, the New South Wales and Victoria Arbitration Acts, the Singapore International Arbitration Act and the Hong Kong Arbitration Ordinance variously make provision to the effect that:

- That practice is only permissible where the arbitration agreement expressly provides for it.
- No objection may be taken to the conduct of arbitral proceedings solely on the ground that the arbitrator has acted as mediator in accordance with the legislation.
- The arbitrator, acting as mediator, must keep confidential any information communicated to him or her by a party.
- But if the arbitration resumes following the mediation, the arbitrator must disclose any such information to the other party.<sup>7</sup>
- The difficulty with the latter provision is that the prospect of disclosure of information imparted privately during the mediation phase, in the event mediation fails, may well deter a party from agreeing to mediation in the first place.

8.5 The difficulty with the latter provision is that the prospect of disclosure of information imparted privately during the mediation phase, in the event mediation fails, may well deter a party from agreeing to mediation in the first place.

8.6 Because of those legal and practical obstacles, Ciarb advises its members to approach this issue with caution and awareness of the possible issues arising from acting as both mediator and arbitrator. In the event a practitioner, following the wishes expressed by the parties, decides to accept such dual appointment, and where the law governing the arbitration contains no express provision on the subject, the steps that should be taken to mitigate (so far as possible) the risks to the enforceability of an award following any subsequent contested proceedings may include some or all of the following:

- Neutrals should not proceed to act as both mediator and arbitrator in the same dispute without the consent of all parties to the dispute.

<sup>7</sup> Note that certain of these provisions use the term "conciliator" rather than "mediator", but for the purposes of this guideline the terms should be treated as interchangeable: see paragraph 2.3 above.

- Should all parties agree that they wish the arbitrator to act as mediator in the same dispute, the arbitrator should take steps to acquaint him- or herself with the likely attitude of the law at the seat of arbitration and in the likely jurisdictions where enforcement will be sought towards an award rendered by an arbitrator who has acted as mediator.
- Before accepting appointment as mediator, the arbitrator should explain the risks to the parties and preferably obtain their written acknowledgement that they have understood that explanation (and where applicable obtained advice on the position from their legal representatives).
- Before the mediation starts, the parties should reach clear agreement on whether the arbitrator is permitted to take part in “caucusing” with the parties; and if so the position regarding subsequent disclosure, in the event the arbitration resumes, of information communicated by a party in the absence of the other. Any agreement that such information should not be disclosed is tantamount to a waiver and should be expressed in writing in unambiguous terms prior to the commencement of mediation.
- The parties should also reach agreement at that stage on extent of any evaluative role of the arbitrator, and whether any opinion on the merits may be expressed to the parties individually as well as jointly.
- The parties should agree not to object to any arbitration award solely on the ground that the arbitrator has before rendering the award also acted as mediator in accordance with the terms agreed by the parties. This waiver should be clearly and unambiguously expressed in writing prior to the commencement of mediation.
- If the mediation fails and the arbitration resumes, the parties should be invited expressly to renew their agreement to the arbitrator continuing to act in writing ***[see also below, paragraph 10.4].***

## **9. Arbitral proceedings where mediation results in settlement of the entire dispute**

9.1 The parties have the choice of either leaving their settlement as a contract, enforceable in the usual way, or to incorporate its terms into a consent award.

9.2 The award will incorporate or append the agreement. The arbitrator should satisfy themselves that the terms are sufficiently certain and drafted effectively. Ensure any requirements of the applicable procedural rules are observed.

9.3 In a Med-Arb setting, note the difficulty that if there is no “dispute” at the time arbitration commences, that may fuel a challenge to an award even if made by consent. As noted above, however **[See above Section 6 on Attempting mediation during the course of arbitral proceedings, paragraph 6.8]**, it may in some circumstances be possible to run mediation and arbitration proceedings concurrently.

9.4 The United Nations Convention on International Settlement Agreements Resulting from Mediation, which became effective on the 12th September 2020, is a means of enforcing international settlement agreements resulting from mediation in signatory States. Courts in the relevant jurisdiction of enforcement will recognise and enforce cross-border mediated settlements, without the need for further litigation. In circumstances where the place of mediation is a signatory to the Convention and the parties desire that the Singapore Convention apply, it is good practice to expressly note in the Settlement Agreement that it is the intent of the parties that the Singapore Convention on Mediation apply to its provisions.

## **10. Completion of arbitral proceedings where mediation does not result in settlement of the entire dispute**

10.1 Where there has been some progress but no overall resolution at the mediation, the Ciarb advises that the following steps should be given consideration:

- The parties may, together with the mediator, agree and record those issues which have been narrowed or resolved, and determine how agreed matters are to be dealt with;
- It is preferable for a settlement agreement to be entered into respecting those agreed issues which can then be entered as a consent award if the parties wish **[see above paragraphs 9.1-9.2]**;
- The parties may, together with the mediator, identify current barriers to settlement and review potential steps to overcome them, perhaps using another ADR mechanism such as a non-binding Neutral Evaluation, which may lead to the impasse being re-examined in a return to mediation or within the arbitral process itself.

10.2 Where offers have been made during the mediation, parties can consider leaving these on the table during the arbitral proceedings and return to them during the arbitration following further reflection on their respective positions and the merits of their cases.

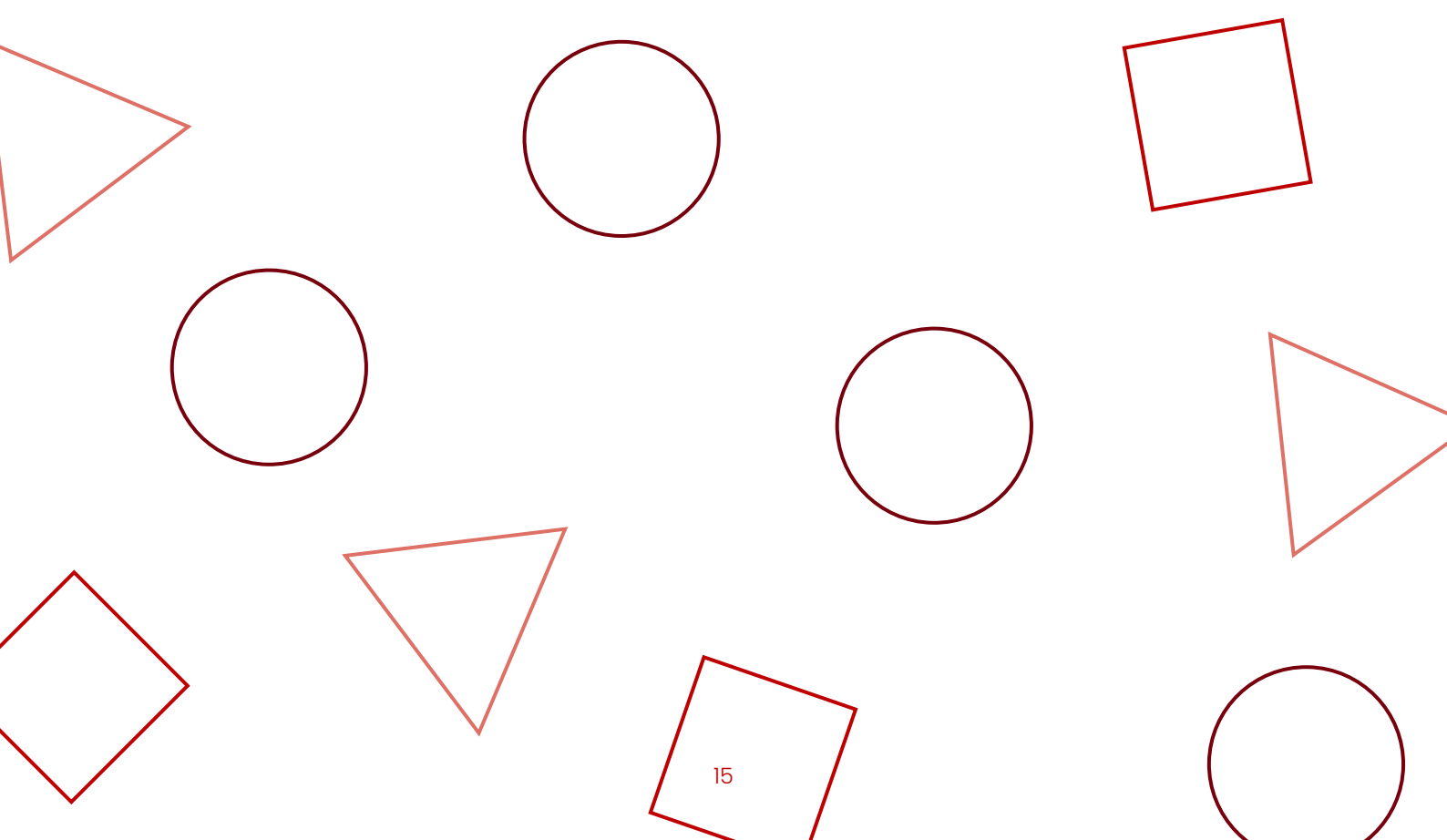


10.3 The arbitration will resume on terms agreed by the parties or directed by the arbitrator when the proceedings were originally stayed or paused for mediation **[see above, paragraph 6.5]**.

10.4 Where the arbitrator has acted as mediator, as noted above he or she should seek the parties' express agreement in writing to the arbitration continuing with the same person now acting as arbitrator. This step should be taken even if there was an earlier written agreement by the parties for the arbitrator to act as mediator.

## **11. Post-award mediation**

11.1 Mediation can also be effective after an award has been rendered to assist with enforcement issues or other areas of disagreement. The mediator should review the award with the parties and seek agreement on what provisions need to be explored. There may be matters with respect to payment provisions, timing and potentially variations in amounts that may lend themselves well to mediation. Creating an agreed list of these matters at a pre-mediation conference or meeting may provide a framework for the mediation. This is also an opportunity to revisit relationships and determine whether the award might be settled by being performed in a manner differing from that contemplated in the award. A mediated settlement after award can provide a basis for voluntary payment without the need for enforcement steps, given that a party has voluntarily agreed to it.



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