



Practice Guideline 7: Guidelines for Arbitrators on the use of ADR procedures

1. Introduction

1.1 It is increasingly accepted internationally, that it is not incompatible with the function of an arbitrator for him or her to raise with the parties the possible use of ADR techniques.

1.2 The expression ADR is taken to include private mediation and conciliation, whether facilitative or evaluative. Though some would say that arbitration itself is included within the concept of ADR techniques, the Guideline proceeds on the alternative, more traditional, assumption that arbitration is a separate method of dispute resolution governed by its own rules and procedures which have been laid down or recognised by specific legislation in force in different countries.

1.3 Despite much academic discussion on the subject, there is little practical guidance for arbitrators. This Guideline, therefore, seeks to set out the circumstances in which an arbitrator can, with advantage, make use of ADR techniques, and the manner in which he should do so.

2. Basic Requirements of Arbitration

2.1 So long as the arbitrator acts or intends to act as arbitrator, there must be compliance with certain basic principles. Article 18 of the Model Law says:

“The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.”

2.2 While, under the doctrine of party autonomy, the parties generally have the right to agree on procedural and evidential matters, this does not extend to diminishing or undermining the basic duty of an arbitrator under Article 18.

2.3 Both the UNCITRAL Model Law and Rules are silent on the subject of mediation and other forms of ADR. Appendix IV of the new ICC Rules does have some material in this area. It encourages arbitrators to identify issues that can be resolved by agreement between the

parties or their experts (paragraph (b)) and to inform the parties that they are free to settle 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 ADR Rules (paragraph (h)(i)). It also adds cautiously (at paragraph (h)(ii):

“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.”

2.4 In Hong Kong, Singapore and Australia, countries with statutes heavily based on the Model Law, the position is different enabling the parties consent to mediation followed by arbitration conducted by the same individual. Section 32(3) of the 2010 Hong Kong Arbitration Ordinance says:

“(3) If any arbitration agreement provides for the appointment of a mediator and further provides that the person so appointed is to act as an arbitrator in the event that no settlement acceptable to the parties can be reached in the mediation proceedings—(a) no objection may be made against the person’s acting as an arbitrator, or against the person’s conduct of the arbitral proceedings, solely on the ground that the person had acted previously as a mediator in connection with some or all of the matters relating to the dispute submitted to arbitration”.

2.5 Section 33(1) of the Hong Kong Ordinance allows the parties to agree in writing for an arbitrator to act as a mediator after the arbitration has commenced although this will come to an end if any party withdraws his or consent. Where an arbitrator switches to being a mediator, the arbitration is stayed: subsection (2).

2.6 Under sub-section (3), an arbitrator who is acting as a mediator can hold meetings with the parties separately and must keep information gained confidential subject to the parties’ agreement and the possible failure of the mediation. In the latter event, sub-section (4) requires the arbitrator to disclose “to all other parties as much of that information as the arbitrator considers is material to the arbitral proceedings”.

2.7 Singapore takes a similar approach. Section 17 of its Singapore International Arbitration Act, mirroring section 62(3) of the Arbitration Act 2001 for domestic cases, says

“(1) If all parties to any arbitral proceedings consent in writing and for so long as no party has withdrawn his consent in writing, an arbitrator or umpire may act as a conciliator.

(2) An arbitrator or umpire acting as conciliator —

(a) may communicate with the parties to the arbitral proceedings collectively or separately; and

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

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

(4) No objection shall be taken to the conduct of arbitral proceedings by a person solely on the ground that that person had acted previously as a conciliator in accordance with this section.”

2.8 Section 27D of the New South Wales Commercial Arbitration Act 2010 and the identically worded and numbered Victoria Commercial Arbitration Act 2011 prefer the Hong Kong and Singapore approach saying:

“(1) An arbitrator may act as a mediator in proceedings relating to a dispute between the parties to an arbitration agreement (mediation proceedings) if:

(a) the arbitration agreement provides for the arbitrator to act as mediator in mediation proceedings (whether before or after proceeding to arbitration, and whether or not continuing with the arbitration), or

(b) each party has consented in writing to the arbitrator so acting.

(2) An arbitrator acting as a mediator:

(a) may communicate with the parties collectively or separately, and

(b) must treat information obtained by the arbitrator from a party with whom he or she communicates separately as confidential, unless that party otherwise agrees or unless the provisions of the arbitration agreement relating to mediation proceedings otherwise provide.

(3) Mediation proceedings in relation to a dispute terminate if:

(a) the parties to the dispute agree to terminate the proceedings, or

(b) any party to the dispute withdraws consent to the arbitrator acting as mediator in the proceedings, or

(c) the arbitrator terminates the proceedings.

(4) An arbitrator who has acted as mediator in mediation proceedings that are terminated may not conduct subsequent arbitration proceedings in relation to the dispute without the written consent of all the parties to the arbitration given on or after the termination of the mediation proceedings.

(5) If the parties consent under subsection (4), no objection may be taken to the conduct of subsequent arbitration proceedings by the arbitrator solely on the ground that he or she has acted previously as a mediator in accordance with this section.

(6) If the parties do not consent under subsection (4), the arbitrator's mandate is taken to have been terminated under section 14 and a substitute arbitrator is to be appointed in accordance with section 15.

(7) If confidential information is obtained from a party during mediation proceedings as referred to in subsection (2) (b) and the mediation proceedings terminate, the arbitrator must, before conducting subsequent arbitration proceedings in relation to the dispute, disclose to all other parties to the arbitration proceedings so much of the information as the arbitrator considers material to the arbitration proceedings.

(8) In this section, a reference to a mediator includes a reference to a conciliator or other non-arbitral intermediary between parties."

2.9 There is a marginal difference between Hong Kong and Singapore approach and that found in the New South Wales and Victoria legislation in that in the latter instance, the arbitrator who has previously unsuccessfully mediated the dispute cannot under sub-section

(4) continue to arbitrate without the parties' active consent. Under the Hong Kong and Singapore legislation, a party can stop the mediator arbitrator by withdrawing its consent in writing. This may have an impact if a party ceases to participate in a case after a failed mediation.

2.10 Section 23D(4) of the Australian International Arbitration Act deals with the problem from a different angle. Recognising the concern that information collected by the mediator arbitrator during a private session could compromise the fairness of the process, this section allows the arbitrator to disclose information to the extent necessary to ensure a fair procedure. The section does not directly address the question of whether it is acceptable for an arbitrator to have previously acted as a mediator.

2.11 Overall, arbitrators and mediators must be careful to ensure that they do not by mediating before arbitrating offend provisions of the law of the seat by following a prohibited procedure generally or where such a process is permitted, not complying with the detailed requirements. However, the examples in Singapore, Hong Kong and Australia show a trend in the Asia-Pacific countries that have adopted the Model Law to adapt it to facilitate arbitrators acting as mediators even if under reasonably strict party control.

3. Facilitative Mediation/Conciliation

3.1 The essence of these processes is that the mediator or conciliator endeavours to promote an agreed settlement of the dispute or of issues within the dispute. No particular difficulty arises where an arbitrator attempts to promote an agreed settlement without meeting with one party in the absence of the other and without receiving information from one party which is not also given to the other. For example, it is very common for arbitrators to direct the parties to seek to agree "figures as figures" or to give specific directions for experts to meet and to report upon matters of agreement and disagreement.

3.2 Nor is there any theoretical difficulty in the arbitrator holding what may be called a "settlement conference" at which all parties are present. The conference can be directed towards enabling the parties to settle particular issues or even the whole dispute. Timing however is all important. Such a conference may achieve little unless the parties are themselves moving towards an agreement when the intervention of the arbitrator can sometimes help to bridge any gap.

3.3 In any such discussions the arbitrator may use ADR techniques to promote agreement. These may include appealing to the interests of one or both parties in reaching non-adversarial outcome to the dispute, in avoiding the further expenditure of time and costs, and in preserving what remains of the commercial relationship. It can help if the principals involved in the dispute (and not merely their representatives) are present at the conference.

3.4 None of this need involve "caucusing" procedures or receiving information from one party which is unknown to the other. Nothing that has so far been said involves the arbitrator in departing from the "basic requirements of arbitration" referred to above.

3.5 Arbitrators can and frequently do use techniques which may fall short of being alternative dispute resolution but which are definitely designed to facilitate settlement. There is considerable tradition, in which London maritime arbitration has played a considerable role, of encouraging the parties to have their refreshments together while not discussing the case. Doing things like this that breakdown the atmosphere of confrontation without in any way interfering with the arbitral process is something that arbitrators have long done to encourage settlement or at least the continuation of trading relationships between parties.

4. Evaluative Mediation/Conciliation

4.1 An arbitrator can also, subject to proper safeguards, assist the parties in evaluating the merits of the dispute. An arbitrator who attempts to promote settlement may be called upon by one side or the other to give a preliminary indication as to his present views on the issues. In response, an arbitrator may give an indication as to what in his view are the more important issues to be decided and as to which party appears to have the stronger case on any issue. An arbitrator may properly take the initiative in doing this but should take care not to give the impression of an eagerness to pre-judge the dispute.

4.2 As a general principle an arbitrator should only give an evaluation of the merits of any issue or dispute where (i) the parties agree to his doing so and (ii) the status of the "view" is clearly understood. The arbitrator should usually state that, on the issues in question, his mind remains open. If a view is given, it should be on the basis that the arbitrator is ready and able to continue with the case, in the absence of settlement.

4.3 The arbitrator may give a view at any stage of the case. It is not necessary to wait until both sides have presented their cases. For example, an arbitrator may serve the interests of the parties by indicating, at the end of the claimant's formal case, that some aspects of it do not at that stage seem persuasive. The arbitrator must bear in mind that the parties will not then have had an opportunity of putting their cases, but it is not objectionable to comment on the case which has been put. In general, an arbitrator should seek to avoid the extremes of on the one hand, sitting passively throughout a hearing without displaying any reaction and, on the other, of appearing to have made up his mind against one of the parties prematurely.

5. "Caucusing" Procedures

5.1 The inherent difficulty in an arbitrator making use of ADR techniques arises principally because mediation and conciliation usually involve the mediator or conciliator communicating separately with the parties. This may involve receiving information from one party which is not to be communicated to the other. Whether the process is "facilitative" or "evaluative", such caucusing procedures are seen as an essential tool of successful mediation and conciliation. Under the Model Law but with the exception of Hong Kong, Singapore and Australia, "caucusing" does not generally appear to be available to an arbitrator who wishes to make use of ADR techniques to facilitate a settlement. There are two reasons for this; one practical, the other deriving from the mandatory nature of an arbitrator's duties.

5.2 From a practical viewpoint, in order to preserve the status of arbitrator, there would have to be an agreement by the parties that, if the mediation fails, all information imparted to the arbitrator by any party material to the arbitration would have to be disclosed to the other party. In the light of this requirement parties may be less forthcoming in the mediation process. The parties may also be concerned that the arbitrator might be influenced by what he has learned of the positions taken by the parties in the negotiations.

5.3 The legal objection to an arbitrator taking part in "caucusing" procedures arises from the mandatory duties of an arbitrator under Article 18 of the Model Law discussed above. While the arbitration statutes in force in some jurisdictions (e.g. Hong Kong, Singapore and Australia) allow arbitrators to communicate separately with parties in aid of mediation, English arbitration law contains no comparable provision. The difficult issue is as to whether

hearing one sides' view in the absence of the other and without handing over any information collected during caucusing prevents each party from having a reasonable opportunity to put his case and deal with that of his opponent. If this is the case, 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.

6. Appointing an Independent Facilitator

6.1 One way in which an arbitrator can safely make use of ADR techniques is to appoint, with agreement of the parties, an independent neutral to act as mediator or conciliator and to adjust the procedural time-table to allow the mediation process to take place. Since the arbitrator does not take part in the mediation process his independence is in no way compromised and he remains available to act as arbitrator to the extent the mediation fails to produce an agreed settlement. The role of mediator can also, if the parties so agree, be undertaken by a tribunal-appointed expert or single joint expert appointed by the parties.

6.2 There is no need for the arbitrator to appoint a mediator (he or she may not have the necessary resources or knowledge of suitably qualified individuals) and this can anyway only be done with the parties' consent. An arbitrator could suggest to the parties that they appoint their own mediator. In Hong Kong, the parties can also ask the court or the Hong Kong International Arbitration Centre to make such an appointment.

6.3 In any event, if the resulting mediation is successful the arbitrator may, if the parties so request, record the settlement in the form of an agreed award (Article 30 of the Model Law). The Tribunal should decline to do this if it suspects that the settlement is being used to assist in the transmission of the proceeds of crime.

6.4 If the mediation is unsuccessful a problem may arise as to whether the costs of the parties in pursuing ADR procedures, together with the charges of the mediator, can be included in the recoverable costs of the arbitration. Rather than allow this problem to remain unsolved it is generally preferable to encourage the parties to agree when appointing the mediator that, if the mediation should fail, the costs incurred in connection with it will form the part of the recoverable costs of the arbitration. This would help to clarify the position under Article 41 of the UNCITRAL Rules and the Model Law which is silent in this specific area.

7. The Arbitrator/Mediator in practice

7.1 For the reasons explained above, the safest technique for the arbitrator is normally to encourage the parties to mediate outside the arbitration before an agreed mediator, rather than for the arbitrator to engage in caucusing procedures or to receive confidential information from one party which is not communicated to the other.

7.2 There are however some situations where an experienced arbitrator may exceptionally consider that the potential benefit of engaging in caucusing procedures outweighs the risk. It is then important that the arbitrator should proceed in an agreed and transparent manner, preferably arranging for the intended steps and procedures to be agreed between the parties and recorded in writing. Where the mediation is successful, no problem of course arises. This risk will only materialise if the mediation is unsuccessful, the arbitrator then resumes the arbitration and makes an award and one or other party then challenges the award on the ground in Article 34(2)(ii) that he was unable to present his case or a grave procedural irregularity such as to contravene public policy. Since this risk cannot be wholly discounted, it has to be emphasised that for an arbitrator to engage in caucusing techniques requires considerable experience and does involve some degree of risk.

7.3 In view of the potential risk, it is strongly recommended that the parties adopt a written agreement which sets out what will occur if the mediation should fail. The agreement may embody terms for:

(1) the parties expressly to waive any right of challenge to the award based on the use by the arbitrator of ADR procedures, or

(2) the arbitrator not to proceed to act as arbitrator after failure of mediation or conciliation without a fresh agreement of the parties and the arbitrator.

However, when acting as an arbitrator in Hong Kong, Singapore or New South Wales and if carrying out the form of med-arb role contemplated by the Ordinance, great care should be taken to observe precisely the provisions of the relevant statutes.

The guidelines are inevitably something of a permanent work in progress. We would welcome it if you could send any suggestions for updating, improvements and corrections to nmcnamee@ciarb.org. Thank you in advance.

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