

**ARBITRATOR'S DILEMMA:  
TROUBLES WITH THE SAME PERSON AS BOTH MEDIATOR AND ARBITRATOR IN  
INDONESIA?**

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**Abstract**

*A form of alternative dispute resolution that combines mediation and arbitration is not new. In such "med-arb" situations - many sees the cost and efficiency advantage of having to only appoint one person who can serve as both mediator and arbitrator. This format would mean that there is no need for the neutral to re-learn the facts of the case – for one. However, this format does not come with no cost. The procedural concerns arising out of such situations ranges – from confidentiality concerns, impartiality concerns and validity and enforceability concerns. This paper aims to see how Asian jurisdictions respond to this issue – and determine if the arbitrator's dilemma is something that parties should be concerned about when dealing with disputes in Asia.*

**Intisari**

*Dalam penyelesaian sengketa alternatif yang menggabungkan mediasi dan arbitrase bukanlah hal yang baru. Dalam situasi "med-arb", banyak yang melihat keuntungan dalam bentuk biaya dan efisiensi dari prosedur yang hanya menunjuk satu orang yang bertindak sebagai mediator dan arbitrator. Misalnya format ini berarti tidak perlu bagi pihak ketiga yang netral untuk mempelajari kembali fakta-fakta dari kasus yang sudah ditanganinya. Namun, peran ganda ada risikonya. Kekhawatiran prosedural yang timbul dari situasi seperti itu berkisar, dari masalah kerahasiaan, masalah ketidakberpihakan dan masalah keabsahan dan penegakan. Makalah ini bertujuan untuk melihat bagaimana Indonesia menanggapi terhadap masalah ini - dan menentukan apakah dilema arbiter adalah sesuatu yang harus dikhawatirkan oleh para pihak ketika menangani perselisihan di Indonesia.*

**Keyword:** *Arbitration, Mediation, Med-Arb, Arbitrator's Dilemma, Impartiality, Confidentiality*  
**Kata Kunci:** *Mediasi, Med-Arb, Dilemma Arbiter, Ketidakberpihakan, Kerahasiaan*

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## A. Introduction

In business relations no one method of dispute resolution can be said to be the best solution for each and every type of dispute. Dispute mechanisms should ideally be tailored to meet the needs and interests of the parties whilst also ensuring a final and binding resolution of the dispute.<sup>1</sup> A fine example of this flexibility in application is the case of *IBM-Fujitsu*, whereby the whole plethora of alternative dispute resolution techniques were employed from structured negotiations, mini-trial, mediation, until final-offer arbitration to have a final decision which could accommodate the technicalities of the dispute.<sup>2</sup> This landmark copyright case is often pitched as the “granddaddy” of Silicon Valley dispute epics, and was the largest commercial arbitration ever conducted in the 1990s.<sup>3</sup> One of the interesting quirks of the *IBM-Fujitsu* example is the fact that the Panel formed by the American Arbitration Association has acted as both arbitrators and mediators in the process of resolving the dispute, a role that requires a high level of skill and more importantly utmost confidence in the neutral from the parties involved – a role which have come to be subject to both praise and criticism over the coming years.<sup>4</sup>

On this note, parties who have selected to have mediation and arbitration as their dispute resolution mechanism may choose between making them distinct processes, or combining both processes into what is called med-arb.<sup>5</sup> There is also the more positively viewed “facilitation settlement” within arbitral proceedings where arbitrators may take the role of a “mediator” to facilitate settlement and end the dispute<sup>6</sup> - a function which is often seen as a useful tool to resolve disputes efficiently. A distinct mediation arbitration process is more commonplace in practice, whereby the parties may call upon arbitration only where mediation has been unsuccessful after a fixed number of days. This structure is commonly described in a lot of template arbitration clauses. An example would be the template ICC Multi-Tier Arbitration Clause:

*“ICC Arbitration may be used as the forum for final determination of a dispute following an attempt at settlement by other means such as mediation. Parties wishing to include in their contracts a tiered dispute resolution clause combining ICC Arbitration with ICC Mediation should refer to the standard clauses relating to the ICC Mediation Rules.*

*Other combinations of services are also possible. For instance, arbitration may be used as a fallback to expertise or dispute boards. Also, parties who resort to ICC Arbitration may*

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<sup>1</sup> Böhning-Uhle, C., Kirchoff, L., & Scherer, G. (2006). *Arbitration and mediation in international business*. Kluwer Law International BV., p. 247

<sup>2</sup> Mnookin, R. H., & Greenberg, J. D. (1997). *Lessons of the IBM-Fujitsu Arbitration: Now Disputants Can Work Together to Solve Deeper Conflicts*. *Disp. Resol. Mag.*, 4, p. 16; Johnston, R. L. (1990). *The IBM-Fujitsu arbitration revisited--A case study in effective ADR*. *COMP. LAWYER.*, 7(5), p. 13-17.

<sup>3</sup> Mnookin, R. H., & Greenberg, J. D. (1997). *Lessons of the IBM-Fujitsu Arbitration: Now Disputants Can Work Together to Solve Deeper Conflicts*. *Disp. Resol. Mag.*, 4, p. 16;

<sup>4</sup> See. Deason, E. E. (2013). *Combinations of mediation and arbitration with the same neutral: A framework for judicial review*. *Arbitration Law Review*, 5(1), p. 219-249.; Oghigian, H. (2003). *The mediation/arbitration hybrid*. *Journal of International Arbitration*, 20(1), p. 75-80.; Talbot, P. (2001). *Should an Arbitrator or Adjudicator Act as a Mediator in the Same Dispute?*. *Arbitration: the Journal of the Chartered Institute of Arbitrators*, 67(3), 221-229.

<sup>5</sup> Nigmatullina, D. (2019). *Aligning Dispute Resolution Processes with Global Demands for Change: Enhancing the Use of Mediation and Arbitration in Combination*. *b-Arbitra | Belgian Review of Arbitration*, 2019(1), 7-51.

<sup>6</sup> Raeschke-Kessler, H. (2005). *The arbitrator as settlement facilitator*. *Arbitration International*, 21(4), 523-536.

*wish to provide for recourse to the ICC International Centre for ADR for the proposal of an expert if an expert opinion is required in the course of the arbitration.”<sup>7</sup>*

A combined process is what this paper is attempting to dissect at. In terms, a combined arbitration mediation proceeding is called “med-arb”, it is a single process where the arbitrator becomes the mediator if mediation does not work. This concept of one neutral taking his “mediator cap” off to switch it for an “arbitration cap” is one that is met with heavy criticism by both practitioners and scholars alike. For the purposes of the article, whenever we refer to “med-arb” we are referring to this dual-role process where the same neutral undertakes both roles as mediator and arbitrator. To understand how the process works, and noting that this paper aims to clarify the practice in Asian countries with a comparative view to the Western viewpoint, we would like to firstly analyze the fundamental principles which make up mediation and arbitration individually. Second, we will take a look into the application of this model in the landmark hybrid IBM-Fujitsu arbitration and will also analyze subsequent awards or practices of med-arb. Third, we will address the commonly brought up concerns regarding confidentiality and impartiality concerns when a mediator switches to become an arbitrator, and how the Asian practice views these concerns.

This ability to vary its forms and be flexible is one of the perks that draws parties to select alternative dispute resolution (“ADR”) instead of pursuing judicial proceedings.<sup>8</sup> Other benefits of ADR is its neutrality, high speed and low cost (even though in some jurisdictions low cost and speed can no longer be used to argue in favor of arbitration as court proceedings continue to also modernize and can be faster and cheaper than arbitration) – and ultimately its neutrality and enforceability.<sup>9</sup> To understand the possible problems that may arise out of a combination proceeding, we will first have to look into the respective advantages of mediation and arbitration.

#### a. **Benefits & Goals of Mediation**

Mediation is in current times gaining popularity, diplomat Amb Chowdhury emphasized four reasons for the prominence of mediation in Asia:

- a. First, mediation is less costly;
- b. Second, mediation is seen as more confidential;
- c. Third, parties has the opportunity to communicate with the mediator privately;<sup>10</sup> and

<sup>7</sup> Arbitration Clause - ICC - International Chamber of Commerce. (n.d.). Retrieved from <https://iccwbo.org/dispute-resolution-services/arbitration/arbitration-clause/>

<sup>8</sup> Blankley, K. M. (2011). *Keeping a Secret from Yourself-Confidentiality When the Same Neutral Serves Both as Mediator and as Arbitrator in the Same Case*. *Baylor L. Rev.*, 63, 317., p. 326; Brewer, T. J., & Mills, L. R. (1999). *Combining mediation & arbitration*. *Dispute Resolution Journal*, 54(4), 32., p. 34; Phillips, Phillips, G. F. (2005). *Same-neutral med-arb: What does the future hold?*. *Message from the Chair*, 75.

<sup>9</sup> Gerbay, R. (2014). *Is the End Nigh Again? An Empirical Assessment of the 'Judicialization' of International Arbitration*. *American Journal of International Arbitration*, 25(2), p. 246–247 Greenwood, L. (2011). *A window of opportunity? Building a short period of time into arbitral rules in order for parties to explore settlement*. *Arbitration International*, 27(2), 199-210., p. 204-204; Drahozal, C. R., & Ware, S. J. (2010). *Why do businesses use (or not use) arbitration clauses*. *Ohio St. J. on Disp. Resol.*, 25, 433., p. 451-452.

<sup>10</sup> Caucuses are a feature of mediation which enables the parties to communicate privately with the mediator without the presence of the other party, while this does indeed benefit in the format of a pure mediation as the parties can be more open and honest with the mediator – allowing the mediator to create a solution which may be more suited for their specific situation. However, this paper will also later on discuss the dangers of caucuses in a med-arb format due to the arising confidentiality and impartiality concerns once the dispute enters the arbitration phase.

- d. Fourth, a court's caseload means that a longer time would be taken to resolve disputes through court.

Furthermore, it must be noted that the main point is that mediation is efficient and saves time, as it can be done and dusted within a few days. The author herself has attended mediations where it took a mere week to settle an issue which could potentially take up months if submitted through litigation or arbitration. However, more importantly even, mediation settlements are a result of the parties' own solutions to their own problems – they essentially structure their own mediation settlement based on party autonomy.<sup>11</sup>

This is highly beneficial because of two main reasons:

- a. Firstly, it results in lower chances for the mediation settlement to be challenged by the parties. Even if there is still grounds for challenge if the mediation have not been done properly, the what is important is that instead of having a third party enforce what they think is the correct solution between the two parties as in arbitration or court, the parties can decide for themselves what the right solution is. In mediation the third party mediator exists solely to facilitate the parties creation of their own solution, thus the final arbitration settlement is a product of the parties' own formulation – based on their own consensus and agreement.<sup>12</sup> Effectively, mediation outcomes does not rely on existing legal principles, rather on the private consideration of the parties.<sup>13</sup>
- b. Secondly, the parties having resolved their issues on their own are more likely to be able to continue their business relationship, whereas in arbitration or litigation their contradictive positions may mean that their work relationship is completely over and they may never work together again.<sup>14</sup>

However, one of the disadvantages of mediation is that mediation settlement agreements do not have the same force as an arbitral award, and are treated as mere contracts which have no direct enforcement mechanism. Prior to the Singapore Convention,<sup>15</sup> parties who had a preference for mediation would find themselves in a conundrum – “[it is questionable if] parties who successfully mediate a dispute would want to suggest a risk of future noncompliance by seeking to have a settlement converted into an award while the disputing parties are still on good terms”.<sup>16</sup> It seems unfair that parties who have preference for mediation would need to seek other modes of dispute resolution to achieve legal protection on

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<sup>11</sup> Anderson, Dorcas Quek. "Litigating Over Mediation-How Should the Courts Enforce Mediated Settlement Agreements." *Sing. J. Legal Stud.* (2015): 105., p. 107-8 ["Anderson"]

<sup>12</sup> Anderson, p. 107

<sup>13</sup> Lee Min Jai v. Chua Cheo Koon [2005] 1 SLR(R) 548(HC), para. 5

<sup>14</sup> Gaillard, E./Savage, J. (eds.), *International Commercial Arbitration*, Kluwer Law: The Hague (1999), p. 13 et seq., para. 17

<sup>15</sup> The Singapore Convention on Mediation, formally the United Nations Convention on International Settlement Agreements Resulting from Mediation which was adopted on 20 December 2018 and opened for signature on 7 August 2019, is an international agreement regarding the recognition of mediated settlements.

<sup>16</sup> Schnabel, Timothy. "The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements." *Pepp. Disp. Resol. LJ19* (2019): 1., p.10

the outcome of their dispute. The Singapore Convention eliminates these risks and allows mediation settlement agreements to be treated with equal force as an arbitral award.<sup>17</sup>

**b. Benefits & Goals of Arbitration**

On the other hand, international arbitration is “*simply another form of litigation which is more suited to the needs of international commerce and avoids the pitfalls of litigation in national courts*”.<sup>18</sup> The advantages of international arbitration over court adjudication are somewhat different compared to those in domestic commercial arbitration. The main advantages are as follows:

- a. The parties’ ability to chose a neutral forum;
- b. Ease in enforcement of the awards abroad;
- c. Confidential procedure;
- d. Expertise of the arbitrators;
- e. Finality of the decision; and
- f. Limited discovery.<sup>19</sup>

Conclusively, in both mediation and arbitration, the neutral acts in a private & confidential forum – all within the framework of consent by the parties involved. An excerpt from the German Kluwer-published journal titled “*May a Neutral Third Person Serve as an Arbitrator and Mediator*” very concisely describes both roles:

*“In detail, an arbitrator is a neutral third person, appointed by the parties, whose obligation is to judicially resolve the dispute and to make a final and binding decision. His main task is, therefore, to render an award. Apart from deciding the dispute, he also has the competence to promote and encourage the parties to reach a voluntary settlement of the dispute. The parties may also choose to then put this agreement in the form of an award.*

*A mediator, on the other hand, is a neutral third person, appointed by the parties, who assists the parties to negotiate a settlement. He does so by discussing the dispute separately (caucuses) or in joint sessions with the parties, drawing attention to the strengths and weaknesses of each case, thereby attempting to get the process of negotiating going . Ultimately, however, it is only the parties that decide whether they want to reach an amicable settlement or not . The mediator only helps the parties to find their own solution ; he himself has no competence at all to decide the dispute.*

*As a conclusion, an arbitrator and a mediator have very different core-competences : Although an arbitrator has also competences that belong to the mediator’s spectrum of tools, the substantial difference is that an arbitrator has the competence to make a binding decision, as opposed to the competence of a mediator to help the parties*

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<sup>17</sup> See. intervention of France, UNCITRAL Audio Recordings: U.N. Comm’n on Int’l Trade Law, 47th Session, July 9, 2014, <https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/4f35457d-6900-4492-9266-d503bad10f7c>.

<sup>18</sup> De Vera, C. (2004). *Arbitrating Harmony: Med-Arb and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China*. *Colum. J. Asian L.*, 18, 149.

<sup>19</sup> Peter, J. T. (1997). Med-arb in international arbitration. *Am. Rev. Int’l Arb.*, 8, 83-86.

*negotiate an amicable settlement and forge a deal. This distinction should be kept in mind when determining at what point the neutral third person changes his role, and whether this is legitimate.”*<sup>20</sup>

The issues raised in this paper highlights how the combined roles of mediator and arbitrator may cause problems – with a specific focus on an Asian perspective towards the arbitrator's dilemma.

**c. Advantages of Med-Arb with the Same Neutral**

Having a combination process ensures flexibility, fulfillment of interest as well as finality and enforceability. In a combination or a multi-tier setting, the interests of the parties may be accommodated during the mediation session and in case of anything there will always be the option to arbitrate – which is considered to be a more “enforceable” final award as mediation agreements in some jurisdictions are only recognized as contracts and not as a binding decision. This structure is often organized in dispute resolution clauses, but can also be organized by consensus or subsequent agreement between the parties after the conclusion of their contract.

More important is the element of flexibility, as in an ideal med-arb process, both processes ought to contribute to each other in a synergistic way. The mediation process, especially, can serve to streamline the arbitration process or like in IBM/Fujitsu produces a settlement framework which can be utilized in the arbitral process.<sup>21</sup>

**B. Variations in Combination of Mediation and Arbitration**

**a. Med-Arb: Pre-Arbitral Mediation**

In designing methods to resolve disputes, parties most commonly place mediation as a precondition to arbitration. This combination of these two modes allows the disputing parties to benefit from the perks of mediation directly – perhaps even preventing them from having to go into expensive and lengthy arbitration. On the other hand, a negative implication of the med-arb is in circumstances where one of the parties intended to enter into arbitration from the very beginning of there being a conflict. A dispute resolution clause with a precondition would in such cases potentially invoke unnecessary costs and added time, and arbitration cannot be activated unless the precondition has been satisfied<sup>22</sup> - and the party that has set his mind on mediation may be uncooperative throughout. This may be problematic in the sense that the parties in dispute may already be at a stage where reconciliation through mediation would simply be a waste of time and costs, or that one party is already set on preparing for an arbitration and would refuse to participate in initiating the mediation, it may also be possible that parties may exploit this precondition to delay proceedings and stretch out costs.<sup>23</sup>

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<sup>20</sup> Pitkowitz, M. M., & Richter, M. T. (2009). *May a Neutral Third Person Serve as Arbitrator and Mediator in the same Dispute*. *Zeitschrift für Schiedsverfahren*, p. 225.

<sup>21</sup> IBM Fujitsu; NOTE & COMMENT: MED-ARB IN INTERNATIONAL ARBITRATION, 8 *Am. Rev. Int'l Arb.* 83, \*107

<sup>22</sup> *Kemiron Atl Inc v Aguakem Int'l Inc* 290 F 3d 1287 (11th Cir 2002); “*Waterfalls in the Gulf: Pre-Conditions to Arbitration and Enforcement in the UAE.*” Brand, <https://www.kwm.com/en/knowledge/insights/preconditions-to-arbitration-uae-20170522>.

<sup>23</sup> Bühring-Uhle, Christian, Lars Kirchhoff, and Gabriele Scherer. *Arbitration and mediation in international business*. Kluwer Law International BV, 2006., 251-4 [‘Bühring-Uhle/Kirchhoff/ Scherer’]

Another concern which may arise with a combination of mediation and arbitration is the “arbitrator’s dilemma” aforementioned – that is the question of whether a single person can act as both arbitrator and mediator while still maintaining impartiality and non-bias.<sup>24</sup> Even where both parties have agreed to having the same person act as mediator and arbitrator - this may still possibly taint the confidential nature of arbitration, as the arbitrator will already have been exposed to parties documents from before the arbitration proceedings started – which may affect his/her biases and viewpoints on the case and his/her final decision.<sup>25</sup>

Analyzing the disadvantages and advantages of med-arb, it seems that whether or not this method is effective would be subject to the parties’ response to mediation and arbitration respectively in light of the extent their disputes. While if what the parties intended to pursue is an arbitration – the med-arb process is disadvantageous as it would incur additional costs, and prevent the parties from moving on into arbitration, may sabotage any future arbitration process due to the ‘arbitrator’s dilemma’<sup>26</sup> and may result in the parties having a mediation settlement that they did not want in the first place. It would be up to the mediator to accommodate the parties’ needs, and to move the process into arbitration if it seems further mediation efforts are futile. On a more positive note, if the parties do not desire to enter into arbitration, the 2019 Singapore Convention regime would help them achieve a safe, enforceable and cost-effective method to settle the dispute.

#### **b. Arb-Med: Post-Arbitral Mediation**

A more unorthodox design of dispute resolution is one where mediation comes after the commencement of arbitration had already undergone and an award had already been rendered. Before the parties were given the opportunity to glimpse the final award, the arbitrator gives an opportunity for the parties to mediate their dispute with him/her acting as a mediator.<sup>27</sup> This would benefit the parties in the sense that having gone through the arbitration process beforehand, they would have a better understanding of their roles and what they're bargaining. However, while it may achieve the fairest final decision, in no means is this a cost-effective method to resolve disputes.

If the mediation is found to be successful, then the mediation settlement becomes binding as the final award. If unsuccessful, then the arbitral award becomes binding.<sup>28</sup> This is known as the “envelope technique” as the arbitrator will have to keep the final arbitral award in an envelope through the process of mediation.<sup>29</sup> The more common “envelope technique” what is known as the “Calderbank Offer” where a party makes an offer of settlement and if it is not accepted, he notes it a sealed envelope and gives to the Tribunal. When they have made their award, if the award is less than the offer, the Respondent has to pay the Claimant’s

<sup>24</sup> Bühring-Uhle/Kirchhoff/ Scherer, p. 248-51

<sup>25</sup> Deason, Ellen E. "Combinations of Mediation and Arbitration with the Same Neutral: A Framework for Judicial Review." *Arbitration Law Review* 5.1 (2013): 219-249., p. 220; Blankley, Kristen M. "Keeping a Secret from Yourself-Confidentiality When the Same Neutral Serves Both as Mediator and as Arbitrator in the Same Case." *Baylor L. Rev.* 63 (2011): 317.

<sup>26</sup> Talbot, P. *Should an Arbitrator or Adjudicator Act as a Mediator in the Same Dispute?*. *Arbitration: the Journal of the Chartered Institute of Arbitrators* 67.3 (2001): 221-229. [‘Talbot’]

<sup>27</sup> Oghigian, Haig. "The mediation/arbitration hybrid." *Journal of International Arbitration* 20.1 (2003): 75-80., p. 77-79

<sup>28</sup> Arnold M. Zack, *The Quest for Finality in Airline Disputes: A Case for Arb-Med*, 58-JAN. DISP. RESOL. J. 34, 37 (Nov. 2003/Jan. 2004).

<sup>29</sup> Bühring-Uhle, Christian, Lars Kirchhoff, and Gabriele Scherer. *Arbitration and mediation in international business*. Kluwer Law International BV, 2006., p. 254

costs. If the award is more, then the costs are apportioned appropriately by the tribunal.<sup>30</sup> An arb-med process avoids concerns that a party may not genuinely mediate in fears of revealing information which could compromise their position in the possibility of the case going into full-arbitration.<sup>31</sup>

**c. Mediation Windows/Arb-Med-Arb: Hybrid Dispute Resolution Proceedings**

In complex and highly technical disputes, it is even possible for the commencement of arbitration to be halted in the middle of proceedings, and for the arbitrator – with the consent of parties – to commence mediation. This is possible due to the length of arbitration proceedings, which may take up months and weeks in between proceedings. It is relatively easy for parties to convene and establish a mediation proceeding while they are still in the middle of an arbitration process.<sup>32</sup> It should also be noted that the parties may suspend an arbitration at any time, upon their mutual desire, to try to mediate.

An arb-med-arb process is one that allows for the most flexibility and creativity in resolving disputes. A successful application of the model – as well as one of its most complex applications - would be the case of *IBM v. Fujitsu*.<sup>33</sup> Hundreds of millions of dollars in damages was claimed by IBM when Fujitsu allegedly copied an IBM program to create an operating system compatible with IBM frame – hereby violating IBM's intellectual property rights.<sup>34</sup> Subsequent negotiations resulted in an operational agreement called the Washington Agreement between the parties, which is the foundational agreement which shall be utilized in their future arb-med proceedings.

However, while it fully utilizes the benefits of flexibility in the alternative dispute resolution context and provides for maximum effectiveness in terms of the final award rendered, this method of dispute resolution is incredibly niche – requiring an incredibly skilled neutral third party and utmost confidence from both parties.<sup>35</sup> These are luxuries which are often unavailable in more conventional disputes.

A select few arbitral institutions have rules which encompass arb-med-arb processes,<sup>36</sup> and even there commentators and practitioners have been reluctant to employ this method as it is seemingly “mediation in disguise, and an abusive attempt to legitimise what would otherwise be an “unenforceable” mediated settlement”.<sup>37</sup> However, with the entry into force of the the Singapore Convention in 2019, this may no longer be necessary as mediation settlements are

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<sup>30</sup> The Caldrbank Offer is a method of envelope technique that is noted by the reviewer of this peer-reviewed article; *Risse/Altenkirch*, 10 *German Arbitration Journal* (“*SchiedsVZ*”) 2012, 5 (7) (in German)

<sup>31</sup> Oghigian, Haig. *Discussion On Arbitrators Acting as Mediators*, 2001.

<sup>32</sup> Bühring-Uhle/Kirchhoff/ Scherer, p. 259-60

<sup>33</sup> Bühring-Uhle, Christian, and Christian. “*The IBM-Fujitsu Arbitration: A Landmark in Innovative Dispute Resolution*.” *Am. Rev. Int'l Arb.* 2 (1991): 113.

<sup>34</sup> *International Business Machines Corporation v Fujitsu Limited, Respondent and Counterclaimant, Award*, p. 156

<sup>35</sup> As spoken by an in-house counsel who participated in the procedure: “... the I.B.M.-Fujitsu arbitration showed that it is possible for the arbitrator to facilitate agreement where possible and to break log jams through adjudication ... there can be serious problems but it can also be the optimal process, it all depends on the personality of the neutral who needs a very rare skill and a strong character and absolutely needs a very high degree of confidence from both parties ...”

<sup>36</sup> The Singapore International Arbitration Centre and the Singapore International Mediation Centre are the only two institutions offering model clauses for this type of dispute resolution.

<sup>37</sup> *Arbitration, Mediation, and the Singapore Convention on Mediation*. 5 Aug. 2019, <http://arbitrationblog.practicallaw.com/arbitration-mediation-and-the-singapore-convention-on-mediation/>.



enforceable even without having to undergo the complex processes of arb-med-arb in jurisdictions which have ratified such convention .

A process can be fully independent of one another, being adjudged by a different person as mediator and arbitrator, or there is the possibility that the parties may choose to have the same third party neutral in both their mediation proceedings and the arbitration proceedings.

### **C. Confidentiality & Impartiality Concerns in Med-Arb Proceedings with the Same Neutral**

A concern with having the same neutral is that the neutral – who will eventually take on the role of arbitrator - then may be affected by the knowledge that they obtained from the mediation process. Again mediation and arbitration are fundamentally distinctive,<sup>38</sup> one of the features of mediation which would be utterly inappropriate in arbitration is caucuses. Caucuses are a procedure which allows the mediator to communicate privately with each respective party. When the mediator then switches to become an arbitrator – this is immediately inappropriate<sup>39</sup> as he/she is meant to render an impartial award and should not engage in *ex parte* communications with the parties.

One might say that a skilled individual may differentiate between his role as a mediator and his role as an arbitrator – but this does not change the fact that the situation is one that raises concerns. Or as put very neatly by Halg Oghigian: “*I am impartial; you are capable of being impartial; he is probably biased.*”<sup>40</sup>

The issue is summarized as follows:

*“It is difficult to believe that the med-arbitrator will remain unaffected as an arbitrator, after becoming privy to private, perhaps intimate, emotional, personal, and other “legally” irrelevant information or compromise positions.”*<sup>41</sup>

On another note, there is also the concern that if they knew that eventually the mediator would have the capacity to act as an arbitrator and would consciously or subconsciously take into consideration the private content of caucuses and other discussions during the process of mediation into the final considerations in making a decision for the final arbitral award.

### **D. Recognition & Validity of Med-Arb in Indonesia**

#### **a. Enforcement**

Indonesia is a country that is infamous for its apparent “unfriendliness” towards enforcement of foreign arbitral awards.<sup>42</sup> This concern arose out of the enforcement procedure in Indonesia

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<sup>38</sup> *Supra*, p.

<sup>39</sup> Elliot, D. C. (1995). Med/arb: fraught with danger or ripe with opportunity. *Alta. L. Rev.*, 34, 163., p. 176; In the 24 September 2019 event in Seoul discussing the topic of facilitation settlements organized by KCAB International, SCAI and ASA titled “A Fresh look at an old concept: Facilitation of settlements in arbitral proceedings”, the panelists explored how and when arbitrators should act as settlement facilitators. The panelists agreed that caucusing - i.e. separate discussions between the arbitrator and the parties and the arbitrator going back and forth between the parties - would in most cases not be appropriate.

<sup>40</sup> Oghigian, H. (2003). The mediation/arbitration hybrid. *Journal of International Arbitration*, 20(1), p. 75

<sup>41</sup> De Vera, C. (2004). Arbitrating Harmony: Med-Arb and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China. *Colum. J. Asian L.*, 18, 149.

which requires courts to release an exequatur or a writ of execution.<sup>43</sup> However, this is a myth that has been debunked by local foreign legal consultant Karen Mills in her article entitled "Debunking the Myth: Enforcement of Foreign Arbitral Awards in Indonesia", where she pointed out that to her knowledge "no application for an exequatur of a registered foreign award has been rejected".<sup>44</sup> Thus, it is presumable that if a med-arb proceedings have been conducted correctly with consent of the parties – there ought to be no issue with its enforcement should the med-arb process be conducted properly.

**b. Annulment**

Challenging the rendered award on the other hand is a different concern, the Undang Undang No. 30/1999 on Arbitration and Alternative Disputes Resolution ("**Arbitration Law**") allows parties to challenge, or request recusal of an arbitrator "*there is found [to be] sufficient cause and authentic evidence to give rise to doubt that such arbitrator will not perform his/her duties independently or will be biased in rendering an award*" under Article 22. This is further elucidated in Article 22(1) that removal may also be subject to '*if it is proven that there is any familial, financial, or employment relationship with one of the parties or its respective legal representatives.*'<sup>45</sup> To this author's knowledge, no arbitral award has been challenged on grounds of impartiality because of an arbitrator's dual role – however this remains an issue which may arise if the same person acts as both arbitrator and mediator.<sup>46</sup>

**c. BANI Centre Rules on Med-Arb**

Indonesia, however does seem to recognize med-arb procedure with the same neutral in its domestic arbitration practice, where the Badan Arbitrase Nasional Indonesia ("**BANI**") Centre's rules and procedures have included mediation procedure, which can be enforced as an arbitral award.<sup>47</sup>

**E. Conclusion**

Conclusively, med-arb proceedings is a unique and flexible way for parties to settle their dispute in a cost effective way – however the concerns that arise out of med-arb should still be taken into account by parties if they are considering using this method of resolution in Indonesia. Even though in most cases a submission to enforce an arbitral award is granted by Indonesian Courts, it is still important for parties and counsels alike to be aware of the possible risks when submitting an enforcement of a med-arb award in Indonesia. This is especially important, noting the lack of precedence and the possible loopholes that may end

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<sup>42</sup> See generally. Rubins, N. (2004). The enforcement and annulment of international arbitration awards in Indonesia. *Am. U. Int'l L. Rev.*, 20, 359.; Nurhayair, I. (2006). Legal Issues in the Annulment of International Arbitral Award in the Himpurna and Karaha Bodas in Indonesia. *Mimbar Hukum*, 18(2006).

<sup>43</sup> Budidjaja, T., & Ilyas, R. B. (2019, February 1). Enforcement of judgments and arbitral awards in Indonesia: overview. Retrieved from [https://uk.practicallaw.thomsonreuters.com/2-619-0724?transitionType=Default&contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/2-619-0724?transitionType=Default&contextData=(sc.Default))

<sup>44</sup> Mills, K. (2015). Debunking the Myth: Enforcement of Foreign Arbitral Awards in Indonesia. *LawyerIssue*.

<sup>45</sup> Mills, Karen. "Arbitration Guide." *IBA Arbitration Committee*. (2018)., p. 10

<sup>46</sup> Notably, one of the grounds for challenge under the Indonesian Arbitration Law is a violation of public policy – a provision that has been criticized for its broadness in application. This is why in the Author's opinion there remains the risk that med-arb awards may not be safely enforceable in Indonesia.

<sup>47</sup> Widnyana, I. M. (2015). Rangkaian Proses Arbitrase. *Indonesia Arbitration Quarterly Newsletter*, 7(5), 1–42., p. 17-18

up costing them more for undergoing a med-arb process rather than if they had made use of more conventional dispute resolution procedures.

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