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The Rationality and System Perfection of Identity Compatibility between Arbitrator and Mediator in the Med-Arb Model

Zijuan Wei

School of Law, University of International Business and Economics, Beijing, China
Email: stellawzj@163.com

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Abstract

In the framework of the Med-Arb Model process, it is reasonable to assume that the identity of the mediator and arbitrator is compatible, which means they could be the same person. This alignment is an important manifestation of the involved parties' autonomy, aligning with substantive justice in practice and enhancing the efficiency of dispute resolution. Besides, the neutrality and impartiality of mediators and arbitrators are guaranteed by internal moderation and external supervision. The modification of the arbitrator selection procedure in *the Draft Amendment of China's Arbitration Law* (2021) aims to mitigate any crisis of confidence among the parties involved. To enhance this model, practical implementation necessitates the express consent of the parties, along with the requirement for the moderator to meet the qualification standards of both the mediator and the arbitrator. In this regard, the information obtained in the mediation is not allowed to be used in the arbitration. Additionally, the arbitration award needs to be reviewed, and there should be an adequate timeframe for procedural adjustments subsequent to the parties' submissions of statements and evidence.

Keywords

Med-Arb Model, Arbitrator, Mediator, Autonomous Will

1. Introduction

Arbitration and mediation represent two pivotal methods for resolving disputes outside of litigation. The Med-Arb model, as a product of the combination of arbitration and mediation, has long been the subject of debate. The Med-Arb model in China is known as the "Oriental Pearl" affirming the compatibility of

the identities of mediators and arbitrators in practice. However, in the process of continuous collision with international commercial arbitration and mediation, this practice has also been put into question. The key debate in Med-Arb model revolves around whether individual or individuals can serve as both arbitrators and mediators. This appears to be a question of applying two methods and discussing the possible advantages and disadvantages that may arise from their combination. However, the transition of identities between mediators and arbitrators is essentially a consideration of balancing natural justice maintenance and efficiency values, as well as an exploration of the boundaries of party autonomy and self-determination.

2. Concepts of Arbitration, Mediation and Med-Arb Model

Arbitration refers to how the parties voluntarily submit their disputes to an arbitration institution and form an arbitral tribunal to adjudicate their disputes according to the selected arbitration rules, and then enforce the arbitral award (Shonk, 2024). Compared with litigation, arbitration has the characteristics of voluntary, professional, confidential, flexible, efficient and so on. Especially the principle of "One-Trial Finality" emphasizes the finality of arbitral awards and precludes parties from raising repeated arbitration or litigation based on the same issue. Compared with mediation, arbitral awards are enforceable (Born, 2021: p. 2896). Mediation is an important mode of alternative dispute resolution (ADR). ADR refers to a series of dispute resolution methods based on the agreement between the parties. For ADR, the agreement between the parties to form the result of dispute resolution is a necessary condition (Brown & Marriott, 1999: p. 131). Mediation is one of the most rapidly developing forms of ADR, which provides a different kind of dispute resolution justice, known as "co-existing justice" (Alexander, 2006: p. 263). The moderator no longer makes a judgment on the facts according to the standard, but the parties shape the result they think is appropriate, which is a kind of "bottom-up justice". In contrast to litigation and arbitration, the mediator cannot impose a solution on the parties. Otherwise, mediation can preserve the long-term and friendly business relationship between the parties (Strong, 2016: p. 73). Both mediation and arbitration are procedures that can be initiated under the mutual agreement of the parties, and they need to fully respect the autonomy of the parties and support their own choices. The logic behind the mixing of procedures is that if the same person is involved in a dispute between two parties, whether he/she can take a time saving and cost-efficient way to resolve it and reach a mutually acceptable solution (Oghigian, 2002: p. 83). However, arbitration and mediation both have disadvantages. With the development of arbitration, it presents a tendency called "litigious". The performance of the arbitration on proceedings cumbersome procedures strictly, judicial supervision over the entity referees, lack of business practices and industry standards, which would result in an increase in time and money costs (Berger, 2015: p. 295). With the same time, if a mediation agreement or settlement agreement is reached be-

tween the parties, it is not enforceable without arbitration or court confirmation, which means that if one party does not fulfill the obligations of the mediation agreement, the mediation work done between the parties will be lost, and the time and financial resources invested will be wasted.

In practice, there are several modes of combination of mediation and arbitration.

1) Mediation Followed by Arbitration

Mediation should be conducted first, if mediation fails, arbitration will be conducted. The two procedures are separate, and arbitrators and mediators are often not the same person.

2) Mediation and Last Offer Arbitration (MEDALOA)

This model is mostly adopted by the American Arbitration Association (AAA) and is consistent with "Baseball Arbitration". In this mode, the parties first conduct mediation, and the mediation successfully ends the procedure. If mediation fails, both parties shall provide an arbitration plan, and the arbitral tribunal shall choose one and make it effective (Sussman, 2010: p. 382).

3) Shadow Mediation

The parties shall first initiate the arbitration proceedings, and initiate parallel mediation proceedings at an appropriate time of the arbitration proceedings. If the mediation is successful, the proceedings shall be terminated. If the mediation is unsuccessful, the parallel arbitration proceedings shall be adjudicated.

4) Co-existence of Mediation and Arbitration (Co-Med-Arb)

Co-Med-Arb is a variant of the procedure that combines multiple factors such as shadow mediation and small court. Mediators and arbitrators are separate from each other, but both can participate in minor court hearings. The arbitrator will not participate in private meetings with the mediator, but the mediator may disclose to the arbitrator information learned during the mediation. As the arbitration process develops, the mediator can be involved throughout and mediate when appropriate.

5) Mediation in arbitration (Med-Arb model)

Mediation in arbitration is the most common mode in practice, which is essentially a mixture of two procedures. In general, a pre-mediation procedure is added in the arbitration, and the arbitrator will make an award according to the mediation agreement if the mediation fails to be transferred to the arbitration procedure.

Med-Arb model is the modes of combination of mediation and arbitration in narrow sense which this paper studies. In this mode, the key issue is that whether the mediator and the arbitrator can be the same person.

There has been a surge in academic discussions on this matter. Laurence Street said, if an arbitrator resumes the arbitration as an arbitrator after the mediation fails, it is an offense and infringement to the principle of natural justice (Street, 1992: pp. 194-197). His supporters hold that during the course of medi-

ation, the arbitrator is obliged to hear additional and confidential statements made by the parties to the dispute, so that the information obtained cannot be cross-examined by the opposing party. As a result, the subsequent arbitration proceedings were adversely affected. Some scholars referred to "confusion of functions" as an opposition to combination of arbitrator and mediator. In their view, arbitral proceedings and mediation proceedings are two completely different procedures, since the functions of the mediator and the arbitrator were fundamentally different. The function of a mediator is to help others make a settlement decision, while the function of an arbitrator is to make a binding decision independently. The "confusion of functions" would undermine the effectiveness of mediation and the independence of arbitral decisions (Buehring-Unle, 1992: p. 22; Cooley, 1986: p. 263). Roger Pitchforce said, arbitrators who attempt to mediate in the pre-mediation and then act as arbitrators when mediation fails will be influenced by the words of the parties rather than the evidence, and they will consider circumstances known only to one party but not to the other. What is more serious is that if the arbitrator receives the materials unilaterally provided by the parties or finds out the bottom line of the parties' offer during the mediation process, the arbitrator will inevitably have a perceptual or actual bias in the award (Pitchforce, 2010: pp. 411-432).

Michael Schneider refuted the opinion that arbitrators acting as mediators are influenced by the opinions of the parties in the mediation process. It is recognized that arbitrators inevitably have to express their own evaluations and views on certain issues in the dispute during mediation, which are preliminary, acceptable and useful. In the mind of the arbitrator, the arbitrator does not make a decision on the dispute issue in the moment after the parties have completed their statements, but he needs a gradual process to form his own perspective (Schneider, 2003: p. 76). Schmitthoff said, the difference between mediation and arbitration cannot be overstated, especially in some commercial disputes with larger subject matter. It may not be practical to make a blunt distinction between the role of the mediator and the arbitrator, which will delay the final settlement of the dispute and increase unnecessary costs. If the parties agree, the conversion of mediators into arbitrators is conducive to reducing unnecessary costs and speeding up the final settlement of disputes (Schmitthoff, 1988: p. 666). Mclaren and Sanderson Said, linking the two methods of dispute resolution can make the whole mechanism more efficient than using one of them alone (Sanderson & Mclaren, 1994: p. 257). Peter Sanders said, if the arbitrator offers to convene a conference to discuss the possibility of settlement, it does not preclude the arbitrator from inviting the parties to use feasible means to resolve the dispute. Such an invitation does not go beyond the remit of an arbitrator. The parties should, of course, interrupt the arbitral proceedings when they have agreed in advance to an interim, and wedge into a procedure for attempting a settlement in accordance with well-established mediation rules (Sanders, 1996: p. 173).

3. The Maintenance of Natural Justice

Natural justice stands as a fundamental concept within legal procedures in common law jurisdictions, stating that "any decision impacting an individual must be rendered by a fair and unbiased tribunal", with completely independent individuals more apt to uphold internal justice. Another main principle is described as "both parties should have reasonable and substantive equal opportunities". In arbitration proceedings, arbitrators are obligated to conduct thorough inquiries upon grasping the dispute and elucidate the facts based on evidence submitted by the parties. Therefore, caution should be exercised when endeavoring to introduce a creative approach to the procedure.

If the parties have indeed exchanged information and communicated openly during prior mediation proceedings, they may face the risk of subsequent arbitrators exhibiting actual or perceived bias. Private meetings between mediators and any one of the parties may lead to secret disclosures that the other party does not have the opportunity to comment on. When a mediator who was unsuccessful in transitions to the role of an arbitrator, they may be swayed more by the parties' statements rather than evidence, especially in situations where one party possesses information that the other does not. Using this information for future arbitration would constitute a significant violation that cannot be tolerated. If arbitrators also fully understand the parties' information during the mediation process, they may inevitably their ruling may exhibit actual bias. Furthermore, information obtained during mediation may affect arbitration judgments, sometimes referred to as a "halt to natural justice".

Natural justice has always been a common argument used by scholars in the common legal system to criticize China's Med-Arb model. However, theoretical arguments often differ from practical results. Further analysis reveals the fact that a mediator and arbitrator are the same person does not affect the basis on which the final arbitration award is made. Although parties may make statements and concessions in mediation that are not in their favor, the arbitrator ultimately bases the award on facts and evidences. The arbitrator may consider information previously acquired, but it is not necessarily a determining factor in their judgments. The arbitrator's impartiality does not depend on a change in their identity, but rather on their professional qualities, level of responsibility toward the parties, and their professional ethics. Even in separate mediation proceedings, parties may not necessarily communicate and share information completely openly. Furthermore, it is always emphasized in the Med-Arb model that statements made during mediation shall not be used as evidence at a later stage. In consecutive mediation sessions, parties can also request that the mediator refrain from disclosing certain information to the other party. Thus, parties do not worry about that their statements potentially generating unfavorable evidence against them.

4. Consideration of Efficiency Value

Justice is one of the values pursued in dispute resolution, but not the only one.

Especially in commercial activities, the value of economic interests and efficiency is as important as that of justice. The emphasis often lies in resolving disputes amicably and constructively, which have already arisen, instead of determining right from wrong, while simultaneously focusing on the future and preserving potential business collaborations. In this regard, the compatibility of mediator and arbitrator identities holds evident and substantial efficiency value (Finn, 2021: p. 19).

Firstly, the process is simplified, time is saved, and the costs of the mediator are reduced. If mediation attempts fail early in the process, when the mediator becomes an arbitrator, they already understand the dispute and can make judgments quickly in the arbitration stage, which is more time efficient. At the same time, the repetition of parties' statements, communications, and evidence exchanges are avoided thereby unnecessary expenses are reduced. The compatibility of both identities makes the dispute resolution process more convenient and optimizes the entire procedure. If a new arbitrator has to be used to handle the dispute after mediation fails, unnecessary costs and delays in resolving disputes will occur, especially when objection refers to a large amount of subject in disputes.

Secondly, the compatibility of both identities can maintain the continuity of the process and reduce the rigidity of arbitration. Traditional arbitration has leaned toward litigation in recent years, and the Med-Arb model balances its high costs, low efficiency, and procedural rigidity, complementing each other's shortcomings in the process. The arbitration process often entails arbitrators exercising their authority akin to litigation. When arbitrators potentially transition to mediators, they must exercise caution in their approach, aiming to enhance the parties' autonomy and compensate for any deficiency in procedural flexibility. Meanwhile, arbitration adds predictability, and the process needs stability. Its continuity requires avoiding the invalidity of previous procedures as much as possible.

Finally, results can be obtained more quickly. Settlement agreements reached during pending arbitration may form part of the award to be enforced. In China's example, it can also be seen that combined with other dispute resolution methods mediation is more likely to lead to settlements. In addition, if no settlement is reached, the final arbitration award is generally more easily accepted. Previous negotiations help narrow down the issues and produce more predictable and acceptable solutions (Telford, 2005: p. 4).

In some way, the compatibility of mediator and arbitrator identities in the Med-Arb model is not only a maintenance of efficiency value but also reflects substantive justice and can be seen as an approach close to natural justice.

5. The Meaning, Scope, and Extent of Party Autonomy

Party autonomy, also known as party self-determination, is a cornerstone in both arbitration and mediation. This principle is most clearly reflected in mediation, as the role of the mediator is to assist the parties in friendly negotiations,

while the final settlement agreement is reached by the parties themselves. Although party self-determination is a common principle in both processes, there are differences in the scope and extent of it. Party autonomy includes the method of dispute resolution, rules, arbitrators/mediators, location, institution, and procedure. The most fundamental difference lies in the fact that the decision is made by arbitrators, which distinguishes them from the mediators. It is believed that arbitrators and mediators cannot be the same person based on this principle. However, this belief tends to be more outdated and inflexible to some extent.

Mediation and arbitration share a lot of similarities, and the distinction between the roles of mediators and arbitrators should not be overstated. Parties can waive the provisions regarding the differences between the two if it is more convenient and beneficial for dispute resolution. The degree of mediator involvement can be problem-solving-oriented or procedure-oriented, and the combination of mediation and arbitration can be seen as a result of a problem-solving-oriented approach.

Nevertheless, both mediation and arbitration are processes initiated by the parties under mutual agreement. The wishes of the parties should be fully respected, supporting their choices. The logic behind the hybrid procedure is whether the same person can resolve a dispute between two parties more efficiently and achieve a solution acceptable to both sides (Oghigian, 2002: p. 83). If parties can choose an appropriate person to preside over their dispute resolution, they can also decide if the same person can hold dual roles (Limbury, 2009: p. 107). Arbitrators do not inherently have the right to mediate, but they can obtain it if granted by the parties.

This is also reflected in the legal framework of China. According to Article 51 of *the Arbitration Law of the People's Republic of China* (2017 *Amendment*), it is assumed that the arbitrator and mediator are the same person, which is also a significant reason for the criticism of the previous Med-Arb model in China. At the same time, Article 47 of the China International Economic and Trade Arbitration Commission (CIETAC) 2024 *Arbitration Rules* provides regulation for the Med-Arb model. It stipulates that mediation is conducted under the auspices of the arbitration tribunal when both parties agree. There is also a special provision in Article 8, which states that if the parties do not wish to be mediated by the arbitration tribunal, the arbitration commission can provide assistance in the mediation process. This special provision gives parties an additional choice, although this choice is still limited to the scope of the arbitration commission. However, *the Draft Amendment of Arbitration Law* (2021) expands on this issue, while retaining the original Article 51 (Article 68 in *the Draft Amendment* 2021), it then clearly states in Article 69 the option for parties to choose a mediator outside of the arbitration tribunal to conduct mediation and specifies how the subsequent procedures should be carried out. According to *the Draft Amendment* (2021), in the Med-Arb model of China, arbitrators and mediators

may either be the same or different based on the parties' choice. By continuing the tradition of affirming the compatibility of arbitrator and mediator identities, new paths have been added.

Therefore, the principle of party autonomy naturally determines that parties can decide whether to use a hybrid arbitration and mediation model or refuse to use it. They can choose to enforce a settlement agreement they have reached by themselves or apply for courts to recognize its effectiveness, or they can convert it into an arbitration award to ensure its enforceability. They can choose to make the mediator and arbitrator be the same person, affirming their compatibility, or they can request a replacement. In this case, there is no violation of party autonomy.

6. The Destruction of the Principle of Neutrality and Fairness

The crisis of trust may lead to violations of fairness, which is the most criticized aspect of the hybrid model. Detractors of the hybrid model posit that the amalgamation of the mediator and arbitrator roles within a single individual may potentially undermine their impartiality, thereby eliciting distrust from the parties engaged in the dispute resolution process. Furthermore, this lack of trust, whether in achieving a settlement or enforcing an award, presents a formidable impediment. If parties know in advance that the mediator and arbitrator are the same person and fear that the arbitrator's prior knowledge during the mediation process may lead to bias, parties may be unwilling to fully trust the mediator, which would obstruct the resolution of disputes (Boulle, 2014: pp. 124-126). This distrust and refusal to share information greatly reduce the likelihood of successful mediation. At the same time, when mediation transitions to arbitration and the arbitrator renders an award, parties may also question the fairness and authority of the award.

However, the principle of neutrality and independence remains unchanged. Whether serving as a mediator or arbitrator, they function as an independent moderator, and the principle of neutrality and fairness provides double protection. Firstly, their professional qualifications ensure their professional competence and judgment, and neutrality and fairness are their basic principles of behavior, whether as arbitrators or mediators, which are internal constraints. Meanwhile, codes of conduct, supervisory bodies, and industry associations also form external principles. Confidentiality principles require that a mediator should not disclose information obtained to the other party upon request by the parties. Therefore, the information known by the mediator alone may not be used as the basis for the arbitration after the transition. The mediation part of the hybrid process allows confidential communication with one party, but if mediation fails and arbitration appears again, the information obtained previously should be kept confidential. Secondly, absolute neutrality is an elusive concept, challenging to ascertain. Authentic "value-free individuals" could not

exist in reality (Noone, 2006: p. 13). Regardless of the arbitrator's awareness of information disclosed during mediation, they will inevitably form value judgments, and these assessments will not impact the foundation of the award. Creating equal treatment for parties in the process for "dynamic fairness" is more important. The arbitrator's impartiality does not depend on a change in identity, but on their professional skills, level of responsibility to the parties, and professional ethics. Decisions are based on facts and evidence, and we need to have some confidence in the impartiality of moderators.

Besides, it can avoid a crisis of trust in procedures. Firstly, regarding the selection of moderators, whether arbitrators or mediators, they are generally chosen by the parties themselves. *The Draft Amendment Arbitration Law* (2021) has modified the selection process for arbitrators, especially the chief arbitrator of a three-member tribunal, to better respect the parties' wishes to help parties choose the arbitrators they trust. There are certain difficulties in determining the chief arbitrator in a three-member tribunal. The original *Arbitration Law* stipulated that the chief arbitrator should be jointly agreed upon by the parties or appointed by the arbitration commission. In practice, due to the adversarial nature of disputes, it is difficult for the parties to reach a consensus on the selection of arbitrators. Parties are also dissatisfied with the arbitration commission's appointment, fearing a lack of transparency and insufficient practical considerations. *The Draft Amendment* has introduced a buffer channel between the parties' selection and the arbitration commission's appointment, where arbitrators chosen by each party jointly select the chief arbitrator, embodying a trust-building iteration. Similarly, if parties choose CIETAC as an arbitration institution, CIETAC has introduced a system of party nominations, wherein if one to five arbitrators selected by the parties coincide, they are appointed as the presiding arbitrator, significantly enhancing the parties' confidence in the arbitral tribunal. In this case, trust is mutual, and if parties choose the same person as both mediator and arbitrator, it signifies a complete reliance on this facilitator, streamlining both mediation and arbitration processes. The authority of the arbitrator may serve as a positive encouragement to some extent. Furthermore, in the transition of the process, parties can choose to mediate with the original arbitral tribunal or request a replacement. This non-mandatory approach gives parties more choices. Finally, a crisis of trust does not inevitably arise from the congruence of the identities of the individuals involved. Regardless of the process, the defendants often feel a sense of unfairness, which is projected onto specific procedures in this system.

Thirdly, it is credible as the basis for arbitration awards and settlement agreements. Settlement agreements are reached by the parties themselves, with the mediator playing a facilitating role and not imposing decisions on the parties. Although parties may make statements and concessions against their interests in mediation, the award still needs to be based on facts and legal principles. Arbitrators may make judgments based on already acquired information, but this is

not a key factor. The rule of not using the contents of mediation as evidence in arbitration is agreed upon and established during the process. The parties' distrust may affect the willingness to enforce, but it does not necessarily lead to the revocation or non-enforcement of the award easily. The confidentiality principle requires that statements and admissions made by parties during the mediation phase cannot be used as evidence in arbitration, under this premise, thus, avoiding explicit self-incrimination, and the mediator's value judgment will not have such a significant impact. Even in a separate mediation process, parties may not fully disclose and share information.

Lastly, results can be obtained faster by this way. Settlement agreements reached during the pending arbitration process may form part of the award for enforcement. China's experience also shows that combining mediation with standalone dispute resolution methods is more likely to lead to settlements (Cao, 2006: p. 91). Furthermore, if no settlement is reached, the final arbitral award is usually more easily accepted. Previous negotiations will help narrow down the issues and lead to more predictable and acceptable solutions.

7. Measures to Improve the Compatibility of the Roles of Mediator and Arbitrator

It is feasible for a mediator and arbitrator to hold compatible roles. To implement this feasibility, it is necessary to regulate the procedures, utilize their strengths, optimize resource allocation, and maximize the effectiveness of this mechanism (Wang, 2009: p. 9). Currently, there may be issues such as improper procedural connections, improper actions by mediators and arbitrators, and arbitrary settlement agreements in practice, which require further improvement in the procedural model. Factors to consider in the design of a mixed system include costs, delays, privacy, the level of confidentiality required, the need for non-judicial remedies, the binding force of procedural solutions, and the degree of control required for enforcement procedures, while adequately protecting the needs of the ailing party (Bühring-Uhle, 2006).

7.1. Parties' Consent Required for the Same Person to Serve as Mediator and Arbitrator

The parties' consent is a fundamental requirement for the compatibility of roles, as both mediation and arbitration are dispute resolution methods centered on party autonomy. In cases where the parties have jointly agreed, even if the selected mediation or arbitration rules prohibit such a mixed identity, the parties' agreement can override this. A more frequent case is when the arbitrator suggests it during the proceedings, and the parties do not object. In such instances, it is crucial to ascertain the genuine intentions of the parties, preventing them from being misled by intricate professional terminology and inadvertently forfeiting their authentic preferences due to lack of comprehension. The scope of overlap needs to expand from "arbitrators related to disputes that have been or

are currently involved in mediation proceedings" to "arbitrators who may also handle another dispute arising from the same contract or legal relationship or any related contract or legal relationship". Formally, arbitrators need to communicate more with the parties, explain more, and inform them of the differences between the mediation and arbitration procedures, especially regarding the inability to unilaterally withdraw from arbitration and the binding nature of arbitral awards, from the beginning of the process. Agreements can be made in advance for other procedures, such as private meetings and consecutive mediations. Both parties and the moderator need to be aware of any changes in the procedures.

7.2. Qualification Requirements for Moderators in Dual Roles

The choice of a dispute resolution moderator is primarily based on the parties' agreement, with parties generally opting for qualified mediators or arbitrators. The qualifications and codes of conduct for mediators and arbitrators may be different, necessitating that the moderators meet the requirements for both roles to ensure compatibility. In this instance, it is posited that the moderator, with their professional acumen, can delineate between the two processes and comprehend the distinct emphases of each. This places higher demands on the moderator, who must not only be familiar with mediation procedures but also understand arbitration procedures and possess strong professional knowledge and practical experience.

For example, the roster of mediators of the China Council from the Promotion of International Trade (CCPIT) overlaps with the roster of arbitrators from CIETAC, which includes 1442 arbitrators (CIETAC Panel of Arbitrators). As commercial disputes evolve, relevant regulations continue to be refined, with increasing requirements for both mediators and arbitrators. When acting as an arbitrator, judgments should be made based on the law and facts. When acting as a mediator, he/she is inclined to guide parties in identifying their true interests and areas of compromise and restoring their relationship. Additionally, apart from meeting professional prerequisites, mediators may also derive advantages from possessing a background in psychology.

The alignment of roles not only sets higher standards for mediators and arbitrators but also poses challenges for the parties engaged in the process. Parties and their representatives need to be familiar with both processes. Even if the moderator informs them of the applicable procedures and rules, they may not fully understand their rights (Deason, 2005: p. 80). Therefore, before transitioning between processes, the moderator should indicate their dual qualifications, be mentally prepared for the transition, and behave accordingly based on their role. When changes occur in the process, the moderator should communicate these changes to the parties with clarity. When facilitating dispute resolution, the moderator should adjust their focus based on the different processes, especially avoiding a dominant attitude in mediation and adhering to the mediator's code

of conduct. This differentiation can also be applied in areas where the two processes conflict. For example, it is considered inappropriate for an arbitrator to privately meet with parties during the arbitration process, while it is common and allowed for a mediator to meet and communicate with parties individually. Settlement agreements can be unilaterally terminated during mediation but not after it transitions to arbitration. The moderator should inform the parties of these differences at the beginning of the process to ensure their right to information and allow them to make their own choices. To enhance the effectiveness of the Med-Arb model, a consistent code of conduct should be actively developed for neutrals and the parties utilizing their services (Chartered Institute of Arbitrators, 1994: p. 177).

7.3. Non-Application of Mediation Information in Arbitration

To prevent the exchange and acquisition of information during mediation from affecting the parties' opportunity to provide opinions on the matter and the arbitrator's impartial judgment, two different measures can be considered. The first solution prohibits arbitrators from using facts disclosed in mediation, while the second requires arbitrators to disclose such facts to the other party during arbitration. However, both of these solutions have flaws.

Prohibiting arbitrators from utilizing facts disclosed in mediation proceedings is frequently criticized for failing to mitigate the risk of arbitrators being swayed by information they have heard. Requiring arbitrators to divulge facts to the opposing party during arbitration may result in the disclosure of information that parties seek to keep confidential. In general, the preferred approach is still based on the parties' agreement. In cases where the parties cannot reach a consensus, for security reasons, the initial option may be preferred, whereby the mediation process is not documented, audio-recorded, or retained as evidence.

In cases where parties agree to a hybrid process, the dual role of a mediator-arbitrator may indeed give rise to situations that prompt inquiries. However, if the parties have genuinely waived any doubts about the impartiality of the moderator in the mediation process, then this waiver inevitably includes waiving the obligation of the arbitrator to disclose confidential information obtained during mediation (Rosoff, 2009: p. 94).

7.4. Review of Settlement Agreements and Arbitration Awards

There is no divergence when it comes to arbitration awards. The discussion here is about a special case that often occurs in practice, where parties reach a settlement agreement and then request for it to be rendered as an arbitration award. In this case, although not explicitly stated, the role of the mediator undergoes a subtle change. In the code of conduct for mediators regarding the review of settlement agreements, it is stated that if the mediator deems the settlement agreement illegal or difficult to enforce, they should raise and document their concerns. However, this should not be considered an obligation of the mediator, nor

should the mediator be allowed to use overly forceful methods in the form of review. On the other hand, when converting a settlement agreement into an arbitration award, the arbitrator should conduct a review. Converting the settlement agreement into an arbitration award adds new responsibilities for the mediator. Procedures can be put in place to avoid being held accountable for and having the arbitration award not enforced. If, during the process of converting the settlement agreement into an arbitration award, mediators identify reasons for non-compliance, they reserve the right to decline the conversion and provide an explanation for the decision.

7.5. Timing Considerations for Procedure Conversion

The conversion of procedures should consider an appropriate timing. If parties enter into mediation before the arbitration panel is constituted, there may be psychological resistance and defiance from the parties, as they might seek a judgment of right and wrong from the arbitrator and lack the requirement for a friendly atmosphere in mediation. However, if the parties engage in mediation after making their statements and presenting evidence, the aggressive attitudes are eliminated, and a more peaceful environment is established. This also increases predictability, allowing for an evaluation of one's position. The arbitrator becomes informed about the facts and evidence, gaining an understanding and a general assessment of the situation. This timing is more suitable. In practice, mediation entering into arbitration generally occurs later on because parties only turn to arbitration when all issues are unresolved in mediation (Nigmatullina, 2016: p. 63). However, initiating mediation at the earliest opportunity may prove more effective, as it can circumvent the acquisition of a strategic advantage in evidence and acknowledgment during arbitration, which could potentially result in a reluctance to negotiate and make concessions. Additionally, early mediation can lead to substantial savings in costs and time. In summary, the appropriate time point for the conversion procedure is after the parties have made their statements and presented evidence.

There are clear guidelines for when the mediation stage ends, and the arbitration stage begins. It is important to ensure that the moderator can adhere to specific ethical rules or behavior standards and can appropriately transition from the role of a mediator to the role of an arbitrator (Huberman, 2019: p. 11). By designing procedures effectively, risks can be minimized, and benefits can be gained from these hybrid processes.

8. Conclusion

In the Med-Arb model, the roles of the mediator and the arbitrator can be compatible which means that they could be the same person. This model has irreplaceable advantages. And corresponding principles should be established to reduce and avoid their disadvantages. The focus should be on ensuring that explicit consent is obtained from the parties when there is a change in the roles of the

process, the qualifications of the mediator and arbitrator, the scope of information used, and the timing of procedural changes. By establishing procedures to prevent violations of fundamental legal principles, it will affirm the compatibility of both the mediator and arbitrator roles. This not only offers parties a broader array of options but also diminishes the time, energy, and financial resources expended on dispute resolution. Moreover, it aligns with the longstanding arbitration and mediation principles in China and the notion of "harmony is precious." *The* amendments to *the Arbitration Law of Chian* are also moving toward providing more choices and reducing divergence. As a result, it holds greater social significance and cultural resonance.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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