Arb-med: ideal solution or dangerous heresy?[1] [2]

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In 2011, the arbitration community in Asia was gripped by a fascinating case in which the central question is whether the use of arb-med[3] is incompatible with a fair procedure in arbitration.

The case is *Gao Hai Yan & Another v Keeneye Holdings Ltd & Others* [2011] HKEC 514 and [2011] HKEC 1626 ("Keeneye"). In this case, the Hong Kong Court of First Instance refused enforcement of an arbitral award made in mainland China on public policy grounds. Specifically, the court held that the conduct of the arbitrators turned mediators in the case would "cause a fair-minded observer to apprehend a real risk of bias".[4] The court decision was swiftly followed by a large number of articles and notes for clients quick to point out the "risks", "dangers" and "pitfalls" of arb-med.[5] However, disappointingly for those predicting the demise of arb-med, it was then followed by a Hong Kong Court of Appeal decision which overturned the first instance decision and allowed enforcement of the award.

This article considers the decisions in the Keeneye case, both at first instance and on appeal, discusses the wider background to the use of arb-med (and those who object to its use) and makes suggestions for as to some common principles which could be observed by parties and arbitrators entering into such a process.

The Keeneye case

Keeneye was an extreme case (although, as mentioned below, elements of mediation are frequently seen in mainland Chinese arbitration). It concerned an arbitration being conducted under the rules of the Xian Arbitration Commission and the events giving rise to the dispute occurred after the first sitting of the tribunal. Although there were a number of disputed facts, at paragraph 22 of his judgment, Reyes J set out certain

1 I would like to acknowledge the assistance of Joel Greer, Christopher Hunt and Albert Monichino with this article. I would also like to thank the many contributors to the ICC YAF Asia discussion thread for all their thoughts on the topic. Needless to say, all views expressed and any errors made in the article are those of the author.

2 The descriptions of "ideal solution" and "heresy" in the title are used in the introductory paragraph of Michael E Schneider, "Combining Arbitration with Conciliation" in Report at the Seoul Conference of the International Council for Commercial Arbitration, ICCA Congress Series, No. 8, 1996, pp. 57 – 99 which is an excellent overview of the main issues arising.

3 In this article, the term "arb-med" is used to describe a procedure in which one or more arbitrators also act at some point during the proceedings as a mediator. The term "med-arb" is also used in the literature and it has been sometimes been suggested that the order in which arbitration and mediation are carried out should determine which of the two terms is used. However, it is submitted that this distinction is not a useful one. Indeed, the issues discussed in this article most commonly arise when an arbitrator acts as a mediator and then returns to acting as an arbitrator so, strictly speaking, that would be a case of "arb-med-arb". Likewise, the term is intended to include "conciliation" to the extent that it is regarded as distinct to mediation.

4 Paragraph 53 of the Judgment of Reyes J.

5 See, for example – Su Yin Anand, *The risks of Arbitration-Mediation: Hong Kong Courts decline to enforce PRC arbitral award*, IBA Arbitration News Vol 16 No 2 September 11, page 40; Allen & Overy, "The Dangers of Arb-Med" (available at http://www.allenovery.com/AOWEB/Knowledge/Editorial.aspx?contentTypeID=1&itemID=60992); Ince & Co, "Mediating your way out of arbitration – the pitfalls of arb-med" (available at http://incelaw.com/ourknowledge/publications/mediating-your-way-out-of-arbitration-the-pitfalls-of-arb-med/

uncontested facts (referred to as the "minimalist version") on which he based his decision. These are worth reciting in full:

(1) Following the first sitting, the members of the Tribunal decided to suggest to the parties to settle the case by the Respondents paying RMB 250 million to the Applicants. The Tribunal appointed Pan Junxin (XAC's Secretary General) and Zhou Jian (an arbitrator) to contact the parties with this suggestion. Pan and Zhou were appointed because they were based in Xian, whereas Jiang Ping and Liu Chuntian (the other 2 arbitrators) were based in Beijing.

(2) Pan's office communicated the suggestion to Kang Ming, a lawyer acting for the Applicants.

(3) Pan and Zhou contacted Zeng Wei and asked him to meet them at the Xian Shangri-la hotel over dinner. Zeng Wei is a shareholder of Angola. Zeng was contacted because he was regarded as friendly with the Respondents. During the arbitration, Zeng through a mutual acquaintance had sought to get in touch with Pan. Zeng had described himself at this time as "a person related to" (關係人) the Respondents. But Pan had initially refused the request. When the Tribunal came up with its RMB 250 million proposal, Pan remembered Zeng's request and Zeng's description of himself. Pan then asked Li Tao for Zeng's contact number.

(4) The persons at the Xian Shangri-la hotel dinner were Pan, Zeng and Zhou Jian. Pan told Zeng about the Tribunal's RMB 250 million proposal and asked Zeng "to work on" the Respondents.

(5) The Respondents refused to pay RMB 250 million to the Applicants.

(6) The Applicants subsequently informed the Tribunal that the Applicants were not prepared to settle the dispute with the Respondents for RMB 250 million."

Unsurprisingly, Reyes J found much to concern him in the "minimalist version" of the facts. Indeed, he had "serious reservations" about whether or not this procedure amounted to a mediation at all.[6] Having concluded that he could regard it as a mediation despite his reservations, he then considered various grounds which concerned him as to creating the impression that the tribunal favoured the Applicants.[7] He concluded that although these did not demonstrate a finding of actual bias, they were sufficient for an "apprehension of apparent bias".[8] He concluded that the facts would "cause a fair-minded observer to apprehend a real risk of bias".[9] In total, Reyes J listed 6 issues arising out of the way that Pan and Zhou proceed as together giving rise to this apprehension of apparent bias. Stating these briefly, they are as follows:

1. The proposal was not made to the Respondents or their lawyers but to a connected third party, Zeng. An impartial observer would fear that this was because it was perceived that Zeng could put pressure on the Respondents to accept the proposal.
2. What did Pan and Zhou mean when they asked Zeng to "work on" the Respondents? This had overtones of actively pushing the particular proposal.
3. Why was the proposal made without consulting the Applicants? The impression conveyed was Pan and Zhou were embarking on an exercise that favoured the Applicants.
4. The amount proposed was significantly above the amount which the Applicants had apparently declared as their bottom line.
5. The setting of a private dinner was odd – the private dinner again suggested Pan and Zhou pushing their proposal to the Respondents.
6. Finally, Reyes J considered that the final point "which would clinch the fair-minded observer's conclusion of apparent bias"[10] was in relation to the terms of the final award which went in the Applicants' favour and only recommended (but did not require) the payment of a lower sum to the Respondents.

Reyes J also considered whether the Respondents had waived any right to object to what had occurred by continuing with the arbitration without clearly stating their complaint about the proceedings. He concluded that they had not done so.

Approximately 8 months later, the Hong Kong Court of Appeal rendered their decision (*Gao Hai Yan v Keeneye Holdings Ltd* [2011] HKEC 514). They reversed Reyes J and held that the Applicants could enforce the arbitration award. The principal finding was that there was a waiver by the Respondents and hence they were not now able to challenge the award on the basis of matters which they had failed to object to at the time.

However, and more interestingly for this article, the Hon Tang VP also decided the wider issue of whether the procedure caused sufficient concerns of bias such that the court would

6 Paragraphs 40 – 50.

7 Paragraphs 54 – 68.

8 Paragraph 53.

9 Paragraphs 56 – 68.

10 Paragraph 68.

not uphold on the basis of the public policy exception under the New York Convention. The Court of Appeal followed Reyes J in only giving weight to the "minimalist version" and refusing to accept further allegations amounting to evidence of apparent (or actual) bias. The Hon Tang VP took issue with each of the 6 areas of concern raised by Reyes J as follows.

1. In relation to the fact that the proposal was not made to the Respondents or their lawyers but to a connected third party, Zeng, the Hon Tang VP considered it that it was clear that Zeng had significant influence over the Respondents and would have appeared at the "mediation" with their authority.[11]
2. The Hon Tang VP also did not have the same concern with the suggestion that Zeng should "work on" the Respondents. He concluded that it was a common expression in mainland China and did not carry the suggestion that the proposal needed to be pushed onto the Respondents as suggested by Reyes J.[12]
3. As to why the proposal was made without discussion with the Applicants, the Hon Tang VP does not comment directly as to why he did not regard it as an issue. However, it seems that the fact that the tribunal were acting on their own initiative was not something which he regarded as suggestive of bias.
4. Again, the Hon Tang VP did not comment directly on the concern that the proposal of RMB250 million seemed to be generous given the Respondents' stated bottom line. However, it seems clear from his discussion on point 6 of Reyes J's concerns that he considered it was impossible for the Hong Kong courts to conclude that this figure was an unreasonable one (see below).
5. As to the question of the private dinner meeting, the Hon Tang VP suggested that the question of whether a private dinner was appropriate for a mediation was better considered by a mainland China court.[13] He also noted that Zeng had paid for the dinner so it was not a case of "wining and dining" by Pan and Zhou.[14]
6. Finally, the Hon Tang VP outlined a number of reasons why the apparent mismatch between the amount recommended in the proposal and the amount recommended to be paid in the award were not comparable and hence not indicative of bias.[15]

The Hong Kong Court of Appeal decision shows that some of the earlier concerns about an arb-med procedure affecting the enforceability of an arbitral award were overblown. The Court of Appeal decision is a strong demonstration of the power of the New York Convention and that, in reputable jurisdictions, it is very difficult to resist enforcement of a valid arbitration award (particularly if an unsuccessful attempt has been made to set it aside in the place that it was made).

As noted above, Keeneye is an extreme case. Whilst there are differing views amongst arbitration practitioners about the acceptability of arb-med (strongly influenced by legal background and culture), it would be hard to find any reputable arbitration practitioners who would regard the procedure adopted by the arbitrators and institution in the Keeneye case as acceptable. Even whilst upholding the award, the Hon Tang VP confessed to "unease" about the procedure[16] although insisting that due weight should be given to the practices in mainland China and the refusal of the Xian Court to set aside the award.

A further oddity is that the case seems to have been argued at first instance and on appeal entirely on the question of whether there was an appearance of arbitrator bias. However, an alternative argument would have been to rely on wider grounds of procedural unfairness and irregularity. Under the Hong Kong Arbitration Ordinance,[17] this could have raised as a matter of public policy but also under Section 95(2)(e) on the rather simpler grounds that the arbitration procedure was not in "accordance with the agreement of the parties". The first instance decision of Reyes J found that the abortive "mediation" which took place was not in accordance with the Xian Arbitration Commission rules and neither had it been consented to by the parties.[18] It is submitted that this argument against enforcement would have been easier to establish than the notoriously tricky question of arbitrator bias.

That said, Keeneye has caused major debate because it is clearly a hard case in that two cardinal principles of international arbitration are in conflict. First, that arbitration awards should be widely enforced and public policy objections kept within narrow grounds. Secondly, that arbitration requires "due process" or

11 Paragraphs 77 to 84 of the Judgment of the Hon Tang VP.

12 Paragraphs 93 to 96.

13 Paragraph 99.

14 Paragraph 100.

15 Paragraphs 85 to 91.

16 At paragraph 102.

17 Ord. No 17 of 2010.

18 At paragraphs 41 – 50.

"fair procedure" (it cannot be seriously denied that there was a major failure in that regard in the Keeneye case). There is also the question of the extent to which courts tasked with enforcement should give deference to the decisions of the courts having jurisdiction over the seat of the arbitration.

Accordingly, the case has sparked a debate not just on its specific facts but also in relation to wider questions of whether combining mediation with an arbitration procedure is an acceptable practice. It is to that debate which I now turn.

Reaction to the Keeneye case and continuing different attitudes to the practice of arb-med

As noted above, the response to the Keeneye case included a wide number of articles, case notes and client notes warning of the dangers of arb-med. In a further intervention, which was widely reported, the deputy president of CIArb, Jeffrey Elkinson made clear his objection to the process on the grounds that the nature of mediation and arbitration are so "contrary to each other".[19] His main argument was against the use of "caucusing" – the mediator meeting the parties separately to try to broker an agreement. Mr Elkinson's view was that this was inconsistent with due process and would inevitably lead to conflict and challenges to awards.

However, it would be wrong to assume that there is a consensus view in the arbitration community on the issue. Indeed, as Michael E. Schneider noted in one of the most wide-ranging reviews of the topic,[20] there is a very stark divide between those who regard it as acceptable and, indeed, desirable and those who condemn it with a significant number of people between those two poles. As Schneider notes, there is a very strong link to different legal cultures. German respondents are very positive, the rest of continental Europe less so and American respondents negative (this latter conclusion can likely be extended to the whole common law tradition).

Although not considered by Schneider in detail, it is also clear that mainland China and Japan (and likely other parts of Asia) side with Germany in this debate. In a useful empirical study of cases from the Japan Commercial Arbitration Association ("JCAA"), Professor Nakamura has demonstrated that the practice is widespread.[21] The study also shows a continuing and strong divide between arbitrators from common law backgrounds and those from civil law backgrounds. Arbitrators from civil law backgrounds are much more likely to attempt an arb-med procedure (with Japanese arbitrators being the most positive of all). Although Professor Nakamura's study pre-dates the Keeneye case, the author's experience is that Keeneye has made no difference to the willingness of Japanese arbitrators to involve themselves in mediation.[22]

In terms of these varying attitudes, there is clearly a very strong link to the practice of the judiciary. In Germany and Japan, the judiciary are actively involved in mediating cases which come before them.[23] This has also been the practice in mainland China although with rather less consistency in approach.[24] These judicial practices are less common in other civil law countries and highly unusual in common law countries.[25]

In those circumstances, it is not surprising that Hong Kong should be the flashpoint for a new debate. As noted above, arbitration in mainland China often involves elements of mediation. As demonstrated by the Keeneye case, those examples of arb-med are also often undertaken by local institutions and arbitrators who do not have a wide international understanding of arbitration and how their behaviour is likely to be viewed on an enforcement of any award. In contrast, Hong Kong is a highly developed jurisdiction which maintains its common law tradition very strongly and, yet, often has to deal with issues arising out of mainland China arbitrations. A clash of the two traditions was more likely to happen here than anywhere else in the world.

19 http://www.globalarbitrationreview.com/news/article/29833/london-problems-med-arb-8211-keeneye-open-eyes.

20 Michael E Schneider, "Combining Arbitration with Conciliation" in Report at the Seoul Conference of the International Council for Commercial Arbitration, ICCA Congress Series, No. 8, 1996, pp. 57 – 99 – especially pp.77 – 81.

21 Tatsuya Nakamura, "Brief Empirical Study on Arb-Med in the JCAA Arbitration", JCAA Newsletter, Number 22 (June 2009), pp.10 – 12.

22 Indeed, in a current case, the author had some difficulty in persuading Japanese counsel that any other procedure for mediation was possible (even though a third party mediation was expressly contemplated by the rules).

23 Katja Funken, "Court-Connected Mediation in Japan and Germany" (March 2001), University of Queensland School of Law Working Paper No. 867 (available at SSRN: http://ssrn.com/abstract=293495 or doi:10.2139/ssrn.293495).

24 Randall Peerenboom and He Xin, Dispute Resolution in China: Patterns, Causes, and Prognosis, 4 East Asia Law Review (2009), pp24 – 28.

25 For a good three-country study, see Erik Ficks, "Models of General Court-Connected Conciliation and Mediation for Commercial Disputes in Sweden, Australia and Japan", Zeitschrift für Japanisches Recht/Journal of Japanese Law, no. 25/2008 (available at http://sydney.edu.au/law/anjel/documents/ZJapanR/ZJapanR25/ZJapanR25_09_Ficks.pdf).

However, it should be noted that clashes of traditions are not always as unhappy as the Keeneye case. The author has had a very satisfactory experience of an arb-med procedure in JCAA proceedings. In that case, two out of the three arbitrators were from the common law tradition (albeit that both had long experience in Japan and, in one case, was recognised for his extensive knowledge on Japanese law). At the suggestion of the other party, the entire arbitral tribunal acted in a mediation – it took a day and resulted in a settlement. To deal with some traditional common law reservations of the author and members of the tribunal, a mediation agreement was drawn up providing for a number of safeguards and matters of procedure of the kind described in the final section of this article below. In the author's view, a key reason for the success of the process was the other side's acceptance of the legitimacy of the process (which is unlikely to have been the case if a conventional mediation had been used).

Attempts to regulate arb-med proceedings in national laws

Given the lack of international consensus on the practice of arb-med, it is interesting to note that there have been a number of national laws passed in order to regulate its practice. Perhaps surprisingly, these provisions have been more common and extensive in common law jurisdictions (where arbitrators will likely be reluctant to engage in the practice) than in civil law jurisdictions (where it is more commonly practiced). The explanation may well be that because arb-med is seen as unproblematic in civil law jurisdictions, they have not seen fit to regulate it.

Notable examples to regulate attempts at arb-med have come in Hong Kong and Singapore. The Hong Kong Arbitration Ordinance (Ordinance No. 17 of 2010) provides for rules applying to arb-med in the following terms:[26]

"33. ***Power of arbitrator to act as mediator***

(1) If all parties consent in writing, and for so long as no party withdraws the party's consent in writing, an arbitrator may act as a mediator after the arbitral proceedings have commenced.

(2) If an arbitrator acts as a mediator, the arbitral proceedings must be stayed to facilitate the conduct of the mediation proceedings.

(3) An arbitrator who is acting as a mediator—

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

(b) must treat the information obtained by the arbitrator from a party as confidential, unless otherwise agreed by that party or unless subsection (4) applies.

(4) If—

(a) confidential information is obtained by an arbitrator from a party during the mediation proceedings conducted by the arbitrator as a mediator; and

(b) those mediation proceedings terminate without reaching a settlement acceptable to the parties, the arbitrator must, before resuming the arbitral proceedings, disclose to all other parties as much of that information as the arbitrator considers is material to the arbitral proceedings.

(5) No objection may be made against the conduct of the arbitral proceedings by an arbitrator solely on the ground that the arbitrator had acted previously as a mediator in accordance with this section."

In almost identical terms, the Singapore International Arbitration Act (Cap. 143A)[27] provides as follows:

"17.

(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."

26 It should be noted that its predecessor also contained provisions regulating arb-med.

27 It should be noted that the Singapore Arbitration Act (Cap. 10) which governs domestic arbitration contains the same provision.

These provisions also appear to have influenced the drafting of CAA Model Bill in Australia.[28] This is a model bill which was intended to be introduced into Australia's States and Territories and has already been widely adopted by them. Interestingly, no such provisions are included in the equivalent Act governing international arbitration.

The CAA Model Bill provides as follows:

27D Power of arbitrator to act as mediator, conciliator or other non-arbitral intermediary

*(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."*

In the author's view, each of these apparent attempts to encourage the practice of arb-med in these common law but Asian jurisdictions, is, in reality, more likely to discourage the practice. As noted above, the countries which have traditionally embraced arb-med have managed perfectly well without such mandatory laws and the provisions enacted infringe on the autonomy of the parties in determining how they can regulate their arb-med process.

I would make the following specific criticisms of the regimes:

First, the provision in each of the regimes that the arbitrator/mediator must "*disclose to all other parties to the arbitral proceedings as much of that information as he considers material to the arbitral proceedings*" seems fraught with difficulties. It is an attempt to deal with the legitimate concern raised by the common practice in mediation of meeting in private or "caucusing" with the parties. As noted above, this is the area which common lawyers particularly criticise in relation to arb-med due to the breach of usual due process requirements. However, in my submission, the Hong Kong/Singapore/Australia remedy for this ill causes more problems than it solves (it appears that some Australian commentators share this view).[29]

28 See Albert Monichino, "Arbitration Reform in Australia: Striving for International Best Practice", The Arbitrator and Mediator (October 2010), pp.45 – 46.

29 Albert Monichino, "Arbitration Reform in Australia: Striving for International Best Practice", The Arbitrator and Mediator (October 2010), pp.45 – 46.

I would say that the provision (a) puts the arbitrator/mediator in a difficult position requiring a judgment call and (b) may well impede the success of the mediation. Taking these in turn, it does not seem right to me that the arbitrator/mediator has to take a view about what is "material" and indeed how exactly to disclose it. The extent to which attacks on the other party made in mediation are "material" is highly debatable. Furthermore, mediations typically happen in an informal fashion with few notes taken – how is the arbitrator/mediator know that he has recorded everything accurately? It is not difficult to imagine the situation in which one party objects to the disclosure made by the arbitrator/mediator as not reflecting an accurate summary of what was said. Also, it would seem to open up the arbitrator/mediator to subsequent court challenges as to what should have been disclosed. It might be said in response to this that because the matters were confidential, the other party would find it difficult if not impossible to mount a challenge. However, if the obligation to disclose is not enforceable, then why give the arbitrator/mediator this difficult responsibility?

As to the second point, practitioners experienced in mediation know that one of the reasons it often works is that it allows the parties to "vent" about their frustrations with the other side. If such matters are to be disclosed, then either parties will either hold back, weakening the benefits of mediation, or they will be disclosed with the likely result that the relationship between the parties gets dramatically worse.

If it is felt necessary to regulate this aspect of arb-med rather than leave it to the parties and their legal advisers, then it is submitted that the better approach is a "disregard" rule. This would provide that the arbitrator/mediator must take no account of the matters discussed in the mediation in reaching his decision in the arbitration. As commentators have noted,[30] this requirement to take no account of matters in the mediation is little different in principle to other occasions in which the arbitrator is aware of material but is required to disregard it in reaching his decision - the most obvious example is when an arbitrator has to consider and rule on the admissibility of certain evidence where he will be required to disregard it if he holds that it is inadmissible. This is a clear rule which arbitrators should have little difficulty in following (and was the approach adopted in the author's case described above). In most cases, it also unlikely to cause any practical difficulty for the experienced arbitrator – if a party is only prepared to make an allegation in mediation and not in arbitration, he will know that it should not be given any weight.

Another area of concern with these legislative rules, is the ability of a party to first agree that there should be power for the arbitrator to mediate and then withdraw its consent. Again, this is aiming at a genuine problem – what if a party having agreed to an arbitrator acting as a mediator then loses confidence in their ability to mediate? However, it is submitted that a legislative rule may not be the best solution because a mandatory rule may well interfere with an approach that the parties would wish to adopt. For example, the parties may wish to engage in mediation over a set period such as a day with an unambiguous waiver for that mediation followed by a return to arbitration if the matter cannot be settled. In that context, it would be undesirable to allow a party to withdraw the mediation power during the day (of course, there is nothing to stop them withdrawing from the mediation if they consider that it will not result in a settlement).

The provision is also quite ambiguous as to waiver. If the parties' consent, have they waived any objection to the process? Or could they later object based on grounds that the procedure was not fair? Does a withdrawal of consent affect the position. None of these points are clearly covered in the legislation.

This point above may be somewhat academic which may not trouble the parties much in practice but the Australian CAA Model Bill introduces a yet more problematic version of consent. As noted above, it provides that: "*[a]n 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.*" By giving each party a veto over whether the arbitrator/mediator can continue, it is inevitable that there will be tactical exercises of that veto to remove an arbitrator who is seen as unfavourable or simply to delay proceedings.

30 Michael E. Schneider, "Combining Arbitration with Conciliation" in Report at the Seoul Conference of the International Council for Commercial Arbitration, ICCA Congress Series, No. 8, 1996, pp. 57 – 99 – at p. 94; Jacob Rosoff, "Hybrid Efficiency in Arbitration: Waiving Potential Conflicts for Dual Role Arbitrators in Med-Arb and Arb-Med Proceedings", Journal of International Arbitration (2009), Volume 26, Issue 1, 89 – 110 at p.96. It is worth noting that having argued cogently that the arbitrator-mediator is capable of disregarding the material, Schneider continues by supporting the Hong Kong/Singapore/Australia approach described above. With respect, Schneider's reasoning in that regard is difficult to follow.

In short, the legislative regulation of arb-med in Hong Kong, Singapore and Australia seem likely to discourage arbitrators from offering it as an option and to discourage the parties from accepting it. It is submitted that any legislative regulation of arb-med should be more circumscribed and more fully respect the parties' autonomy (with the possible caveat that they should receive adequate legal advice on the issues raised by arb-med before entering into it).

An alternative approach

If not legislation, then what should be the approach in relation to the regulation of arb-med? As noted above, there is a huge gulf in views between arbitration practitioners from different backgrounds and it may be more useful to try to bridge that gulf rather than attempting to pass legislation in countries where the process is rarely used. In other contentious areas, a working group of international practitioners has often performed the valuable exercise of developing guidelines and best practice internationally – the various IBA Guidelines are the best known and most successful examples.

There may be some scepticism that sufficient consensus could be reached to produce useful guidelines but despite the wide gulf between civil and common law arbitration practitioners in relation to disclosure and document production, the *IBA Rules on the Taking of Evidence in International Arbitration* were still successfully developed and have gone on have immense influence in international arbitration. On a personal note, the author is a English solicitor who was initially very sceptical but has become convinced of the merits of arb-med over many years spent in Japan in which he was actively involved in arbitration with Japanese elements so there is clearly scope for people to change their mind.

With that in mind, the author would like to suggest a few guidelines which could be considered for those considering arb-med. Some of these should be uncontroversial but some will provoke more of a debate.

1. An arb-med procedure should only take place with the written consent of the parties (this is a common provision in both legislation and arbitral rules that contemplate the process).
2. It should not be used unless both sides are legally represented and have the opportunity to receive legal advice on the implications (this should ensure that any consent is an informed consent).
3. The parties should always be given the option of an independent mediator as an alternative (this is useful to ensure that neither party feels that it is being pressured into a procedure with which it is not comfortable).
4. Before any mediation occurs, the parties and arbitrator-mediator should draw up a written document recording their consent and containing other key aspects of the procedure. These could include the following:
   - The time for the mediation to occur (including potentially a deadline after which it will be deemed terminated unless extended by the agreement of the parties).
   - Any actions to be taken in respect of the arbitration if the mediation is terminated without success.
   - Whether the arbitrator-mediator will be allowed to meet with parties privately (it should not be assumed that this is the only way a mediation could occur).
   - Other aspects of the mediation procedure which is thought useful or prudent to regulate (an example may be whether the arbitrators have the power to offer an evaluation of the strength of the parties' cases).
   - The parties' agreement to waive challenges arising out of the procedure (both to the arbitrator-mediator and to the eventual award).
   - An agreement not to produce evidence of what occurred in the mediation into the arbitration process (in that sense, the parties accept its "without prejudice" nature despite the fact that the arbitrators would have participated).
5. The agreement should also record that the arbitrators would fully disregard any matters raised in the mediation unless they were properly presented and pleaded in the arbitration.

These guidelines aim to ensure that - a decision to enter arb-med is taken only if the parties are fully informed and enter into the procedure freely; having done so, a party is not then able to later object; to minimise all challenges and disputes about the process and to ensure, to the maximum extent possible, that the contents of the mediation do not affect the eventual outcome of the arbitration.

Conclusion

As should be clear by now, the author is of the view that arb-med, carried out appropriately, can be a useful tool whilst recognising that this view is still heretical amongst arbitration practitioners from the common law tradition. It is hoped that this article may persuade some readers that the process is not as dangerous as they may have thought. Furthermore, whilst arbitration is being subjected to heavy criticism for its increasing time and costs and legalistic approach, I would suggest that it is entirely right to be actively considering alternative approaches to "arbitration as usual".