Developing Efficient Dispute Resolution Solutions for International Commercial Disputes: Ways to Address Concerns Associated with the Combined Use of Mediation and Arbitration by the Same Neutral

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Abstract

Securing fast, inexpensive and enforceable redress is vital for the development of international commerce. In a changing international commercial dispute resolution landscape, the combined use of mediation and arbitration, and particularly a combination where the same neutral acts as a mediator and an arbitrator (same neutral (arb)-med-arb), has emerged as a dispute resolution approach offering these benefits. However, to date there has been little agreement on several aspects of the combined use of processes, which the literature often explains by reference to the practitioner’s legal culture. There is a heated debate in the international dispute resolution community as to whether it is appropriate for the same neutral to conduct both mediation and arbitration. When the same neutral acts as a mediator and an arbitrator, caucuses become a primary concern. This is largely due to the danger that an arbitrator will appear to be, or actually be biased, and the risk that the process may offend the principles of due process.

A review of the literature shows that the combined use of mediation and arbitration raises more questions and concerns than it offers answers and solutions. This thesis proposes remedies for this situation. The purpose of this thesis is twofold. First, to investigate ways to address concerns associated with the same neutral (arb)-med-arb, which should allow parties to benefit from time and cost efficiencies of the process and the ability to obtain an internationally enforceable result. Second, to examine whether the perception and use of the same neutral (arb)-med-arb varies depending on the practitioner’s legal culture. The research involved an analysis of legal sources complemented by a two stage empirical study conducted through questionnaire and interview.

The thesis identifies three major ways to address concerns associated with the same neutral (arb)-med-arb: 1) the involvement of different neutrals in combinations, 2) procedural modifications of the same neutral (arb)-med-arb, and 3) the implementation of safeguards for using the same neutral (arb)-med-arb. It demonstrates that not all of these ways will achieve the goals of fast, inexpensive and enforceable dispute resolution. The results support the conclusion that the perception and use of the same neutral (arb)-med-arb varies throughout the world depending on the practitioner’s legal culture. This and other factors ultimately affect the choice of ways to address concerns...
associated with the same neutral (arb)-med-arb. Further to these significant results, the thesis argues that the same neutral (arb)-med-arb is not a ‘one-size-fits-all’ process. Other combinations discussed in the thesis require more attention from practitioners and academics.

This thesis makes a substantial and original contribution to the understanding of combinations in international commercial dispute resolution in four ways. First, the empirical study is the first study to investigate specifically the use of combinations in international commercial dispute resolution. Its results shed light on the use of combinations in international commercial dispute resolution, their common triggers, the way in which the processes are combined most frequently, and the most common forms of recording the outcome of combinations. Second, the thesis synthesises existing ways of addressing concerns associated with the same neutral (arb)-med-arb in international commercial dispute resolution and groups them into the three major categories mentioned above. Third, having identified that there is scope for a more widespread use of combinations in international commercial dispute resolution, the thesis provides recommendations on how to enhance the use of combinations. Finally, the thesis highlights several areas where future research is needed.
The following published journal article contains aspects of this thesis:

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PART I. THE INTRODUCTION
CHAPTER 1. THE INTRODUCTION

1.1 Background

Everything changes and nothing stands still.¹ The dispute resolution landscape is no exception.² While initially, the international commercial arbitration community praised arbitration for its flexibility and expedition, this process has recently drawn criticism for becoming as slow and expensive as judicial proceedings, if not more so.³

A number of empirical studies provide evidence of the discontent of users with the international arbitration process due to the escalated costs and protracted proceedings. For example, in a 2006 survey conducted by the School of International Arbitration (SIA), Queen Mary University of London, expense and the length of time to resolve disputes were the two most commonly cited disadvantages of international arbitration.⁴ Participants of a 2010 study of the Corporate Counsel International Arbitration Group reiterated concerns over costs and delays in arbitration proceedings.⁵ The most recent 2015 SIA survey similarly found that cost is seen as arbitration’s worst feature, followed by, among others, lack of speed.⁶

¹ Heraclitus, a Greek philosopher, quoted in Plato, Cratylus, in IV Plato in Twelve Volumes 383, 401d (Harold N. Fowler trans., Cambridge, MA: Harvard University Press, 1921).
² The focus of this thesis is international (cross-border) commercial dispute resolution.
Many factors have contributed to the growing concerns over the costs and delays of arbitration proceedings. These factors include: counsel fees, fees of arbitrators and institutions, the procedures and methods employed, the limited possibility of appeal and minimal curial intervention, and parties’ fixation with involving the best arbitrators and lawyers in the process.

Despite concerns over costs and delays, arbitration seems to still be the preferred means for resolving international commercial disputes, mostly because it is better adapted to the special environment of international commercial disputes than litigation. Neutrality and enforceability, rather than high speed and low cost, emerge as the true drivers behind the use of arbitration for international disputes. The selection of arbitrators with specialist competencies and the privacy afforded by the process might be others.

1.1.1 Time for reforms in international arbitration

As concerns over the effectiveness of international arbitration remain, the time is right for reforms in the field of international commercial arbitration. Reforms could focus

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8 Examples from case law show parties’ discontent with fees of arbitrators and institutions. Two cases dealt with challenges of arbitrator and institutional fees for their excessiveness: Coffee Beanery v. WW, L.L.C., No. 07-1830, 2008 U.S. App. LEXIS 23645 (6th Cir. Nov. 14, 2008) and Soyak Int’l Constr. & Investment Inc. v. Hobér, Kraus & Melis, No. Ö 4227-06 (3 Dec. 2008) (Swedish Supreme Court) cited in Menon, supra n. 3, at ¶ 35. In one Singaporean case a party attempted, though unsuccessfully, to challenge the costs awarded by a tribunal as being disproportionate and contrary to public policy. VV and anor v. VW [2008] 2 SLR(R) 929 cited in Menon, supra n. 3, at ¶ 35.

9 Marriott, supra n. 7; Greenwood, supra n. 3, at ¶ 25.

10 Menon, supra n. 3, at ¶ 25.

11 Ibid, at ¶ 35.


13 Cheng, supra n. 3, at 434-435.


on improving efficiency within the arbitration process and creating better conditions for settlement.\(^{17}\)

It appears that so far, the international arbitration community has concentrated on the former, rather than the latter.\(^{18}\) In recent years, arbitration institutions have introduced, for example, fast-track proceedings and emergency arbitration. There is probably no international arbitration institution that has not revised its rules to speed up the arbitration process.\(^{19}\) Despite these and other measures, there has been little visible improvement in recent years in the management of arbitrations,\(^{20}\) while delays seem to be on the rise.\(^{21}\) The common call is to use stand-alone mediation and a combination of mediation and arbitration.\(^{22}\)

### 1.1.2 Mediation

Increasingly disenchanted with lengthy and costly international arbitration, parties are choosing mediation as an alternative.\(^{23}\) While arbitration is often referred to as the ‘new litigation’, mediation has now been coined the ‘new arbitration’.\(^{24}\) Although the extent

\(^{17}\) Greenwood, supra n. 3, at 200-201, 205; Stipanowich & Ulrich, supra n. 16, at 6.

\(^{18}\) Greenwood, supra n. 3, at 205.


\(^{20}\) Greenwood, supra n. 3, at 204.

\(^{21}\) Respondek, supra n. 5, at 509.

\(^{22}\) Greenwood, supra n. 3, at 200-201 (referring to a solution proposed by a team of in-house counsel at the round table discussion on the issue of increased time and cost of international arbitration organised by Global Arbitration Review); Gabrielle Kaufmann-Kohler, When Arbitrators Facilitate Settlement: Towards a Transnational Standard, Clayton Utz, available at [http://www.claytonutz.com/jalecure/2007/transcript_2007.html> (accessed 5 Sep. 2015) (expecting that arbitration will develop new less formal ways of resolving disputes: resorting to (separate) mediation may be one, having an arbitrator act as mediator may be another); Kun, supra n. 3, at 549 (observing that because arbitration is now being criticized for becoming ‘judicialized’, due to the slowness and expensive of the procedure, practitioners are beginning to see the merits of integrating mediation and other ADR means into arbitration); Nottage, supra n. 3 (suggesting that costs and delays be managed by, among other measures, using Arb-Med - authorising tribunal (in writing) to facilitate settlement during proceedings); Ehle, supra n. 16, at 94 (observing that although no established transnational consensus exists on how the international arbitrator may meet users’ expectations of more efficient process, the trend clearly favours the arbitrator as a more active settlement facilitator); Stipanowich & Ulrich, supra n. 16, at 6 (noting that while early settlement of a dispute can be a uniquely effective way of minimizing cost and length of a dispute resolution process, the role of arbitrators in promoting informal settlement has not been sufficiently looked into, at least in places like the US).


\(^{24}\) Ibid.
to which mediation is practised is not yet comparable to that of arbitration, it appears to be constantly growing.\textsuperscript{25} Bustamante Vasconez even argues that mediation is becoming the best alternative to international litigation.\textsuperscript{26} Parties benefit from mediation because it offers them the ability to control the process and tailor their own solution in a setting that helps preserve their relationship.\textsuperscript{27} Mediation is also praised for outstanding settlement rates.\textsuperscript{28}

Nevertheless, it appears that the mediation of many international commercial disputes does not constitute the quick, easy and inexpensive dispute resolution process that many commercial actors envision.\textsuperscript{29} Contributing to this is the increasing complexity of international commercial disputes and the involvement of many participants, which presents some additional challenges, non-existent in a two-party process.\textsuperscript{30} Cheng even argues that there may be little or no difference in costs involved in international mediation and international arbitration.\textsuperscript{31} According to Cheng, this is because the most expensive items in a dispute resolution budget are the fees of counsel and experts that are similar in international mediation and arbitration.\textsuperscript{32}

Researchers and practitioners in some countries argue that mediation is not a viable mechanism on its own and its likely future lies with integration in other dispute resolution mechanisms.\textsuperscript{33} One of the most frequently cited impediments for more widespread use of mediation as a stand-alone method of international commercial dispute resolution is the lack of a coherent enforcement mechanism for international

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{26} See, e.g., Bustamante Vasconez, supra n. 25, at 283.
\item \textsuperscript{28} See, e.g., Bustamante Vasconez, supra n. 25, at 283.
\item \textsuperscript{29} Strong, supra n. 3, at 18-24.
\item \textsuperscript{30} Ibid.
\item \textsuperscript{31} Cheng, supra n. 3, at 438.
\item \textsuperscript{32} Ibid.
\end{enumerate}
\end{footnotesize}
mediated settlement agreements.\textsuperscript{34} As explained in the next paragraph, the combined use of mediation and arbitration offers parties a chance to remove this impediment.

1.1.3 \textit{Combined use of mediation and arbitration and the same neutral (arb)-med-arb}

The use of mediation and arbitration in combination is not new,\textsuperscript{35} and its practice has ancient roots.\textsuperscript{36} The combined use of mediation and arbitration, and particularly the combination where the same neutral\textsuperscript{37} acts as a mediator and an arbitrator (same neutral (arb)-med-arb), may provide parties with a process that is faster and less expensive, as compared to arbitration used on its own.\textsuperscript{38} In addition, it allows parties to convert their mediated settlement agreement into a consent arbitral award that is, arguably, enforceable worldwide pursuant to the New York Convention.\textsuperscript{39}

Despite these and other advantages, dispute resolution practitioners around the world express different, and sometimes conflicting views about a number of aspects of the combined use of processes. Commentators often explain this divide in views by reference to the practitioners’ legal culture.\textsuperscript{40} In particular, no agreement exists on whether it is appropriate for the same neutral to act as both a mediator and an arbitrator in the same dispute.\textsuperscript{41} In the same neutral (arb)-med-arb, caucuses become the most problematic issue. This is largely due to the danger that an arbitrator will appear to or actually lack impartiality and the risk that the process may offend the principles of due

\textsuperscript{35} Wolski, supra n. 3, at 257; Mercedes Tarrazon, \textit{Arb-Med: A Reflection a Propos of a Bolivian Experience}, 2(1) NYSBA New York Disp. Res. Law. 87, 87 (2009) (noting that a combination of mediation and arbitration has been the customary practice in many jurisdictions throughout the world, including Latin America).
\textsuperscript{36} Derek Roebuck, \textit{The Myth of Modern Mediation}, 73(1) Arb. 105, 106 (2007) (observing that everywhere in the Ancient Greek world, including Ptolemaic Egypt, arbitration was normal and in arbitration the mediation element was primary; mediation was attempted first and a mediated settlement was preferred).
\textsuperscript{37} For the purposes of this thesis, ‘a neutral’ means a neutral third party requested to resolve or assist in resolving a dispute in which the third party has no financial, official, or personal interest.
\textsuperscript{38} See discussion in section 3.2.1 infra.
\textsuperscript{40} For the purposes of this thesis, ‘a practitioner’ means a dispute resolution practitioner with or without a legal qualification. See discussion of the influence of the practitioners’ legal culture on their perception of the same neutral (arb)-med-arb in Chapter 4 infra.
process. As a consequence, the arbitrator and the award resulting from the same neutral (arb)-med-arb may be challenged. The pitfalls of enforcing international arbitral awards resulting from the same neutral (arb)-med-arb are illustrated by Gao Haiyan, a case to which some commentators attribute the recent emergence of the same neutral (arb)-med-arb as a ‘hot topic’ among practitioners. For the reasons explained in section 1.4, the same neutral (arb)-med-arb is the central combination for this thesis.

1.2 Research Hypotheses and Questions
The starting point of the research was the hypothesis that parties to international commercial disputes could benefit from the time and cost efficiencies of the same neutral (arb)-med-arb and achieve an internationally enforceable result, provided certain measures were implemented to address concerns associated with this process. It was also hypothesised that not all international commercial dispute resolution practitioners raised concerns over the same neutral (arb)-med-arb. Instead, the perception and use of the process varied, depending on the practitioners’ legal culture.

To test these hypotheses, the following five research questions were formulated:

1. What are the advantages and concerns associated with the same neutral (arb)-med-arb?
2. What is the current state of use of combinations, including the same neutral (arb)-med-arb, in international commercial dispute resolution and how are they perceived?
3. What is the influence of the practitioners’ legal culture on their perception and use of the same neutral (arb)-med-arb?
4. How can the concerns associated with the same neutral (arb)-med-arb be addressed?
5. How can the use of the same neutral (arb)-med-arb and other combinations in international commercial dispute resolution be enhanced?

An answer to the first question is provided in Chapter 3 and is complemented by Chapter 5. The second question is addressed in Chapter 5. Chapter 5 together with Chapter 4 provide an answer to the third question. The fourth question is answered in Chapters 6, 7 and 8, and the fifth is addressed in Chapter 9.

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42 See discussion in section 3.3 infra.
43 See discussion of this case in sections 8.2.2.3.1.2 and 9.5.2 infra.
1.3 Research Justification

A review of the literature demonstrates that so far the combined use of mediation and arbitration in international commercial dispute resolution raises more questions and concerns than it offers answers and solutions. The unique possibility of fast, inexpensive and enforceable redress that the combined use of processes provides should not be missed. The current demands of international business for more efficient dispute resolution solutions and, yet untapped potential of combinations justify this research.

Moreover, even though academic debate is ongoing about acceptable ways of combining mediation and arbitration, there is little evidence to suggest that practitioners actually use any combinations. No empirical research focused on the combined use of processes in an international commercial dispute resolution context has been found. Existing empirical studies either explore how particular questions related to the combined use of processes are dealt with in certain jurisdictions or constitute part of broad-based inquiries into the practice of international dispute resolution. These do not

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44 Haig Oghigian, *Perspectives from Japan: A New Concept in Dispute Resolution - the Mediation - Arbitration Hybrid*, 2(1) NY State Bar Ass'n New York Disp. Res. Law. 110, 112 (2009) (noting that ‘the suggestions put forward ... are meant to stimulate dialogue and attract comments from other practitioners and academics who may have innovative suggestions on how to better make the med-arb hybrid an effective tool for alternative dispute resolution’); Pierre Tercier, *Foreword*, in *ADR in Business: Practice and Issues across Countries and Cultures* vol I xxi, xxiii (J C Goldsmith, Arnold Ingen-Housz & Gerald H Pointon eds., Kluwer Law International 2006) (observing that ‘[a]rbitration and ADR are...complementary...[t]he problem is how to combine them so as to benefit from the synergy they are capable of offering’).

45 See, e.g., Donald E. Conlon, Henry Moon & K. Yee Ng, *Putting the Cart before the Horse: The Benefits of Arbitrating Before Mediating*, 87(5) J. Applied Psychol. 978 (2002) (where the authors examine the impact of mediation-arbitration and arbitration-mediation and three disputant dyadic structures (individual vs. individual, individual vs. team, and team vs. team) on various dispute outcomes; participants were undergraduate students from a large mid-western US university); Neil B. McGillicuddy, Gary L. Welton & Dean G. Pruitt, *Third-Party Intervention: A Field Experiment Comparing Three Different Models*, 53(1) J. Personality & Soc. Psychol. 104 (1987) (where the authors conducted a field experiment at a community mediation center to test the impact on behaviour in mediation of three models of third-party intervention; third parties and disputants were randomly assigned to one of three conditions: (a) straight mediation; (b) mediation-arbitration (same); or (c) mediation-arbitration (different); the data was collected at the Dispute Settlement Center of Western New York); Gerald F. Phillips, *The Survey Says: Practitioners Cautiously Move Toward Accepting Same-Neutral Med-Arb, But Party Sophistication is Mandatory*, 26(5) Alternatives 101 (2008) (where the author surveyed US commercial arbitrators and mediators; the survey questions addressed mostly practitioners’ perceptions of the same neutral med-arb).

provide significant insight into the dynamics of the combined use of processes as a discrete dispute resolution approach. Scholars expressly recognise the lack of empirical research related to the combined use of processes and specifically invite researchers to conduct studies to remedy this deficit. Taking up these invitations, an empirical study investigating the use of combinations in international commercial dispute resolution was conducted for the purposes of this thesis. Its results are presented in Part III.

1.4 Focus on the Same-Neutral (Arb)-Med-Arb

The same neutral (arb)-med-arb is the central combination for this thesis for two reasons. First, as noted in section 3.2, the same neutral (arb)-med-arb appears to be a combination with the most potential for the increased time and cost efficiency of dispute resolution, as compared to arbitration and other combinations. Second, as discussed in section 3.3, the same neutral (arb)-med-arb is a combination that raises numerous concerns, particularly in some jurisdictions. The thesis aims to explore ways to address concerns associated with the same neutral (arb)-med-arb, which should allow parties to benefit from the time and cost efficiency of the process and an internationally enforceable result.

1.5 Overview of Methodology

The thesis involves an analysis of primary and secondary legal sources complemented by empirical research. A variety of primary and secondary legal sources on the combined use of mediation and arbitration have been examined. These include international conventions, national legislation, case law, ‘soft law’ instruments (such as institutional arbitration and mediation rules, texts of the United Nations Commission on International Trade Law, and so on).

Survey aimed to obtain information regarding the use of mediation, arbitration, and other ADR approaches by major US corporations).


Stipanowich & Lamare, supra n. 46, at 67 (concluding that broad-based surveys offer a springboard for research on the performance and effectiveness of multi-step dispute resolution approaches, among other areas of interest); International Institute for Conflict Prevention and Resolution, Attitudes Toward ADR in the Asia-Pacific Region: A CPR Survey, available at <http://www.cpradr.org/Portals/0/Asia-Pacific%20Survey.pdf> (accessed 5 Sep. 2015) (recognising the need to develop and deploy a survey to achieve more detailed measurement of forms of mediation, including a combination of mediation and arbitration, in use, because the actual use of mediation appeared to lag behind positive attitudes toward mediation).

on International Trade Law (UNCITRAL) on international commercial arbitration and conciliation, guidelines and rules of the International Bar Association (IBA), book chapters, journal articles, conference papers, specialised online databases, publications and blogs. A significant proportion of data has been collected through the University of Western Australia library catalogue. Most of the primary legal sources were available online. Materials from the Documentation & Research Centre of the International Chamber of Commerce have also been used.

A thorough review of primary and secondary sources provided the theoretical foundation for the design of the empirical study that comprised two phases undertaken through a questionnaire and interview, respectively. The use of multiple methodologies in empirical legal research is not uncommon. This is because when different methodologies are used together in ways that are interactive and linked, research can have more explanatory power. Bühring-Uhle et al. believe that the only way to access a meaningful and representative body of arbitration experience is to conduct a survey complemented by in-depth interviews with leading practitioners. The empirical study conducted for the purposes of this thesis follows this methodology.

The first phase employed a questionnaire to investigate the current use of mediation in combination with arbitration in international commercial dispute resolution. It was conducted between February and June 2014 and involved eighty-one participants. The analysis of the questionnaire data in the context of legal sources assisted in defining the scope of the second phase of the empirical study undertaken through semi-structured interviews.

The second phase involved interviews with six highly experienced international commercial dispute resolution practitioners. The interviews were conducted in March and April 2015 and aimed to elicit views about the most significant questionnaire results

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52 Ibid.
54 As explained in section 5.3.1.1 infra, although thirteen professionals were invited to participate in an interview, only six of them accepted the invitation.
and explore ways to enhance the use of the combined processes in international commercial dispute resolution.

Both phases of the empirical study were conducted with ethics approval from The University of Western Australia Human Ethics office.

The methodology of each phase is described in more detail in sections 5.2.1 and 5.3.1, respectively.

1.6 Synopsis

The thesis is divided into six parts. This Chapter comprises Part I and provides an introduction to the thesis.

Part II consists of three chapters (Chapters 2, 3 and 4). It lays out the theoretical foundation for this work, in general and for the design of the empirical study in Part III, in particular. It provides an answer to the first research question in Chapter 3, and partially answers the third question in Chapter 4.

Before addressing the two research questions, Part II synthesises in Chapter 2 the existing approaches to defining terms denoting various combinations, and formulates definitions of the terms used to denote the key combinations in this thesis. This is necessary because of the lack of clarity that surrounds the use of terms denoting various combinations. Chapter 2 coins the term ‘the same neutral (arb)-med-arb’ to denote the central combination for this thesis. By defining terms denoting the key combinations other than the same neutral (arb)-med-arb, Chapter 2 lays the basis for the further exploration of these combinations in Part IV in the context of addressing concerns associated with the same neutral (arb)-med-arb. All combinations introduced in Chapter 2 are valuable flexible process design options, which parties might find useful depending on the particular circumstances of their case. This will be discussed in section 9.5.3. A summary of the main approaches to defining terms denoting the key combinations and definitions used in this thesis is presented in Appendix 1.

Chapter 3 draws on the extensive literature to examine advantages and concerns associated with the same neutral (arb)-med-arb. It identifies six advantages recurrently attributed to this process and two main groups of concerns associated with it: behavioural, that surface in the mediation stage and procedural, that arise in the arbitration stage. It also analyses a challenge posed by the same neutral (arb)-med-arb to dual role neutrals. Not only must dual role neutrals be skilled in both mediation and
arbitration, they must also be capable of effectively handling each role while switching from one to another.

Chapter 4 reviews the literature, including a small number of empirical studies, to explore the influence of the practitioners’ legal culture on their perception and use of the same neutral (arb)-med-arb in different jurisdictions in the world. In particular, it traces the influence of the practice of the judiciary, and the way disputes are resolved in a particular jurisdiction, on how practitioners from that jurisdiction perceive the same neutral (arb)-med-arb, and whether and how they use this process. It also analyses the ongoing changes and adaptations in this field taking place in different parts of the world.

Part III comprises Chapter 5. It provides an answer to the second research question, partially answers the third research question, and complements the answer to the first research question. It does so through presenting and discussing the key results of the two-phase empirical study carried out for the purposes of this thesis. The first phase was conducted through a questionnaire to investigate the current use of mediation in combination with arbitration in international commercial dispute resolution. Chapter 5 examines the questionnaire results related to the extent to which mediation is currently used in combination with arbitration at an international level, the way in which the processes are combined most frequently, and the most common forms of recording the outcome of combinations. It then summarises the questionnaire results that are significant for the second phase of the empirical study – semi-structured interviews. Finally, it presents and discusses interview results related to perceived barriers to using the same neutral (arb)-med-arb, the significance of the legal culture for the way combinations are conducted, the emergence of a harmonisation trend in the use of combinations, and whether the introduction of an international enforcement mechanism for mediated settlement agreements might decrease the parties’ interest in the use of combinations.

Part IV consists of three chapters (Chapters 6, 7 and 8) and provides an answer to the fourth research question. It investigates ways to address behavioural and procedural concerns associated with the same neutral (arb)-med-arb discussed in Chapter 3. It identifies three major ways to address these concerns: first, by involving different neutrals in each, mediation and arbitration, phase of combinations; second, by modifying the same neutral (arb)-med-arb procedure; and third, by implementing
safeguards for using the same neutral (arb)-med-arb. These three ways are examined in Chapters 6, 7 and 8, respectively.

Most of the combinations discussed in Chapters 6 and 7 have been introduced and defined in Chapter 2. Chapters 6 and 7 explore these processes further, identifying their strengths and weaknesses, and giving specific examples of their use.

Chapter 6 examines the first way to address concerns associated with the same neutral (arb)-med-arb: the use of combinations involving different neutrals as a mediator and an arbitrator. These are diff neutral (arb)-med-arb, shadow mediation, co-med-arb, four combinations involving different neutrals suggested by various dispute resolution institutions, and (arb)-med-arb opt-out. While combinations involving different neutrals eliminate behavioural and procedural concerns associated with the same neutral (arb)-med-arb, often they do not save time and money.

Chapter 7 analyses the second way to address concerns associated with the same neutral (arb)-med-arb: by modifying the same neutral (arb)-med-arb procedure. Procedural modifications discussed in Chapter 7 are MEDALOA (Mediation and Last Offer Arbitration), arb-med and modifications relevant to a three-member tribunal. Each reduces some of the procedural and behavioural concerns associated with the same neutral (arb)-med-arb.

Chapter 8 reviews and analyses the existing scholarship and empirical data collected for this thesis on the safeguards for using the same neutral (arb)-med-arb, and identifies two key safeguards: party voluntary and informed consent to the process, and two main safeguard options for reducing concerns related to the use of caucuses.

Part V comprises Chapter 9 and answers the fifth research question. It investigates initiatives, including those suggested in the interviews conducted for this study, directed to enhance the use of the same neutral (arb)-med-arb and other combinations in international commercial dispute resolution. These include the adoption of legislation explicitly providing for a possibility to use combinations, elaboration of international guidelines addressing various combinations and safeguards for their use, and more active involvement of dispute resolution centres in promoting the use of combinations. These three measures need to be accompanied by consistent efforts to build the capacity of dispute resolution practitioners.

Finally, Part VI comprises Chapter 10 and presents the thesis conclusions. It highlights the contributions made by the thesis and identifies areas for future research.
PART II. THE THEORETICAL FOUNDATION

Part II comprises three chapters and lays out the theoretical foundation for this work. Chapter 3 provides an answer to the first research question. Chapter 4 partially answers the third question. Before addressing these two research question, Part II synthesises in Chapter 2 the existing approaches to defining terms denoting various combinations and formulates definitions of the terms denoting the key combinations described in this thesis. Importantly, Chapter 2 coin the term ‘the same neutral (arb)-med-arb’ to denote the central combination for this thesis. On the basis of the theoretical foundation laid out in Part II, the two-phase empirical study was designed and conducted for the purposes of this thesis. Its results are presented and discussed in Part III.
CHAPTER 2. KEY COMBINATIONS, TERMS AND DEFINITIONS

2.1 Introduction

This Chapter demonstrates the lack of clarity surrounding the use of terms denoting various combinations and proposes remedies to this situation by formulating definitions of the terms denoting the key combinations in this thesis.

Clarity in the terminology is paramount to parties and neutrals intending to use combinations. This is because mediation and arbitration can be combined in different ways and every combination has its specific characteristics, advantages and concerns associated with its use. Prior to embarking on any combination, it is necessary to make sure that all participants of a dispute resolution process know exactly what combination they are about to use, what advantages and concerns are associated with its use, and what safeguards, if any, they need to implement. This course of action will allow parties to maximise advantages of any combination and minimise concerns associated with its use.

Before examining the terminology used to denote various combinations, it is important to define the terms ‘mediation’, ‘arbitration’ and ‘the combined use of mediation and arbitration’.

For the purposes of this thesis, ‘mediation’ means an assisted decision-making process in which the mediator assists parties in making decisions about the issues in dispute between them. This thesis uses the term mediation interchangeably with conciliation in a broad sense, which encompasses different models of mediation practice, including facilitative and evaluative.

Throughout the thesis, the term ‘arbitration’ is used to refer to a means by which disputes can be definitively resolved, pursuant to the parties’ agreement, by independent, non-governmental decision-makers, selected by or for the parties, applying neutral judicial procedures that provide the parties an opportunity to be heard.

The term ‘the combined use of mediation and arbitration’, or simply ‘combinations’, is used to denote the actual use of the discrete processes of mediation and arbitration in combination. It includes any combination of processes in whatever
order and whether conducted by the same or different neutrals. This definition is intentionally broad to encompass all combinations. This, however, calls for the use of more specific terms to denote particular combinations.

Mediation and arbitration can be combined in sequence, in parallel and otherwise. Commentators employ different terms to denote various combinations, often attributing different meanings to the same term, while using the same term to denote different combinations. For example, Sawada notes that the expressions ‘hybrid’, ‘arb-med’ and ‘med-arb’ are sometimes used synonymously to refer to any process involving some interrelation of arbitration and mediation, whereas on other occasions these terms are used to refer to distinct processes. To avoid the confusion that can result, this Chapter synthesises approaches to defining terms used to denote various combinations and formulates definitions of the terms denoting the key combinations in this thesis. For ease of understanding, the definitions presented in this chapter are summarised in Appendix 1.

This Chapter comprises two sections. ‘Med-arb’, the most common term used to denote the combined use of mediation and arbitration, is the focus of section 2.2. This section suggests the use of the term ‘the same neutral med-arb’ rather than ‘med-arb’ to denote a combination where the same neutral acts first as a mediator and then as an arbitrator. To justify this suggestion, section 2.2 explores differing interpretations of med-arb. This section concludes by specifying the meaning of med-arb and its two main variations, the same neutral med-arb and diff neutral med-arb for the purposes of the thesis.

Section 2.3 provides an overview of combinations other than med-arb, examines terms used to denote them, and defines the terms denoting the key combinations for the purposes of the thesis. Importantly, this section coins the term the same neutral (arb)-med-arb to denote the central combination for this thesis. Key combinations introduced in section 2.3 are explored further in Chapters 6 and 7 in the context of addressing concerns associated with the same neutral (arb)-med-arb discussed in section 3.3.

All combinations introduced in this Chapter are valuable flexible process design options that parties might find useful depending on the particular circumstances of their case.

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Training of dispute resolution practitioners in flexible process design is one of the initiatives to enhance the use of combinations that will be discussed in section 9.5.3.

2.2 Med-Arb, the Same Neutral Med-Arb and Diff Neutral Med-Arb
This thesis uses the term ‘the same neutral med-arb’ to refer to the sequential use of mediation and arbitration, with the mediation phase taking place first, where the same neutral acts as the mediator and the arbitrator. As explained further, the thesis uses this term instead of a more common ‘med-arb’ to distinguish it from the process where mediation is followed by arbitration using a different neutral.

2.2.1 Lack of clarity surrounding the term ‘med-arb’
Med-arb appears to be the most common term used in the literature to refer to the combined use of mediation and arbitration. Another frequently used term is arb-med; however, often arb-med is perceived as merely a variation of the original med-arb. For this reason, arb-med will be discussed in section 2.3.1.

Despite its common use, the term med-arb lacks a generally accepted definition. Approaches to defining this term vary. The major point of difference in definitions is whether med-arb is understood only as a process where both mediation and arbitration stages are conducted by the same neutral, or whether the term encompasses situations where different neutrals are involved in each stage.

2.2.1.1 Med-Arb as a process conducted by a dual role neutral
De Vera defines med-arb as a process in which the same neutral serves both as the mediator and the arbitrator if the matter is not settled in mediation. Similar meaning is attributed to med-arb by Mironi, Deekshitha and Saha, Fullerton, Burr, Baizeau and Loong, Leathes, Giaretta and McMenamin, and Ross.

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63 Other criteria may be employed to differentiate between the existing approaches to defining med-arb. See, e.g., Peter, supra n. 61, at 89 (speaking about two ways to define med-arb: the first way is to describe the med-arb process; the second way concentrates on the goals and the elements of the process, and is broader); Blankenship, supra n. 62, at 30.
64 Carlos De Vera, Arbitrating Harmony: 'Med-Arb' and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China, 18 Colum. J. Asian L. 149, 156 (2004).
65 Mordehai Mironi, From Mediation to Settlement and from Settlement to Final Offer Arbitration: An Analysis of Transnational Business Dispute Mediation, 73(1) Arb. 52, 56 (2007).
In defining med-arb Greenbaum underlines the importance of the parties’ agreement in advance that the same neutral will act as a mediator and, if mediation is not successful or if only a few issues remain unresolved, an arbitrator.73 Hill, however, criticises this approach on the basis that it does not appear to correspond to actual practice since it is more common not to specify in advance that the mediator will definitely act as arbitrator.74

The Alternative Dispute Resolution Practice Guide (ADR Guide) takes a strict approach and emphasises that if separate people serve as the mediator and the arbitrator, the process is not med-arb.75 The essence of med-arb is that a single individual conducts both mediation and arbitration. The ADR Guide defines med-arb as a two-step process, where the first step involves mediation of the issues, and the second step uses formal arbitration (by the same neutral) to decide the issues not settled in mediation. The final result is a binding decision that includes the agreement achieved during mediation together with the decisions resulting from arbitration. The final decision is enforceable as an ordinary arbitration award.

Bartel, similarly to the ADR Guide, argues that it is misleading to call med-arb the process in which different people perform the mediation and arbitration functions.76 Only where the same person performs both functions is the process properly called med-arb. Where different people perform these two functions, it is more accurately called mediation and arbitration as distinct processes.

67 Fullerton, supra n. 61, at 31-32 (drawing his definition of med-arb from the Colorado Bar Association website).
70 Michael Leathes, Dispute Resolution Mules - Preventing the Process from Being Part of the Problem, International Mediation Institute 2 (14 Mar. 2012), available at <https://imimediation.org/index.php?cID=391&cType=document> (referring to med-arb as the process that is the reverse of arb-med and that is also known as binding mediation).
72 Ross, supra n. 23, at 359.
74 Hill, supra n. 62, at 105.
75 Sam Kagel & Bette J. Roth, MED-ARB (Mediation-Arbitration), in Alternative Dispute Resolution Practice Guide § 37:8 (Sep. 2014).
Stipanowich and Ulrich define med-arb as a process in which a single third party serves, or agrees to serve, as the mediator and arbitrator. However, one significant point distinguishes their definition of med-arb from those already mentioned in this section.\(^{77}\) This point relates to the sequence of processes. According to Stipanowich and Ulrich, dual-role arrangements include situations when neutrals engaged in mediating a dispute are asked to shift to an arbitral role and adjudicate the dispute as well as situations when arbitrators are invited to assume the role of mediators. Thus, this definition of med-arb encompasses situations when the process starts with either mediation or arbitration, whereas other definitions presume that med-arb starts with mediation only.

Lew attributes an even broader meaning to med-arb.\(^{78}\) In his view, med-arb can begin as an arbitration where, after appointment, the arbitrator acts as a mediator and assists parties to settle. If mediation is unsuccessful, the mediator resumes as the arbitrator. Equally, parties can begin mediation and then arbitrate specific issues before returning to mediation. Or, it can be a fully hybrid process whereby the parties go backwards and forwards between mediation and arbitration.

2.2.1.2 Med-Arb as a process conducted by a dual role neutral or different neutrals

Onyema’s defines med-arb as two separate dispute resolution processes combined to form one process.\(^{79}\) If parties fail to settle in mediation, the mediator can continue by transforming from mediator into arbitrator. The parties, however, can equally decide to nominate a different tribunal when the dispute reaches the arbitration stage.\(^{80}\) Mason\(^{81}\) and Wolski\(^{82}\) refer to the term med-arb along the same lines - as a sequential process where mediation precedes arbitration and the same or different neutrals act as a mediator and an arbitrator. So does Hill, adding that the mediation phase should be facilitative.\(^{83}\)

The Singapore International Mediation Centre (SIMC) also defines med-arb as a process commencing with mediation, and, if mediation does not result in a settlement,

\(^{77}\) Stipanowich & Ulrich, supra n. 16, at 10; see also Royden Hindle, Mixing it up: Medarb Re-visited, ¶¶ 6, 8 (unpublished paper prepared for the AMINZ Seminar ‘Current issues in Arbitration’, Mar. 2014).  
\(^{80}\) Ibid, at 414.  
\(^{81}\) Paul E. Mason, The Arbitrator as Mediator, and Mediator as Arbitrator, 28(6) J. Int'l Arb. 541, 544-545 (2011) (using the unusual term ‘medi-arb’ instead of the common ‘med-arb’).  
\(^{82}\) Wolski, supra n. 3, at 258.  
\(^{83}\) Hill, supra n. 62, at 105–106 (adopting this definition from Arnold, a well-known US practitioner).
followed by arbitration. While not mentioning anything about the neutrals, and, thus, presumably encompassing both options (dual role neutral or different neutrals), it specifies that the reference to mediation is done by ‘the parties to an arbitration agreement’.

Some commentators in this group do not specify the exact sequence, although one might assume from what they say, that arbitration is expected to follow mediation. For example, Mills and Brewer use the term med-arb for any ADR procedure combining mediation and arbitration in sequence. Some commentators do not refer to any sequence at all. For instance, Blankenship observes that in med-arb mediation and arbitration can ‘be combined and operate effectively free of the “in sequence” mandate’.

Most commentators who define med-arb broadly, as a process where the same or different neutrals act as the mediator and the arbitrator, tend to either identify the original/typical med-arb or distinguish variations within med-arb.

Identifying original/typical med-arb

There are many of those who identify a ‘typical’, ‘original’, or ‘traditional’ med-arb, or single out its ‘pure form’, or describe its ‘usual case’. Oghigian points out the difficulty of coming up with a single acceptable definition of a ‘typical’ med-arb process. While this might be true, almost all commentators who speak about ‘original’, ‘traditional’, ‘typical’ etc. med-arb conceptualise it as a process that starts with mediation and if mediation does not resolve the dispute, the same neutral becomes the arbitrator. Newmark and Hill disagree. For them, the usual case of med-

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86 Blankenship, supra n. 62, at 30.
90 Blankenship, supra n. 62, at 28; Bartel, supra n. 76, at 665.
92 Oghigian, supra n. 87, at 76.
93 See, e.g., Thomson, supra n. 89, at 2-3; Sawada, supra n. 59, at 29; Peter, supra n. 88, at 159; Peter, supra n. 61, at 91-92; Bartel, supra n. 76, at 665; Blankenship, supra n. 62, at 28; Elliott, supra n. 87, at 163.
arb involves one person being appointed as a mediator and, if mediation fails, either the mediator or another person subsequently arbitrates the dispute.94

Distinguishing variations within med-arb: the same neutral med-arb and diff neutral med-arb

Those scholars who do not identify any original or pure form of med-arb tend to distinguish different variations within med-arb. For example, Wolski observes that different models of med-arb have emerged over time, the most popular of which are med-arb (diff) and med-arb (same).95 In med-arb (diff), mediation and arbitration phases are conducted by different neutrals. In med-arb (same), the same neutral first acts as a mediator and then, if necessary, decides on any unresolved issues. Similarly, Blankenship distinguishes between the same neutral med-arb and med-arb-diff.96 Phillips uses the term the same-neutral med-arb, explaining that this term is used in lieu of a more common ‘med-arb’ to distinguish it from the process whereby mediation is followed by arbitration using a different neutral.97

Given the fact that med-arb may have many different meanings, parties wishing to use this dispute resolution mechanism need to specify in detail, preferably in a written protocol, exactly what process they wish to follow before the proceedings begin.98

2.2.2 Definition of med-arb, the same neutral med-arb and diff neutral med-arb for the purposes of this thesis

Throughout this thesis, the term ‘med-arb’ is used to refer to the sequential use of mediation and arbitration, with the mediation phase taking place first. Similarly to Wolski and Blankenship, the thesis distinguishes two main variations of med-arb, ‘the same neutral med-arb’ and ‘diff neutral med-arb’, depending on whether the mediation and arbitration phases of the process are conducted by the same or different neutrals. In view of differing approaches to defining the term med-arb and importance of delineating med-arb conducted by the same and different neutrals, the thesis uses the terms the same neutral med-arb and diff neutral med-arb that leave no ground for doubt and ensure clarity as to exactly what process is meant whenever any of these terms is used.

94 Newmark & Hill, supra n. 91, at 81.
95 Wolski, supra n. 3, at 258-259.
96 Blankenship, supra n. 62, at 30-31.
98 Brewer & Mills, supra n. 85, at 34.
2.3 Combinations Other than Med-Arb and Their Definitions

Med-arb and its two variations, the same neutral med-arb and diff neutral med-arb, are some of many ways mediation and arbitration can be used in combination. Arguably, many combinations have emerged in response to concerns associated with the use of the same neutral med-arb that will be discussed in the next chapter. This section provides an overview of combinations other than med-arb, examines terms used to denote them, and defines the terms denoting the key combinations in this thesis. A review of the literature identified four valuable combinations that will be in the focus of this section and Chapters 6 and 7. These are arb-med, arb-med-med, MEDALOA, and co-med-arb.

2.3.1 Arb-Med

Similarly to the case with med-arb, there is no unanimity of opinion in the literature as to what the term arb-med stands for.

Nevertheless, the majority of commentators who address arb-med describe it as a process that begins with the arbitration phase resulting in a binding award that is sealed and kept confidential while parties proceed with the same neutral to the mediation phase. If parties settle in mediation, the neutral never discloses the arbitral award. Otherwise, the award is revealed and becomes binding. Some commentators refer to this process differently. For example, Lawday refers to it as post-arbitration mediation.

The definition of arb-med of Lack and Leathes differs from the above in one point. According to these two commentators, the mediation phase may be conducted by the same or a different neutral.

Contrary to all the commentators above, the ADR Guide conceptualises arb-med as a variation of med-arb, where the dual role neutral conducts an arbitration proceeding

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99 See, e.g., Peter, supra n. 61, at 99 (speaking about formats alternative to the ‘original med-arb’); Bartel, supra n. 76, at 666-669 (discussing variations of med-arb in its ‘pure form’); Fullerton, supra n. 61, at 34-36 (referring to several variations of med-arb); Kagel & Roth, supra n. 75, at § 37:8 (noting that in response to criticism directed at ‘pure’ med-arb, there are now many variations on the med-arb process).

100 Fullerton, supra n. 61, at 36; Deekshitha & Saha, supra n. 66, at 80; Peter, supra n. 88, at 165; Ross, supra n. 23, at 359; Alan L. Limbury, Hybrid Dispute Resolution Processes - Getting the Best While Avoiding the Worst of Both Worlds?, in Mediation Compendium 6 (CIArb 2009); Martin C. Weisman, Med/Arb - A Time and Cost Effective Hybrid for Dispute Resolution, Weisman, Young & Ruemenapp, P.C. 2, available at <http://www.wysr-law.com/articles.html> (accessed 25 Oct. 2015).


102 Lack, supra n. 58, at 358 n. 19; Leathes, supra n. 70, at 2.
concerning all issues first and, before issuing a decision, conducts mediation. Thus, according to the Guide, mediation in arb-med takes place before the neutral renders the award.

Blankenship, and Baizeau and Loong identify two variations of arb-med. While all these commentators regard the sealed award and the dual role neutral as the first variation, their views differ on what they understand as the second variation. For Blankenship, the second variation is similar to the first, except the mediator is a different person than the arbitrator. This variation seems to require an additional decision to be made on whether the mediator is present throughout arbitration. The second arb-med variation for Baizeau and Loong is when an attempt to mediate is made within the arbitration proceedings. Usually a member of the tribunal acts as the mediator. If the dispute is not resolved in mediation, arbitration resumes with the same tribunal.

Some commentators, for example Mason and Wolski, define arb-med solely as the second variation of Baizeau and Loong. While it appears that Mason and Wolski speak about one mediation attempt in the course of arbitration proceedings, Sawada seems to have a slightly different understanding of arb-med. According to Sawada, arb-med is a process whereby subject to the parties’ agreement, an arbitrator will try mediation on one or more occasions within the course of the same proceedings so that those proceedings can end successfully either with a settlement agreement or other constructive agreement, or with an arbitral award.

Wolski observes that in practice, most such processes are more likely to be in the nature of arb-med-arb, because if parties settle in mediation they would still want to resume arbitration in order to formalise their agreement as a consent award. If parties do not settle in mediation, the arbitration will be resumed and the arbitrator will render an award. Hindle addresses the same point and notes that despite the fact that much of

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103 Kagel & Roth, supra n. 75, at § 37:9.
104 Blankenship, supra n. 62, at 31; Baizeau & Loong, supra n. 69, at 1452 (noting, however, that unless another neutral is appointed, it is the arbitrator who conducts mediation in arb-med).
105 Blankenship, supra n. 62, at 31.
106 Baizeau & Loong, supra n. 69, at 1452.
108 Wolski, supra n. 3, at 260.
109 Emphasis added.
110 Sawada, supra n. 59, at 29 (using the terms 'arb-med', 'hybrid' and 'hybrid arb-med' synonymously).
111 Wolski, supra n. 3, at 260.
the literature uses the term ‘arb/med’ that ends with ‘med’,\footnote{Hindle, supra n. 77, at 3 n. 11 (referring to Luke Nottage’s article as an example of this approach: Nottage, \textit{Arb-Med and New International Commercial Mediation Rules in Japan}, Japanese Law and the Asia-Pacific (21 Jul. 2009), available at <http://blogs.usyd.edu.au/japaneselaw/2009/07/arbmed_and_new_international_c_1.html>).} in many cases the processes being discussed finish with an award not a settlement agreement.\footnote{Hindle, supra n. 77, at 3 n. 11.}

\subsection*{2.3.2 Arb-Med-Arb}

Recognising the nature of the process, many commentators employ the terms arb-med-arb\footnote{Ross, supra n. 23, at 361; \textit{What is Arb-Med-Arb?}, supra n. 84.} or mediation window,\footnote{Peter, supra n. 61, at 103; Peter, supra n. 88, at 167; Blankenship, supra n. 62, at 32.} or both terms synonymously\footnote{Lack, supra n. 58, at 360.} instead of arb-med for the use of mediation within an already existing arbitration. Abramson suggests a term with a broader meaning, ‘arb-settlement-arb’ for settlement efforts, including mediation, attempted after the formal arbitration has been commenced.\footnote{Abramson, supra n. 60, at 2 n. 1, 3 n. 3.}

However, there is no clear and shared understanding among the commentators addressing arb-med-arb on how many times mediation can be attempted throughout arbitration and whether the arbitrator or a different neutral acts as the mediator.

For Peter, mediation may take place at any time, and on more than one occasion. It may be conducted either by the arbitrator, or a separate mediator.\footnote{Peter, supra n. 61, at 103; Peter, supra n. 88, at 167 referring to Christian Bühring-Uhle, \textit{Arbitration and Mediation in International Business: Designing Procedures for Effective Conflict Management} 370 (Kluwer Law International 1996); see also Blankenship, supra n. 62, at 32 (adding that parties are not required to mediate but are merely encouraged to do so).} While SIMC’s general definition of arb-med-arb focuses on the sequence of the processes - a dispute is referred to arbitration before mediation is attempted - it specifies that under the SIAC-SIMC Arb-Med-Arb protocol, the arbitrators and the mediators will generally be different persons, unless parties agree otherwise.\footnote{\textit{What is Arb-Med-Arb?}, supra n. 84.} According to the SIAC-SIMC Arb-Med-Arb protocol, the dispute is referred to mediation once.

Similarly to the SIAC-SIMC Arb-Med-Arb protocol, Ross conceptualises arb-med-arb as a three-stage process that involves one attempt to resolve the dispute by mediation. In Ross’ view, all three stages in arb-med-arb are conducted by the same neutral. She observes that the initial arbitration stage may be conducted in a condensed and fast track manner. The arbitrator may open mediation windows to dispose of issues as they are
raised, thereby, helping parties to streamline the process. If mediation is not completely successful, the arbitration stage is resumed.\textsuperscript{120}

For Lack, in arb-med-arb the arbitral tribunal suspends arbitration at some stage to allow parties to meet with another (non-evaluative) neutral to mediate. Mediation can be limited to only certain aspects of the dispute.\textsuperscript{121} At the same time, Lack distinguishes arb-med-arb from arb-con-arb (conciliation window). This is due to the fact that, contrary to many other commentators, Lack does not use the terms conciliation and mediation interchangeably. By mediation he means a subjective and non-evaluative process that focuses on the parties’ needs and interests. Conciliation, in Lack’s view, is a process that focuses on objective norms and is an evaluative process, in which the conciliator is expected to make proposals to the parties as to possible settlement solutions based on these norms.\textsuperscript{122} According to Lack, in the arb-con-arb, parties start with arbitration and later on open a window for conciliation. Arbitrators become conciliators, but they do not caucus with the parties and their role remains evaluative at all times.\textsuperscript{123} Lack identifies even one more variation - the arb-con-med-con-arb process - where parties move from arbitration to conciliation to mediation and, after trying to conciliate once more, back to arbitration.

To avoid any confusion, this thesis uses the term arb-med-arb for any attempt to resolve the dispute by mediation within an ongoing arbitration. Depending on whether the same or different neutrals conduct mediation and arbitration, this thesis suggests distinguishing between the same neutral arb-med-arb and diff neutral arb-med-arb.

\subsection*{2.3.3 MEDALOA}

MEDALOA stands for Mediation and Last Offer Arbitration.\textsuperscript{124} This process is very similar to med-arb\textsuperscript{125} and is often referred to as its variation.\textsuperscript{126} The difference lies in the arbitration stage. If parties do not reach a settlement in the mediation stage, each party submits a ‘last offer’ to the neutral who must choose between one of them.

\begin{itemize}
  \item \textsuperscript{120} Ross, \textit{supra} n. 23, at 361.
  \item \textsuperscript{121} Lack, \textit{supra} n. 58, at 360.
  \item \textsuperscript{122} Ibid, at 350 n.9.
  \item \textsuperscript{123} Ibid, at 359.
  \item \textsuperscript{124} Ibid, at 366-368; Blankenship, \textit{supra} n. 62, at 31; Peter, \textit{supra} n. 88, at 165-166; Ross, \textit{supra} n. 23, at 361; Lawday, \textit{supra} n. 101, at 21; Christian Borris, \textit{Final Offer Arbitration from a Civil Law Perspective}, 24(3) J. Int’l. Arb. 307, 311 (2007) (attributing the invention in the early 1990s of the term MEDALOA to Robert Coulson, a former President of the American Arbitration Association).
  \item \textsuperscript{125} Blankenship, \textit{supra} n. 62, at 31.
  \item \textsuperscript{126} See, e.g., Peter, \textit{supra} n. 88, at 165; Ross, \textit{supra} n. 23, at 361.
\end{itemize}
Similarly to the situation with med-arb, the main point of difference among commentators who conceptualise MEDALOA is whether the same or different neutrals act as the mediator and the arbitrator. According to the majority, it is the same neutral.\textsuperscript{127} However, Borris speaks about the involvement of different neutrals in the mediation and the arbitration stage of MEDALOA,\textsuperscript{128} whereas Lawday does not specify in his description of MEDALOA whether the same or different neutrals conduct both phases of the process.\textsuperscript{129}

Borris suggests another way of combining last offer arbitration with mediation. This uses mediated negotiation rounds between offers in multi-round last offer arbitration.\textsuperscript{130} This variation provides for several rounds of offers, with mediated negotiation rounds in between, which gives parties an opportunity for strategic manoeuvres. Mediator’s tasks include not only keeping parties’ manoeuvres in check, but also fostering a settlement in the negotiation rounds between submissions of offers.

\textbf{2.3.4 Co-Med-Arb}

Co-Med-Arb is commonly conceptualised as a process that involves two different people who perform the roles of a mediator and an arbitrator.\textsuperscript{131} Both neutrals preside over an information exchange between parties, after which the mediator works with parties, including in private sessions, in the absence of the arbitrator. If mediation fails to achieve a settlement, the dispute is then submitted to the arbitrator for a binding decision.\textsuperscript{132} The ADR Guide adds that if the dispute moves to the arbitration phase, the arbitrator conducts it alone, although there may be a continuing role for the mediator either to conduct a later planned mediation, or spontaneously to mediate any issues that may arise in arbitration.\textsuperscript{133}

As with other combinations, some commentators attribute a different meaning to co-med-arb. For example, Lawday, and Newmark and Hill understand co-med-arb as a sequential use of mediation and arbitration with a different person becoming the

\textsuperscript{127} Lack, supra n. 58, at 367 (specifying that the dual role neutral may engage in caucuses); Peter, supra n. 88, at 165; Ross, supra n. 23, at 361-362; Elliott, supra n. 87, at 164 (describing the process of MEDALOA, but calling it a variation of the med-arb process, instead of MEDALOA).
\textsuperscript{128} Borris, supra n. 124, at 311 n. 12.
\textsuperscript{129} Lawday, supra n. 101, at 21.
\textsuperscript{130} Borris, supra n. 124, at 311.
\textsuperscript{131} Wolski, supra n. 3, at 269; Peter, supra n. 61, at 102; Burr, supra n. 68, at 70; Blankenship, supra n. 62, at 31; Kagel & Roth, supra n. 75, at § 37:12.
\textsuperscript{132} Peter, supra n. 61, at 102; Burr, supra n. 68, at 70; Blankenship, supra n. 62, at 31; Wolski, supra n. 3, at 269.
\textsuperscript{133} Kagel & Roth, supra n. 75, at § 37:12.
arbitrator in the event of a failed mediation (a combination that is referred to as diff neutral med-arb in this thesis).134

2.3.5 Other combinations
Med-Arb, arb-med, arb-med-arb, MEDALOA and co-med-arb are the most frequently discussed combinations. Many other possibilities of using mediation and arbitration in combination exist.135 These include combinations like med-arb opt-out, and shadow mediation. In med-arb opt-out, parties need to agree after the mediation phase whether the same neutral will continue as an arbitrator.136 In shadow mediation a separate mediator ‘shadows’ the arbitration process.137 Parties may resort to the shadow mediator at any time to mediate any particular issue. Med-arb opt-out and shadow mediation will be explored further in Chapter 6.

2.3.6 Definition of arb-med, arb-med-arb, MEDALOA, co-med-arb and the same neutral (arb)-med-arb for the purposes of this thesis
Throughout this thesis, the term ‘arb-med’ is used to refer to a process beginning with arbitration resulting in an award that is placed in a sealed envelope and kept confidential. Then the former arbitrator becomes a mediator. If parties do not settle in mediation, the award is revealed and becomes binding. Otherwise, the neutral never discloses the award.

The thesis uses the term ‘arb-med-arb’ for a separate mediation process in the course of arbitration. Depending on whether the same or a different neutral conducts mediation in the course of arbitration, the thesis will distinguish ‘the same neutral arb-med-arb’ and ‘diff neutral arb-med-arb’.

The thesis uses the term ‘MEDALOA’ to refer to a process that starts with mediation and if parties do not settle in the mediation stage, each party submits a ‘last offer’ to the dual role neutral who chooses between one of them.

The thesis uses the term ‘co-med-arb’ to refer to a process where the arbitrator attends joint sessions in mediation (but does not participate in caucusing) and if no settlement is reached in mediation, renders an award.

134 Lawday, supra n. 101, at 21; Newmark & Hill, supra n. 91, at 87.
135 See combinations discussed in, e.g., Bartel, supra n. 76, at 665-668; Kagel & Roth, supra n. 75, at §§ 37:10, 13-14; Fullerton, supra n. 61, at 34-36; Elliott, supra n. 87, at 164; Ross, supra n. 23, at 358; Leathes, supra n. 70; Lawday, supra n. 101, at 21-22; Lack, supra n. 58, at 357-372.
136 Peter, supra n. 88, at 164; Peter, supra n. 61, at 99; Bartel, supra n. 76, at 666 (referring to this combination as a contingent form of the same neutral med-arb); Blankenship, supra n. 62, at 31 (noting that med-arb opt-out is basically the same as the contingent form of the same neutral med-arb).
137 Kagel & Roth, supra n. 75, at § 37:11.
The term ‘the same neutral (arb)-med-arb’ is used to refer jointly to the same neutral med-arb and the same neutral arb-med-arb.

2.4 Conclusion

Mediation and arbitration can be combined in many different ways. The terms used to denote various combinations can cause misunderstanding. Med-arb – the most common term used in the literature to denote the combined use of mediation and arbitration - lacks a universally accepted definition. Usually, though not always, it means a sequential process, where mediation precedes arbitration. Commentators, however, disagree as to whether it is a process where both mediation and arbitration stages are conducted by the same neutral only or whether the term encompasses situations where different neutrals are involved in each stage. Similarly, the inconsistent use of terms to denote other combinations, such as arb-med, arb-med-arb, MEDALOA and co-med-arb may be a source of confusion. To avoid any uncertainty, the thesis has defined the terms denoting the key combinations for the purposes of the thesis. The main approaches to defining terms denoting the key combinations and definitions used in this thesis are summarised in Appendix 1.

The thesis uses the term ‘the same neutral (arb)-med-arb’ to denote the central combination for this thesis. This term refers jointly to the same neutral med-arb and the same neutral arb-med-arb. In both combinations the same neutral acts as a mediator and an arbitrator. The processes differ in that the same neutral med-arb starts with mediation, whereas the same neutral arb-med-arb starts with arbitration.

The next Chapter will discuss the controversy surrounding the use of the same neutral (arb)-med-arb as well as the advantages and concerns associated with the process. Other key combinations defined in this Chapter will be revisited in Chapters 6 and 7, where they will be analysed in the context of addressing concerns associated with the same neutral (arb)-med-arb. All combinations introduced in this Chapter will serve as an illustration of how practitioners could adopt a flexible approach to process design. Training of practitioners in flexible process design is an initiative to enhance the use of combinations in international commercial dispute resolution that is discussed in section 9.5.3.

3.1 Introduction

The issue of whether it is appropriate and admissible for the same neutral to act as a mediator and arbitrator in the same dispute has been a controversial and much disputed subject within the field of the combined use of mediation and arbitration for two decades or more. Ross vividly depicts the controversy surrounding this issue:

The practice of combining arbitration and mediation into a single, hybrid process when the role of mediator and arbitrator is assumed by the same neutral raises a tidal wave of controversy. Certain detractors of Med-Arb/Arb-Med oppose it so fervently they consider it not only an ethical disaster, but heretical — a process that should be burned at the stake. On the other side of the spectrum, some of its devotees believe it is not only more efficient, but a panacea, encompassing the best of both worlds. 138

The literature provides numerous examples of the divide of opinions among commentators regarding the issue of the same neutral acting as a mediator and an arbitrator. Some commentators disapprove of the process involving a dual role neutral and insist on keeping the functions of a mediator and an arbitrator separate by having different neutrals for each stage. 139 Others recognize that in certain circumstances (where parties are fully informed of the pros and cons and safeguards are put in place) the same neutral (arb)-med-arb is a viable option. 140 Yet others believe that the process involving a dual role neutral is the most flexible of all the ADR and combined processes, more efficient and less costly. 141 This divide in views is often explained by reference to the practitioner’s legal culture, which will be examined in Chapter 4.

The advantages and concerns will be discussed in the context of both the same neutral med-arb and the same neutral arb-med-arb, because, subject to a limited number of

138 Ross, supra n. 23, at 352.
141 See, e.g., Phillips, supra n. 97, at 77.
exceptions that will be pointed out throughout sections 3.2 and 3.3, the advantages and concerns raised in respect of these two combinations appear to be the same. The concerns seem to arise whenever arbitration follows mediation and the same neutral performs the functions of a mediator and an arbitrator.\textsuperscript{142} The literature often discusses the advantages and concerns in reference to both combinations.\textsuperscript{143}

Notably, the review of the literature reveals that the discussion of advantages and concerns associated with the same neutral (arb)-med-arb is mostly theoretical, having very little empirical support. Where possible, the thesis refers to the empirical evidence. In cases where it does not, empirical data is yet to be collected. Where available, the thesis illustrates the way advantages and concerns materialise in practice through cases anecdotally reported by dispute resolution practitioners. It is important to note that unless commentators expressing their views on different aspects of the same neutral (arb)-med-arb specifically indicate, it is not clear whether they have actual experience in the process.

The discussion of the advantages and concerns raised in respect of the same neutral (arb)-med-arb is important because it will help shape the type of activity in which dual role neutrals may engage.\textsuperscript{144} This will be addressed in Chapter 8.

This Chapter comprises three sections. The focus of sections 3.2 and 3.3 is the advantages and concerns associated with the same neutral (arb)-med-arb. Section 3.4 analyses the challenge posed by the same neutral (arb)-med-arb for practitioners acting as dual role neutrals. These practitioners need to be skilled to function effectively as mediators and arbitrators while switching from one role to another.

\section*{3.2 Advantages Associated with the Same Neutral (Arb)-Med-Arb}

Supporters of the same neutral (arb)-med-arb see it as a process that attempts to capture the independent strengths of both mediation and arbitration while limiting their perceived weaknesses.\textsuperscript{145}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{142} Wolski, \textit{supra} n. 3, at 265, Peter, \textit{supra} n. 61, at 103; \textit{see generally} section 3.3 on concerns associated with the same neutral (arb)-med-arb. In the same neutral arb-med-arb, concerns are raised not when the arbitrator takes on the role of a mediator, but when mediation does not result in a settlement and the mediator has to resume as the arbitrator.
\item \textsuperscript{143} See, \textit{e.g.}, Lawday, \textit{supra} n. 101, at 4-10; Baizeau & Loong, \textit{supra} n. 69, at 1453-1455; Stipanowich & Ulrich, \textit{supra} n. 16, at 25-26; Jacob Rosoff, \textit{Hybrid Efficiency in Arbitration: Waiving Potential Conflicts for Dual Role Arbitrators in Med-Arb and Arb-Med Proceedings}, 26(1) J. Int’l. Arb. 89, 89-100 (2009); Deekshitha & Saha, \textit{supra} n. 66, at 88; Ross, \textit{supra} n. 23, at 358-362 (observing that the same neutral arb-med-arb is a form related to the same neutral med-arb); J. Brian Casey, \textit{Arbitration Law of Canada: Practice and Procedure}, 16 (JurisNet 2005).
\item \textsuperscript{144} Kaufmann-Kohler, \textit{supra} n. 22.
\end{itemize}
\end{footnotesize}
The key advantages commonly attributed to mediation are an opportunity for parties to create solutions, which uphold convergent interests and reconcile divergent ones and parties’ maximum control over the outcome.\textsuperscript{146} Mediation, however, does not guarantee reaching a settlement\textsuperscript{147} or a final resolution.\textsuperscript{148} A mediator cannot render a binding decision if mediation does not result in a settlement.\textsuperscript{149} Contrary to mediation used on its own, the same neutral (arb)-med-arb ensures that a final resolution of the dispute will be achieved.\textsuperscript{150}

One of the main benefits of arbitration is a final and binding outcome.\textsuperscript{151} At the same time, arbitration can be slow and expensive and in the end a decision may be imposed upon the parties that is not desired by any of them.\textsuperscript{152} Arbitration has limited capacity to restructure the party’s relationships because it usually produces a win or lose outcome.\textsuperscript{153} Also, the formality of the arbitration process may prevent parties from providing information that would allow an arbitrator to address their underlying interests in an arbitral award.\textsuperscript{154} In the same neutral (arb)-med-arb that is less formal than arbitration a neutral can play an active role and easily address underlying interests.\textsuperscript{155}

The most zealous advocates of the process contend that the same neutral (arb)-med-arb offers benefits that neither mediation nor arbitration offers alone.\textsuperscript{156}

The literature review shows that six advantages are commonly attributed to the same neutral (arb)-med-arb: efficiency, finality and legal enforceability, quality of the outcome, flexibility, incentive to settle, and more honest behaviour of parties (as compared to mediation only). Some advantages, for example, finality and legal

\textsuperscript{145} See, e.g., Thomson, \textit{supra} n. 89, at 2; Wolski, \textit{supra} n. 3, at 258; Bartel, \textit{supra} n. 76, at 665; Hindle, \textit{supra} n. 77, at ¶ 1.

\textsuperscript{146} Wolski, \textit{supra} n. 3, at 258.

\textsuperscript{147} Ibid.

\textsuperscript{148} Bartel, \textit{supra} n. 76, at 665.

\textsuperscript{149} Thomson, \textit{supra} n. 89, at 2.

\textsuperscript{150} Bartel, \textit{supra} n. 76, at 665.

\textsuperscript{151} Wolski, \textit{supra} n. 3, at 258.

\textsuperscript{152} Thomson, \textit{supra} n. 89, at 2.

\textsuperscript{153} Wolski, \textit{supra} n. 3, at 258.

\textsuperscript{154} Bartel, \textit{supra} n. 76, at 665.

\textsuperscript{155} Ibid.

enforceability, are not unique to the same neutral (arb)-med-arb, but are common to other combinations. This Chapter will turn now to examining these advantages.

3.2.1 Efficiency

Cost and time efficiency appears to be the most commonly cited advantage of the same neutral (arb)-med-arb.\footnote{See, e.g., Sawada, supra n. 59, at 33; Houzhi Tang, Combination of Arbitration with Conciliation - Arb-Med, in New Horizons in International Commercial Arbitration and Beyond, 12 ICCA Congress Series 547, 555 (Albert Jan van den Berg ed., Kluwer Law International 2005); Brewer & Mills, supra n. 85, at 34; Edna Sussman, Developing an Effective Med-Arb/ Arb-Med Process, 2(1) NYSBA New York Disp. Res. Law. 71, 73 (2009); Bartel, supra n. 76, at 665; Leon & Peterson, supra n. 156, at 92; Victor Lau & Vanja Bulut, Resolution of Disputes in China - What It Means for Australia, Clayton Utz (15 Mar. 2012), available at \url{http://www.claytonutz.com/publications/edition/15_march_2012/20120315/resolution_of_disputes_in_china-what_it_means_for_australia.page}; Ross, supra n. 23, at 360; Abramson, supra n. 60, at 4.} Some authors even regard efficiency as the key advantage of the process\footnote{See, e.g., Blankenship, supra n. 62, at 34; Kaufmann-Kohler, supra n. 22.} and the most compelling reason to engage in it.\footnote{Thomson, supra n. 89, at 2; Flake, supra n. 48, at 8; Ehle, supra n. 16, at 85.}

Parties can save considerable time by having the mediator as an arbitrator or an arbitrator as a mediator. First, they do not need to review qualifications of potential arbitrators if they move to the arbitration phase, eliminating, thereby, a time-consuming task of selecting a new arbitrator.\footnote{Phillips, supra n. 97, at 76.} Second, parties can save time necessary to prepare for arbitration or mediation before a separate neutral.\footnote{Ibid.} Third, parties can proceed to the arbitration phase with almost no delay.\footnote{Blankenship, supra n. 62, at 34.} Very little time might be needed at the end of mediation that has not brought a complete settlement to commence or resume the arbitration phase of the same neutral (arb)-med-arb.\footnote{Ibid.} Fourth, if the dispute goes or returns to the arbitration phase, the arbitrator already knows the case and there is no need to educate another neutral.\footnote{Phillips, supra n. 97, at 76.} The arbitration phase has the potential to be truncated or presented in a summary fashion, which is not possible in a separate arbitration conducted by a different neutral.\footnote{Gabrielle Kaufmann-Kohler & Fan Kun, Integrating Mediation into Arbitration: Why it Works in China, 25(4) J. Int’l. Arb. 479, 490 (2008); Kaufmann-Kohler, supra n. 22; Roman Rewald & Kimberly Jachimek Weil, Expanding ADR in Poland: Mediation and Arbitration Together, Lexology 2 n. 16, available at \url{http://documents.lexology.com/63ade58ab-0582-410b-97aa-1c6f490e7f67.pdf} (accessed 5 Sep. 2015) (citing Brian Pappas); Leon & Peterson, supra n. 156, at 92; Blankenship, supra n. 62, at 34; Kun, supra n. 3, at 537; Abramson, supra n. 60, at 4.} There may not even be a need for a hearing.\footnote{Blankenship, supra n. 62, at 34.} If parties agree, the arbitrator can render an award basing on the facts presented in mediation. The savings can be
magnified in international arbitrations where scheduling of sessions is more difficult among neutrals, parties and attorneys coming from different jurisdictions.\textsuperscript{167}

No empirical data has been found to support the perception of the same neutral (arb)-med-ARB as a cost and time efficient process. The questionnaire data collected for this thesis has partially filled this gap. As reported in section 5.2.3.3, faster resolution of the dispute and its lower cost (as compared to arbitration only) were rated as two of the top three benefits of the combined use of process. It should be noted, however, that this result relates to all combinations rather than the same neutral (arb)-med-ARB only.

\textit{Same neutral med-ARB v. same neutral arb-med-ARB}

Comparing the same neutral med-ARB and the same neutral arb-med-ARB, it appears that the former can potentially save more time and money than the latter. This is because in the same neutral med-ARB, if a dispute is settled in the mediation stage, parties will not incur any costs related to arbitration; however, the situation is different in the same neutral arb-med-ARB where regardless of whether a dispute is settled in the mediation stage, parties have to invest time and financial resources into the initial arbitration stage.

\textbf{3.2.2 Finality and legal enforceability}

Apart from allowing resolution of a dispute in a time and cost efficient manner, the same neutral (arb)-med-ARB appears to ensure that a final resolution of a dispute is achieved within a reasonable time.\textsuperscript{168} Parties either settle in the mediation stage or, if they do not, the dual role neutral renders an award in the arbitration stage. Thereby, the same neutral (arb)-med-ARB seems to overcome the non-binding element of mediation and commit parties to engage in the process that achieves final resolution.\textsuperscript{169} Moreover, a mediated settlement agreement reached in the course of arbitration can be recorded as a consent award and thus, arguably, become enforceable internationally pursuant to the New York Convention.\textsuperscript{170} For some authors, the finality and legal enforceability of the outcome of the same neutral (arb)-med-ARB is the most appealing attribute of the process,\textsuperscript{171} and a reason why other advantages, such as savings of time and money, exist.\textsuperscript{172}

\begin{footnotesize}
\begin{enumerate}
\item 167 Abramson, \textit{supra} n. 60, at 4.
\item 168 Blankenship, \textit{supra} n. 62, at 34-35; Brewer & Mills, \textit{supra} n. 85, at 34; Lawday, \textit{supra} n. 101, at 9.
\item 169 Lawday, \textit{supra} n. 101, at 9; Bartel, \textit{supra} n. 76, at 665; Ross, \textit{supra} n. 23, at 362.
\item 170 Kaufmann-Kohler & Kun, \textit{supra} n. 164, at 490-491; Lau & Bulut, \textit{supra} n. 157; Kun, \textit{supra} n. 3, at 537; Ross, \textit{supra} n. 23, at 362.
\item 171 Flake, \textit{supra} n. 48, at 5; Blankenship, \textit{supra} n. 62, at 35; Rewald & Jachimek Weil, \textit{supra} n. 164, at 2.
\item 172 Blankenship, \textit{supra} n. 62, at 35.
\end{enumerate}
\end{footnotesize}
Although mediation offers many advantages, the absence of a unified enforcement mechanism for international mediated settlement agreements is often seen as an obstacle to its greater use as a stand-alone method of international commercial dispute resolution.\textsuperscript{173} Steele observes that while in a perfect world, no enforcement mechanism might be required for mediation because a voluntary agreement should yield voluntary compliance, in the world of international business, imperfect circumstances may affect the performance of mediation agreements.\textsuperscript{174} For instance, human rights abuses could make investors balk, the commodity in question could be subject to embargo, or the currency designated for payment could suffer devaluation.\textsuperscript{175}

UNCITRAL has started considering the preparation of a convention on enforcement of settlement agreements resulting from international commercial mediation,\textsuperscript{176} which drew a mixed reaction. For example, McIlwrath commends the proposed convention for its practical value and strong incentive to use mediation to resolve international commercial disputes.\textsuperscript{177} Alexander, however, warns against rushing its adoption because the narrative assuming the need for this kind of convention may fail to consider significant variables and issues relevant to the nature of cross-border mediation practice.\textsuperscript{178} Nevertheless, some empirical studies confirm the desirability of an enforcement mechanism for international mediated settlement agreements.\textsuperscript{179} Interestingly, the idea of this kind of convention is not new. In 1982, the IBA drafted a convention for the enforcement of foreign conciliation settlements. It was, however,

\begin{itemize}
\item \textsuperscript{173} See, e.g., Sharp, supra n. 34; Wolski, supra n. 3, at 249; Jean Francois Guillemin, Reasons for Choosing Alternative Dispute Resolution, in ADR in Business: Practice and issues across Countries and Cultures vol II 13, 34 (Arnold Ingen-Housz ed., Kluwer Law International 2011).
\item \textsuperscript{174} Brette L. Steele, Enforcing International Commercial Mediation Agreements as Arbitral Awards under the New York Convention, 54 UCLA L. Rev. 1385, 1387 (2007).
\item \textsuperscript{175} Ibid.
\end{itemize}
never implemented. The empirical data collected for this thesis and presented in sections 5.2.3.2.8, 5.2.3.3.1 and 5.3.3.4 casts doubt on the necessity of a convention providing for the enforceability of international mediated settlement agreements.

For the moment, a mediated settlement agreement can be the subject of a breach of contract or specific performance claim, as it represents a legally enforceable contract. A breach of contract, however, is usually the reason why the parties decide to use mediation. It is unlikely that litigating a contract resulting from successful mediation is the outcome that the parties want.

A mediated settlement agreement may be entered as a judgement, though this kind of recognition procedure does not seem to be known in common law countries. Even where it is possible to incorporate a mediated settlement agreement into a judgement, difficulties of enforcement in foreign jurisdictions often diminish the judgement’s value.

The same neutral (arb)-med-arb, similar to other combination, offers parties the possibility of converting their settlement agreement into a consent arbitral award, which Wolski and Ross believe to be the reason why parties resort to combinations.

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181 Sharp, *supra* n. 34; Sussman, *supra* n. 27, at 392-393.

182 Sharp, *supra* n. 34; Sussman, *supra* n. 27, at 393; *but see* Tarrazon, *supra* n. 35, at 88 (stating that ‘[t]he question of enforceability is not important here because when parties settle through a well-conducted mediation they voluntarily comply with the terms of the agreements’).

183 Many EU states incorporated such provision into their national legislation further to Directive 2008/52/EC of the European Parliament and of the Council on Certain Aspects of Mediation in Civil and Commercial Matters art. 6(1)-(2), 21 May 2008, OJL 136/3:

1. Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable. The content of such an agreement shall be made enforceable unless, in the case in question, either the content of that agreement is contrary to the law of the Member State where the request is made or the law of that Member State does not provide for its enforceability.

2. The content of the agreement may be made enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the Member State where the request is made.


If the parties involved in a dispute reach a full or partial agreement, the agreement upon request of the parties shall be reduced to writing and approved by the parties and their attorneys, if any. If reduced to writing and signed by the parties, the agreement may be presented to the court by any party or their attorneys, if any, as a stipulation and, if approved by the court, shall be enforceable as an order of the court.

185 Sussman, *supra* n. 27, at 393.

186 Wolski, *supra* n. 3, at 249; Ross, *supra* n. 23, at 362.
Almoguera contends that this possibility by itself should help dissipate any mistrust about a combination of mediation and arbitration.\(^\text{187}\)

Arbitration laws of many countries equate the status and the effect of consent awards to any other award on the merits of the case.\(^\text{188}\) This is a strong argument in support of enforceability of consent awards pursuant to the New York Convention, although the convention itself is silent in this respect. While this silence can be interpreted as raising the question of whether consent awards qualify as arbitral awards under the Convention,\(^\text{189}\) according to the prevailing view, consent awards can be enforced as any other awards.\(^\text{190}\) The enforceability of consent awards has found support in some empirical studies. Kaufmann-Kohler’s research could find no judgment from courts anywhere in the world where a consent award had been successfully challenged either at the seat or in the country of enforcement.\(^\text{191}\)

The empirical data collected for this thesis and presented in sections 5.2.3.2.8, 5.2.3.3.1 and 5.3.3.4 does not support the narrative in the literature that the reason why parties use a combination of mediation and arbitration is the possibility of incorporating a mediated settlement agreement into a consent award.

*Same neutral med-arb v. same neutral arb-med-arb*

While, as mentioned in section 3.2.1, the same neutral med-arb has the potential to save more time and money than the same neutral arb-med-arb, in terms of enforceability the latter can be more attractive to parties than the former. It is worth considering formally beginning the process as arbitration,\(^\text{192}\) namely same neutral arb-med-arb rather than the same neutral med-arb. If the process starts as mediation, which succeeds, one could argue that there is no more dispute capable of triggering arbitration and hence

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\(^{189}\) Steele, supra n. 174, at 1397-1398.


\(^{192}\) See, e.g., Limbury, supra n. 100, at 5; Luke Nottage & Richard Garnett, *Top 20 Things to Change in or Around Australia’s International Arbitration Act*, 6(1) Asian Int’l Arb. J. 1, 35 n. 93 (2010); Newmark & Hill, supra n. 91, at 85.
generating an enforceable consent award. This issue will be explored further in section 5.2.3.2.8.

3.2.3 Quality of the outcome

The quality of the outcome is reported to be another strength of the same neutral (arb)-med-arb. This process, arguably, allows parties to achieve the outcome of better quality than the outcome resulting from either stand-alone mediation or stand-alone arbitration.

The best-case scenario for parties in the same neutral (arb)-med-arb is to resolve the entire dispute in the mediation phase of the process. The quality of the outcome resulting from the mediation phase of the same neutral (arb)-med-arb may be even better than the outcome resulting from stand-alone mediation because the former may help parties achieve a fair outcome of mediation. This is because while the primary role of mediators in stand-alone mediation is to assist parties in their negotiation, mediators in the same neutral (arb)-med-arb are more likely to consider the fairness of the result, as they will be required to render a decision, if mediation does not result in a settlement.

Even if no settlement is reached in the mediation phase and the dispute proceeds to the arbitration phase, the ultimate award resulting from the same neutral (arb)-med-arb is likely to be more acceptable to the parties than the award resulting from stand-alone arbitration. This is because previous negotiations may have narrowed the issues and resulted in procedural measures (for example, a third party evaluation on key findings of fact), that could lead to more predictable and acceptable solutions. The enhanced knowledge that neutrals have from participating in the mediation phase may allow them to render a more informed decision, as compared to arbitration used on its own.

The same neutral (arb)-med-arb allows parties to work out in the mediation phase remedies unavailable in arbitration alone. Parties can agree to rewrite their business arrangement, terminate it and agree on a division of assets, or come up with any other mutually satisfactory solution, which is illustrated by the following two cases.

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193 See, e.g., De Vera, supra n. 64, at 156-157; Elliott, supra n. 87, at 171 (citing Vince Ready, a leading British Columbia labour relations mediator and arbitrator).
194 Bartel, supra n. 76, at 682.
195 Kaufmann-Kohler & Kun, supra n. 164, at 491; Kun, supra n. 3, at 537; Ehle, supra n. 16, at 86.
196 Sawada, supra n. 59, at 33; Greenbaum, supra n. 73, at 227; De Vera, supra n. 64, at 156-157; Bartel, supra n. 76, at 665.
197 Phillips, supra n. 97, at 76; see also Burr, supra n. 68, at 68 (noting that the same neutral med-arb covers more human elements such as politics, cultural differences, effective communication, as opposed to litigation-relevant selection of facts).
In one case, the neutral first acted as a mediator, but when it became clear that the dispute could not be settled in mediation, the neutral became the arbitrator and decided to award a permanent injunction to the claimant. The parties expressed their wish to elaborate the terms of the injunction together and the arbitrator mediated these terms with counsel. According to the professional who participated in the process, the parties appeared to be very satisfied with the result. The claimant even waived its claim for damages, happy with the injunctive relief.

In another so-called 'Machinery Joint Venture' case, a dispute arose between an American and an Asian company and they commenced arbitration proceedings before a sole arbitrator. At a certain point the parties agreed to let the arbitrator try mediation. The arbitrator tried to mediate twice, meeting separately with the parties. Those meetings, however, were not successful and he resumed his work as an arbitrator after each meeting. Nevertheless, this eventually enabled the parties to draft ‘Heads of Agreement’ to create a joint venture in a spirit of mutual trust and cooperation. The dispute thus ended with neither a formal settlement agreement nor a consent award, but with a ‘constructive forward-looking agreement saying nothing about the past’.

The questionnaire data collected for this thesis confirms that the quality of the outcome is perceived as a strength of the combinations. As reported in section 5.2.3.3.1, about half of the participants considered that a high quality outcome, i.e., the outcome of a dispute resolution process is more in line with parties’ needs (as compared to arbitration only), is a benefit of combinations (50.6%). Similar to the situation with cost and time efficiency addressed in section 3.2.1, this result relates not only to the same neutral (arb)-med-arb, but to all combinations.

### 3.2.4 Flexibility

Flexibility is another significant beneficial attribute of the same neutral (arb)-med-arb. Phillips regards this process as the most flexible of all the ADR processes. According to Schneider, the flexibility with which the dual role neutral may switch

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198 Blankenship, supra n. 62, at 33 (discussing a case from practice of Gerald Phillips, a full-time neutral in California who specializes in large complex commercial and entertainment disputes).
199 Discussed in Sawada, supra n. 59, at 31-32.
200 Ibid.
201 Blankenship, supra n. 62, at 33-34; but see Lawday, supra n. 101, at 6 (observing that the flexibility of the same neutral (arb)-med-arb is considered by some to be a major weakness: the ability to be versatile, shifting back and forth, is an anathema to many practitioners from Anglo-American based systems).
from one method to the other in the same neutral (arb)-med-arb, makes this combination superior to each of the two methods taken alone.\textsuperscript{203}

The flexibility of the same neutral arb-med-arb lies in the fact that arbitration can be resumed at any moment and new attempts to mediate the dispute can be initiated at any moment.\textsuperscript{204} Arbitrators are free to choose the most appropriate moment in the course of arbitration to offer their services as mediators.\textsuperscript{205} Often this tends to happen after the exchange of written briefs and before the hearing.\textsuperscript{206} It may also be after a partial award. It should not be too early or too late in the proceedings.\textsuperscript{207} In fact, arbitrators are best placed to know when it is a good opportunity to facilitate settlement.\textsuperscript{208} Experienced arbitrators will generally know when the time is ripe.\textsuperscript{209} Since the timing of settlement efforts may be crucial for their success, the same neutral arb-med-arb appears to maximise the opportunity to settle.\textsuperscript{210} Arbitrators’ awareness of the case and the strengths and weaknesses of parties’ positions makes arbitrators well placed to mediate.\textsuperscript{211}

\textbf{3.2.5 Incentive to settle}

The same neutral (arb)-med-arb, arguably, makes parties work harder because they may want to avoid having to arbitrate.\textsuperscript{212} Knowing that a binding decision will be imposed if parties do not settle in mediation may motivate them toward resolution.\textsuperscript{213}

The pressure on parties to settle in mediation seems to be higher in the same neutral (arb)-med-arb than in stand-alone mediation\textsuperscript{214} or in mediation within diff neutral (arb)-med-arb.\textsuperscript{215} The possible explanation for that might be that when the mediator is going to be the arbitrator the imminence of a binding award seems closer, whereas when mediation is followed by arbitration with an unknown person, arbitration seems more

\begin{itemize}
  \item Schneider, \textit{supra} n. 41, at 77.
  \item Ehle, \textit{supra} n. 16, at 86; Phillips, \textit{supra} n. 97, at 76.
  \item Kaufmann-Kohler & Kun, \textit{supra} n. 164, at 490; Kaufmann-Kohler, \textit{supra} n. 22; Kun, \textit{supra} n. 3, at 537.
  \item Kaufmann-Kohler, \textit{supra} n. 22.
  \item \textit{Ibid.}
  \item Ehle, \textit{supra} n. 16, at 85.
  \item Kaufmann-Kohler, \textit{supra} n. 22; Lau & Bulut, \textit{supra} n. 157.
  \item Lau & Bulut, \textit{supra} n. 157.
  \item Schneider, \textit{supra} n. 41, at 77.
  \item Phillips, \textit{supra} n. 97, at 77; Marriott, \textit{supra} n. 7.
  \item Phillips, \textit{supra} n. 97, at 77 (citing James P. Groton of Sutherland, Asbill & Brennan in Atlanta, Georgia); Weisman, \textit{supra} n. 100, at 4; Sawada, \textit{supra} n. 59, at 33; Thomson, \textit{supra} n. 89, at 3; Greenbaum, \textit{supra} n. 73, at 227.
  \item Blankenship, \textit{supra} n. 62, at 34.
  \item Phillips, \textit{supra} n. 97, at 77.
\end{itemize}
The imminence of an imposed award might create a strong incentive for parties to successfully mediate their dispute. Interestingly, some practitioners perceive this strong incentive as a coercion that makes parties feel they have no choice other than to settle to avoid upsetting the neutral, which will be discussed in section 3.3.1.4. The irony of the divide between different members of the ADR community is that exactly the same circumstance is viewed as appropriate subtle pressure by some, and as a loss of free will by others.

Empirical data supports the argument that parties are more encouraged to reach an agreement in mediation conducted as part of the same neutral med-arb, than in stand-alone mediation or mediation conducted within diff neutral med-arb. McGillicuddy, Welton, and Pruitt conducted a field experiment at a community centre to test the impact on behaviour in mediation of stand-alone mediation, mediation within the same neutral med-arb process, and mediation within diff neutral med-arb. Results showed that parties in the same neutral med-arb engaged in more problem solving and were less hostile and competitive than were parties in stand-alone mediation, with diff neutral med-arb intermediate on these dimensions. Parties were also more conciliatory in mediation as part of the same neutral med-arb than in stand-alone mediation, making more proposals and exhibiting a trend toward more concession making. McGillicuddy, Welton, and Pruitt explain this result by the twofold influence of the same neutral med-arb procedure on party motivation. First, parties showed greater motivation to settle in the mediation part of the same neutral med-arb as opposed to stand-alone mediation because they feared losing control of the process if the dispute moved to the arbitration stage. Second, parties were more motivated to follow the mediator in the same neutral med-arb because of the respect that is naturally given to a person who has the power to ultimately decide on a dispute.

Mediators in diff neutral med-arb were less involved throughout mediation than were mediators in stand-alone mediation and mediation conducted as part of the same neutral

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216 Ibid.
217 Ibid; Blankenship, supra n. 62, at 34.
218 Blankenship, supra n. 62, at 34.
219 McGillicuddy, Welton & Pruitt, supra n. 45.
220 Ibid, at 104.
221 Ibid, at 110; see also Blankenship, supra n. 62, at 34 (suggesting that a process with more conciliatory, more creative and less hostile parties logically should achieve a more satisfying result and referring to a study where the same neutral med-arb emerged as a more satisfying process over either mediation or arbitration alone. Cynthia F. Cohen & Murray F. Cohen, Relative Satisfaction with ADR: Some Empirical Evidence, 57 Disp. Res. J. 37 (2002)).
222 McGillicuddy, Welton & Pruitt, supra n. 45, at 110.
The researchers explained this result by three reasons. First, mediators in neutral med-arb may feel less responsible for the case because another person can take it over. Second, they may see themselves as low-power adjuncts to a process that may be dominated by a high-power figure at a later time. Third, parties may see the mediator as a weak figure in comparison to the arbitrator and, feeling this, the mediator may become disinterested in the case.

Mediation attempts by arbitrators may be even more persuasive than those by judges. Arbitration laws usually provide limited grounds for having an award reviewed by the courts. Knowing about the ability to appeal adverse judgments, a party can disregard mediation attempts by judges. Nottage reports a situation when he advised a New Zealand defendant in a case before a Japanese court. Although Japanese judges traditionally encourage settlement in civil proceedings, the Japanese plaintiff showed zero interest in engaging in mediation despite the proceedings unfolding in a manner unfavourable to him. Later on, the plaintiff appealed the adverse judgment. Nottage concludes that had the matter been arbitrated with no possibility of appeal for error of law, the plaintiff might have been more conciliatory.

Sometimes just becoming aware of how long arbitration may take may be a sufficient incentive for parties to give mediation another try. In one recorded case, at a certain point, it became clear that parties were unable to settle in mediation. With the parties’ written consent the mediator became the arbitrator in the same dispute; however, soon both counsel acknowledged that arbitration seemed to be long and costly and requested to resume mediation. Then the case settled.

### 3.2.6 Parties’ more honest behaviour

Parties to the same neutral (arb)-med-arb are likely to participate in the mediation phase in good faith and to approach the bargaining table with honest demands, because if they hold back on a particular issue, they know that the dual role neutral is going to

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223 Ibid, at 111.
226 Ibid.
227 Phillips, *supra* n. 97, at 76.
228 Ibid (referring to a case from his own practice).
229 Blankenship, *supra* n. 62, at 34.
make a decision.\textsuperscript{230} For Kagel, the power to keep parties honest is the key to the same neutral (arb)-med-arb.\textsuperscript{231} No empirical data has been found to deny or confirm this.

Using the same neutral (arb)-med-arb might even assist a party who is in a weaker bargaining position in the mediation phase.\textsuperscript{232} A weaker party may negotiate secure knowing that if no mutually acceptable agreement is reached, the dual role neutral will render a decision.\textsuperscript{233} This differs from stand-alone mediation where a party may yield to what it regards an unfair result, as the only way of putting an end to the dispute.\textsuperscript{234} Also, a mediator in stand-alone mediation may be unable or simply unwilling to equalize bargaining skill or power.\textsuperscript{235} Although the weaker party is not guaranteed a favourable result in the mediation phase of the same neutral (arb)-med-arb, the process appears to help ensure that weakness will not be a factor in and of itself.\textsuperscript{236}

At the same time, the awareness that the mediator may ultimately decide the dispute may induce the stronger party to be reasonable and fair.\textsuperscript{237} A contractual commitment to the same neutral (arb)-med-arb should prevent the stronger party from refusing to use this process because of this kind of discomfort.

### 3.3 Concerns Associated with the Same Neutral (Arb)-Med-Arb

While in the view of its supporters the same neutral (arb)-med-arb enables parties to have the best of mediation and arbitration,\textsuperscript{238} many experienced and highly ethical practitioners remain convinced that mediation and arbitration by the same person are inherently incompatible and the process is fatally flawed.\textsuperscript{239} Concerns regarding the same neutral (arb)-med-arb are so serious that some neutrals take the position that they would never agree to arbitrate a case in which they have previously served as the mediator.\textsuperscript{240}

\textsuperscript{231} Ibid.
\textsuperscript{232} Lawday, \textit{supra} n. 101, at 9.
\textsuperscript{233} Bartel, \textit{supra} n. 76, at 682-683.
\textsuperscript{234} Ibid, at 682.
\textsuperscript{235} Ibid.
\textsuperscript{236} Ibid, at 683.
\textsuperscript{237} Ibid.
\textsuperscript{238} See generally section 3.2.
\textsuperscript{239} Thomson, \textit{supra} n. 89, at 3; Blankenship, \textit{supra} n. 62, at 29; Lau & Bulut, \textit{supra} n. 157; Stipanowich & Ulrich, \textit{supra} n. 16, at 25; Brewer & Mills, \textit{supra} n. 85, at 35. Ross, \textit{supra} n. 23, at 352.
\textsuperscript{240} Brewer & Mills, \textit{supra} n. 85, at 35-36.
Critics of the same neutral (arb)-med-arb question whether the mediation and arbitration phases can both remain valid while conducted by the same neutral because mediation and arbitration are radically, inherently and fundamentally different processes with different aims and even moralities.

The key differences between mediation and arbitration are as follows. In the privatised legal process of arbitration, arbitrators render a decision that they usually base on their interpretation of the relevant law as applied to the facts of the case. Mediation is not a legal process, but a communication and negotiation process, whereby a mediator helps parties negotiate a settlement. An arbitrator’s award is legally binding and enforceable in national courts if necessary. Parties’ agreement reached in mediation, in general, is only contractually binding. While arbitration is about what happened in the past (e.g. who was liable), mediation focuses on fixing problems in the present as well as preserving future relationship. Also, the arbitrator’s award is usually limited in scope by what parties have asked for in their arbitration clause. A mediator, on the contrary, can help parties expand the scope of what terms can be considered. Perhaps, that is the reason why arbitration is said to be more of a science while mediation is more of an art.

For critics, the same neutral (arb)-med-arb inevitably compromises the neutral’s legal capacity to act in an adjudicative capacity, while at the same time undermining the efficacy of the prior mediation. It appears that the single most problematic issue in the same neutral (arb)-med-arb and the cause of the majority of concerns associated with the process is caucuses. Notably, objections to caucuses arise whenever a dual role neutral becomes an arbitrator after acting as a mediator in mediation that involved the use of caucuses. If arbitration comes to an end and mediation is commenced, caucuses do not seem to raise any concerns.

241 Blankenship, supra n. 62, at 29; Peter, supra n. 88, at 159; Wolski, supra n. 3, at 267.
242 De Vera, supra n. 64, at 159.
243 Lawday, supra n. 101, at 8; Peter, supra n. 88, at 159.
244 Bartel, supra n. 76, at 663; Stipanowich & Ulrich, supra n. 16, at 25.
245 Bartel, supra n. 76, at 688; Blankenship, supra n. 62, at 34.
246 Lew, supra n. 78, at 425; Mason, supra n. 81, at 541. This, however, is not the case if parties authorise the arbitrator to decide ex aequo et bono.
247 Mason, supra n. 81, at 541; Bartel, supra n. 76, at 663.
248 Mason, supra n. 81, at 542.
249 Ibid, at 542-543.
250 Lawday, supra n. 101, at 4 (citing Newman); Peter, supra n. 88, at 164.
251 Ross, supra n. 23, at 360; Leon & Peterson, supra n. 156, at 93; Hindle, supra n. 77, at ¶ 15.
252 Hindle, supra n. 77, at ¶ 8 n. 11.
The main concerns associated with the same neutral (arb)-med-arb can be divided into two groups: behavioural that surface in the mediation stage, and procedural that arise in the arbitration stage.\[^{253}\]

### 3.3.1 Behavioural concerns

Behavioural concerns\[^{254}\] include the possible reluctance of parties to be open in their discussions with mediators knowing that at a certain point they might become arbitrators, the inhibited conduct of mediators, parties’ use of mediation as a tactical tool, and the abuse of power by mediators resulting in the coercion of parties into a settlement.

#### 3.3.1.1 Parties’ reluctance to be open in mediation

Knowledge of parties’ true intentions, underlying interests and preferences, and business background enables a mediator to guide parties in exploring areas of mutual gain.\[^{255}\] Therefore a mediator encourages parties to be candid. In arbitration, parties tend to focus on persuading the arbitrator that their side is right, which prevents them from revealing any weaknesses and letting the arbitrator explore the background of the case.

The same neutral (arb)-med-arb is often criticised for the risk of inhibiting parties’ willingness to share information candidly with the neutral during the mediation phase of the process.\[^{256}\] Marriott even considers that this is the main conceptual objection to the same neutral (arb)-med-arb.\[^{257}\] A negative impact on the mediation phase may occur because of a parties’ knowledge that the mediator may eventually become the arbitrator. Fearing that their disclosure will prejudice arbitration, parties may become less

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\[^{253}\] This division is made on the basis of discussion in Alan L. Limbury, *Making Med-Arb Work*, 9(7) ADR Bulletin 1, 1-2 (2007); Wolski, *supra* n. 3, at 259-260. Other commentators enumerate concerns related to the same neutral (arb)-med-arb. These repeat and/or complement those that appear in two groups suggested by Limbury and Wolski. *See* e.g., Stipanowich & Ulrich, *supra* n. 16, at 25-26; Bartel, *supra* n. 76, at 678-689; Peter, *supra* n. 88, at 159-164; Peter, *supra* n. 61, at 92-99; Elliott, *supra* n. 87, at 166-168; Lawday, *supra* n. 101, at 4-8.

\[^{254}\] Limbury, *supra* n. 253, at 1-2; Wolski, *supra* n. 3, at 259. Most concerns in this group were suggested by Limbury and Wolski.

\[^{255}\] Peter, *supra* n. 88, at 163; Peter, *supra* n. 61, at 98.

\[^{256}\] See e.g., Brewer & Mills, *supra* n. 85, at 35; Kaufmann-Kohler & Kun, *supra* n. 164, at 491; Thomson, *supra* n. 89, at 3; Phillips, *supra* n. 97, at 76; Kaufmann-Kohler, *supra* n. 22; Peter, *supra* n. 61, at 98; Sawada, *supra* n. 59, at 33; Blankenship, *supra* n. 62, at 36-37; Lang, *supra* n. 139, at 101; Limbury, *supra* n. 253, at 1; Stipanowich & Ulrich, *supra* n. 16, at 26; Flake, *supra* n. 48, at 6-7; Kun, *supra* n. 3, at 538; Abramson, *supra* n. 60, at 5; Safeguards for Arbitrators Who Use Private Meetings with Each Party as a Means of Facilitating Settlement (Final Report of the CEDR Commission on Settlement in International Arbitration, Appendix 2), ¶ 5, available at <http://www.cedr.com/about_us/arbitration_commission/> (accessed 5 Sep. 2015) [hereinafter, CEDR Appendix 2].

forthcoming during caucusing and more reluctant to reveal their true settlement positions, as they would be in mediation followed by arbitration with another neutral.\textsuperscript{258} There is a risk that one of the biggest advantages of mediation that is essential to its success, the safe exploration of mutual gain without the danger of conveying confidential information to the party’s own detriment, is substantially weakened.\textsuperscript{259}

However, one may assume that this shortfall of information and frankness as compared to stand-alone mediation may be partly compensated in the same neutral arb-med-arb by dual role neutrals’ thorough knowledge of the file resulting from their prior participation in the process as arbitrators.\textsuperscript{260} Independent mediators usually spend only a few days on a case and are unable to gain an insight comparable to dual role neutrals who mediate after acting as arbitrators. No empirical data has been found to confirm this assumption.

Also, Lang expresses concerns that knowing that there is an easy and available alternative option of achieving finality (namely have the mediator (as arbitrator) make a decision for them), parties may not work as hard at the mediation phase as they otherwise might.\textsuperscript{261} This is an example of a situation when the exact same circumstance, i.e. parties’ knowledge that a binding decision will be imposed if parties do not settle in mediation, is perceived by some authors as creating a motivation for parties to work harder in mediation,\textsuperscript{262} and as having directly the opposite effect by others. The available empirical data supports the view that parties in the same neutral med-arb work harder and engage in more problem solving than parties in stand-alone mediation and mediation conducted within diff neutral med-arb.\textsuperscript{263}

\subsection*{3.3.1.2 Inhibited conduct of a mediator}

Not only parties may become reluctant to be open in mediation; dual role neutrals’ conduct of the mediation phase may also be inhibited.\textsuperscript{264} Mediators’ knowledge that they might become arbitrators, may prevent them from conducting the mediation phase with their usual vigor.\textsuperscript{265} Speaking from his own professional experience as a dual role neutral, Flake suggests that neutrals should be less probative and opinionated in the

\begin{enumerate}
\item\textsuperscript{258} Ross, \textit{supra} n. 23, at 360; Phillips, \textit{supra} n. 97, at 76; Rewald & Jachimek Weil, \textit{supra} n. 164, at 2 (citing Brian Pappas).
\item\textsuperscript{259} Peter, \textit{supra} n. 61, at 98.
\item\textsuperscript{260} Schneider, \textit{supra} n. 41, at 93.
\item\textsuperscript{261} Lang, \textit{supra} n. 139, at 101.
\item\textsuperscript{262} This kind of perception has been discussed in section 3.2.5 \textit{supra}.
\item\textsuperscript{263} McGillicuddy, Welton & Pruitt, \textit{supra} n. 45, at 110 discussed in section 3.2.5 \textit{supra}.
\item\textsuperscript{264} Brewer & Mills, \textit{supra} n. 85, at 35; Abramson, \textit{supra} n. 60, at 5, n. 9.
\item\textsuperscript{265} Brewer & Mills, \textit{supra} n. 85, at 35.
\end{enumerate}
mediation phase of the same neutral (arb)-med-arb. Flake expects a lower success rate of resolution in the mediation phase of the same neutral med-arb as compared to stand-alone mediation because of the ‘chilling effect’ on both parties and mediators. Nevertheless, the available empirical data presented in section 3.2.5 demonstrates the opposite; parties appear to be more encouraged to reach an agreement in mediation conducted as part of the same neutral med-arb than in stand-alone mediation or mediation conducted as part of different neutral med-arb.

3.3.1.3 Tactical use of mediation

If parties know that the mediator will become the arbitrator, if mediation does not result in a settlement, there is a fear that they may use mediation strategically, to introduce material strictly to influence the arbitrator’s award, rather than to reach a settlement. After receiving the mediator’s assurances about confidentiality of discussions in caucuses, a party may embellish its story about the other side. Then it may drive mediation to an impasse and move the dispute to arbitration.

It may be less the parties than the counsel who misuse the mediation process in this way. For example, counsel may attempt to ‘spin’ the mediator towards the client’s side in preparation for arbitration. To be fair, it should be noted that counsel may do this even in stand-alone mediation, in an attempt to present the case to the advantage of their client so that the mediator facilitates a settlement more favourable to that party. Thereby, it appears that neutrals in all types of processes need to distil the real facts of the case despite the posturing of counsel.

The perception that the same neutral (arb)-med-arb enables parties to abuse mediation by using it strategically contrasts with the perception referred to in section 3.2.6 that parties to this process are likely to participate in the mediation phase in good faith and approach the bargaining table with the honest demands. No empirical data has been found to support either perception.

266 Flake, supra n. 48, at 7.
267 Ibid, at 8.
268 Elliott, supra n. 87, at 179; Thomson, supra n. 89, at 3; Greenwood, supra n. 3, at 201.
270 Kichaven, supra n. 269, at 80; see also Blankenship, supra n. 62, at 36 (noting that later consideration of this embellished information by the neutral arguably has the effect of allowing ‘perjury’ to influence an award).
271 Phillips, supra n. 97, at 76; Ross, supra n. 23, at 360.
272 Ross, supra n. 23, at 360.
3.3.1.4 Power of a dual role neutral and a threat of coercion

Vesting the authority to render a binding decision in the same person who mediates the dispute creates enormous power in the neutral. There is a fear that consciously or unconsciously the neutral may abuse this power and use the threat of an award to coerce parties into a settlement during the mediation stage. Blankenship calls this power the ‘muscle’ of the process that depending on the commentator’s opinion, is either a source of abuse or the strength of the same neutral (arb)-med-arb. The latter view has been addressed in section 3.2.5.

For some critics, coercion is the fatal flaw in the process. Agreements reached in this process may be a result of strong-arm tactics. The value of mediation is compromised when mediators, knowing they could later decide a dispute, coerce parties into a settlement. A negotiated resolution may be perceived by parties as an imposed one, thus diminishing the degree of satisfaction and commitment. By eliminating the ability of parties to withdraw from mediation voluntarily, the process deprives parties of a key mediation principle – the right to self-determination.

Some anecdotally reported cases demonstrate how the potential to abuse the power materialises in practice.

In a Brazilian-US arbitration, the parties did not have a same neutral arb-med-arb clause in their contract and did not agree to mediate. Nevertheless, the sole arbitrator, who was trained primarily as a mediator, threatened the parties with ‘punishment’ if they did not settle the case in mediation. Parties were not able to negotiate a settlement and the arbitrator ‘carried out his threat through his award’.

In another International Court of Arbitration of International Chamber of Commerce (ICC) arbitration case, an arbitrator from Zürich informed the parties at the Terms of Reference conference that both parties had a weak position and that they needed to

273 Bartel, supra n. 76, at 679.
274 Ibid; Phillips, supra n. 97, at 76; Kichaven, supra n. 269, at 82; Deekshitha & Saha, supra n. 66, at 93; Kaufmann-Kohler, supra n. 22; Ross, supra n. 23, at 360.
275 Blankenship, supra n. 62, at 36.
276 Ibid; Deekshitha & Saha, supra n. 66, at 93; Peter, supra n. 88, at 159.
277 De Vera, supra n. 64, at 159.
278 William Ury, Jeanne M. Brett & Stephen B. Goldberg, Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict, 57 (San Francisco: Jossey-Bass 1988) cited in De Vera, supra n. 64, at 160 n. 38; Bartel, supra n. 76, at 679; Peter, supra n. 88, at 159.
279 Fullerton, supra n. 61, at 34.
280 Mason, supra n. 81, at 550 (reporting a case from his own experience that he was peripherally involved in).
281 Ibid.
He made some proposals. The French party was concerned that the arbitrator was prepared to rule against them. Thus, they accepted the proposals, but not because they thought that they were reasonable, but because they felt obliged to do so. The counsel who represented the French party in that case reported that he doubted the fairness of the settlement.

In yet another case the German Supreme Court annulled a settlement concluded before a lower court. The ground for annulment was that the lower court had announced that its decision against the defendant had been prepared and that, if the defendant would not immediately accept the settlement offer, the court would render this decision. The Supreme Court regarded this conduct as the exercise of the illegal pressure.

The risk that a dual role neutral may coerce parties into a settlement seems confirmed by empirical data. The field experiment introduced in section 3.2.5 investigated whether the power available to the dual role neutral could elicit directive behaviour from neutrals in the mediation phase and encourage them to dictate terms. There was a hint of these dangers in the study’s data. Mediators used heavier tactics in the same neutral med-arb, more often threatening to terminate mediation or insisting on a particular proposal (as compared to stand-alone mediation). However, it appeared that mediators tended to use these tactics at the very end of mediation, in a last-ditch effort to save a failing mediation rather than a policy of forceful advocacy. The post hearing questionnaire filled out by disputing parties showed that the parties saw themselves as more involved in working out the terms of the agreement and the mediator as less forceful in the same neutral med-arb than in stand-alone mediation or diff neutral med-arb.

3.3.2 Procedural concerns

Procedural concerns relate to the arbitration stage and are directed at the danger that arbitrators will appear or actually be biased, because of the information received in mediation and particularly in caucuses. Moreover, the inability of a party to hear and respond to the issues raised by the other party in caucuses with mediators who later become arbitrators, may lead to a breach of due process.

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282 Schneider, supra n. 41, at 82, n. 111 (citing Derains, a French counsel with extensive experience in international arbitration both as arbitrator and counsel, who represented a French party in that case).
283 Ibid, at 84-85, n. 122.
285 Limbury, supra n. 253, at 2; Wolski, supra n. 3, at 259-260.
3.3.2.1 **Bias of a dual role neutral**

The literature often refers to the threat to arbitrator’s impartiality as the main drawback of the same neutral (arb)-med-arb.\(^{286}\) Events may occur during the mediation phase that could cause parties later to question the fairness of the arbitration part of the process.\(^{287}\) For example, if dual role neutrals express in mediation a view as to the merits of the dispute this might be seen as affecting their impartiality for the remaining arbitration part of the process.\(^{288}\)

Another fear is that if settlement efforts fail and neutrals become or resume their role of arbitrators, they may lose their impartiality because of the information that they have become aware of in the mediation stage but that is not on the record.\(^{289}\) Dual role neutrals might have difficulty remaining unaffected by private and perhaps intimate, emotional and other legally irrelevant information or compromise positions revealed in mediation.\(^{290}\) They may become consciously or unconsciously empathetic towards one of the parties or may become involved with the subject matter.\(^{291}\) This may happen especially if dual role neutrals engage in caucuses and invite parties to discuss, for example, emotional issues that may be relevant for settlement purposes, though not strictly relevant for resolution purposes.\(^{292}\) It might be challenging for neutrals to ignore information disclosed in mediation when called on to decide as arbitrators.\(^{293}\) This will allow the losing party to challenge the award on the ground of actual or apparent bias, which would bring to nought time and cost saving advantages of the process.\(^{294}\)

Even arbitrators in stand-alone arbitration may be influenced by what they see and hear. Nevertheless, dual role neutrals undoubtedly become privy to much more than arbitrators in stand-alone arbitration would.\(^{295}\) This exposes dual role neutrals much

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\(^{286}\) See, e.g., Kaufmann-Kohler, *supra* n. 22; Ehle, *supra* n. 16, at 86.

\(^{287}\) Brewer & Mills, *supra* n. 85, at 35.


\(^{290}\) Peter, *supra* n. 61, at 92-93; Peter, *supra* n. 88, at 160; Lang, *supra* n. 139, at 100.

\(^{291}\) Peter, *supra* n. 61, at 92-93; Peter, *supra* n. 88, at 160 & n. 53 (citing Claude Reymond and Richard W. Hulbert from Bühring-Uhle, *supra* n. 118, at 205-206).

\(^{292}\) Peter, *supra* n. 88, at 160.

\(^{293}\) *Ibid*; Elliott, *supra* n. 87, at 167.

\(^{294}\) Ross, *supra* n. 23, at 360; Deekshitha & Saha, *supra* n. 66, at 89.

\(^{295}\) De Vera, *supra* n. 64, at 159; Bartel, *supra* n. 76, at 685; Peter, *supra* n. 88, at 160.
more to the danger of bias than arbitrators.\textsuperscript{296} Even if parties limit the decision-making to only certain facts, a dual role neutral might still struggle to block out information gained in mediation.

While it may be difficult for the dual role neutral to block out the information from mediation in the arbitration stage, it may be even more difficult for the losing party to believe that the neutral did.\textsuperscript{297} Counsel might fear that the mediator who has become the arbitrator has developed a skewed view of their client’s position that is not possible to set right anymore.\textsuperscript{298}

This situation might be a variation of the classic tautology: I can’t tell you what you don’t know because I don’t know what you don’t know. Counsel cannot correct a misrepresentation that may have been made to dual role neutrals in mediation because counsel do not know what may have been said nor can they gauge what evidentiary weight neutrals have already given it in their mind. It is not so much that neutrals are no longer impartial, as that counsel have no effective method of determining if there has been a bias formed. Like most risk adverse people, counsel would rather not take a chance if they sense that they might lose.\textsuperscript{299}

The empirical data shows that the threat to arbitrator impartiality is more a perception than a reality. The research conducted by Kaufmann-Kohler found no cases where arbitrators were challenged or removed, or where awards were set aside or denied enforcement on the ground that an arbitrator facilitated settlement.\textsuperscript{300} Instead, the research found some court cases that held exactly the opposite: the involvement of judges in settlement of their own cases is admissible. According to Kaufmann-Kohler, the same must necessarily apply to arbitrators.

3.3.2.2 \textbf{Breach of due process}

Arbitrators may only make decisions on the evidence presented in hearings at which each side has the opportunity to challenge the evidence.\textsuperscript{301} Mediation differs from arbitration; a party does not have an inalienable right to defend all accusations in mediation, and the mediator is not ruling on the dispute.\textsuperscript{302} The same neutral (arb)-med-

\textsuperscript{296} De Vera, \textit{supra} n. 64, at 159; Peter, \textit{supra} n. 88, at 160.
\textsuperscript{297} Ury, Brett & Goldberg, \textit{supra} n. 278, at 57 cited in Bartel, \textit{supra} n. 76, at 686 n. 123.
\textsuperscript{298} Oghigian, \textit{supra} n. 87, at 77.
\textsuperscript{299} Ibid.
\textsuperscript{300} Kaufmann-Kohler, \textit{supra} n. 22.
\textsuperscript{301} Phillips, \textit{supra} n. 97, at 76; Blankenship, \textit{supra} n. 62, at 36.
arb becomes problematic when mediation fails and dual role neutrals take on or resume their role as arbitrators.\textsuperscript{303}

The process may offend the principles of due process\textsuperscript{304} because parties have no chance to hear and respond to the issues raised by each of them in caucuses with the mediator who later becomes an arbitrator.\textsuperscript{305} An award resulting from the same neutral (arb)-med-arb may be unfairly influenced by evidence from caucuses.\textsuperscript{306} Kun regards the risk of a breach of due process as the main argument against arbitrators serving as mediators.\textsuperscript{307} Notably, concerns about due process seem to arise only in some countries but not in others. For example, the ICC Mediation Guidance Notes observe that the risk of offending the rules of due process is a common concern in jurisdictions where the same neutral arb-med-arb is used rarely, if at all.\textsuperscript{308} The Notes, however, do not specify what jurisdictions in particular, they mean. Lawday and Ross speak about the risk of offending principles of due process as understood in Anglo-American/common law system.\textsuperscript{309}

As discussed in detail in Part IV (Chapters 6, 7 and 8), this thesis identifies three major ways to address behavioural and procedural concerns associated with the same neutral (arb)-med-arb: the involvement of different neutrals in combinations, procedural modifications of the same neutral (arb)-med-arb, and the implementation of safeguards for using the same neutral (arb)-med-arb.

If parties choose the last option, and as explained in Chapter 8, they can reduce behavioural and procedural concerns through the implementation of two key safeguards. These are party voluntary and informed consent to the process and one of the two safeguard options for reducing concerns related to the use of caucuses. Section 8.2.2 considers whether and, if yes, to what extent parties can waive the impartiality requirement and their due process rights.

\textsuperscript{303} Rosoff, supra n. 143, at 93.
\textsuperscript{304} Natural justice, procedural fairness and due process are terms used to describe the same principle in different countries.
\textsuperscript{305} Rosoff, supra n. 143, at 92-93; Barney Jordaan, Hybrid ADR Processes in South Africa, 2(1) NYSBA New York Disp. Res. Law. 117, 117 (2009); Alan Limbury, ADR in Australia, in ADR in Business: Practice and Issues across Countries and Cultures vol II 429, 454 (Arnold Ingen-Housz ed., Kluwer Law International 2011); Kaufmann-Kohler & Kun, supra n. 164, at 491; Kaufmann-Kohler, supra n. 22; Blankenship, supra n. 62, at 36; Peter, supra n. 88, at 161; Thomson, supra n. 89, at 3; Elliott, supra n. 87, at 166-167.
\textsuperscript{306} Phillips, supra n. 97, at 76.
\textsuperscript{307} Kun, supra n. 3, at 537.
\textsuperscript{308} International Court of Arbitration of the International Chamber of Commerce (ICC), Mediation Guidance Notes ¶ 34 (International Chamber of Commerce 2013).
\textsuperscript{309} Lawday, supra n. 101, at 8; Ross, supra n. 23, at 361.
3.4 The Challenging Task of a Dual Role Neutral in the Same Neutral (Arb)-Med-Arb

The success of any dispute resolution method often depends on the quality of the neutral selected. Proponents of the same neutral (arb)-med-arb argue that many criticisms of the process are dramatically overstated and much depends on finding a competent neutral. A competent neutral will be skilled to deal with information from caucuses, overcome the difficulties of information quality and exchange, and minimise the possibilities of bias and breach of due process.

In the same neutral (arb)-med-arb, even assuming that neutrals are willing to make a transition from one process to another, they will not necessarily be capable of performing this task without proper training. A significant concern with the process is the skill of dual role neutrals and capacity to effectively handle both roles. No matter in what sequence the processes are used, dual role neutrals need to possess qualifications for both mediation and arbitration and likely will have topic specific expertise in the issues involved.

Mediation focuses on finding an efficient and value-creating solution, which requires an exploration of parties underlying interests. Mediators, therefore, may ask parties for confidential information or engage in ‘reality-testing’ – a process where mediators confront and question parties' positions on the merits to narrow the difference between them and to deflate exaggerated demands and expectations. Both reality testing and exploring parties’ real interests work particularly well in caucuses. Good mediators need to possess traits and skills oriented toward interpersonal awareness and dynamics, securing the trust of all parties to the dispute, understanding the psychology of negotiations, finding issues that may underlie the parties' dispute, and being creative in helping parties find a unique solution for themselves. Effective mediation often relies on a well-developed personal relationship between a mediator and parties.
Arbitration, on the contrary, requires a high level of detachment and emotional distance from the parties, and their interests and positions. In general, arbitrators should use the facts and law to resolve the issues in dispute. They need to understand the commercial realities and blend these with the contractual and legal. They must also be capable of rendering difficult decisions. Good arbitrators need to have traits and skills such as strict neutrality and impartiality, knowledge of the law, ability to evaluate documents and witnesses, time management, organisational and decision-making skills. An arbitrator must possess a judicial temperament in order to command parties’ respect.

Given different natures of arbitration and mediation, these processes require different core competences from their respective neutrals. The core competence of arbitrators is to make a binding decision on legal questions, whereas the core competence of mediators is to help parties negotiate an amicable settlement. It appears that good mediators and good arbitrators employ a completely different set of tools; arbitrators use a wide range of legal tools, while mediators rely on an array of intangible attributes. This may make it difficult for one person to perform both roles effectively.

The training offered for mediation and arbitration appears to have little in common. Sussman observes that while in arbitration training a good deal of attention is devoted to how to manage the pre-hearing process efficiently, in mediation training significant attention is devoted to how to overcome impasse.

Even if neutrals are skilled and able to function effectively as either mediators or arbitrators, they may face other challenges when taking up both roles. For example, dual role neutrals may have difficulty switching from being problem solvers to being decision makers. Or, they may have difficulty giving their entire energy to mediating

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319 Ibid, at 248-249.
320 This, however, is not the case if parties authorise the arbitrator to decide ex aequo et bono.
321 Lew, supra n. 78, at 425.
322 Mason, supra n. 81, at 543.
323 Matthias M. Pitkowitz & Marie-Therese Richter, May a Neutral Third Person Serve as Arbitrator and Mediator in the Same Dispute?, 4 Schieds VZ 225, 226 (2009); De Vera, supra n. 64, at 159; Bartel, supra n. 76, at 688.
324 Pitkowitz & Richter, supra n. 323, at 226; Bartel, supra n. 76, at 688-689; Peter, supra n. 88, at 164.
325 Mason, supra n. 81, at 542.
326 Sussman, supra n. 157, at 73; Thomson, supra n. 89, at 3.
327 Sussman, supra n. 157, at 73.
328 Phillips, supra n. 97, at 76; see also Mason, supra n. 81, at 545 (noting that apart from skills and experience in both processes, the dual role neutral needs to know how and when to put on and take off
a dispute when in the back of their mind they realize that they may need to ultimately resolve the dispute. Effective mediators may have difficulty keeping the arbitral role fully in mind, even if they are able to function well as arbitrators on a separate occasion.

Dual role neutrals appear to face a dilemma between the effectiveness of a mediation attempt and the integrity of the arbitral procedure. When dual role neutrals switch from the role of a mediator to the role of an arbitrator they might experience difficulties in dealing with information from caucuses and trying to distance themselves from any views they have expressed in mediation, so that they can render an impartial decision. Neutrals need to endeavour to view the facts of the case in a completely new light, as if they had previously known nothing about them. This is a difficult thing to do. It will be hard for them to hear arguments with an open mind. If they fail in this attempt, the integrity of arbitration is impaired. Also, neutrals must remain capable of issuing a decision against one party, which requires a certain distance from the parties. Even in stand-alone arbitration, arbitrators may struggle with an ‘urge to split the baby, to soften the results’. Having acted as a mediator this might become much harder.

Bühring-Uhle et al argue that because the dual role is so demanding, many practitioners prefer to err on the side of caution. Interestingly, it appears that even if practitioners do not doubt their own ability to juggle the roles of a mediator and arbitrator, they might feel sceptical about other’s ability to do so. Oghigian notes:

> When acting as a mediator, I have no doubt about my own impartiality should I later find myself as the arbitrator in the same matter. However, if I am acting as counsel, I may well be concerned about the appropriateness of such a structure and may be sceptical about the mediator/adjudicator’s

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329 Bartel, supra n. 76, at 689.
330 Ibid.
331 Bühring-Uhle et al., supra n. 46, at 248.
332 Ibid, at 250.
333 Peter, supra n. 88, at 160 n. 51.
334 Bühring-Uhle et al., supra n. 46, at 250 n. 632 (quoting an American in-house counsel interviewed in April 1992; but see Mason, supra n. 81, at 543 (noting that despite a common perception that arbitrators in stand-alone arbitration act more like mediators and ‘split the baby’ in their arbitral awards, his own experience as arbitrator and counsel in arbitrations has been the opposite – rarely, if ever, has arbitration been decided this way).
335 Bühring-Uhle et al., supra n. 46, at 250.
336 Ibid.
337 Ibid; Oghigian, supra n. 87, at 75.
ability to remain impartial. It is a bit like one of those irregular verbs: I am impartial, you are capable of being impartial; he is probably biased.\textsuperscript{338}

Bairstow makes the following comment about the heavy responsibility of a dual role neutral:

When you sit there with the parties, separately or together - listening, persuading, cajoling, looking dour or relieved – your responsibility is a heavy one. Every lift of your eyebrow can be interpreted as a signal to the parties as to how you might eventually decide an issue if agreement is not reached.\textsuperscript{339}

In view of the above, an issue of a parties’ trust in dual role neutrals comes to the fore. It appears that for the same neutral (arb)-med-arb to work well, it is not sufficient for neutrals to be capable of performing both roles. Parties need to have confidence in neutrals’ capacity to handle both roles as well.\textsuperscript{340} Blankenship observes that the competence and reputation of the neutral, and particularly the trust the parties and their counsel have in the neutral, are even more essential to the success of the same neutral (arb)-med-arb than to traditional mediation and arbitration.\textsuperscript{341}

3.5 Conclusion

The same neutral (arb)-med-arb is a combination that raises a tidal wave of controversy. For supporters, it as a process that attempts to capture the independent strengths of both mediation and arbitration while limiting their perceived weaknesses. In particular, the process is often praised for its cost and time efficiency, finality and legal enforceability, quality of the outcome, flexibility, incentive to settle, and more honest behaviour of parties in mediation (as compared to stand-alone mediation). Critics, however, remain convinced that mediation and arbitration by the same neutral are inherently incompatible and the same neutral (arb)-med-arb is a fatally flawed process. Caucuses appear as the single most problematic issue in the process and the cause of the majority of concerns associated with it.

The main concerns associated with the same neutral (arb)-med-arb may be divided into two groups: behavioural concerns that surface in the mediation stage, and procedural

\textsuperscript{338} Oghigian, supra n. 87, at 75.
\textsuperscript{340} Bühring-Uhle et al., supra n. 46, at 265.
\textsuperscript{341} Blankenship, supra n. 62, at 34.
concerns that arise in the arbitration stage. Behavioural concerns include the possible reluctance of parties to be open in their discussions with mediators knowing that at a certain point they might become arbitrators, the inhibited conduct of mediators, parties’ use of mediation as a tactical tool, and the abuse of power by mediators resulting in the coercion of parties into a settlement. Procedural concerns are directed to the danger that arbitrators will appear, or actually be biased, because of the information received in mediation and particularly in caucuses. Moreover, the inability of parties to hear and respond to the issues raised by each of them in caucuses with mediators who later become arbitrators, may lead to a breach of the rules of due process. As discussed in Chapters 6, 7 and 8, the thesis has identified three major ways to address concerns associated with the same neutral (arb)-med-arb. These are the involvement of different neutrals in combinations, procedural modifications of the same neutral (arb)-med-arb and the implementation of safeguards for using the same neutral (arb)-med-arb.

The same neutral (arb)-med-arb also poses a significant challenge to dual role neutrals. Not only must dual role neutrals be skilled and experienced in both mediation and arbitration, but they also must be capable of effectively handling both roles while switching from one to another. Only this kind of neutral may earn parties’ trust essential to the success of the same neutral (arb)-med-arb. The thesis suggests in section 9.5 that this challenge may be met by making a concerted effort to build the capacity of dispute resolution practitioners, in particular, by training more arbitrators as mediators and more mediators as arbitrators.

Having discussed the advantages and concerns associated with the same neutral (arb)-med-arb and challenges it poses to dual role neutrals, the thesis will turn now to examine the issue of the legal culture. As explained in the next Chapter, the legal culture emerges from the analysis of the literature and available empirical data as the reason why practitioners around the world have different, if not conflicting, views on the same neutral (arb)-med-arb and perceive it either as essentially a beneficial or flawed process.
CHAPTER 4. THE INFLUENCE OF THE PRACTITIONERS’ LEGAL CULTURE ON THEIR PERCEPTION OF THE SAME NEUTRAL (ARB)-MED-ARB

4.1 Introduction

The literature suggests that the reason for the divide in views of practitioners on whether the same neutral (arb)-med-arb is an appropriate and admissible process lies in the practitioners’ legal culture. Before examining the specific factors that appear to shape practitioners’ perception of the same neutral (arb)-med-arb, some attention needs to be given to the explanation of the meaning of a ‘legal culture’ for the purposes of this thesis.

Interestingly, various authors referring to the legal culture in the context of the same neutral (arb)-med-arb do not explain, intentionally or not, what they mean by a legal culture. The only comment found addressing the meaning of a legal culture in this particular context belongs to Cremades who noted that it ‘is difficult to state what is understood by a legal culture’.

It appears, however, that defining a legal culture is a challenging task, and not only in the context of the combined use of mediation and arbitration. Little agreement seems to exist on how best to grasp the concept in the literature on legal culture, in general. This term is understood as referring to multiple different ideas. Nelken observes:

> For different purposes, and in line with competing approaches to social theory, legal culture will be seen as manifested through institutional behavior, or as a factor shaping and shaped by differences in individual

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342 See, e.g., Mark Goodrich, Arb-med: Ideal Solution or Dangerous Heresy?, 1 Int’l Arb. L. Rev. 12, 14 (2012); Almoguera, supra n. 187, at 112-113; Bernardo M. Cremades, Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration, 14(2) Arb. Int’l. 156, 164 n. 10 (1998); Ehle, supra n. 16, at 79; Schneider, supra n. 41, at 78; Kun, supra n. 3, at 536. Some authors, however, refer to cultural differences in general (rather than differences in legal cultures). See, e.g., Greenwood, supra n. 3, at 207; Mason, supra n. 81, at 545; Abramson, supra n. 60, at 5-6; Nabil N. Antaki, Muslims’ and Arabs’ Practice of ADR, 2(1) NYSBA New York Disp. Res. Law. 113, 113 (2009); but see Cheng, supra n. 3, at 437 (cautioning against making generalizations about culture and referring to a case where a party from the Middle East – the region that is believed to have a cultural preference against conflict – had zero interest in conciliation or avoiding conflict).

343 Cremades, supra n. 342, at 160.


legal consciousness, as a pattern of ideas that lie behind behavior, or as another name for politicolegal discourse itself.346

Friedman draws a distinction between internal and external legal culture.347 While internal legal culture refers to the ideas and practices of legal professionals, external legal culture refers to public knowledge about law and the general population’s attitude towards the legal system. This thesis uses the term ‘legal culture’ in the former sense.

Specifically, a ‘legal culture’ in this thesis means the shared values, attitudes, standards, and beliefs that characterise members of the legal profession practising in a particular jurisdiction or region.348 In particular, the key factors that appear to shape one’s attitude to the same neutral (arb)-med-arb are the practice of the judiciary and the way disputes are resolved in a particular jurisdiction.

This Chapter comprises three sections. Section 4.2 examines how the practice of the judiciary in countries of Continental Europe and Anglo-American law countries influences the perception by legal practitioners of the same neutral (arb)-med-arb. Section 4.3 analyses how the way disputes are resolved in the Western world and East Asia has an effect on the practitioners’ perception of the same neutral (arb)-med-arb. Section 4.4 investigates whether different traditions and cultures are moving closer together and whether one can speak about a harmonisation trend favouring the same neutral (arb)-med-arb.

It is important to acknowledge that this Chapter engages in generalisations that tend to disregard the complexities and vast differences that exist in any country, region, legal system or culture. Nevertheless, generalisations appear necessary when comparing one legal or cultural system to another.

4.2 The Influence of the Practice of the Judiciary on the Perception of the Same Neutral (Arb)-Med-Arb

The literature often links the practitioner’s attitude to the same neutral conducting both mediation and arbitration, to the practice of the judiciary in the country of that

346 Nelken, supra n. 344, at 3.
practitioner. Overall, commentators agree upon the existence of a divide between common law and civil law systems in the question of facilitation of settlement by a judge; while some civil law systems have traditionally regarded promotion of settlement as duty of judges, their common law counterparts have not allowed judges to be actively involved in facilitation of settlement. The typical common law approach is explained by a fear that active involvement in settlement facilitation may suggest that judges have prejudged the case before hearing all the evidence and argument.

In this context, one could contrast the inquisitorial legal traditions of Continental Europe with the adversarial approach of the Anglo-American legal system. While under the inquisitorial legal traditions of Continental Europe, facilitation of settlement is generally regarded as a desirable part of a judge’s and an arbitrator’s role, common law courts under the adversarial system traditionally were entrusted with adjudicating not settling disputes.

At the same time, Cremades points out differences in Continental Europe between areas following the Germanic and Latin traditions. Schneider contrasts the approach of common law countries with that of countries following the Germanic tradition, observing that other countries of the civil law tradition take a place somewhere in between. While German judges systematically attempt to settle a dispute before them, French judges appear to be more reluctant to become involved in the settlement of their

351 Ehle, supra n. 16, at 79-80; Schneider, supra n. 41, at 78; Burr, supra n. 68, at 63; Cremades, supra n. 342, at 164 n. 10; Nottage & Garnett, supra n. 192, at 35-36; Lew, supra n. 78, at 427 (noting that the position of a judge differs in common and civil law countries from a distant, ‘blind umpire’ to what is effectively a case manager); see generally Schneider, supra n. 41, at 78-81 on attitudes to a combination of arbitration and conciliation in different jurisdictions.
352 CEDR Final Report, supra n. 14, at ¶ 2.3.
353 Ehle, supra n. 16, at 80-83; Almoguera, supra n. 187, at 120 (observing that differences separate the Anglo-Saxon and Continental European systems); Kaufmann-Kohler, supra n. 22 (comparing the approach of common law courts with the approach of the courts in Romano-Germanic tradition, in which it is part of a judges’ mission to attempt to settle a dispute brought before them).
354 Ehle, supra n. 16, at 80.
355 Kaufmann-Kohler, supra n. 22.
356 Cremades, supra n. 342, at 159.
357 Schneider, supra n. 41, at 80; see also Jason Fry et al., The Secretariat’s Guide to ICC Arbitration 264 (International Chamber of Commerce 2012) (differentiating the Anglo-Saxon system where the initiative to settle is traditionally taken by the parties’ legal counsel or the parties themselves and certain civil law traditions, notably Germany, Austria and parts of Switzerland, where arbitral tribunals may be very proactive in encouraging the parties to settle the case).
own cases, despite the fact that the French Code of Civil Procedure (French CCP) expressly regards conciliation as one of functions of a judge.\textsuperscript{358}

Empirical research confirms that arbitration practitioners often approach the role of the arbitrator by referring to the rules applicable in their home courts.\textsuperscript{359} In one empirical study, Kaufmann-Kohler and Bonnin reviewed sixty-three consent awards rendered under the ICC Rules of Arbitration between 2002 and 2005.\textsuperscript{360} In thirteen of all examined consent awards an arbitrator actively participated in the settlement process. In all thirteen cases all arbitrators were from jurisdictions where courts facilitate settlement.\textsuperscript{361} These cases involved seven German or Swiss co-arbitrators. Six cases were chaired by a German or Swiss arbitrator. Cases also included two tribunals composed exclusively of Argentinian nationals and one tribunal composed exclusively of Brazilian nationals.\textsuperscript{362}

The findings of another empirical study demonstrated that practitioners with common law and civil law backgrounds, were divided on the question of an arbitrator acting as a mediator.\textsuperscript{363} Bühring-Uhle et al surveyed in-house counsel, advocates and arbitrators/mediators globally on the practice of international business dispute resolution. The participants, however, comprised mostly Americans and Germans. Very few participants were from Asia. That survey revealed that the German participants were familiar with the involvement of the arbitrator as mediator and had very little objections to it, which stood in stark contrast to the common law respondents who had rarely encountered this practice and who by a two-thirds majority regarded it as inappropriate.\textsuperscript{364}

Both above-mentioned studies confirm the narrative in the literature indicating that German practitioners are familiar with the practice of facilitation of settlement by judges and arbitrators. It seems worthwhile to have a closer look at the German approach to facilitating settlement.

\textsuperscript{358} Arts. 21, 1464 C. pr. civ.; Kaufmann-Kohler, supra n. 22; Ehle, supra n. 16, at 82; Schneider, supra n. 41, at 78.

\textsuperscript{359} Kaufmann-Kohler, supra n. 22.


\textsuperscript{361} Ibid., at 4.

\textsuperscript{362} Ibid.

\textsuperscript{363} Bühring-Uhle et al., supra n. 46, at 122.

\textsuperscript{364} Ibid.
4.2.1 The German approach to facilitating settlement

Jones observes that in the German civil tradition, judges have always performed a settlement role.\textsuperscript{365} The requirement to attempt to settle a matter arises from law.\textsuperscript{366} Similarly, German arbitrators appear to traditionally encourage settlement.\textsuperscript{367} Article 32.1 of the German Institution of Arbitration (DIS) Arbitration Rules 1998 states that ‘at every stage of the proceedings, the arbitral tribunal should seek to encourage an amicable settlement of the dispute or of individual issues in dispute’.\textsuperscript{368} Ehle conceptualises the ‘German approach’ as the expectations of parties and their lawyers that an arbitrator will at some stage in the procedure – ex officio – express a preliminary but clear view on the merits of the case and explicitly encourage an amicable settlement.\textsuperscript{369}

The German approach to facilitating settlement, however, does not seem to be mediation, but a sui generis method of proactive ‘managerial judging’.\textsuperscript{370} Four differences and limitations set German facilitation of settlement apart from what is generally understood as a mediation process.

(1) The obligation to promote and facilitate a settlement in Germany does not appear to be the tribunal’s main remit but merely its additional task.\textsuperscript{371} Ehle and Peter emphasise that the main purpose of the tribunal is to decide, not to settle the case.\textsuperscript{372} Rendering an enforceable award and ensuring impartiality of an arbitrator appear as key priorities, which leads to a rather low-intensity form of mediation.\textsuperscript{373} This contrasts with the situation in the same neutral arb-med-arb, where a mediation part is as important as an arbitration part because the latter will only take place if the former does not lead to a settlement of the entire dispute.\textsuperscript{374}

\textsuperscript{366} Art. 278 Abs. 1-2 ZPO.
\textsuperscript{368} Ehle, supra n. 16, at 80.
\textsuperscript{369} Ibid, at 82; Peter, supra n. 61, at 110.
\textsuperscript{370} Ibid; Peter, supra n. 68, at 174; Peter, supra n. 61, at 113.
\textsuperscript{371} Ehle, supra n. 16, at 81-82.
\textsuperscript{372} Ibid; Peter, supra n. 88, at 174; Peter, supra n. 61, at 113.
\textsuperscript{373} Peter, supra n. 61, at 113; Peter, supra n. 88, at 174.
\textsuperscript{374} Peter, supra n. 61, at 113; Peter, supra n. 88, at 174.
(2) German judges tend to be very legalistic and interventionist in their approach. In Peter's view, they do not try to depart from the level of the legal issues in order to reveal the underlying interests.

(3) German judges appear to intervene minimally, if at all, in the parties’ negotiation process. The purpose of any intervention is, arguably, to help parties evaluate their chances to prevail before the arbitrator, rather than to facilitate negotiation.

(4) Caucuses do not appear to be common for German judges and arbitrators. Thereby, because the process is neither called nor understood as the same neutral arb-med-arb, the agreement of the parties to a formal same neutral arb-med-arb process might result in an increased emphasis on mediation.

According to Ehle, Austria and Switzerland follow the German approach. Interestingly, similarities in approaches are found not only among countries of Germanic origin but they can also be traced in countries that geographically and culturally are far from Germany. The practice of arbitration in some East Asian countries resembles the German approach. The reason for that might be that mediation is natural and closer to the mentality of East Asian jurists than litigation, which this Chapter turns now to examine.

4.3 The Influence of the Way Disputes Are Resolved on the Perception of the Same Neutral (Arb)-Med-Arb

Cremades observes that the Western world is traditionally characterised as a litigious culture (although with widely differing approaches to dispute resolution), whereas East Asian and Arab and Islamic societies are known for their emphasis on conciliation.

A closer look at litigation in Western countries reveals differences in the perception of a judge’s role. As we have seen in section 4.2, Anglo-American law countries have

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376 Peter, supra n. 61, at 113-114; Peter, supra n. 88, at 174.
377 Peter, supra n. 61, at 114; Peter, supra n. 88, at 174.
378 Peter, supra n. 61, at 115; Peter, supra n. 88, at 175.
379 Peter, supra n. 61, at 114; Bühning-Uhle, supra n. 118, at 191, 195; Newmark, supra n. 140, at 88; Peter, supra n. 88, at 173-174.
380 Peter, supra n. 61, at 110; Peter, supra n. 88, at 172-173.
381 Ehle, supra n. 16, at 81; see also David J. A. Cairns, Mediating International Commercial Disputes: Differences in U.S. and European Approaches, 60(3) Disp. Res. J. 62, 67 (2005) (observing that in European countries of the Germanic tradition settlement initiatives are traditionally judge-led).
382 Schneider, supra n. 41, at 58.
383 Ehle, supra n. 16, at 82.
384 Cremades, supra n. 342, at 158-159.
traditionally entrusted judges with adjudicating not settling disputes; they disapproved of the involvement of judges in facilitating settlement. Countries in Continental Europe differ in their approach to the question of facilitation of settlement by judges. Germany and countries following its tradition regard facilitation of settlement as a part of a judge’s role and favour this practice. Other countries in Continental Europe seem to be less open to it. Nevertheless, it appears that, overall, Continental European countries have less objections to facilitation of settlement by judges than their Anglo-American counterparts.

Jones believes that the success of mediation in some Anglo-American law countries and a lower level of success in Continental European countries is due to the fact that the legal culture in Europe has not created the demand for ADR processes to the same extent that the litigiousness in Anglo-American law countries has. At the same time, Cairns links the slow development of mediation in Continental Europe to the reasonable costs of litigation there. Litigation in Anglo-American law countries in general appears to be much more expensive and disruptive as compared to litigation in Continental Europe. But these disadvantages of litigation in Anglo-American law countries seem to have inspired the acceptance of and enthusiasm for mediation.

In East Asia, mediation has an exceptionally long history and in some senses it is the cornerstone of the region’s legal tradition. Similarly to East Asia, in Arab countries mediation is also preferred to court proceedings and arbitration. Although there is no uniform legal system for all Arab countries, most of the Arab countries have adopted the codified civil law system, based on the Egyptian Civil Code, rather than the English common law system.

Various authors observe that East Asian cultures in general do not share Western values of privacy, favouring instead to handle conflict diplomatically and within the

385 Jones, supra n. 365, at 406.
386 Cairns, supra n. 381, at 68.
387 Ibid. Comments of the Belgian practitioner interviewed for the empirical study carried out for the purposes of this thesis (discussed in Part III) were along the same lines. He noted: ‘...of course, in the United States there are lots of mediations ... anything else than going to court is a good solution, because it is so expensive. It is not a problem in Belgium, because the court proceedings are inexpensive.’ Practitioner from Belgium, Interview 6.
388 Jones, supra n. 365, at 407.
389 Almoguera, supra n. 187, at 109; Cremades, supra n. 342, at 159 n. 3.
Donahey points out a profound societal and philosophical preference for agreed solutions in East Asian countries and a predisposition towards a natural hierarchy which governs conduct in interpersonal relations, rather than a cultural bias toward ‘equality’ in relationships. In accordance with these preferences and predisposition, East Asian cultures frequently seek a ‘harmonious’ solution, one which tends to preserve the relationship, rather than one which, while arguably factually and legally correct, may severely damage the relationship of the parties involved.

However, this does not mean that conflict is unknown. Kun notes that in East Asian cultures, especially those influenced by Confucianism, an outright conflict is perceived as a failure or an embarrassment. Because of the deeply rooted tradition of conflict avoidance, East Asian arbitrators tend to play a very active role to assist parties in settling their dispute.

The active role of East Asian arbitrators in facilitating settlement has been confirmed by the findings of a survey, case statistics, case studies, and interviews that Ali conducted for her PhD project. The findings demonstrate that participants in East Asian international arbitration proceedings exhibit a greater openness to exploring settlement options and a greater degree of support for arbitrator-initiated settlement discussions than in Western countries.

In interviews that Ali conducted, East Asian practitioners noted that a good arbitrator is one who assists parties to reconcile their relationship and acts as a guardian of the best interests of the parties, which makes it advantageous for the arbitrator to act as mediator. East Asian perceptions about the integration of mediation into the arbitration process contrasted with those commonly held in the West. In particular, several Western arbitrators noted a widely held concern that the arbitrator would become biased on prior ex parte communications. This concern has been examined in section 3.3.2.1.

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391 De Vera, *supra* n. 64, at 183; Deekshitha & Saha, *supra* n. 66, at 84-85.
392 Donahey, *supra* n. 349, at 74.
393 *Ibid*.
394 Fan Kun, *International Dispute Resolution Trends in Asia*, 10(4) Transnat’l Disp. Mgmt 1, 11 (2013) (observing that this is particularly relevant to China, Singapore, and Hong Kong).
398 *Ibid*, at 201.
400 *Ibid*. 
From the analysis of the literature and available empirical data, China and Japan emerge as East Asia’s foremost proponents of the practice of the combined role of a mediator and an arbitrator, which will be discussed now in more detail.

### 4.3.1 Chinese practice of the combined role of a mediator and an arbitrator

The practice of combining mediation and arbitration seems to be one of the cornerstones of Chinese arbitration. Following the practice of the Chinese judiciary, Chinese arbitrators systematically offer assistance to parties by facilitating settlement. Article 51 of the Chinese Arbitration Law encourages promotion of settlement by arbitrators. It states:

> The arbitration tribunal may carry out conciliation prior to giving an award. The arbitration tribunal shall conduct conciliation if both parties voluntarily seek conciliation. If conciliation is unsuccessful, an arbitration award shall be made promptly.

The Chinese Arbitration Law does not specify what procedures, methods and techniques arbitrators may employ in mediation. Neither does it impose any limitation on the timing of mediation. Arbitrators might attempt to mediate the differences at any stage of the proceedings and if their efforts fail, continue with arbitration, ready to mediate again once another opportunity arises. The necessary condition for arbitrators’ mediating activity is party consent. Very few other jurisdictions, if any, appear to offer a level of fluidity in the combined use of mediation and arbitration similar to the Chinese.

Rules of arbitration institutions that administer cases in China seem to support the flexible approach promoted by the Chinese Arbitration Law. Since its establishment, the China International Economic and Trade Arbitration Commission (CIETAC) has promoted the integration of mediation into arbitration. Apparently, even before enactment of the Arbitration Law and with the first Arbitration Rules having no

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402 Ehle, *supra* n. 16, at 82; Kun, *supra* n. 3, at 540.
404 Donahhey, *supra* n. 349, at 76.
406 Harpole, *supra* n. 401, at 624.
provision regarding mediation, CIETAC attempted to mediate its arbitration cases. According to CIETAC's Secretary-General Yu Jianlong, 20 to 30 per cent of cases submitted for arbitration are resolved through mediation conducted within arbitration.

A series of interviews carried out by Kaufmann-Kohler with Chinese arbitrators acting for CIETAC, the Beijing Arbitration Commission (BAC) and arbitration commissions in Shanghai and Wuhan confirmed that Chinese arbitrators systematically ask the parties at the beginning of the hearing whether they wish the tribunal to assist them in reaching a settlement. Interview data showed that in about 50% of the cases, the response is affirmative. Most often, arbitrators then engage in caucuses with parties and in shuttle diplomacy. However, they tend to refrain from assessing the merits of the case because they consider that it would be improper and may jeopardise their impartiality and independence.

4.3.2 Japanese practice of the combined role of a mediator and an arbitrator
Facilitation of settlement by both judges and arbitrators seems to be a long established tradition of Japanese legal culture and one of its important features. The legal basis for facilitation of settlement by arbitrators is established in Article 38(4) of the Japanese Arbitration Law, whereby an arbitral tribunal or one or more arbitrators designated by it may attempt to settle the civil dispute subject to the arbitral proceedings, if consented to by the parties.

Many cases are settled thanks to the active involvement of arbitrators. As reported by Ohara at the Chartered Institute of Arbitrators (CIArb) Centennial Conference 2015, parties settled in fifty-two out of 171 cases administered by the Japan Commercial Arbitration Association (JCAA) and terminated between 2005 and 2014 (30.4%). In thirty of these fifty-two cases, arbitrators acted as mediators (57.7%). While it is not

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408 Kaufmann-Kohler & Kun, supra n. 164, at 485.
410 Kaufmann-Kohler, supra n. 22.
411 Shuttle diplomacy usually means that the mediator moves from one party to another.
412 Kaufmann-Kohler, supra n. 22.
415 Yoshimi Ohara, Mediation and Adjudication: Where Asia Stands Now (Japan), CIArb Centennial Conference (Hong Kong, 21 Mar. 2015) (recorded and transcribed by D. Nigmatullina).
clear from the record how exactly arbitrators acted as mediators, Ohara assumed that arbitrators would disclose their impression on the outcome of the case on an ex parte basis, which would prompt parties to settle.

Another study on arbitrators acting as mediators in JCAA arbitration showed that arbitrators attempted to mediate in forty-eight out of 121 arbitration cases administered by the JCAA over 1999-2008 (39.7%). In twenty-five of these forty-eight cases, mediation efforts resulted in a settlement agreement (52%). The study also found a clear tendency for the same neutral arb-med-arb to be widely employed by arbitrators with the civil law background, the majority of whom were Japanese. Arbitrators with the common law background, on the contrary, appeared to be unlikely to attempt to mediate their cases.

The approach of Chinese and Japanese judges and arbitrators, however, differs from that of their German colleagues in two primary respects.

4.3.3 Differences between the German approach and that of China and Japan

First, as noted in section 4.2, in Germany, the main purpose of a judge and arbitrator is to decide on a case, not to settle it. Facilitation of settlement is merely an additional task. In China, on the contrary, it appears that the main purpose of a judge and arbitrator is to dissolve the dispute, persuade parties to cease it, rather than render a binding decision. In Japan, similarly to China, in accordance with the culture of conflict avoidance that is deeply embedded in the people’s mind, harmony in interpersonal relationship appears to be paramount and conflicts are dealt with indirectly. Interestingly, Tateishi disagrees with the views that Japanese people prefer amicable settlement by nature and notes that Japanese people are more practical than sentimental in resolving their disputes. It appears that particularly where the prospects of recovering damages are limited, Japanese parties may see benefits from settling their case at minimal expense.

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417 Ibid, at 12.
418 De Vera, supra n. 64, at 164.
419 Kun, supra n. 394, at 12; Donahey, supra n. 349, at 75.
420 Kun, supra n. 394, at 12.
Second, while caucuses are uncommon for German judges and arbitrators,\(^\text{422}\) they appear to be widely used by their colleagues in China and Japan.\(^\text{423}\)

The overview provided in this section and section 4.2 explains why Germany, Austria, Switzerland, Japan, and mainland China are frequently referred to as examples of civil law countries where judges and arbitrators are eager to mediate cases that come before them.\(^\text{424}\)

### 4.4 The Emerging Harmonisation Trend

International arbitration is a field where arbitrators and counsel of different legal cultures meet and work together to resolve disputes. This confluence of legal cultures appears to have led to harmonisation of the arbitration procedure.\(^\text{425}\) The differences between the arbitral procedures in the common law and the civil law traditions seem to be fading in today’s international arbitration practice. Parties, their counsel, and tribunals often agree to apply a mixture of the evidence procedures of the common law and civil law traditions.\(^\text{426}\)

Kaufmann-Kohler attributes harmonisation of law and practice of international arbitration to the effect of the New York Convention, UNCITRAL Arbitration Rules and the Model Law on International Commercial Arbitration (UNCITRAL ML on Arbitration), a series of national laws and institutional rules, as well as soft law texts such as the IBA Rules on the Taking of Evidence.\(^\text{427}\) It is notable that both common law and civil law countries have adopted the UNCITRAL ML on Arbitration, despite the

\(^{422}\) Peter, supra n. 61, at 111; Bühring-Uhle, supra n. 118, at 191, 195; Newmark, supra n. 140, at 88; Peter, supra n. 88, at 174; Marriott, supra n. 7.

\(^{423}\) Kaufmann-Kohler & Kun, supra n. 164, at 488; Nottage, supra n. 112 (referring to a conversation with Professor Nakamura regarding the use of caucuses in Japan); Albert Monichino, Inquiry into Commercial Arbitration Bill 2011(WA) - Clause 27D Mediation Clause, 3 (unpublished submission to Legislative Council of Western Australia, 17 Oct. 2011).

\(^{424}\) See, e.g., Goodrich, supra n. 342, at 15; Karl-Heinz Böckstiegel, Past, Present, and Future Perspectives of Arbitration, 25(3) Arb. Int’l. 293, 299 (2009); Nottage & Garnett, supra n. 192, at 35-36; Kaufmann-Kohler, supra n. 22; Ehle, supra n. 16, at 80-83; Schneider, supra n. 41, at 80; J. Martin Hunter, Commentary on Integrated Dispute Resolution Clauses, in New Horizons in International Commercial Arbitration and Beyond, 12 ICCA Congress Series 470, 472 (Albert Jan van den Berg ed., Kluwer Law International 2005); Oghigian, supra n. 87, at 76; Marriott, supra n. 257, at 537; CEDR Final Report, supra n. 14, at ¶ 2.2.

\(^{425}\) Cremades, supra n. 342, at 159-160.


\(^{427}\) Kaufmann-Kohler, supra n. 22; see also Menon, supra n. 3, at ¶ 12 (explaining unprecedented harmonisation of national laws governing international arbitration by the widespread adoption of the Model Law).
fact that it contains several principles, which correspond more with the civil law, rather than common law concept of arbitration.\textsuperscript{428}

Despite the powerful wave of harmonisation, the role of the arbitrator as a mediator in international arbitration appears to be resistant to this convergence.\textsuperscript{429} Kaufmann-Kohler observes that in domestic arbitration, particularly in areas where a weaker party needs protection, national legislation differs significantly.\textsuperscript{430} However, divergences are not desirable in international arbitration, where the factual matrix giving rise to a dispute is transnational and the participants come from different national and legal cultures. With time a transnational practice on the issue of an arbitrator acting as a mediator may be settled, as has already been done for many other issues, including separability of the arbitration agreement, Kompetenz-Kompetenz,\textsuperscript{431} limited remedies against the award, and party autonomy.\textsuperscript{432}

4.4.1 Increasing influence of East Asian cultures

In view of the rapidly growing economy of the East Asian region\textsuperscript{433} and its increasing commercial influence worldwide,\textsuperscript{434} dispute resolution approaches adopted in East Asia, in general, and in China, in particular require attention.\textsuperscript{435} These include the use of the same neutral arb-med-arb.

About twenty years ago, Tang pointed out an expanding culture favouring the same neutral arb-med-arb in international commercial dispute resolution spreading from the East to the West and elsewhere.\textsuperscript{436} Other authors allude to changes in the traditional hostile common law attitude to mediating efforts by a judge and arbitrator.\textsuperscript{437} Several common law jurisdictions, such as Canada,\textsuperscript{438} Hong Kong,\textsuperscript{439} Singapore,\textsuperscript{440} and

\begin{itemize}
  \item Cremades, supra n. 342, at n. 29.
  \item Kaufmann-Kohler, supra n. 22.
  \item \textit{Ibid.}
  \item That is, the competence of an arbitral tribunal to decide upon its own competence (sometimes referred to as ‘competence-competence’). See, e.g., Nigel Blackaby et al., \textit{Redfern and Hunter on International Arbitration} (6th ed., Oxford University Press 2015).
  \item Kaufmann-Kohler, supra n. 22.
  \item Kun, supra n. 394, at 16.
  \item Mason, supra n. 81, at 551.
  \item See, e.g., \textit{ibid}.; Hindle, supra n. 77, at ¶ 34; Kun, supra n. 394, at 16.
  \item Cremades, supra n. 342, at 164 n. 10; Schneider, supra n. 41, at 80; Kaufmann-Kohler, supra n. 22; Nottage & Garnett, supra n. 192, at 36.
  \item See, e.g., \textit{British Columbia International Commercial Arbitration Act}, R.S.B.C. 1996, c. 233, s. 30(1) [hereinafter, \textit{British Columbia ICAA}]. For the sake of accuracy, it should be noted that all provinces and territories in Canada, except for Quebec, are governed essentially by common law.
  \item Arbitration Ordinance (Cap. 609, 1 Jun. 2011), L.N. 38 of 2011, ss. 32-33 [hereinafter, Hong Kong AO].
\end{itemize}
Australia\textsuperscript{441} have adopted legislation facilitating mediation by an arbitrator. It appears, however, that these legislative provisions are rarely used in practice.\textsuperscript{442}

These changes in the traditional Western approach are, arguably, happening under the influence of East Asian cultures.\textsuperscript{443} The eastern outposts of Western culture have the closest relationships with the East Asian cultures and the earliest opportunities to assimilate useful concepts. This might be the reason why the acceptance and facilitation of the concept of the same neutral arb-med-arb is occurring mostly in Western jurisdictions on the Pacific Rim.\textsuperscript{444} Kaufmann-Kohler is convinced that the provisions in the Hong Kong and Singapore arbitration statutes are the result of the influence of the Chinese tradition.\textsuperscript{445} The experience of Asian trading partners and citizens of Asian background could have influenced the drafting of the provisions of the British Columbia International Commercial Arbitration Act.\textsuperscript{446} Vancouver, the capital of British Columbia, is a busy seaport city with a large Asian population.

\subsection*{4.4.2 Inter-influence of Western and East Asian cultures}

Differences between the Western and East Asian cultures might be diminishing due to adaptations in both directions.\textsuperscript{447} With the growth of international arbitration in China, Western arbitrators sitting on the tribunals with their Chinese colleagues are learning about the advantages of the combined approach. Developments in Western jurisdictions have triggered reforms in China. For instance, the CIETAC and BAC Arbitration Rules contain a provision that allows parties to appoint as a mediator a neutral other than their current arbitrator, if they fear that the award may be influenced by their current

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{440} International Arbitration Act (Ch. 143A, 31 Dec. 2002), ss. 16-17 [hereinafter, Singapore IAA].
\item \textsuperscript{441} In Australia, a possibility for an arbitrator to act as a mediator is recognised under Commercial Arbitration Acts (CAAs) that govern domestic arbitration in Australian States and Territories. See, e.g., Commercial Arbitration Act 2012 (WA), s. 27D [hereinafter, CAA 2012 (WA)].
\item \textsuperscript{442} See discussion in section 5.2.3.2.5 infra.
\item \textsuperscript{443} Donahey, supra n. 349, at 77.
\item \textsuperscript{444} Ibid, at 74; Antaki, supra n. 342, at 113 (observing that while in China and other Asian countries arbitration and mediation are fully integrated, California and British Colombia adopted similar legislation allowing arbitrators to mediate disputes).
\item \textsuperscript{445} Kaufmann-Kohler, supra n. 22.
\item \textsuperscript{446} Donahey, supra n. 349, at 77. British Columbia ICAA, supra n. 438, s. 30(1) and Cal. Civ. Proc. Code Ann. \textsection 1297.301 (West 2013) are identical and provide as follows: It is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties, the arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement.
\item \textsuperscript{447} Kaufmann-Kohler & Kun, supra n. 164, at 492.
\end{itemize}
\end{footnotesize}
arbitrator’s involvement in mediation. Also, similarly to the Western institutions, such as ICC and AAA, BAC adopted a separate set of mediation rules.

A study of the Asian Development Bank demonstrated that, with the expansion of Asian markets beyond national frontiers, the informal dispute settlement mechanisms that are used in East Asia become less reliable and formal institutions and procedures with powers of decision and enforcement more important.

4.4.3 Inter-influence of Anglo-American and Continental European legal traditions

Adaptations seem to be happening between the Anglo-American and Continental European legal systems. In Reiner’s view, practitioners from the Anglo-American legal tradition may now be more prepared to accept mediation by the arbitrator, whereas those from the Continental European legal tradition may have become more aware of risks that combining of the roles of the arbitrator and mediator may pose. Consequently, the latter might be more prepared to accept that in some cases mediation outside arbitration has some benefits.

For Newmark, however, there is a clear shift away from a traditional common law approach towards a civil law approach in facilitating settlement as part of arbitral proceedings. Nottage’s remarks are more cautious. He notes that while active facilitation of settlement by arbitrators in international arbitration mostly happens when arbitrators come from certain jurisdictions following the Continental European tradition, particularly Switzerland, Germany and Latin America, views have evolved in the common law world that acknowledge that arbitrating is not fundamentally incompatible with mediating.

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449 Kaufmann-Kohler & Kun, supra n. 164, at 492.

450 Böckstiegel, supra n. 424, at 300-301.


452 Newmark, supra n. 140, at 90.

453 Nottage, supra n. 191, at ¶ 3 (referring to the findings of Kaufmann-Kohler’s empirical research); see also Kaufmann-Kohler, supra n. 22 (observing that current practice in the US shows that some judges get involved in settling their own cases and even do not hesitate to caucus with parties); but see Thomson, supra n. 89, at 1 (stating that while the culture and tradition in many countries accepts the dual role of the neutral, the practice has not been widely adopted in North America).
Kaufmann-Kohler and Ehle identify a strong trend towards settlement and away from adjudication.454 This seems to be a response to users’ concerns that arbitration is becoming an increasingly inefficient and expensive process. More specifically, for Ehle, the trend clearly favours arbitrators as more actively involved settlement facilitators,455 whereas for Kaufmann-Kohler the picture is ‘more nuanced’ as regards the involvement of arbitrators in settling their own cases.456

The above analysis indicates that dispute resolution practitioners in different parts of the world might be changing their views on the same neutral (arb)-med-arb due to the inter-influence of Western and East Asian cultures, on the one hand, and Anglo-American and Continental European legal traditions, on the other hand. Although there is a variation in the literature as to what the emerging harmonisation trend is, most authors appear to agree that common law practitioners are beginning to acknowledge that the roles of an arbitrator and a mediator are not fundamentally incompatible.

4.5 Conclusion

The divide in views of practitioners on whether the same neutral (arb)-med-arb is essentially a beneficial or flawed process can be partly explained by reference to practitioners’ legal culture. This thesis has identified two key factors that appear to shape the practitioner’s perception of the same neutral (arb)-med-arb. These are the practice of the judiciary and the way disputes are resolved in a particular jurisdiction.

Overall, while some civil law systems have traditionally regarded promotion of settlement as duty of judges and arbitrators, the common law system has prohibited judges and arbitrators from being actively involved in settlement facilitation. In this context, one could contrast the inquisitorial legal traditions of Continental Europe with the adversarial approach of the Anglo-American legal system. Germany, Austria and Switzerland stand out in Continental Europe as countries where judges systematically attempt to settle a dispute before them.

In some East Asian countries, where mediation is natural and closer to the mentality of its practitioners than litigation, the practice of arbitration resembles the German approach. The discussion of the East Asian approach to resolution of disputes is commonly held in the context of contrasting the Western world that is often

454 Kaufmann-Kohler, supra n. 22; Ehle, supra n. 16, at 88.
455 Ehle, supra n. 16, at 94.
456 Kaufmann-Kohler, supra n. 22.
characterised as a litigious culture with East Asian and Arab and Islamic societies that are known for their emphasis on conciliation.

In Western countries, however, differences exist in the perception of the role of a judge. Anglo-American law countries have traditionally entrusted judges with adjudicating not settling disputes. In Continental Europe, Germany and countries following its tradition regard facilitation of settlement as a part of a judge’s role, which is not the case for other Continental European countries. Nevertheless, it appears that, overall, Continental European countries have less objections to facilitation of settlement by judges than their Anglo-American counterparts.

In East Asia, arbitrators tend to play an active role in settling parties’ dispute, due to a profound societal and philosophical preference for agreed solutions. China and Japan seem to be the foremost proponents of the practice of the combined role of an arbitrator and a mediator.

It appears, however, that differences between the Western and East Asian cultures, on the one hand and between Continental European and Anglo-American legal traditions, on the other hand are diminishing. There is a shared view in the literature that common law practitioners are beginning to recognise that the roles of an arbitrator and a mediator are not fundamentally incompatible. This might be an indication of an emerging harmonisation trend favouring the same neutral (arb)-med-arb.

This Chapter together with two other chapters of Part II (Chapters 2 and 3) constituted the theoretical foundation for the design of the empirical study conducted for the purposes of this thesis. Its results are presented and discussed in Part III (Chapter 5).
PART III. THE EMPIRICAL STUDY

Part III comprises Chapter 5. It provides an answer to the second research question, partially answers the third research question and complements the answer to the first research question. It does so through presenting and discussing the key results of the two-phase empirical study carried out for the purposes of this thesis. The first phase employed a questionnaire to investigate the current use of combinations in international commercial dispute resolution. The second phase was undertaken through semi-structured interviews. It aimed to elicit views concerning the most significant questionnaire results.
CHAPTER 5. RESULTS OF AN EMPIRICAL STUDY OF THE USE OF MEDIATION AND ARBITRATION IN COMBINATION

5.1 Introduction

This Chapter comprises two sections. Section 5.2 is dedicated to the first phase of the empirical study. It begins by describing the methodology and the background of the questionnaire participants. Then it presents and discusses the key questionnaire results, after identifying several limitations. In particular, it examines the results related to the extent to which mediation is currently used in combination with arbitration at an international level, common triggers of the combined use of processes, the way in which the processes are combined most frequently, and the most common forms of recording the outcome of the combined use of mediation and arbitration. Section 5.2 concludes by summarising the questionnaire results significant for the second phase of the empirical study undertaken through semi-structured interviews.

Section 5.3 reports and discusses the interview results after describing the methodology and identifying the purpose of the interviews. In particular, it reports the results revealing perceptions as to barriers to the use of the same neutral (arb)-med-arb, the significance of the legal culture for the way combinations are conducted, the emergence of a harmonisation trend in the use of combinations, and the influence that the creation of an international enforcement mechanism for mediated settlement agreements might have on parties’ willingness to use combinations. As specified in section 5.3.2, the remaining part of the interview results is presented in Chapters 8 and 9.

5.2 Phase One: The Questionnaire

5.2.1 Methodology

5.2.1.1 Process

The first phase of the study was conducted between February and June 2014. It involved the distribution of a questionnaire in paper and electronic form to a pool of participants as follows. Two hundred eighty paper copies of the questionnaire were distributed at two international conferences: the 2014 ICC Mediation Week and the APRAG 2014 Conference. These conferences brought together international practitioners and legal academics from different legal cultures. The 2014 ICC Mediation Week assembled key experts in mediation and arbitration predominantly from Europe. The APRAG 2014 Conference took place in Melbourne in March 2014.

458 The 10th Anniversary Asia Pacific Regional Arbitration Group (APRAG) Conference took place in Melbourne in March 2014.
Conference mostly gathered international arbitration and mediation practitioners from the Asia Pacific region. A total of thirty-three responses were collected from both conferences, which represents a response rate of 12%. An invitation to complete the questionnaire online was published on LinkedIn and circulated by the ICC and the Arbitration Institute of the Stockholm Chamber of Commerce (SCC). Forty-eight online responses were received. The total number of completed questionnaires amounted to eighty-one.

5.2.1.2 Purpose and design
The overarching goal of the questionnaire was to gather data from international dispute resolution practitioners about the current use of mediation in combination with arbitration in international commercial dispute resolution.

The questionnaire contained twenty-two questions organised into three parts.

(1) Questions 1-4 gathered background information about the participants.

(2) Questions 5-19 enquired into the participants’ professional experience (if any) in the combined use of mediation and arbitration in international commercial dispute resolution over the previous 5 years. Through questions asked in this part, the study sought information on the following aspects of the combined use of processes:

- To what extent is a combination of mediation and arbitration used?
- Are there any regional variations in its use? Are there any variations in its use depending on the participants’ legal background?
- Are many practitioners with experience in the combined use of mediation and arbitration qualified to practise as lawyers?
- How is the combined use of processes triggered? Are legislative provisions, where they are in place, relied upon? Do arbitration institutions become involved?
- What is the most popular way to combine mediation and arbitration? Are processes used in any particular sequence, or concurrently? Do neutrals have a single or dual role?
- Are caucuses used in the mediation stage of the combined use of processes?

459 In particular, an invitation was posted in several interest groups, including International Arbitration, ADR Resources, and Latin American International Arbitration.

460 In particular, the ICC distributed the announcement and the link to the online questionnaire to its network, including through Facebook and Twitter pages. The SCC published the invitation to complete the questionnaire on its news webpage both in Russian and in English.

461 The background of the participants is described in section 5.2.2 infra.

462 A copy of the questionnaire is provided in Appendix 2.
Is enforceability of the dispute resolution outcome a concern for parties? Do parties use the possibility of incorporating their settlement agreement into a consent award?

Questions 20-22 aimed at eliciting participants’ views on the main benefits of the combined use of processes and the use of this dispute resolution approach in the future, irrespective of the participants’ experience in this field.

5.2.1.3 Key terms

Given the fact that ‘mediation’ and ‘the combined use of mediation and arbitration’ might mean different things to different academics and practitioners and to minimise the possibility of confusion, the questionnaire defined these terms and stated that:

‘Mediation’ is used interchangeably with conciliation. Evaluative and facilitative styles of mediation are distinguished. A mediator adopting a facilitative style will not suggest specific options for settlement, express a view as to the merits of the dispute, or be directive on the outcome.

‘The combined use of mediation and arbitration’ refers to the actual use of the discrete processes of mediation and arbitration in combination. It includes any combination of processes in whatever order and whether conducted by the same or different neutrals.464

5.2.2 Participants

The pool of eighty-one participants comprised predominantly international commercial dispute resolution practitioners from twenty-eight countries of the world.

In segmenting the pool of the participants their geographic distribution and legal background were taken into account. The latter factor is important because, as explained in Chapter 4, practitioners’ perception of the same neutral (arb)-med-arb is often explained by reference to their legal culture. The participants were segmented into four main groups (see Figure 1). The largest two groups of the participants practised in Continental Europe (Continental Europe) and in common law countries in the Asia

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464 The same definition is used throughout this thesis, see section 2.1 supra.

465 In particular, the participants practised in Austria (2.5%), Belgium (4.9%), Czech Republic (1.2%), France (3.7%), Germany (3.7%), Greece (2.5%), Italy (4.9%), the Netherlands (1.2%), Russia (3.7%), Spain (1.2%), Sweden (1.2%), Switzerland (1.2%) and Ukraine (1.2%).
Pacific region (Common Law Asia Pacific).

Two other groups comprised participants practising in common law and civil law countries that did not fall into the largest two groups.

**Figure 1. Legal system/Region of practice**

![Chart showing distribution of legal systems and regions of practice](chart.png)

The participants consisted almost entirely of lawyers (88.9%): three quarters indicated that they were qualified to practise as a lawyer (75.3%); about 14% were qualified but not in practice at the time of the survey (13.6%). Only about 11% of the participants had never been qualified to practise as a lawyer (11.1%).

When asked about their most frequent professional role in international commercial dispute resolution over the previous 5 years (see Figure 2), most often the participants referred to the role of a counsel (38.3%), about 15% of the participants chose the option of an arbitrator (14.8%), and about 12% of a mediator (12.3%).

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466 In particular, the participants practised in Australia (14.8%), Hong Kong (9.9%), India (2.5%), New Zealand (1.2%) and Singapore (4.9%).

467 ‘Other Civil Law’ group included participants practising in Argentina (2.5%), Brazil (3.7%), China (1.2%), Ethiopia (1.2%), Mexico (1.2%), Taiwan (1.2%), and Turkey (2.5%). ‘Other Common Law’ group included participants from the United Kingdom (7.4%) and the United States (6.2%). The smallest group ‘Other’ included those who either indicated more than one primary country of practice (e.g. one participant referred to three countries: Switzerland, the United Kingdom, and the United States) (3.7%), or referred to a country with a hybrid legal system (Philippines) (1.2%), or indicated something other than a country (e.g. Global Litigation Counsel) (1.2%).

468 The remaining participants (34.6%) included those who referred to a professional role other than as counsel, mediator or arbitrator, e.g. an academic, expert witness, institutional case manager, arbitral tribunal secretary or arbitrator’s or mediator’s assistant (23.5%); or referred to more than one most frequent professional role (9.9%); or indicated that they had not had any professional role in international commercial dispute resolution over the previous 5 years (1.2%).
Almost all participants had been involved in international commercial disputes over the previous 5 years, though to varying degrees (see Figure 3). One-third of the participants had participated in more than 16 international commercial disputes (33.3%). Some participants in this group specified the approximate number of disputes they had been involved in over the previous 5 years as varying from about 20 to 800. About 30% of the participants were involved in 1-5 international commercial disputes in the 5-year period (29.6%).

As explained in section 5.2.3.1, the background of the questionnaire participants is an important factor to consider when interpreting the questionnaire results.

5.2.3 Limitations, results and discussion

This section presents the key questionnaire results and discusses them in the context of the literature, after identifying several limitations to the the first phase of the empirical study.
5.2.3.1  **Limitations**

There are several limitations to the first phase of the empirical study. First, from a statistical point of view, the pool of 81 participants is a relatively small sample.\(^{469}\) Second, the response rate to the questionnaire in paper form was relatively low, 12%. The response rate to the questionnaire in electronic form is impossible to calculate because of the way the electronic questionnaire data was collected.\(^{470}\) Third, those who had some experience in the combined use of mediation and arbitration may have been more inclined to complete the questionnaire than those who did not have any experience in the combined use of processes. Fourth, the participants represented certain regions and legal cultures more than others. The majority of the participants reported practising either in Continental Europe or in Common Law Asia Pacific.\(^{471}\) Also, the participants may have had a pre-existing interest in international commercial arbitration and mediation.\(^{472}\) They may have been more supportive of their use, separately or in combination, than lawyers, in general, and in-house lawyers, in particular.\(^{473}\) As a result, the questionnaire participants cannot be regarded as representative of dispute resolution practitioners worldwide.

Finally, although the questionnaire defined the term ‘the combined use of mediation and arbitration’, it did so broadly.\(^{474}\) Consequently, in completing the questionnaire participants could have narrowed down the meaning of the term and used it to refer to a particular way of combining mediation and arbitration that they had experience of or were familiar with. Experiences of the participants varied. Some participants could have used the term as meaning a combination of mediation and arbitration involving only the same neutral or used only sequentially. At the same time, other participants could have

\(^{469}\) However, researchers who conducted other empirical studies on international arbitration that involved even fewer participants regarded their sample size as appropriate. *See, e.g.*, Bühring-Uhle et al., *supra* n. 46, at 106 (stating that 53 respondents to a survey on international arbitration is not a small sample).

\(^{470}\) An invitation to complete the questionnaire online was published on LinkedIn and circulated by the ICC and SCC. It is not possible to identify the number of international dispute resolution practitioners and academics who saw the invitation to participate in the study and, consequently, it is impossible to calculate the response rate to the questionnaire in electronic form.

\(^{471}\) For example, practitioners from China and Japan, East Asian civil law jurisdictions that are believed to be the foremost proponents of the practice of the same neutral arb-med-arb, participated in the study only minimally. Only one participant indicated China as a primary country of practice (1.2%); none of the participants indicated Japan as their primary country of practice.

\(^{472}\) This comment is particularly relevant to those attending the two international conferences where the questionnaire was distributed in paper form.

\(^{473}\) Although a choice of a dispute resolution mechanism is usually made by a party to the dispute in collaboration with in-house and external counsel, in-house counsel usually have the final say on this decision.

\(^{474}\) See the definition of the term in section 5.2.1.3 *supra*. 

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extended the meaning of the term to encompass, for example, the potential use of this
dispute resolution approach,\textsuperscript{475} whereas the questionnaire definition referred only to ‘the
actual use’. In view of all the above limitations, it is suggested that the questionnaire
results cannot be generalised.\textsuperscript{476}

5.2.3.2 Participants’ experience in the combined use of mediation and arbitration

The participants were asked about their experience as professionals in international
commercial disputes involving the combined use of mediation and arbitration over the
previous 5 years. Fifty-three participants stated that they had not had this kind of
experience (65.4%), whereas twenty-eight reported on their participation in disputes
involving the combined use of processes (34.6%). Although about one third of the
participants of this study claimed experience in the combined use of processes, the
particular way of combining mediation and arbitration that each of these participants
referred to remained unclear. That uncertainty stemmed from the fact that the
questionnaire provided a broad definition of ‘the combined use of mediation and
arbitration’.\textsuperscript{477} Nevertheless, follow-up questions revealed the most common way of
combining mediation and arbitration as experienced by the participants: the sequential
use of processes with different neutrals in charge of the mediation and arbitration
stages.\textsuperscript{478}

All following questions in the second part of the questionnaire\textsuperscript{479} were answered only by
those participants who had experience in the combined use of processes. Some
participants from this group chose not to answer certain questions.

5.2.3.2.1 Professional role in the combined use of mediation and arbitration

The participants were asked to specify professional roles they had in disputes involving
the combined use of mediation and arbitration. In answering this question they could
select from four options. The answers to this question were not mutually exclusive.
Most frequently the participants reported on their experience as counsel (see Table 1).

\textsuperscript{475} The potential combined use of mediation and arbitration can be illustrated by the following scenario.
Parties incorporate into their contract a model multi-tiered clause of an arbitration institution. Once the
dispute arises they resolve it in the mediation stage. The dispute never gets to the arbitration stage.

\textsuperscript{476} Section 10.4 \textit{infra} indicates how future research could address the limitations of this study.

\textsuperscript{477} See the questionnaire definition of ‘the combined use of mediation and arbitration’ in section 5.2.1.3
\textit{supra} and discussion of its limitations in section 5.2.3.1 \textit{supra}.

\textsuperscript{478} See sections 5.2.3.2.6 and 5.2.3.2.7 \textit{infra}. Interestingly, this result contradicts views expressed in the
literature. \textit{See, e.g.,}, Wolski, \textit{supra} n. 3, at 260 (observing that med-arb (diff) does not seem to be used
much).

\textsuperscript{479} These are the questions presented and discussed in sections 5.2.3.2.1 - 5.2.3.2.8 \textit{infra}. On parts of the
questionnaire see section 5.2.1.2 \textit{supra}.
Table 1. Professional role in an international commercial dispute involving the combined use of mediation and arbitration

<table>
<thead>
<tr>
<th>Answer Options</th>
<th>Response %</th>
<th>Response Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>As a counsel</td>
<td>57.1</td>
<td>16</td>
</tr>
<tr>
<td>As a mediator in a dispute involving arbitration with a different neutral</td>
<td>32.1</td>
<td>9</td>
</tr>
<tr>
<td>As an arbitrator in a dispute involving mediation with a different neutral</td>
<td>28.6</td>
<td>8</td>
</tr>
<tr>
<td>As a mediator and an arbitrator in the same dispute</td>
<td>17.9</td>
<td>5</td>
</tr>
<tr>
<td>Total</td>
<td>28</td>
<td></td>
</tr>
</tbody>
</table>

5.2.3.2.2 Proportion of disputes involving the combined use of processes of the overall practice

The participants were asked to indicate the approximate proportion of disputes involving the combined use of mediation and arbitration of their overall international commercial dispute resolution practice over the previous 5 years (see Figure 4). In answering this question, the participants could select from six options. Twenty-seven participants answered this question. Almost half of them reported a minimal involvement in the combined use of processes, of not more than 10% (48.1%).

**Figure 4. The approximate proportion of disputes involving the combined use of mediation and arbitration of the overall international commercial dispute resolution practice over the last 5 years**

![Proportion of disputes involving the combined use of mediation and arbitration](chart)

5.2.3.2.3 Regional variations in the combined use of mediation and arbitration

As reflected in Figure 1, overall the questionnaire participants evenly represented Common Law Asia Pacific and Continental Europe (33.3% each). However, a different picture emerged when the participants were asked about their experience with the combined use of mediation and arbitration. The questionnaire data revealed (see Figure 5) that the participants practising in Common Law Asia Pacific experienced the
combined use of mediation and arbitration more often (35.7%) than their colleagues from Continental Europe (25%).

Figure 5. Legal system/Region of practice (participants with experience in the combined use of mediation and arbitration)

5.2.3.2.4 Interrelation between participants' qualification to practise as a lawyer and their experience in the combined use of processes

The data shows that a large majority of practitioners with experience in the combined use of mediation and arbitration, regardless of the region of their practice, were qualified lawyers (85.7%), whereas about 14% of the participants did not hold a qualification to practise as a lawyer (14.3%). This result is comparable to the overall proportion of participants with and without legal qualifications: almost 90% of all participants indicated that they were qualified to practise as a lawyer (88.9%).

This result is no surprise in light of the professional background of the participants with experience in the combined use of mediation and arbitration (see Table 1). Most frequently these participants were involved in the combined use of processes as counsel (57.1%). More than one quarter of the participants had been involved in the combined use of processes as arbitrators (28.6%), whereas about 18% had done so as both mediators and arbitrators in the same dispute (17.9%). About 32% of the participants had acted as mediators in a combination of mediation and arbitration, where a different neutral was involved for the arbitration stage (32.1%).

While it is logical to expect that most professionals acting as counsel are qualified lawyers, the necessity of this qualification for arbitrators is not self-evident.

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480 Compared to the overall proportion of the participants depending on their country of practice (see Figure 1), those who had experience with the combined use of mediation and arbitration constituted 37% of the overall number of Common Law Asia Pacific and 25.9% of Continental European participants.

481 Although arbitration laws and rules almost never require formal legal qualifications for counsel, in practice, parties would rarely instruct as counsel an individual who is not qualified.
However, commentators point out the desirability of appointing a lawyer as a neutral in international arbitrations. Indeed, in general, an arbitrator should use the facts and the law to resolve the issues at stake. While differences exist in the perception of the role of an arbitrator (whether it is confined to producing a binding award or whether it is to resolve a dispute, including by facilitating a settlement), an arbitrator must be qualified to determine a dispute, if necessary. Similarly, neutrals having dual role (acting as mediators and arbitrators in the same international commercial dispute) might be expected to be lawyers, because of the arbitration component of the combined use of processes.

A mediator’s role differs significantly from that of an arbitrator. A mediator assists parties in settlement, which may involve narrowing the issues in dispute, helping parties understand each other, and revising a contract for the future. Jones argues that non-lawyers (e.g., psychologists, business consultants, counsellors, and others) can make valuable contributions to mediation. By embracing a wide range of professions, mediation can be informed by a number of perspectives. This will increase the number of available tools in the toolbox, which will enable mediation practitioners best help parties come to a settlement.

In this study, only a minority of the participants with experience in the combined use of mediation and arbitration reported being non-lawyers (14.3%). This result can be explained by the fact that the participants’ involvement solely as mediators in the combined use of processes was quite limited (32.1%). As mentioned above, many participants had experience acting as counsel, arbitrators, or dual role neutrals in disputes involving the combined use of mediation and arbitration. The nature of these roles calls for, if not requires, a qualification to practise as a lawyer.

482 Anyone can be appointed as an arbitrator. The choice of arbitrator usually depends on the subject-matter of the dispute. For example, it is not unusual for parties to choose an engineer for a building dispute.
483 Alan Redfern et al., Redfern and Hunter on International Arbitration 259 (5th ed., Oxford University Press 2009) (observing that in international arbitrations before a sole arbitrator, it is usual to appoint a lawyer; where the arbitral tribunal consists of three arbitrators, at least one member should be a lawyer; a lawyer with suitable procedural and legal experience may better handle the frequently arising problems of procedure and of conflict of law rather than a person whose expertise lies in another area).
484 Lew, supra n. 78, at 425. As mentioned earlier, this is not the case if parties authorise the arbitrator to decide ex aequo et bono.
485 See, e.g., Newmark, supra n. 140, at 87-88; Kaufmann-Kohler & Bonnin, supra n. 360, at 1; Kun, supra n. 3, at 536-537.
486 Lew, supra n. 78, at 425.
487 Jones, supra n. 365, at 406.
488 Ibid.
5.2.3.2.5 Triggers for the combined use of mediation and arbitration

The participants were asked to indicate what triggered the combined use of processes in the dispute they were involved in (see Table 2). In answering this question the participants could select from eleven options and specify any other trigger. The answers to this question were not mutually exclusive.

<table>
<thead>
<tr>
<th>Table 2. Triggers for the combined use of mediation and arbitration</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Answer Options</strong></td>
</tr>
<tr>
<td>One or both parties’ counsel suggestion</td>
</tr>
<tr>
<td>Specifically tailored contractual provision</td>
</tr>
<tr>
<td>Initiative of one or both parties</td>
</tr>
<tr>
<td>Model multi-tiered clause of an arbitration institute incorporated into parties’ contract</td>
</tr>
<tr>
<td>Your suggestion</td>
</tr>
<tr>
<td>Arbitrator’s suggestion</td>
</tr>
<tr>
<td>Provision in the applicable legislation</td>
</tr>
<tr>
<td>Provision in the rules of an arbitration institute</td>
</tr>
<tr>
<td>Mediator’s suggestion</td>
</tr>
<tr>
<td>Combination of triggers</td>
</tr>
<tr>
<td>Suggestion of an arbitration institute</td>
</tr>
<tr>
<td>Other</td>
</tr>
<tr>
<td><strong>Total</strong></td>
</tr>
</tbody>
</table>

The participants identified **the suggestion of counsel** as the most frequent trigger for the use of a combination of mediation and arbitration (66.7%). When asked about countries of practice of those counsel, the participants referred to countries from all over the world. However, the United States and the United Kingdom appeared to be the

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489 That is, what prompted the use of a combination of mediation and arbitration.
490 They specified, in particular, the following countries: Argentina, China, France, Germany, Hong Kong, India, Italy, Malaysia, Switzerland, the United Kingdom and the United States.
countries most frequently referred to, which might reflect a traditional common law trained approach, where the initiative to settle is usually taken by counsel or parties themselves.

Contrary to views expressed by some commentators that parties are reluctant to suggest using mediation because of the fear of appearing weak, parties appeared to be relatively active in invoking the combined use of processes (40.7%).

A specifically tailored contractual provision requiring both the use of mediation and arbitration was the second most common trigger (51.9%). The result is not surprising, given the benefits that this kind of provision may offer. These include creating the possibility of settlement by bringing parties to the negotiating table and eliminating parties’ fear to appear weak in suggesting mediation. However, not all commentators commend contractual commitments in advance to attempt mediation. For example, Jones observes that the disadvantage of a contractual commitment to mediation is that when a dispute arises, parties will generally know straight away whether there is any point in negotiating. A better option could be to insert a general clause requiring that each party consider settling the dispute through mediation or to designate in the contract that a mediation clause applies only to certain disputes.

Carter warns against leaving the drafting of clauses to parties because then parties ‘rely on home-cooked individual recipes, which can be toxic’. While arbitration clauses alone offer myriad examples of pathologies, the possibility of drafting chaos might be multiplied when several mechanisms are integrated. Arbitration institutions need to engage more actively in promulgation of multi-tiered dispute resolution clauses.

The fact that only a limited number of arbitration institutes currently offer model multi-tiered clauses may explain the questionnaire result that a model multi-tiered clause

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491 The United States and the United Kingdom were mentioned by three participants each, France and Hong Kong by two, and the rest of the listed countries were referred to by one participant each.
492 Fry et al., supra n. 357, at 264.
494 Jones, supra n. 365, at 404-405.
495 Ibid, at 405.
497 Ibid, at 454.
498 Ibid, at 447 (adding that even if a model multi-tiered clause has been promulgated by an arbitration institute, it might not be free from ambiguity).
was relied upon to invoke the combined use of processes half as often as compared to a specifically tailored contractual provision (25.9%).

The combined use of processes rarely resulted from a suggestion of an arbitrator (11.1%) or a mediator (7.4%). Although Ehle calls for enhancing the arbitrator’s mandate and transforming arbitrators into proactive settlement facilitators,499 other commentators are more sceptical in this respect. For example, Greenwood considers that expectations that arbitrators would take a lead in suggesting the idea of a settlement are unrealistic.500 Apart from requiring the making of certain assumptions about an arbitrator’s role in the dispute resolution process,501 these expectations place a heavy burden on the tribunal. More specifically, arbitrators might be facing competing issues: the need to issue a binding award, to observe due process and to maintain confidentiality.502 They also need to be mindful of the time taken to reach a final award and the cost of reaching that award. Facilitation of settlement may not be a priority for the tribunal for more prosaic reasons, like lack of appropriate skills as a negotiator necessary to reach a settlement.503 Naughton even doubts the wisdom of arbitrators who switch roles and recommends parties to refrain from granting arbitrators the power to do so, despite the difficulties of saying ‘no’ to a suggestion coming from their arbitrators.504 Few participants had experienced the combined use of mediation and arbitration pursuant to a provision in the applicable legislation (11.1%). Practitioners in jurisdictions with the legislation facilitating the combined use of processes by the same neutral for resolving international disputes, such as Singapore505 and Hong Kong,506 did not report any cases where this legislation applied in practice.507 This result resonates with views of commentators who point out the paucity of the combined use of mediation and arbitration by the same neutral in Hong Kong and Singapore, despite its

499 Ehle, supra n. 16, at 94.
500 Greenwood, supra n. 3, at 204-206.
501 Ibid, at 205-206 (observing that many international arbitrators still view their role as predominantly to render an enforceable arbitral award).
502 Ibid, at 204.
503 Ibid, at 204-205.
505 Singapore IAA, supra n. 440, ss. 16-17.
506 Hong Kong AO, supra n. 439, ss. 32-33. It appears that provisions encouraging arbitrators to act as mediators have been provided for in the Hong Kong AO since 1989. See Mason, supra n. 81, at 549.
507 Although, in Australia, the possibility for an arbitrator to act as a mediator is explicitly recognised by CAAs that govern domestic commercial arbitration in Australian States and Territories, International Arbitration Act 1974 (Cth) governing international arbitration is silent in this respect.
legislative recognition. Notably, the legislative acts in both Singapore and Hong Kong expressly permit an arbitrator to act as a mediator (the same neutral arb-med-arb) and a mediator to act as an arbitrator (the same neutral med-arb), jointly referred to as the same neutral (arb)-med-arb.

The infrequent use of the same neutral (arb)-med-arb might be due to various factors. The legislative obligation of an arbitrator to disclose all confidential information from mediation that is material to arbitration to all parties in dispute seems to raise major concerns among academics and practitioners. This obligation is regarded as the main stumbling block to hinder the use of the same neutral (arb)-med-arb because it prevents parties from being completely open in their discussions in mediation. While a disclosure obligation may inhibit candid exchanges in mediation, it may be necessary to prevent offending Western notions of due process: the ultimate decision maker might know some material information of which one side is unaware and has had no opportunity to respond.

Additionally, one could attribute the infrequent use of the same neutral (arb)-med-arb in Hong Kong to the failure rate of mediation in the context of court proceedings where many parties apparently feel compelled to mediate pursuant to the Civil Justice Reforms. The infrequent use might also be due to a relatively novel culture of mediation in this jurisdiction: arbitrators do not yet feel comfortable with mediating. This attitude may change if more arbitrators and lawyers receive mediation training. In Singapore, practitioners might be cautious to actually implement the same neutral (arb)-

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509 Singapore IAA, supra n. 440, s. 17; Hong Kong AO, supra n. 439, s. 33.

510 Singapore IAA, supra n. 440, s. 16; Hong Kong AO, supra n. 439, s. 32.


512 Wilson, supra n. 508 (speaking about the situation in Hong Kong).

513 Donahay, supra n. 349, at 77.

514 D’Agostino, supra n. 511.

515 Wilson, supra n. 508.
med-arb, until individual dual role neutrals develop their own case law with some guidance from courts in a suitable test case.516

From a broader perspective, the scarce use of the legislative provisions might be due to the difficulty to ‘move the mindset of lawyers trained in the common law tradition towards that of those from other legal traditions’.517 It may not be a coincidence that legislation supporting the use of the same neutral (arb)-med-arb is adopted most often in common law jurisdictions where practitioners and the courts are ‘culturally far less comfortable’ with these processes than in civil law jurisdictions.518 The provisions enacted in Hong Kong and Singapore will be discussed further on in section 8.3.2.1.

The questionnaire results demonstrate that arbitration institutions play a very insignificant role in encouraging the combined use of mediation and arbitration. Only two participants of the study experienced a combination of mediation and arbitration pursuant to a provision in the rules of an arbitration institution (7.4%) and only one pursuant to a suggestion of an arbitration institution (3.7%).

The rare use of mediation and arbitration in combination pursuant to a suggestion of an arbitration institution, as reported by the study’s participants, contrasts with the high demand for such initiatives, evidenced by empirical studies. For example, the 2013 IMI International Corporate Users ADR Survey found that arbitration providers are expected by about three-quarters of corporate users to be proactively encouraging parties to mediate their dispute.519 In-house counsel, advocates, arbitrators and mediators who participated in Bühring-Uhle’s 2006 survey were of a similar opinion: three-quarters thought it was appropriate for an arbitration institution to explicitly suggest, at its own initiative, the use of mediation to the parties.520

While some commentators commend procedures that are already available in some arbitration institutions for offering possibilities to facilitate settlement,521 others point

516 Hwang, supra n. 288, at 577.
517 Nottage & Garnett, supra n. 192, at 36 (speaking about the situation in Singapore).
520 Bühring-Uhle et al., supra n. 46, at 126.
out that arbitrators and arbitration institutions could be doing more to assist parties in settling disputes.\textsuperscript{522}

Many dispute resolution institutions offer both arbitration and mediation services. However, few, if any, appear to make a continued effort to encourage parties to use mediation before or during arbitration proceedings administered by the institution.\textsuperscript{523} The greater role that dispute resolution institutions need to play in promoting the use of mediation and arbitration in combination is explored in section 9.4.

5.2.3.2.6 Single or dual role of a neutral in the combined use of mediation and arbitration

The participants were asked about the neutral who conducted mediation in the dispute involving the combined use of mediation and arbitration (see Figure 6). In answering this question the participants could select from three options: the sole arbitrator, a member of the arbitral tribunal, or a neutral other than the sole arbitrator or a member of the arbitral tribunal. The answers to this question were not mutually exclusive. Twenty-six participants answered this question.

The data shows that the involvement of different neutrals for the mediation and arbitration stages of the process is the most common way of using mediation and arbitration in combination (84.6%). Interestingly, all but one of the participants with a common law background who responded to this question (twelve out of thirteen) indicated their experience with this combination, whereas the participants with a civil law background who responded to this question appeared to have experienced this combination less often (seven out of ten participants). The use of the sole arbitrator or a member of the arbitral tribunal as a mediator in the combined use of processes is limited (11.5\% and 19.2\%, respectively).\textsuperscript{524}

\textsuperscript{522} Newmark, supra n. 140, at 87.
\textsuperscript{523} Ibid, at 89; Lack, supra n. 58, at 379 (noting that ADR institutions should examine and create more links between the various processes they offer).
\textsuperscript{524} The participants who experienced a sole arbitrator acting as a mediator practised in Belgium (3.85\%), China (3.85\%), and Hong Kong (3.85\%). The participants who experienced a member of the arbitral tribunal acting as a mediator practised in China (3.85\%), Hong Kong (3.85\%), Italy (3.85\%), and Mexico (3.85\%). One participant in this group did not indicate primary country of practice (3.85\%).
The approach where different neutrals are in charge of the mediation and arbitration stages of the combined use of processes finds support among commentators. Fiechter observes that there is much to gain in keeping the functions of a mediator and arbitrator separate.\textsuperscript{525} Similar views have been expressed by Masood,\textsuperscript{526} Lang,\textsuperscript{527} Costa Braga de Oliveira,\textsuperscript{528} and Ross.\textsuperscript{529} In fact, the involvement of different neutrals is one of the three ways to address concerns associated with the same neutral (arb)-med-arb discussed in section 3.3, including the threat to arbitrator’s impartiality, and the risk of a breach of due process. This and the other two ways, namely procedural modifications of the same neutral (arb)-med-arb and the implementation of safeguards for using the same neutral (arb)-med-arb, are explored further in Chapters 6, 7 and 8.

As discussed in Chapter 4, the practitioners’ perception of the same neutral (arb)-med-arb is often explained by reference to the legal culture and more specifically, the practice of the judiciary and the way that disputes are perceived and resolved in practitioners’ home jurisdictions. While in common law countries judges and arbitrators traditionally refrain from actively contributing to settlement, practices in civil law countries vary. Nevertheless, Germany, Austria, Switzerland, Japan and mainland China are often referred to as examples of civil law countries where judges and arbitrators are eager to mediate cases that come before them.\textsuperscript{530}

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\textsuperscript{525} Fiechter, \textit{supra} n. 139, at 261.
\textsuperscript{526} Masood, \textit{supra} n. 139, at 276.
\textsuperscript{527} Lang, \textit{supra} n. 139, at 102.
\textsuperscript{528} Costa Braga de Oliveira, \textit{supra} n. 139, at 89.
\textsuperscript{529} Ross, \textit{supra} n. 23, at 358.
\textsuperscript{530} See discussion in sections 4.2 and 4.3 \textit{supra}. 

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The questionnaire result showing that the most common way of using mediation and arbitration in combination is by involving different neutrals for the mediation and arbitration stages of the process (84.6%) may be explained by the legal background of the participants who reported experience with the combined use of mediation and arbitration.

The majority of these participants practised in Common Law Asia Pacific and in Continental Europe (see Figure 5). As discussed in section 5.2.3.2.5, while legislative acts in Singapore and Hong Kong encourage arbitrators to act as mediators and mediators as arbitrators, these legislative provisions have rarely been used in practice. Dispute resolution practitioners trained in the common law tradition still seem to be uncomfortable with these practices. Among the participants with a civil law background, very few reported practising in civil law countries that are known for their favourable attitude to mediation by judges and arbitrators, namely Germany, Austria, Switzerland, Japan, and mainland China. More specifically, amongst participants with experience in the combined use of mediation and arbitration only one practised in China and one in Switzerland. None practised in Germany, Austria, Switzerland, or Japan. The participant from Switzerland did not answer the question about the neutral who conducted mediation in the dispute involving the combined use of mediation and arbitration.

A preference for involving different neutrals for the mediation and arbitration stages of the combined use of processes demonstrated by the questionnaire participants contrasts with the results of another empirical study, the International Academy of Mediators and Straus Institute Survey on Mediator Practices and Perceptions (the IAM-Straus Institute survey).\footnote{Stipanowich & Ulrich, supra n. 16, at 27-28.} One-hundred and thirty experienced mediators practising in different parts of the world, all fellows of the International Academy of Mediators, participated in this survey.\footnote{Ibid, at 27. The participants indicated that they ‘regularly practised’ in Africa; Asia, including the Middle East; Australia and New Zealand; Canada; Europe (both Western and Eastern, with a majority from the United Kingdom); Latin America; and the United States. About 90% (89.8%) of respondents indicated that they worked ‘full-time’ at the time the survey was administered, and devoted, on average, more than 70% of their work time to mediation practice.} About 61% of the participants reported some experience in acting as both a mediator and an arbitrator in the same dispute (61.3%).\footnote{Ibid, at 28.} This result of the IAM-Straus Institute survey indicating a relatively frequent involvement of mediators as arbitrators in the same dispute is difficult to explain. Perhaps knowing the exact distribution of

\footnote{Stipanowich & Ulrich, supra n. 16, at 27-28.}
participants per countries could have provided a clue to this result. It would have been particularly interesting to know what proportion of the participants ‘regularly practised’ in China, Japan, Germany, Switzerland, and Austria. Nevertheless, the relatively frequent involvement of mediators as arbitrators in the same dispute may be attributed to the fact that mediators participating in that survey were asked to report on their overall experience rather than that over any particular period of time (e.g., over the last five years). The participants of the IAM-Straus Institute survey had, on average, over eighteen years of mediation experience, and had conducted, on average, about 1,500 mediations throughout their careers. This extensive professional mediation experience of the IAM-Straus Institute survey’s participants may provide an explanation to their more frequent (as compared to the participants of this study) involvement as mediators and arbitrators in the same dispute.

5.2.3.2.7 Mediation in the combined use of processes: timing and the use of caucuses

Timing. The participants were asked to indicate when, in the combined use of processes, mediation had been used (see Table 3). In answering this question the participants could select from five options and specify any other timing of mediation. The answers to this question were not mutually exclusive. About three quarters of the participants had experienced mediation before arbitration (74.1%) and almost the same number reported the use of mediation after commencement of arbitration but before the hearing on the merits (70.4%). Those participants who selected more than one answer were asked to

534 Ibid, at 27.
535 Apart from collecting data on these two aspects of mediation in combinations, the questionnaire investigated whether mediators are proactive rather than purely facilitative. Although many trainers still teach a purely facilitative model of mediation, Leathes highlights the need for mediators to learn how, when and whether to deploy evaluative and transformative techniques, depending on the circumstances. See Michael Leathes, 2020 Vision: Where in the World Will Mediation Be Within 10 Years?, International Mediation Institute (Nov. 2010), available at <https://imimediation.org/2020-vision-article>. Leathes’ comments, however, refer to stand-alone mediation. When mediation is used as part of the same neutral (arb)-med-arb, commentators give a different advice to mediators. They recommend mediators to refrain from being evaluative, not to opine on particular issues, to be careful not to express any definite opinion as to an appropriate outcome, and to avoid exerting any undue pressure. See, e.g., Ross, supra n. 23, at 360; Flake, supra n. 48, at 7; Limbury, supra n. 253, at 3; Reiner, supra n. 451, at 24. The questionnaire asked those who conducted mediation in a dispute involving the use of combinations to characterise their mediation style. Twenty-three participants answered this question. Surprisingly, 43.5% of these participants did not report any professional experience as mediators in international commercial disputes involving the combined use of processes when asked about it in one of the preceeding questions. The majority of the remaining 56.5% participants with professional experience as mediators in combinations characterised their mediation style as facilitative (34.8%), while 8.7% said that their mediation style was evaluative; and 13% reported that their mediation style varied and could be facilitative, evaluative, or transformative. Most of those who characterised their mediation style as facilitative had acted as mediators in disputes that involved arbitration with a different neutral (21.7%). Due to the fact that 43.5% of the participants who answered the question on the mediation style did not actually have any experience as mediators in combinations, the responses to this question are not discussed in this thesis any further.
indicate the one that had applied most frequently. Nine participants answered this follow-up question and six of them referred to the use of mediation before arbitration.

Table 3. Timing of mediation in the combined use of mediation and arbitration

<table>
<thead>
<tr>
<th>Answer Options</th>
<th>Response %</th>
<th>Response Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Before arbitration</td>
<td>74.1</td>
<td>20</td>
</tr>
<tr>
<td>After commencement of arbitration but before the hearing on the merits</td>
<td>70.4</td>
<td>19</td>
</tr>
<tr>
<td>After the hearing on the merits but before issuing the award</td>
<td>25.9</td>
<td>7</td>
</tr>
<tr>
<td>At the same time as arbitration</td>
<td>14.8</td>
<td>4</td>
</tr>
<tr>
<td>After issuing the award</td>
<td>11.1</td>
<td>3</td>
</tr>
<tr>
<td>Other</td>
<td>7.4</td>
<td>2</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td>27</td>
</tr>
</tbody>
</table>

The questionnaire results correspond to the views expressed by some commentators that the earlier mediation can be done, the better. The process starting with mediation could potentially result in a considerable savings of cost and time because only if all issues are not settled in mediation, parties move to arbitration. Hence, mediation conducted before arbitration may allow parties to avoid arbitration proceedings altogether.

However, if parties have reached the stage of preparing for arbitration, the moment immediately before the initiation of arbitration may be inappropriate for mediation because then parties may focus more on how to win rather than how to reconcile their interests. Also, parties’ views on the case may be too one-sided, pre-arbitral mediation may be exploited for delay tactics, and parties may simply lack the necessary

536 Michael McLwrath, *Anti-Arbitration: 10 Things To Do Before The Arbitration Gets Underway*, Kluwer Arbitration Blog (12 Nov. 2011), available at <http://kluwerarbitrationblog.com/blog/2011/11/12/anti-arbitration-10-things-to-do-before-the-arbitration-gets-underway/>; Stipanowich & Ulrich, supra n. 16, at 8 (noting that ‘most business disputes are amenable to a negotiated resolution, and that there are multiple benefits associated with early, informal resolution of disputes’); but see Naughton, supra n. 504, at 31 (stating that the most difficult cases are often those referred to mediation before any proceedings have been commenced).

537 Ross, supra n. 23, at 363.

538 Bühring-Uhle et al., supra n. 46, at 251.

539 Ibid, at 264.
information on the merits of the dispute. At that point, it may be preferable to formalise the dispute by initiating arbitration proceedings. After commencement of arbitration, mediation is thought to have more potential for success once parties have exchanged information at the preparatory phase of arbitration, which allows them to better estimate their respective strengths. The chances of mediation being successful increase also because parties become aware of the costs and uncertainties of arbitration. These arguments might explain the questionnaire result demonstrating frequent use of mediation after commencement of arbitration but before the hearing on the merits.

The questionnaire data reveals that most frequently the combined use of mediation and arbitration involves the use of its mediation and arbitration components in sequence. The reference to mediation is usually made in the early stages of this dispute resolution approach: either before arbitration or after commencement of arbitration but before the hearing on the merits. This result is understandable, as cost incentives exist for parties to resolve their dispute sooner rather than later.

Use of caucuses. The participants were asked about the frequency of the use of caucuses in the mediation stage of the combined use of processes (see Figure 7). The data reveals that caucuses were used in mediation either in all (66.7%) or the majority of cases involving the combined use of processes (22.2%).

\[540\] Ibid, at 252.
\[541\] Ibid, at 264. Also, the initiation of arbitration is sometimes a deliberate settlement tactic, as it is supposed to create the necessary pressure on the other party to seriously negotiate. However, initiating arbitration may have an antagonising effect and change the frame for parties’ interaction. Ibid, at 118.
\[542\] Ibid, at 264-265; Schneider, supra n. 41, at 86 (pointing out that while many views exist about the best moment for raising the idea of settlement discussions after commencement of arbitration, normally parties should have been able to present the essence of their case).
\[543\] Pierre Lalive, *The Role of Arbitrators as Settlement Facilitators - A Swiss View*, in *New Horizons in International Commercial Arbitration and Beyond*, 12 ICCA Congress Series 556, 563 (Albert Jan van den Berg ed., Kluwer Law International 2005); but see Marriott, supra n. 257, at 543 (noting that once fully involved in arbitration, parties may switch to a more adversarial mode and become less inclined to compromise).
\[544\] Marriott, supra n. 257, at 542.
These results are not surprising, given the fact that about 85% of the participants experienced the combined use of processes with different neutrals in charge of the mediation and arbitration stages (see Figure 6). Caucuses are problematic only in the context of the same neutral (arb)-med-arb. They raise no concerns if different neutrals conduct the mediation and arbitration stages, which is the case in this study. Consequently, there is nothing unusual in the result that caucuses were used in the mediation stage in all or the majority of cases.

The involvement of different neutrals is merely one of the three ways to address concerns associated with the same neutral (arb)-med-arb. These concerns may be addressed otherwise. For example, if parties want to keep the same neutrals for both roles, they may prohibit them from using caucuses altogether. Or, parties may allow caucusing but then require dual role neutrals either to disregard the disclosed facts or disclose them, if mediation does not result in a settlement and parties have to move on to the arbitration stage. All options have their strengths and weaknesses and will be discussed in Chapters 6, 7 and 8.

5.2.3.2.8 Recording the outcome of the combined use of mediation and arbitration

The participants were asked to indicate how the outcome of the combined use of mediation and arbitration was recorded (see Figure 8). In answering this question the participants could select from four options: in a mediated settlement agreement, in a consent arbitral award incorporating a mediated settlement agreement, in a regular arbitral award,\textsuperscript{545} or in a court judgment. The participants could also specify any other form of recording the outcome. The answers to this question were not mutually exclusive. A mediated settlement agreement was used to record the outcome of the

\textsuperscript{545} That is, awards resulting from an arbitral tribunal’s deliberations. In the context of the combined use of mediation and arbitration, usually an arbitrator will need to decide on a dispute and render an arbitral award if the parties do not settle in mediation.
combined use of processes according to eighteen of twenty-seven participants who answered this question (66.7%). Those who selected more than one answer were asked to indicate the one that had been used most frequently. Eleven participants answered this follow-up question and seven of them selected recording the outcome of the combined use of processes in a mediated settlement agreement.

As discussed in section 3.2.2, the current absence of unified enforcement mechanism for international mediated settlement agreements is often seen as an obstacle to its greater use as a stand-alone method of international commercial dispute resolution. One of the frequently cited benefits of the combined use of mediation and arbitration is a possibility to convert a mediated settlement agreement into a consent award arguably enforceable all over the world pursuant to the New York Convention.

The questionnaire data, however, shows that the absence of a coherent enforcement mechanism for international mediated settlement agreements is not an obstacle to recording the outcome of the combined use of processes in this kind of agreement. On the contrary, two-thirds of the participants had experienced the combined use of mediation and arbitration resulting in a mediated settlement agreement (66.7%). Notwithstanding the existence of the established international enforcement mechanism for arbitral awards, neither consent nor regular arbitral awards had been used, according to the questionnaire participants, to a similar extent (44.4% and 37%, respectively). Moreover, the majority of those participants who experienced various ways of recording the outcome of the combined use of processes referred to a mediated settlement agreement as the most frequently used option.
This suggests that the importance of establishing a unified enforcement mechanism for international mediated settlement agreements might be overstated: even in the absence of this mechanism in the majority of cases the outcome of the combined use of processes is recorded as a mediated settlement agreement. The possibility offered by the combined use of mediation and arbitration to incorporate a mediated settlement agreement into a consent arbitral award is used only to a limited extent.

One more issue related to the enforceability of the outcome of combinations needs to be explored here. The questionnaire data on timing of mediation discussed in section 5.2.3.2.7 revealed that in combinations, mediation is usually used either before arbitration or after commencement of arbitration but before the hearing on the merits. If parties reach settlement in the mediation phase of a combination and want to incorporate it into a consent award, the timing of a mediated settlement agreement is important for the consent award’s enforceability. This section turns now to examine this issue in more detail.

**Timing of a mediated settlement agreement**

If a mediated settlement agreement terminates an arbitration process already in progress, it is generally recognised that the settlement agreements which are recorded in the consent award are enforceable under the New York Convention.546 National laws and arbitral and mediation institutions authorise arbitrators to make an award in the form of terms of settlement reached during arbitration.547

However, there is no clear and shared understanding in the literature of whether a mediator can be appointed as an arbitrator merely for the purposes of issuing a consent award. It is questionable whether a mediated settlement agreement will be enforced other than simply as a contract, if the mediation part of the proceedings occurs apart

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546 Klaus Peter Berger, *International Economic Arbitration*, 582 (Kluwer Law and Taxation Publishers 1993) referred to in De Vera, supra n. 64, at 161 n. 45, Peter, supra n. 88, at 158-159 n. 34; Peter, supra n. 61, at 90 n. 34; Anthony Connerty, *ADR as a ‘Filter’ Mechanism: The Use of ADR in the Context of International Disputes*, 79(2) Arb. 120, 128 (2013); Ross, supra n. 23, at 362-363; Wolski, supra n. 3, at 261 n. 54 (noting, however, that this view is not universally accepted with some authors noting that the proposition is ‘untested’).

from and before the arbitration part of the process, namely med-arb.\textsuperscript{548} It appears important for the process to formally begin as arbitration, namely arb-med-arb.\textsuperscript{549}

The major criticism related to med-arb, is that if mediation successfully resolves all differences there is then no dispute capable of triggering a valid arbitration and hence, generating an enforceable consent award.\textsuperscript{550} As observed by Newmark and Hill, one cannot validly agree to appoint arbitrators where there is nothing for them to arbitrate.\textsuperscript{551} Mustill and Boyd similarly note that it appears to be settled law that a procedure cannot be arbitration unless there is a formulated dispute in existence when the arbitrator is appointed.\textsuperscript{552} Likewise, an agreement cannot be an arbitration agreement unless it contemplates that a dispute will already exist when the appointment is made.\textsuperscript{553}

At the same time, similarly to other issues arising in the context of the combined use of mediation and arbitration, one’s answer to the question whether it is possible to enforce as a consent award a mediated settlement agreement concluded before the appointment of an arbitrator appears to be influenced by one’s legal culture. When this possibility was discussed in the intergovernmental Working Group within the framework of preparation of the UNCITRAL Model Law on International Commercial Conciliation 2002 (UNCITRAL ML on Conciliation), the opinions of the participants of that discussion differed. Some opined that it would be acceptable on the basis of the experience in their countries, whereas others indicated that it would not work technically because to have arbitration one needs to have a dispute and there is none once a settlement has been reached.\textsuperscript{554}

Practitioners’ legal system emerged as a determinative factor in the approach taken to this question. Civil and common law legal systems appear to interpret differently the notion of a dispute as a condition precedent to arbitration and the approach of the former is, arguably, broader.\textsuperscript{555} As noted by the former Secretary of UNCITRAL, Jernej

\textsuperscript{548} See, e.g., Peter, supra n. 61, at 90; De Vera, supra n. 64, at 161; Peter, supra n. 88, at 158-159; Greenwood, supra n. 3, at 201-202; Steele, supra n. 174, at 1401; José María Abascal Zamora, Some Remarks on the UNCITRAL Model Law on International Commercial Conciliation, in New Horizons in International Commercial Arbitration and Beyond, 12 ICCA Congress Series 415, 419-420 (Albert Jan van den Berg ed., Kluwer Law International 2005); Wolski, supra n. 3, at 262; Newmark & Hill, supra n. 91, at 83-85; Kryvoi & Davydenko, supra n. 190, at 864-865.

\textsuperscript{549} See, e.g., Limbury, supra n. 100, at 5; Nottage & Garnett, supra n. 192, at 35 n. 93; Newmark & Hill, supra n. 91, at 85.

\textsuperscript{550} See, e.g., Zamora, supra n. 548, at 420; Wolski, supra n. 3, at 261.

\textsuperscript{551} Newmark & Hill, supra n. 91, at 83.


\textsuperscript{553} Ibid.

\textsuperscript{554} Alexander, supra n. 55, at 362.

\textsuperscript{555} Ibid, at 363.
Sekolec, when debtors accept the liability but claim that they do not have money to pay, there is no dispute in common law jurisdictions while there still may be one in civil law countries.\footnote{Ibid.}

Nevertheless, a closer look at civil law and common law systems suggests that the approach is not consistent throughout either system.

\textit{Civil law jurisdictions}

Under Brazilian law, for example, parties cannot convert their mediated settlement agreement into a consent award if arbitration has not started before the parties’ settlement is achieved and any award recorded under such circumstances will be null and void.\footnote{Costa Braga de Oliveira, \textit{supra} n. 139, at 90.} However, settlement reached by the parties after the commencement of arbitration may be recorded as a consent award under Brazilian Arbitration Act.\footnote{Lei Ordinária 9.307, de 23.09.96 art. 28.}

Germany appears to have adopted the same stance. The conversion of a settlement agreement reached in mediation into an arbitral award on agreed terms further to the German Arbitration Act appears to be highly problematic because a dispute is a necessary precondition for arbitration.\footnote{Art. 1053 Abs. 1 ZPO. See also Klaus Peter Berger, \textit{Integration of Mediation Elements into Arbitration: ‘Hybrid’ Procedures and ‘Intuitive’ Mediation by International Arbitrators}, 19(3) Arb. Int’l. 387, 389-390 & n. 16 (2003).} Under the same conditions in France, on the contrary, a mediated settlement agreement can be converted into a consent award either by the mediator in the function of an arbitrator, or by a third party appointed for that purpose.\footnote{Mediation: Principles and Regulation in Comparative Perspective, 475-476 (Klaus J. Hopt & Felix Steffek eds., Oxford University Press 2012).} Similar possibility exists in Croatia, where article 13(5) of the Croatian Conciliation Act allows parties to formalise their mediated settlement agreement as a notarial deed, court settlement or an arbitration award on agreed terms.\footnote{Mediation Act (Official Gazette NN 18/11, 2011), art. 13(5).}

\textit{Common law jurisdictions}

commencement of arbitration into a consent award in international disputes. In Bermuda, parties to an arbitration agreement may appoint a mediator and any resulting settlement shall enjoy the status of a consent award and be enforced in an identical manner as a judgment to the same effect. Although the disputants must be parties to an arbitration agreement, it is not necessary for an arbitration procedure to commence before the appointment of a mediator. Similar provisions can be found in the laws of Singapore and Hong Kong.

**Institutional rules**

A number of institutional rules provide for a possibility to incorporate a mediated settlement agreement into an arbitral award even if mediation precedes arbitration.

Article 14 of the SCC Mediation Rules states that

> In case of settlement, the parties may, subject to the consent of the Mediator, agree to appoint the Mediator as an Arbitrator and request him/her to confirm the settlement agreement in an arbitral award.

Similar provisions are found in the Vienna Conciliation Rules, the Mediation Rules of the Court of Arbitration at the Polish Chamber of Commerce, the International Commercial Mediation Rules of the Japan Commercial Arbitration Association, the Domestic Arbitration Rules of the Korean Commercial Arbitration Board and elsewhere.

Despite the fact that the possibility of incorporating a mediated settlement agreement into an arbitral award exists in certain jurisdictions and under certain institutional rules

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564 Bermuda International Conciliation and Arbitration Act 1993, s. 20.
565 Singapore IAA, supra n. 440, ss. 16, 18.
566 Hong Kong AO, supra n. 439, ss. 32, 66(2).
even if the arbitrator is appointed after reaching the settlement, the enforceability of the resulting consent award is unclear and largely untested. For now, to ensure its enforceability, it is advisable that parties start the combined process with arbitration rather than mediation. While, as discussed in Chapter 3, the advantages and concerns associated with the same neutral med-arb and the same neutral arb-med-arb are generally the same, the enforceability of the outcome is the issue that makes the same neutral arb-med-arb preferable over the same-neutral med-arb.

5.2.3.3  Main benefits and the future of the combined use of mediation and arbitration

All questionnaire participants were asked to share their views on the main benefits of the combined use of mediation and arbitration and the use of this dispute resolution approach in the future, regardless of their experience in this field. Although seventy-seven and seventy-nine participants answered these two questions respectively, the particular way of combining mediation and arbitration that each of these participants referred to remained unclear. This was due to the fact that the questionnaire provided a broad definition of ‘the combined use of mediation and arbitration’.\textsuperscript{573}

5.2.3.3.1  Main benefits of the combined use of mediation and arbitration

The participants were asked to identify the main benefits to parties of using a combination of mediation and arbitration (see Table 4). The participants could select from six options, including 'no benefits', and specify any other benefit. The answers to this question were not mutually exclusive.

The data shows that, overall, the participants had a positive attitude to the combined use of processes, with only 6.5% seeing no benefits to parties of using them. The benefits of the combined use of processes were attributed mostly to the mediation rather than to the arbitration component. The ability to preserve business relationships, faster resolution of the dispute and its lower cost were rated as the top three benefits of the combined use of processes (72.7%, 67.5%, and 63.6%, respectively). About half of the participants perceived the high quality of the outcome\textsuperscript{574} as a benefit of the combined use of processes (50.6%), whereas the possibility of obtaining an enforceable arbitral award was regarded as a benefit by about 31% of the participants (31.2%).

\textsuperscript{573} See the questionnaire definition of ‘the combined use of mediation and arbitration’ in section 5.2.1.3 supra and discussion of its limitations in section 5.2.3.1 supra.

\textsuperscript{574} As specified in the questionnaire, a high quality outcome means that the outcome of a dispute resolution process is more in line with parties’ needs (as compared to arbitration only).
As discussed in section 3.2.1, faster resolution of a dispute, its lower cost and the better quality of the outcome, as compared to arbitration only, are advantages often associated with the use of the same neutral (arb)-med-arb. In view of the broad questionnaire definition of ‘the combined use of mediation and arbitration’, the particular way of combining mediation and arbitration that each questionnaire participant referred to remained unclear.

Only about 31% of the participants perceived the possibility of obtaining an enforceable arbitral award as a benefit of the combined use of mediation and arbitration. On the one hand, this result is surprising because it contradicts the prevalent view among commentators that the possibility of incorporating a mediated settlement agreement into a consent arbitral award is a major advantage of using mediation and arbitration in combination. This possibility is often seen as a remedy against, arguably, the key impediment to a more widespread use of mediation as a stand-alone method of international commercial dispute resolution: the absence of a coherent enforcement mechanism for international mediated settlement agreements.

On the other hand, this result is consistent with responses given to a question directed to the participants with experience in the combined use of mediation and arbitration. These participants were asked about the way the outcome of the combined use of processes had been recorded. As discussed in section 5.2.3.2.8, two-thirds of the participants had

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575 See discussion in section 5.2.3.2.8 supra.
experienced the combined use of processes resulting in a mediated settlement agreement. Neither consent nor regular arbitral awards had been used, according to the participants, to a similar extent. Thereby, it appears that the possibility of incorporating a mediated settlement agreement into an arbitral award is neither perceived as a benefit of the combined use of processes nor availed of in practice.

It is notable that the questionnaire data revealed a contrast between the perception of combinations as beneficial processes and their infrequent use. A similar gap between the perception and use of combinations emerged from the Bühring-Uhle’s survey. The author found that despite a growing acceptance of explicit mediation elements in arbitration, these mediation elements are used less frequently than their general acceptance by practitioners might suggest.

5.2.3.3.2 Future of the combined use of mediation and arbitration

The participants were asked whether they wanted to see more use of a combination of mediation and arbitration for resolving international commercial disputes in the coming years. More than three-quarters of seventy-nine participants answered ‘yes’ to this question (78.5%), whereas about 11% said ‘no’ (11.4%), and about 10% were not sure about their answer and selected the ‘don’t know’ option (10.1%). Although all participants were asked to comment on their answer, only thirty-five did so.

Most often the participants qualified the combined use of mediation and arbitration with reservations related to the conduct of both processes by the same neutral or the use of caucuses. These reservations were reiterated in the comments of those participants who were against or uncertain about the desirability of a wider use of this dispute resolution approach in the future. The participants frequently attributed benefits of the combined use of processes and its drawbacks to its mediation component.

5.2.4 Questionnaire results significant for the second phase of the empirical study

Section 5.2.3 presented and discussed the key questionnaire results. Four of them are significant for the second phase of the empirical study. These are:

Result 1. Extent of use of combinations

All combinations are reported to be used to a relatively low extent in international commercial dispute resolution. Only about one third of the questionnaire participants

576 Bühring-Uhle et al., supra n. 46, at 128.
577 Ibid.
578 Concerns associated with the same neutral (arb)-med-arb are discussed in section 3.3 supra.
had experience with them over the previous 5 years, almost half of whom reported that disputes involving combinations had constituted not more than 10% of their overall international commercial dispute resolution practice.

**Result 2. Most common combination**

The sequential use of processes with different neutrals in charge of the mediation and arbitration stages, namely diff neutral (arb)-med-arb, turned out to be the most common combination, whereas the use of the same neutral (arb)-med-arb appeared to be minimal only. This preference for diff neutral (arb)-med-arb can be explained by reference to the legal culture of the questionnaire participants with experience in combinations. The majority of these participants practised in Common Law Asia Pacific and Continental Europe. Among the participants with a civil law background, very few reported practising in civil law countries that are known for their favourable attitude to mediation by judges and arbitrators, namely Germany, Austria, Switzerland, Japan, and mainland China. The participants with a common law background demonstrated a typical preference amongst common law practitioners for using arbitration and mediation separately by involving different neutrals in each stage.

**Result 3. Possibility of recording the outcome of combinations in a consent award**

As noted in sections 3.2.2 and 5.2.3.2.8, the possibility of converting a mediated settlement agreement into a consent arbitral award is one of the frequently cited benefits of combinations. The questionnaire participants, however, neither perceived this possibility as a benefit of combinations nor availed of it in practice.

**Result 4. Perception of combinations**

Almost all questionnaire participants recognised some benefits of combinations (93.5%). The ability to preserve business relationships, and faster and less expensive resolution of the dispute (as compared to arbitration only) were rated as the top three benefits. More than three-quarters of the participants supported the wider use of combinations in the coming years.

These four questionnaire results invited further enquiry that was undertaken through semi-structured interviews.
5.3 Phase Two: Interviews

5.3.1 Methodology

5.3.1.1 Process

The second phase of the study, semi-structured interviews, was conducted in March and April 2015. Thirteen professionals were invited to participate in a one-on-one interview, and six accepted the invitation. The interviewees were selected using purposive sampling. In particular, the selection was based on the interviewees’ substantial professional experience in international commercial dispute resolution and highly probable professional experience with the combined use of mediation and arbitration, as evidenced by their publications and publicly available CVs. One interviewee was selected on the basis of the completed questionnaire that demonstrated experience with combinations and indicated willingness to participate in a follow up interview. Considering the fact that practitioners’ perception and, as demonstrated by the questionnaire data, use of the same neutral (arb)-med-arb can often be explained by reference to their legal culture, the study sought a balanced representation of both common law and civil law traditions among the interviewees. Of the six interviewees, three were from a civil law jurisdiction, namely Belgium, Spain, and Switzerland. The remaining three originated from a common law jurisdiction, namely Australia, Hong Kong, and the United States.

Five interviews were conducted in person and one by telephone. Each interview lasted 30-60 minutes. The interviewees were asked three introductory and six questions on the substance of the research. All interviews were recorded using an audio digital recording device and transcribed into a word document following the interviews. All interviewees have been given an opportunity to verify accuracy of the data used in this thesis.

5.3.1.2 Purpose

The interview questions sought to elicit views concerning the most significant questionnaire results. Specifically, they covered the following matters:

- perceptions as to barriers to the use of the same neutral (arb)-med-arb;
- actual ways of overcoming barriers to the same neutral (arb)-med-arb (based on the participants’ practice);

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579 The interview schedule is provided in Appendix 3.
• perceptions as to the significance of a legal culture for the way the combined use of mediation and arbitration is conducted;
• perceptions as to the emergence of a harmonisation trend in the combined use of mediation and arbitration;
• perceptions as to the ways of enhancing the use of combinations;
• perceptions as to whether the introduction of an international enforcement mechanism for mediated settlement agreements might decrease parties’ interest in the use of combinations.

5.3.1.3 Limitations
The interview results need to be interpreted with some caution. First, those interviewed were highly experienced international dispute resolution practitioners and were likely to have a pre-existing interest in international commercial arbitration and mediation. Hence, it is probable that the interviewees were more favourably disposed to the use of arbitration, mediation, and their combinations than dispute resolution practitioners in general. Second, the interviewees represented certain regions and legal cultures more than others. All three interviewees with the civil law background were from Continental Europe. This happened because, despite the fact that an invitation to participate in an interview was sent to six potential interviewees originating from civil law countries, including China and Japan, only those from Continental Europe accepted the invitation. As discussed in section 4.3, while Germany, Austria, Switzerland, Japan, and China are frequently referred to as examples of civil law countries where arbitrators are eager to mediate their own cases, differences exist between the German approach, on the one hand, and that of China and Japan, on the other hand. In particular, caucuses are uncommon for German judges and arbitrators, whereas they are widely used by their colleagues in China and Japan.

In view of these two limitations, the interview results cannot be extrapolated to all international dispute resolution practitioners.

5.3.2 Reporting
One part of the interview questions sought data on issues that have already been introduced in this and earlier chapters, whereas another part related to issues that are yet to be discussed in Chapters 8 and 9. Taking this point into account, the thesis will present and discuss in this chapter the results relevant to the issues that have already been introduced. The remaining results will be addressed in Chapters 8 and 9.
5.3.3 Results

5.3.3.1 Barriers to the use of the same neutral (arb)-med-arb

The questionnaire data revealed a rare use of combinations in general and a minimal use of the same neutral (arb)-med-arb in particular, with diff neutral (arb)-med-arb being the most common combination. The interviewees were asked to explain the rare use of the same neutral (arb)-med-arb. Most interviewees indicated that the extent of the use of this combination varied from country to country.

Well, those empirical studies would not include China. Because the stats that I hear from say CIETAC ... is that there is a massive number of the arbitrations settled while mediation in the process... To leave China out of this debate [on the extent of the use of the same neutral (arb)-med-arb] is to ignore an elephant in the room.\(^{580}\)

I think you will be surprised that practice and the attitude is more spread than even I have thought ... I was surprised that it was not only the Chinese but also the Japanese, and Korean and I think there was some other Asian group.\(^{581}\)

It's a cultural matter. In Switzerland and Germany there is a tradition to lead parties to a settlement. I would be very hesitant to do that in England.\(^{582}\)

Some interviewees explained the rare use of the same neutral (arb)-med-arb by a particular mindset or a particular perception of the role of an arbitrator. For example:

A lot of attorneys think in a compartmentalised way about the processes ... So often, if you are selected as a mediator, they want you to mediate. If you are selected as an arbitrator, they expect you to arbitrate. They don't choose you to be an all-purpose neutral ... There is just a mindset.\(^{583}\)

The big difference is the role model of the arbitrator. If the arbitrator considers himself as an impartial referee, he would not do this [act as a mediator] ... whereas in these other jurisdictions, the arbitrator considers

\(^{580}\) Practitioner from Australia, Interview 2.
\(^{581}\) Practitioner from Switzerland, Interview 4.
\(^{582}\) Practitioner from Belgium, Interview 6.
\(^{583}\) Practitioner from the United States, Interview 5.
himself someone who has a dispute to solve and means, the way he resolves the dispute, do not matter.\textsuperscript{584}

Two interviewees pointed out what they believed to be problematic issues in the use of the same neutral (arb)-med-arb.

There are elements of arbitration which are potentially inconsistent with some of the techniques that make mediation very successful. And in particular the big issue for the combination of the processes is the caucus process.\textsuperscript{585}

There are problems with this process also. One of them is the arm-twisting, that the arbitrator or judge wants to avoid writing a judgment, and coerces parties.\textsuperscript{586}

One interviewee considered that the rare use of the same neutral (arb)-med-arb stemmed from the reluctance to use mediation in general.

In international arbitration, not talking about a concrete legal system ... there is no really great enthusiasm about formally conducting mediation, because ... formally instituting mediation will probably be not the last solution and at the end they [parties] might have to go to arbitration or litigation.\textsuperscript{587}

5.3.3.2 \textbf{Significance of the legal culture}

All but one interviewee recognised the significant influence that the legal culture of counsel and neutral(s) has on the way a combination of mediation and arbitration is conducted. For example:

I think US attorneys and ... to some extent US neutrals tend to be very doctrinaire about keeping mediation and arbitration separate ... there is a vast cultural difference say between a US situation or Germany and Switzerland or China where you have an experience with mixed roles. How it actually plays out is another thing ... So there is a spectrum of experience, it’s affected by culture.\textsuperscript{588}

\textsuperscript{584} Practitioner from Switzerland, Interview 4.
\textsuperscript{585} Practitioner from Australia, Interview 2.
\textsuperscript{586} Practitioner from Switzerland, Interview 4.
\textsuperscript{587} Practitioner from Spain, Interview 1.
\textsuperscript{588} Practitioner from the United States, Interview 5.
Probably the Chinese will be more open to it [the same neutral (arb)-med-arb] than, I would say, French. There is a tradition in Asian countries ... to settle rather than go to litigation or arbitration.\textsuperscript{589}

The interviewee who disagreed with the interviewees above, stated:

\textit{I think the culture is not really an issue. I think the issue is the lawyers. If you are a law firm and this is your biggest client ... you are going to convince your client that he should not settle.}\textsuperscript{590}

One interviewee emphasised the challenging task of an international arbitrator acting in a multicultural environment.

\textit{Well, probably, the Chinese culture like other cultures, for instance, in Germany ... they are very much in favour of mediating. Other cultures prefer not to mediate ... International experienced arbitrators have to go through this clash of cultures and ... be bold in trying to use one way or the other.}\textsuperscript{591}

Another interviewee pointed out the shortage of dispute resolution professionals who are open to new ideas and new ways of doing things.

\textit{You're going to get both parties comfortable with the processes different from what they're used to ... The baggage of legal culture is heavy. And there aren't a lot of lawyers who are interested in doing things differently.}\textsuperscript{592}

\textbf{5.3.3.3 Harmonisation trend}

Overall, interviewees appeared to be sceptical when asked whether they saw any harmonisation trend emerging in the combined use of mediation and arbitration, in general and in relation to the same neutral (arb)-med-arb, in particular. The roots of their scepticism, however, varied.

The scepticism of one interviewee related to harmonisation efforts, in general.

\textit{I don’t believe in harmonisation ... We have too many guidelines ... too many harmonisation instruments. At the end we have to rely on the

\textsuperscript{589} Practitioner from Belgium, Interview 6.
\textsuperscript{590} Practitioner from Hong Kong, Interview 3.
\textsuperscript{591} Practitioner from Spain, Interview 1.
\textsuperscript{592} Practitioner from Australia, Interview 2.
experience and capability of the arbitration tribunal and especially the chairman.\textsuperscript{593}

Another interviewee pointed out the disparity in the practice of mediation around the world and the lack of international experience with it.

\textit{To me it’s too early to say that there is any harmonisation ... There are lots of parts of the world ... where there is a lot of discussion of mediation ... than there is any actual mediation of commercial cases ... That’s not a basis for any kind of harmonisation. People don’t even know what mediation is, if they have never mediated.}\textsuperscript{594}

Another interviewee criticised the focus of the ongoing debate on combinations.

\textit{It’s unfortunately been a debate that has not moved on in twenty years. Same arguments around at the conferences that I hear are being talked about. And there is not enough work being done to talk intelligently about it ... and to think more flexibly instead of debating it from the extremes of the spectrum.}\textsuperscript{595}

Yet another interviewee reminded about differences in the underlying attitude to the use of mediation in arbitration in various countries and limits to one’s procedural flexibility.

\textit{I would have thought that a German judge or arbitrator goes about it quite differently from a Chinese or Japanese ... But that is the underlying attitude ... Even depends on a dispute ... whether there is something that you can settle ... I think to some extent we are flexible but I have my own temperament, I have a certain way how I think things can be conducted most effectively.}\textsuperscript{596}

5.3.3.4 \hspace{1em} \textbf{Enforceability of the outcome}

Since UNCITRAL is considering the adoption of a convention on enforcement of settlement agreements resulting from international commercial mediation, one of the questions asked of the interviewees was whether they thought that combinations could become less attractive to parties if there was an international enforcement mechanism for mediated settlement agreements.

\textsuperscript{593} Practitioner from Spain, Interview 1.
\textsuperscript{594} Practitioner from the United States, Interview 5.
\textsuperscript{595} Practitioner from Australia, Interview 2.
\textsuperscript{596} Practitioner from Switzerland, Interview 4.
One interviewee disagreed that parties use a combination of mediation and arbitration to incorporate a mediated settlement agreement into an arbitral award.

*I don’t think people arbitrate because they want to have an enforceable mediated outcome.*

Another interviewee expressed doubts that the adoption of the convention would make a difference.

*Probably the things might change because that’s [the absence of an enforcement mechanism] one of the problems [with mediation]. But I mean, at the end to come to … settlement through mediation … you have to come to that and mediation does not always come to such a settlement of disputes.*

Many interviewees commented on whether an international enforcement mechanism for mediated settlement agreements was desirable in general. All, however, appeared to disapprove of the adoption of such mechanism for various reasons. For example:

*I, however, disagree … that there should be a separate international regime for the enforcement of mediation outcomes … Trying to make it as if it’s some sort of further enforceable obligation strikes at the heart of true consensus in the outcome of mediation.*

*I am troubled frankly by the fact that they are trying to create an international convention on mediation. All of this … regulatory superstructure being created for something that people have never experienced. I don’t know how you can do that. I am somewhat cynical about it.*

*I am very sceptical about this convention … One of the biggest problems in the whole thing is … it is not practised domestically … In the US judges give some credence to settlement agreements in mediations in the US because they know the process … There is a problem if it comes from abroad … How can you then overcome this credibility gap simply by binding international convention?*

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597 Practitioner from Australia, Interview 2.
598 Practitioner from Spain, Interview 1.
599 Practitioner from Australia, Interview 2.
600 Practitioner from the United States, Interview 5.
601 Practitioner from Switzerland, Interview 4.
5.3.4 Discussion

Legal culture

Section 5.2.3.2.6 explained the questionnaire result that diff neutral (arb)-med-arb is used more frequently than the same neutral (arb)-med-arb by reference to the legal culture of practitioners with experience in combinations: practices in practitioners’ home jurisdictions influence the way they perceive and use the same neutral (arb)-med-arb. The interview data supports this explanation. The interviewees observed that the extent of the use of the same neutral (arb)-med-arb varied from country to country. They referred to China, Japan, Korea, Germany and Switzerland as countries where arbitrators do not hesitate to act as mediators, while noting that this practice is uncommon for the United States and England. Given the fact that international dispute resolution involves neutrals and parties of different legal cultures, it appears desirable that more international dispute resolution practitioners become open to new ideas and ways of resolving disputes. International neutrals need to be capable and skilled to arrange a dispute resolution procedure in a way that accommodates parties from different legal cultures.602

Harmonisation trend

The interview data does not support a narrative in the literature addressed in section 4.4 suggesting that there is an emerging harmonisation trend favouring the same neutral (arb)-med-arb: common law practitioners are beginning to recognise that the roles of an arbitrator and a mediator are not fundamentally incompatible. The interview data revealed that it might be premature to talk about harmonisation. For harmonisation to occur it seems that many countries need to gain more experience with international commercial mediation. It appears that in some countries there is more discussion of mediation than its actual use in commercial cases. Rather than taking a rigid stance on

602 An interesting issue pointed by the interviewee from Hong Kong (cited in section 5.3.3.2) is that lawyers rather than legal culture are an impediment to the wider use of mediation in combination with arbitration. Nottage notes in this respect that ‘practices such as Arb-Med [same neutral arb-med-arb] come up against the “billable hours” model for funding legal practice – as well as defining career progression in large, increasingly multinational law firms’. See Luke Nottage, *Informalisation and Glocalisation of International Commercial Arbitration and Investment Treaty Arbitration in Asia*, in Formalisation and Flexibilisation in Dispute Resolution 211, 227 (Joachim Zekoll, Moritz Bälz & Iwo Amelung eds., Brill 2014). Similarly, Ali observes that financial pressures on lawyers prevent settlement: ‘[w]ith rates exceeding $650/hour, the potential financial impact of a quick settlement is … significant’. See Shahla F. Ali, *Barricades and Checkered Flags: An Empirical Examination of the Perceptions of Roadblocks and Facilitators of Settlement Among Arbitration Practitioners in East Asia and the West*, 19 Pac. Rim L. & Pol'y J. 243, 269 (2010). While the issue of lawyers opposing settlement is of growing concern, a further inquiry into this is beyond the scope of this thesis.
whether the same neutral (arb)-med-arb is an appropriate process, it appears desirable that dispute resolution practitioners learn to look for opportunities that combinations offer and avail only of those that are viable in light of the circumstances of each particular case.

**Enforceability of the outcome**

The interview data further corroborates the questionnaire result that the possibility of incorporating a mediated settlement agreement into a consent award is not the reason why parties use a combination of mediation and arbitration. Also, in contrast to the strong narrative in the literature, which assumes there is a need for an international convention providing for enforceability of mediated settlement agreements, the interviewees questioned the necessity of such convention and expressed various concerns related to this proposal. Their concerns include the lack of experience with mediation in some parts of the world, current absence of an enforcement mechanism for mediated settlement agreements on a domestic level, and the credibility gap, if a party seeks to enforce a mediated settlement agreement that originated from abroad.603

### 5.4 Conclusion

This Chapter has presented and discussed the key results of the two-phase empirical study conducted for this research project. The first phase employed a questionnaire to investigate the current use of mediation in combination with arbitration in international commercial dispute resolution. The second phase conducted through interview sought to elicit views of professionals concerning the most significant questionnaire results.

**Significant questionnaire results**

Section 5.2.4 identified four questionnaire results significant for the second phase of the empirical study. These are:

1. All combinations are used to a relatively low extent in international commercial dispute resolution.
2. Diff Neutral (Arb)-Med-Arb is the most common combination. The use of the same neutral (arb)-med-arb is minimal only.
3. The ability to convert a mediated settlement agreement into a consent award is neither perceived as a benefit of combinations nor availed of in practice.

603 While the need for a convention providing for enforceability of mediated settlement agreements is a fascinating issue to consider in the current international commercial dispute resolution environment, a further inquiry into this is beyond the scope of this thesis.
(4) All combinations are widely perceived as beneficial processes. The ability to preserve business relationships, and faster and less expensive resolution of the dispute (as compared to arbitration only) emerged as their top three benefits.

Interview results

The interview results presented in this Chapter relate to two of the four significant questionnaire results (Results 2 and 3). The interview results concerning the remaining two significant questionnaire results (Results 1 and 4) will be presented and discussed in Chapter 9. Chapter 8 will present and discuss more interview results concerning questionnaire Result 2. There is a reason why the interview results concerning questionnaire Result 2 are presented in two different chapters. While the interview results presented in this Chapter seek to explain the minimal use of the same neutral (arb)-med-arb, those presented in Chapter 8 explore ways to increase the use of this combination by addressing concerns associated with it. The interview results concerning questionnaire Results 2 and 3 presented in this Chapter are as follows:

1. When asked to explain the minimal use of the same neutral (arb)-med-arb, the interviewees observed that the extent of the use of this combination varied from country to country. In this way, the interviewees further supported the earlier explanation of this questionnaire result by reference to the practitioners’ legal culture: practitioners’ perception and use of the same neutral (arb)-med-arb largely depends on practices in their home country. Contrary to the narrative in the literature, assuming that there is an emerging harmonisation trend favouring the same neutral (arb)-med-arb, the interview data reveals that it might be premature to talk about harmonisation.

2. The interview data further corroborates the questionnaire result that the ability to convert a mediated settlement agreement into a consent arbitral award is not the reason why parties use combinations.

DiffNeutral (Arb)-Med-Arb (the most common combination according to the questionnaire participants) has been praised for avoiding concerns associated with the same neutral (arb)-med-arb\(^\text{604}\) analysed in section 3.3. At the same time, the same neutral (arb)-med-arb has been discussed in the literature as a process with the most potential for the increased time and cost efficiency of dispute resolution along with other advantages, as compared to any other combination. The thesis turns now to

\(^{604}\) Wolski, supra n. 3, at 259.
examining in Part IV the fourth research question: ways to address concerns associated with the same neutral (arb)-med arb.
PART IV. SOLUTIONS

Section 3.3 identified two principal groups of concerns associated with the same neutral (arb)-med-arb: behavioural concerns that surface in the mediation stage and procedural concerns that arise in the arbitration stage. The key behavioural concerns are parties’ reluctance to be open in their discussions with mediators, the inhibited conduct of mediators, parties’ use of mediation as a tactical tool, and the abuse of power by mediators resulting in the coercion of parties into a settlement. The procedural concerns include the danger that arbitrators will appear or actually be biased and the risk that the process may offend the principles of due process.

Part IV consists of three chapters and provides an answer to the fourth research question. It investigates ways to address behavioural and procedural concerns associated with the same neutral (arb)-med-arb. It identifies and evaluates three major ways the concerns can be addressed. First, through the involvement of different neutrals in each, mediation and arbitration, phase of a combined process. Second, by modifying the same neutral (arb)-med-arb procedure. Third, by implementing relevant safeguards for using the same neutral (arb)-med-arb. These three ways are discussed in Chapters 6, 7 and 8, respectively.

Most of the combinations examined in Chapters 6 and 7 have been introduced and defined in Chapter 2. Chapters 6 and 7 explore these processes further, identifying their strengths and weaknesses and giving specific examples of their use. The use of combinations is illustrated mostly through cases anecdotally reported by dispute resolution practitioners.\textsuperscript{605} Chapter 8 identifies and examines two key safeguards for using the same neutral (arb)-med-arb: party voluntary and informed consent to the process, and two main safeguard options for reducing concerns related to the use of caucuses.

\textsuperscript{605} It should be acknowledged that these cases are impossible to verify and their reporting may be tainted by the practitioner’s subjective interpretation of the circumstances of the case.
CHAPTER 6. INVOLVEMENT OF DIFFERENT NEUTRALS IN COMBINATIONS AS A WAY TO ADDRESS CONCERNS ASSOCIATED WITH THE SAME NEUTRAL (ARB)-MED-ARB

6.1 Introduction

This Chapter evaluates the involvement of different neutrals as a way to address concerns associated with the same neutral (arb)-med-ARB. Section 6.2 examines diff neutral (arb)-med-ARB, the most common combination, according to the questionnaire participants. Section 6.3 analyses combinations involving different neutrals as mediators and arbitrators other than diff neutral (arb)-med-ARB. These are shadow mediation, co-med-ARB, and four other combinations suggested by dispute resolution institutions. Section 6.4 examines (arb)-med-ARB opt-out – a combination that allows any party independently to call for a different neutral to act as the arbitrator after completion of the mediation phase of the process.

6.2 Diff Neutral (Arb)-Med-Arb

Bühring-Uhle et al. consider that the only solution to overcome the confusion of roles and the resulting interference between mediation and arbitration when both processes are conducted by the same neutral, is to conduct mediation and arbitration as two distinct processes.606 A clear separation can be achieved through having different persons perform the two tasks.607

Diff Neutral (Arb)-Med-Arb or the involvement of different neutrals in a sequential use of mediation and arbitration is widely supported in the literature on combinations.608 Fiechter emphasises that it is for good reasons that most mediation rules set the principle that mediators may not act as arbitrators, unless all participating parties ask a mediator to arbitrate the dispute.609 In most cases, the parties will feel more comfortable if the mediator hands over the arbitration proceedings to a different neutral. The CEDR Commission on Settlement in International Arbitration (CEDR Commission) prefers diff neutral arb-med-ARB over the same neutral arb-med-ARB that involves the use of

606 Bühring-Uhle et al., supra n. 46, at 249.
607 Ibid.
608 See, e.g., Masood, supra n. 139, at 276; Wolski, supra n. 3, at 260; Su Yin Anand, The Risks of Arbitration-Mediation: Hong Kong Courts Decline to Enforce PRC Arbitral Award, 16(2) Arb. News (Newsletter of the International Bar Association Legal Practice Division) 40, 42 (2011); Abramson, supra n. 60, at 3; Lack, supra n. 58, at 373; J. Martin H. Hunter cited in Bühring-Uhle, supra n. 118, at 209; Hill, supra n. 62, at 107.
609 Fiechter, supra n. 139, at 260.
caucuses in the mediation stage.\textsuperscript{610} Diff Neutral (Arb)-Med-Arb turned out to be the most common combination, according to the questionnaire participants.

\textbf{6.2.1 Advantages and disadvantages of diff neutral (arb)-med-arb}

There are at least three advantages of diff neutral (arb)-med-arb. The first obvious advantage of this process is that it eliminates the risk of compromising the procedural integrity of arbitration and undermining the efficacy of mediation,\textsuperscript{611} i.e. procedural and behavioural concerns associated with the use of the same neutral (arb)-med-arb. Second, the involvement of two different neutrals might improve the quality of both processes, if a process expert is chosen as a mediator and a legal or technical specialist as an arbitrator.\textsuperscript{612} Third, arbitrators’ power to confirm the agreement as an award is subject to their consent.\textsuperscript{613} This ‘health check’ of the settlement by someone other than the mediator might be particularly valuable where mediators do not have a legal qualification.

The obvious disadvantages of using two individuals, are additional costs and time as compared to the same neutral (arb)-med-arb.\textsuperscript{614} Unless a dispute is settled in the mediation phase, there is little savings in time and cost in diff neutral (arb)-med-arb.\textsuperscript{615} If the dispute proceeds or goes back to the arbitration stage, however, additional expenses may be reduced by authorising mediators to provide arbitrators with an agreed list of issues that are and are not in dispute.\textsuperscript{616}

A field experiment conducted at the Dispute Settlement Center in New York revealed other disadvantages of diff neutral med-arb as compared to the same neutral med-arb.\textsuperscript{617} In the former, mediators appeared to be less involved in the case and disputants were not as motivated to reach agreement as in the latter.\textsuperscript{618}

\textbf{6.2.2 Diff Neutral (Arb)-Med-Arb and legal culture}

In section 5.2.3.2.6, the thesis explained the questionnaire result that the most common combination is diff neutral (arb)-med-arb by referring to the legal culture of the

\textsuperscript{610} CEDR Appendix 2, supra n. 256, at ¶ 6. The starting preference of the CEDR Commission is the same neutral arb-med-arb that does not involve the use of caucuses.
\textsuperscript{611} Bühring-Uhle et al., supra n. 46, at 249; Deekshitha & Saha, supra n. 66, at 79; Newmark & Hill, supra n. 91, at 86.
\textsuperscript{612} Bühring-Uhle et al., supra n. 46, at 249; Deekshitha & Saha, supra n. 66, at 79.
\textsuperscript{613} Newmark & Hill, supra n. 91, at 86.
\textsuperscript{614} Ibid; see also Ehle, supra n. 16, at 85; Wolski, supra n. 3, at 258-259; Wilson, supra n. 508.
\textsuperscript{615} Wolski, supra n. 3, at 258-259.
\textsuperscript{616} Ibid, at 259.
\textsuperscript{617} Pruitt, supra n. 284.
\textsuperscript{618} Ibid, at 368.
participants with experience in combinations. Most of these participants practised in Common Law Asia Pacific and Continental Europe, with very few originating from countries known for their favourable attitude to mediation by arbitrators, like Germany, Austria, Switzerland, Japan and mainland China.

This questionnaire result combined with the reviewed literature indicates that practitioners who come from countries that disapprove of the same neutral acting as a mediator and arbitrator, in particular, view diff neutral (arb)-med-arb as a solution to concerns associated with the same neutral (arb)-med-arb. Many of these practitioners would have been those trained in the common law system that has traditionally demonstrated a preference for the separate use of mediation and arbitration by involving different neutrals as mediators and arbitrators.

While Singapore is one of the few common law jurisdictions that have adopted legislation facilitating the use of the same neutral (arb)-med-arb, its main mediation and arbitration centres, the Singapore International Mediation Centre (SIMC) and the Singapore International Arbitration Centre (SIAC), in cooperation, promote a combined process that involves different neutrals in the mediation and arbitration stages.

The two centres offer their combined services through an arb-med-arb clause\(^\text{619}\) that entails the application of the SIAC-SIMC Arb-Med-Arb Protocol.\(^\text{620}\) In accordance with this protocol, a party may start arbitration, proceed to mediation after appointment of the tribunal, and revert to the tribunal to incorporate a settlement agreement into a consent award. Unless parties agree otherwise, the arbitrators and the mediators are different persons.\(^\text{621}\) They are separately and independently appointed by the SIAC and the SIMC, respectively, under the applicable arbitration and mediation rules of each centre.

In Hong Kong, there is a similar disparity between the legislation facilitating the use of the same neutral (arb)-med-arb and the rules of the Hong Kong’s main international arbitration institution, which discourage the use of this process. The Mediation Rules of the Hong Kong International Arbitration Centre (HKIAC) differ from the provisions of the Arbitration Ordinance. Article 14 of the Mediation Rules prohibits the parties from appointing the mediator as adjudicator, arbitrator or representative, counsel or expert


\(^{621}\) What is Arb-Med-Arb?, supra n. 84.
witness of any party in any subsequent adjudication, arbitration or judicial proceedings whether arising out of the mediation or any other dispute in connection with the same contract. Unlike the approach taken by the SIAC-SIMC that establishes the involvement of different neutrals as a default rule, Article 14 is not a default provision. Consequently, parties cannot change it. HKIAC’s Arbitration Rules do not appear to provide for any mixing of mediation and arbitration either.

This disparity in both Singapore and Hong Kong between the legislation and the rules of the jurisdictions’ main dispute resolution centres can be explained by the conflicting influences of the Chinese tradition and Western standards. As observed in section 4.4, Kaufmann-Kohler has no doubt that the provisions on the same neutral (arb)-med-arb were included in the Hong Kong and Singapore arbitration statutes because of the influence of the Chinese tradition. While China is commonly regarded as a foremost proponent of the practice of using the same neutral as a mediator and an arbitrator, this practice seems to be disfavoured in the West. SIAC-SIMC and HKIAC appear to integrate the rules of Western institutional arbitration regimes into their own rules to standardise their mediation and arbitration procedures for Western parties resolving their disputes in Hong Kong and Singapore.

6.2.3 **Anecdotally reported cases**

6.2.3.1 **Resolution of a dispute in the mediation stage of diff neutral arb-med-arb**

In the following three cases parties who intended to use diff neutral arb-med-arb succeeded in resolving their dispute in the mediation stage. They did not need to go back to arbitration, which allowed them to make substantial savings of time and money. These cases illustrate the best case scenario for diff neutral arb-med-arb in terms of time and cost efficiency.

*International metals case*

In a case involving international metals arbitration in London, the parties agreed to attempt mediation with a leading London mediator. The sole arbitrator was requested to stay the arbitration proceedings, which were being conducted under the rules of a

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623 Kaufmann-Kohler, *supra* n. 22.
624 De Vera, *supra* n. 64, at 192 (speaking about the HKIAC Rules).
625 Connerty, *supra* n. 546, at 130 (reporting a case from his own professional experience where he acted as co-counsel together with in-house corporate counsel in that case).
London commodities association. The mediation was successful and the parties signed an agreement embodying the terms of settlement.

***Missing contractual base case***

In this case, the parties agreed to try mediation in Bern after exchanging the first submissions in arbitration proceedings in Zurich.\(^{626}\) It became clear during mediation that a situation had arisen which had not been contemplated in the initial contract, yet the contract had not been adjusted. The contract turned out to be totally inappropriate to deal with the situation. In one single mediation session, the parties imagined a fair contract for the future and then applied the solution retroactively.

Commenting on this case, Fiechter argues that the arbitrator could never have acted as the mediator because to succeed, the parties were to explore scenarios that could have been detrimental to their positions as expressed in arbitration.\(^{627}\) It would have been unthinkable for them to admit before the arbitrator that the contract on the basis of which they had based their respective positions was simply not an adequate basis for their relationship. In this case, Fiechter’s point may be true due to the particular circumstances of the case, which Fiechter only partially discloses; however, it would be a far stretch to say that arbitrators should never act as mediators in similar situations. Whether to do it or not will depend on numerous factors, including the legal background of the participants of a dispute resolution process. For instance, as noted in section 4.3, the same neutral arb-med-arb is a common practice for Chinese practitioners.

***Brazilian shareholders case***

In this case, the involvement of a professional mediator led to a settlement of one of the biggest shareholders’ disputes in Brazil’s corporate history: Casino’s (France) acquisition of Pao de Açucar - a leading supermarket chain in Brazil.\(^{628}\) After more than two years of a ruthless shareholding dispute for the control of the Brazilian supermarket chain, William Ury was appointed as a mediator to help parties settle their dispute. With William Ury’s involvement, the parties reached a simple two-page agreement. This contained only seven points and specified parties’ agreement to settle all disputes,

\(^{626}\) Fiechter, *supra* n. 139, at 259.

\(^{627}\) *Ibid.*

complaints or claims related to their partnership in Brazil, and bring to an end all arbitration cases brought by them throughout the dispute.

6.2.3.2 Resolution of a dispute in the arbitration stage of diff neutral arb-med-arb
In the following two cases parties did not settle in the mediation stage of diff neutral arb-med-arb and had to return to arbitration. Despite this, in the first case the parties still benefitted from the mediation stage by using it to agree on the relevant facts, which substantially reduced the number of issues left for the subsequent arbitration. This differed from what happened in the second case, where parties failed to reach any kind of agreement in the mediation stage of diff neutral arb-med-arb.

*Commodity delivery case*

The dispute involved several deliveries of a commodity, the price of which had fluctuated considerably and the quality of which was challenged. The contract was cancelled and damages resulted from the impossibility of selling the commodity on similar terms at the time when the buyer notified the seller about the cancellation. The parties appointed an arbitrator but agreed to try mediation first. Although the dispute could not be resolved in mediation, mediation enabled the parties to sort out numerous issues and to agree on the facts that were relevant. The arbitrator's task therefore became limited to establishing the few decisive disputed facts and drawing the legal consequences to rendering his award. This case demonstrates how the mediation stage of diff neutral arb-med-arb, even if it does not create conditions for resolving the dispute entirely, can be used to streamline arbitration, saving parties’ time and money.

*North Sea oil-drilling case*

This case illustrates an expensive and time-consuming scenario for diff neutral arb-med-arb. In this case, the parties returned to arbitration after the mediation stage had resulted in no agreement at all. The parties were in a dispute concerning sub-sea oil drilling structures for use in the North Sea. The claimant commenced arbitral proceedings. Part-way through arbitration the parties decided to try mediation and appointed a separate mediator. Numerous joint and private sessions took place throughout the two days allocated for mediation. The sessions involved the parties’ representatives, including lawyers, the commercial director of one party and the sub-contract manager of the other; and expert witnesses. By the end of the second day the parties agreed to

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629 Fiechter, *supra* n. 139, at 257-258.
630 Connerty, *supra* n. 546, at 132-134 (reporting a case from his own professional experience where he was appointed as the sole mediator).
adjourn the mediation so that discussions could continue. Further discussions took place but no agreement was reached. The arbitration resumed.

6.3 Involvement of Different Neutrals in Combinations Other Than Diff Neutral (Arb)-Med-Arb

Although diff neutral (arb)-med-arb eliminates most of the procedural and behavioural concerns associated with the same neutral (arb)-med-arb, it is not always a cost and time efficient combination. Parties may benefit from using processes like shadow mediation and co-med-arb because apart from eliminating many concerns associated with the same neutral (arb)-med-arb, these processes appear to be more time efficient than diff neutral (arb)-med-arb.631 This section explores shadow mediation, co-med-arb and four other combinations suggested by dispute resolution institutions.

6.3.1 Shadow mediation

In shadow mediation, mediators attend arbitration hearings and at promising moments during the proceedings such as at the beginning or end of each hearing day, conduct mediation. By attending arbitration hearings, mediators educate themselves about the facts of the case, which reduces the time that will need to be spent on mediation. This aspect of shadow mediation makes this process more time efficient than diff neutral (arb)-med-arb. However, similarly to diff neutral (arb)-med-arb, shadow mediation is not a cost efficient process due to the involvement of two neutrals.

According to Hunter, a process resembling shadow mediation is frequently employed in practice. In particular, Hunter observes that there are numerous documented examples of mediators being appointed by the parties to work independently of, and in parallel with, arbitral tribunals: the mediator receives all the materials received by the tribunal, and reviews these materials with the parties to evaluate the strengths and weaknesses of their positions.632 The following case illustrates the potential of shadow mediation to achieve financial savings.

Multi-party construction dispute

In a complex multi-party construction dispute with eight parties and claims and counterclaims totalling close to USD 9 million, three arbitrators were appointed and up

631 Ross, supra n. 23, at 358; see also Bühring-Uhle et al., supra n. 46, at 261 (referring to shadow mediation as an example of cooperation between two neutrals that may increase the efficiency of the combined use of mediation and arbitration by different neutrals).

632 Hunter, supra n. 424, at 472.
to fifty hearing days were anticipated. A retired judge was appointed as a mediator to ‘shadow’ the arbitration proceedings as an initially passive observer, being informed about the case and ready to step in as soon as the parties thought mediation attempts might make sense. The mediator tried to mediate twice. First, after a pre-hearing conference, which did not result in a settlement. Second, on the day of the main hearing, where a breakthrough occurred in mediation. Once each side gave a summary presentation of its case, the mediator met with all parties and engaged in intensive negotiations and shuttle diplomacy. After one and a half days, he was able to broker an agreement not only between the two main parties in dispute but also among the various subcontractors. The compensation for the mediator, who had spent a total of four days observing the arbitration and conducting the mediation and who charged the same per diem fee as the arbitrators, could easily be covered by the deposit the parties had made to cover the costs of the arbitration. Although the estimated costs of arbitration are not known, the savings achieved through the mediated settlement were around USD 500,000 - 750,000.

6.3.2 Co-Med-Arb

In co-med-arb, the arbitrator attends the joint mediation sessions, but does not participate in caucusing. If no settlement is reached in mediation, the arbitrator renders an award with or without additional hearings and documents, depending on the particular circumstances of the case. The key feature of co-med-arb is that mediation is divided into an open, and a confidential phase.

The most commonly given advantage of co-med-arb is that it reduces concerns associated with the same neutral (arb)-med-arb. In particular, parties may be interested in using co-med-arb because it seems to eliminate concerns of partiality, coercion and withholding of information by parties, while protecting the confidentiality and purpose of caucuses. In addition, the fact that the joint session serves to instruct both the mediator and the arbitrator, makes co-med-arb streamlined.

633 This case was administered by the American Arbitration Association. Reported in Bühring-Uhle et al., supra n. 46, at 261-262.
634 Ibid, at 262.
635 Elliott, supra n. 87, at 178; Peter, supra n. 61, at 102.
636 See, e.g., Limbury, supra n. 100, at 9; Elliott, supra n. 87, at 178.
637 Peter, supra n. 61, at 102; see also Steven Friel, Arbitration in Context (Chapter 3), in Arbitration in England, with Chapters on Scotland and Ireland 31, 42 (Julian D. M. Lew, Harris Bor, et al. eds., Kluwer Law International 2013) (regarding co-med-arb as a solution to the potentially ‘chilling’ effect of the same neutral med-arb).
638 Wolski, supra n. 3, at 269.
639 Peter, supra n. 61, at 102.
If the dispute is not settled in mediation, no time is lost because the arbitrator is already aware of the facts of the case. In summary, co-med-arb seeks to preserve the efficiency gains of a mediation process with the impartiality of an arbitration process.\(^{640}\)

Similarly to diff neutral (arb)-med-arb and shadow mediation, the disadvantage is that the involvement of an extra neutral makes co-med-arb cost intensive.\(^{641}\) Even if parties manage to settle in mediation and no arbitration award is needed, the arbitrator has to be paid anyway.\(^{642}\)

### 6.3.3 Other combinations suggested by dispute resolution institutions

A number of dispute resolution institutions offer parties the use of model multi-tiered clauses that are generally similar to one another. They often prescribe parties mediate as the first step, then, if required, arbitrate as the second step (that is diff neutral med-arb). For example, one of the ICC model clauses provides:

In the event of any dispute arising out of or in connection with the present contract, the parties shall first refer the dispute to proceedings under the ICC Mediation Rules. If the dispute has not been settled pursuant to the said Rules within [45] days following the filing of a Request for Mediation or within such other period as the parties may agree in writing, such dispute shall thereafter be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration.\(^{643}\)

The London Court of International Arbitration and the SCC have similar provisions.\(^{644}\) However, several dispute resolution institutions around the world suggest different combinations summarised below.

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\(^{640}\) Elliott, supra n. 87, at 178.

\(^{641}\) Wolski, supra n. 3, at 269; Limbury, supra n. 100, at 9.

\(^{642}\) Peter, supra n. 61, at 103.


6.3.3.1 Centre de Médiation et d’Arbitrage de Paris simultaneous and independent mediation and arbitration

In France, the Centre de Médiation et d’Arbitrage de Paris (CMAP) provides for simultaneous, parallel and independent mediation and arbitration proceedings in a case, using different individuals as mediators and arbitrators. This option mitigates concerns related to caucuses in the context of the same neutral (arb)-med-arb.

The CMAP approach has found some supporters. For example, Santos and de la Garcia recommend, among others, a dispute settlement clause providing for conciliation proceedings immediately after the arbitration proceedings have commenced, and without suspending or interrupting said proceedings.

6.3.3.2 International Centre for Dispute Resolution concurrent arbitration-mediation

In the United States, the International Centre for Dispute Resolution (ICDR) has developed a model ‘Concurrent Arbitration-Mediation’ clause (concurrent clause) that obligates parties to mediate at some point after the initiation of arbitration. This clause is as follows:

Any controversy or claim arising out of or related to this contract, or a breach thereof, shall be resolved by arbitration administered by the International Centre for Dispute Resolution in accordance with its International Arbitration Rules. Once the demand for arbitration is initiated, the parties agree to attempt to settle any controversy or claim arising out of or relating to this contract or a breach thereof by mediation administered by the International Centre for Dispute Resolution under its International Mediation Rules. Mediation will proceed concurrently with arbitration and shall not be a condition precedent to any stage of the arbitration process.

As noted by Andersen, the ICDR vice president, the ICDR presumes that arbitrators will not be mediators and that mediators will not be arbitrators in the same case, unless

647 Santos and de la Garcia quoted in Schneider, supra n. 41, at 74.
parties expressly agree otherwise after full disclosure of the risks involved. Parties can remove any doubts about this by expressly specifying: ‘Absent agreement of the parties, no mediator appointed pursuant to this agreement shall serve as an arbitrator and no arbitrator shall serve as a mediator’. Parties may decide to mediate whenever they believe it would be most productive, as long as it is prior to the issuance of the award. Mediation proceeds on a parallel track with arbitration, which alleviates concerns that a party can use mediation as a tactic to delay arbitration. If parties settle during the concurrent mediation, the concurrent clause allows the arbitral tribunal to incorporate the parties’ settlement in an award pursuant to the ICDR International Arbitration Rules. Interestingly, the ICDR Guide to Drafting International Dispute Resolution Clauses does not justify the use of mediation after commencement of arbitration for reasons related to concerns about the subsequent enforceability of the outcome. It takes into account parties’ concerns that early mediation will not allow them sufficient time to understand the case, making negotiations more perilous.

6.3.3.3 Judicial Arbitration and Mediation Services, Inc. Mediator-in-Reserve

Judicial Arbitration and Mediation Services, Inc. (JAMS), another dispute resolution centre in the United States, has developed a Mediator-in-Reserve Policy for international arbitrations that it administers. This policy provides that within one week of the commencement of an international arbitration, a list of suggested mediators is sent to the parties. The parties are encouraged to select a mediator from the list, who is placed in reserve during arbitration. This Mediator-in-Reserve is available to the parties to assist in settlement if, at any time in arbitration, all parties agree to use the mediator’s assistance. Parties are not charged for the appointment of the Mediator-in-Reserve, and they do not incur any fees unless and until they choose to use the mediator’s services. The Mediator-in-Reserve is not informed of the parties’ selection until and unless the parties decide to request the mediator’s services. The parties are not bound to use the Mediator-in-Reserve and may, at any time, mutually select another

650 Ibid.
651 Ibid.
652 See discussion in section 5.2.3.2.8 infra.
653 Guide to Drafting International Dispute Resolution Clauses, supra n. 648, at 5.
mediator to assist in their settlement. The arbitrator(s) have no knowledge of the identity of the Mediator-in-Reserve, or whether the parties may have engaged their services at any point in arbitration.

It is not a coincidence that the three above examples promoting the use of combinations involving different neutrals as mediators and arbitrators are offered by the US and French arbitration institutions. The ICDR concurrent arbitration-mediation and JAMS Mediator-in-Reserve are processes that accord and align with the traditional approach of the common law system that does not allow judges and arbitrators to be actively involved in facilitation of settlement, as explained in section 4.2. As for the combination available at the CMAP, again it reflects the practice of French judges and arbitrators who, as observed in section 4.2, appear to be reluctant to become involved in the settlement of their own cases, despite the fact that the French CCP expressly regards conciliation as one of their functions.

It is difficult to say which of the three processes (ICDR concurrent arbitration-mediation, CMAP simultaneous and independent mediation and arbitration, or JAMS Mediator-in-Reserve) has more potential of saving costs as compared to the others. In all three cases, even if parties settle in mediation, they can do so only after the commencement of arbitration. This means that in all three cases parties would have already incurred costs related to arbitration. If parties do not settle in mediation, in all three cases arbitration will run its full course.

6.3.3.4 Baltic and International Maritime Council combination

A final example of a combination involving different neutrals as a mediator and an arbitrator is a dispute resolution provision available at the Baltic and International Maritime Council (BIMCO).655 This provision allows a party, once arbitration has commenced, at any time to refer the dispute or part thereof to mediation by serving on the other party a written Mediation Notice.

If the other party agrees to mediate, the parties need to agree on a mediator within 14 calendar days, failing which, on the application of either party a mediator will be appointed by the Arbitration Tribunal or such person as the Tribunal may designate for that purpose. The mediation is to be conducted in accordance with parties’ agreement or, in the event of disagreement, as may be set by the mediator.

If the other party does not agree to mediate, that fact may be brought to the attention of the Tribunal and may be taken into account by the Tribunal when allocating the costs of the arbitration between the parties.

If parties agree to mediate, the arbitration procedure continues during mediation but the Tribunal may take the mediation timetable into account when setting the timetable for arbitration. The mediation process is without prejudice and confidential, and no information or documents disclosed during it can be revealed to the Tribunal, except to the extent that they are disclosable under the law and procedure governing the arbitration.

Although this BIMCO provision does not oblige parties to mediate after commencement of arbitration, the fact that an award of costs can be made against a party who refuses to mediate creates a strong incentive for a party receiving a suggestion to mediate to accept it.656

The four combinations presented in this section provide alternatives to diff neutral (arb)-med-arb. All four combinations involve different neutrals acting as a mediator and an arbitrator. This, similarly to the situation with diff neutral (arb)-med-arb, eliminates behavioural and procedural concerns associated with the same neutral (arb)-med-arb, and makes the dispute resolution process more expensive than the same neutral (arb)-med-arb. The four combinations, however, may be more time efficient than diff neutral (arb)-med-arb, because in all four cases mediation proceeds on a parallel track with arbitration. In diff neutral (arb)-med-arb, arbitration and mediation are used in sequence.


Behavioural and procedural concerns associated with the same neutral (arb)-med-arb may be allayed to a certain extent by (arb)-med-arb opt-out – a process that allows each party independently to call for a different person to act as the arbitrator after completion of the mediation stage of the process.657

Panchu even argues that it is neither just nor effective to bind parties at the commencement of arbitration or mediation to enter into the second process on the

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656 Hunter, supra n. 424, at 474.
657 Bühring-Uhle et al., supra n. 46, at 253; Peter, supra n. 88, at 164; Peter, supra n. 61, at 99; Blankenship, supra n. 62, at 37; Sussman, supra n. 157, at 71; Berger, supra n. 559, at 394; Limbury, supra n. 100, at 9.
failure of the first.\textsuperscript{658} To ensure party autonomy and choice Panchu considers it important that the parties exercise their choice whether to engage in the same neutral (arb)-med-arb closest to when the second process can commence.\textsuperscript{659} If mediation is attempted and has not succeeded, then the mediator becomes an arbitrator only if both parties are willing at that stage. Similarly, in the case of arb-med-arb, each party must be willing to mediate after arbitration hearings; however, as pointed out in section 3.1, concerns arise when arbitration follows mediation and the former mediator acts as an arbitrator. No concerns are raised when the arbitrator takes on the role of a mediator. Taking this into account, it appears that obtaining parties consent to the former mediator becoming the arbitrator is much more important in terms of alleviating concerns associated with the same neutral (arb)-med-arb, than the former arbitrator becoming the mediator.

(Arb)-med-arb opt-out allows parties to avoid being submitted to a binding decision by the former mediator. Parties may choose to do so if, based on the conduct in mediation, they doubt the mediator’s impartiality, or if they have disclosed highly sensitive information that might influence the decision.\textsuperscript{660}

6.4.1 Advantages and disadvantages of (arb)-med-arb opt-out

(Arb)-med-arb opt-out may appeal to parties for at least three reasons.\textsuperscript{661} First, it allows parties to express reservations as to the neutral’s impartiality and ability to decide on the dispute. If parties consider that the neutral can no longer act impartially, they can appoint a new arbitrator to render the award. This upholds the integrity of the process and the award. Second, (arb)-med-arb opt-out increases the likelihood that parties will be candid in mediation. This is because parties know that if they do not reach a settlement in mediation, they can appoint another neutral as the arbitrator. Third, (arb)-med-arb opt-out might eliminate the issue of coercion. As discussed in section 3.3.1.4, vesting the authority to decide on the dispute in the same person who mediates, creates enormous power in a dual role neutral in the same neutral (arb)-med-arb. The dual role neutral may use the threat of an award to coerce parties into settlement in the mediation stage. Mediators in (arb)-med-arb opt-out do not have this kind of power, because mediators cannot be sure that they will act as arbitrators, as parties still need to decide on this issue. Concerns related to the same neutral acting as a mediator and an arbitrator.


\textsuperscript{659} \textit{Ibid}, at 104.

\textsuperscript{660} Bühring-Uhle et al., supra n. 46, at 253-254.

\textsuperscript{661} \textit{Ibid}, at 254; Peter, supra n. 61, at 99-100; Blankenship, supra n. 62, at 37.
may even prove unfounded once parties are engaged in the process.\textsuperscript{662} Or, the mere existence of a right to veto the process could create an atmosphere which eliminates the need to actually do so.\textsuperscript{663}

Parties may refrain from using (arb)-med-arb opt-out for at least three reasons. First, parties may lose the incentive to settle created by the neutral’s authority to decide. As discussed in section 3.2.5, this incentive is one of the six advantages attributed to the same neutral (arb)-med-arb. Second, if parties proceed with the new arbitrator, the process transforms into mediation followed by arbitration conducted by two different neutrals. This leads to higher costs and lengthier proceedings, as compared to the same neutral (arb)-med-arb.\textsuperscript{664} However, unlike where the parties simply agree to mediate, and then (if mediation does not result in a settlement) to arbitrate their dispute by a different neutral, in (arb)-med-arb opt-out the chance that the parties will keep the same neutral for both stages seems to be higher.\textsuperscript{665} Finally, if parties choose to continue with the same neutral, the risk of a breach of due process, a major procedural concern associated with the same neutral (arb)-med-arb discussed in section 3.3.2.2, remains.\textsuperscript{666}

Similarly to other combinations, (arb)-med-arb opt-out is a valuable dispute resolution option that parties may find useful depending on the particular circumstances of their case. Before agreeing to use (arb)-med-arb opt-out, it is essential that parties inform themselves about the advantages and disadvantages associated with this combination. Their decision to use (arb)-med-arb opt-out must be an informed decision. The same requirement applies to the use of other combinations.

\textbf{6.4.2 Med-Arb Opt-Out and the potential to reach an agreement in mediation}

Med-arb opt-out (more so than arb-med-arb opt-out) might be the combination that creates best conditions for parties to reach an agreement in mediation.\textsuperscript{667} The analysis of the following four different consequences that can result from the mediation phase of all combinations allows drawing this conclusion.

First, the mediation phase may lead to an agreement that resolves all issues in dispute. This is obviously the preferred outcome and the main goal of mediation.\textsuperscript{668} However, it

\textsuperscript{662} Blankenship, supra n. 62, at 37.
\textsuperscript{663} Ibid.
\textsuperscript{664} Peter, supra n. 61, at 100; Ross, supra n. 23, at 365; Limbury, supra n. 100, at 9.
\textsuperscript{665} Peter, supra n. 61, at 100 n. 76.
\textsuperscript{666} Limbury, supra n. 100, at 9.
\textsuperscript{667} Peter, supra n. 61, at 117.
\textsuperscript{668} Ibid, at 115-116.
appears that most of the discussion of mediation focuses exclusively on this possibility. The possibility of reaching a partial agreement is not considered sufficiently.

Second, the mediation phase may end with an agreement on a cooperative concept to resolve the dispute. This is an agreement that transforms the dispute from a rights-based arbitration focused on the past, into an interest-based arbitration focused on the determination of a new contract. In this way, legal issues are diminished and business interests are emphasised. This result can be illustrated by a situation where parties, instead of quarrelling over the damages, agree to an imposed license for which the fee has yet to be determined.669

Third, the mediation phase may result in an agreement on a streamlined procedure or a consensus on factual and legal issues.670 If parties do not manage to reach any of the two previously mentioned types of the agreements, they can still agree on other matters that may assist them with settling their dispute. For example, parties may agree on how to proceed to settle their dispute or negotiate to eliminate certain disputed issues, or elaborate procedural rules (such as 'last offer arbitration') and rules concerning the process style. If the applicable law is in question, parties could agree on a particular law to apply to the entire dispute or to its certain part.671

Fourth, the mediation phase may result in no agreement at all.672 Peter laments that this outcome is too often perceived as the only alternative to an agreement that disposes entirely of the dispute (option one). Parties may benefit more from mediation used either as a stand-alone mechanism or as part of a combination, if more neutrals conducting mediation work towards achieving a partial agreement (options two and three).673 Considering that efficiency is one of the important benefits that combinations can contribute to international arbitration, combinations that encourage or at least allow termination of the mediation phase by a partial agreement might be more favourable than others.

669 Ibid, at 116 (another example would be the Washington Agreement in the IBM-Fujitsu case discussed in section 9.5.3 infra).
670 Ibid.
671 Ibid.
672 Ibid.
673 Ibid; see also Stipanowich & Ulrich, supra n. 16, at 9 (pointing out that over the years, there have been efforts to ‘think outside the box’ of the linear framework of stepped dispute resolution by exploiting its potentials in different ways; for example, even where substantive issues cannot be resolved in mediation, mediators may focus on facilitating agreements regarding dispute resolution process elements and helping parties to set the stage for arbitration proceedings with features that are effectively tailored to the issues at hand).
The chance that the mediation phase will end with a partial agreement as per options two and three above appears to be higher if the mediation phase takes place prior to the arbitration phase. Beginning with arbitration may make parties focus from the very beginning on the arbitration process, which determines (psychologically and technically) to a large extent how the dispute’s settlement is approached.\textsuperscript{674} The focus on the arbitration process may diminish the possibility that parties will change the track they are already on, by agreeing to a partial settlement, as described in options two and three above.\textsuperscript{675} This lessens the attractiveness of combinations starting with arbitration, like co-med-arb or arb-med-arb.\textsuperscript{676}

Combinations that begin with mediation, like the same neutral med-arb and med-arb opt-out become more appealing because they appear to create good conditions for parties to reach an agreement in mediation. What may make med-arb opt-out preferable over the same neutral med-arb is that it reduces many concerns associated with the use of the same neutral med-arb. It has, however, its own disadvantages, as compared to the same neutral (arb)-med-arb, as discussed in section 6.4.1.

\textbf{6.4.3 Med-Arb Opt-Out and CIArb’s hybrid process}

In 2008, the Australian branch of CIArb prepared what it regarded as draft hybrid dispute resolution rules.\textsuperscript{677} These provided for a process that resembles med-arb opt-out. Although these rules have never come into force, the approach taken by the drafters is interesting to consider because it is another example of how mediation and arbitration can be used in combination.

The process in the draft rules differs from med-arb opt-out in at least two respects. First, it calls for the appointment of two neutrals at the commencement of proceedings, with one neutral staying in reserve and stepping in only if the first neutral resigns. Second, the first neutral mediates the dispute after being appointed as the arbitrator. The default provisions of the rules authorise the first neutral to caucus with the parties but forbid expressing any opinion as to the likely outcome of the dispute if it were to go to arbitration. If mediation results in a settlement, the first neutral, upon request by the parties, produces a consent award. If mediation does not result in a settlement, the first neutral proceeds as an arbitrator. Before the first neutral does so, the parties must

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{674} \textit{Peter, supra} n. 61, at 117.
  \item \textsuperscript{675} \textit{Ibid}.
  \item \textsuperscript{676} \textit{Ibid}.
  \item \textsuperscript{677} All materials related to the CIArb draft hybrid dispute resolution rules were provided by Albert Monichino by email of 31 March 2014.
\end{itemize}
\end{footnotesize}
provide a written authority acknowledging that they agree to the first neutral continuing to act as an arbitrator; they have had an opportunity of obtaining legal advice before agreeing to such continuation; and they have no objection to the first neutral conducting the arbitration.

The first neutral that proceeds as an arbitrator must disregard any information from caucuses and is prohibited from disclosing it. The first neutral who is unable to continue impartially as an arbitrator after mediation must resign. Then the second neutral will act as an arbitrator. Similarly, the first neutral will resign if any party objects to the first neutral continuing to act as an arbitrator. The first and the second neutrals are not allowed to discuss with each other anything said or done in the mediation phase of the process.

While it is not clear why the rules did not come into force, it is likely that even if put into effect the rules would not have gained popularity due to being cumbersome and limiting parties’ autonomy to design their own process.

6.5 Conclusion

The involvement of different neutrals in combinations is the first of three ways to address concerns associated with the same neutral (arb)-med-arb. The main advantage of combinations involving different neutrals as mediators and arbitrators is that they eliminate concerns associated with the same neutral (arb)-med-arb. Their main disadvantage, as compared to the same neutral (arb)-med-arb, is additional costs and time, due to the involvement of different neutrals. The questionnaire findings combined with the literature review indicate that diff neutral (arb)-med-arb is viewed as a solution to concerns associated with the same neutral (arb)-med-arb mostly by common law practitioners. This is due to the traditional common law preference for the separate use of mediation and arbitration by involving different neutrals as mediators and arbitrators.

Anecdotally reported cases on the use of diff neutral arb-med-arb demonstrate that despite the involvement of different neutrals, this combination can still save parties’ time and money. Even if parties do not manage to resolve their dispute in the mediation stage, they can use mediation to agree on matters that may assist them in the following arbitration stage. For example, they may agree on disputed or undisputed facts. Using the mediation stage of diff neutral arb-med-arb in this way can increase the time and cost efficiency of the process.
Combinations like shadow mediation and co-med-arb appear to be more time efficient than diff neutral (arb)-med-arb. In shadow mediation, mediators attend arbitration hearings and do not need any time to educate themselves about the facts of the case at the commencement of mediation. In co-med-arb, arbitrators become aware of the facts of the case by attending joint mediation sessions, which saves time, if arbitration is needed.

Some dispute resolution institutions administer other combinations involving different neutrals: JAMS Mediator-in-Reserve, BIMCO combination, ICDR concurrent arbitration-mediation, and CMAP simultaneous and independent mediation and arbitration. Similarly to diff neutral (arb)-med-arb, the involvement of different neutrals in these four processes eliminates concerns associated with the same neutral (arb)-med-arb, but increases costs of dispute resolution, as compared to the same neutral (arb)-med-arb; however, these processes may be more time efficient than diff neutral (arb)-med-arb because in all four cases mediation proceeds on a parallel track with arbitration. In diff neutral (arb)-med-arb, mediation and arbitration are used in sequence.

(Arb)-med-arb opt-out allows each party independently to call for a different person to act as the arbitrator after completion of the mediation stage. This alleviates behavioural concerns associated with the same neutral (arb)-med-arb, particularly parties’ reluctance to be open in mediation, and the abuse of power by a mediator resulting in the coercion of parties into a settlement. If parties decide to proceed with a different person as the arbitrator, the process transforms into diff neutral (arb)-med-arb. Med-arb opt-out (more so than arb-med-arb opt-out) appears to create best conditions for parties to reach an agreement in mediation, as compared to other combinations.
CHAPTER 7. PROCEDURAL MODIFICATIONS OF THE SAME NEUTRAL (ARB)-MED-ARB AS A WAY TO ADDRESS CONCERNS ASSOCIATED WITH THIS PROCESS

7.1 Introduction

This short Chapter considers the second way to address concerns associated with the same neutral (arb)-med- arb. This is by modifying the same neutral (arb)-med- arb procedure. The effect of these procedural modifications on concerns associated with the same neutral (arb)-med- arb, however, is different from that of combinations involving different neutrals discussed in Chapter 6. While the latter effectively eliminate these concerns, the former mostly reduce them.

This is because the procedural modifications still involve the use of the same neutral as a mediator and arbitrator. What changes is the arbitration part of the process (MEDALOA), or the sequence in which mediation and arbitration are used (arb-med), or who among a three-member tribunal conducts mediation (mediation by only some members of a three-member arbitration tribunal). These three procedural modifications of the same neutral (arb)-med- arb are explored in sections 7.2, 7.3, and 7.4, respectively.

7.2 MEDALOA

Some of the behavioural and procedural concerns raised by the same neutral (arb)-med-arb may be eased by modifying the arbitration part of the process and incorporating last offer arbitration into it.678

As defined in section 2.3.6, MEDALOA (Mediation and Last Offer Arbitration) means a process that starts with mediation and if parties do not settle in the mediation stage, each party submits a ‘last offer’ to dual role neutrals who choose between one of them. While MEDALOA is commonly discussed as a modification of the same neutral med- arb, it is equally relevant to the same neutral arb-med- arb; if mediation does not result in a settlement and dual role neutrals resume as arbitrators, parties may authorise them to choose between the parties’ last offers.

While not a complete cure for concerns associated with the same neutral (arb)-med- arb, this change gives parties an opportunity to resolve the case in the mediation phase, and also has the virtue of ‘limiting’ the award that can be issued by neutrals, if the process

678 Flake, supra n. 48, at 8-9; Hindle, supra n. 77, at ¶ 40[g].
goes to the arbitration phase. Two high profile US cases illustrate the use of MEDALOA.

In the first case, Conoco Inc. and Browning Ferris Industries became involved in an environmental clean-up dispute over responsibility for paying to clean-up a holding pond in which hazardous chemicals had been dumped.\textsuperscript{679} After 3 years of fruitless litigation and increasing cost and complexity, the parties agreed to MEDALOA. Nine months of mediation settled most issues and narrowed the difference between the parties over liability. The mediator became arbitrator and chose one of the final offers made by each party.

The second case, Federal Deposit Insurance Corporation and Cheny, Bekart and Holland involved a claim that auditors had misrepresented the status of a bank which had defaulted.\textsuperscript{680} After spending $2 million in fees and costs without getting to trial, the parties agreed to mediation, and ultimately to final offer arbitration to settle the remaining issues.

A review of the literature shows that MEDALOA is a combination well known in the United States. Last offer or ‘baseball’ arbitration (one of the two key components of MEDALOA) was conceived in the United States and was originally used to resolve salary disputes in Major League Baseball.\textsuperscript{681} Continental European and East Asian practitioners do not appear to be familiar with the concept of MEDALOA. At least, no reference to MEDALOA has been found in the literature outside the context of the United States.

7.2.1 Advantages and disadvantages of MEDALOA

The incorporation of last offer arbitration is likely to result in the parties putting their best settlement foot forward in the mediation phase of the proceeding,\textsuperscript{682} being reasonable\textsuperscript{683} and less prone to inflate their offer lest it not be chosen.\textsuperscript{684} Moreover, MEDALOA may reduce the risk of bias, since the arbitrator does not decide but chooses a resolution proposed by the parties.\textsuperscript{685} The neutral may even continue mediation after the best offers are submitted to see whether a compromise could be

\textsuperscript{679} Reported in Elliott, supra n. 87, at 165.
\textsuperscript{680} Ibid.
\textsuperscript{681} Borris, supra n. 124, at 307.
\textsuperscript{682} Flake, supra n. 48, at 9; see also Borris, supra n. 124, at 311 (noting that by including final offer arbitration, the parties are given an additional incentive to continue mediation in good faith—more so than in the case of med-arb).
\textsuperscript{683} Thomson, supra n. 89, at 5.
\textsuperscript{684} Ross, supra n. 23, at 362.
\textsuperscript{685} Ibid.
reached. As a variation of MEDALOA, parties may agree that any of them may opt out of the process after exchanging final offers but before presenting them to the neutral for consideration. Both parties are then in a position to decide whether an award against them will be within a range that they can accept.

One of the MEDALOA’s limitations appears to be its relative inability to solve the dispute on something other than strictly monetary terms. Also, dual role neutrals are not allowed to settle the dispute in a way neutrals consider appropriate even if neither party submits a last offer which seems reasonable to them, which may occur, for example, in cases of multi-issue disputes. Arbitrators, however, may manage this situation by asking parties to submit more than one final offer.

7.2.2 Use of MEDALOA in domestic v. international context

Interestingly, the drivers behind the use of MEDALOA in the domestic context might not exist in the international setting. It appears that in the United States, an important rationale behind the use of MEDALOA in the domestic context, is that the US arbitrators tend to compromise and ‘split the baby’. Assuming arbitrators will ‘split the baby’, parties may hesitate to compromise in the mediation phase of the same neutral (arb)-med-arb to gain more when the arbitrator eventually comes to the stage of making a decision. MEDALOA, however, seems to compel parties to make reasonable concessions because arbitrators are more likely to choose the last offer they decide is more balanced. The process appears to drive parties towards a compromised settlement, which may enhance the success of the mediation phase of the process. Also, it seems the process becomes even more attractive the more the issue lacks well defined rights for decision making purposes.

In international arbitration, however, it appears to be less common for arbitrators to ‘split the baby’. Consequently, in the United States, parties may be less hesitant to seek a compromise in the mediation phase of the same neutral (arb)-med-arb in an international context rather than in the domestic context. Although this might eliminate the main incentive to agreeing to MEDALOA in international arbitration, MEDALOA may still be suitable for certain disputes. It is better to leave the decision whether to use it until the dispute has actually emerged.

686 Flake, supra n. 48, at 9.
687 Thomson, supra n. 89, at 7.
688 Ibid; Flake, supra n. 48, at 9.
689 Peter, supra n. 61, at 102.
As noted above, it appears that for now MEDALOA has gained ground in the US practice only. Given the advantages that MEDALOA offers, it seems reasonable to suggest that more efforts need to be made to increase awareness of Continental European and East Asian practitioners of this combination.

7.3 Arb-Med

As defined in section 2.3.6, arb-med is a process beginning with arbitration resulting in an award that is placed in a sealed envelope and kept confidential. Then the former arbitrator becomes a mediator. If parties do not settle in mediation, the award is revealed and becomes binding. Otherwise, the neutral never discloses the award.

Oghigian recalls his experience as a dual role neutral in arb-med in three cases, each involving one Japanese and one American party. In all three cases Oghigian prepared a formal arbitral award after the arbitration hearing, met with parties and placed an envelope with the signed and sealed arbitral award on the table. After informing parties that he was fully discharged of his duties as an arbitrator, he suggested that if parties agreed in writing, he could attempt to mediate. All participants (including the neutral) could at any time terminate the process. In all three cases, parties eagerly accepted the suggestion and the matter was successfully mediated and settled.

Oghigian refers to arb-med as the most effective way to disarm a possible challenge to a dual role neutral’s ability to maintain impartiality in both roles in the same neutral (arb)-med-arb. More pragmatic commentators suggest that when compared to the same neutral (arb)-med-arb, arb-med could be considered the lesser of the alleged evils, as it raises fewer ethical concerns.

7.3.1 Advantages of arb-med

In arb-med, mediation occurs after a decision has been reached on the merits. This eliminates a concern associated with the same neutral (arb)-med-arb that in rendering their decision arbitrators may be partial further to parties’ disclosures during mediation. Arb-med also prevents parties from using mediation tactically, which is

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691 Oghigian, supra n. 44, at 111.
692 ibid (observing that he draws no particular inference from the origin of the parties but states it as a common feature for the record).
693 ibid.
694 Ross, supra n. 23, at 359; Peter, supra n. 88, at 164-168; Sussman, supra n. 157, at 71; Sussman, supra n. 27, at 384-385.
695 See discussion of this concern in section 3.3.2.1 supra.
696 Oghigian, supra n. 44, at 112.
another concern commonly associated with the use of the same neutral (arb)-medARB. In the same neutral (arb)-medARB, there is a fear that parties may use mediation to present their position, not with a genuine view to achieving a settlement, but tactically, to lay the groundwork for the subsequent arbitration phase of the process. Since mediation in arb-med occurs after arbitration resulting in an award, parties cannot use mediation tactically to influence the arbitrators’ decision.

Another advantage of arb-med is that parties seem to demonstrate less grandstanding and belligerency in post-arbitral mediation, because they may feel that they have been given the opportunity to put their best case in the adversarial setting. Also, by the time of mediation each side has a fair idea of its strengths and weaknesses, which may make them receptive to exploring settlement avenues with someone who knows the file very well.

Parties’ motivation to achieve settlement in the mediation part of arb-med has been confirmed empirically in a 2002 study by Conlon, Moon and Ng. They conducted a field experiment, in which they examined the impact of the same neutral medARB and arb-med on various dispute outcomes. These researchers found that disputants in arb-med settled in the mediation phase of their procedure more frequently than did disputants in the same neutral medARB.

Arb-med appears to reduce one more concern commonly associated with the same neutral (arb)-medARB and discussed in section 3.3.1.2 - the inhibited conduct of a mediator. Oghigian recalls his feelings as a mediator in the mediation part of arb-med: he felt both liberated and empowered. He felt liberated because he could be assertive and somewhat opinionated, without risking that someone could claim bias. The arbitral award was already on the table and at any point either party could end mediation. He felt empowered because having acted as an arbitrator he knew the soft spots of each party’s case and could move them towards a possible compromise solution with a free hand and foreknowledge. In Oghigian’s view, arb-med allowed him to play a much more effective role as a mediator. While this can definitely be the case, the mediation style adopted by Oghigian could make parties feel as though they are being coerced into accepting his solution. To avoid this risk, arbitrators turned mediators could consider

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697 See discussion in section 3.3.1.3 supra.
698 Panchu, supra n. 658, at 104.
699 Conlon, Moon & Ng, supra n. 45.
700 Ibid, at 982.
701 Oghigian, supra n. 44, at 112.
702 Ibid.
adopting a facilitative, interests-based approach because the purpose of arb-med is to allow parties to forge their own settlement, rather than accept the decision of the arbitrator.\(^{703}\)

Arb-med seems to be particularly useful when parties have an ongoing relationship and when they want some degree of control and finality.\(^{704}\) Oghigian reports that in all three above-mentioned arb-med cases where he acted as a dual role neutral, parties although in a significant commercial dispute, expressly stated their intent to continue their business relationship.\(^{705}\) The real driver in the use of arb-med may have been the ultimate wish of the parties to continue their commercial relationships.\(^{706}\) Arb-med may be a preferred option in countries where enforceability of a mediated settlement agreement reached before commencement of arbitration as a consent award might be an issue.\(^{707}\) Anecdotal evidence suggests that the process can be of help in business negotiations, not just in dispute resolution.\(^{708}\)

### 7.3.2 Disadvantages of arb-med

Arb-med does not save time and costs.\(^{709}\) Regardless of whether parties manage to settle their case in the mediation phase, the arbitration process will run its full course. Thus, there appears to be no incentive of eliminating a time-consuming and cost-intensive arbitration for parties in reaching a settlement.\(^{710}\) While going through an entire arbitration process requires substantial money and time, engaging in mediation after arbitration will involve even more time and money.\(^{711}\)

Also, having gone through the highly adversarial arbitration process, parties may have psychological difficulties working through the issues together. They might be reluctant to make the effort to engage in mediation, after trying to convince arbitrators to decide in their favour.\(^{712}\) Instead of focusing on reaching a settlement in mediation, each party might attempt to figure out what neutrals decided in the sealed arbitral award. If one party thinks that neutrals’ behaviour indicates that they have issued an award in its

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\(^{703}\) Ross, supra n. 23, at 359.

\(^{704}\) Ibid.

\(^{705}\) Oghigian, supra n. 44, at 111.

\(^{706}\) Burr, supra n. 68, at 72 (commenting on Oghigian’s experience).

\(^{707}\) Ibid.

\(^{708}\) Lack, supra n. 58, at 358 n. 19 referring to Michael Leathes et al., Einstein’s Lessons in Mediation, Managing Intellectual Property 23 (Jul./Aug. 2006) (presenting a case study describing how arb-med was used in business negotiations when the parties disagreed on an issue of price).

\(^{709}\) Peter, supra n. 61, at 100; Deekshitha & Saha, supra n. 66, at 81 & 93; Wilson, supra n. 508.

\(^{710}\) Peter, supra n. 61, at 100-101.

\(^{711}\) Ibid, at 100.

\(^{712}\) Ibid.
favour, this party may be less willing to engage in mediation and negotiate with another party.\footnote{Ibid, at 101; Rewald & Jachimek Weil, supra n. 164, at 3; but see Deekshitha & Saha, supra n. 66, at 80 (noting that the fact that neither party can be certain that the award is in their favour encourages cooperation in the mediation stage).} Nevertheless, as noted in section 7.3.1, the available empirical data demonstrates that parties settle more frequently in the mediation phase of arb-med than the same neutral med-arb.\footnote{Conlon, Moon & Ng, supra n. 45, at 983.}

Analysing the results of their field experiment, Conlon, Moon and Ng identify three environments in which the same neutral med-arb might still be preferable to arb-med: when there is significant time pressure; when the financial costs of paying for a third party need to be minimized; and when there is considerable hostility between disputants.\footnote{Ibid.} In the last situation, beginning with the more adversarial arbitration phase might be unwise because it may further heighten animosity between the parties, making it unlikely that mediation will be successful.

7.3.3 \textit{Arb-Med and a hybrid hearing in Queensland}

In 2012, the Queensland Civil and Administrative Tribunal introduced a process called a ‘hybrid hearing’,\footnote{Queensland Civil and Administrative Tribunal, Hybrid Hearings (effective 3 Sep. 2012), available at http://www.qcat.qld.gov.au/using-qcat/practice-directions#2012}. which resembles to a large extent arb-med. In a hybrid hearing, parties attend a hearing first, and then attend a mediation after the hearing. Both the hearing and the mediation take place on the same day. The award is sealed in an envelope following the hearing. If parties are unable to reach agreement on all issues in mediation, the envelope is opened and the decision becomes binding. Both the adjudicative and mediatory functions are performed by the same neutral. However, the neutral is not allowed to meet with any of the parties in a private session in mediation. A hybrid hearing might be useful when the issues in dispute are simple, the amount involved is not large, and the hearing can be expedited and simplified.\footnote{Wolski, supra n. 3, at 264.} It is, however, unlikely to be suitable for the majority of international commercial disputes due to their complexity and high amounts at stake.

7.4 Modifications Relevant to a Three-Member Tribunal

In arb-med-arb, an arbitral tribunal consisting of three arbitrators offers significant flexibility in configuring a pathway toward helping parties settle a case. Involvement in mediation of only some members of the tribunal is a way to reduce concerns associated
with the same neutral (arb)-med-arb. At least four configurations of a panel have been identified.\textsuperscript{718}

First, mediation may be conducted by the two co-arbitrators, while reserving the chair for the arbitration hearing.\textsuperscript{719} This would ensure that the chair is not privy to and, consequently, not influenced by confidential information. If settlement efforts are unsuccessful, the chair could serve as a sole arbitrator. Alternatively, all three arbitrators could hear the case.

Second, the chair could serve as the mediator, preserving the relative impartiality of the co-arbitrators.\textsuperscript{720} If the case does not settle, the three-person panel would hear the case but it may be agreed that only the two co-arbitrators would issue an award. A tie between the two co-arbitrators could be broken by the chair.

Third, when three arbitrators are selected, one co-arbitrator could serve as a mediator while the chair and another co-arbitrator function only as arbitrators. This arrangement would preserve the impartiality of two arbitrators.\textsuperscript{721} If the case does not settle, the remaining two arbitrators would issue the award. If the two arbitrators reach an impasse, then the third arbitrator-turned-mediator would be available to break the tie.

Fourth, three arbitrators could serve as a mediation team, which poses a significant risk of arbitrators’ impartiality being compromised.\textsuperscript{722}

Abramson gives recommendations on the type of activity arbitrators can engage in in each of the four configurations. For example, in the first configuration, Abramson suggests that if parties authorise two co-arbitrators to caucus, they should be allowed to do so only as a team - each co-arbitrator should avoid any ex parte contact with the appointing party.\textsuperscript{723} In the last configuration, Abramson recommends that the arbitrators consider limiting themselves in mediation to employing the least intrusive techniques. These include encouraging the participants to try settling the case on their own, requesting parties with settlement authority to be present, helping participants define legal and factual issues in dispute, or suggesting at an appropriate moment that the parties ‘split the difference’. However, it appears that the decision in respect of the kind

\textsuperscript{718} Abramson, supra n. 60, at 13-15 (protocol 8).
\textsuperscript{719} Ibid, at 13-14; see also Anand, supra n. 608, at 42; Sussman, supra n. 157, at 71; Sussman, supra n. 27, at 385.
\textsuperscript{720} Abramson, supra n. 60, at 14.
\textsuperscript{721} Ibid, at 14-15.
\textsuperscript{722} Ibid, at 15.
\textsuperscript{723} Ibid, at 13-14.
of mediation techniques that arbitrators should use in each of the four configurations should be left until the moment the arbitral tribunal is constituted. The kind of techniques to use will depend on the particular circumstances of a case, including the legal culture of the participants of a dispute resolution process.

7.4.1 Anecdotally reported cases

Four anecdotally reported cases illustrate how various configurations of a three-member tribunal play out in international arbitration cases.

7.4.1.1 Mediation by a party-appointed arbitrator

*General Electric Company (GEC) case*

In this case parties settled in mediation by a party-appointed arbitrator during arbitral proceedings. There had been a series of commercial disputes between the same parties under different contracts. These had resulted in two ad hoc arbitrations and a court proceeding in a southern European country. Claims and counterclaims amounted to a small amount less than USD 1 million.

The chairman of the joint tribunal constituted for both arbitrations observed that the costs of arbitration seemed to be disproportionate to any amounts that could be recovered. He asked if parties wanted to discuss the possibility of subjecting all three pending disputes to mediation before one of the co-arbitrators, noting her qualifications in the field.

Both sides expressed interest. The co-arbitrator indicated she would accept the appointment by the parties, if they would allow her to resign as arbitrator if a settlement was not reached or if she or either of the parties felt that her impartiality as arbitrator had been compromised by information she had received. If she resigned, the party that had nominated her (the respondent in this case) would be permitted to appoint a new co-arbitrator to replace her, without prejudice to its position or any delay in the arbitration. It was important to safeguard the appointing party’s right to designate an arbitrator of choice should the mediation fail and there might exist any doubts about confidential information that had been shared.

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The parties agreed to mediation under these conditions, and the hearing was adjourned. The parties reconvened the following week with the co-arbitrator acting as a mediator. All three disputes were rapidly settled. As noted by a participant of the process, the parties used the positive feelings about the settlement to re-establish relationships that had been lost.725

7.4.1.2 Mediation by the chairman of a tribunal

In the following two cases the chairman of a tribunal acted as a mediator.

COMECON case

In a dispute between a Western private company and a State Trading Organization (STO) of a country from what then was the Council for Mutual Economic Assistance (COMECON), the parties met with the arbitral tribunal to prepare the Terms of Reference and organise the procedure.726 At a certain point, it became apparent that the parties were interested to settle. The chairman of the tribunal offered assistance but pointed out that, should the settlement attempt fail, he and his colleagues would have to decide the outcome of the dispute. The parties agreed to a mediation attempt by the chairman. In mediation, parties reached agreement on the essential elements of a settlement. The STO representatives found the settlement acceptable but requested to arrange it as a settlement proposal from the chairman of the tribunal. The chairman prepared the proposal, emphasising that it was made on the basis of his current understanding of the case and had the case proceeded to the arbitration, different conclusions could be reached. The proposal was delivered to the parties. Once parties returned to their respective headquarters, they notified the chairman that they had accepted the proposal, and requested the tribunal to issue an award by consent.

Hong Kong case

In a Hong Kong arbitration, an overseas party claimed damages from a Chinese party for a delay in completing a building project.727 The claimed amount approached USD 1 million and there were counterclaims. At the hearing, both parties asked the chair of the tribunal to mediate. Before proceeding with mediation, the participants discussed the procedure. The minute of the agreed outcome of discussions provided for a ‘standstill’

725 McLwrath, supra n. 724.
726 Schneider, supra n. 41, at 82 (reporting a case from his personal experience).
727 Michael Thomas, Mediation at Work in Hong Kong, 58(1) Arb. 29 (1992) (reporting his own recollections of a Hong Kong case where he was appointed as the chair and then as the mediator); also reported in Hwang, supra n. 288, at 579-580; Burr, supra n. 68, at 72-73.
in the arbitration for two months pending the chair’s efforts to mediate, that the chair could contact or meet with the parties separately or together (and without lawyers) at his choice, that everything said or done for the purpose of mediation could not be referred to at the arbitration, and that the mediator should continue to act as the third arbitrator if mediation failed. The mediator caucused with the parties and then met them at a joint session before sending them off to discuss the matter between themselves. After some hours a settlement was concluded.

The parties settled at the figure which beforehand the mediator had privately indicated to the paying party as his best guess of the lowest figure that the other party would be likely to accept in settlement. As a result, the parties saved some HKD 1.5 million of estimated tribunal costs for a hearing scheduled to last three weeks. In the view of the mediator, nothing said or seen during his discussions with the parties would have inhibited him in the least from continuing with arbitration if it had gone ahead.728

7.4.1.3 Mediation by all three members of a tribunal

JCAA case

In a JCAA case, two of three arbitrators were trained in the common law tradition, though both had vast experience in Japan.729 On the suggestion of a party, the entire arbitral tribunal acted as mediators, which resulted in a settlement.730 To deal with some traditional common law concerns, a mediation agreement was arranged providing for some safeguards and matters of procedure. In reporting this case, Goodrich does not specify what safeguards and matters of procedure the mediation agreement provided for. He notes, however, that they were of a kind described in the final section of his article. That section indicates that parties should record in their mediation agreement, among others, their consent to the same neutral arb-med-arb, the time for mediation to occur, and whether the dual role neutral is allowed to caucus with the parties.731 In Goodrich’s view, a key reason for the success of the process was the participants’ acceptance of the legitimacy of the process.

728 Thomas, supra n. 727, at 29; Hwang, supra n. 288, at 580.
729 Goodrich, supra n. 342, at 15 (reporting a case from his own professional experience).
730 The fact that in this case all three members of the tribunal acted as mediators transforms this process to the same neutral (arb)-med-arb. The safeguards for using the same neutral (arb)-med-arb are discussed in Chapter 8 infra.
731 Goodrich, supra n. 342, at 18.
7.4.1.4 Commentary

It is not clear from the available information what mediation techniques dual role neutrals used in the GEC and COMECON cases. The available information reveals divergent expectations of dual role neutrals in these two cases as to their role in subsequent arbitration, if mediation did not result in a settlement. In the GEC case, the dual role neutral indicated that she would resign if she or either of the parties felt that her impartiality had been compromised by information she had received in mediation. The dual role neutral in the COMECON case left parties no choice by stating that if mediation did not lead to a settlement, he and his colleagues would have to decide the outcome of the dispute.732

The position taken by the dual role neutral in the GEC case is preferable. It finds support in soft law instruments, like the CEDR Rules for the Facilitation of Settlement in International Arbitration (CEDR Rules)733 and the IBA Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines on CIIA)734 and is advocated by Kaufmann-Kohler.735 There is, however, one difference between the position of the latter three and the former. Contrary to the dual role neutral in the GEC case, the CEDR Rules, IBA Guidelines on CIIA and Kaufmann-Kohler suggest that the decision on resignation should be left to the discretion of a dual role neutral only.

In the Hong Kong and JCAA cases, mediating arbitrators addressed concerns associated with their dual roles by discussing and arranging with the parties mediation agreements. These specified matters of procedure and provided for safeguards. The safeguards addressed issues like parties’ consent to the process, caucusing and the use of information from mediation in subsequent arbitration. These will be explored in Chapter 8.

It is not clear from the available information whether the reason for the conduct of mediation by one member of the tribunal (in three of four presented cases) was to reduce concerns associated with the involvement of the entire tribunal as mediators. However, all four cases demonstrate that mediation by some or all members of a three-

732 A similar position was taken by the arbitrator-mediator in the Hong Kong case.
735 Kaufmann-Kohler, supra n. 22.
member tribunal may create conditions for parties to settle, which saves their time and money.

**7.5 Conclusion**

Procedural modifications of the same neutral (arb)-med-arb are the second of three ways to address concerns associated with this process. Procedural modifications discussed in this Chapter are MEDALOA, arb-med and modifications relevant to a three-member tribunal.

MEDALOA appears to ease some of the behavioural and procedural concerns raised by the same neutral (arb)-med-arb. In particular, the incorporation of last offer arbitration is likely to reduce the risk of dual role neutral’s bias because the arbitrator does not decide but chooses from resolutions proposed by parties.

In arb-med, the risk of arbitrator’s bias further to confidential disclosures in mediation is excluded because mediation occurs after an arbitral award has been issued. The same factor prevents parties from using mediation tactically, to influence the arbitrator’s decision. Empirical research shows that parties settle more frequently in the mediation phase of arb-med than the same neutral med-arb. The disadvantage of starting with arbitration is that arb-med saves little time and costs.

Arbitral tribunals consisting of three arbitrators offer significant flexibility for configuration in the mediation phase. This assists in reducing concerns associated with the same neutral (arb)-med-arb, particularly those related to the risk of arbitrator’s bias. For example, two co-arbitrators may conduct mediation, while reserving the chair of the tribunal for the arbitration hearing. This would ensure that the chair is not privy to any confidential information. If mediation does not result in a settlement, the chair could serve as a sole arbitrator.

If, given the particular circumstances of a case, parties consider that they can benefit from using the same neutral (arb)-med-arb, they need to consider the third way to address concerns associated with the same neutral (arb)-med-arb. This is through the implementation of safeguards for using this process. These safeguards are explored in the next Chapter.
CHAPTER 8. SAFEGUARDS FOR USING THE SAME NEUTRAL (ARB)-MED-ARB AS A WAY TO ADDRESS CONCERNS ASSOCIATED WITH THIS PROCESS

8.1 Introduction

This Chapter explores the third way to address concerns associated with the same neutral (arb)-med-ARB, the implementation of safeguards for using this process. As discussed in section 3.3, the same neutral (arb)-med-ARB risks undermining the efficacy of mediation (behavioural concerns) and jeopardising the integrity of arbitration (procedural concerns). The arbitrator’s prior involvement in mediation, particularly in caucuses, may deprive parties of their right to an impartial tribunal and due process. As a result, the arbitrator and the award resulting from the same neutral (arb)-med-ARB may be challenged.

To protect the arbitrator and the award from a challenge, many authors propose safeguards for using the same neutral (arb)-med-ARB. Some authors focus on a limited number of key issues, whereas others address almost every aspect of the process. This Chapter synthesises the suggestions of various authors and the empirical data collected for this thesis to identify two key safeguards for using the same neutral (arb)-med-ARB: 1) party voluntary and informed consent; and 2) two safeguard options for reducing concerns related to the use of caucuses.

The majority of commentators suggest safeguards for situations when arbitrators act as mediators. Others address the opposite situation, when mediators act as arbitrators or refer to both options simultaneously. As noted in section 3.1, concerns arise

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736 See, e.g., Kaufmann-Kohler, supra n. 22; Blankenship, supra n. 62, at 36; Burr, supra n. 68, at 64-66; Plant, supra n. 463, at 145-146; David W. Plant, We Must Talk Because We Can: Mediating International Intellectual Property Disputes (International Chamber of Commerce 2008) discussed in Lack, supra n. 58, at 375-376; Rosoff, supra n. 143, at 93-94; Reiner, supra n. 451, at 27-28; Ehle, supra n. 16, at 87-94; D’Agostino, supra n. 511; Schneider, supra n. 41, at 85-96; Hwang, supra n. 288, at 578; Hindle, supra n. 77, at ¶ 40; Mark Goodrich, Arb-Med: Ideal Solution or Dangerous Heresy?, 8, White & Case (30 Mar. 2012), available at <http://www.whitecase.com/publications/article/arb-med-ideal-solution-or-dangerous-heresy>; Peter Talbot, Should an Arbitrator or Adjudicator Act as a Mediator in the Same Dispute?, 67(3) Arb. 221, 229 (Aug. 2001); Limbury, supra n. 253, at 3-4; Brewer & Mills, supra n. 85, at 36-38; Anand, supra n. 608, at 41-42; Abramson, supra n. 60, at 8-16.

737 Ehle, supra n. 16, at 87; Burr, supra n. 68, at 64; Plant, supra n. 463, at 145-146; Kaufmann-Kohler, supra n. 22; Schneider, supra n. 41, at 85-86; Goodrich, supra n. 736, at 8; Anand, supra n. 608, at 41-42.

738 Lew, supra n. 78, at 426-427; Thomson, supra n. 89, at 5.

739 Hindle, supra n. 77, at ¶ 8, 40 (discussing safeguards for the use of what she calls ‘med-ARB’, which means the same neutral (arb)-med-ARB); Brewer & Mills, supra n. 85, at 34-37 (although Mills and Brewer define med-ARB broadly, as any ADR procedure combining mediation and arbitration in sequence (either by the same or different neutrals and starting either with mediation or arbitration), when they describe advantages and disadvantages of med-ARB and its safeguards, they seem to narrow the meaning down to the same neutral (arb)-med-ARB); Casey, supra n. 143, at 16-17 (addressing situations
whenever arbitration follows mediation and the same neutral performs the functions of a mediator and an arbitrator. Thus, unless otherwise specified, all safeguards discussed here are in relation to both the same neutral med-arb and the same neutral arb-med-arb, referred to jointly as the same neutral (arb)-med-arb.

This Chapter comprises two sections. Section 8.2 analyses the fundamental safeguard for using the same neutral (arb)-med-arb – party voluntary and informed consent to the process. It explores whether consent incorporates the waiver of the right to challenge the arbitrator and the award on the ground of the arbitrator’s participation in mediation. Section 8.3 examines two main safeguard options for reducing concerns related to the use of caucuses, and assesses their strengths and weaknesses.

8.2 Consent and Waiver

8.2.1 Consent

8.2.1.1 The importance of consent

When the same neutral acts as mediator and arbitrator, party consent is a critical safeguard that must be followed to protect the arbitrator and the award from a challenge on the ground of the arbitrator’s participation in mediation. The requirement for consent is in accordance with the consensual nature of arbitration and mediation as well as the parties’ procedural autonomy.

The vast majority of legislative acts and institutional arbitration and mediation rules all over the world allow arbitrators to act as mediators and mediators to act as arbitrators, if parties expressly agree upon that. The legislation and rules, however, differ in their starting preference. For example, the starting preference of both the UNCITRAL ML on Conciliation and UNCITRAL Conciliation Rules is that a conciliator should not take the role of an arbitrator. Article 12 of the ML on Conciliation provides:

when the arbitrator acts as a mediator during the arbitral process or where a person mediates and then, if there is no settlement, sits as an arbitrator; Ross, supra n. 23, at 358, 363-366 (speaking about the same neutral (arb)-med-arb and referring to the same neutral arb-med-arb as a form derivative from the same neutral med-arb).

See, e.g., Goodrich, supra n. 736, at 8; Bartel, supra n. 76, at 689-691; Hwang, supra n. 288, at 578; Ariel Ye, Commentary on Integrated Dispute Resolution Systems in the PRC, in New Horizons in International Commercial Arbitration and Beyond, 12 ICCA Congress Series 478, 482 (Albert Jan van den Berg ed., Kluwer Law International 2005) (citing Professor Kaplan who endorses the combination of mediation and arbitration subject to the agreement of the parties and two other conditions so as to ensure justice); Abramson, supra n. 60, at 16 (protocol 12); Burr, supra n. 68, at 64; Almoguera, supra n. 187, at 130.

See, e.g., Appendix 4 to the CEDR Final Report that contains a table of existing legislative provisions from around the world on this issue.

Unless otherwise agreed by the parties, the conciliator shall not act as an arbitrator in respect of a dispute that was or is the subject of the conciliation proceedings or in respect of another dispute that has arisen from the same contract or legal relationship or any related contract or legal relationship.

The ICC Mediation Rules take the same view. Likewise, Section 80(a) of the Indian Arbitration and Conciliation Act 1996 prohibits a conciliator from transforming to an arbitrator, unless parties agree otherwise. However, a different approach is taken by the same Indian Act towards the reverse transformation of an arbitrator to a conciliator. Section 30(1) of the Act states:

It is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties; the arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement.

The Bangladesh Arbitration Act and the International Commercial Arbitration Acts (ICAAs) of Canadian common law provinces, except for Northwest Territories and Nunavut, likewise, allow arbitral tribunals to encourage settlement and, if parties agree, to use mediation, conciliation or other procedures. The position taken by the Canadian ICAAs contrasts with that of the Ontario Arbitration Act (OAA) governing domestic arbitration in that province. Rather than expressing its starting preference, the OAA prohibits arbitrators from acting as mediators. Section 35 of the OAA states:

The members of an arbitral tribunal shall not conduct any part of the arbitration as a mediation or conciliation process or other similar process that might compromise or appear to compromise the arbitral tribunal’s ability to decide the dispute impartially.
As discussed in section 6.2.2, in Hong Kong, Article 14 of the HKIAC Mediation Rules prohibits the reverse transformation of the mediator to an adjudicator or an arbitrator.\(^\text{748}\) This contrasts with the provisions of the Hong Kong Arbitration Ordinance that allow arbitrators to act as mediators and mediators to act as arbitrators, provided parties consent to this in writing.\(^\text{749}\)

The starting preferences, arguably, reflect the general position taken by a particular jurisdiction, organisation, or institution on whether the same neutral can act as a mediator and an arbitrator. The above examples from India, Canada and Hong Kong demonstrate that these jurisdictions are not yet completely settled on whether the same neutral can serve as both a mediator and an arbitrator.

Before embarking on the same neutral (arb)-med-arb, neutrals need to ensure that they have the clear authority of both parties or clear statutory authority, to serve as both a mediator and an arbitrator.\(^\text{750}\) Absent clear authority, the dual role neutral, the process, and the result may become susceptible to allegations of unfairness, whereas if parties know what to expect from the process and accept it voluntarily, they may be less likely to undermine the result, even if they are not completely satisfied with it.\(^\text{751}\)

8.2.1.2 Form of consent

According to Berger, parties’ implied agreement to the same neutral (arb)-med-arb should be sufficient, if there is a shared intention and neither party is coerced into the process.\(^\text{752}\) The following examples from case law, however, show the necessity of parties’ express consent to the process.

**Gaskin v. Gaskin**

In the US case *Gaskin v. Gaskin*,\(^\text{753}\) the court noted that mediation encourages candid disclosure, including disclosure of confidential information to a mediator. This creates the potential for a problem if the mediator, over the objection of one of the parties, becomes the arbitrator of the same or a related dispute.\(^\text{754}\) The court concluded that it

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\(^{748}\) HKIAC Mediation Rules, *supra* n. 622.

\(^{749}\) Hong Kong AO, *supra* n. 439, ss. 32, 33.

\(^{750}\) Bartel, *supra* n. 76, at 691.

\(^{751}\) *Ibid*; *but see* Lawday, *supra* n. 101, at 4 (noting that parties’ consent does not cure the same neutral (arb)-med-arb and practical and legal weaknesses remain when the process moves from one stage to the other).

\(^{752}\) Berger, *supra* n. 559, at 393.


\(^{754}\) Sussman, *supra* n. 157, at 72; Sussman, *supra* n. 27, at 388.
would be improper for the mediator to act as the arbitrator in the same or related dispute ‘without the express consent of the parties’.

**Marchese v. Marchese**

Following the court decision in *Marchese v. Marchese*, contracting parties in Ontario can expressly opt for the same neutral arb-med-arb. In that case the Court of Appeal for Ontario held that an agreement between parties to submit to the same neutral arb-med-arb was enforceable despite a provision in the province’s domestic arbitration statute that prohibits arbitrators from conducting any part of arbitration as mediation. The Court stated that if the prohibition applied to the same neutral arb-med-arb (a point that the Court held it did not need to decide), the prohibition could be waived by the parties’ mutual decision to engage in the same neutral arb-med-arb.

It is a common view in the literature that parties’ consent must be recorded in writing. The legislation in Hong Kong and Singapore, and the ICC Mediation Rules require parties’ written consent for an arbitrator to act as a mediator and a mediator to act as an arbitrator. Considering the seriousness of concerns associated with the same neutral (arb)-med-arb in some jurisdictions, this thesis suggests that, unless the form of consent is regulated in the applicable legislation or rules, it is good practice to record parties consent to the process in writing.

**8.2.1.3 Timing of consent**

In the same neutral arb-med-arb, it may be impractical to authorise an arbitrator to serve as a mediator in advance. Parties are better off permitting arbitral proceedings to unfold to the extent sufficient to build trust between them and the arbitrator as a potential mediator. If parties want their arbitrator to mediate, at the moment when the arbitrator commences mediation at the latest, parties should confirm their consent to the process and clarify all points that may give rise to difficulties, which should be recorded in writing. One of the points that parties need to specify is the actions to be taken in

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756 Leon & Peterson, *supra* n. 156, at 92.

757 See, e.g., Ehle, *supra* n. 16, at 88; Hwang, *supra* n. 288, at 578; Goodrich, *supra* n. 736, at 8; Hindle, *supra* n. 77, at ¶ 40[a]; Lew, *supra* n. 78, at 428; Sawada, *supra* n. 59, at 36; Reiner, *supra* n. 451, at 27; Schneider, *supra* n. 41, at 87; Ross, *supra* n. 23, at 363; Plant, *supra* n. 463, at 146 (pointing out that the arbitrator may agree to participate in settlement discussion only with the express written agreement of all parties and their counsel and only in accordance with the terms and conditions of the parties' express agreement). See also CEDR Appendix 2, *supra* n. 256, at ¶ 7.2.

758 Hong Kong AO, *supra* n. 439, s. 33(1); Singapore IAA, *supra* n. 440, s. 17(1); ICC Mediation Rules, *supra* n. 743, art. 10(3).

759 Plant, *supra* n. 463, at 146 n. 2.

760 Schneider, *supra* n. 41, at 87; Goodrich, *supra* n. 736, at 8.
respect of arbitration if mediation terminates without success. In particular, to ensure that the neutral in mediation avoids conduct that could later taint arbitration, it is highly recommended that parties specify up front whether the mediator will later become the arbitrator. This recommendation is relevant to both the same neutral arb-med-arb and the same neutral med-arb.

At the same time, written consent of parties before the mediation phase of the same neutral (arb)-med-arb may be insufficient to protect the arbitrator or the award from a challenge. A safer approach might be to obtain renewed consent from parties every time the process shifts from mediation to arbitration and vice versa, and particularly after termination of mediation and before commencement of the arbitration phase, as parties may change their position. It is in the interest of neutrals to verify that they have the parties’ written consent before changing hats.

The CEDR Commission recommends that parties insert a requirement of the second consent to be given upon termination of mediation, and before the mediator resumes as an arbitrator. It should be noted that this CEDR Commission’s recommendation relates to situations when parties authorise an arbitrator to caucus during mediation. According to the CEDR Commission, the second consent is more effective than the one at an earlier stage, because parties give it in the knowledge of developments during mediation. Australian Commercial Arbitration Acts (CAAs) even require parties’ second consent on or after the termination of the mediation proceedings to enable the former mediator to resume arbitration. What the CEDR Commission and CAAs propose is (arb)-med-arb opt-out. As discussed in section 6.4, (arb)-med-arb opt-out is a process with advantages and disadvantages that parties may find useful, depending on the particular circumstances of the case. The English case of Glencot illustrates the consequences of the parties’ disagreement as to whether the same person should go back to the role of an adjudicator after unsuccessful mediation.

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761 Goodrich, supra n. 736, at 8; Cremades, supra n. 342, at 164 (calling for setting the terms under which arbitration shall continue if mediation between parties does not prove possible, establishing these conditions in the clearest possible fashion to prevent challenge of the arbitrator or the award).
762 Schneider, supra n. 41, at 87 (speaking about the same neutral arb-med-arb); Flake, supra n. 48, at 8 (addressing the same neutral med-arb).
763 Ross, supra n. 23, at 364.
764 CEDR Appendix 2, supra n. 256, at ¶ 7.3.
765 As will be explained in section 8.3.1 infra, the starting point of the CEDR Commission is that arbitrators who facilitate settlement may not caucus with the parties. See CEDR Rules, supra n. 733, art. 5(2).
766 See, e.g., CAA 2012 (WA), supra n. 441, ss. 27D(1), 27D(4).
In *Glencot case*, the parties to a construction dispute met with the adjudicator for an adjudication hearing at a hotel. Before the adjudication hearing the parties negotiated and seemed to reach substantial agreement on a figure. They informed the adjudicator about their agreement. They then discovered that they had not agreed whether a discount should be applied to the figure. They both asked the adjudicator to mediate between them. He agreed, adding that if negotiations failed he would resume his role as adjudicator. He then presided over six hours of talks, which failed to bring an agreed resolution of the dispute. The defendant asked the adjudicator to withdraw. The claimant wanted the adjudicator to continue and he did so, ultimately giving a decision in the claimant’s favor. The claimant sought to enforce the award by way of summary judgment but the application was successfully resisted on grounds of partiality on the part of the adjudicator.

In the High Court proceedings, Judge Humphrey Lloyd Q.C. applied the apparent bias test. This test essentially asks whether the relevant circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility or a real danger that the tribunal was biased. On the facts of the case, Judge Lloyd found that caucuses in mediation could have conveyed information or impressions which subsequently influenced the adjudicator’s decision. Judge Lloyd also noted that as the discussions during the mediation were heated, it would have been understandable if the adjudicator-mediator had formed some view about one or both of the parties. Further, the adjudicator-mediator was also asked to form a view about the credibility of the applicant's case without any documentary evidence or basis. In view of these facts, the judge decided that the adjudicator’s conduct was such that there was a danger of apparent bias.

8.2.1.4 Consent as a result of parties’ voluntary choice

It is essential that the same neutral (arb)-med-arb is voluntarily chosen by parties. Parties should not be coerced into the process. This may occur, for example, if one party suggests to the other in the presence of arbitrators that arbitrators should attempt to mediate the dispute. While the other party may have no wish to mediate, it may feel

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768 Bartel, *supra* n. 76, at 689-691; Almoguera, *supra* n. 187, at 130.
coerced into the process because of fear that refusing to do so may give arbitrators the impression of weakness of its position or reluctance to cooperate. Alternatively, arbitrators might suggest that they act as mediators. In this case, both parties may feel coerced into the process because of the fear of causing some negative reaction from arbitrators if they refuse their suggestion. In either case, Bartel believes that all concerns associated with the same neutral arb-med-arb will surface due to the fact that the process has not been voluntarily chosen by the parties.769

Nevertheless, consent is more likely to be uncoerced if a suggestion to mediate comes from a party rather than arbitrators.770 Arbitrators’ suggestion may be interpreted as an order that if not followed will alienate arbitrators against a party who refuses their suggestion. If arbitrators raise the idea of assisting parties in their settlement attempts, they must exercise caution.771 Parties should have no doubt that arbitrators are willing to decide a dispute and all issues that parties fail to settle. If arbitrators are prepared to assist parties in their settlement attempt at a later stage in the proceedings parties should be made aware of this from the start, so that they can express any reservations.

Comments of the US practitioner interviewed for this study echoed the concern about coercing parties into the process. He noted,

I have been involved in cases where arbitrators said: let me mediate this case. And my client ... was feeling tremendous pressure because he did not want to offend the arbitrator ... I think that’s absolutely terrible for an arbitrator to say: let me mediate this and putting pressure on the parties.772

He went on to share his approach.

I was always very careful about saying: it’s not my expectation that I would play multiple roles. It was only when they [parties] raised the issue about whether I could play the role, we would talk about the problems with that. Then they would have to go ... and confirm between themselves and then come back jointly and report. And I did not want a situation where one party would say: oh we want you; and the other party would say: no, we don’t. I don’t want to put any pressure on people.773

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769 Bartel, supra n. 76, at 689.
770 Abramson, supra n. 60, at 9.
771 Burr, supra n. 68, at 64.
772 Practitioner from the United States, Interview 5.
773 Ibid.
The same practitioner succinctly summarised his approach to dealing with concerns related to the same neutral (arb)-med-arb:

>To me it’s a combination of proper education, surfacing the concerns, but then giving people the space to make their own decision away from the arbitrator or the mediator.\(^{774}\)

This points to another essential element of a solution to concerns associated with the same neutral (arb)-med-arb, which the practitioner refers to here as ‘proper education’, i.e. the need to inform parties of the behavioural and procedural concerns associated with the process.

8.2.1.5  **Informed consent**

Parties must not only choose the process voluntarily, they should also be able to make an informed decision.\(^{775}\) Unless parties understand what the process involves and voluntarily choose it, agreeing to the same neutral arb-med-arb may do more harm than good in the long run.\(^{776}\) The question is how to ensure that parties’ consent is informed.

The literature gives different answers to this question. Most authors limit themselves to general recommendations. For example, Flake considers it essential for parties to agree on methodology and record their agreement prior to the commencement of the same neutral med-arb.\(^{777}\) Talbot suggests that when shifting from one process to another in arb-med-arb parties must be made fully aware of the implications. They should enter a written agreement identifying the ground rules, and the neutral must ensure clarity as to the direction of the process.\(^{778}\) Goodrich advises against arbitrators engaging in mediation unless all parties are legally represented and have the opportunity to receive legal advice on the implications.\(^{779}\) He further notes that before any mediation occurs, the parties and the dual role neutral should draw up a written document that records the parties’ consent and contains other key aspects of the procedure.\(^{780}\)

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\(^{774}\) *Ibid.* These comments addressed questionnaire Result 2 (minimal use of the same neutral (arb)-med-arb). See a summary of the significant questionnaire results in section 5.4 *supra*.

\(^{775}\) See, e.g., Ehle, *supra* n. 16, at 89; Kaufmann-Kohler, *supra* n. 22; Bartel, *supra* n. 76, at 691; Brewer & Mills, *supra* n. 85, at 36; Kun, *supra* n. 3, at 551; Abramson, *supra* n. 60, at 9.

\(^{776}\) Bartel, *supra* n. 76, at 691.

\(^{777}\) Flake, *supra* n. 48, at 4.

\(^{778}\) Talbot, *supra* n. 736, at 229; see also Burr, *supra* n. 68, at 64 (suggesting that when the arbitrator commences mediation, all parties should be made aware that they are entering a new stage of the proceedings and all points giving rise to the conflict and differences must be clarified).

\(^{779}\) Goodrich, *supra* n. 736, at 8; see also Abramson, *supra* n. 60, at 16 (observing in protocol 12 that to increase the likelihood of parties making an informed decision, they should be given a disclosure statement on the advantages and risks of the neutral performing two roles).

\(^{780}\) Goodrich, *supra* n. 736, at 8.
Mills and Brewer regard active client counselling, by both counsel and the neutral, combined with written agreements by parties as the best way to secure genuine informed consent of the parties to the same neutral (arb)-med-arb.\textsuperscript{781} Contrary to the general recommendations of the above authors, Mills and Brewer recommend six specific steps:\textsuperscript{782}

1. Counsel for parties interested in the same neutral (arb)-med-arb should inform their clients about advantages and disadvantages of the process.\textsuperscript{783}

2. Parties who wish to employ the same neutral (arb)-med-arb following such counselling should enter into a written pre-dispute agreement providing for possible use of the same neutral (arb)-med-arb before any disputes have arisen.\textsuperscript{784}

3. The pre-dispute agreement should provide that the same neutral (arb)-med-arb cannot be required unless both parties still agree to use it after the dispute has arisen.\textsuperscript{785}

4. After the dispute has arisen, and if the parties still agree that the same neutral (arb)-med-arb is their preferred process, they should execute a detailed written protocol specifying how the process is to be conducted.\textsuperscript{786}

5. When invited to serve as a dual role neutral, the neutral should take reasonable steps to ascertain that parties understand possible advantages and disadvantages of the process.\textsuperscript{787} For example, the neutral may require parties to execute a retention agreement that summarizes the possible disadvantages of the same neutral (arb)-med-arb, which, once arranged, should leave little doubt of parties’ informed consent to employ the same neutral (arb)-med-arb process. Thus, if parties have followed other recommendations to ensure informed consent to the same neutral (arb)-med-arb before execution of such a retention agreement, it would be the third time parties would have agreed in writing to employ the procedure before it began: once in the pre-dispute agreement, then in the written

\textsuperscript{781} Brewer & Mills, supra n. 85, at 36.
\textsuperscript{782} Ibid, at 36-37.
\textsuperscript{783} Ibid, at 36.
\textsuperscript{784} Ibid, at 36-37 (suggesting a draft of a pre-dispute ADR clause).
\textsuperscript{785} Ibid, at 36 (observing that this should enhance the likelihood that the procedure is employed only in cases where the parties clearly understand and agree that the procedure is appropriate for the particular dispute at issue).
\textsuperscript{786} Ibid, at 36-38 (suggesting a draft of a protocol).
\textsuperscript{787} Ibid, at 37.
protocol to submit a particular dispute to the same neutral (arb)-med-arb and, finally, in executing the neutral’s retention agreement. Parties who are this clear about the procedure they wish to employ to resolve their dispute should be free to commit to the same neutral (arb)-med-arb process.

(6) Finally, once the process begins, the neutral must strictly adhere to the written protocol negotiated and agreed to by the parties.\textsuperscript{788}

These six steps can serve as a roadmap to ensuring that parties’ consent to the same neutral (arb)-med-arb is informed. This should prevent challenges to an arbitrator and an award on the grounds of the arbitrator’s participation in mediation. It may be unnecessary to implement all of them. What can be useful for parties intending to use the same neutral (arb)-med-arb is to consider these steps and select those that suit their particular circumstances.

Although there is a variation in the level of prescription in the literature as to how to ensure that parties’ consent is informed, two steps appear to be essential. First, a dual role neutral needs to verify that parties have received legal advice on the implications of the process. Second, parties and a dual role neutral need to arrange a written document that records parties’ consent to the process and specifies other key aspects of the procedure. Both steps need to occur before a dual role neutral embarks on the mediation stage of the same neutral (arb)-med-arb.

Parties need to clearly understand nuances, imperfections and ethical issues associated with the process because not every case is appropriate for the same neutral (arb)-med-arb.\textsuperscript{789} Many parties will not wish to accept the imperfections inherent therein. However, parties need to be allowed to knowingly and voluntarily consent to having the same neutral mediate and arbitrate if they believe that the benefits outweigh the risks.\textsuperscript{790} Thereby, it appears that the strongest argument for acceptance of the same neutral (arb)-med-arb originates with parties – parties’ interests overrule ethical principles.\textsuperscript{791}

\textsuperscript{788} Ibid.
\textsuperscript{789} Flake, supra n. 48, at 4.
\textsuperscript{790} Ross, supra n. 23, at 366; Marriott, supra n. 257, at 541 (observing that the risks are understood by the parties who consent to the combination of roles, expressing a clear wish to settle the case and inviting to pay parties the compliment of believing that they understand what they are doing).
\textsuperscript{791} Fullerton, supra n. 61, at 37; Phillips, supra n. 97, at 75-76; Thomson, supra n. 89, at 5; Bartel, supra n. 76, at 691-692; Lack, supra n. 58, at 378.
Given the implications of the same neutral (arb)-med-arb, the process appears to be better adapted to sophisticated parties.792 These are parties who have a good understanding of the process, its risks and possible shortcomings. In the commercial context parties tend to be sophisticated and can be fully informed of any ethical problems and decide to waive objections they may have to the process.793 This, according to Phillips, makes parties’ informed consent to same-neutral (arb)-med-arb critical.794 Nevertheless, even where such consent is given, it may be argued that consent is not given on a fully informed basis if the parties are not aware of all matters that have been discussed in caucuses.795 As discussed in section 8.2.2.3, questions arise regarding whether and, if so, to what extent parties can waive their rights to an impartial tribunal and due process.

A question that emerges from the review of the literature is whether by giving their informed consent to the same neutral (arb)-med-arb parties automatically waive the right to challenge the arbitrator and the award on the ground of the arbitrator’s participation in mediation. In short, does parties’ informed consent to the process imply waiver? This is the question that this Chapter turns now to examine.

8.2.2 Waiver

8.2.2.1 Does parties’ informed consent to the process imply waiver?

Before addressing this question, it is necessary to clarify what rights in particular a waiver is meant to waive. To do this, the thesis proposes to look back at section 3.3.2 that discussed two procedural concerns associated with the same neutral (arb)-med-arb. The first is the danger for the arbitrator to appear or actually become biased because of the information received in mediation. The inability of parties to hear and respond to the issues raised by each of them in caucuses with the mediator, who later becomes an arbitrator, gives rise to the second procedural concern, a failure to adhere to the rules of due process. In the context of the same neutral (arb)-med-arb, a waiver means that parties are presumed to waive their right to challenge arbitrators and the award on two specific grounds. First, partiality of arbitrators due to their participation in mediation. Second, failure to adhere to the rules of due process due to the arbitrators’ participation

793 Phillips, supra n. 97, at 75-76; Brewer & Mills, supra n. 85, at 36.
794 Phillips, supra n. 97, at 76.
795 CEDR Appendix 2, supra n. 256, at ¶ 5 (adding that whether the parties’ consent is effective may also vary under different laws).
in caucuses. The effect of parties’ waiver of the right to challenge arbitrators and the award on these two grounds will be discussed in section 8.2.2.3.

For now, let us return to the posed question: does parties’ informed consent to the process imply waiver? A review of the literature shows that commentators are not yet settled on this question. Three main views have been identified. According to the first view, parties’ informed consent implies a waiver of the right to challenge the arbitrator and the award, if mediation does not lead to settlement.\textsuperscript{796} The reasoning behind this view is that the parties are not obliged to have the same person act as a mediator and an arbitrator\textsuperscript{797}. Their deliberate choice of the process must constitute an implied waiver to challenge the dual role neutral for complying with their agreement.\textsuperscript{798}

According to the second view, informed consent and waiver are alternative options. For example, Blankenship refers to parties’ informed consent and/or knowing waiver as one of the safeguards for using the same neutral (arb)-med-arb.\textsuperscript{799} This means that parties can either give their informed consent or knowing waiver. Both, in Blankenship’s understanding, have the same effect.

Third, some consider that apart from expressly consenting in writing to the arbitrator acting as a settlement facilitator, parties need to expressly waive any right to challenge the arbitrator or the award on the ground of the arbitrator’s participation in mediation.\textsuperscript{800}

Support for the first view has been found in some soft law instruments and case law. For example, the IBA Guidelines on CIIA that are widely consulted when arbitrators evaluate whether they need to make disclosures to the parties about potential conflicts before accepting appointments specify:

\begin{quote}
An arbitrator may assist the parties in reaching a settlement of the dispute, through conciliation, mediation or otherwise, at any stage of the proceedings. However, before doing so, the arbitrator should receive an express agreement by the parties that acting in such a manner shall not
\end{quote}

\textsuperscript{796} See, e.g., Kaufmann-Kohler, supra n. 22; Lew, supra n. 78, at 428 (noting that written consent of all parties to the mediator acting as arbitrator should, on its own, prevent mediation from giving reason to challenge the arbitrator on the grounds of lack of impartiality); Ross, supra n. 23, at 363 (warning parties that if they provide informed written consent they must be aware that they may be waiving their right to due process).

\textsuperscript{797} Rosoff, supra n. 143, at 94.

\textsuperscript{798} Ibid.

\textsuperscript{799} Blankenship, supra n. 62, at 36.

\textsuperscript{800} See, e.g., Plant, supra n. 463, at 146; Ehle, supra n. 16, at 93; Schneider, supra n. 41, at 87; Goodrich, supra n. 736, at 8; Anand, supra n. 608, at 42; Burr, supra n. 68, at 64; Abramson, supra n. 60, at 6 (protocols 10 and 12).
disqualify the arbitrator from continuing to serve as arbitrator. Such express agreement shall be considered to be an effective waiver of any potential conflict of interest that may arise from the arbitrator’s participation in such a process, or from information that the arbitrator may learn in the process. If the assistance by the arbitrator does not lead to the final settlement of the case, the parties remain bound by their waiver (emphasis added). 801

In Duncan & Davis Nurseries New Plymouth Ltd. v. Honnor Block Ltd., 802 the High Court of New Zealand appeared to side with commentators holding the first view. In that case, the parties to the dispute agreed to mediation and appointed the mediator, Ms Dean, QC. In their settlement agreement, parties included a clause 23 providing that if ‘there is any dispute as to the terms of, or implementation of, this agreement the parties will appoint the mediator [Ms Dean] to determine any such dispute.’ 803 Subsequently, the respondent contacted the mediator asking her to arbitrate two disputes between the parties. The applicant requested Ms Dean to withdraw as arbitrator, which Ms Dean disregarded and proceeded to arbitrate the dispute. The applicant then filed an application with the High Court of New Zealand to remove Ms Dean as arbitrator. The court dismissed that application.

The court found that the applicant was aware of the grounds for challenging the arbitrator when it signed the settlement agreement containing clause 23. Therefore, the applicant was aware of situations that would give rise to justifiable doubts as to the arbitrator’s impartiality when the appointment was made and could not sustain a challenge to the arbitrator. The result was that the applicant had waived the right to challenge Ms Dean on the basis of her involvement as a mediator when the applicant signed the settlement agreement. 804 It should be noted that the High Court differentiated the situation of the same neutral med-arb from the situation in this case, where parties had already concluded mediation before they agreed that the mediator would become the arbitrator. 805 Nevertheless, the reasoning in this decision suggests that if parties agree to the same neutral (arb)-med-arb then they have implicitly waived their right to

801 IBA Guidelines on CIIA, supra n. 734, general standard 4(d).
803 Duncan & Davis, supra n. 802, at ¶ 2.
804 Rosoff, supra n. 143, at 95.
805 Hindle, supra n. 77, at ¶12.
challenge the arbitrator or the award on the ground of arbitrator’s participation as a mediator.806

The CEDR Commission appears to support both the first and third views. This is because the CEDR Commission distinguishes the situation when the same neutral arb-med-arb does not involve the use of caucuses from the situation when it does, and provides a different set of rules for each situation. The CEDR Rules apply to the former, whereas Appendix 2 to the Final Report of the CEDR Commission (CEDR Appendix 2) applies to the latter. Article 3(3) of the CEDR Rules specifies that by agreeing to apply the CEDR Rules:

The Parties agree that the Arbitral Tribunal’s facilitation of settlement in accordance with these Rules will not be asserted by any Party as grounds for disqualifying the Arbitral Tribunal (or any member of it) or for challenging any award rendered by the Arbitral Tribunal.

In other words, parties’ consent to the same neutral arb-med-arb that does not involve the use of caucuses, implies a waiver of the right to challenge the arbitrator and the award, if mediation does not lead to settlement, which corresponds to the first view.

The third view is supported by the CEDR Appendix 2 that provides safeguards for using the same neutral arb-med-arb that involves the use of caucuses. Paragraph 5 of the CEDR Appendix 2 states:

If the parties have not consented to the mediator/conciliator resuming as arbitrator, and have not waived any right to object arising out of his role as mediator/conciliator, the arbitrator and/or his award may therefore be subject to challenge.

The use of the conjunction ‘and’ means that both consent and waiver are required to protect the arbitrator and the award from challenge.

In addition, paragraph 7.5 of the CEDR Appendix 2 specifies that:

The consent should include a statement that the parties will not at any later time use the fact that the arbitrator has acted as a mediator/conciliator as a basis for challenging the arbitrator or any award which the arbitrator may make (either alone or as part of a tribunal).

806 Rosoff, supra n. 143, at 95.
By indicating the need for both written consent and waiver, the CEDR Appendix 2 sides with commentators holding the third view.

This dual approach taken by the CEDR is not surprising. As discussed in section 8.3.1, where no caucuses are held, the problem of due process does not arise and the issue of arbitrators’ partiality becomes less problematic. This is the most probable reason for the CEDR not to require an express waiver for the same neutral arb-med-arb that does not involve the use of caucuses. The same neutral arb-med-arb that involves the use of caucuses, on the contrary, raises very serious concerns due to the danger that arbitrators may lose their impartiality and the risk of failure to adhere to the rules of due process. These serious concerns appear to be the reason why the CEDR requires a separate waiver for the situation of the same neutral arb-med-arb that involves the use of caucuses.

8.2.2.2 Should parties arrange for consent and waiver?

It is likely that parties’ informed consent implies a waiver of their right to challenge the arbitrator and the award on the ground of the arbitrator’s participation in mediation. It might be, however, impractical and could potentially jeopardize the entire arbitration if parties do not sign an express waiver. 807 In view of this, it is suggested that, unless the issue of waiver is regulated in the applicable legislation or rules, parties should specifically arrange an express written waiver of their right to challenge the arbitrator and the award on the ground of the arbitrator’s participation in mediation.

It was argued in section 8.2.1.3 that parties’ consent to the same neutral (arb)-med-arb should be reiterated every time the process shifts from mediation to arbitration and vice versa. Likewise, it would be wise to sign written waivers from stage to stage within the process, accepting that the neutral may continue to act on a different basis at each stage of the process. 808 This should also ensure that parties are able to differentiate between different roles that the same person takes at different times.

8.2.2.3 The effect of waiver

As noted in section 8.2.2.1, parties’ informed consent to the process and waiver are presumed to mean that parties waive their right to challenge arbitrators and the award on two specific grounds. First, partiality of arbitrators due to their participation in mediation. Second, failure to adhere to the rules of due process due to the arbitrators’ participation in caucuses. The first ground can be invoked in both situations the same

807 Ibid.
808 Lack, supra n. 58, at 378.
neutral (arb)-med-arb involving the use of caucuses or not, although in the former, the risk that arbitrators may become biased is undoubtedly higher. The second ground can be invoked only if the same neutral (arb)-med-arb involves the use of caucuses. This section will first investigate the effect of parties’ waiver of the right to challenge arbitrators and the award on the first ground. Then it will explore the effect of parties’ waiver of the right to challenge arbitrators and the award on the second ground.

8.2.2.3.1 Waiver of the right to an impartial tribunal

In international arbitration, arbitrators are expected to be independent and impartial. At the same time, the preponderance of opinion favours the view that parties can waive the impartiality requirement to a large extent. This view is supported by UNCITRAL ML on Arbitration, the IBA Guidelines on CIIA and some court decisions.

For example, Kaufmann-Kohler refers to a decision of the European Court of Human Rights on fair trial under Article 6 of the European Convention on Human Rights that might be enlightening by analogy. In that case an arbitrator disclosed a conflict of interest but parties consented to him acting as arbitrator anyway. One party later challenged the award alleging arbitrator’s bias as a result of his conflict of interest. The award was upheld by the national courts and the European court refused to set aside that decision. It held that the party had unequivocally consented to waive the requirement of impartiality. The unequivocal waiver given by a party who was represented by counsel and fully informed had to be enforced. It might be assumed from this case that arbitrators can act as mediators and their challenge or the challenge of the award is unlikely to be sustained, provided parties waive the requirement of impartiality.

Another example is the Duncan case, discussed in section 8.2.2.1, where the High Court of New Zealand dismissed the application to remove the arbitrator who previously acted as the mediator. In this case the applicant was aware of a situation that could give rise to

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809 Peter, supra n. 88, at 161, 158 n. 28. Interestingly, in a three-member tribunal the ‘American rule’ is that party-appointed arbitrators are not subject to the impartiality requirement. Finkelstein v. Smith, 326 So 2d 39, 40 (Fla. App. 1976) (‘Arbitrators appointed by disputants to a tripartite panel are expected by the disputants and should be understood by the courts to act as partisans - only one step removed from the controversy.’).

810 Almoguera, supra n. 187, at 121.

811 ML on Arbitration, supra n. 188, art 12(2).

812 IBA Guidelines on CIIA, supra n. 734, ¶ 2.1.2 at 20. A prior involvement in the dispute by the arbitrator, including as mediator, constitutes a waivable conflict of interest under the IBA red list.

813 Rosoff, supra n. 143, at 93 (pointing out that parties successfully waive their right to challenge arbitrators for their conduct as mediators in many same neutral (arb)-med-arb proceedings in the United States).

814 Kaufmann-Kohler, supra n. 22.
justifiable doubts as to the arbitrator’s impartiality when the appointment was made and, thereby, could not sustain a viable challenge to the arbitrator.\textsuperscript{815}

8.2.2.3.1.1 \textit{The effect of waiver of the right to an impartial tribunal depending on the point in time when it is given}

Pitkowitz and Richter suggest that two situations be distinguished, depending on the point in time when parties consent to the same neutral med-arb.\textsuperscript{816} These authors hold the view that parties’ informed consent implies a waiver of the right to challenge the arbitrator and the award on the ground of the arbitrator’s participation in mediation.

The first situation is when parties agree at the outset, before using the same neutral med-arb, that if mediation fails they will proceed to arbitration and former mediators will act as arbitrators.\textsuperscript{817} It might be assumed that such agreements have to be binding on parties who should not be allowed to object to the appointment of former mediators as arbitrators before and if the dispute proceeds to the arbitration stage.\textsuperscript{818} This is the position taken by the IBA Guidelines on CIIA.\textsuperscript{819} Allowing parties’ to object would be equivalent to the unilateral revocation of one’s consent. This would make an agreement concerning the neutral impracticable in business life because no one could reasonably rely on it. Nevertheless, parties still preserve their right to challenge arbitrators during the proceedings if they consider that arbitrators demonstrate partiality. They can also challenge the award if it reveals arbitrators’ bias.

The second situation is when parties initially decide only to mediate their dispute and once the mediation efforts fail they choose to proceed with arbitration. It is then that the parties appoint former mediators as arbitrators. Future arbitrators, however, have to disclose all circumstances that might raise reasonable doubts about their impartiality and independence. If, despite the disclosure, parties appoint former mediators as their arbitrators, they might be presumed to have waived their right to challenge arbitrators for reasons connected with their service as mediators. An argument against this view would be that any waiver will only apply to the parties if consent is given on a fully informed basis.\textsuperscript{820} If something emerges during the course of arbitration that raises fresh

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{815} Duncan & Davis, supra n. 802.
\item \textsuperscript{816} Pitkowitz & Richter, supra n. 323, at 228-229.
\item \textsuperscript{817} Ibid, at 229.
\item \textsuperscript{818} Ibid.
\item \textsuperscript{819} IBA Guidelines on CIIA, supra n. 734, general standard 4(d) (addressing the situation of the same neutral arb-med-arb).
\item \textsuperscript{820} Lang, supra n. 139, at 101.
\end{itemize}
\end{footnotesize}
doubts as to the arbitrators’ impartiality, the earlier consent might become ineffective. \footnote{821} An illustration of such situation might be that one party may know something about the mediation stage of the process and shares this information subsequently with the other party, which makes them both wonder about the impartiality of a mediator-turned-arbitrator.

Hence, it appears that in both discussed situations, parties’ waiver of the right to challenge arbitrators or the award is not absolute. If arbitrators manifest bias during or after arbitration, parties may still challenge them as arbitrators and the award. This view finds support in the literature. \footnote{822}

\subsection*{8.2.2.3.1.2 Importance of a timely challenge on the ground of partiality}

A party’s challenge of the arbitrator and the award stands little chance of success if parties have given informed consent to the process and expressly waived the impartiality requirement. Nevertheless, as observed in section 8.2.2.3.1.1, parties’ waiver of the right to challenge the arbitrator and the award is not absolute. A party may still challenge the arbitrator and the award if the arbitrator manifests bias during or after arbitration. If a party believes that it has reasons to challenge the arbitrator or the award, it should do it promptly. This is because otherwise a party will waive its right to challenge the award on that basis at a later stage. \footnote{823} Section 73(1) of the English Arbitration Act, for example, provides that a party loses the right to object to any irregularity affecting the tribunal or the proceedings if it continues to take part in the arbitral proceedings without making any objection, either forthwith or within the allowed time. The IBA Guidelines on CIIA allow a party 30 days to raise an objection, failing which the party will be deemed to have waived the right to object. \footnote{824}

Two cases illustrate the importance of a timely challenge. The first case, *ASM Shipping Ltd of India v. TTMI Ltd of England*, \footnote{825} shows that a party is not permitted to hedge, to hang on to a possible challenge on grounds of bias pending the award and to complain only if they lose. In that case Morison J. said:

> In my judgment, by taking up the award, at the very least, the owners had lost any right they may have had to object to X QC’s continued involvement.

\footnote{821} Ibid. \footnote{822} See, e.g., Casey, supra n. 143, at 17; Plant, supra n. 736 discussed in Lack, supra n. 58, at 376; Rosoff, supra n. 143, at 98. \footnote{823} Ross, supra n. 23, at 364; Lang, supra n. 139, at 100-101. \footnote{824} IBA Guidelines on CIIA, supra n. 734, general standard 4(a). \footnote{825} *ASM Shipping Ltd of India v. TTMI Ltd of England*, (2006) EWCA Civ 1341 (16 Oct. 2006) [hereinafter, *ASM Shipping*].
in that part of the arbitral process. It is unacceptable to write making further objections after the hearing was concluded. X QC had made his decision not to recuse himself, rightly or wrongly, at the beginning of the third day. Owners were faced with a straight choice: come to the court and complain and seek his removal as a decision maker or let the matter drop. They could not get themselves into a position whereby if the award was in their favour they would drop their objection but make it in the event that the award went against them. A 'heads we win and tails you lose' position is not permissible in law as section 73 makes clear. The threat of objection cannot be held over the head of the tribunal until they make their decision and could be seen as an attempt to put unfair and undue pressure upon them.\textsuperscript{826}

One of the two main issues that emerged in the second \textit{Gao Haiyan} case\textsuperscript{827} was whether the failure of a party to raise the issue of bias in arbitration resulted in a waiver of a right to do so at the stage of enforcement.\textsuperscript{828} It appears to be one of the first cases in which the enforcement of an award arising from the same neutral arb-med-arb was considered.\textsuperscript{829} The case is also interesting because it traces the positions of the parties step by step following the same neutral arb-med-arb proceedings up to the enforcement stage. As noted in section 1.1, some commentators attribute to \textit{Gao Haiyan} the recent emergence of the same neutral arb-med-arb as a ‘hot topic’ among practitioners.\textsuperscript{830}

The dispute arose out of a share transfer agreement and a supplementary share transfer agreement (Agreements) signed in 2008 between Gao Haiyan and her husband (the Applicants) and Keeneye Holdings Limited and New Purple Golden Resources Development Limited (the Respondents). The Applicants disputed the validity of the

\textsuperscript{826} Cited in Lang, supra n. 139, at 101.
\textsuperscript{828} The second issue was whether the way the mediation had been conducted created apparent bias sufficient to refuse the enforcement of the award for being contrary to public policy. This issue is discussed in section 9.5.2.
\textsuperscript{829} Kun, supra n. 3, at 538.
Agreements. The Respondents commenced arbitration before the Xi’an Arbitration Commission of China (XAC). The XAC Rules permit parties to agree to mediate during arbitration, and the arbitrators to act as the mediators. At the end of the first hearing in December 2009, the arbitral tribunal (the Tribunal) suggested that the parties mediate, to which the parties agreed. The Tribunal decided to propose that the parties settle the case with the Respondents paying RMB 250 million to the Applicants and authorised the Secretary General of XAC (Pan) and one member of the Tribunal (Zhou) to contact the parties with the proposal. On 27 March 2010 over dinner in a hotel in Xi’an, Pan and Zhou informed ‘a person related to’ the Respondents (Zeng) that the tribunal was going to find that the Agreements were valid but the Respondents had to pay RMB 250 million as compensation. Zeng was asked to ‘work on’ the Respondents. Both the Respondents and the Applicants rejected the settlement and arbitration resumed.831 No complaint was brought about the conduct of Pan and Zhou. In June 2010, the Tribunal rendered an award that differed from the suggestion voiced over dinner. The Tribunal declared the Agreements invalid and recommended that the Respondents pay the Applicants RMB 50 million as compensation.

The Respondents challenged the award at the Xi’an Intermediate People’s Court of Shaanxi (XIPCS) contending that the difference in the outcome was due to Pan’s manipulation and the tribunal’s ‘favouritism and malpractice’. The application was dismissed.

The Applicants then sought to enforce the award in Hong Kong. While the first ex parte application was granted, the Respondents appealed the order granting enforcement. They relied on Article 40E(3) of the Arbitration Ordinance (Cap 391) then in force, whereby the enforcement of an award may be refused if enforcement would be against public policy.

The Hong Kong High Court found that the meeting over a private dinner created apparent bias and refused to enforce the award for being contrary to public policy.832 The Court also found that the Respondents had not waived their right to raise bias by not complaining about the events of 27 March 2010 in the resumed arbitration.833

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831 Gao Haiyan v. Keeneye Holdings Ltd [2011] 3 HKC 157 at ¶ 22 (setting out in more detail the circumstances in which the mediation was conducted).
832 Ibid (the reasoning of the Court is discussed in section 9.5.2 infra).
833 Ibid, at ¶¶ 84-85.
the Respondents complained about bias, they would have risked antagonising the tribunal and turning the tribunal against them.\textsuperscript{834}

About eight months later, the Hong Kong Court of Appeal reversed the High Court’s judgment on appeal of the Respondents and held that the Applicants could enforce the award.\textsuperscript{835} The Court of Appeal found that by failing to timely raise their objections during arbitration, the Respondents had waived their right to do so at the stage of enforcement.\textsuperscript{836}

Although the Court determined that a clear case of waiver had been established, it proceeded in any case to consider whether the events of 27 March 2010 caused concerns of bias sufficient to give rise to the issue of public policy. The Court was not satisfied that a case of apparent bias had been established, certainly not such that would lead the Court to refuse the enforcement of the award.\textsuperscript{837} Thus, the Court of Appeal upheld the award.

One of the important implications of the Court of Appeal ruling is that parties need to raise their objections to any procedural defects, including arbitrator’s bias, in the course of the arbitral proceedings.\textsuperscript{838} Otherwise, parties will be held to have waived their right to object.\textsuperscript{839}

\textbf{8.2.2.3.2 Waiver of the right to due process}

It was noted in section 3.3.2 that the same neutral (arb)-med-arb may offend the principles of due process because parties have no possibility to hear and respond to the issues raised by each of them in caucuses with the mediator who later becomes an arbitrator. The question is whether parties can waive their due process rights.

There is no clear and shared view in the literature on this issue. Commentators express contrasting views in this respect. Some raise serious doubts that parties can waive their due process rights.\textsuperscript{840} For example, Pryles examines the UNCITRAL ML on Arbitration

\begin{footnotes}
\footnotetext[834]{\textit{Ibid}, at ¶ 87.}
\footnotetext[835]{Gao Haiyan v. Keeneye Holdings Ltd [2012] 1 HKRLD 627 (CA).}
\footnotetext[836]{\textit{Ibid}, at ¶ 69.}
\footnotetext[837]{\textit{Ibid}, at ¶¶ 103-104, 106 (the reasoning of the court is discussed in section 9.5.2 infra).}
\footnotetext[839]{Wu, \textit{supra} n. 830, at 9.}
\footnotetext[840]{See, e.g., Leon & Peterson, \textit{supra} n. 156, at 93 (noting that it remains an open question whether procedural fairness requirements tie the hands of the dual role neutral in the mediation phase and impede the use of caucuses); Bühring-Uhle et al., \textit{supra} n. 46, at 264 (referring to an argument that the principles of natural justice cannot be set aside by parties’ agreement, and, consequently, the validity of the award cannot be assured by means of a written consent to the dual role of the neutral); Michael Pryles, \textit{Limits to Party Autonomy in Arbitral Procedure}, ICCA 3, available at \texttt{http://www.arbitration}.
\end{footnotes}
and notes that while parties enjoy very broad freedom in selecting the procedure to be followed, some ML provisions are mandatory and cannot, therefore, be excluded or modified by the parties. While the ML does not expressly so say, Pryles considers it almost certain that a court would construe Article 18 as mandatory. Article 18 provides that ‘[t]he parties shall be treated with equality and each party shall be given a full opportunity of presenting his case’. Pryles concludes that if parties agreed that only the claimant would be heard in arbitration, this agreement would be struck down as invalid on account of article 18 of the ML. Section 33(1)(a) of the Arbitration Act 1996 (UK) resembles Article 18 of the ML. It provides that the tribunal ‘shall act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent’. This section is mandatory because it is listed in Schedule 1 of the Act.

Pryles’ view is supported by Holtzmann and Neuhaus, who observed:

The freedom of the parties [under the Model Law] is subject only to the provisions of the Model law, that is, to its mandatory provisions. The most fundamental of such provisions, from which the parties may not derogate, is the one contained in paragraph (3) [Art. 18 in the final text].

A similar view was taken by the New Zealand Hamilton High Court in Acorn Farms Ltd v. Schnuriger case. The Court considered it clear that it was beyond the power of parties to contract out of the fundamental requirements of due process. Consequently, it would be legally impossible to commit parties by contract to the same neutral (arb)-med-arb process in which the parties agreed that no breach of due process by the mediation phase of the same neutral (arb)-med-arb would be a ground for challenging an award that might result if completion of a formal arbitration proved necessary.

Some commentators disagree with this view and argue that waiving due process rights is not as outrageous as it may sound and parties can do so provided they have

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841 Pryles, supra n. 840, at 3.
842 Ibid.
843 Cited ibid.
845 Sawada, supra n. 59, at 30 (concluding this after analysing the meaning of natural justice and its role of mostly a supplementary source for filling the gaps of the positive law); see also Blankenship, supra n. 62, at 36 (noting that the denial of due process is a criticism that can be overstated); Schneider, supra n. 41, at 94 (observing that the due process problem is much less serious than it is often described).
considered the implications of this choice in the light of a particular dispute. One supporter of this view, Elliott speaks about the tension between the competing concepts of due process, which does not favour mixing mediation and arbitration processes and party autonomy that allows parties to resolve their dispute by whatever means, including by involving a dual role neutral. According to Elliott, increasingly, although not universally, the party autonomy view seems to be winning the battle. Some case law provides support to this view. For example, the South Australian *Duke Group* case demonstrates that the Australian courts will allow caucuses with a judge or arbitrator where the parties consent beforehand. The judge in that case referred to the following principles:

> It would be inconsistent with basic notions of fairness that a judge should take into account, or even receive, secret or private representations on behalf of a party or from a stranger with reference to a case which he has to decide.  

> … save in the most exceptional cases, there should be no communication or association between a judge and one of the parties (or the legal advisers or witnesses of such a party) otherwise than in the presence of or with the previous knowledge or consent of the other party (emphasis added).  

The words ‘or consent’ clearly indicate that caucuses with a judge or arbitrator are permissible where the parties consent beforehand, which accords with the principle of party autonomy.  

However, the debate on ability to waive due process rights does not seem to be over, except in those few jurisdictions that have addressed the issue directly. For example, in Australia s. 27 of the former Commercial Arbitration Acts (governing domestic

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846 Talbot, *supra* n. 736, at 228; see also Limbury, *supra* n. 100, at 9 (noting that to avoid difficulties with the same neutral med-arb while retaining caucuses in the mediation phase, parties may agree, either at the outset or before each stage that the arbitrator does not need to observe the rules of procedural fairness when mediating, thus enabling caucuses); Lack, *supra* n. 58, at 374 (observing that a party may waive its due process rights if it is aware of the risk, trusts the neutral to act fairly and impartially and wants the mediator to act as arbitrator even after caucusing).  

847 Elliott, *supra* n. 87, at 169.  


849 *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 350 per Mason J cited in Limbury, *supra* n. 100, at 12 n. 26; Limbury, *supra* n. 253, at 3 n. 11.  

850 Per McInerney J in *R v. Magistrates’ Court at Lilydale; Ex parte Ciccone* [1973] VR 122 at 127, cited with approval by Gibbs CJ and Mason J in *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 346, 350 cited in Limbury, *supra* n. 100, at 12 n. 27.  

851 Limbury, *supra* n. 100, at 12.
arbitration) expressly permitted waiver of the right to due process.\textsuperscript{852} The ability of parties to waive their due process rights in Australia was supported by the \textit{Duke Group} case. This, however, is not possible for parties in New Zealand, as demonstrated by the \textit{Acorn Farms} case. Some UK cases have suggested that the Human Rights Act 1998, which implemented the European Convention on Human Rights, may preclude waiver of the right to due process guaranteed by Article 6 of the Convention.\textsuperscript{853} However, this may apply only to court proceedings, because other cases have held that parties to arbitration waive their Article 6 rights in the interests of privacy and finality.\textsuperscript{854} In any event, some degree of legal risk to the award remains since this point is not settled in many jurisdictions.\textsuperscript{855}

The absence of a definite answer to the question whether parties can waive their due process rights has prompted law and rule makers and commentators to come up with various solutions to minimise the risk of breach of due process and arbitrator’s bias arising from the arbitrator’s participation in caucuses. These will be discussed in the next section.

\section*{8.3 Safeguards Related to Caucuses}

Although caucuses are widely regarded as invaluable in mediation,\textsuperscript{856} their use becomes a fundamental concern in the context of the same neutral (arb)-med-arb\textsuperscript{857} due to the risk of breach of due process and arbitrator’s bias. Virtually all commentators proposing safeguards for using the same neutral (arb)-med-arb address the issue of caucuses. It is recommended that parties using the same neutral (arb)-med-arb at least specify whether caucuses are allowed.\textsuperscript{858} Some commentators suggest a range of options, and depending

\textsuperscript{852} See, e.g. \textit{Commercial Arbitration Act 1984} (NSW), s. 27(3) discussed in Alan L. Limbury, \textit{Making Med-Arb Work in Australia}, 2(1) NYSBA New York Disp. Res. Law. 84, 85 (2009). Current CAAs address concerns related to the breach of due process differently. This will be discussed in section 8.3.2.1 infra.


\textsuperscript{855} Bühring-Uhle et al., \textit{supra} n. 46, at 264 (concluding that in the large majority of cases full-intensity mediation in the shadow of arbitration will only be advisable if it is conducted by someone other than the arbitrator).

\textsuperscript{856} Wolski, \textit{supra} n. 3, at 265; Steele, \textit{supra} n. 174, at 1403-1404; \textit{but see} Thevenin, \textit{supra} n. 463, at 368-369 (observing that the role of caucuses in mediation has been the subject of debate in recent years and some authors propose that mediation should be conducted in joint sessions only).

\textsuperscript{857} Leon & Peterson, \textit{supra} n. 156, at 93; Burr, \textit{supra} n. 68, at 65; Bühring-Uhle et al., \textit{supra} n. 46, at 263.

\textsuperscript{858} See, e.g., Hindle, \textit{supra} n. 77, at ¶ 40[c]; Burr, \textit{supra} n. 68, at 64; Goodrich, \textit{supra} n. 736, at 8; Ross, \textit{supra} n. 23, at 364; Reiner, \textit{supra} n. 451, at 28; Schneider, \textit{supra} n. 41, at 87; Hwang, \textit{supra} n. 288, at 578.
on the circumstance of each particular case, parties may choose the one that suits them the best.\footnote{Each commentator suggests two-three options. See, e.g., Panchu, supra n. 658, at 104; Hindle, supra n. 77, at ¶ 21; Kaufmann-Kohler, supra n. 22; Bartel, supra n. 76, at 686-688; Onyema, supra n. 79, at 417-418; Thomson, supra n. 89, at 3, 6-7; Ross, supra n. 23, at 364; Schneider, supra n. 41, at 94-96; Donahey, supra n. 349, at 77; M. Scott Donahey, The Asian Concept of Conciliator/Arbitrator: Is It Translatable to the Western World?, 9-10 (on file with the ICC Documentation & Research Centre); Elliott, supra n. 87, at 175-176. Although the starting point of the CEDR Rules is ‘no’ caucusing, the CEDR Commission offers safeguards to minimise risks involved in the approach that uses caucuses. CEDR Appendix 2, supra n. 256, at ¶ 7.1.} Having analysed options suggested by different commentators that often overlap, this thesis has identified two main options:\footnote{The list does not include options that have already been discussed in Chapters 6 and 7.}

1. to exclude caucusing and conduct mediation in joint sessions only;
2. to caucus and, if parties do not settle in mediation and the dispute proceeds to arbitration, authorise the neutral:
   a. to disclose the information from caucuses to the other party before starting/resuming arbitration; or
   b. to disregard the information from caucuses.

Both options are either promoted by legislation/rules or effectively practised in different countries of the world. Each option will be explored now in more detail.

\subsection*{8.3.1 The ‘no’ caucusing approach}

The exclusion of caucuses from the mediation phase of the same neutral (arb)-med-arb should eliminate most of the behavioural and procedural concerns associated with this process discussed in section 3.3.\footnote{See, e.g., Ehle, supra n. 16, at 86, 92-93; Kaufmann-Kohler, supra n. 22; Onyema, supra n. 79, at 420; Sussman, supra n. 157, at 71; Nottage, supra n. 112; Luke Nottage, International Commercial Arbitration Developments in Model Law Jurisdictions: Japan Seen from Australia, 29 JCAA Newsletter 3, 5-6 (Dec. 2012); Nottage, supra n. 3; Ross, supra n. 23, at 363; Abramson, supra n. 60, at 12-13 (protocol 7); Hindle, supra n. 77, at ¶ 21[a]; Deekshitha & Saha, supra n. 66, at 95.} Where no caucuses are held, the problem of due process does not arise and the issue of arbitrator’s bias becomes less problematic.\footnote{Peter, supra n. 88, at 174-175; Peter, supra n. 61, at 114.} Disallowing dual role neutrals from caucusing in the mediation stage also avoids committing in advance to additional clauses that attempt to minimise due process concerns related to that practice, such as those prohibiting the use of confidential information or requiring its disclosure.\footnote{Nottage, supra n. 191, ¶ 6.} The benefits of these clauses and concerns expressed in their respect are addressed in section 8.3.2.
The ‘no caucusing’ approach is practised in parts of Continental Europe, particularly in Germany and countries following its tradition. As noted in section 4.2, in facilitating settlement German judges and arbitrators usually do not try to depart from the level of the legal issues to reveal the underlying interests of parties. This makes the issue of bias of even less concern in Germany. Fears that an arbitrator may become biased due to a prejudgment of the case does not seem to be considered a serious problem in German proceedings.

The Rules of some arbitration institutions and ADR providers promote the ‘no caucusing’ approach. For example, Article 5(2) of the CEDR Rules prohibits arbitral tribunals from meeting with any party separately or obtaining information from any party that is not shared with other parties. Or, Section 8 of the IBA’s Rules of Ethics for International Arbitrators explicitly discourages separate meetings where the arbitrator discusses settlement terms with only one of the parties at a time, because normally this would disqualify an arbitrator from any future participation in arbitration. The CIArb International Practice Guideline 7 demonstrates a similar approach.

Another example is contained in the ICC Rules of Arbitration. Article 24(1) of these Rules requires the arbitral tribunal to convene a case management conference to consult the parties on appropriate procedural measures to be adopted, including the techniques described in Appendix IV entitled ‘Case Management Techniques’. Paragraph (h)(ii) of Appendix IV suggests, in particular, that where agreed between the parties and the

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864 Peter, supra n. 61, at 111; Bühring-Uhle, supra n. 118, at 191, 195; Newmark, supra n. 140, at 88; Peter, supra n. 88, at 174; Marriott, supra n. 7; Luke Nottage, International Commercial Arbitration in Australia: What’s New and What’s Next?, 30(5) J. Int’l Arb. 465, 490 (2013) (observing that the ‘no caucusing’ approach is common for international arbitrations involving arbitrators from Switzerland and some other European countries); Lack, supra n. 58, at 374 (noting that mediation in joint sessions only is quite common for Austria, Germany, and the Netherlands; the approach, however, is not widely used in Anglo-Saxon mediations); but see Hill, supra n. 62, at 106 (observing that some Swiss arbitrators even go so far as to have ex parte communications (with the agreement of both parties) in order to seek a negotiated settlement).

865 Peter, supra n. 88, at 174-175; Peter, supra n. 61, at 113-114.

866 Peter, supra n. 88, at 175; Peter, supra n. 61, at 114.

867 This is a starting point. The Commission, however, offers safeguards that may minimise the risks involved in the approach that involves caucusing with parties. CEDR Appendix 2, supra n. 256, at ¶ 2.5.


870 ICC Rules of Arbitration, supra n. 19.
arbitral tribunal, the arbitral tribunal may take steps to facilitate settlement of the dispute, provided that every effort is made to ensure that any subsequent award is enforceable at law. The Secretariat’s Guide to ICC Arbitration expands on this issue and recommends the arbitral tribunal to verify whether the chosen approach may give rise to concerns either at the place of arbitration or at likely places of enforcement, before adopting a settlement procedure that requires its participation.871 The Guide specifies that any form of separate party caucusing is likely to give rise to such concerns.

The ‘no’ caucusing approach has also found support in case law. For example, in a New Zealand case Acorn Farms, the Hamilton High Court held that the dual role neutral may not receive information without the knowledge of both parties, which rules out the possibility of caucusing at any stage of the process. The High Court considered it clear that it was beyond the power of parties to contract out of the fundamental requirements of due process.872 The exclusion of caucuses was one of the five suggested precautions if arbitration is to be combined with mediation in New Zealand.873

Four of six practitioners interviewed for this study reported874 that they refrain from caucusing with parties in the context of the same neutral (arb)-med-arb.875 Two of them considered that their approach was conditioned by their legal and cultural background. In particular, the practitioner from Spain noted,

I think there are different methods depending on, let’s say, the legal culture in different countries. In my personal activity ... I prefer, if I try to mediate, I have to do that in the presence of everybody and with total transparency.876

The Australian practitioner who does not caucus, pointed out China as a country where caucusing is a common practice. He observed,

871 Fry et al., supra n. 357, at 264-265.
872 Acorn Farms, supra n. 844, at 2 ¶ 26.
873 Ibid, at ¶ 27. See also David A R Williams and Amokura Kawharu, Arbitration and Dispute Resolution, 2012 N.Z. L. Rev. 487, 490-491 (2012) (referring to this case to emphasise that arbitrators should only meet with parties in joint sessions).
874 All interviewed practitioners were asked how they deal with concerns related to the same neutral (arb)-med-arb (in particular, those related to the use of caucuses) in their practice. This question addressed questionnaire Result 2. See a summary of the significant questionnaire results in section 5.4 supra.
875 The remaining two interviewees reported that they caucus with the parties in the mediation stage of the same neutral (arb)-med-arb. Their responses are reported in section 8.3.2 infra.
876 Practitioner from Spain, Interview 1.
I am not comfortable with caucusing as an arbitrator. It’s my cultural background. I know in China it’s done all the time and it seems to work. But I don’t myself feel sufficiently comfortable to do it.877

The Swiss practitioner admitted that although he had not done much caucusing himself, he did not see caucusing as very problematic.

No. I have not done this [caucusing when acting as a mediator and an arbitrator in the same case]. But in one case – yes, I did some ... I would think the concern about caucusing is overdone and exaggerated. I think the concern with caucusing is more what the arbitrator acting as mediator would say himself about the prospective of the party with whom he is discussing ... especially if it is unilateral and used to coerce the party into a settlement.878

The Belgian practitioner, similarly to the above three, reported that he did not use caucuses in the mediation stage of the same neutral (arb)-med-arb.

I have not done it because it is very dangerous to caucus...879

However, contrary to the above three, this practitioner observed that he was against the use of the same neutral (arb)-med-arb, in principle. He said:

I would never accept to be a conciliator; nobody would do that in Continental Europe. The only country that I know where they do that is in China.880

A theme that emerges from the above responses is that despite the fact that the four practitioners do not use caucuses themselves, at least half of them recognises that the same neutral (arb)-med-arb involving the use of caucuses is a common practice in some countries due to the legal culture.

Indeed, the attitude to the use of caucuses in the context of the same neutral (arb)-med-arb, similarly to the question of whether it is appropriate for the same neutral to act as a mediator and arbitrator, appears to be closely linked to the legal culture of a

877 Practitioner from Australia, Interview 2.
878 Practitioner from Switzerland, Interview 4.
879 Practitioner from Belgium, Interview 6.
880 Ibid.
practitioner.\textsuperscript{881} As observed in section 4.3, the literature and some empirical evidence suggest that caucuses are widely used in the same neutral (arb)-med-arb in China and Japan, whereas they are uncommon for German judges and arbitrators. For the Chinese caucusing is, arguably, not a serious problem because they seem to believe that the parties would not reveal to the mediator during the mediation phase any facts that the neutral could not have found out from the record.\textsuperscript{882} Chinese arbitrators seem to perceive caucusing as the best way to clarify the positions and to facilitate a negotiated settlement.\textsuperscript{883} De Vera suggests that because of the dominance of cultural expectations over law in China, the restoration of harmony is the primary goal of a dispute resolution process regardless of the way this is achieved.\textsuperscript{884} While not a matter of concern in China and Japan, in the Western world caucuses are regarded as one of the major dangers of the same neutral (arb)-med-arb because they may compromise impartiality of an arbitrator and parties’ due process rights,\textsuperscript{885} and raise other concerns discussed in section 3.3. That is why the ‘no’ caucusing approach appears to be widely supported by Western practitioners and academics.

\subsection*{8.3.2 The ‘yes’ caucusing approach. The use of information disclosed in caucuses in subsequent arbitration}

Although caucuses are not necessarily an indispensable part of mediation,\textsuperscript{886} their elimination may do more harm than good.\textsuperscript{887} Barring caucuses might prevent the use of a process stage that many mediators consider vital for settlement efforts to be successful.\textsuperscript{888} This will affect the efficiency of the mediation phase of the process.\textsuperscript{889}

\footnotesize
\textsuperscript{881} Kaufmann-Kohler, supra n. 22; CEDR Appendix 2, supra n. 256, at ¶ 8 (recognising that concerns about caucuses may not arise where the arbitration takes place in jurisdictions where the courts consider caucuses to be a common and accepted practice).
\textsuperscript{882} Kaufmann-Kohler & Kun, supra n. 164, at 491; \textit{see also} Donahey, supra n. 859, at 10 (observing that it is unclear whether parties actually convey any confidential information to the neutral during the mediation phase, and, if so, how it is maintained).
\textsuperscript{883} Kaufmann-Kohler & Kun, supra n. 164, at 488.
\textsuperscript{884} De Vera, supra n. 64, at 184.
\textsuperscript{885} \textit{Ibid}; Nottage, supra n. 112 (noting that European civil law jurisdictions and the Anglo-Australian variant of the common law tradition appear to remain sceptical about caucuses due to concerns about natural justice and bias tainting arbitrators).
\textsuperscript{886} Reiner, supra n. 451, at 24 (referring to his own experience of many mediations in the course of arbitration that were successful without caucuses).
\textsuperscript{887} Bartel, supra n. 76, at 687; Abramson, supra n. 60, at 12-13 (recommending in protocol 7 that the dual role neutral should refrain from caucusing while observing, at the same time, that many settlers believe that caucuses create a unique opportunity for neutrals to help parties vent anger, clarify positions, and assess the acceptability of alternative settlement options).
\textsuperscript{888} Abramson, supra n. 60, at 12; Thomson, supra n. 89, at 3.
\textsuperscript{889} Deekshitha & Saha, supra n. 66, at 95-96 (observing that elimination of caucuses will inevitably decrease the efficiency of the mediation phase of the process); Nottage, supra n. 191, at ¶ 6 (noting that mediation in joint sessions only may have some chilling effect on parties’ willingness to express views
Although not every mediation requires caucuses, the ability to caucus to explore parties’ position and interests in confidence is regarded as an important part of the mediation process.  

Two of six interviewed practitioners said that they use caucuses in the mediation phase of the same neutral (arb)-med-arb. The Hong Kong practitioner who reported using caucuses in the mediation phase of the same neutral (arb)-med-arb at all times emphasised the benefits of doing so. He noted,

Actually it [caucusing] helps ... once you start to talk to your clients in the private sessions ... they start thinking: I have to spend more money, more time and everything is basically unpredictable and maybe I will have to go to appeal. May be if I settle within a reasonable area, I will get something done.

It appears that one of the purposes of caucuses for this practitioner is to make sure that parties are aware about costs and delays that the arbitration process will involve. This approach may create a healthy pressure on parties to settle. It may also make parties feel coerced into settlement. These two options were discussed in sections 3.2.5 and 3.3.1.4, respectively. A competent and experienced neutral would usually know how to achieve the first and avoid the second.

The US practitioner reported that in his experience caucuses were used or not, depending on whether the process started with mediation or arbitration. He said,

Where I had been mediating ... yes, I had been caucusing. So at this point when they [parties] say: we would like you now to arbitrate, we will have to talk about the fact that I have already caucused ... Where I had been appointed as an arbitrator and then put on the hat of the mediator, as far as

aimed at achieving settlement); Rosoff, supra n. 143, at 92 (observing that it should be entirely possible, although perhaps not as effective, for a dual role neutral to conduct mediation in joint sessions only).

Hindle, supra n. 77, at ¶ 20; Abramson, supra n. 60, at 12-13; Leon & Peterson, supra n. 156, at 93; Thomson, supra n. 89, at 7; Bartel, supra n. 76, at 687.

This practitioner was selected to participate in an interview on the basis of the completed questionnaire (first phase of the empirical study) that demonstrated experience with combinations. This practitioner answered ‘always’ to the questionnaire question whether caucuses were used in mediation (the mediation stage of combinations). This practitioner reported experience as a dual role neutral, as a mediator in a dispute that involved arbitration with a different neutral and as an arbitrator in a dispute that involved mediation with a different neutral.

Practitioner from Hong Kong, Interview 3.
In short, this practitioner used caucuses in the mediation stage of the same neutral med-arb, but did not in the mediation stage of the same neutral arb-med-arb. A possible explanation to this approach is that in the former case the practitioner was not aware that he would be asked to arbitrate until the completion of the mediation process. Consequently, the use of caucuses in mediation did not raise concerns that are typically raised in the context of the same neutral (arb)-med-arb. This differed from the situation in the latter case, where the practitioner acted as a mediator after being appointed as an arbitrator. This should have surfaced concerns associated with the use of caucuses in the mediation stage of the same neutral (arb)-med-arb. It is likely that the practitioner refrained from using caucuses in this situation as a precaution.

As noted in section 8.3.1, the CEDR is a proponent of the ‘no’ caucusing approach. At the same time, it says nothing against caucusing if this approach is acceptable to the courts of all jurisdictions which might have reason to evaluate the validity of the tribunal’s award or if the parties explicitly consent to this approach and its consequences. The latter point finds support in case law and the literature.

The South Australian Duke Group case discussed in section 8.2.2.3.2 demonstrates that the Australian courts are likely to allow caucuses with a judge or arbitrator where the parties consent beforehand. Similarly, in the literature, despite the scepticism surrounding the use of caucuses, commentators suggest that caucuses are permissible, provided parties consent to their use on a fully informed basis and put necessary safeguards in place. Lack argues that the use of caucuses in the mediation phase of the same neutral (arb)-med-arb clearly calls for involvement of separate neutrals. He considers, however, that provided special measures are implemented the dual role neutrals can still engage in caucuses. In Lack’s view this is primarily a matter that should be left to the parties to decide.

Abramson suggests that caucuses are less risky if mediation is focused on solely forward-looking solutions such as a continuing business relationship instead of...
backward-looking issues that typically arise in arbitration.\(^{898}\) If mediation can be separated in time or subject matter from the issues in arbitration, a dual role neutral is much less likely to be affected by off-the-record information disclosed during mediation in the subsequent arbitration stage.

Overall, rules, case law, literature, and interview data support the use of caucuses in the mediation stage of the same neutral (arb)-med-arb, provided parties explicitly consent to it and necessary safeguards are in place. The thesis turns now to examine two main safeguards for using caucuses in the same neutral (arb)-med-arb. To do so, the thesis draws on experiences of jurisdictions where the use of caucuses in the context of the same neutral (arb)-med-arb is permitted by law or is an accepted practice.

8.3.2.1 A ‘disclosure’ rule

To protect an arbitrator against claims for bias and to meet due process requirements, the legislators in Singapore,\(^{899}\) Hong Kong\(^{900}\) and Australia\(^{901}\) require dual role neutrals, before resuming arbitral proceedings, to disclose to all parties as much of the confidential information obtained via prior caucuses as they consider material to the arbitral proceedings.

Although the disclosure may inhibit candid exchanges in mediation, it appears to be necessary not to offend the principles of due process, particularly as understood in the Anglo-American legal system,\(^{902}\) because a decision maker might possess material information of which one side is unaware and to which it has had no opportunity to respond.\(^{903}\) If due process requirements are met, the award should be safe against attack on this ground in the courts of the country where it is made and in any country of enforcement.\(^{904}\)

Apart from minimising concerns relating to the breach of due process, the approach in Singapore, Hong Kong and Australia is commended for leaving it up to arbitrators to decide on what information they will rely in making their decisions.\(^{905}\) Only the

\(^{898}\) Abramson, supra n. 60, at 13.

\(^{899}\) Singapore IAA, supra n. 440, s. 17 (3).

\(^{900}\) Hong Kong AO, supra n. 439, s. 33(4).

\(^{901}\) In Australia, the ‘disclosure’ rule is provided under the legislation governing domestic, but not international, arbitration. See, e.g., Commercial Arbitration Act 2010 (NSW) s. 27D(7) [hereinafter, CAA 2010 (NSW)]; Commercial Arbitration Act 2013 (Qld) s. 27D(7).

\(^{902}\) Lawday, supra n. 101, at 8; see also Donahey, supra n. 859, at 9-10 (referring to a threat posed by caucuses to the Western notions of due process).

\(^{903}\) Donahey supra n. 349, at 77; Donahey, supra n. 859, at 9-10; Schneider, supra n. 41, at 96.

\(^{904}\) Marriott, supra n. 257, at 545; Schneider, supra n. 41, at 96.

\(^{905}\) Marriott, supra n. 257, at 545.
information relied on must be disclosed to all parties. Arbitrators may equally decide
that they will not rely on any information revealed in caucuses in making their decision.
If either party wishes, it may submit evidence presented to the dual role neutral in
mediation in arbitration once it resumes.906

Article 24(3) of the UNCITRAL ML on Arbitration also imposes a disclosure
requirement on dual role neutrals by stating:

All statements, documents, or other information supplied to the arbitral
tribunal by one party shall be communicated to the other party.

Contrary to the approach taken by the legislators in Singapore, Hong Kong and
Australia the requirement of disclosure under the UNCITRAL ML is not limited to the
information that is material to the arbitral proceedings, but covers ‘all statements,
documents, or other information’ supplied to arbitrators. Commentators on the
UNCITRAL ML emphasise the mandatory nature of Article 24(3)907 and note that its
violation will most likely lead to the annulment of the award or the refusal of the
award’s enforcement.908

The UNCITRAL ML disclosure requirement applies in countries that base their
legislation on the UNCITRAL ML and have adopted its Article 24(3) without
amendment. For example, that is the case for New Zealand where Article 24(3) of the
First Schedule to the Arbitration Act 1996 repeats word for word the disclosure
requirement contained in Article 24(3) of the UNCITRAL ML.

The New Zealand Court of Appeal endorsed the view that rather than being a default
provision, Article 24(3) encapsulates an inalienable procedural right. The Court of
Appeal observed that although the parties in arbitration have significant autonomy in
setting up the arbitral process, it is not open to them to exclude Article 24(3).909

This research did not find any cases from other countries where courts would comment
on the nature of Article 24(3) of the UNCITRAL ML adopted without amendment into

906 Ibid.
907 See, e.g., Howard M. Holtzmann et al., A Guide to the 2006 Amendments to the UNCITRAL Model Law
on International Commercial Arbitration: Legislative History and Commentary, 674 (Kluwer Law
International 2015); Stavros L. Brekoulakis et al., UNCITRAL Model Law, Chapter V, Article 24 [Hearings
and written proceedings], in Concise International Arbitration 885-886 (Loukas A. Mistelis ed., 2d ed.,
908 Brekoulakis et al., supra n. 907, at 885.
909 Hindle, supra n. 77, at ¶¶ 16-17 referring to Methanex Motunui v. Spellman [2004] 3 NZLR 454. Hindle observes that in view of this decision, in New Zealand, it might be necessary for neutrals to keep an accurate record of any and all information that is given to them in caucuses, if it needs to be disclosed later. Ibid, at ¶ 40[e]. Keeping an accurate record can turn into a very time-consuming task.
countries’ national legislation. However, taking into account the view of commentators on the UNCITRAL ML and the position of the New Zealand Court of Appeal, one might expect that courts in other countries will be inclined to regard Article 24(3) as a mandatory rather than default provision.

Even if it is not required under the applicable legislation, a number of commentators insist on the disclosure of all material information from mediation as a measure to manage concerns related to impartiality and due process. Some even suggest sample clauses. For example, Thomson, a Canadian practitioner, proposes the following clause:

If caucusing (meetings separately with each party) is used during the mediation process, any statements in caucusing which might influence the decision of the Mediator/Arbitrator will be revealed to the other side prior to the decision of the Mediator/Arbitrator (this will not apply if the parties reach an agreement).

8.3.2.1.1 Concerns related to the ‘disclosure’ rule

The Hong Kong, Singaporean and Australian provisions raise three main concerns for some practitioners and academics.

*Concern Nos 1. Disclosure requirement*

The major concern relates to the obligation of a dual role neutral to disclose to all parties to arbitration, information that he considers material to the arbitral proceedings.

Firstly, it puts the dual role neutral in a difficult position requiring to take a view about what information is ‘material’ and how exactly to disclose it. Furthermore, mediations usually take place in an informal fashion with few notes taken, which makes it difficult for the neutral to record everything accurately. It might happen that one party will object to the disclosure made by the neutral as not reflecting an accurate summary of

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910 See, e.g., Thomson, *supra* n. 89, at 5; Anand, *supra* n. 608, at 42; Tang, *supra* n. 157, at 554 (adding that dual role neutrals should warn parties in the course of caucusing against giving any substantive information which they do not want the neutral to disclose to the other party); Ye, *supra* n. 740, at 482 (citing Professor Kaplan who endorses the combined use of mediation and arbitration by the same neutral under three conditions, including the disclosure of all material facts discovered in mediation, if mediation efforts do not bring a settlement).

911 Thomson, *supra* n. 89, at 7.

912 Goodrich, *supra* n. 736, at 6-7; Wilson, *supra* n. 508.

913 Goodrich, *supra* n. 736, at 7; Wolski, *supra* n. 3, at 263; Ross, *supra* n. 23, at 361 (observing that instead of determining what information is material, it might be more convenient for the neutral to simply disclose everything); Thomson, *supra* n. 89, at 7; Deekshitha & Saha, *supra* n. 66, at 92.
what was said. Also, it would seem to open up the neutral to subsequent challenges as to what should have been disclosed.\textsuperscript{914} In response to this criticism, the Hong Kong Law Revision Commission has suggested that if the dual role neutral sends each party a list of issues disclosed in confidence by that party, which the dual role neutral regards as ‘material’ prior to any disclosure of that information and allows the party to comment to the dual role neutral prior to such disclosure, the chances of error in the process would be quite small.\textsuperscript{915} In any case, no disclosure requirement will eliminate the possibility that one party will believe that the dual role neutral has been told a lie by the other party in caucuses, but has chosen not to reveal it or withdraw.\textsuperscript{916}

Secondly, parties’ knowledge about possible disclosure may impede the success of mediation.\textsuperscript{917} The parties are unlikely to be candid and forthcoming in caucuses if they know that information might be passed onto the other party.\textsuperscript{918}

\textit{Concern No 2. Ability to withdraw consent}

The legislative rules in Hong Kong and Singapore are also criticised for allowing a party to first agree that the arbitrator can mediate and later to withdraw its consent.\textsuperscript{919} For example, Section 33(1) of the Hong Kong Arbitration Ordinance provides:

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.

The Australian legislation governing domestic arbitration even prohibits dual role neutrals from conducting subsequent arbitration proceedings unless parties re-authorise them in writing to do so after mediation that did not result in settlement. For example, Section 27D(4) of the New South Wales’ Commercial Arbitration Act 2010 (NSW) states:

An arbitrator who has acted as mediator in mediation proceedings that are terminated may not conduct subsequent arbitration proceedings in relation

\textsuperscript{914} Goodrich, \textit{supra} n. 736, at 7 (noting that one might say that because the matters were confidential, the other party would find it difficult to mount a challenge; however, if the obligation to disclose is not enforceable, Goodrich wonders why to give the neutral this difficult responsibility).

\textsuperscript{915} Donahey, \textit{supra} n. 349, at 77 n. 31; Donahey, \textit{supra} n. 859, at 11 n. 31.

\textsuperscript{916} Bartel, \textit{supra} n. 76, at 687.

\textsuperscript{917} Goodrich, \textit{supra} n. 736, at 7; Kaufmann-Kohler, \textit{supra} n. 22; Wolski, \textit{supra} n. 3, at 263; Deekshitha & Saha, \textit{supra} n. 66, at 92; Wilson, \textit{supra} n. 508; Schneider, \textit{supra} n. 41, at 96.

\textsuperscript{918} Wolski, \textit{supra} n. 3, at 263.

\textsuperscript{919} Goodrich, \textit{supra} n. 736, at 7.
to the dispute without the written consent of all the parties to the arbitration
given on or after the termination of the mediation proceedings.

In both cases (Hong Kong and Singapore, on the one hand, and Australia, on the other
hand) the legislation gives each party a veto over whether the dual role neutral can
continue. There is a fear that parties may use this veto tactically to remove an arbitrator
who is seen as unfavourable or simply to delay proceedings.\textsuperscript{920}

\textit{Concern No 3. Limitation of party autonomy}

Finally, these provisions may infringe the autonomy of the parties in determining how
they can regulate their (arb)-med-arb process.\textsuperscript{921} It appears that attempts to encourage
the practice of the same neutral (arb)-med-arb through the legislation in Hong Kong and
Singapore have had the opposite effect,\textsuperscript{922} which is supported by the empirical data
collected for this thesis. As discussed in section 5.2.3.2.5, none of the questionnaire
participants practising in Singapore and Hong Kong reported any cases where this
legislation applied in practice. Goodrich argues that countries which have traditionally
embraced same neutral (arb)-med-arb seem to have managed perfectly well without any
mandatory laws.\textsuperscript{923} It is, therefore, desirable that any legislative regulation of the same
neutral (arb)-med-arb be more circumscribed and more fully respect party autonomy. It
could include a caveat that parties should receive adequate legal advice on the concerns
raised by the process before entering into it.\textsuperscript{924}

\textbf{8.3.2.2 A ‘disregard’ rule}

An alternative approach to dealing with information from caucuses to minimise bias and
due process concerns is a so called ‘disregard’ rule. In accordance with this rule, the
dual role neutral when acting as an arbitrator is to take no account of material
information obtained in caucusing and base the award only on evidence presented in
arbitration. The ‘disregard’ rule has many supporters.\textsuperscript{925} For some commentators, this

\textsuperscript{920} Ibid; but see Deekshitha & Saha, \textit{supra} n. 66, at 96-97 (commending the requirement of the second
consent in CAA 2010 (NSW), \textit{supra} n. 901, s. 27D for mitigating the risk of bias and violation of principles
of natural justice to a large extent and advocating for incorporation of a second consent requirement
into the existing framework of the Hong Kong and Singaporean law because this will allow parties, after
disclosure of the material information, to check for the danger of bias and act accordingly to protect
their interests).

\textsuperscript{921} Goodrich, \textit{supra} n. 736, at 6.

\textsuperscript{922} \textit{Ibid}, at 8.

\textsuperscript{923} \textit{Ibid}, at 6.

\textsuperscript{924} \textit{Ibid}, at 8.

\textsuperscript{925} See, e.g., Plant, \textit{supra} n. 463, at 146; Reiner, \textit{supra} n. 451, at 27; Burr, \textit{supra} n. 68, at 68; Leon &
Peterson, \textit{supra} n. 156, at 93; Bühring-Uhle et al., \textit{supra} n. 46, at 249; Schneider, \textit{supra} n. 302, at 27–28;
Marriott, \textit{supra} n. 257, at 545; Limbury, \textit{supra} n. 253, at 3; Abramson, \textit{supra} n. 60, at 15 (Protocol 9).
rule is a better approach, as compared to the ‘disclosure’ rule, if it is felt necessary to regulate the way of dealing with information from mediation rather than leave this question to parties and their legal advisers.

The disregard rule is sometimes referred to as the Chinese solution/approach. The Chinese appear to have no problem with disregarding information from caucuses. They believe that if judges are trusted to be capable of disregarding inadmissible evidence, one should not doubt the ability of well-trained arbitrators to remain impartial despite the information obtained in mediation. The 2015 CIETAC Arbitration Rules contain a provision that prohibits the use of any information from mediation in the subsequent arbitration. Article 47(9) of the 2015 CIETAC Arbitration Rules provides:

Where conciliation is not successful, neither party may invoke any opinion, view or statement, and any proposal or proposition expressing acceptance or opposition by either party or by the arbitral tribunal in the process of conciliation as grounds for any claim, defense or counterclaim in the subsequent arbitral proceedings, judicial proceedings, or any other proceedings.

The Chinese Arbitration Law does not have any similar provision. The disregard rule appears to be practised in the United States due to the statutory protection of mediation confidentiality.

8.3.2.2.1 US courts applying the ‘disregard’ rule
The available US case law shows that, unless parties agree otherwise, the arbitrator in the same neutral (arb)-med-arb must disregard anything disclosed in confidence during mediation.

The court in Bowden v. Weickert dealt with an arbitrator who attempted to mediate the dispute. Upon failure of the mediation process, the dual role neutral returned to his role as arbitrator and rendered the award. The court reviewed the same neutral arb-med- arb and delineated the nature of the agreement necessary for this kind of process:

926 Goodrich, supra n. 736, at 7; Deekshitha & Saha, supra n. 66, at 96.
927 Goodrich, supra n. 736, at 7.
928 Kaufmann-Kohler, supra n. 22; Wolski, supra n. 3, at 262; but see Donahey, supra n. 859, at 10 (observing that in Chinese practice once the mediator determines that efforts at mediation have failed, it is uncertain how the evidence that the mediator has received in confidence is treated and whether it influences any award that may be issued).
929 Wolski, supra n. 3, at 263.
930 Ibid; Kaufmann-Kohler & Kun, supra n. 164, at 491.
At a minimum, the record must include clear evidence that the parties have agreed to engage in a med-arb process [same neutral arb-med-arb], by allowing a court appointed arbitrator to function as the mediator of their dispute. The record must also contain: (1) evidence that the parties are aware that the mediator will function as an arbitrator if the mediation attempt fails; (2) a written stipulation as to the agreed method of submitting their disputed factual issues to an arbitrator if the mediation fails; and (3) evidence of whether the parties agree to waive the confidentiality requirements imposed on the mediation process … in the event that their disputes are later arbitrated.

Finding that the arbitrator had relied on information obtained in his role as mediator in violation of statutory protections of mediation confidentiality and that there had been no explicit agreement by the parties regarding the use of confidential information, the court held that the use of the same neutral as arbitrator and mediator rendered the arbitrator’s decision ‘arbitrary and capricious’ on its face. The award was set aside.

In *Town of Clinton v. Geological Services Corp.*, 932 a Massachusetts superior court reiterated the reasoning of Bowden, and further stated that waiver of mediation privilege must be explicitly made and consenting to the same neutral arb-med-arb procedure would not automatically and implicitly result in a waiver of mediation confidentiality.

California’s Second District Court of Appeals held in *John Eisendrath v Superior Court* 933 that there can be no implied waiver of mediation privilege. Mediation communications could only be disclosed with the express consent of all participants (as distinguished from parties), including the disputants, other non-parties in attendance and the mediator.

At the same time, as demonstrated by the next case, the court will not necessarily vacate the award even in the absence of an express consent on the use of confidential information in limited circumstances.

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In *Logan v. Logan*,934 the losing party sought to set aside the award on the grounds that the dual role neutral referred to confidential information from mediation in his arbitration award. The court noted that:

> If there was an improper reference to the mediation in the arbitration proceedings, this would constitute grounds for vacating or modifying the arbitration order and subsequent judgment, if the reference materially affected appellants’ substantial rights.

However, on the facts before it, the court refused to set aside the award, stating that it was not convinced that the reference in the arbitration order to matters that occurred in mediation ‘materially affected substantial rights’.

As shown in the next case, where parties have consented, the use of confidential information by the arbitrator in the award will not provide a basis for vacating the award.

In *U.S. Steel Mining Company v. Wilson Downhole Services*,935 the parties had agreed to have the mediator serve as the arbitrator if mediation failed to lead to a resolution and empowered the mediator, now arbitrator, to select between the parties competing proposals in baseball arbitration. The parties expressly authorized the dual role neutral to rely on confidential mediation disclosures in reaching his decision. The parties’ agreement provided:

> The Parties anticipate that ex parte communications with the Arbitrator will occur during the course of the mediation. The Parties agree that the Arbitrator, in evaluating each Party’s best and final offer, may rely on information he deems relevant, whether obtained in an ex parte communication or otherwise, in making the final Award.

In attacking the award, the challenging party claimed fraud in the presentation of information in the mediation. The court held that such evidence of fraud had to be clear and convincing and no such finding could be made on the facts presented in the face of the consent given.

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Critique of the ‘disregard’ rule

The ability of any neutral to disregard information disclosed in caucuses is the subject of discussion in the literature. Some commentators contend that arbitrators should have no problem with following a disregard rule, whereas others argue that this is unachievable in practice. This difference in views, similarly to the difference in views on whether it is appropriate to use caucuses in the same neutral (arb)-med-arb, can be explained by reference to the practitioners’ legal culture. Lew observes that while in China awards tend to be based solely on what is heard in arbitration, not in mediation, for Western minds it seems impossible that arbitrators can mentally disregard everything heard in the mediation phase. Even if arbitrators believe in their capacity to do so, parties are unlikely to accept this, particularly when a decision is made against them. This might well be the case. The available case law from the United States presented in section 8.3.2.2.1, however, demonstrates that parties may succeed in vacating an arbitral award rendered by arbitrators who previously acted as mediators only if there is a reference to confidential information from mediation in the arbitral award without parties’ explicit agreement to it. In Logan v. Logan, the court even stated that for an award to be vacated, the reference to confidential information (to which parties did not explicitly agree) needs to materially affect party’s substantial rights. It appears that in the absence of the reference to confidential information from mediation in an arbitral award (to which parties did not explicitly agree), a party’s challenge of the award in the United States stands little chance of success.

Reasons why arbitrators may have no problem with following the ‘disregard’ rule

Some commentators are convinced that arbitrators should have little difficulty in following the disregard rule and state that concerns about possible contamination of neutrals by receiving information in caucuses are overstated. After all, all decision-makers are taught to decide only on the basis of properly admitted applicable evidence. These commentators draw parallels between judges and arbitrators and suggest that if one presumes that judges are able to render decisions based only upon

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936 See, e.g., Lew, supra n. 78, at 426.
937 Ibid.
938 Ibid (quoting Tang Houzhi).
939 Ibid.
940 Ibid.
941 See, e.g., Goodrich, supra n. 342, at 17; Goodrich, supra n. 736, at 7; Marriott, supra n. 257, at 544.
942 Marriott, supra n. 257, at 544; Thomson, supra n. 89, at 8; Schneider, supra n. 41, at 94 (noting that arbitrators generally are not quite as gullible as critics of caucusing seem to presume).
943 Marriott, supra n. 257, at 544.
admissible evidence, and that they are capable to block out extraneous, yet potentially prejudicial, matters, there is no reason why dual role neutrals cannot be afforded the same presumption.\footnote{Ibid; Peter, supra n. 88, at 160; Thomson, supra n. 89, at 8.}

Also, the requirement to disregard information from caucuses appears to be little different in principle from other occasions in which arbitrators are aware of certain matters but are required to disregard them in reaching their decision. For example, arbitrators may have to consider and rule on the admissibility of certain evidence and if they hold that it is inadmissible, they need to disregard it.\footnote{Goodrich, supra n. 736, at 7; see also Schneider, supra n. 41, at 94 (observing that sometimes improperly submitted arguments are rejected after the arbitrators have become aware of them); Marriott, supra n. 257, at 544 (noting that arbitrators often get documents or hear testimony that is irrelevant but may be prejudicial to one side, which they must and do disregard in reaching their decisions).} Apart from inadmissible evidence, arbitrators may be required to disregard information that is not presented in arbitration, such as public documents or information in the media.\footnote{Rosoff, supra n. 143, at 97.} Arbitrators, generally, often receive documents and information of which they take note and to which the other party replies only months later in the responding statement.\footnote{Schneider, supra n. 41, at 94.} Arbitrators read the initial material with a critical mind expecting that the other side will respond to most of what is said in these statements and it is unlikely that dual role neutrals will react differently to information revealed in caucuses where their critical sense is likely to be sharpened.\footnote{Ibid.}

Any concerns about possible contamination of arbitrators by receiving information in caucuses can be reduced by requiring dual role neutrals upon conclusion of mediation to inform parties whether they feel able to conduct arbitration impartially.\footnote{Limbury, supra n. 253, at 3; Limbury, supra n. 852, at 85.} In particular, dual role neutrals need to report whether in formulating the award, they feel able to disregard confidential information from mediation. If dual role neutrals feel that they are unable to ignore confidential information, these neutrals should resign.\footnote{Limbury, supra n. 253, at 3; Limbury, supra n. 852, at 85; Rosoff, supra n. 143, at 97 (observing that it may only be in extreme circumstances where a dual role neutral may feel compelled to resign or refuse appointment because of a bias created in mediation; for that to happen the confidential information from mediation would have to create a bias that the dual role neutral could not ignore).} The IBA Guidelines on CIIA and CEDR Appendix 2 contain the same recommendation.\footnote{IBA Guidelines on CIIA, supra n. 734, general standard 4(d); CEDR Appendix 2, supra n. 256, at ¶ 7.6.}
Alternatively, parties may expressly permit dual role neutrals to continue as arbitrators and to use confidential information in arbitration.\footnote{952}{Limbury, supra n. 253, at 3.}

Considering that courts may vacate awards or disqualify arbitrators if they manifest partiality in the arbitration proceedings or in the award, arbitrators need to ensure that they do not rely in arbitration on anything learned in mediation.\footnote{953}{Ibid; Limbury, supra n. 852, at 86.} To achieve this, dual role neutrals may provide at the outset of the arbitration phase a written statement of what they apprehend to be the issues to be determined and the facts as then understood, and invite parties to comment on it, including to object to the admissibility of any of the facts. Admitted facts would provide a starting point for the arbitration phase.\footnote{954}{Limbury, supra n. 100, at 10.}

*Reasons why arbitrators may find it difficult to follow the ‘disregard’ rule*

Some authors argue that the idea of erasing things from one’s mind is an artificial one and unrealistic in practice: ‘[u]nlike a computer keyboard, one could not simply press a ‘delete’ key or ‘empty trash can’.\footnote{955}{Lawrence G. S. Boo, *Commentary on Issues Involving Confidentiality*, in *New Horizons in International Commercial Arbitration and Beyond*, 12 ICCA Congress Series 523, 528 (Albert Jan van den Berg ed., Kluwer Law International 2005); see also Nottage, supra n. 191, at ¶ 6 (noting that the requirement to disregard ‘is probably unrealistic in practice’).} The requirement to disregard does not avoid the risk that arbitrators may be influenced by what they have heard in caucuses.\footnote{956}{Kaufmann-Kohler, supra n. 22; Lang, supra n. 139, at 100 (observing that it is arrogant to suggest that there is no chance for a neutral to become influenced in rendering an award by what has been said by the parties in private during the mediation stage); Deekshitha & Saha, supra n. 66, at 96 (noting that the disregard rule does not resolve the issue of residual inherent bias, which owing to its psychological and subconscious nature is not something a procedural rule can eliminate).} This is because ‘bias is such an insidious thing that, even though a person may in good faith believe that he was acting impartially, his mind may unconsciously be affected by bias’.\footnote{957}{Lang, supra n. 139, at 100 (quoting Lord Goff from *R v. Gough* [1993] UKHL 1 (20 May 1993)).}

The argument that an arbitrator should be able to block out information like a judge does when applying the rules of evidence appears to be insufficient to overcome the problem of apprehended bias.\footnote{958}{Peter, supra n. 61, at 93-94.} The rules of evidence relate to legally relevant facts which can be consciously blocked out for decision purposes, i.e. the particular facts and their impact on the decision can be rationally determined. Legally irrelevant information conveyed during mediation cannot be consciously blocked out because, unlike under the rules of evidence, such legally irrelevant information should not have
an impact on the outcome of the case in the first place. As no rational connection exists between such legally irrelevant information and the outcome of the decision, it is not possible to rationally isolate the information which should be blocked out. The dual role neutral may subconsciously and for whatever reason become more understanding and supportive of a particular party’s position after becoming aware of certain facts. This kind of information is hard to consciously block out.

At the same time, impartiality, being understood as a complete lack of opinion is psychologically impossible. Even if arbitrators or mediators start as impartial, they will at a certain point become biased, even if unconsciously so. Also, impartiality could never be understood in an absolute way, which would exclude preconceptions, because neutrals who have lived in the world ‘will invariably come to a case with perspectives and beliefs and preconceptions that bear the stamp of their past experiences’.

Moreover, according to some commentators, it is not only unrealistic to expect mediators turned arbitrators when making an arbitration award to put aside their awareness of underlying interests that surfaced in mediation, but it may well lessen the quality of the decision and affect the efficiency of the process, even if it is theoretically and practically possible to do so. A dual role neutral cannot and should not be expected to merely block out information gleaned from mediation, because this is the reason why parties have chosen the same neutral (arb)-med-arb instead of opting for different neutral (arb)-med-arb.

Nevertheless, in view of all discussed concerns raised about both the disclosure and disregard rule, some commentators remain pessimistic about the ability to overcome

959 Ibid; Limbury, supra n. 852, at 85 (making an interesting observation: while in court proceedings all parties are aware of the evidence that has been ruled inadmissible, in the same neutral (arb)-med-arb only one party knows what confidential information it has confided in the neutral).
960 Peter, supra n. 61, at 94.
961 Ibid.
962 Almoguera, supra n. 187, at 128; Peter, supra n. 88, at 158 n. 28.
963 Almoguera, supra n. 187, at 128 (quoting Jeremy Lack).
965 Elliott, supra n. 87, at 167; Peter, supra n. 61, at 94 (adding that it is not even possible to exclude generally all information gained during mediation from being considered in arbitration; this would render the efficiency argument obsolete).
966 De Vera, supra n. 64, at 186.
them and advocate for either elimination of caucuses altogether or for the use of alternative approaches examined in Chapters 6 and 7.\textsuperscript{967}

One of the major concerns associated with the use of caucuses in the same neutral (arb)-med-arb is the risk of breach of due process due to the arbitrator’s participation in caucuses. It was noted in section 8.2.2.3.2 that for the moment there is no definite answer to the question whether parties can waive their due process rights. Both the disclosure and disregard rule minimise but do not eliminate the risk of breach of due process. To remedy this situation, the thesis suggests that jurisdictions permitting the same neutral (arb)-med-arb involving the use of caucuses should specify that parties using this process waive their due process rights on the ground of arbitrator’s participation in caucuses.

\section*{8.4 Conclusion}

This Chapter has investigated the third way to address behavioural and procedural concerns associated with the same neutral (arb)-med-arb, the implementation of safeguards for using the same neutral (arb)-med-arb. It has identified two key safeguards that parties need to consider and should implement if they choose the same neutral (arb)-med-arb as their dispute resolution mechanism: party consent and one of the two safeguard options for reducing concerns related to the use of caucuses.

\textit{Safeguard 1. Party consent}

Party written consent is the first and critical safeguard for using the same neutral (arb)-med-arb that must be followed to protect the arbitrator and the award from a challenge on the ground of the arbitrator’s participation in mediation. Party consent is required in accordance with the consensual nature of arbitration and mediation and parties’ procedural autonomy. To be valid, party consent needs to satisfy two essential criteria. First, consent must be a result of parties’ voluntary choice, which means that parties cannot be coerced into the process. One of the ways to ensure that parties choose the same neutral (arb)-med-arb voluntarily is through allowing them to discuss separately and between themselves (outside the neutral’s presence) any process design option. Second, consent must be informed, which means that parties must be fully aware of the risks and concerns associated with the same neutral (arb)-med-arb.

\textsuperscript{967} Nottage, \textit{supra n.} 191, at ¶6 (criticising both the disregard rule for being ‘unrealistic in practice’ and the disclosure rule for going ‘too far’ and advocating for a ‘no’ caucusing approach); Kun, \textit{supra n.} 3, at 554 (observing that neither approach appears to be capable of totally eliminating the risks of potential contamination of neutrals when they are exposed to information in caucuses; and suggesting to consider alternative approaches).
Apart from giving their informed and voluntary consent and unless the issue of waiver is regulated in the applicable legislation or rules, it is advisable that parties arrange an express written waiver of their right to challenge the arbitrator and the award on the ground of the arbitrator’s participation in mediation. In the absence of such an express written waiver, it is arguable that parties’ written consent to the process will imply the said waiver.

Although it is widely recognised that parties can waive the impartiality requirement, the waiver is not absolute. If arbitrators manifest bias during or after arbitration, parties may still challenge them or the award. It is unclear whether parties can waive their due process rights. While some commentators believe that this is entirely possible, provided parties have considered implications of this choice in light of a particular dispute, others disagree or at least question this possibility. The few jurisdictions that addressed this issue directly, reached contrasting conclusions in its respect. The ability of parties to waive their due process rights in Australia was supported by the Duke Group case. This, however, is not possible for parties in New Zealand, as demonstrated by the Acorn Farms case. The debate is ongoing and some risk to the award remains because this issue is not settled in many jurisdictions. The absence of a definite answer to the question whether parties can waive their due process rights has prompted law and rule makers and commentators to come up with various solutions to minimise the risk of breach of due process and arbitrators’ partiality due to their participation in caucuses.

**Safeguard 2. Safeguards related to caucuses**

The thesis has identified two main safeguard options for reducing concerns related to the use of caucuses, both having their strengths and weaknesses. The first option is to exclude caucuses altogether and conduct mediation in joint sessions only. Where no caucuses are held, the problem of due process does not arise and the issue of arbitrators’ bias due to their participation in mediation becomes less problematic. This approach is practised in European countries following the Germanic tradition and is recommended by the CEDR, the CIArb and the ICC. However, this ‘no’ caucusing approach is criticised for eliminating a mediation process stage that may be vital for settlement efforts to be successful.

The second option is to allow caucuses and to specify what dual role neutrals are to do with the information from caucuses, if mediation efforts do not result in a settlement and dual role neutrals need to resume as arbitrators.
One way is to require dual role neutrals, before resuming as arbitrators, to disclose to all parties as much of the confidential information from caucuses as they consider material to the arbitral proceedings (the ‘disclosure’ rule). This is the approach taken by the legislators in Singapore, Hong Kong and Australia. In some jurisdictions, for example, in New Zealand, the requirement of disclosure is not limited to information that is material, but extends to all information provided to dual role neutrals in caucuses.

Alternatively, dual role neutrals may be required when acting as arbitrators to disregard any information obtained in caucuses and base their award only on evidence properly presented in arbitration (the ‘disregard’ rule). This approach is practised in China and, as the available case law shows it, in the United States.

Both the disclosure and disregard rule have flaws. The former may, for example, deter parties from being open in caucuses and thereby inhibit the entire mediation process. The latter is often criticised for not avoiding the risk that arbitrators may become influenced by what they have heard. Both the disclosure and disregard rule minimise but do not eliminate the risk of breach of due process. To remedy this situation, the thesis suggests that jurisdictions permitting the same neutral (arb)-med-arb involving the use of caucuses should specify that parties using this process waive their due process rights on the ground of the arbitrators’ participation in caucuses.

The thesis does not advocate for any of the presented safeguard options for reducing concerns related to the use of caucuses. Neither does it advocate for any of three ways to address concerns associated with the same neutral (arb)-med-arb discussed in Part IV (Chapters 6, 7 and 8). Which safeguard or way is appropriate to use, will depend on the particular circumstances of the case, including the jurisdictions that are the place of arbitration and the award’s enforcement, and the legal culture of the participants of the dispute resolution process.
PART V. THE WAY FORWARD

The questionnaire data presented and discussed in Chapter 5 reveals a contrast between the infrequent use of combinations in international commercial dispute resolution and the overwhelmingly positive perception of their potential benefits. Only about one third of the participants reported experience with combinations (34.6%) whereas 93.5% acknowledged that the use of combinations was beneficial to parties. Faster resolution of a dispute and its lower cost (as compared to arbitration only) were among the top three benefits, as rated by the questionnaire participants. Considering the current discontent of users with costs and delays in arbitration proceedings, the questionnaire participants appeared to regard combinations as a remedy against these limitations of arbitration. This shows that there is scope for a more widespread use of combinations.

Part V answers the fifth research question. It explores initiatives, including those suggested in the interviews conducted for this study, that could enhance the use of the same neutral (arb)-med-arb and other combinations in international commercial dispute resolution. So far the discussion of combinations has revolved around one combination, the same neutral (arb)-med-arb. Other combinations examined in Chapters 6 and 7 have been largely overlooked and addressed mostly in the context of ways to address concerns associated with the same neutral (arb)-med-arb. This needs to change. Combinations other than the same neutral (arb)-med-arb should be considered as valuable dispute resolution options as well.

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968 See questionnaire Results 1 and 4 in section 5.4 supra.
CHAPTER 9. INITIATIVES TO ENHANCE THE USE OF THE SAME NEUTRAL (ARB)-MED-ARB AND OTHER COMBINATIONS IN INTERNATIONAL COMMERCIAL DISPUTE RESOLUTION

9.1 Introduction

This Chapter proposes four initiatives to enhance the use of combinations in international commercial dispute resolution. Sections 9.2 and 9.3 examine how the use of combinations can be supported through the adoption of legislation and development of international guidelines. Section 9.4 analyses how dispute resolution institutions can contribute to enhancing the use of combinations. Section 9.5 emphasises the importance of consistent efforts to build the capacity of dispute resolution practitioners. It argues that in the international commercial dispute resolution environment of today more arbitrators need to be trained in mediation and more mediators need to be trained in arbitration. It calls for dispute resolution practitioners to learn and enhance their knowledge on how to overcome cultural differences and adopt a flexible approach to process design.

9.2 Adopt Legislation Supporting the Use of Combinations

The first initiative to enhance the use of combinations in international commercial dispute resolution is to adopt legislation promoting their use. This thesis advocates for incorporating a succinct provision that recognises the possibility of using combinations, rather than specifies the details of the process.

As observed in section 5.2.3.2.5, legislation supporting the use of the same neutral (arb)-med-arb has been adopted more often in common law jurisdictions where practitioners are not comfortable with the process. Although legislation in Hong Kong and Singapore expressly recognises the same neutral (arb)-med-arb and regulates its use in detail, commentators point out the paucity of its use, which is confirmed by the empirical data collected for this thesis.969

The research shows that in China and Japan, arbitrators actively assist parties in settling their disputes due to the deeply rooted tradition of conflict avoidance.970 The legal basis for facilitation of settlement is established in the countries’ respective arbitration laws. It appears, however, that arbitrators in both countries attempted to mediate their cases even before enactment of these laws.

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969 See discussion in section 5.2.3.2.5 supra.
970 See discussion in section 4.3 supra.
Contrary to the detailed legislative provisions in Hong Kong and Singapore, relevant provisions in China and Japan merely acknowledge the possibility of facilitation of settlement, provided parties consent to that. In China, Article 51 of the Arbitration Law provides:

The arbitration tribunal may carry out conciliation prior to giving an award.
The arbitration tribunal shall conduct conciliation if both parties voluntarily seek conciliation. If conciliation is unsuccessful, an arbitration award shall be made promptly.971

Article 38(4) of the Japanese Arbitration Law authorises an arbitral tribunal or one or more arbitrators designated by it to attempt to settle a civil dispute subject to the arbitral proceedings, if consented to by the parties.972

In Australia, the ability of an arbitrator to act as a mediator is recognised under Commercial Arbitration Acts (CAA) that govern domestic arbitration in Australian States and Territories.973 The CAAs provisions regulating the use of the same neutral (arb)-med-arb are as detailed as the corresponding provisions in Hong Kong and Singapore, although different in some respects.974 Similarly to the provisions in Hong Kong and Singapore, the relevant provisions of the Australian CAAs seem to have been applied in practice rarely.975

The express recognition of the same neutral (arb)-med-arb in the Australian legislation regulating domestic arbitration contrasts with the gap in the legislation regulating international arbitration – the International Arbitration Act 1974 (IAA). In 2010 following a near two-year review process, the amended IAA came into force. Although public submissions made during the IAA review process raised the issue of the same neutral (arb)-med-arb and suggested this process be recognised expressly, the revised IAA remained silent in this respect. Analysing the impact of the new IAA regime, Nottage observes that little has changed in positioning Australia as a plausible arbitral

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971 Chinese Arbitration Law, supra n. 403.
972 Japanese Arbitration Law, supra n. 414.
973 See, e.g., CAA 2012 (WA), supra n. 441, s. 27D.
974 The relevant provisions of the Australian CAAs differ from those contained in the laws of Hong Kong and Singapore in that they require parties’ written consent twice: first, for arbitrators to act as mediators (s. 27D(1)) and, second, to continue as arbitrators if mediation does not result in a settlement (s. 27D(4)).
venue in the Asia-Pacific region and advocates for a new round of IAA amendments. Nottage recommends that one of the amendments should address the same neutral arb-med-arb. He suggests that instead of incorporating provisions allowing caucusing and requiring disclosure as in the legislation of Hong Kong and Singapore, the IAA should clarify that the same neutral arb-med-arb is permissible if it does not involve caucusing.

The legislative recognition of only one particular variation of the same neutral (arb)-med-arb, however, might be unhelpful, be it the same neutral arb-med-arb with no caucuses or the combination promoted by the legislators in Hong Kong and Singapore. This type of recognition will inevitably limit parties’ choice and prevent them from considering other combination possibilities and exercising their autonomy when selecting the most suitable process for their specific dispute.

What appears to be important is to make parties aware and remind them that they have a choice of dispute resolution options and empower them to select the process that best suits their needs. This can be achieved by incorporating a general legislative provision stating that if parties agree, the arbitral tribunal, its member or a different neutral may, among others, act as a mediator and assist parties in reaching settlement. The thesis argues that the provision should be worded affirmatively to signal parties that their choice of a dispute resolution process will be supported. The provision could provide as follows:

> With the written agreement of the parties, the arbitral tribunal, its member, or a different neutral may use mediation or other processes at any time during the arbitral proceedings to facilitate settlement.

The thesis suggests that no further procedural details should be specified, as this will inevitably restrict parties’ choice. The decision on procedural details should be left to the participants of each particular case. Before taking the decision parties should be encouraged to seek legal advice on the available combinations, advantages and concerns associated with them. A sentence could be added to the above provision:

> The arbitral tribunal may encourage parties to seek legal advice on processes that may assist with settlement; the benefits and risks associated with these processes.

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976 Nottage, supra n. 864, at 465.
977 Ibid, at 489.
In this context, it could be useful to have a dispute resolution adviser to assist parties in selecting the most suitable and efficient dispute resolution process for their dispute. It will help if parties are directed to a set of guidelines addressing various combinations and safeguards for their use. Developing guidelines is the second of the suggested initiatives.

9.3 Develop International Guidelines for Using Combinations

For Goodrich, developing guidelines internationally is a better approach in dealing with a gulf in views between practitioners of different legal cultures on the same neutral (arb)-med-arb than passing legislation in countries where the process is rarely used. However, this thesis argues that passing legislation and developing international guidelines are complementary initiatives.

There is a common call in the literature to elaborate a set of guidelines addressing acceptable same neutral (arb)-med-arb procedures. This should be of assistance, particularly where the practice of the same neutral (arb)-med-arb is not accepted at present. A set of guidelines could also lay the groundwork for a broader appreciation of the opportunities that exist for resolving arbitrated cases through settlement. In fact, the basis for the proposed set of guidelines already exists. These are the CEDR Rules elaborated by the CEDR Commission.

The CEDR Rules

The CEDR Rules are the first major international effort to focus specifically on settlement during arbitration. These rules have been commended for recognizing the differences between civil and common law tradition and providing a menu appropriate for different tribunals and different nationalities of parties. Ehle regards them as a step towards establishing a transnational standard for encouraging settlement of disputes.

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978 This was an idea suggested in one of the interviews conducted by Shahla Ali for her PhD project. See Ali, supra n. 396, at 218.
979 Goodrich, supra n. 736, at 8.
980 See, e.g., ibid; D'Agostino, supra n. 511; Stipanowich & Ulrich, supra n. 16, at 29-31 (proposing to elaborate guidelines for US practitioners that reflect current US practice but that take note of developing international norms).
981 D'Agostino, supra n. 511.
982 Stipanowich & Ulrich, supra n. 16, at 29.
983 Ibid, at 14.
985 Ehle, supra n. 16, at 86-87.
and transforming arbitrators into proactive settlement facilitators, while establishing safeguards.986

At the same time, the CEDR Rules have drawn criticism. In particular, roles envisioned for arbitrators in facilitation of settlement have been criticised for falling short of a consensus model and being somewhat controversial.987 Particularly US arbitrators may feel uncomfortable in taking steps listed in Article 5 of the CEDR Rules in settling the parties’ dispute.988 Steps like presenting preliminary views or offering suggested settlement terms risk projecting ‘arbitration tribunals into a much more forthright role as settlement facilitators’ as compared to other initiatives such as the ICC Techniques.989

The CEDR Rules have also been criticised for failing to address significant areas of settlement facilitation process.990 In particular, although engaging in facilitation of settlement is still a controversial practice for many international arbitrators, the CEDR Rules seem to take for granted that arbitrators will not hesitate to do it. In the case of three member tribunals, as compared to sole arbitrators, issues are even more exacerbated because the Rules appear to assume that a tribunal of three arbitrators would act with one mind, and provide no assistance to help arbitrators overcome cultural, conceptual and technical differences of approach between themselves.991

Apart from failing to address the consensus-building exercise carried out by the tribunal about the decision to facilitate settlement, the Rules appear to be silent on the timing and trigger of the settlement facilitation process, and a possibility of a shift in the perception of tribunal’s authority both by the parties and within the tribunal, as a consequence of the tribunal’s facilitation of settlement.992 Any future guidelines should be elaborated, taking into account and responding to these criticisms of the CEDR Rules.

It is important to note that, as mentioned in section 8.2.2.1, the CEDR Commission provides rules and safeguards for two variations of the same neutral arb-med-arb. While the CEDR Rules apply to the same neutral arb-med-arb that does not involve the use of caucuses, the CEDR Appendix 2 establishes safeguards for using the same neutral arb-

986 Ibid, at 94.
988 Ibid.
989 Ibid, at 15.
991 Ibid, at 465.
992 Ibid, at 466-470.
med-arb that involves the use of caucuses. In this way, the CEDR Commission provides parties with guidance on two variations of the same neutral arb-med-arb (with and without caucuses).

**Proposed Guidelines on Combinations**

This thesis advocates for the guidelines to encompass combinations other than the same neutral (arb)-med-arb, including those involving different neutrals and procedural modifications of the same neutral (arb)-med-arb. The guidelines can be developed on the basis of the CEDR Rules, CEDR Appendix 2, and this thesis. The guidelines need to define various combinations, specify benefits and risks associated with them, and provide safeguards for their use. They should emphasise the importance of ensuring that a combination that parties intend to use does not offend legislative provisions at the place of arbitration and the place of the award’s enforcement. Where possible, combinations addressed in the guidelines could be accompanied by a brief overview of positions taken by different jurisdictions to them.

**9.4 A Greater Role for Dispute Resolution Institutions**

As observed in section 5.2.3.2.5, the questionnaire result showing that combinations are rarely used pursuant to a suggestion of an arbitration institution, contrasts with the high demands for such initiatives. Dispute resolution institutions are urged to examine and create more links between different processes they offer. By doing so, they can provide parties with greater choice and create opportunities for less expensive, faster and better outcomes (as compared to arbitration only), minimizing the risk of the process itself becoming part of the problem.

More specifically, arbitration institutions could consider implementing a rule, which, as a matter of routine, would oblige the arbitration institution or the arbitrator at a certain point to suggest that parties consider using mediation. An example of this kind of rule is contained in Article 21.3 of the 2016 ACICA Arbitration Rules, although it does not refer specifically to mediation:

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993 Lack, supra n. 58, at 379.
994 Ibid.
995 Peter, supra n. 61, at 103; Peter, supra n. 88, at 167-168 (observing that the rule could help parties make the first move in respect of mediation after commencement of arbitration, as they might be afraid to appear weak).
The Arbitral Tribunal shall raise for discussion with the parties the possibility of using other techniques to facilitate settlement of the dispute.\textsuperscript{996}

To remove the burden of suggesting mediation from arbitrators, rules of arbitration institutions could provide for a standard, obligatory, short (two-week) settlement window into the arbitral procedure.\textsuperscript{997} Ideally, this hypothetical window should open after establishing the tribunal, once parties have seen the initial pleadings, but before the cost-intensive phase of arbitration.\textsuperscript{998} Within this window of time parties could consider using alternative means to resolve their dispute. Rather than requiring parties to mediate or negotiate, rules could give parties the possibility of doing so. The tribunal would not even need to know whether settlement had been explored by the parties.

Arbitration institutions may introduce the idea of a mediation window through another standard procedure. Following the designated stage, the institution could send a letter to the parties saying ‘at this stage, as a matter of routine, we ask whether the parties would be interested in having a mediator appointed who is not the arbitrator and has nothing else to do with the case and will have nothing to do with it if the mediation fails’.\textsuperscript{999} Marriott even suggests that we should learn from the experience of court-attached mediation schemes and make mediation mandatory, authorising the arbitrator to direct parties to mediate either with the arbitrator or a different person.\textsuperscript{1000} According to Marriott, in England, where such schemes are voluntary, the take-up rate is five percent or less, while statistical evidence from various jurisdictions shows a similarly high rate of success regardless of whether the case is referred voluntarily or by compulsion.\textsuperscript{1001} Marriott, however, does not indicate the sources of the statistical evidence he is referring to. In fact, mandatory court-related mediation is still a controversial subject.\textsuperscript{1002}

This thesis argues against mandatory mediation in the context of arbitration. It suggests that to use mediation or not should be left to parties to decide, in accordance with the


\textsuperscript{997} Greenwood, supra n. 3, at 208-209.

\textsuperscript{998} Ibid, at 209.

\textsuperscript{999} Bond quoted in Bühring-Uhle et al., supra n. 46, at 262-263.

\textsuperscript{1000} Marriott, supra n. 257, at 546.

\textsuperscript{1001} Ibid.

\textsuperscript{1002} See, e.g., Nadja Alexander, Global Trends in Mediation: Riding the Third Wave, in Global Trends in Mediation 1, 25 (Nadja Alexander ed., 2d ed, Kluwer Law International 2006) (referring to legal debates over mandatory court-related mediation due to the classical definition of mediation as a voluntary process and observing that voluntary court-related mediation may be a much more powerful tool than mandatory mediation for changing disputing cultures and reducing abuse of the mediation process).
consensual nature of mediation. Instead of obliging parties to use mediation, arbitration rules should merely nudge parties into considering the use of mediation in arbitration.

Rules could encourage not only arb-med-arb, but also the reverse process, med-arb. The Mediation Rules of the World Intellectual Property Organization (WIPO) illustrate this. Article 14(b) of the Rules provides that where the mediator believes that any issues in dispute between the parties are not susceptible to resolution through mediation, the mediator may propose, for the consideration of the parties, procedures that may lead to the most time and cost efficient settlement of those issues. In particular, the mediator may propose:

1. an expert determination of one or more particular issues;
2. arbitration;
3. the submission of last offers of settlement by each party and arbitration conducted on the basis of those last offers pursuant to an arbitral procedure in which the mission of the arbitral tribunal is confined to determining which of the last offers shall prevail.

This WIPO rule, initiatives like implementation of an arbitration rule that, as a matter of routine, opens a settlement window for parties to mediate (if they want) or obliges an arbitrator to suggest that parties consider using mediation, and procedures from the CMAP, ICDR, JAMS, and BIMCO discussed in section 6.3.3, illustrate how bridges can be built between mediation and arbitration. Even separate organisations can cooperate to provide parties with more dispute resolution options. The SIAC-SIMC Arb-Med-Arb procedure discussed in section 6.2.2 is an example of this kind of cooperation, which hopefully will inspire dispute resolution centres in other countries to revise and enhance dispute resolution services that they currently offer.

The importance of having arbitration rules that encourage the use of mediation was emphasised by two practitioners interviewed for this study when they were asked what needed to be done to enhance the use of combinations in international commercial dispute resolution. The Hong Kong practitioner noted,

_If you have a formal set of rules, for example ICC Rules ... when you are arranging the Terms of Reference, you can ask then: are you keen on doing_

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1004 This interview question related to questionnaire Result 1. See a summary of the significant questionnaire results in section 5.4 _supra_.

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mediation? ... If you actually have the empowerment from the rules that allow you to do this, the chances are that you can achieve more.\textsuperscript{1005}

Similar thoughts were expressed by the Australian practitioner, who observed,

\textit{I am a great believer in innovation, but I have so many arbitrations where my co-arbitrators run a mile from my suggestion that we should do something to encourage settlement ... if I had a rules system which said we should think about it I could get them to think about it, I could open their minds to the possibility.}\textsuperscript{1006}

Clearly there is scope for dispute resolution institutions to enhance the use of combinations by creating links between mediation and arbitration services and expanding parties’ choice of dispute resolution solutions.

9.5 Build Capacity of Dispute Resolution Practitioners

Section 3.4 addressed the challenging task for dual role neutrals in the same neutral (arb)-med-arb. They must be skilled and experienced in both mediation and arbitration and capable of effectively switching from one to another. This thesis argues that to be truly effective in promoting the use of combinations in international commercial dispute resolution the first three initiatives proposed above need to be accompanied by considerable efforts to build the capacity of dispute resolution practitioners. The crucial role that adequate training of dispute resolution practitioners has in boosting the use of combinations was highlighted by a practitioner from Spain. In response to a question how the use of combinations could be enhanced, he proposed,

\textit{To rely on very experienced arbitrators ... I think a lot has been done and it’s much more a question of ... training of the young people more than elaborating documents and guidelines and something like that.}\textsuperscript{1007}

9.5.1 Training of arbitrators in mediation and mediators in arbitration

The use of combinations will not increase unless there is a concerted effort to train more dispute resolution practitioners in both mediation and arbitration so they can gain experience in both. This suggestion is particularly relevant to the same neutral (arb)-med-arb due to high demands of a dual role. However, knowledge and experience in

\textsuperscript{1005} Practitioner from Hong Kong, Interview 3.
\textsuperscript{1006} Practitioner from Australia, Interview 2.
\textsuperscript{1007} Practitioner from Spain, Interview 1.
both mediation and arbitration can pave the way for wider use of combinations in general.

Commonly cited expressions that ‘the process is only as good as the neutral’\textsuperscript{1008} and ‘arbitration is as good as arbitrators’\textsuperscript{1009} is equally applicable to the same neutral (arb)-med-arb: by and large, the process is as good as the dual role neutral facilitating it. Therefore, it is essential to ensure that dual role neutrals are skilled professionals who have the trust of all parties, are experienced in both mediation and arbitration and capable of handling the challenges presented by the special nature of the same neutral (arb)-med-arb.\textsuperscript{1010} The complex task of dual role neutrals may well be a reason why many neutrals are reluctant to offer the same neutral (arb)-med-arb services.\textsuperscript{1011} In this context, capacity building comes to the fore.

It is time to make greater efforts to familiarize arbitrators with the practice of mediating\textsuperscript{1012} and particularities of proceedings which incorporate elements of mediation\textsuperscript{1013} This can be done through more training of arbitrators in mediation practice and encouraging counsel to notify their clients about the same neutral (arb)-med-arb.\textsuperscript{1014} The increased awareness of dispute resolution practitioners about various combinations will contribute to expanding the toolkit of available dispute resolution solutions.

The current challenge of finding professionals capable of effectively handling both roles\textsuperscript{1015} can be addressed by initiatives like Arbitrator Intelligence (formerly known as the International Arbitrator Information Project). This is an interactive not-for-profit online resource to collect, organize and enable sharing of the collective intelligence about arbitrators that is equally accessible to the entire international arbitration

\textsuperscript{1008} Ross, supra n. 23, at 366.
\textsuperscript{1009} Kun, supra n. 3, at 550.
\textsuperscript{1010} Ross, supra n. 23, at 366; Talbot, supra n. 736, at 229; Hindle, supra n. 77, at ¶ 40[f]; Anand, supra n. 608, at 42; Lew, supra n. 78, at 428; Lawday, supra n. 101, at 8; Thomson, supra n. 89, at 5; Reiner, supra n. 451, at 28; Michael F. Hoellering, Comments on the Growing Inter-Action of Arbitration and Mediation, in \textit{International Dispute Resolution: Towards an International Arbitration Culture}, 8 ICCA Congress Series 121, 123 (Albert Jan van den Berg ed., Kluwer Law International 1998); Blankenship, supra n. 62, at 36; Abramson, supra n. 60, at 9 (protocol 1).
\textsuperscript{1011} Fullerton, supra n. 61, at 38; Bühring-Uhle, supra n. 118, at 249.
\textsuperscript{1012} Kaufmann-Kohler & Kun, supra n. 164, at 492.
\textsuperscript{1013} Schneider, supra n. 41, at 97; see also Wilson, supra n. 508 (suggesting to enhance the awareness of the same neutral arb-med-arb’s advantages in Hong Kong).
\textsuperscript{1014} Wilson, supra n. 508.
\textsuperscript{1015} De Vera, supra n. 64, at 159; Lawday, supra n. 101, at 7; Leon & Peterson, supra n. 156, at 92; Peter, supra n. 88, at 163; Peter, supra n. 61, at 98.
In this online resource, each arbitrator is expected to have a webpage that would include standard biographic information, links to publicly available awards associated with the arbitrator, academic and professional publications, and more importantly, information about case management skills, predilections, and the demeanour as an adjudicator. Currently, the information about an arbitrator’s case management skills is usually collected through ad hoc, piecemeal, and individualised inquiries. This information may lack objectivity. The online resource will provide a more cost-effective, systematic, and accessible source for this critical information, by collecting reliable feedback through, for example, structured questionnaires requesting substantive assessments on specific questions. This resource is expected to have an editorial board that would set policies to ensure that the content is professional, credible and germane. It could also include information on dual role neutrals, which would facilitate the finding of skilled and experienced professionals capable to act as mediators and arbitrators. This could remove one of the obstacles to a wider acceptance of the same neutral (arb)-med-arb as a viable dispute resolution mechanism.

It is not only dispute resolution practitioners that need to be trained in both mediation and arbitration, but students as well. The latter can be educated about possibilities of combining mediation and arbitration through moot court competitions similar to the annual Willem C. Vis International Commercial Arbitration Moot Competition. The International ADR Moot Competition (ADR Moot) already provides students with an opportunity to act as both a mediator and an arbitrator. Commencing in 2010, the ADR Moot is conducted annually by City University of Hong Kong in association with the CIETAC, Columbia University (New York), and UNCITRAL Regional Centre for Asia and the Pacific.

According to the rules of this moot, every round starts in the format of arbitration. The panel of three arbitrators convenes the session. The student designated as mediator/arbitrator serves as the Chairman of the Panel. The other two arbitrators are the judges of that match sitting together with the student mediator/arbitrator. At the end

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of two teams’ presentations during the arbitration or at the end of the allocated time for the whole arbitration process, the Panel gives an opinion that the parties should go for mediation. The moot rules provide that the parties’ consent to mediation is deemed to be present. In that way the round moves to mediation stage. The student mediator/arbitrator assumes the role of the mediator and conducts the process. This ADR Moot allows students to gain practical skills and experience in the same neutral arb-med-arb. Similar moots could be established to enable students to learn about other combinations.

9.5.2 Training in cross-cultural awareness

_Gao Haiyan_, the case introduced in section 8.2.2.3.1.2, vividly illustrates the pitfalls of enforcing international arbitral awards resulting from the same neutral arb-med-arb due to cultural differences between the place of arbitration and the place of enforcement. It, thereby, highlights the need for increasing cross-cultural awareness of dispute resolution practitioners around the world.

In _Gao Haiyan_, the cultural differences surfaced when the Hong Kong Court of First Instance (CFI) and the Court of Appeal (CA) had to decide on whether the way mediation had been conducted during arbitration proceedings in mainland China created bias sufficient to refuse the enforcement of the award for being contrary to public policy.\textsuperscript{1020} While the relevant facts of the case have been presented in section 8.2.2.3.1.2, the discussion in this section is focused on the two decisions of the Hong Kong courts on the issue of bias.

The CFI found that a meeting between Pan, Zhou and Zeng over a private dinner on 27 March 2010 created apparent bias by the Tribunal and refused to enforce the award for being contrary to public policy.\textsuperscript{1021} According to the CFI, the events of 27 March 2010 would have caused a fair-minded observer to apprehend a real risk of bias on behalf of the Tribunal and that the Tribunal favoured the Applicants.\textsuperscript{1022}

However, about eight months later, the CA reversed the CFI judgment on appeal of the Respondents and held that the Applicants could enforce the award.\textsuperscript{1023} Although the CA determined that a clear case of waiver had been established, it proceeded to consider whether the events of 27 March 2010 caused concerns of bias sufficient to give rise to the issue of public policy. The CA noted in this respect:

\textsuperscript{1020} This was the second issue that emerged in _Gao Haiyan_ case. The first was the issue of waiver discussed in section 8.2.2.3.1.2 _supra_.


\textsuperscript{1022} _Ibid_, at ¶¶ 53-54.

With respect, although one might share the learned Judge’s unease about the way in which the mediation was conducted because mediation is normally conducted differently in Hong Kong, whether that would give rise to an apprehension of apparent bias, may depend also on an understanding of how mediation is normally conducted in the place where it was conducted. In this context, I believe due weight must be given to the decision of the Xi’an Court refusing to set aside the Award.  

Thereby, the CA demonstrated greater respect for cultural differences and a sense of comity with the Chinese arbitrators and courts, which the CA regarded as being in a better position to detect any bias in the process than the Hong Kong courts. Notably, different judges in Hong Kong took starkly contrasting positions in relation to the same set of facts and issues. Although the questions that the judges had to deal with probably did not have straightforward answers, the CA appreciated the cross-cultural nuances of practices in mainland China, which contrasted with the position of the CFI heavily coloured by a common law interpretation of the events. Yeoh and Ang commend the CA approach for placing facts in the appropriate cultural context, which allowed considering the parties’ expectations and the standards subscribed to when they agreed to arbitration in mainland China.

The differences in practice of mediation in mainland China and Hong Kong that surfaced in *Gao Haiyan* are an example of a broader dichotomy between the practice of mediation in Asian and Arabic countries and the West. While in the former mediation is claimed to be intuitive and informal, in the latter it seems to be cognitive and scientific and, consequently, more formal and adversarial. Cheng and Kohtio delineate a fundamental difference between conceptions of mediation in China and the United States. In the view of these authors, while it is common for mediation in the United States to aim at identifying the interests of the parties and reaching a settlement that meets all parties’ non-negotiable interests, in China mediators tend to simply dictate a proposed settlement and threaten to issue a binding decision incorporating the proposal.

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1025 Mason, *supra* n. 107, at 226.  
1026 Wu, *supra* n. 830, at 9.  
1027 Yeoh & Ang, *supra* n. 838, at 296.  
1028 *Ibid*.  
1030 Cheng & Kohtio, *supra* n. 407, at 96.
if parties reject it.\textsuperscript{1031} Alexander explains the differences in how one views and applies mediation in practice by the influence of national legal-political structures and cultural attitudes to conflict and dispute processing that can vary dramatically from nation to nation.\textsuperscript{1032}

The Swiss practitioner interviewed for this study emphasised the specificity of mediation practised in countries following the Germanic tradition and the importance of having clarity about the kind of combined process in each particular case. He noted,

\begin{quote}
In Switzerland, Germany, and Austria where this [mediation by an arbitrator] is a frequent practice, mediation or conciliation is not exactly the same as the type of mediation when one speaks about a separate process because it is more or less anticipation of the outcome of the procedure ... One really has to be careful in knowing what one talks about when combining mediation and arbitration.\textsuperscript{1033}
\end{quote}

At the same time differences exist in practice of mediation even within one country. For example, the US practitioner observed,

\begin{quote}
... there are significant differences in the way mediation is practised regionally, even within the United States. I think that California mediators are much more likely to be evaluative. There are also distinctions between the use of joint sessions and caucuses. There is much more emphasis on caucus in California mediation.\textsuperscript{1034}
\end{quote}

Apart from differences in conceptions and practice of mediation around the world, we saw in Chapters 4 and 5 that differences exist in the practitioners’ perception and use of the same neutral (arb)-med-arb. This was explained by reference to the practitioners’ legal culture. The literature and empirical evidence presented in Chapter 4 show that practitioners trained in the common law tradition generally prefer involving different neutrals in the mediation and arbitration stages of the combined process. Continental European practitioners, particularly those from countries following the Germanic tradition, appear to be more open to the idea of mediation by an arbitrator but disfavour the use of caucuses in the mediation stage. Chinese and Japanese practitioners emerge as the foremost proponents of the same neutral arb-med-arb that involves the use of

\begin{flushright}
\textsuperscript{1031} Ibid.
\textsuperscript{1032} Alexander, supra n. 1002, at 3.
\textsuperscript{1033} Practitioner from Switzerland, Interview 4.
\textsuperscript{1034} Practitioner from the United States, Interview 5.
\end{flushright}
caucus. The questionnaire result showing that the most frequently used combination is diff neutral (arb)-med-arb has been explained in section 5.2.3.2.6 by the legal culture of the participants with experience in combinations who originated mostly from jurisdictions with an unfavourable attitude to mediation by arbitrators.

Since international dispute resolution involves practitioners of different legal cultures with different understandings of mediation and appropriate ways of combining mediation and arbitration, more efforts need to be directed toward improving skills of arbitrators, mediators, and dual role neutrals in managing and overcoming cultural differences.

To teach future practitioners how to achieve that goal, it might be wise to start with changing university programs. Universities should focus more on international and comparative law in training law students, because even though the world becomes increasingly globalised, the curriculum of the majority of law faculties in the world is mostly domestic. While this seems to be slowly changing, many lawyers trained in one system of law by and large see things in a domestic manner. It is, however, essential for dispute resolution practitioners acting in the international arena to be open to other cultures. These practitioners would benefit from a cross-cultural training focused on improving their understanding of the impact of culture on local legal practices.

The current tendency of dispute resolution practitioners to approach things in a purely domestic manner and take a rigid stance on the same neutral (arb)-med-arb, either endorsing or disapproving of it, may be a reason why the Australian practitioner advocated for the possibilities lying between the same neutral (arb)-med-arb and diff neutral (arb)-med-arb. In particular, he said,

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\text{The debate about arb-med or med-arb is really better conducted in the context of the continuum where at one end you have distinct processes separately conducted; on the other hand, you have some combined process like the CIETAC process. But they are two ends of the spectrum and there is so much that can be done in between.}
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The thesis turns now to examine what ‘can be done in between’ these two ends of the spectrum.

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1035 Q&A with Professor Pierre Lalove, supra n. 7, at 3.
1036 Ibid.
1038 Practitioner from Australia, Interview 2.
9.5.3 Training in flexible process design

Although using the same neutral (arb)-med-arb can be effective in the resolution of disputes, it is not always the best solution. In the field of international commerce, even more than in the domestic field, dispute resolution procedures need to be tailored to meet the particularities of the conflict, the type of transactions involved, as well as the legal, economic, social, and cultural backgrounds of the various participants. The interview data echoed this idea. When asked about the ways to enhance the use of combinations in international commercial dispute resolution, the Belgian practitioner noted,

I think, first, it’s a matter of legal culture. It depends where you sit; it depends on the type of the dispute. It also depends on the feelings of the panel, whether the parties want to settle ... it’s a combination of so many things, there is no overall pattern.

The US practitioner similarly observed that,

One should not establish cast-iron rules for dispute resolution process. One should never say never ... For me it’s more a matter of education and priorities of the parties. There may be circumstances where they say the role involving multiple hats may make perfect sense or may be a situation in which there is a close teaming between a facilitator and an evaluator.

What could contribute to promoting a flexible approach to process design is broadening the ADR curricula of law schools to include, apart from a study of ADR forms and methods, courses like ‘Creative Problem Solving’. This course could educate students about the same neutral (arb)-med-arb and other combinations introduced in Chapter 2 and discussed in detail in Chapters 6 and 7, and how to design a dispute resolution process depending on the needs of a particular dispute. Similar but more advanced programs can be developed for experienced dispute resolution practitioners. These might be particularly useful to legal counsel who draft dispute resolution clauses. Advanced programs on ‘Creative Problem Solving’ will help go beyond the mindset that there is only a limited number of unalterable ADR methods available.

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1039 Blankenship, supra n. 62, at 39.
1040 Bühring-Uhle et al., supra n. 46, at 247.
1041 Practitioner from Belgium, Interview 6.
1042 Practitioner from the United States, Interview 5.
1043 Blankenship, supra n. 62, at 39 (referring to the saying ‘if the only thing you have is a hammer, everything looks like a nail’).
Also, as noted by the Australian practitioner, it is important to consider what characteristics of mediation can be incorporated in arbitration. He said,

> So, my view is that debating the question of arbitration and mediation as two separate concepts that may be pushed together is a less than sensible or helpful way of analysing the topic. One is better off looking at what characteristics are involved in the process of mediation, which could sensibly be incorporated in the adjudicative process of arbitration. And what can’t sensibly be incorporated.\(^{1044}\)

In fact four of six practitioners interviewed for this study reported experience with the use of mediation techniques in the arbitration process rather than the use of the discrete processes of mediation and arbitration.

Two of these four interviewees understood the combination of mediation and arbitration as the interactive and transparent conduct of the arbitration procedure, which enables parties to participate in the tribunal’s growing understanding of the case and the process of finding the decision. The Swiss practitioner noted,

> In an interactive way … you let the parties participate in your growing understanding of the case and in your process to finding your decision … my experience and my thinking about this combination, which I will do as an arbitrator, is more a development or a form of the interactive conduct of the procedure.\(^{1045}\)

Comments of the Spanish practitioner were along the same lines:

> Well, my personal impression is that every arbitration tribunal should be very transparent to the parties from the very beginning … every reasonable arbitrator nowadays has to mediate in order to put very clear to the parties what is his way of thinking.\(^{1046}\)

For two other interviewees (of four with experience with the use of mediation techniques in arbitration), the combination meant the use of mediation for handling procedural matters in arbitration. The Australian practitioner said,

> In the way in which the procedural issues are handled [in arbitration] I think there is an enormous opportunity for consultative mediation between

\(^{1044}\) Practitioner from Australia, Interview 2.
\(^{1045}\) Practitioner from Switzerland, Interview 4.
\(^{1046}\) Practitioner from Spain, Interview 1.
the tribunal and the parties ... In the design of arbitration processes it is very much a mediated outcome: mediated by making suggestions as to what should be done letting the parties then think about it ... Every arbitration is a mediation procedurally at least.1047

This was echoed by the US practitioner, who noted,

As an arbitrator, I think of my role as involving a facilitative function on procedural matters ... In that sense in a very broad way I am functioning as a mediator, although my role is ultimately as the arbitrator is adjudicator.1048

Chapters 6, 7 and 8 discussed numerous ways to combine the discrete processes of mediation and arbitration. However, as the above comments of highly experienced dispute resolution practitioners demonstrate, there is a huge potential for the use of mediation techniques in arbitration. These can assist in conducting arbitration proceedings in an interactive and transparent way allowing parties to participate in the arbitrator’s growing understanding of the case. Mediation techniques can also prove valuable in handling procedural matters in arbitration. These comments of the practitioners create avenues for further research into the kind of mediation techniques that can be incorporated into international commercial arbitration process, benefits and potential problems of their use. The results of this future research might be useful for the proposed course on ‘Creative Problem Solving’.

This course, however, can be developed already based on the results of this thesis. The course on ‘Creative Problem Solving’ could explore various combinations, benefits and concerns associated with their use and enable students to apply their knowledge through, for example, designing the most suitable dispute resolution process for hypothetical cases. Being equipped with this knowledge, new and experienced practitioners will be more prepared to assist parties to tailor a dispute resolution process to fit their specific needs.

The benefits of adopting a flexible approach to process design are illustrated by the IBM-Fujitsu case.1049 In this case, IBM alleged that Fujitsu had used IBM programs to develop IBM-compatible operating systems software for its own mainframes. IBM

1047 Practitioner from Australia, Interview 2.
1048 Practitioner from the United States, Interview 5.
1049 This case has been discussed by several authors. See, e.g., Bühring-Uhle et al., supra n. 46, at 255-259; Sawada, supra n. 59, at 30-31; Peter, supra n. 88, at 168-170; Elliott, supra n. 87, at 165; Almoguera, supra n. 187, at 111-112.
claimed several hundred million dollars in damages. In 1983, the parties signed a settlement agreement, which required Fujitsu to make a lump sum payment in exchange for a licence from IBM. However, this agreement was not sufficiently specific. Subsequent negotiations between the parties to arrange a more operational agreement failed and in July 1985 IBM initiated arbitration proceedings under the rules of the American Arbitration Association.

The arbitrators experimented with the whole array of dispute resolution techniques. Early on in the procedure lawyers and experts presented the parties’ views before the arbitrators and one senior executive from each side. However, this mini-trial did not lead to a resolution of the fundamental differences. The panel suggested then that the parties try and negotiate the two major areas of disagreement (scope of IBM’s copyrights and amount of ‘external information’ to be exchanged) with the two party-appointed arbitrators acting as mediators. The mediation efforts benefited from the combined expertise of the arbitrators-turned-mediators in computer technology and dispute resolution. They employed the full arsenal of mediation techniques, including caucuses with each party. However, in order to maintain complete neutrality, they conducted all mediation activities jointly and refrained from ex parte communications between one of them and the party that had appointed him.

In February 1987, the mediation resulted in a framework ‘Washington Agreement’ which represented a breakthrough in the two major areas of the controversy and laid the foundation for the subsequent resolution of the entire dispute. In respect of the existing software, the parties agreed to an unspecified lump sum for IBM covering past and future program use by Fujitsu. The parties agreed further to create a Secured Facility regime under which each party would have limited access to the other’s programming information in exchange for an annual access fee. The agreement also granted the panel the power to resolve all of the parties’ disputes. However, the Washington Agreement was only a framework agreement. The determination of the exact amount of the paid-up license, as well as the scope of the information covered by the Secured Facility regime, the amount of the annual compensation and the task of compliance monitoring were left to the arbitration panel. The chairman of the tribunal resigned in May 1987. Instead of replacing him, the parties decided to reduce the panel to the two party-appointed arbitrators who were authorised to engage, in case of a disagreement, a third arbitrator to break the tie. The appointment of the arbitrators was extended for 15 years, thereby
creating a standing dispute resolution panel to monitor the implementation of the Secured Facility regime and to resolve all disputes arising out of its operation.

After extensive interaction between the parties, including teams of technical experts, and the panel, which constantly gave guidelines on means to narrow the problems, the arbitrators rendered a framework for the creation of the Secured Facility. A similar approach was taken by the arbitrators for ultimately determining the license fee. The few remaining issues were to be settled by final offer arbitration, but the parties settled before the arbitrators reached the point of having to choose a proposal.

Hence, in this case, the arbitrators managed to turn an arbitration procedure into a future-oriented problem solving process that went to the roots of the parties’ conflict.\textsuperscript{1050}

The final solution contained a high degree of consensual elements and created value for the parties not only by resolving a costly dispute but also by creating the basis for a controlled technology transfer considered beneficial by both parties. The maximization of consensus was achieved in a continuous revolving process in which facilitated negotiation alternated with limited arbitral decision-making.

Several factors may have made possible this transformation from arbitration to a process involving a spectrum of dispute resolution techniques.\textsuperscript{1051} First, the amount in dispute reached several hundred million dollars, which prompted senior corporate officers on both sides, including CEOs, to participate. This involvement of CEOs, who took on the responsibility of engaging in cooperative dispute resolution, assisted in reaching a creative solution. Second, while often arbitrators lack the knowledge of mediation and ADR, one of the arbitrators in this case was an ADR expert. Another arbitrator was an expert in information technology. Third, the combination of the arbitrators’ expertise gave the parties confidence in the arbitrators, which allowed the arbitrators to design the dispute procedure the way they did. Fourth, the dispute related to the copyright protection of computer programs, which was a highly controversial legal field at that time. There were also differences in understanding the issue in the United States and Japan, which increased the uncertainty of the outcome in arbitration. This could have made parties even more motivated to take the resolution of the dispute in their own hands.

\textit{IBM-Fujitsu} demonstrates how the ADR expertise of even one member of the arbitral tribunal may enable arbitrators to adopt a flexible approach to process design to satisfy

\textsuperscript{1050} Bühring-Uhle et al., \textit{supra} n. 46, at 258-259.

\textsuperscript{1051} Peter, \textit{supra} n. 88, at 169-170.
the needs of a particular dispute. In this way, IBM-Fujitsu reinforces the importance of training of international commercial dispute resolution practitioners in arbitration, mediation and flexible process design.

9.6 Conclusion

Concerted efforts are needed to enhance the use of the same neutral (arb)-med-arb and other combinations in international commercial dispute resolution.

First, the use of combinations should be explicitly provided for in the legislation. It is suggested that, in countries where this has not been done yet, a general provision be incorporated that acknowledges that if parties consent in writing, the arbitrator, a member of the arbitral tribunal, or a different neutral may use mediation or other processes to assist parties in reaching settlement. The legislative recognition of only one particular combination or one particular variation of a combination might prevent parties from considering other combination possibilities and exercising their autonomy in choosing the most suitable process. Before parties agree to any process in writing, arbitral tribunals should encourage parties to seek legal advice on the available combinations, advantages and concerns associated with them.

Second, the implementation of the relevant legislation needs to go hand in hand with the elaboration of international guidelines that would define various combinations, explain benefits and risks associated with them and specify safeguards for their use. These guidelines would allow neutrals to direct parties to consult them, with the aim of selecting the most suitable mechanism for resolution of parties’ dispute.

Third, dispute resolution institutions definitely have a greater role to play in promoting the use of combinations by creating links between their arbitration and mediation services and, thereby, providing parties with greater choice of dispute resolution options. Procedures available at the CMAP, ICDR, JAMS, BIMCO, WIPO and SIAC-SIMC might inspire dispute resolution centres all over the world to revise and enhance dispute resolution services that they currently offer.

Finally, the implementation of the above three initiatives needs to be accompanied by continuous efforts to build the capacity of dispute resolution practitioners. Arbitrators should be trained as mediators and mediators should be trained as arbitrators. While this kind of training is essential for those acting as dual role neutrals, knowledge and experience in both mediation and arbitration will pave the way for the wider use of combinations in general. Taking into account the fact that international dispute
resolution involves practitioners of different legal cultures, particular attention needs to be paid to improving the skills of these practitioners in managing cultural differences. University programs need to focus on international and comparative law in training law students. Also, law school curriculum needs to be broadened to include courses on flexible process design. These would teach students how to design a dispute resolution process basing on needs of a particular dispute. It is desirable to develop similar but more advanced courses for experienced dispute resolution practitioners.

While the same neutral (arb)-med-arb is a viable combination, it is not a ‘one-size-fits-all’ dispute resolution process. Rather it is one of many dispute resolution process options that, depending on the circumstances of a particular case, may or may not meet parties’ needs. The existing combinations can be used more frequently, and new combinations can emerge if more dispute resolution practitioners adopt a flexible approach to process design and focus on choosing the most suitable dispute resolution process for each particular dispute.
PART VI. THE CONCLUSIONS
CHAPTER 10. THE CONCLUSIONS

10.1 Introduction

The thesis has investigated the value of the combined use of mediation and arbitration (combinations) in international commercial dispute resolution. Combinations, and particularly the combination where the same neutral acts as a mediator and an arbitrator (the same neutral (arb)-med-arb), offer a possibility of fast, inexpensive and enforceable redress. Because of this, combinations can better meet the current demands of international business for enforceable, time and cost efficient dispute resolution solutions, compared to arbitration on its own.

Hypotheses

The research began with two hypotheses. The first hypothesis was that parties to international commercial disputes could benefit from the time and cost efficiencies of the same neutral (arb)-med-arb and achieve an internationally enforceable result, provided certain measures were implemented to address concerns associated with this process. The second hypothesis was that not all international commercial dispute resolution practitioners raised concerns over the same neutral (arb)-med-arb. Instead, the perception and use of the process varied, depending on the practitioners’ legal culture.

Research questions

To test these two hypotheses, the thesis addressed five research questions. Before addressing these research questions, the thesis synthesised in Chapter 2 the existing approaches to defining terms denoting various combinations, and formulated definitions of the terms used to denote the key combinations in this thesis. This needed to be done because of the lack of clarity surrounding the use of terms denoting various combinations. Importantly, the thesis coined the term ‘the same neutral (arb)-med-arb’ to denote the central combination for this thesis. This term is used throughout this thesis to refer jointly to the same neutral med-arb and the same neutral arb-med-arb. Both the same neutral med-arb and the same neutral arb-med-arb refer to the sequential use of mediation and arbitration where the same neutral acts as a mediator and an arbitrator. There is one difference between the two. While the former starts with mediation, the latter starts with arbitration. After formulating definitions of the terms denoting the key combinations, the thesis turned to addressing the following five research questions:
(1) What are the advantages and concerns associated with the same neutral (arb)-med-arb?

(2) What is the current state of use of combinations, including the same neutral (arb)-med-arb, in international commercial dispute resolution and how are they perceived?

(3) What is the influence of the practitioners’ legal culture on their perception and use of the same neutral (arb)-med-arb?

(4) How can the concerns associated with the same neutral (arb)-med-arb be addressed?

(5) How can the use of the same neutral (arb)-med-arb and other combinations in international commercial dispute resolution be enhanced?

The results of this study are presented as answers to these five research questions.

10.2 Results

(1) What are the advantages and concerns associated with the same neutral (arb)-med-arb?

The literature analysed through this thesis has shown that, subject to a limited number of exceptions, the advantages and concerns associated with the same neutral med-arb and the same neutral arb-med-arb are the same. Consequently, the advantages and concerns have been analysed in the context of both processes, namely the same neutral (arb)-med-arb.

The same neutral (arb)-med-arb is a controversial combination. While proponents see it as a process that attempts to capture the independent strengths of both mediation and arbitration and limit at the same time their perceived weaknesses, opponents have little doubt that mediation and arbitration by the same neutral are inherently incompatible and the same neutral (arb)-med-arb is an ethical disaster.

Advantages

Six advantages attributed to the same neutral (arb)-med-arb have been identified. These are:

(1) cost and time efficiency;
(2) finality and legal enforceability;
(3) quality of the outcome;
(4) flexibility;
(5) incentive to settle; and
more honest behaviour of parties in mediation (as compared to stand-alone mediation).

Each of the two analysed combinations, namely the same neutral med-arb and the same neutral arb-med-arb, appears to be beneficial as compared to the other in at least one respect. One aspect that may make the same neutral arb-med-arb more attractive to parties than the same neutral med-arb is that if the process starts as mediation, and leads to settlement, there will be no more dispute capable of triggering arbitration and hence generating an enforceable consent award. On the other hand, parties may prefer using the same neutral med-arb over the same neutral arb-med-arb because the former has more potential to save time and money as compared to the latter. If a dispute is settled in the mediation stage of the same neutral med-arb, parties do not need to invest any time and effort into the arbitration stage, which is not the case for the same neutral arb-med-arb that commences with the arbitration stage.

Concerns

As for concerns, the analysis of the literature showed that caucusing is the most problematic issue in the same neutral (arb)-med-arb and the cause of the majority of concerns associated with this process. The main concerns associated with the process can be divided into two groups: behavioural concerns that surface in the mediation stage and procedural concerns that arise in the arbitration stage.

Behavioural concerns include the possible reluctance of parties to be open in their discussions with mediators knowing that at a certain point mediators might become arbitrators, the inhibited conduct of mediators, parties’ use of mediation as a tactical tool, and the abuse of power by mediators resulting in the coercion of parties into a settlement.

Procedural concerns are directed to the danger that arbitrators will appear, or actually be biased, because of the information received in mediation and particularly in caucuses. The inability of a party to hear and respond to the issues raised by the other party in caucuses with mediators who later become arbitrators, may lead to a breach of the principles of due process.

Apart from behavioural and procedural concerns, a matter that raises serious doubt is the capacity of one person to cope with the challenging tasks of a dual role neutral. Not only must dual role neutrals be skilled and experienced in both mediation and arbitration, but they also must be able to effectively handle both roles while switching
from one to another. Moreover, it is essential that parties have confidence in the neutrals’ capacity to handle both roles. The research has shown that the divide in views of practitioners on whether the same neutral (arb)-med-arb is essentially a beneficial or flawed process is commonly linked to the practitioners’ legal culture, which is addressed in research question 3.

(2) What is the current state of use of combinations, including the same neutral (arb)-med-arb, in international commercial dispute resolution and how are they perceived?

The current use of combinations in international commercial dispute resolution has been investigated through the first phase of a two-phase empirical study. The first phase employed a questionnaire to survey international dispute resolution practitioners from different parts of the world. Importantly, the study did not focus on the use of the same neutral (arb)-med-arb, but it investigated the use of all combinations. The second phase conducted through interviews aimed to elicit views concerning the most significant questionnaire results.

Use of combinations

The most significant result to emerge from the questionnaire is that all combinations are used to a relatively low extent in international commercial dispute resolution. Only about one third of the targeted questionnaire participants had experience with them over the previous 5 years. Moreover, almost half of those participants who had experience with combinations reported that disputes involving them had constituted not more than 10% of their overall international commercial dispute resolution practice.

The most common combination appeared to be the sequential use of processes with different neutrals in charge of the mediation and arbitration stages, namely diff neutral (arb)-med-arb, whereas the use of the same neutral (arb)-med-arb turned out to be minimal only. In most cases the mediation stage involved the use of caucuses.

Perception of combinations

Although the questionnaire result revealed the infrequent use of combinations, almost all questionnaire participants acknowledged that combinations were beneficial in some respects, which might be the first step in the acceptance of combinations as viable dispute resolution mechanisms. The ability to preserve business relationships, and the faster, and less expensive resolution of the dispute (as compared to arbitration only) were regarded as the three key benefits of combinations. Considering that a common
concern relating to arbitration is increased costs and protracted proceedings, the questionnaire participants seemed to regard combinations as a remedy against these limitations of arbitration. More than three quarters of the participants supported the wider use of combinations in the coming years.

Is the ability to incorporate a mediated settlement agreement into a consent award an advantage?

There is a strong narrative in the literature that the ability to incorporate a mediated settlement agreement in an arbitral award is a key advantage of the combined use of processes. However, the questionnaire participants neither perceived this ability as an advantage of the combined use of processes nor availed of it in practice.

The interview data collected in the second phase of the empirical study further corroborated the questionnaire result that incorporating a mediated settlement agreement into a consent award is not the reason why parties use combinations. Also, in contrast to the common call in the literature for the adoption of an international convention providing for enforceability of mediated settlement agreements, the interviewed practitioners expressed doubts that the convention was needed. They referred to the lack of experience with mediation in some parts of the world, current absence of an enforcement mechanism for mediated settlement agreements on a domestic level, and the credibility gap if a party seeks to enforce a mediated settlement agreement that originated from abroad, as issues that needed to be addressed before one could discuss the adoption of the convention.

(3) What is the influence of the practitioners’ legal culture on their perception and use of the same neutral (arb)-med-arb?

Although diff neutral (arb)-med-arb does avoid potential problems associated with the same neutral (arb)-med-arb, the involvement of different neutrals in each stage of the combined process increases and may even double the time and costs of a dispute resolution process. The preference of the questionnaire participants for diff neutral (arb)-med-arb, and a minimal use of the same neutral (arb)-med-arb needed explanation.

From an analysis of the literature, including empirical studies, the practitioners’ legal culture emerged as the reason why dispute resolution practitioners around the world have different and even conflicting views on the same neutral (arb)-med-arb. More specifically, the thesis has identified two key factors that appear to shape one’s
perception of the same neutral (arb)-med-arb: the practice of the judiciary and the way disputes are resolved in a particular jurisdiction.

The first factor - practice of the judiciary

Overall, while some civil law systems have traditionally regarded promotion of settlement as duty of judges and arbitrators, their common law counterparts have not allowed judges and arbitrators to be actively involved in settlement facilitation. A review of the literature showed that this discussion is usually carried out in the context of contrasting the inquisitorial legal traditions of Continental Europe with the adversarial approach of the Anglo-American legal system. Germany, Austria and Switzerland stand out in Continental Europe as countries where judges and arbitrators systematically attempt to settle a dispute before them. However, this practice is not common in France, despite express recognition of conciliation as one of the functions of a judge under the French CCP. One characteristic feature of the German approach to facilitation of settlement is that caucuses do not seem to be common for German judges and arbitrators. The practice of arbitration in some East Asian countries resembles the German approach. The reason for that might be that mediation is natural and closer to the mentality of East Asian jurists than litigation.

The second factor - way disputes are resolved

In East Asian countries, harmony in interpersonal relationship appears to be paramount and outright conflict may be perceived as an embarrassment. Due to the deeply rooted tradition of conflict avoidance, East Asian arbitrators tend to actively assist parties in settling their dispute. The East Asian approach to resolution of disputes is often discussed in the context of contrasting the Western world that is commonly characterised as a litigious culture with East Asian, and Arab and Islamic societies that are known for their conciliatory culture.

Among Western countries, however, there are different perceptions of the role of a judge. Anglo-American law countries have traditionally entrusted judges with adjudicating disputes. In Continental Europe, Germany and countries following its tradition appear to regard facilitation of settlement as part of a judge’s role, which is not the case for other Continental European countries. Overall, practitioners in Continental European countries seem to have less objections to facilitation of settlement by a judge than in Anglo-American law countries.
In East Asia, China and Japan appear to be the foremost proponents of the practice of the combined role of an arbitrator and a mediator. However, differences exist between the approach of the Chinese and Japanese judges and arbitrators and their colleagues in Germany. For instance, while the former do not seem to hesitate to caucus with parties, this is uncommon for the latter.

**Emerging harmonisation trend**

It appears, however, that differences between the Western and East Asian cultures, on the one hand and between Continental European and Anglo-American legal traditions, on the other hand are diminishing. There is a shared view in the literature that common law practitioners are beginning to recognise that the roles of an arbitrator and a mediator are not fundamentally incompatible. This might be an indication of an emerging harmonisation trend favouring the same neutral (arb)-med arb.

**Empirical results on legal culture**

The existence of a link between the practitioners’ legal culture and their use of the same neutral (arb)-med arb is supported by the questionnaire result. The preference for different neutral (arb)-med arb over the same neutral (arb)-med arb can be explained by reference to the legal culture of the questionnaire participants with experience in combinations: practices in practitioners’ home jurisdictions influence the way they perceive and use the same neutral (arb)-med arb. The majority of the participants with experience in combinations practised in Common Law Asia Pacific and Continental Europe. Amongst the participants with a civil law background, very few reported practising in civil law countries that are known for their favourable attitude to mediation by judges and arbitrators, namely Germany, Austria, Switzerland, Japan, and mainland China. The participants with a common law background demonstrated a typical common law preference for using arbitration and mediation separately by involving different neutrals in each stage. The data does not support the narrative in the literature that those trained in the common law tradition are becoming used to the practice of the same neutral (arb)-med arb. This applies even to practitioners from jurisdictions like Hong Kong and Singapore that adopted legislation encouraging the use of the same neutral (arb)-med arb. The data reveals that these legislative provisions are not applied in practice. Arbitration institutions almost never suggest that parties use combinations, despite high demands for such propositions.
The infrequent use of the same neutral (arb)-med-arb was one of the questionnaire results followed up in the second phase of the empirical study. When the interviewees were asked to explain the infrequent use of the same neutral (arb)-med-arb, most of them observed that the extent of the use of the same neutral (arb)-med-arb varied from country to country. China, Japan, Korea, Switzerland and Germany were referred to as countries where the use of the same neutral (arb)-med-arb was the most widespread. All but one interviewee recognised the significant influence of the legal culture of counsel and neutrals on the way a combination of mediation and arbitration is conducted. Thereby, the interview data further supported the earlier explanation of the questionnaire result that diff neutral (arb)-med-arb is used more frequently than the same neutral (arb)-med-arb by reference to the legal culture of practitioners with experience in combinations. Contrary to the narrative in the literature assuming that there is an emerging harmonisation trend favouring the same neutral (arb)-med-arb, the interview data revealed that it might be premature to talk about any harmonisation. This interview result, however, is consistent with the questionnaire result that the participants with a common law background still prefer using arbitration and mediation separately by involving different neutrals in each stage.

(4) How can the concerns associated with the same neutral (arb)-med-arb be addressed?

The thesis has identified three major ways to address concerns associated with the same neutral (arb)-med-arb. These are the involvement of different neutrals in combinations, procedural modifications of the same neutral (arb)-med-arb and the implementation of safeguards for using the same neutral (arb)-med-arb.

Way 1. Involvement of different neutrals in combinations

The involvement of different neutrals in combinations effectively eliminates behavioural and procedural concerns associated with the same neutral (arb)-med-arb. However, often it does not lead to time and cost savings.

Diff Neutral (Arb)-Med-Arb, the most common combination according to the questionnaire participants, appears to be viewed as a solution to concerns associated with the same neutral (arb)-med-arb mostly by common law practitioners. This can be explained by the traditional common law preference for separating the roles of a mediator and an arbitrator. Interestingly, while the legislation in Hong Kong and Singapore facilitates the use of the same neutral (arb)-med-arb, the main dispute
resolution centres in both jurisdictions promote the use of diff neutral (arb)-med-arb. This disparity in both Hong Kong and Singapore between the legislation and the rules of the jurisdictions’ main dispute resolution centres can be explained by the conflicting influences of the Chinese tradition of using the same person as a mediator and an arbitrator and Western standards disapproving of this practice. Anecdotally reported cases illustrate that by using diff neutral (arb)-med-arb parties still can save time and money. Even if the dispute is not resolved in mediation, parties can use mediation to agree on matters that may assist them in the following arbitration stage.

Combinations like shadow mediation and co-med-arb appear to be more time efficient than diff neutral (arb)-med-arb. In shadow mediation, mediators attend arbitration hearings and do not need any time to educate themselves about the facts of the case at the commencement of mediation. In co-med-arb, arbitrators become aware of the facts of the case by attending joint mediation sessions, which saves time, if arbitration is needed.

Dispute resolution institutions around the world offer four other combinations involving different neutrals. These are CMAP simultaneous and independent mediation and arbitration, ICDR concurrent arbitration-mediation, JAMS Mediator-in-Reserve, and BIMCO combination. These combinations can be more time efficient than diff neutral (arb)-med-arb. This is because in all four cases mediation proceeds on a parallel track with arbitration, whereas in diff neutral (arb)-med-arb mediation and arbitration are used in sequence.

One more combination, (arb)-med-arb opt-out allows parties to invite a different person to act as the arbitrator after the termination of mediation. This reduces behavioural concerns associated with the same neutral (arb)-med-arb, in particular those about parties’ reluctance to be open in mediation and the abuse of power by a mediator leading to the coercion of parties into settlement. The mere existence of a possibility to involve a different neutral can create an atmosphere that eliminates the need to do so. If parties decide to invite a different neutral after the mediation phase, the combination transforms into diff neutral (arb)-med-arb. Med-arb opt-out (more so than arb-med-arb opt-out) seems to be a combination that creates best conditions for parties to reach an agreement in mediation, as compared to other combinations.
Way 2. Procedural modifications of the same neutral (arb)-med-arb

Similarly to the involvement of different neutrals in combinations, procedural modifications of the same neutral (arb)-med-arb, such as MEDALOA, arb-med and modifications relevant to a three-member tribunal, are a way to address concerns associated with the same neutral (arb)-med-arb.

Incorporation of last offer arbitration in MEDALOA eases some of the concerns associated with the same neutral (arb)-med-arb. This is because MEDALOA can prevent parties from inflating their offers and reduce the risk of arbitrator’s bias since the arbitrator does not decide but chooses a resolution proposed by parties. A limitation of MEDALOA lies in its relative inability to solve a dispute by something other than strictly monetary terms.

In another combination, arb-med, the risk of arbitrator’s bias and breach of due process further to confidential disclosures in mediation is excluded because mediation occurs after an arbitral award has been rendered. For the same reason, parties cannot use mediation tactically to influence the arbitrator’s decision. However, since arbitration will run its full course regardless of whether parties settle in mediation, arb-med is not a time and cost efficient process.

Arbitral tribunals consisting of three arbitrators offer significant flexibility for configuration in the mediation phase. This may help reduce many concerns associated with the same neutral (arb)-med-arb, particularly those related to the risk of arbitrator’s bias. For example, two co-arbitrators may conduct mediation, while the chair is reserved for the arbitration hearing or the chair of the tribunal may act as a mediator, while two co-arbitrators are reserved for the hearing.

Way 3. Safeguards for using the same neutral (arb)-med-arb

The implementation of safeguards for using the same neutral (arb)-med-arb is the third way to address concerns associated with this process. The thesis has identified two key safeguards that parties intending to use the same neutral (arb)-med-arb need to consider and should implement. These are party consent to the process and one of the two safeguard options for reducing concerns related to the use of caucuses.

Safeguard 1. Consent

The fundamental safeguard for using the same neutral (arb)-med-arb is party written consent to the process. This safeguard must be followed to protect the arbitrator and the
award from a challenge on the ground of the arbitrator’s participation in mediation. To be valid, party consent needs to meet two key criteria. First, consent must be a result of parties’ voluntary choice, which means that parties cannot be coerced into the process. Second, consent must be informed, which means that parties must be fully aware of the risks and ethical issues associated with the same neutral (arb)-med-arb.

In addition to written consent and unless the issue of waiver is regulated in the applicable legislation or rules, it is advisable that parties arrange an express written waiver of their right to challenge the arbitrator and the award on the ground of the arbitrator’s participation in mediation. In the absence of such an express written waiver, it is arguable that the parties’ written consent to the process will imply a waiver of the above-mentioned right.

Although it is generally recognised that parties can waive the impartiality requirement, the waiver is not absolute. If arbitrators manifest bias during or after arbitration, parties may still challenge them or the award. It is not clear whether parties can waive their due process rights. The few countries that have addressed the issue directly, reached contrasting conclusions. The ability of parties to waive their due process rights in Australia was supported by the *Duke Group* case. This, however, is not possible for parties in New Zealand, as demonstrated by the *Acorn Farms* case. The debate is ongoing and some risk to the arbitrator and the award remains because this issue is not settled in many countries. The absence of a clear answer to the question whether parties can waive their due process rights has prompted law and rule makers and commentators to come up with various solutions to minimise the risk of breach of due process, and the arbitrator’s partiality due to the arbitrator’s participation in caucuses.

*Safeguard 2. Two safeguard options for reducing concerns related to the use of caucuses*

Since caucuses appear to be the cause of most concerns associated with the same neutral (arb)-med-arb, it is essential for parties to specifically address this issue. The thesis has identified two main safeguard options for reducing concerns related to the use of caucuses. The first is to exclude caucuses altogether and conduct mediation in joint sessions only. This approach is practised in European countries following the Germanic tradition and is recommended by the CEDR, CIArb and the ICC. Where no caucuses are held, the problem of due process does not arise and the issue of arbitrators’ bias becomes less problematic. However, the exclusion of caucuses might eliminate a mediation process stage that is arguably vital for settlement efforts to be successful.
The second option is to allow caucuses and to specify what dual role neutrals are to do with the information from caucuses, if mediation does not lead to settlement and dual role neutrals need to resume as arbitrators.

One way is to require dual role neutrals, before resuming as arbitrators, to disclose to all parties as much of the confidential information revealed in caucuses as they consider material to the arbitral proceedings (the ‘disclosure’ rule). This is the approach taken by the legislators in Singapore, Hong Kong and Australia. In some jurisdictions, for example, New Zealand, the requirement of disclosure is not limited to information that is material, but extends to all information provided to dual role neutrals in caucuses.

Another way is to require dual role neutrals when acting as arbitrators to disregard any information obtained in caucuses and base their award only on evidence properly presented in arbitration (the ‘disregard’ rule). This approach is practised in China and, as the available case law shows, in the United States.

Both the disclosure and disregard rule have flaws. The former may, for example, deter parties from being open in caucuses and thereby inhibit the entire mediation process. The latter is often criticised for not avoiding the risk that arbitrators may become influenced by what they have heard. Both do not eliminate the risk of breach of due process. This could be remedied, if jurisdictions that authorise the same neutral (arb)-med-arb involving the use of caucuses specify that parties using this process waive their due process rights on the ground of arbitrators’ participation in caucuses.

The thesis suggests that all three ways to address concerns associated with the same neutral (arb)-med-arb, namely the involvement of different neutrals in combinations, procedural modifications of the same neutral (arb)-med-arb and the implementation of safeguards for using the same neutral (arb)-med-arb are valuable options. Each option can be used, depending on the particular circumstances of the case – above all, jurisdictions that are a place of arbitration and the award’s enforcement and the legal culture of practitioners involved in the dispute resolution process.

(5) How can the use of the same neutral (arb)-med-arb and other combinations in international commercial dispute resolution be enhanced?

Finally, a number of initiatives can be implemented to enhance the use of the same neutral (arb)-med-arb and other combinations in international commercial dispute resolution.
First, the use of combinations can be supported through the adoption of the legislation explicitly providing for the use of combinations. A sound approach might be to incorporate a general provision that would acknowledge that if parties consent in writing, the arbitrator, a member of the arbitral tribunal, or a different neutral may use mediation or other processes to assist parties in reaching settlement. Before parties agree to any process in writing, an arbitral tribunal should encourage parties to seek legal advice on combinations.

It will help if parties can be directed to a set of guidelines addressing the same neutral (arb)-med-arb and other combinations, explaining advantages and concerns associated with them and specifying safeguards for their use. Developing this kind of guidelines is the second of the suggested initiatives. These guidelines can be elaborated relying on the CEDR Rules, CEDR Appendix 2 and this thesis. Parties could consult the guidelines with the aim to select the most suitable mechanism for resolution of their dispute.

Third, dispute resolution institutions need to take on a greater role in promoting the use of combinations by creating links between their arbitration and mediation services. Procedures like the ICDR concurrent arbitration-mediation, JAMS Mediator-in-Reserve, SIAC-SIMC Arb-Med-Arb might inspire dispute resolution centres around the world to revise and enhance dispute resolution services that they currently offer to provide parties with bigger choice of dispute resolution options.

Finally, to be truly effective, the adoption of legislation, development of international guidelines and active promotion of combinations by dispute resolution institutions need to be accompanied by continuous efforts to build the capacity of dispute resolution practitioners.

Dispute resolution practitioners play a significant role in the use of combinations. In fact, to use combinations or not, largely depends on dispute resolution practitioners’ awareness of various combinations, readiness to assist parties in selecting the process that best suits their particular needs, and ability to properly and ethically administer the selected process. Also, since international dispute resolution involves participants from all over the world, arbitrators and mediators need to have skills to arrange a dispute resolution process in a way that accommodates parties from different legal cultures. It appears that currently not many dispute resolution practitioners are prepared to arrange a dispute resolution process differently from how they were trained to do it in their home jurisdiction. Instead of looking for a process that best meets the demands of each
particular case, many practitioners still tend to opt for processes that they are familiar and comfortable with.

Considering the key role that dispute resolution practitioners play in the use of combinations, the thesis argues that the use of combinations cannot be enhanced without concerted efforts to build the capacity of dispute resolution practitioners in three areas.

Firstly, more arbitrators need to be trained as mediators and more mediators need to be trained as arbitrators. While this kind of training is essential for those acting as dual role neutrals, knowledge and experience in both mediation and arbitration will pave the way for wider use of combinations in general. A practical problem of finding a skilled and experienced dual role neutral can be addressed by including information on dual role neutrals in an online resource, like Arbitrator Intelligence, that is accessible to the entire international dispute resolution community.

Secondly, taking into account the fact that international dispute resolution involves practitioners of different legal cultures with different understanding of mediation and appropriate ways of combining mediation and arbitration, more efforts need to be directed toward improving the skills of dispute resolution practitioners in managing cultural differences. It might be wise to start with changing university programs so that they focus more on international and comparative law in training law students. International dispute resolution practitioners would benefit from cross-cultural training designed to improve their understanding of the impacts of culture on local legal practices and to provide guidance on how to manage cultural differences.

Thirdly, dispute resolution practitioners should be trained in flexible process design. While the same neutral (arb)-med-arb is a viable combination, this thesis does not argue that it is a ‘one-size-fits-all’ dispute resolution process. Rather it is one of many dispute resolution process options that, depending on the circumstances of a particular case, may or may not meet the parties’ needs. The existing combinations can be used more and new combinations may emerge if more dispute resolution practitioners adopt a flexible approach to process design and focus on choosing the most suitable dispute resolution process for each particular dispute. Law school curriculum could be broadened to include courses like ‘Creative Problem Solving’. These would educate students about various combinations and how to view, analyse and choose a dispute resolution process depending on the needs of a particular dispute. Similar but more
advanced courses could be developed and offered to experienced dispute resolution practitioners.

### 10.3 Conclusions

The results of this thesis presented above partially confirm the first hypothesis and support the second.

**Hypothesis 1**

Concerns associated with the same neutral (arb)-med-arb can be reduced in three major ways: the involvement of different neutrals in combinations, procedural modifications of the same neutral (arb)-med-arb and the implementation of safeguards for using the same neutral (arb)-med-arb. Not all three of these ways allow parties to benefit from fast, inexpensive and enforceable dispute resolution. For instance, while the involvement of different neutrals in combinations eliminates concerns associated with the same neutral (arb)-med-arb, it often results in additional costs and time, as compared to the same neutral (arb)-med-arb.

**Hypothesis 2**

The results support the hypothesis that not all international commercial dispute resolution practitioners raise concerns over the same neutral (arb)-med-arb and that the perception and use of the process varies throughout the world. Ultimately, which of the three ways to reduce concerns associated with the same neutral (arb)-med-arb is appropriate, will depend on the particular circumstances of the case, including the legal culture of dispute resolution practitioners involved in the process.

The thesis suggests that the same neutral (arb)-med-arb is not a ‘one-size-fits-all’ process. Other combinations discussed in this thesis deserve more attention from practitioners and academics.

### 10.4 Future Research

The results of this thesis have highlighted several areas where further research is needed.

First, the results indicate that it is time for a shift in the focus of the debate about combinations. It appears that so far the whole discussion of combinations has centred upon the same neutral (arb)-med-arb, while other combinations have largely been neglected and discussed mostly in the context of how to address concerns associated with the same neutral (arb)-med-arb. It is suggested that combinations other than the
same neutral (arb)-med-arb need to be explored further as dispute resolution options equally valuable as the same neutral (arb)-med-arb. This will contribute to enhancing parties’ choice of dispute resolution mechanisms.

Second, the debate about the same neutral (arb)-med-arb itself needs to be refocused. Currently, the process is discussed mostly from the extremes of the spectrum with most commentators either advocating for the use of the same neutral (arb)-med-arb or insisting on the involvement of different neutrals, namely diff neutral (arb)-med-arb. It is suggested that opportunities lying within these two options should be explored. Future research could investigate how particular characteristics of each process, mediation and arbitration, can improve the other. This will address current concerns raised in respect of mediation and arbitration. For example, future research could explore how the use of elements of mediation to facilitate procedural matters can make the arbitration process more time and cost efficient.

Third, future research could address some of the limitations of the empirical study presented in this thesis. In particular, as indicated in section 5.2.3.1, the questionnaire had a relatively small sample of participants. Also, the participants represented certain regions and legal cultures more than others. The majority of the participants practised either in Continental Europe or in Common Law Asia Pacific. Future studies could remedy these limitations by involving more participants and ensuring equal representation of different regions and legal cultures. The latter point is important in view of a result of this thesis that the use and perception of combinations can be explained by reference to practitioners’ legal culture.

Fourth, while the empirical study presented in this thesis investigated the use and perceptions of all combinations, future research could focus on examining specific combinations and their characteristics. For example, advantages and concerns attributed to the same neutral (arb)-med-arb in the literature have little empirical support. Future empirical studies could remedy this deficit. Empirical studies need to be conducted in respect of other combinations, such as diff neutral (arb)-med-arb, (arb)-med-arb opt-out, MEDALOA, arb-med etc. It would be worthwhile to involve in future empirical studies not only professionals but also parties.

10.5 Contribution
This thesis makes a substantial and original contribution to the understanding of combinations, their use and perception, in international commercial dispute resolution.
First, the empirical study conducted for this thesis is the first empirical study to investigate specifically the use of combinations in international commercial dispute resolution. Its findings shed light on the current use and perception of combinations. The design of the empirical study can be used to develop future empirical studies on the use of combinations.

Second, the thesis synthesises the existing ways of addressing concerns associated with the same neutral (arb)-med-arb in international commercial dispute resolution and groups them into three major categories mentioned above.

Third, having identified that there is scope for a more widespread use of combinations in international commercial dispute resolution, the thesis recommends initiatives to enhance the use of combinations. These initiatives include the adoption of legislation explicitly providing for the use of combinations, development of international guidelines addressing various combinations and safeguards for their use, and more active involvement of dispute resolution centres in promoting the use of combinations. These three initiatives need to be accompanied by consistent efforts to build the capacity of dispute resolution practitioners.

Overall, this thesis increases awareness, improves understanding and expands the knowledge of the international commercial dispute resolution community about combinations. Insights from theory and practice presented in this thesis can assist international dispute resolution practitioners in reducing and eliminating concerns associated with the same neutral (arb)-med-arb, and, consequently, better fulfilling their tasks. They can guide those involved in international commerce in creating more efficient mechanisms for resolving disputes. The study contributes to the field of international dispute resolution in general. It expands the toolkit of available dispute resolution mechanisms by exploring approaches to resolving commercial disputes. This should have significant implications for the development and enhancement of international dispute resolution theory and practice overall.
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### Appendix 1

<table>
<thead>
<tr>
<th>Key combinations</th>
<th>Most common definitions</th>
<th>Definition used in this thesis</th>
</tr>
</thead>
</table>
| **Med-arb**      | (1) A two-step process, where mediation is the first step followed, if necessary, by arbitration as the second step to decide the issues not settled in mediation and where  
|                  | (a) the same neutral acts as the mediator and the arbitrator  
|                  | (b) the same or different neutrals act as the mediator and the arbitrator  
|                  | (2) A two-step process that starts either with mediation or arbitration in which the same neutral acts as the mediator and the arbitrator | The sequential use of mediation and arbitration, with the mediation phase taking place first where the same or different neutrals act as the mediator and the arbitrator. |
| **Same neutral med-arb** | The sequential use of mediation and arbitration, with the mediation phase taking place first where the same neutral acts as the mediator and the arbitrator. | The sequential use of mediation and arbitration, with the mediation phase taking place first where the same neutral acts as the mediator and the arbitrator. |
| **Diff neutral med-arb** | The sequential use of mediation and arbitration, with the mediation phase taking place first where different neutrals act as the mediator and the arbitrator. | The sequential use of mediation and arbitration, with the mediation phase taking place first where different neutrals act as the mediator and the arbitrator. |
| **Arb-med-arb**  | A separate mediation process in the course of an on-going arbitration where  
|                  | (1) mediation is conducted either by the arbitrator or by a different neutral  
|                  | (2) mediation is conducted by a different neutral  
<p>|                  | (3) mediation is conducted by the arbitrator | A separate mediation process in the course of arbitration where mediation is conducted by the arbitrator or a different neutral. |
| <strong>Same neutral arb-med-arb</strong> | - | A separate mediation process in the course of arbitration where mediation is conducted by the arbitrator. |
| <strong>Diff neutral arb-med-arb</strong> | - | A separate mediation process in the course of arbitration where mediation is conducted by a different neutral. |</p>
<table>
<thead>
<tr>
<th>Same neutral (arb)-med-arb</th>
<th>-</th>
<th>A joint reference to the same neutral med-arb and the same neutral arb-med-arb.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Diff neutral (arb)-med-arb</td>
<td>-</td>
<td>A joint reference to the diff neutral med-arb and diff neutral arb-med-arb.</td>
</tr>
<tr>
<td><strong>Arb-med</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(1)</td>
<td>A process that begins with arbitration resulting in a binding award that is sealed and kept confidential while parties proceed to the mediation phase. If parties settle in mediation, the award is not disclosed; otherwise, the award is revealed and becomes binding. In arb-med</td>
<td></td>
</tr>
<tr>
<td>(a)</td>
<td>the same neutral acts as the arbitrator and the mediator</td>
<td></td>
</tr>
<tr>
<td>(b)</td>
<td>the same or different neutrals act as the arbitrator and the mediator</td>
<td></td>
</tr>
<tr>
<td>(2)</td>
<td>A process that begins with arbitration and an attempt to mediate is made within the arbitration proceedings.</td>
<td></td>
</tr>
<tr>
<td><strong>MEDALOA</strong></td>
<td>Mediation followed by last offer arbitration where each party submits a ‘last offer’ to the neutral who must choose between one of them and where</td>
<td></td>
</tr>
<tr>
<td>(1)</td>
<td>the same neutral acts as the mediator and the arbitrator</td>
<td></td>
</tr>
<tr>
<td>(2)</td>
<td>different neutrals act as the mediator and the arbitrator</td>
<td></td>
</tr>
<tr>
<td>(3)</td>
<td>the same or different neutrals act as the mediator and the arbitrator</td>
<td></td>
</tr>
<tr>
<td></td>
<td>A process that starts with mediation and if parties do not settle then, each party submits a ‘last offer’ to the dual role neutral who chooses between one of them.</td>
<td></td>
</tr>
<tr>
<td><strong>Co-med-arb</strong></td>
<td>(1)</td>
<td>Two different neutrals, the mediator and the arbitrator conduct a joint session, after which the mediator works with parties, including in caucuses, in the absence of the arbitrator. If the dispute is not settled in mediation, it goes to the arbitrator who renders an award.</td>
</tr>
<tr>
<td></td>
<td>(2)</td>
<td>A sequential use of mediation and arbitration with a different person acting as the arbitrator, if mediation does not result in settlement.</td>
</tr>
<tr>
<td></td>
<td>A process where the arbitrator attends joint sessions in mediation (but does not participate in caucusing) and if no settlement is reached in mediation, renders an award.</td>
<td></td>
</tr>
</tbody>
</table>
Appendix 2

QUESTIONNAIRE ON THE COMBINED USE OF MEDIATION AND ARBITRATION IN AN INTERNATIONAL COMMERCIAL CONTEXT

INFORMATION REGARDING THE QUESTIONNAIRE THAT YOU ARE ABOUT TO COMPLETE

This questionnaire relates to your experience as an international commercial dispute resolution practitioner over the last 5 or fewer years as applicable. Its particular focus is your experience, if any, in the combined use of mediation and arbitration in international commercial dispute resolution. Experience in the combined use of mediation and arbitration, however, is not a prerequisite for participation in this study.

The questionnaire has 22 questions and it should take you not more than 10-15 minutes to complete it.

You will remain anonymous, unless you indicate that you are interested to participate in a follow up interview and you provide your contact information. Any contact information will be used for the purposes of research only.

Completion of this questionnaire will be considered evidence of your consent to take part in this research project.

Please note in this questionnaire:

Mediation is used interchangeably with conciliation. Evaluative and facilitative styles of mediation are distinguished. A mediator adopting a facilitative style will not suggest specific options for settlement, express a view as to the merits of the dispute, or be directive on the outcome.

The neutral means either a mediator or an arbitrator in an international commercial dispute resolution process.

The combined use of mediation and arbitration refers to the actual use of the discrete processes of mediation and arbitration in combination. It includes any combination of processes in whatever order and whether conducted by the same or different neutrals.

Q1-4 PROVIDE BACKGROUND INFORMATION ABOUT YOUR INTERNATIONAL COMMERCIAL DISPUTE RESOLUTION PRACTICE

<table>
<thead>
<tr>
<th>1. What is your primary country of practice?</th>
<th>Country .................................................................</th>
</tr>
</thead>
<tbody>
<tr>
<td>2. Are you qualified to practise as a lawyer?</td>
<td>a) Yes</td>
</tr>
<tr>
<td></td>
<td>b) No</td>
</tr>
<tr>
<td></td>
<td>c) Yes, but not currently in practice</td>
</tr>
<tr>
<td>3. Over the last 5 years what has been your most frequent professional role in international commercial dispute resolution?</td>
<td>a) counsel</td>
</tr>
<tr>
<td></td>
<td>b) mediator</td>
</tr>
<tr>
<td></td>
<td>c) arbitrator</td>
</tr>
<tr>
<td></td>
<td>d) other. Please specify: ..................................</td>
</tr>
</tbody>
</table>
4. Over the last 5 years, approximately how many international commercial disputes have you been involved in as a professional?

<table>
<thead>
<tr>
<th>Option</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>a)</td>
<td>1-5</td>
</tr>
<tr>
<td>b)</td>
<td>6-10</td>
</tr>
<tr>
<td>c)</td>
<td>11-15</td>
</tr>
<tr>
<td>d)</td>
<td>&gt; 16. Please specify the approximate amount: ...................................................</td>
</tr>
</tbody>
</table>

5. Over the last 5 years have you acted as a professional in any international commercial dispute resolution that involved the combined use of mediation and arbitration?

Please circle as many answers as are applicable

<table>
<thead>
<tr>
<th>Option</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>a)</td>
<td>Yes, I have acted as a counsel</td>
</tr>
<tr>
<td>b)</td>
<td>Yes, I have acted as a mediator in a dispute that involved arbitration with a different neutral</td>
</tr>
<tr>
<td>c)</td>
<td>Yes, I have acted as an arbitrator in a dispute that involved mediation with a different neutral</td>
</tr>
<tr>
<td>d)</td>
<td>Yes, I have acted as a mediator and an arbitrator in the same dispute</td>
</tr>
<tr>
<td>e)</td>
<td>No, I have not acted as a professional in any dispute involving the combined use of mediation and arbitration (Go to question 20)</td>
</tr>
</tbody>
</table>

6. Over the last 5 years, what is the approximate proportion of disputes involving the combined use of mediation and arbitration of your overall international commercial dispute resolution practice?

Please circle one answer

<table>
<thead>
<tr>
<th>Option</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>a)</td>
<td>not more than 10 %</td>
</tr>
<tr>
<td>b)</td>
<td>not more than 20 %</td>
</tr>
<tr>
<td>c)</td>
<td>not more than 30 %</td>
</tr>
<tr>
<td>d)</td>
<td>not more than 50 %</td>
</tr>
<tr>
<td>e)</td>
<td>not more than 75 %</td>
</tr>
<tr>
<td>f)</td>
<td>all</td>
</tr>
</tbody>
</table>

7. What triggered the combined use of mediation and arbitration?

Please circle as many answers as are applicable

<table>
<thead>
<tr>
<th>Option</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>a)</td>
<td>specifically tailored contractual provision</td>
</tr>
<tr>
<td>b)</td>
<td>model multi-tiered clause of an arbitration institute incorporated into parties’ contract</td>
</tr>
<tr>
<td>c)</td>
<td>initiative of one or both parties</td>
</tr>
<tr>
<td>d)</td>
<td>one or both parties’ counsel suggestion</td>
</tr>
<tr>
<td>e)</td>
<td>mediator’s suggestion</td>
</tr>
<tr>
<td>f)</td>
<td>arbitrator’s suggestion</td>
</tr>
<tr>
<td>g)</td>
<td>your suggestion. Please specify in which capacity you were acting: ..........................................................</td>
</tr>
<tr>
<td>h)</td>
<td>provision in the rules of an arbitration institute</td>
</tr>
</tbody>
</table>
8. If in Q7 you circled more than one answer, is there any that applied most frequently?

<table>
<thead>
<tr>
<th>Trigger</th>
<th>Country</th>
<th>Don’t know</th>
</tr>
</thead>
<tbody>
<tr>
<td>a party/ parties</td>
<td></td>
<td></td>
</tr>
<tr>
<td>a counsel/counsel</td>
<td></td>
<td></td>
</tr>
<tr>
<td>mediator</td>
<td></td>
<td></td>
</tr>
<tr>
<td>arbitrator</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

9. If in Q7 you circled a participant in the process other than you, please specify the country of origin or practice of such participant.

10. When in the combined process has mediation been used?

Please circle as many answers as are applicable

a) before arbitration
b) after commencement of arbitration but before the hearing on the merits
c) after the hearing on the merits but before issuing the award
d) after issuing the award
e) at the same time as arbitration
f) other. Please specify: ........................................

11. If in Q10 you circled more than one answer, is there any that applied most frequently?

a) Yes. Please specify by writing the letter: ........
b) No

12. Who conducted mediation in the combined process?

Please circle as many answers as are applicable

a) the sole arbitrator
b) a member of the arbitral tribunal
c) a neutral other than a) or b)
<table>
<thead>
<tr>
<th>Question</th>
<th>Answer Options</th>
</tr>
</thead>
</table>
| 13. If in Q12 you circled more than one answer, is there any that applied most frequently? | a) Yes. Please specify by writing the letter: ........  
                          b) No                                                                                   |
| 14. If you conducted mediation in a dispute involving the combined use of mediation and arbitration how would you best characterise your mediation style? | Please circle one answer  
                          a) facilitative                                                                  
                          b) evaluative                                                                     
                          c) not applicable                                                                  
                          d) other. Please specify: .......................................................... |
| 15. Were caucuses (private meetings) used in mediation?                 | Please circle one answer  
                          a) always                                                                   
                          b) in the majority of cases                                                    
                          c) in the minority of cases                                                    
                          d) never                                                                    
                          e) don't know                                                                  |
| 16. How was the outcome of a dispute resolution process recorded?       | Please circle as many answers as are applicable  
                          a) in a mediated settlement agreement                                              
                          b) in a consent arbitral award incorporating a mediated settlement agreement  
                          c) in a regular arbitral award                                                   
                          d) in a court judgement                                                           
                          e) other. Please specify: .......................................................... |
| 17. If in Q16 you circled more than one answer, is there any that applied most frequently? | a) Yes. Please specify by writing the letter: ........  
                          b) No                                                                                   |
| 18. What types of disputes were resolved by using a combination of mediation and arbitration? | Please circle as many answers as are applicable  
                          a) complex commercial disputes                                                    
                          b) specialised industry disputes. Please specify the industry: ..................  
                          c) other. Please specify: .......................................................... |
| 19. If in Q18 you circled more than one answer, is there any that applied most frequently? | a) Yes. Please specify by writing the letter: ........  
                          b) No                                                                                   |
### 20. In your opinion, what are the main benefits to parties of using a combination of mediation and arbitration?

Please circle as many answers as are applicable:

- a) faster resolution of their dispute (as compared to arbitration only)
- b) lower cost of resolution of their dispute (as compared to arbitration only)
- c) ability to preserve business relationship
- d) high quality of the outcome, i.e. the outcome of a dispute resolution process is more in line with parties’ needs (as compared to arbitration only)
- e) possibility of obtaining an enforceable arbitral award
- f) no benefits
- g) other. Please specify: ..............................................

### 21. Would you like to see more use of mediation and arbitration in combination for resolving international commercial disputes in the coming years?

- a) Yes
- b) No
- c) Don’t know

Please provide a brief reason for your answer:

........................................................................................................
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### 22. Would you be willing to participate in a follow up interview or survey?

- a) Yes. Please provide the following information:
  
  Name: .................................................................
  
  Email address: ........................................................
  
  Phone number: ....................................................

- b) No

THANK YOU VERY MUCH FOR YOUR PARTICIPATION!
Appendix 3

Semi-structured interview schedule

Mediation and arbitration can be combined in many different ways. They can be used in sequence, in parallel and otherwise. If they are used in sequence it is possible for the combined process to start either with mediation or arbitration. Also, a combination of mediation and arbitration can be conducted either by the same or different neutrals.

Introductory questions

(1) My first question refers to your own professional experience in the combined use of mediation and arbitration in the broad sense, which encompasses many different ways of combining these two processes. Could you please tell me about this.

(2) Please tell me specifically about your own professional experience in the combined use of mediation and arbitration by the same neutral.

(3) Has your attitude to the combined use of mediation and arbitration by the same neutral changed over time?

Questions on the substance of the research

(1) Many articles address the benefits that the combined use of mediation and arbitration by the same neutral can offer to parties (in particular, time and cost efficiency of the process). However, several empirical studies show that this process is rarely used in practice. How would you explain this phenomenon?

(2) How do you deal with concerns related to the combined use of mediation and arbitration by the same neutral (in particular, those related to the use of caucuses) in your practice?

(3) Do you think there is any harmonisation trend in the field of the combined use of mediation and arbitration? What about the use of a combination of mediation and arbitration by the same neutral?

(4) What needs to be done, in your opinion, to enhance the use of a combination of mediation and arbitration in international commercial dispute resolution?

(5) Imagine, there is an international enforcement mechanism for mediated settlement agreements. Do you think this attribute of mediation may make the combined use of mediation and arbitration less attractive to parties?
(6) In your experience, what is the significance of the legal culture of counsel and neutral(s) for the way a combination of mediation and arbitration is conducted?

(7) Is there anything you would like to add?