

AMALGAMATING THE CONCILIATORY AND THE ADJUDICATIVE: HYBRID PROCESSES AND ASIAN ARBITRAL INSTITUTIONS

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ABSTRACT

In the recent past, Asia has grown into one of the world's foremost business destinations, as a result of which ADR mechanisms and institutions that offer them have been on the rise in the region. This article seeks to show how swifter, more economical and pioneering mechanisms such as hybrid processes could do wonders in a world where traditional dispute resolution is becoming increasingly painstaking, and the incorporation of these processes by leading Asian arbitral institutions could potentially change the way dispute resolution works in Asia and worldwide. The authors seek to explain how such processes work, identify and analyse potential flaws and fissures in the law in Asia concerning them, and ultimately provide a framework for their implementation in Asian arbitral institutions.

“I cannot tell you the number of times I have been frustrated at the waste of resources in resolving disputes through standard litigation practices. It sometimes reminds me of what an American army captain said in Vietnam: “To secure the village it was necessary to destroy it.””

- David Shaughnessy¹

In the backdrop of a bustling Asian business hub, two parties are cementing a business relationship that has lasted decades on paper. The transaction is to sell A's multimillion dollar insurance business to B, ensuring A's continued presence in the functioning of the business. The parties are apprehensive about the possibility of ruined business relations over any dispute that might arise over the contract, and do not even fathom the idea of going to court. The idea of arbitration is also shrouded with many of the same concerns, but the prospect of mediating or negotiating a possible conflict brings doubts about whether the latter processes can be enforced as efficiently as the former. The parties, as

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rational persons,² seek a quick and efficient solution while keeping costs minimal. The parties pin their hopes on one of the many premier alternative dispute resolution institutions that have emerged in Asia - but how do they reconcile these apprehensions?

The answer, perhaps, lies in coalescing the confrontational and the non-confrontational, with the assurance that the dispute shall be resolved, come hell or high water. The emergence of hybrid arbitral processes in Asia could put these fears to rest. Coupled with the reputation and efficiency of a premier arbitral institution, a 'hybrid' process, which is a combination of two or more traditional ADR processes like arbitration and mediation, could offer the best deal to the complex business relations that throng Asia today. This paper will analyse two of the most widely utilised processes, Med-Arb (the combination of mediation first and then arbitration) and Arb-Med (which involves arbitration first, followed by mediation) from an Asian perspective, and seeks to highlight why the incorporation of these models in Asian arbitral institutions will immensely benefit international arbitration.

Part-I of this paper will examine what these processes entail and how they work, while Part-II scrutinizes the existing framework for hybrid processes in the rules of Asian arbitral institutions. Part-III will point out flaws and potential issues in these processes and lacunae in the law concerning them, which Part-IV will then attempt to resolve and provide a framework for the incorporation of these hybrid processes in Asian arbitral institutions.

I. Med-Arb and Arb-Med: What they Entail

A. Med-Arb

Med-Arb, at the risk of over-simplifying, can be defined as an amalgamation of the processes of mediation and arbitration in a temporal sequence. The former process is carried out, having confidence in the existing safety net of subsequent arbitration resulting in the decree of a final binding award in case of failure of mediation. In Med-Arb, the parties to a dispute first undergo the mediation process, wherein they try to reach an agreement in the presence of a neutral mediator, failing which, the mediator assumes the position of an arbitrator, and the dispute enters the arbitration phase. If the parties arrive at an agreement in

² Cooter & Ulen, *Law and Economics* 50 (Addison Wesley 2012) (hereinafter 'Cooter and Ulen')

the mediation phase, they usually sign a binding settlement agreement and sometimes, the mediator assumes his role as an arbitrator to convert the crux of the intended agreement in to a binding arbitral award.³

The certainty of a defined outcome, comparatively greater efficiency in terms of economics of time and money and greater party autonomy and control of the timeline of the process of dispute resolution are the central advantages of the process.⁴Further, Med-Arb follows a low to high cost consumption process which is in consonance with many scholars' beliefs⁵ that the cost incurred during the dispute resolution phase should move likewise as the dispute progresses. It provides the greater decision control characteristic of mediation and allows disputants to retain a fair say in how the dispute is settled for a more prolonged period.⁶Apart from these advantages, this process accommodates greater efficiency than separate mediation and arbitration by cutting costs and saving time involved in hiring an unfamiliar neutral arbitrator for the second stage of the process. Further, issues in dispute are narrowed down in the mediation phase, which results in a process that is less time consuming and allows for more free-flowing arbitration.⁷

³ Alan L. Limbury, *Hybrid Dispute Resolution Processes – Getting the Best while Avoiding the Worst of Both Worlds?*(Jan. 23, 2014) http://www.cedr.com/about_us/arbitration_commission/Hybrids.pdf (hereinafter referred to as 'Limbury')

⁴ Brewer, Thomas J., and Lawrence R. Mills.,*Combining Mediation and Arbitration*, 54:4 DISP. RESOL. J. 32-39 (1999)

⁵ WILLIAN URY, JEANNE BRETT & STEPHEN GOLDBERG, GETTING DISPUTES RESOLVED²⁰¹ (Jossey-Bass Publishers, 1988);[In the book the authors sketch three separate choices for resolving disputes in a workplace, moving from a low to high cost consumption pattern. The favoured choice, which is also the most economical, is reconciliation by negotiation or mediation followed by the second and relatively less favoured and more expensive option which is a rights based process in which an authority adjudicates.]; *See also*, Michele Gelfand& Jeanne Brett eds.,*The Handbook of Negotiation and Culture* (Stanford Bus. Books 2004); William H. Ross and Donald E. Conlon, *Hybrid Forms of Third-Party Dispute Resolution: Theoretical Implications of Combining Mediation and Arbitration*, 25:2 ACAD. MANAGE. REV 416-427 (2000) (hereinafter referred to as 'Ross and Conlon')

⁶ Ross and Conlon, *supra* note 5, pp. 416-427

⁷ Blankenship, John T., *Developing your ADR Attitude: Med-Arb, a Template for Adaptive ADR*, TENNESSEE BAR JOURNAL 28-41 (2006)

Med-Arb is specifically advantageous in situations where the disputants hold their overall commercial relationship more valuable than ‘irritant’ disputes. It provides for a process that disputants in these situations consider fair, more even handed and an expedient form of dispute resolution.⁸

However, there exist certain dangers plaguing the process, the most noted being the reduction in the efficiency of the mediation part of Med-Arb due to the concern among disputants that confidential information revealed to the Med-Arbitrer,⁹ might subsequently be used by her in granting the final arbitral award, and subsequent issues of bias¹⁰. Part-III of this article will discuss these shortcomings in detail.

This particular shortcoming however, is often overcome by having different individuals don the role of mediator and arbitrator. Doing so would raise costs, but it also allows the mediator to have available ‘the full range of mediation techniques conducive to settlement’¹¹, and ameliorates concerns around violations of principles of natural justice, especially the principle of *audi alterem partem*.¹²Part IV of this article will discuss the idea of two different individuals carrying out the mediation and arbitration stages respectively, as well as other possible solutions with respect to issues like bias and revealing confidential information that Med-Arb entails.

B. *Arb-Med*

In 2011, the arbitration community in Asia witnessed a case that sparked off heated debates. This was *Gao Hai Yan & Another v Keeneye Holdings Ltd & Others*, popularly known as the wining and dining case, which primarily scrutinized whether the hybrid ADR process of Arb-Med, (a conglomeration of the processes of arbitration and then mediation, in precisely that lexical order) was

⁸ *Ibid.*

⁹ The person who is first appointed mediator and then assumes the role of an arbitrator, if the mediation fails.

¹⁰ Fuller, L. 1962, *Collective bargaining and the arbitrator proceedings*, Fifteenth Annual Meeting, National Academy of Arbitrators: 8-54. Washington, DC: Bureau of National Affairs

¹¹ Limbury, *supra* note 3

¹² A latin maxim which means each party should have the opportunity to present their side.

congruous with the principle of procedural fairness in arbitration.¹³ In its initial stages, the Hong Kong Court of First Instance decided that the fact that this process involved an individual who would first operate as an arbitrator and then switch roles to a mediator created a reasonable doubt of bias in the eyes of a fair-minded observer, which is a concern shared by both Med-Arb and Arb-Med. Before delving into the pros and cons (the latter of which constituted most of the discourse that emerged as a result of this decision), the question of what this hybrid process is needs to be answered.

Arb-Med essentially involves two stages – first, the arbitrator passes an award, which remains sealed and unrevealed to the parties until the process of arbitration reaches an end. The arbitrator then switches to the more informal role of a mediator and attempts to convince the parties to negotiate and reach consensus. In the event that the mediation fails, however, the award is unsealed and becomes binding upon the parties.¹⁴ There is also a possibility of the arbitration stage resuming in the event of failure of mediation. One of the redeeming features of this course of action is that the parties are more likely to reach a final settlement and continue with business relationships (something that is crucial in business villages such as Hong Kong). Arb-Med also ensures that the dispute is resolved even if the mediation phase were to fail.¹⁵ The mechanism would also result in lower expectations of a favourable outcome in each party,¹⁶ which subsequently results in the possibility of greater cooperation and thereby a higher chance of reaching a settlement.¹⁷ It has also been argued that more disputes can potentially be settled in the mediation stage in the Arb-Med

¹³ Gao Hai Yan & Another v Keeneye Holdings Ltd & Others, 2011 WL 5506418 (CA), [2012] 1 HKLRD 627, [2011] HKEC 1626[2011] HKEC 1626 (hereinafter referred to as ‘Keeneye’)

¹⁴ Limbury, *supra* note 11.

¹⁵ Claire Wilson, *The Arb-Med hybrid in Hong Kong – Much ado about nothing?* KLUWER ARBITRATION BLOG (Jan 24, 2014) <http://kluwermediationblog.com/2012/02/01/the-arb-med-hybrid-in-hong-kong-much-ado-about-nothing/>

¹⁶ This is because the arbitral award has already been passed, so parties could enter the mediation phase with the idea that any new information at this juncture is not going to change the final decision if the mediation were to fail.

¹⁷ The idea of greater cooperation when a party is uncertain about whether the other party would make a co-operative choice or not flows from the classic economic conception of the prisoner’s dilemma. See TVERSKY&SHAFIR, THE DISJUNCTIVE EFFECT IN CHOICE UNDER UNCERTAINTY 305-309 (Psychological Science 1992)

mechanism, because parties are more willing to reveal confidential information as the stakes and desire to emerge victorious post the arbitral process has faded, since they realise that any information they divulge during mediation cannot affect the final award.¹⁸

However, Arb-Med does have its fair share of pitfalls as well, some of which were elucidated upon in the *Keeneye* case. Some of the concerns expressed include the threat of possible bias,¹⁹ and wastage of time and money spent on the initial arbitration phase if the mediation is successful - but this needs to be juxtaposed against the desire for consensus between the parties on their own. Parties could also be influenced into settlement if the behaviour of the mediator during the process is read into for hints of what the arbitral award could contain.²⁰ This article will discuss possible repercussions in detail in Part-III. However, it is important to recognize that the *Keeneye* case is an exception, as there were qualms about the procedure right from the beginning of the process, and the fundamental premise of arguments against it have all been bias, as opposed to wider issues of due process and public policy.²¹

In fact, the Appeals court in the case later took the stance that the parties had waived their rights to object on the grounds of possible bias when they consented to the process, in consonance with views worldwide on the merits of the Arb-Med process.²²

¹⁸ Ross and Conlon, *supra* note 5 at pp. 423-426

¹⁹ On the flipside, this seems to be a more serious concern for the Med-Arb mechanism, as the mere holding of private sessions creates a reasonable apprehension of bias in an arbitrator. *See*, *The Duke Group Ltd (In Liq.) v. Alamain Investments Ltd & Ors*, SASC 272, 2003 WL 22000368, 15 Aug 2003, SASC [2003]; *Glencot Development & Design Ltd v Ben Barrett & Son (Contractors) Ltd*[2001] B.L.R. 207; (2001) 3 T.C.L.R. 11; 80 Con. L.R. 14; (2001) 17 Const. L.J. 336; Official Transcript; QBD (TCC); 2001-02-13 [2001]

²⁰ Limbury, *supra* note 14.

²¹ Mark Goodrich, *Arb-med: Ideal solution or dangerous heresy?* WHITE & CASE 2012 (Jan 24, 2014) <http://www.whitecase.com/files/Publication/fb366225-8b08-421b-9777-a914587c9c0a/Presentation/PublicationAttachment/36c4bfd1-db71-4990-bfd7-b27b3ce759ae/articles-IALR-2012-Arb-med-solution-or-dangerous-heresy.pdf>

²² Article 12 of the UNCITRAL Model Law and Section 18A of the domestic arbitration act in Australia also follow this view, for example. Article 12 stipulates if parties are informed of circumstances that could cast doubts upon an arbitrator's impartiality by the arbitrator, they cannot object to it later. Similarly,

II. Hybrid Processes and Asian Arbitral Institutions

A. *Med-Arb and Asian Arbitral Institutions*

Given the cultural premise in place in Asia, which imposes an amiable code of conduct aimed at co-operation and preservation of cultural ties,²³ it is expected that a process such as Med-Arb that allows disputants to mediate in the first phase should flourish. This is bolstered by the fact that historically, it has been found that mediation/ conciliation is the preferred mode of dispute resolution in most Asian jurisdictions.²⁴ A logical extrapolation would be the acceptance of hybrid ADR processes that combine the certainty of a final arbitral award with the greater outcome control of mediation. This particular hypothesis is backed by the fact that Med-Arb is provided for in the laws of many Asian countries²⁵ like China, Hong Kong, Japan, Taiwan and Singapore, as opposed to their western counterparts who consider the two processes to be “two different routes to be kept separate from each other.”²⁶

Med-Arb in Hong Kong is governed by the Arbitration Ordinance²⁷ which assumed the force of law in 2011. Section 32 of the Ordinance allows for Med-Arb by dealing with the appointment of mediators in sub-section 3, by allowing the mediator appointed under an arbitration agreement to act as an arbitrator if no settlement is arrived at during the mediation phase. This position is in line with the ends foreseen during the Civil Justice Reforms²⁸ which, in the form of

Section 18A of the Australian Arbitration Act also lays down that once an arbitrator discloses circumstances that can cast doubts upon his impartiality, the parties cannot later challenge the arbitrator.

²³ A.F.M Maniruzzaman, *International Commercial Arbitration in the Asia Pacific - Asian Values, Culture and Context* 30 INT'L BUS. LAW. 510 (2002)

²⁴ ANDREW HUXLEY (ED), *THAI LAW, BUDDHIST LAW - ESSAYS ON THE LEGAL HISTORY OF THAILAND LAOS AND BURMA* 15 (White Orchid Press, Bangkok, 1996)

²⁵ Takao Tateishi, *The Role of the two-tier 'Med/Arb' Scheme in Japanese Dispute Resolution* ASIAN DISPUTE RESOLUTION 24 (2000)

²⁶ See the reflection of the Western tradition in Article 19 of the United Nations Commission on International Trade Law (UNCITRAL) Rules of Conciliation (1981) 20 ILM501. See generally, CHRISTIAN BFIHRING-UHLE, *ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS* (GRAHAM & TROTMAN/MARTINUS NIJHOFF, 1996).

²⁷ Hong Kong Arbitration Ordinance Cap. 609 (2011)

²⁸ The Civil Justice Reform in Hong Kong was implemented in April 2009. The objectives of the reforms were to transmogrify the general approach to court-litigation.

court encouragement and facilitation of ADR processes (especially mediation), aimed to provide special impetus to ‘consensual ADR’,²⁹ including Med-Arb. In Hong Kong, there exists a distinction in the laws governing mediation proceedings standing alone, and those forming a part of a Med-Arb process. The Mediation Ordinance,³⁰ which came into force on the January 1st, 2013, leaves mediation processes forming part of Med-Arb to be governed by the Arbitration Ordinance, thus specifically dealing with inherent issues of violations of natural justice, confidentiality and legal status distinct to the Med-Arb process emanating from the dynamic ‘shifting’ role played by the med-arbiter.³¹

However, the Hong Kong International Arbitration Centre (hereinafter referred to as ‘HKIAC’), a premier international centre for commercial arbitration and mediation under the ambit of the Hong Kong Mediation Council (HMC), in its mediation rules³² (in effect from August 1999) abnegates the possibility of Med-Arb services through the institution. Rule 14 expressly prohibits the appointment of the mediator in a mediation proceeding from being appointed as the arbitrator in subsequent arbitration arising out of the mediation, or any other dispute arising out of the same contract.³³

The Singapore International Arbitration Act,³⁴ however, allows for Med-Arb proceedings in Singapore, a major commercial hub in Asia, by prohibiting

The major underlying objects of the reform were to expedite the resolution of cases, decrease costs, and provide a framework for fair distribution of the resources of the courts. Another notable feature was that ADR, especially mediation, was given major impetus.

²⁹ As highlighted by the working party in its Interim Report, §625-628, http://www.civiljustice.gov.hk/ir/paperHTML/toc_ir.html (last visited 21 Jan 2014).

³⁰ Hong Kong Mediation Ordinance Cap. 620 (2012)

³¹ Nadja Alexander, *How is med-arb regulated in Hong Kong?* KLUWER MEDIATION BLOG (Jan 24, 2014) <https://kluwermediationblog.com/2013/03/10/what-legislation-applies-to-med-arb-in-hong-kong/>

³² HKIAC Mediation Rules, <http://hkiac.org/index.php/mediation/mediation-rules> (last visited 20th February 2014)

³³ Rule 14: Mediator’s Role in Subsequent Proceedings - The parties undertake that the mediator shall not be appointed as adjudicator, arbitrator or representative, counsel or expert 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. No party shall be entitled to call the mediator as a witness in any subsequent adjudication, arbitration or judicial proceedings arising out of the same contract.

³⁴ International Arbitration Act, Cap 143A

objection by disputants on arbitration proceedings on the ground that the arbitrator had previously acted as a conciliator in the dispute.³⁵ The Singapore Mediation Centre (SMC) and the Singapore International Arbitration Centre (SIAC) in tandem, offer the SMC-SIAC Med-Arb procedure, wherein parties to a dispute attempt to arrive at an agreement by mediation under the SMC rules governing the same, before taking the dispute to arbitration in case of failure. Arbitration is then carried on at the SIAC under its rules. If the parties to the process arrive at a resolution in the mediation phase, under Rule 6(2) of the SMC Mediation Procedure, the mediator is appointed as the arbitrator solely to give the settlement the force of an arbitral award.

Rule 10³⁶ allows the individual previously appointed as the mediator by SMC in the mediation phase to subsequently don the hat of an arbitrator in the arbitration phase, given the consent of the parties and if he/she is of the opinion that the conduct of any of the parties and/or any confidential information revealed to her in the mediation phase shall not affect her decision during arbitration.

The recent economic boom in India and China resulted in an unprecedented increase in the foreign investments, leading these nations to take measures to simplify dispute resolution mechanisms to further establish themselves as secure business locations. Therefore, it would seem logical that arbitral institutions in these two countries would provide for Med-Arb. In China, the China International Economic and Trade Arbitration Commission³⁷ (hereinafter referred to as 'CIETAC') allows for the amalgamation of conciliation and arbitration under a detailed procedure laid down in Article 45 of the institutional rules.³⁸ The other major institutions offering these processes include the Beijing

³⁵ *Id* at §17

³⁶ Rule 10, SMC Mediation Procedure

³⁷ The CIETAC is the oldest and largest arbitration institution in China.

³⁸ Article 45 of the CIETAC Rules state that with the consent of both parties to a dispute obtained by the arbitral tribunal it can conciliate the case during the course of the arbitration proceedings. Subsequent to this, if settlement is reached in the conciliation phase, the parties must sign a settlement agreement, which may be later converted to an arbitral award.

Rule 7 puts down that in event of breakdown in conciliation proceedings the arbitral tribunal shall resume arbitration.

Rule 9 deals with confidentiality of information obtained during conciliation

Arbitration Commission³⁹ and the Indian Institution of Arbitration and Mediation⁴⁰ in India.

B. *Arb-Med and Asian Arbitral Institutions*

The general trend noticed with respect to dispute resolution in Asia is that the Asian approach to dispute resolution is largely non-confrontational. This is why numerous places in Asia (such as Hong Kong and Japan) have enacted domestic legislations that allow for an arbitrator to act as a mediator in addition to allowing a mediator to act as an arbitrator despite the UNCITRAL Model Law being silent on the issue, as discussed in the previous section.

The International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration⁴¹ also allows for an arbitrator to aid the parties in reaching a settlement as long as there has been express consent by the parties to the same, and the arbitrator has not behaved in a manner that would disqualify

proceedings and bars reliance on such in subsequent arbitration, and ad verbatim, states the following- “Where conciliation fails, 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, shall not be invoked by either party as grounds for any claim, defence or counterclaim in the subsequent arbitration proceedings, judicial proceedings, or any other proceedings.” <http://www.cietac.org/index/rules.cms> (last accessed 21st March 2014)

³⁹ The Beijing Arbitration Commission is a not-for-profit arbitral institution to promote effective alternative dispute mechanism processes. Beijing Arbitration Rules 2007, Article 39, <http://www.bjac.org.cn/en/Arbitration/index.html> (last accessed 21st March 2014)

⁴⁰ The Indian Institution of Arbitration and Mediation, similarly, is a not-for-profit arbitral organization in India. In its website, the IIAM provides a recommended Med-Arb clause that provides for mediation to be carried out first under the institution’s mediation rules followed by subsequent arbitration according to its rules and the provisions of the Indian law, namely the Arbitration and Conciliation Act, <http://www.arbitrationindia.com/htm/mediation.html> (last accessed 21st March 2014)

⁴¹ The IBA Guidelines are a set of guiding principles for determining and evaluating the independence of an arbitrator, and lay down when, how and what information can be disclosed by the arbitrator to the parties. Part I of the Guidelines lays down general principles (which are seven in number) about impartiality, independence, etc. Part II lays down ‘Application Lists’ or situations where disclosure by the arbitrator is not warranted. The IBA Guidelines, however, are not binding by themselves.

him from adjudicating the dispute.⁴² The Indian Arbitration and Conciliation Act of 1996, the Japanese Arbitration Law of 2003 and the recent Hong Kong Arbitration Ordinance in 2011 all permit an arbitrator to act as a mediator, for example, within the framework of the IBA Guidelines.⁴³ However, China is the only Asian country to have used Arb-Med processes widely and without many hurdles.⁴⁴

Cases where Arb-Med has been used in arbitral institutions in Asia are close to nought since most Asian institutions do not have express provisions to facilitate such a process. In fact, some of their rules prohibit a mediator to take the role of an arbitrator even if the parties have previously consented to the same. A possible rationale behind these prohibitions could be the fact that mediation and arbitration are engaged in as two different processes in most arbitral institutions, resulting in an inherent apprehension in combining the two. Another possibility could be to circumvent the many issues that a hybrid arbitral process presents to an institution.

This process is essentially what happens with Arb-Med – if the mediation fails, the mediator dons the role of an arbitrator once more. This is the present

⁴² General Standard 4(d) of the IBA Guidelines says “An arbitrator may assist the parties in reaching a settlement of the dispute 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 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 process or from information that the arbitrator may learn in the process. If the assistance by the arbitrator does not lead to final settlement of the case, the parties remain bound by their waiver. However, consistent with General Standard 2(a) and notwithstanding such agreement, the arbitrator shall resign if, as a consequence of his or her involvement in the settlement process, the arbitrator develops doubts as to his or her ability to remain impartial or independent in the future course of the arbitration proceedings.”

⁴³ GREENBERG ET AL., *INTERNATIONAL COMMERCIAL ARBITRATION* 333-334 (Cambridge University Press 2011) (hereinafter referred to as ‘Greenberg’)

⁴⁴ Kun Fan, *The New Arbitration Ordinance in Hong Kong*, 29:6 J. INT’L ARB 715-722 (2012) (hereinafter referred to as ‘Kun Fan’); M Moser, *People’s Republic of China* in *DISPUTE RESOLUTION IN ASIA* 93 (Kluwer Law International 2006); Gabrielle Kauffman-Kohler and Kun Fan, *Integrating Mediation into Arbitration: Why It Works in China* 25:4J. INT’L ARB (2008); Greenberg at 334

scenario with the HKIAC, as discussed earlier, where Mediation Rule 14 expressly prohibits a mediator to act as an arbitrator for the same dispute.⁴⁵

Hong Kong earlier grappled with the question of whether Arb-Med processes should be implemented at all in the *Keeneye* case, but apprehension that surrounded the process was allayed by the Court of Appeal ruling that Arb-Med can be implemented. Further, Section 33 of the Hong Kong Arbitration Ordinance establishes a procedural framework within which Arb-Med proceedings are to operate, contingent on whether there has been express consent by the parties. The Ordinance also mandates that in the event that mediation fails, the arbitrator must disclose to both parties any confidential information gathered during the mediation that might be material to the arbitral proceedings, something that has been subject to much criticism and scepticism as it may discourage candid discussions during mediation.⁴⁶

While the SIAC allows for Med-Arb processes and has a separate set of procedural rules that apply to such processes (SMC-SIAC Med-Arb Procedure)⁴⁷ their rules do not expressly provide for Arb-Med, although provisions of the Singapore Arbitration Act are nearly identical to the Hong Kong Ordinance, which allow the same.⁴⁸ Unlike the HKIAC, however, the SIAC does not have express rules that prohibit an arbitrator from facilitating mediation, and vice versa.

The only leading Asian institution to have express provisions in their rules allowing for Arb-Med is the CIETAC. Article 40 of the CIETAC rules allows an arbitral tribunal to mediate the dispute between the parties, subject to the parties' consent, in any manner the tribunal deems appropriate. It also states that mediation can be terminated upon the request of a party, and arbitration resorted to once more.⁴⁹ The CIETAC rules were revised in 2012. Now Article 45.8 of

⁴⁵ Luke Nottage, *Arb-Med and New International Commercial Mediation Rules in Japan*, (Jan 25, 2014) http://blogs.usyd.edu.au/japaneselaw/2009/07/arbmed_and_new_international_c_1.html

⁴⁶ Kun Fan, *supra* note 45 at pp. 715-722

⁴⁷ SMC-SIAC Med-Arb Procedure, (Jan 25, 2014) http://www.mediation.com.sg/images/stories/downloads/Med_Arb_Service/medarb%20procedure%20ss.pdf

⁴⁸ Goodrich, *supra* note 21

⁴⁹ Greenberg, *supra* note 44 at 335-336

the 2012 Rules allows for Arb-Med.⁵⁰China is not only the sole Asian country to have routinely engaged in Arb-Med – it is also the only country where an arbitral institution has provisions for the same. Many account this to the fact that Chinese culture encourages harmony to the point that the very existence of a conflict is often ignored. This also means the influence of Chinese culture has allowed for processes that begin as non-confrontational and proceed to become confrontational only if the former fails. This is also evident from the emphasis placed on mediation and conciliation by the Chinese law on civil procedure.⁵¹

III. Issues with Hybrid Processes and Lacunae in the Law Concerning Them

A. *Bias in Med-Arb and Arb-Med*

The most controversial problem with both Med-Arb and Arb-Med, and the law surrounding it, which has been in forefront of academic discourse, is whether or not both process is antithetical to the principles of natural justice. This arises due to the fact that Med-Arb, and Arb-Med, if the mediation fails and the process relapses back to arbitration, involves the mediator assuming the role of an arbitrator. The ethical conundrum here is twofold – *one*, does the mere fact that the arbitrator shifts to the position of a mediator create the possibility of a real risk of bias in the eyes of a fair-minded observer; and *two*, how much of the information received during a failed mediation session can potentially affect the arbitral award?

The first issue primarily revolves around the mediation phase, a process that could involve private caucuses, wherein the mediator discusses matters with one party without the other. Clearly, mediation involves a fair amount of confidential information in the hands of the mediator.⁵²

⁵⁰ Justin D'Agostino, *Key changes to the CIETAC Arbitration Rules* KLUWER ARBITRATION BLOG (25 Jan, 2014) <http://kluwerarbitrationblog.com/blog/2012/04/11/key-changes-to-the-cietac-arbitration-rules/>

⁵¹ WON KIDANE (ED), CHINA-AFRICA DISPUTE SETTLEMENT: THE LAW, ECONOMICS AND CULTURE OF ARBITRATION, 343-393 (International Arbitration Law Library, Volume 23, Kluwer Law International 2011)

⁵² Michael Leathes, *Stop Shoveling Smoke! Give Users a Classic Definition of Mediation* (Jan 27, 2014) <http://www.mediate.com/articles/LeathesM3.cfm?nl=333>

In a court of law, information is regulated and presented under oath. In Med-Arb and Arb-Med, there is no such regulation on the information presented to the Med-Arbiter in the mediation phase during private caucuses.⁵³ During these private sessions, parties are free to pass personal comments, subjective criticisms and other information, which could inevitably colour the Med-Arbiter's opinion without her knowledge. Also, such opinions and comments conveyed to the Med-Arbiter *ex parte* during private caucuses are not subject to rebuttal as the other party has no knowledge of it. Such information is treated as 'extra confidential' and hence, is not allowed to be put before the other disputant without the first party's consent.⁵⁴ Such information, which may or may not be acceptable during the subsequent arbitration phase, might still have a role to play in the Med-Arbiter's mind during the latter process and influence her award,⁵⁵ giving rise to questions of residual bias. Such questions of bias might be subtle, and if one of the parties can show that the award rendered was influenced by such confidential and inadmissible information, the award may be set aside on the basis that the award was fashioned by relying on information obtained outside the arbitration phase.⁵⁶ The courts, in deciding whether the award is to be set aside on such grounds looks at whether the parties by agreement have waived any or all of the mediation communications and allowed for its use in the subsequent arbitration.⁵⁷

In *Bowden v Weickert*,⁵⁸ the award issued by a Med-Arbiter in a contract dispute concerning the sale of an insurance business, was subsequently vacated as the court held that the Med-Arbiter had a duty to remain impartial and to protect all confidential information elicited during the mediation phase.⁵⁹ The Court also held that the Med-Arbiter could only rely on the evidence gathered and presented at the arbitration phase without exceeding her powers.⁶⁰ It was also held that in the absence of a waiver by the disputants, if it was proved that

⁵³ These are situations in which the med-arbiter meets the parties to a dispute separately.

⁵⁴ Gerald F Phillips, *Same-Neutral Med-Arb*, 60J. DISP. RESOL. (2005)

⁵⁵ *Id.*

⁵⁶ Blankley, Kristen M., *Keeping a Secret from Yourself - Confidentiality When the Same Neutral Serves Both as Mediator and as Arbitrator in the Same Case*, 63 BAYLOR L. REV. 317 (2011) (hereinafter referred to as 'Blankley')

⁵⁷ *Id.* at 346.

⁵⁸ 188 Ohio App.3d 730, 936 N.E.2d 984, 2010 -Ohio- 2581, Ohio App. 6 Dist., June 04, 2010 (NO. S-09-022)

⁵⁹ *Id.*

⁶⁰ *Id.* at 6-7

mediation communications were utilized in shaping the final award, it may be declared invalid.⁶¹ Another leading case dealing with similar issues is *Town of Clinton v. Geological Services Corp.*,⁶² in a Massachusetts superior court. The ratio of the case reiterates that of Bowden, and further states that waiver of mediation privilege must be explicitly made and consenting to a Med-Arb procedure does not automatically and implicitly result in a waiver of mediation confidentiality.⁶³ Therefore, the ultimate choice must rest with the parties to a dispute to agree or disagree to the use of confidential information in the arbitration phase by the Med-Arbitrer, negating the possibility of challenging the final award.

The judicial trend, emanating from the cases discussed above, and other noted cases in the United States of America⁶⁴ and in Hong Kong, like the *Keeneye* case,⁶⁵ is to rely on statutes, court rules and public policy while dealing with mediation confidentiality in the absence of agreement between the parties to the dispute in Med-Arb processes.⁶⁶

In addition to subjective opinions and personal comments discussed, private caucuses could also involve the divulging of more serious confidential information, which may lead to the mediator *consciously* forming an opinion that invariably affects the subsequent arbitration. This becomes even more probable in light of the fact that the mediator has to decide what information is ‘material’ and what isn’t. Hence, the question of the creation of a risk of bias in the event of the mediation failing and lapsing back into arbitration is not an unfounded one. In Arb-Med, if the mediation were to fail and the case switches back to arbitration, does the revealing of confidential information and private caucuses create the risk of bias?

⁶¹ *Id* at 7.

⁶² *Town of Clinton v. Geological Servs. Corp.*, No. 04-0462A, 2006 WL 3246464, at §1 (Mass. Super. Nov. 8, 2006) (Unreported Memo).

⁶³ Blankley, *supra* note 61.

⁶⁴ *In re Cartwright*, 104 S.W.3d (Tex. App.—Houston [1st Dist.] 2003) at 706, 708; *Twp. of Aberdeen v. Patrolmen's Benevolent Ass'n*, Local 163, 669 A.2d 291 (N.J. Super. Ct. App. Div. 1996)

⁶⁵ Keeneye, *supra* n.13

⁶⁶ Blankley, Kristen M., *Keeping a Secret from Yourself - Confidentiality When the Same Neutral Serves Both as Mediator and as Arbitrator in the Same Case*, 63 Baylor L. Rev. 317 (2011)

In the *Keeneye* case, for example, a private caucus between the arbitrators turned mediators Zhou Jian and Pan Junxin and one Mr. Zeng Wei (somebody who was associated with the respondents) was what brought up the whole issue of bias in the first place. The judge, Reyes J, contemplated as to whether this could even constitute a private caucus, but stated that it did create a risk of bias.⁶⁷ What further added to the concern is that the mediators never conducted caucuses with the parties themselves.

At this juncture, it might be relevant to note that until recently, the test of bias that is followed in Hong Kong (and most of Asia) follows the ‘real danger of apparent bias’ test laid down by the House of Lords in *Regina v Gough*.⁶⁸ This test departs from the test of ‘apparent bias’ as the former involves a heavier burden, the proof of an actual possibility or real risk of bias as opposed to a reasonable apprehension of bias in the eyes of an informed observer. While England follows the test in *Porter v Magill*⁶⁹ of a real possibility of bias (along the lines of the apparent bias, while raising the standard of proof), the courts of Hong Kong⁷⁰ as well as the rules of the HKIAC have, in the past, followed the *Gough* test. However, the Hong Kong Court of Appeals in *Suen Wah Ling v China Harbour Engineering Co.*⁷¹ departed from previous jurisprudence and approved of the *Porter v Magill* formulation of the *Gough* test, which sets a lesser standard of proof of real possibility. Recent decisions of Singaporean courts, as well, have deviated from their previous usage of the ‘real danger’ test to adopt the ‘reasonable suspicion’ or apparent bias test.⁷² The authors believe that this support of the apparent bias test will facilitate more opportunities for the parties to object to bias that is not glaringly obvious, thereby further cementing the case for usage of hybrid processes in Asia as it allows for more control of the process from the perspective of the parties as well as helps in allaying the fears of bias that have plagued discourse on the Arb-Med process in particular.

⁶⁷ Goodrich, *supra* note 21

⁶⁸ [1993] UKHL 1, [1993] A.C. 646, H.L. (UK)

⁶⁹ [2002] 2 AC 357

⁷⁰ See, *Logy Enterprises Ltd v Haikou City Bonded Area Wansan Products Trading Co* 1997 WL 33125257 (CA), [1997] HKLY 186

⁷¹ 2008 WL 809864 (CFA), [2008] HKEC 620

⁷² See, *Re Shankar Alan S/O Anant Kulkarni* [2006] SGHC 194 at 76; *Turner (East Asia) Pte Ltd v Builders Federal (Hong Kong) Ltd & Anr* (No.2) [1988] SGHC 28 at 503

Although the *Keeneye* case did not involve private caucuses with the parties, the mediation phase of most Arb-Med processes would involve the same, raising both issues of bias as well as how much of the confidential information the mediator is mandated to disclose. The English case *Glencot Development & Design v. Ben Barref*⁷³ reflects the European view on caucusing, which acknowledges the possibility of an inherent bias in arbitrators turned mediators due to private caucusing. Asian countries like Hong Kong and Singapore, however, have allowed private caucusing in the law concerning Arb-Med, with the requirement that if the mediation is unsuccessful, the arbitrator is obliged to disclose as much of the confidential information that he considers material to the proceedings.⁷⁴

This brings us to the second issue outlined earlier - mandated disclosure of confidential information considered material to the proceedings.⁷⁵ The first and most obvious problem with this requirement is the subjectivity of what could be considered 'material' – would a party confessing to be insolvent (thereby expressing his possible inability to adhere to the award) qualify? What about a party who shows the mediator a document he has not shown the other party about an issue pertinent to the case? The second concern would be that if parties knew that what they discuss with the mediator might be disclosed, the entire mediation process might become more inhibited than it would be in normal settings.

B. *Med-Arb: Offshoot Issues*

Challenges to the validity of the process of Med-Arb arise due to the inherent differences between mediation, a largely conciliatory process, and arbitration, which are adjudicatory. These differences are what limit an effective combination of the two.⁷⁶ One such issue hindering the process is the possibility of a coercive element that a Med-Arbitrator may induce in the mediation phase by virtue of her being authorized to subsequently issue a binding arbitral award. Though this

⁷³ [2001] B.L.R. 207

⁷⁴ Michael Hwang, *The Role of Arbitrators as Settlement Facilitators - Commentary* in ALBERT JAN VAN DEN BERG (ED), *NEW HORIZONS IN INTERNATIONAL COMMERCIAL ARBITRATION AND BEYOND* 571-581 (ICCA Congress Series, 2004 Beijing Volume 12 Kluwer Law International 2005)

⁷⁵ Hong Kong Arbitration Ordinance, §33

⁷⁶ Bartel, Barry C., *Med-Arb as a Distinct Method of Dispute Resolution: History, Analysis, and Potential* 27 WILLAMETTE L. REV. 661 (1991) (hereinafter referred to as 'Bartel')

'muscle' possessed by the med-arbiter mediating prior to arbitration contributes positively to the success of this process,⁷⁷ it leaves a wide scope for misuse. There exists the perceived risk of the Med-Arbiter coercing a settlement by hinting at negative results in the arbitration phase. This has prompted many scholars in expressing that the agreements reached during the mediation phase of Med-Arb processes are actually not voluntary, but products of strong-arm tactics.⁷⁸

In a study conducted by collecting field data, this particular trend of Med-Arbiters forcing upon the parties premature and forceful concessions was analysed.⁷⁹ The authors concluded that though these risks did manifest, Med-Arbiters in general did not direct and dictate the mediation phase to a great extent. Further, it was put forth that such pressure tactics were more often than not used late in the process of mediation to rescue it. This issue of abuse of power by the Med-Arbiter in the mediation phase can be overcome by making the arbitration phase contingent to the agreement of the parties post the mediation phase.⁸⁰ If either of the parties to the dispute nurtures doubts regarding abuse of power, they should be allowed to terminate the process.

C. Arb-Med: Offshoot Issues

Perhaps the most immediate and practical problem one would have with Arb-Med is the fact that if mediation is successful, the resources and time spent on the arbitration phase of the process go to waste.⁸¹ If two different persons are appointed to be arbitrator and mediator respectively, the cost issue is deepened with the resources and time utilized to familiarize another person with the facts of the case.⁸²

⁷⁷ Kagel, *Combining Mediation and Arbitration*, 96 MONTHLY LAB. REV. 62 (1973)

⁷⁸ Lon Fuller, *Collective Bargaining and the Arbitrator*, 1962 NAT'L ACAD. ARB. 8, 255, reprinted in *Dispute Resolution* 12 (1985)

⁷⁹ PRUITT, MCGILICUDDY, WELTON, & FRY, *PROCESS OF MEDIATION IN DISPUTE SETTLEMENT CENTERS*, MEDIATION RESEARCH 368 (K. Kressel, D. Pruitt & Assoc., eds. 1989)

⁸⁰ Bartel, *supra* note 77

⁸¹ Limbury, *supra* note 3

⁸² Houzhi Tang, *Combination of Arbitration with Conciliation - Arb-Med* in ALBERT JAN VAN DEN BERG (ED), *NEW HORIZONS IN INTERNATIONAL COMMERCIAL ARBITRATION AND BEYOND* 547-555 (ICCA Congress Series, 2004 Beijing Vol 12 2005)

However, this must be contrasted with Arb-Med's merits – the fact that by lowering expectations of a favourable outcome for both parties (since neither can be certain the award will be in their favour) encourages co-operation in the mediation stage and ensures that ensuing business relations are not hampered as a result of the dispute. The fact remains, however, that the uncertainty that Arb-Med creates might also mean that parties could choose other processes where they exercise more control, such as Med-Arb or mediation.⁸³

If the 'sealed envelope' model of Arb-Med is utilised to circumvent the confidentiality issues, several other reasons for apprehension arise other than the fact that if the mediation is successful, the award is not disclosed;⁸⁴ and if the mediation runs its full course, the costs incurred on arbitration would be for nothing.

Ethical issues aside, there are other dilemmas that plague this process. The question of enforceability of either an award post failed mediation that could potentially be tainted with bias or, in case of a successful mediation, with the agreement itself. With respect to the first, an award set aside for being against public policy in Hong Kong has to contravene the fundamental conceptions of morality and justice of the country. Singapore, however, has always tried to ensure minimal curial intervention beyond typical grounds such as fraud, corruption, breaches of natural justice and so on in arbitration.⁸⁵ In both countries, however, the award being tainted by bias as well as the question of whether Arb-Med violates the principle of due process would be an extremely pertinent cause for concern.

If the mediation is successful, how does one enforce the settlement agreement? How does it override the earlier award that was delivered, but never unsealed? What happens to that award? Is the award in the nature of a decree, and if so, can it be disregarded by the parties consenting to the waiver? These are

⁸³ Ross and Conlon, *supra* note 5 at p. 423-426

⁸⁴ Article 34 (5) of the UNCITRAL Rules states that "An award may be made public with the consent of all parties or where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority."

⁸⁵ Rodyk and Davidson LLP, *Arbitration and Public Policy – Is the Unruly Horse being Tamed?* (Jan 28, 2014)
http://www.rodyk.com/usermedia/documents/RodykReporter_Jun12.pdf

extremely valid concerns regarding the process which an institution incorporating it will have to consider and successfully reconcile. As Part IV will elaborate, the answer to these questions lies in the finality of the sealed award.

IV. Incorporating Hybrid Processes in Asian Arbitral Institutions: A Workable Framework

A. Circumventing Bias

Bias, both actual and apparent, is what has fuelled the discourse against Med-Arb and Arb-Med time and again. Rules of natural justice mandate that no person should go unheard. That is, every party to a dispute must be given reasonable opportunity to answer the case against it. However, one fundamental aspect of mediation is that of private caucuses (which will be examined in greater detail with respect to Arb-Med). In pure mediation, the rule of natural justice mentioned above does not operate as the mediator has no authority to decide the rights and duties of the parties. However, the dynamic shifts in the process of Med-Arb. The Med-Arbiter here subsequently issues a binding award on the parties and thus, must work in harmony with the principles of natural justice. At this juncture, the model proposed in the Keeneye case could be considered to overcome the issues private caucuses entail. The Court of Appeal in the *Keeneye* case attempted to provide a solution in ruling that the parties had waived their right to challenge the arbitrators for bias merely because they also mediated the dispute. The Court relied on *Hebei Import & Export Corp. v. Polytek Engineering Co. Ltd*⁸⁶ to say that a party not objecting to apparent bias in a timely manner amounted to a waiver.⁸⁷ If parties enter into an Arb-Med agreement with full knowledge of this fact, the apprehensions surrounding the process (which have significantly reduced since the Appeal decision) might subside. The problem however, runs deeper than a mere waiver.⁸⁸ The issue lies with the concept of private caucusing, as is evident from the facts of *Keeneye*.

One way to overcome this challenge to procedural fairness is to eliminate private caucuses altogether. However, this decreases the efficiency of the mediation

⁸⁶ *Hebei Import & Export Corp. v. Polytek Engineering Co. Ltd.*, (1999) 2 HKCFAR 111, [1999] 1 HKLRD 665, [1999] 2 HKC 205

⁸⁷ Article 45 of the CIETAC Arbitration Rules is also along these lines.

⁸⁸ FrivenYeoh and Desmond Ang, *Reflections on GaoHaiyan – Of ‘Arb-Med’, ‘Waivers’, and Cultural Contextualisation of Public Policy Arguments* 29:3 J. INT’L ARB pp. 285 – 297 (2012)

phase to a great extent, enervating the very process of Med-Arb. Instead, provisions that make it mandatory to disclose all information material to the arbitral proceeding obtained by the Med-Arbitrator from the parties to a dispute during the mediation phase to the other party, are Section 33(4) of the Hong Kong Arbitration Ordinance⁸⁹ and Section 17(3) of the Singapore International Arbitration Act, can be considered.⁹⁰ However, these provisions, aimed at mitigating natural justice concerns however, suffer from practical infirmities, such as deciding what ‘material’ information is, and the possibility of conscious or unconscious bias colouring that decision, as Part III discussed. As Lord Goff said in *R v Gough*,⁹¹ “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.” In light of risks of both real and inherent bias, the authors are of the opinion that one solution could be the inclusion of an express provision in the law renouncing the use of all information gathered in private caucuses in the arbitration phase, which seems to be the only way to address issues relating to the violation of natural justice and subsequent real bias. This, though not watertight, takes the onus of separating material information from the rest gathered at private caucuses from the Med-Arbitrator, concomitantly negating behavioural risks of disputants such as non-disclosure of certain information which the disclosing party wants to be kept away from the knowledge of the opposing party to the dispute. This, however, does not resolve the issue of residual inherent bias, which owing to its psychological and subconscious nature of existence is not something a procedural rule can negate. However, as discussed previously, the judicial trend towards the test of apparent as opposed to real bias, as well as inclusion of a mechanism in the form of the second consent principle for the parties to object to the bias might, if not fully circumvent the issue of residual bias, provide the parties with an effective means of objecting to residual bias.

In light of the latter suggestion for a mechanism, the authors are of the opinion that a provision akin to Section 27D (4) of The Commercial Arbitration Act 2010 (NSW) needs to be incorporated into the existing framework in the Hong Kong and Singapore law which requires for the said second consent from the parties post the mediation phase for the med-arbitrator to proceed to the arbitration

⁸⁹ Hong Kong Arbitration Ordinance, §33(4)

⁹⁰ International Arbitration Act, §17(3)

⁹¹ *Supra* note 69

phase. If such consent is not granted by both the parties, a substitute arbitrator should be appointed vide a provision akin to Section 27D (6) of the Commercial Arbitration Act. In effect, this will allow the disputants who fear the risk of bias seeping into the arbitration phase to prohibit all information obtained during private caucuses from being used in the issuance of the final award with an option to change to a new arbitrator. These provisions, if incorporated into the existing framework shall mitigate the risk of bias and violations of principles of natural justice to a large extent. Alternatively, if material information gathered during private caucuses *is* allowed to play a role in the arbitration phase, a second consent provision should still be incorporated and such material information should be disclosed to the parties prior to seeking their consent to allow the same neutral med-arbiter to proceed to arbitration. This will allow the parties to check for the danger of bias and act accordingly to protect their interests.

What hybrid processes essentially seek to do, in light of the Normative Coase theorem,⁹² is to reduce both the transaction costs of the process for the parties (which include search costs, bargaining costs, and enforcement costs) as well as reduce information costs⁹³ for the adjudicating body. This is done by allowing the same person to both mediate and arbitrate, thereby reducing the costs of discerning the values attached to the rights and liabilities in question by both parties to efficiently allocate them in the arbitration phase, as they have already been determined to some extent in the mediation phase. In light of this efficiency argument, it is contended that the residual opinion from the mediation phase in certain cases reduces the cost of determining several facts and issues already determined in the mediation phase. The risk of bias here is offset by the incorporation of the second consent mechanism.

B. *Med-Arb: Resolving Offshoot Issues*

The concerns with Med-Arb that have been illustrated here revolve around the notion of lack of procedural fairness, bias (either actual or apparent) that Part IV-A discussed, and the coercive element that a Med-Arbiter might bring to the table resulting in the parties making unwanted and premature concessions.

⁹² The Normative Coase theorem states that if transaction costs are high, the law must be structured to reduce them. *See*, Cooter and Ulen, *supra* note 2 at 93

⁹³ Courts are usually faced with a trade-off between transaction costs and information costs. If the cost of determining which party values certain rights more than the other is higher than the transaction costs of the dispute between the parties, the efficient solution for the court is to follow precedent. The corollary is efficient when information costs are low. *See*, Cooter and Ulen, *supra* note 2 at 93

Further, certain behavioural issues of disputants can inhibit the effective functioning of the process and keep it from performing with utmost efficiency. For example, if the parties are fearful that confidential information, like concessions that the parties are willing to make if revealed to the Med-Arbitrator in the mediation phase might influence the shaping of the arbitral award issued subsequently, they might choose to withhold it. However, such withholding of information might ultimately hurt him in arbitration.⁹⁴

C. *Arb-Med: Resolving Offshoot Issues*

Other than bias, the issues with Arb-Med can broadly be catalogued into two major areas – costs and enforceability. It cannot be denied that Arb-Med is a relatively expensive process and does involve potential wastage of resources, but this is slightly nullified by the appointment of a single person to undertake both the arbitration and mediation phases. Also, considering the market and clientele that has usually engaged in Arb-Med, it can be asserted that the incurring of greater costs is for the long-term benefit of both parties, as it can be compensated for by their continued business association. For parties with long standing business relations, it can be argued that the costs of a more expensive process like Arb-Med pales in comparison to the business they stand to lose if the relationship between the two parties ends on a bad note due to a process like arbitration, where one party always loses. For business hubs like Hong Kong and Singapore, this would certainly make the process seem more attractive than traditional dispute resolution mechanisms. Other redeeming features of Arb-Med, such as the fact that it allows for quicker and more consensual methods of dispute resolution, makes it even more attractive. Dispute resolution is guaranteed, either by arbitration or mediation.⁹⁵

As for enforceability of mediated agreements, the UNCITRAL Model Law provides for a framework wherein a settlement agreement can be enforced as a consensual arbitral award.⁹⁶ All that is required is that the countries in question

⁹⁴ Bartel, *supra* note 77

⁹⁵ Claire Wilson, *The Arb-Med hybrid in Hong Kong – Much ado about nothing?* KLUWER MEDIATION BLOG (Jan 28, 2014) <http://kluwermediationblog.com/2012/02/01/the-arb-med-hybrid-in-hong-kong-much-ado-about-nothing/>

⁹⁶ Article 14, United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration 1985: with amendments as adopted in 2006 (Vienna: United Nations, 2008); See Arnaud Ingen-Housz, *Enforcement of Mediated*

should operate under the Model Law framework and the institutions should have rules that allow the agreement to be so enforced.⁹⁷In countries that do not follow the Model Law, it is possible to enforce the agreement as a contract between the two parties.⁹⁸

As discussed previously, the concerns that surround the ‘sealed envelope’ model of Arb-Med about the effect and enforceability of the sealed award can be effectively addressed by examining the finality of arbitral awards with the finality of judicial decisions. It is contended that *first*, the role of an arbitrator is quasi-judicial and cannot be equated to that of a judge.⁹⁹ Since the sealed award is never enforced, the issue of considering it a binding decree does not arise. *Second*, arguments for the finality of an arbitral award are fundamentally premised on the fact that the parties have commonly consented to be bound by the award, and allowing an appeal undermines this consent. In an Arb-Med process, however, the parties have consented to disregard the award in case the mediation is successful, so the finality argument is inapplicable.

V. Conclusion

Asia has always been more receptive to hybrid processes than the west, as evident from the number of countries that have successfully incorporated such processes into their law. If premier Asian arbitral institutions such as the HKIAC and the SIAC (which offers Med-Arb services, but is yet to incorporate Arb-Med) follow the CIETAC’s example and incorporate the model into their rules, they are not only offering more alternatives to their present clientele – they are also inviting clients from around the world who could be interested in the process, for all the benefits listed previously. The fact that these processes have express provisions facilitating it in the respective laws of both Singapore and

Settlement Agreements and Combined Procedure Awards (Jan 28, 2014) <http://www.brp-forum.ch/enforcement-of-mediated-settlement-agreements-and-combined-procedure-awards>

⁹⁷ The SIAC, for example, allows for this. See http://www.mediation.com.sg/index.php?option=com_content&view=article&id=50&Itemid=226 (last accessed 28th January 2014)

⁹⁸ Tore Wiwen-Nilsson, *Conciliation: Enforcement of settlement agreement* (Modern Law for Global Commerce, Congress to celebrate the fortieth annual session of UNCITRAL, Vienna, 9-12 July 2007)

⁹⁹ Pierre Lalive, *Absolute Finality of Arbitral Awards?* *Revista Internacional de Arbitragem e Conciliação* 9 (2008)

Hong Kong and can be effectively enforced further strengthens this proposition. In a world where everybody is looking for a quicker, cheaper and more efficient process, arbitration seems to be losing its appeal as it becomes increasingly like litigation, a processes such as Med-Arb and Arb-Med being undertaken by institutions such as the SIAC and HKIAC could do wonders to international commercial arbitration.

With respect to the situation introduced earlier in this article, A and B have agreed to submit disputes arising out of the transaction to institutional Med-Arb and Arb-Med. These hybrid forms of alternative dispute resolution, they realize, are a panacea to their concerns over the trade-off between efficiency and finality on one hand, and the need to foster and preserve their amiable business relations on the other. They also realize that unlike court litigation, and characteristic of both mediation and arbitration, these hybrid processes can keep their dispute in the shadows while substantially cutting costs that are incurred in submitting their dispute to separate mediation and arbitration.

Amalgamating the conciliatory nature of mediation with the adjudicatory nature of arbitration makes available the best attributes of mediation and arbitration resulting in efficiency, expediency, flexibility and privacy among other things.¹⁰⁰

¹⁰⁰ Sherry Landry, *Med-Arb: Mediation with a Bite and an Effective ADR Model*, 63 DEF. COUNSEL J. 263 (1996)