Arbitrators, make mediation your new year's resolution

Arbitration analysis: The Chartered Institute of Arbitrators (CIArb) published their Professional Practice Guideline on the Use of Mediation in Arbitration which aims to be a reference guide for parties, their representatives, arbitrators and mediators. Andrew Miller QC FCIArb, mediator and arbitrator, offers a review and commentary on the guideline.

This analysis was first published on Lexis®PSL on 1 February 2022 and can be found here (subscription required).

CIArb has long recognised and advocated the benefits of parties utilising mediation within the arbitration framework. The recent election of our new President Jane Gunn will no doubt see the use of mediation being advocated and championed throughout the year.

However, it remains the case that the uptake of the use of mediation by parties to arbitration lags behind that of parties in regular domestic litigation. There are several factors at play. Alternative Dispute Resolution (ADR) and mediation specifically has been promoted by the English judiciary and by the procedural rules that apply to civil and commercial disputes for the last 15 to 20 years. Those years have seen a progression both within the procedural rules and in the attitude of the judiciary, from one of initially 'encouraging' parties to mediate to a current 'expectation' that parties will mediate. This same approach has not been reflected or adopted in the procedural rules of the international arbitration institutions. Equally, this 'encouragement' to mediate has not been adopted by the key stakeholders of arbitration, namely the arbitrators or the lawyers. It certainly cannot be said that there is any 'expectation' that parties to arbitral disputes will attempt mediation.

What does the guideline cover?

The new CIArb Guideline aims to provide practitioners of arbitration with an understanding of where mediation might be used as part of the arbitration process and provide guidelines for practitioners conducting a mediation between parties to an arbitration agreement. The guide recognises that there are other forms of ADR but concentrates on the use of mediation in the arbitration setting. The guideline is not an attempt to set out any mandatory rules but aims to provide practical guidance to practitioners in the arbitration world.

As a member of the drafting panel, I also sincerely hope that this new guideline will promote the greater use of mediation as part of the arbitration process and encourage arbitrators and lawyers to introduce and encourage their respective clients to consider, discuss and make better use of mediation to resolve their arbitral disputes as an alternative to staying in the arbitration process from start to finish. As with regular litigation, it is the case that the majority of arbitrated disputes settle before a final hearing, but often very late in the day. Mediation provides the alternative for more speedier resolution of disputes at a much earlier stage in the arbitral process.

The guideline provides the reader with an introduction as to how and when arbitration and mediation can and do interact and identifies the legal and practical issues that may arise within the arbitration forum. The guide sets the scene by reviewing the functions and professional obligations of the role of an arbitrator and that of a mediator. Given that this a guidance produced by the CIArb we considered it necessary to remind our members of the obligations pursuant to the CIArb's Code of Professional and Ethical Conduct. However, this simply sets the scene for the main discussion about the use of mediation within the arbitration forum.

The guideline discusses various timing scenarios for the introduction of mediation within the arbitral proceedings. These include:

- mediation at the commencement of the arbitral proceedings
- other settlement techniques that may be possible during the arbitral techniques
- mediation during the course of arbitral proceedings

The guideline deals with the common themes and specific issues that may arise in each scenario. Some of the key questions that the guide asks and attempts to provide an answer to are:

- where the parties have not already agreed to or attempted mediation, to what extent should an arbitrator proactively propel the parties towards mediation?
- what procedural steps should be taken within an arbitration to facilitate the mediation process, including enabling the arbitration to be stayed to allow for mediation and to enable the arbitration to resume if mediation fails to resolve the dispute?
- where the parties mediate their dispute successfully, need the arbitration proceed to an award? Where it does, are there particular issues of enforceability to consider?
- is it possible to mediate some issues and leave others for decision by the arbitrator?

The common theme that runs through all of these scenarios is the role of the arbitrator at each of these steps. The issues involved can probably be summed up by one single question: 'How proactive should an arbitrator be in suggesting mediation?'. In seeking to answer this question, the guide encourages arbitrators:

> ' …to be alert for circumstances in which an attempt at mediation might be of assistance to the parties. That includes the situation where the arbitrator considers there is potential to resolve specific issues with the aid of mediation. That may reduce the overall time and costs consumed by the arbitral proceeding.'

Having given this encouragement, the guide reminds arbitrators to always remember the voluntary nature of mediation and therefore not to put any undue pressure on parties to mediate. But having given this note of caution the guideline informs arbitrators:

> 'But that does not prevent an arbitrator from seeking to explain the nature and potential benefits of mediation to an initially sceptical party.'

The emphasis is therefore not simply providing information about the possibility of mediation to the arbitral parties but encourages arbitrators to be thinking about the possibility of advising the parties of the choices open to them in terms of an alternative mediated resolution, at any time throughout the whole arbitration process. And if both parties have confirmed their intention to mediation, the guideline provides a guide to arbitrators as how they can then assist the parties to move to mediation with both practical and procedural assistance.

Arb/Med & Med/Arb

The guideline would not be complete without addressing the difficult and for many, controversial question of 'Arb-Med-Arb' or 'Med-Arb-Med' where the arbitration and mediation move from one process to the other and back again in the event that the other process is not successful. The controversy arises when the process of the arbitration and the mediation are conducted by the same person. The guideline therefore looks at the circumstances in which it might be appropriate

for the same person to act as both arbitrator and mediator in the same dispute and the issues and pitfalls that might arise.

There is a lively debate on ‘Arb-Med-Arb’ or ‘Med-Arb-Med’ within both the arbitration and mediation community and the guideline deals with many of the issues such as neutrality and the extent to which an arbitrator’s role or jurisdiction may be compromised. There is also sensitivity to this process in many jurisdictions, arising from the different nature of the roles of arbitrator and mediator.

My own view about ‘Arb-Med-Arb’ or ‘Med-Arb-Med’ is that it is a bit like a unicorn. It is very often talked about, the concept of which is fairly familiar and generally understood but in reality, it is very difficult ever to have seen or experienced one or to find someone who actually has. In practice is that it is not a common process and in our research for the guidelines, the researchers struggled to find practitioners who regularly undertook the same role in the same dispute. However, we did not want to rule it out as something that either never happens or something that could not be developed as possibly a more used process in the future. The guidelines highlight a fundamental point namely that ‘…the parties may have good reasons for wanting the same person to act as arbitrator and mediator.’

This could be a question of both parties having equal trust and confidence in that single person that overrides the potential pitfalls.

However, having in mind the various potential difficulties the guideline seeks to provide assistance as found in other jurisdictions such as Singapore and Hong Kong and then sets out its own advice to CIArb members, to approach this particular issue with caution and awareness of the possible issues that may arise if the same person acts as both arbitrator and mediator.

In conclusion, it will be seen that although the guideline does address the thorny issue of ‘Arb-Med-Arb’ or ‘Med-Arb-Med’, the clear emphasis within the guideline is the encouragement of the greater use of mediation as a method of resolving the parties’ dispute, but with the mediation being undertaken by a different person to the arbitrator(s). In that scenario, if the mediation fails to achieve a settlement, the parties can return to the arbitration process with the same arbitrator and without any concern of any of the pitfalls and ethical issues that may have arisen if the arbitrator had switched hats to become a mediator and then switched back.

The guidelines are ‘green’ and will allow arbitrations to be even ‘greener’

There is a growing movement advancing the case for greener arbitrations. The commitment of those involved in advancing greener arbitrations is admirable and without doubt deserves support. The aims of those campaigning and advancing the cause of greener arbitrations is to achieve ‘greener’ dispute resolution.

Given these commendable aims of the campaign, it is perhaps surprising that there appears (at least to me) to be a complete absence of any encouragement to arbitrators or arbitration lawyers and practitioners, to encourage the parties to the arbitration to attempt to resolve their disputes by mediation. Why do I express this surprise? Simply put, I think that in most commercial disputes a ‘mediation footprint’ is almost always going to be a great deal smaller than an ‘arbitration footprint’.

Mediation provides the opportunity for the early or at least earlier resolution of a dispute, which stating the obvious would reduce the energy consumption and the waste involved in running an arbitration. A mediated settlement will usually bring to an end all the steps necessary to run an arbitration. Following a mediated settlement there would be no more fact finding expeditions, witness and expert meetings, production of witness statements and expert reports, copious printing, meetings with clients, experts and lawyers and of course no further arbitration hearings.

Once a dispute has settled there is no need to think about the impact of travel, let alone actually travel.

And so, in support of CIArb's new guideline I personally want to take this opportunity to encourage my fellow arbitrators and arbitration practitioners to think about, and at every stage encourage the parties to use mediation or another alternative dispute resolution process to attempt to resolve their arbitration dispute. And if I may be so bold as to suggest, for those advocating greener dispute resolution, how about including such a recommendation in the various green pledges. That must surely be a sustainable practice?

The future for mediation

The future for mediation is incredibly bright. The year 2021 saw the Civil Justice Council produce their report on Compulsory ADR, which made out the case for the introduction of compulsory ADR in some circumstances—see: LNB News 12/07/2021 92. The paper has received much attention and the concept of compulsory mediation has been championed by The Master of the Rolls, Sir Geoffrey Vos, who set out his views in the Keynote speech at the London International Disputes Week in May 2021—see: LNB News 11/05/2021 66. Since then, there has been an extensive 'Call for Evidence' by the Ministry of Justice in respect of dispute resolution in general and mandatory mediation—see: LNB News 03/08/2021 41. Mediation has therefore become a subject of discussion by all those involved in dispute resolution from the judiciary to users of the court services, and that will no doubt continue to be the case.

CIArb's new guideline should be seen as being a fundamental and important part of this ongoing discussion. It shines the lights on the practices of arbitrators and arbitration practitioners and aims to provide help and assistance for those same arbitrators and arbitration practitioners in how to move parties towards mediation. In my own view the guideline should be taken as being a powerful message to those involved in arbitration to encourage the greater and more frequent use of mediation by parties involved in disputes in arbitration.

Whether it is at the beginning of the year, middle or end of the year, what better resolution can there be for parties, than allowing them to bring an arbitral dispute to an end sooner rather than later? At any time that is a great resolution.

The opinions expressed in this article are those of Andrew Miller QC alone and are independent of the CIArb and other members of the drafting committee.

Written by Andrew Miller QC, FCIArb, mediator and arbitrator. Andrew has 30 years of practice as a top ranked commercial, construction and insurance QC (and junior counsel), Andrew now practices principally as a Mediator and Arbitrator. Andrew has been involved in the mediation of disputes since 1996, when he undertook his first mediation in Singapore. He has experience of over 150 mediations and has been involved in mediations both domestically and internationally for over 20 years. Acting as a mediator in a wide range of commercial sectors, including construction, property damage, insurance and reinsurance, professional negligence, and general commercial disputes.