

Arb-Med-Arb: Connecting the Dots between Arbitration and Mediation

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In the recent years, the “Arb-Med-Arb” process has gained traction as a dispute resolution mechanism. The process of “Arb-Med-Arb” (the short form for Arbitration-Mediation-Arbitration) entails exactly what its name suggests: the commencement of arbitration proceedings, followed by mediation to attempt an amicable resolution, followed by continuation of arbitration proceedings if mediation was unsuccessful.

The Singapore International Arbitration Centre (“SIAC”) and the Singapore International Mediation Centre (“SIMC”) have formalised their very own SIAC-SIMC Arb-Med-Arb Protocol (“AMA Protocol”) to handle disputes in accordance with an “Arb-Med-Arb” clause. It is noteworthy that parties can also agree to submit their dispute for resolution under the AMA Protocol even if there was no prior agreed “Arb-Med-Arb” clause.

While the “Arb-Med-Arb” process may be conducted out differently in other jurisdictions, in our considered view, the key aspects of “Arb-Med-Arb” are encapsulated under the AMA Protocol which we describe below:

- a) Pursuant to the “Arb-Med-Arb” clause or as otherwise agreed by parties, the arbitration is commenced in accordance with the applicable arbitration rules.
- b) After exchanging the Notice of Arbitration and Response to the Notice of Arbitration (“arbitration pleadings”), the arbitration is stayed.
- c) Under the AMA Protocol, the case file with all documents lodged by parties will then be sent by the SIAC to the SIMC where the mediation will be conducted.
- d) If the dispute is not been settled by mediation (whether partially or entirely), the arbitration proceeding will resume in respect of the remaining part of the dispute.

The difference between Arbitration and Mediation

To the uninitiated, the phrases “arbitration” and “mediation” may be misunderstood to be the same. However, save that both arbitration and mediation allows the dispute to be kept private and confidential, they are otherwise vastly different.

The process of arbitration entails the adjudication of the dispute of by a tribunal, most often consisting of an odd number of arbitrators. An arbitrator need not be a practitioner of law and can be a practitioner of the industry which the dispute arises from. Ultimately, the arbitral tribunal will decide on the matter after a private hearing of each party’s case. To a significant extent, this process mirrors the litigation process, except that court proceedings are public and it is the Judiciary who will decide on the matter.

On the other hand, mediation is essentially the facilitated negotiation between parties. It does not involve any adjudication, and any settlement arising from mediation must be reached by consent and without coercion. The mediator plays a critical role in allaying hostilities, helping parties find common ground and encouraging compromise where necessary. It should also be noted that the discussions and negotiations in a mediation are private without prejudice to the concurrent arbitration or litigation proceedings.

Why Arb-Med-Arb?

The common question about “Arb-Med-Arb” is whether the initial arbitration is even necessary, and whether a simpler “Med-Arb” process is more effective to help parties to save time and costs. However, any practitioner with sufficient experience in mediation will explain that it is unwise to

attempt mediation before each party has sufficient understanding of its own and its opponent's case. This is even more so where the dispute is multi-faceted or acrimonious.

For this reason, the "Arb-Med-Arb" process stays the initial arbitration proceeding only after the arbitration pleadings have been exchanged. The principle behind this is that by having parties formulate and state their case in the arbitration pleadings, the scope of the dispute will be sufficiently outlined to allow them to adequately prepare for the mediation, on both the merits of their case as well as their readiness to negotiate in good faith. This discourages parties from using the mediation session as a fishing expedition to supplement their case in the litigation or arbitration.

It is also noted that under the AMA Protocol, the case file and all documents are also forwarded from SIAC to SIMC for the mediation. This not only ensures that the necessary information will be available to all parties (including the mediator) at the mediation, but also saves the time and costs of having to reproduce or recreate the same materials. This unique partnership between the SIAC and SIMC in Singapore is laudable as it further streamlines the entire process.

While the simpler "Med-Arb" is not ineffective in itself, the growing traction of "Arb-Med-Arb" shows the recognition that the more comprehensive "Arb-Med-Arb" may well be the way forward for alternative dispute resolution mechanisms.

Sample Arb-Med-Arb clause

The SIAC and SIMC have provided a sample "Arb-Med-Arb" clause, which we reproduce below and in *italics* the portions which are subject to change depending on the agreement of parties

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Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration administered by the [*Singapore International Arbitration Centre ("SIAC")*] in accordance with the [*Arbitration Rules of the Singapore International Arbitration Centre ("SIAC Rules")*] for the time being in force, which rules are deemed to be incorporated by reference in this clause.

The seat of the arbitration shall be .

The Tribunal shall consist of [*Three*] arbitrator(s).

The language of the arbitration shall be .

The parties further agree that following the commencement of arbitration, they will attempt in good faith to resolve the Dispute through mediation at the [*Singapore International Mediation Centre ("SIMC")*], in accordance with the [*SIAC-SIMC Arb-Med-Arb Protocol*] for the time being in force. Any settlement reached in the course of the mediation shall be referred to the arbitral tribunal appointed by [*SIAC*] and may be made a consent award on agreed terms.

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