

Drawing Outside The Lines: Utilizing International Approaches to Resolve Due Process Concerns in Med-Arb

I. INTRODUCTION

Every country has a unique approach to conflict resolution, and how each nation facilitates that process varies based on their cultural norms.¹ Due to the backlog in the United States court system, there is a need for more expeditious resolution and cost saving approaches. As a result, new hybrid styles of dispute resolution have increased in popularity. One of the most prevalent alternative methods, known as med-arb, allows for a third-party neutral to conduct a mediation with the parties and proceed to binding arbitration only after settlement efforts have failed.² While med-arb can provide many unique advantages for the parties, it also creates serious due process concerns during the exchange of confidential information while in caucus.

Several countries utilize med-arb as a form of dispute resolution and have chosen to address these due process concerns with varying degrees of success. This paper will analyze these international approaches, and provide some guidance for how the United States can adopt a statutory remedy based on foreign solutions to combat these deficiencies. Part II of this paper gives a brief history and overview of med-arb in the United States. Part III will look at several international approaches to med-arb and how these countries address due process issues when transitioning from mediation to arbitration. Part IV will outline some potential statutory provisions based on foreign approaches to improve med-arb in the United States.

II. OVERVIEW OF MED-ARB IN THE UNITED STATES

Same-neutral med-arb is a two-step approach that traditionally begins with mediation and is followed by binding arbitration only after failing to reach a settlement.³ The neutral party acts

¹ John, Blankenship, *Developing Your Adr Attitude Med-Arb, A Template for Adaptive Adr*, TENN. B.J., (2006).

² *Id.*

³ Gerald F. Phillips, *Same-Neutral Med-Arb: What Does the Future Hold?*, DISP. RESOL. J., 24, 27 (2005). For the purposes of this paper, mediation is defined as a dispute resolution process in which the parties in conflict use a

in dual roles as both the mediator and the arbitrator throughout the process.⁴ A primary feature of this hybrid approach is that the parties in dispute desire to have a single individual act as both the mediator and arbitrator during the joint session. This request is either through contract or the consent of the parties.

As med-arb has developed in the last few decades it has become prevalent in many dispute resolution settings. Parties that employ med-arb cite the benefits of an efficient and cost-saving method that can give parties some finality in their dispute. While there is a place for med-arb as a viable form of dispute resolution in the United States, there remains several defects with the process. The most discouraging is the lack of due process protections for parties when transitioning from mediation to arbitration.

A. History and Application

When President Franklin D. Roosevelt created the National War Labor Board (“NWLB”) in 1942 the United States began its first foray into med-arb.⁵ While the process was not identified as med-arb, it followed the same basic structure. These NWLB proceedings were essentially mediation and arbitration that sought “equitable rather than legally correct conclusions.”⁶ The formal start of med-arb is attributed to Sam and John Kagel in the 1970s and was originally used in nursing strikes.⁷

The acceptance of med-arb as a dispute resolution process has evolved significantly in the last 50 years. During the early 20th century the use of a neutral as both an arbitrator and mediator was considered a “cardinal sin” in the alternative dispute resolution (“ADR”)

third-party to facilitate a resolution. Similarly, arbitration is defined as the use of a formal alternative method where the parties present their case in front of a third-party to reach a verdict.

⁴ Yolanda Vorys, *The Best of Both Worlds: The Use of Med-Arb for Resolving Will Disputes*, 22 OHIO ST. J. DISP. RESOL. 871, 886 (2007).

⁵ *Id.*

⁶ Blankenship, *supra* note 1, at 32.

⁷ James Peter, *Med-Arb in International Arbitration*, 8 AM. REV. INT’L ARB. 83, 88 (1997).

community.⁸ The tide began to turn in the last few decades as more practitioners began to see the merits of med-arb in the field.⁹ Today, the American Arbitration Association (“AAA”) and Judicial Arbitration and Mediation Services (“JAMS”) do not recommend the use of single neutral med-arb, except in unique circumstances. However, both organizations will provide assistance with the hybrid process at the parties’ request.¹⁰ While far from universally accepted,¹¹ med-arb has grown significantly and has created a prominent niche in the ADR field.¹² While it is employed in a number of settings, the four primary areas where med-arb is utilized are corporate,¹³ labor, international commercial arbitration, and family law disputes.¹⁴ While some scholars have espoused the benefits of med-arb for smaller claims it is also prominent in larger international disputes.¹⁵ As alternative dispute resolution systems have grown in the United States practitioners have come around to the benefits of conducting both proceedings in a joint session.

B. *Advantages of Med-Arb.*

⁸ Barry C. Bartel, *Med-Arb As A Distinct Method of Dispute Resolution: History, Analysis, and Potential*, 27 WILLAMETTE L. REV. 661, 662 (1991).

⁹ *Id.* at 677 (writing that at the 1988 meeting 45% of National Academy of Arbitrators members and 33% of non-Academy members stated that they had participated in labor-management mediation fact-finding mediation, or med-arb in 1986).

¹⁰ Phillips, *supra* note 3, at 27.

¹¹ *See e.g.* The Ontario Arbitration Act, forbids any individuals acting as arbitrators from operating as a mediator in the same session. The exact language reads:

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.

Ontario Arbitration Act § 35 (1991), *available at* http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_91a17_e.htm#BK42.

¹² David and Sean-Patrick Wilson, *Compelling Mediation in the Context of Med-Arb Agreements*, DISP. RESOL. J., 28, 29 n. 4 (2008) (finding that ten years ago as many as 40% of Fortune 1000 corporations used med-arb as a dispute resolution process).

¹³ Dafna Lavi, *Divorce Involving Domestic Violence: Is Med-Arb Likely to Be the Solution?*, 14 PEPP. DISP. RESOL. L.J. 91, 131 n. 207 (discussing the very successful use of med-arb in resolving an protracted intellectual property dispute between IBM and Fujitsu that had hundreds of millions of dollars in the balance); Blankenship, *supra* note 1, at 33.

¹⁴ *Id.* at 132.

¹⁵ Edna Sussman wrote that disputes that went as high as 5 million dollars would benefit from the efficiency and finality of med-arb. Edna Susman, *Med-Arb: an Argument for Favoring Ex Parte Communications in Mediation Phase*, 7 WOR. ARB. AND MED. R., 1, 2 (2013).

Med-arb is designed for the parties to benefit from the procedural advantages of both mediation and arbitration.¹⁶ The process is often praised for the efficiency, flexibility, and finality it provides parties in dispute. First, the efficiency of med-arb is one of the reasons why several fields commonly utilize the process¹⁷ and why some authors have cited efficiency as a reason other unique fields would benefit from using med-arb.¹⁸ One of the primary explanations for the efficiency of med-arb is the need for only one proceeding.¹⁹ By eliminating the hassle of changing locations and arranging a second time to conduct the arbitration the parties can shift from mediation to arbitration during a single hearing. Further, by removing the need for a second neutral the parties save time and the frustration of briefing a new arbitrator on background information and pre-hearing material.

Finally, an efficient resolution can help preserve the relationship of the parties.²⁰ As evidenced in countless cases stuck in protracted litigation the longer the dispute goes the more strain is put on the parties' relationship. By shifting from mediation to arbitration in one proceeding, parties that have an interest in preserving their affiliation with the other side can reduce the risk of damaging their long-term relationship. While the vetting process for employing a neutral in this dual role could take more effort, it still provides a far more efficient method compared to hiring the mediator and arbitrator separately.²¹

In addition to efficiency, the flexibility of med-arb is a major advantage. While the traditional med-arb approach has mediation followed by a full arbitration proceeding, parties can

¹⁶ Peter, *supra* note 7, at 89.

¹⁷ Lavi, *supra* note 13, at 131. For a more extensive discussion on the various forms of med-arb see Blankenship, *supra* note 1, at 30–32; Peter, *supra* note 7, at 98–103.

¹⁸ See generally Lavi, *supra* note 13 (applying med-arb in divorce cases with domestic violence). See also Vorys, *supra* note 4, at 894 (arguing the merits of applying med-arb in resolving will disputes).

¹⁹ See generally, 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 (2004).

²⁰ *Id.*

²¹ Gu Weixia, *The Delicate Art of Med-Arb and Its Future Institutionalisation in China*, 31 UCLA PAC. BASIN L.J. 97, 98 (2014).

request breaks, or alternatively have an arbitration proceeding prior to the mediation.²²

Depending on the design of the process the neutral can revert back to the role of mediator to address an issue during the arbitration.²³ The ability to shape the process that works best with the parties' needs is a major advantage for finding a successful resolution.

The third major benefit of med-arb is the finality of the process. The parties can begin the proceeding with the knowledge that they will receive a final resolution to the dispute. This can vary from a settlement during the initial mediation phase to resolving the dispute through an arbitration award.²⁴ Regardless of how the final decision is made the parties can walk out of the hearing with a binding and enforceable agreement.²⁵ As opposed to a non-binding procedure like mediation, the conclusiveness of med-arb creates a great incentive for both parties to settle early in order to avoid the risk of an uncertain arbitration decision.²⁶ The finality of med-arb can save the parties time and resources in protracted litigation.

C. Shortcoming of the Current Process

While it is evident that med-arb has a viable role as an alternative dispute resolution method there are several problems in how the process is applied in the United States. Med-arb can often seem coercive if the parties feel pressured to find a resolution. Additionally, given the merging of processes there is some confusion in the U.S. on the actual appealability of med-arb claims. Finally, the most serious concern is the due process and confidentiality risks from caucusing during mediation and then utilizing *ex parte* information in the arbitration award.

²² Kristen Blankley, *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, 329 (2011); *See also* Blankenship, *supra* note 1, at 34.

²³ Lavi, *supra* note 13, at 135.

²⁴ Blankley, *supra* note 22, at 331.

²⁵ Blankenship, *supra* note 1, at 35.

²⁶ *Id.* at 34.

One of the weaknesses commonly cited by critics of med-arb is that participants feel coerced to reach an agreement. While the finality of the process is a major advantage, parties are at risk for feeling forced into an agreement to settle when it is not in their best interests. Critics argue that this coercive effect impedes the parties from finding a settlement that will create a true and lasting agreement.²⁷ This coercive approach can detract from the voluntary nature of alternative forms of resolution.

Another major deficiency is appealability. While mediated agreements are enforceable in the courts, the settlement itself is not necessarily covered under the Federal Arbitration Act. Given the unique features of med-arb it is arguably materially distinct from arbitration and is not designed for appeal under the FAA in its current form.²⁸ Neither the arbitration nor mediation methods of “appeal” are designed for this hybrid process as many of the issues on appeal depend on what stage the settlement was reached.²⁹ The courts have created remedies for confidentiality violations in adjudications that follow pure mediation. For example, California’s evidence code requires vacating a decision if there is a reference during the proceeding to discussions from mediation that impacts the “substantial rights” of the parties.³⁰ It is unclear if these remedies extend to med-arb.

The court in *Advance Bodycare* found that the procedure of the alternative method controlled how the court would consider the process, not the title. “Normally labels do not control; indeed, if an agreement specifies in detail a dispute resolution procedure, which it calls ‘mediation’ (or anything else) but which is, in substance, FAA ‘arbitration,’ *substance controls*

²⁷ *Id.*

²⁸ Ellen E. Deason, *Combinations of Mediation and Arbitration with the Same Neutral: A Framework for Judicial Review*, 5 PENN ST. Y.B. ARB. & MED., 219 (2013).

²⁹ *Id.* at 240.

³⁰ CAL. EVID. CODE SECT. 1128. *See also* Deason, *supra* note 28, at 240.

*over title.*³¹ So if the parties create a med-arb provision, a court could interpret that process as materially distinct from arbitration under the FAA. Since med-arb is not the typical arbitration structure it is a fair inference to think that a future court could reject the appeal of a med-arb result under the FAA procedures.

While coercion and appealability are serious shortcomings of med-arb the most gaping deficiency is a lack of due process for the parties. The most obvious example of this is using information exchanged during caucus³² as “evidence” in the final award.³³ The use of *ex parte* communications impacts both the objectivity of the neutral and the open flow of information between parties in the dispute.³⁴ The lack of procedural protections in med-arb, found in litigation or arbitration, impacts the reliability of the information during the proceeding.

If a neutral hears information in the caucus that is later used as the basis of his ruling during the arbitration phase it creates a number of confidentiality issues. First, it prevents the outside party from responding to the dispositive information. Since the med-arbiter is obligated to keep the communication private the other side has no opportunity to dispute the claim. Additionally, a party that thinks that the other side will tell the neutral false or misleading information in caucus could be hesitant to fully participate, or at the very least this would increase their anxiety during the process.

The evidentiary system in the United States puts a special importance on confidentiality during settlement. This emphasis is apparent in our evidentiary protections³⁵ as well as through state regulations.³⁶ The Uniform Mediation Act forbids a mediator from disclosing statements

³¹ *Id.* (emphasis added).

³² “A caucus is a private meeting between the mediator and one of the parties that does not include the other party.” Weixia, *supra* note 21, at 105.

³³ Blankenship, *supra* note 1, at 36.

³⁴ Bartel, *supra* note 8, at 686.

³⁵ See e.g. FED. R. EVID. 408.

³⁶ See Blankley, *supra* note 22, at 343–346.

from mediation to a future judge or arbitrator that will rule on the dispute.³⁷ However, when the neutral conducts both proceedings this protection is nonexistent. The party that did not participate in the caucus is left to wonder how that private information will impact the neutral's decision.³⁸ This violates the parties' trust that the communication will remain confidential. While awards that are based on these confidential communications can be vacated under FAA §10 this is difficult to identify let alone demonstrate to a judge.³⁹ In caucus, while confidentiality helps to make participants feel comfortable in discussions with the neutral, it unfairly excludes the party that was not privy to the communication.

Not only is the neutral privy to the parties' confidential information, but also their interests. Parties in caucus, with the belief that the communication will remain confidential, often disclose their bottom-line figures. While it is easy to say the med-arbiter will simply not use this information in fashioning the award this seems overly idealistic and ignores the simple reality that judges or arbitrators will inevitably use all the resources and information to craft their decision. Requiring them to ignore information from caucus is not a realistic solution.⁴⁰ The arbitrator, knowing what each party cares about from their private discussion in caucus, can create an award using information that was outside the arbitration hearing.⁴¹ This could create a "chilling effect on participants" and negates many of the advantages of med-arb.⁴² As a result, the parties may withhold any weaknesses or concerns with their position believing that the med-arbiter will use it later in their decision.

³⁷ UNIF. MEDIATION ACT § 7.

³⁸ Blankenship, *supra* note 1, at 36.

³⁹ 9 U.S.C. §10.

⁴⁰ See Andrew J. Wistrich et. al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1323 (2005) (concluding that judges, like everyone else, can not close off information and will inevitably use all the information possible in a decision).

⁴¹ Vorys, *supra* note 4, at 894.

⁴² Blankenship, *supra* note 1, at 37.

The parties could go as far as to present false or misleading information during caucus. Statements in mediation are not under oath and provide no real protections against dishonesty.⁴³ Denying the non-producing party a realistic opportunity to rebut material statements creates a major disadvantage for reaching a fair resolution. Confidentiality in caucus, in this context, is actually a negative because it prevents the excluded party from knowing what information the med-arbiter is considering in their arbitration award. While in the criminal context evidence that is deemed “poisoned” by how it was obtained is excluded from the jury, med-arb does not have a similar protection.⁴⁴ While confidentiality is needed to improve the freedom for parties to communicate, it also gives them the freedom to stretch the truth. The lack of a proper shield against private disclosures leaves the possibility for a one-sided dialogue during caucus that could change the outcome of a case.⁴⁵

The confidentiality dilemma creates its own ethical predicament for neutrals. This is evident in the distinctions in the two roles of the med-arbiter. “The primary role of an arbitrator is to assess the merits of the parties' claims and to make a decision, while a mediator mainly facilitates communication between the parties and assists them in reaching a settlement.”⁴⁶ The distinct characteristics of these two roles create a difficult ethical dilemma once the parties shift from mediation to arbitration.

The risk of this confidentiality concern was evident in the Ohio case *Bowden v. Weickert*.⁴⁷ The disputes arose from the sale of an insurance business where the contract called for the med-arbiter to first try and resolve the case through mediation.⁴⁸ The parties drafted an agreement, but

⁴³ Peter, *supra* note 7, at 95.

⁴⁴ See e.g. U.S. CONST. amend. IV; *Mapp v. Ohio*, 367 U.S. 643 (1961).

⁴⁵ Richard Fullerton, *Med-Arb and Its Variants: Ethical Issues for Parties and Neutrals*, DISP. RESOL. J., 52, 61 (2010).

⁴⁶ Weixia, *supra* note 21, at 104.

⁴⁷ *Bowden v. Weickert*, 2003-Ohio-3223, WL 21419175 (2003).

⁴⁸ *Id.*

the specific terms were never finalized and were eventually rejected during mediation.⁴⁹ Once the mediation broke down, the med-arbiter used that agreement as the basis of his award and included some other terms from industry norms.⁵⁰

The award was challenged, and the court vacated the arbitrator's ruling finding that the neutral's use of the prior agreement was a communication that was to remain confidential during the arbitration phase.⁵¹ The court found that the med-arbiter was only allowed to rely on the original contract and other evidence presented during the arbitration hearing. This case demonstrates the court's concern for confidentiality and informed consent violations in med-arb.⁵² While the court caught this particular violation, there is no guarantee that future parties will be so fortunate. These due process deficiencies leave a serious gap in the fundamental protections of the parties.

III. INTERNATIONAL APPROACHES TO CONFIDENTIALITY IN MED-ARB

While med-arb has proved a useful resolution process in the United States there remain serious due process concerns. Other countries have adopted different responses to remedy this deficiency by how they structure their med-arb systems. While some international settings forbid the neutral to work as a mediator and an arbitrator,⁵³ others include statutory protections that allow both processes to operate at maximum capacity. Countries like China and Germany incorporate mediation and settlement discussions into their arbitration proceedings. This allows for a more efficient resolution, but fails to provide adequate protections for the parties. Australia

⁴⁹ *Id.* at 3.

⁵⁰ *Id.*

⁵¹ *Id.* at 4.

⁵² *See also* Gaskin v. Gaskin, No. 2-06-039-CV, 2006 WL 2507319 (Tex. App. 2006) (rejected the arbitration award after it was demonstrated that only one of the parties consented to the use of a single neutral for both mediation and arbitration).

⁵³ "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." UNCITRAL Model Law on International Commercial Conciliation Rules, Art. 12; *See also* Ontario Arbitration Act § 35.

has provided a progressive model that ensures strong statutory safeguards for parties that ensure their due process rights are protected. Analyzing how these countries have addressed these issues could greatly benefit med-arb in the United States as it continues to grow in popularity.

A. *Med-Arb In China*

While China and the United States both share strong economic and military influence around the globe they have numerous cultural distinctions that set them apart. Among the many cultural differences between these two nations is how they approach dispute resolution. Historically, the United States has emphasized an adversarial process and the special role of a judge to decide the merits of a dispute. The Chinese approach to dispute resolution emphasizes conciliation over litigation.⁵⁴ While in the U.S. there is a hesitation to combine processes, Chinese culture espouses the merits of hybrid resolution systems.⁵⁵

Mediation in China has roots in Confucian philosophy and dates back to pre-Communism China.⁵⁶ There is also an extensive tradition of avoiding conflict by resolving disputes using neutrals.⁵⁷ The conception of individual vs. collective identity is a major distinction between the United States and many eastern philosophies.⁵⁸ These preferences impact the parties' desire for adversarial or mediation based methods. Mediation is recognized as an "informal social control"⁵⁹ that places effective resolution over formality of process. The "rule of li" is a social

⁵⁴ Peter, *supra* note 7, at 106.

⁵⁵ M. Scott Donahey, *Seeking Harmony-Is the Asian Concept of the Conciliator/arbitrator Applicable in the West?*, DISP. RESOL. J., 74, 75 (1995).

⁵⁶ Victor Lau and Vanja Bulut, *Resolution of Disputes in China-What it means for Australia*, Clayton Utz, last updated March 15, 2012, available at http://www.claytonutz.com/publications/edition/15_march_2012/20120315/resolution_of_disputes_in_china-what_it_means_for_australia.page; See also Vera, *supra* note 19, at 165.

⁵⁷ Wang Wenying, *The Role of Conciliation in Resolving Disputes: A P.R.C. Perspective*, 20 OHIO ST. J. ON DISP. RESOL. 421, 422 (2005).

⁵⁸ *Id.*; Shahla F. Ali, *Approaching the Global Arbitration Table: Comparing the Advantages of Arbitration As Seen by Practitioners in East Asia and the West*, 28 REV. LITIG. 791, 796 (2009).

⁵⁹ Vera, *supra* note 19, at 165. Vera artfully explains that in the absence of formal written law social duties regulated ordinary affairs.

obligation compared to the rule of law in Western culture.⁶⁰ Unlike the U.S. system that encourages complaints through the courts, Chinese law discourages bringing cases for violations of personal rights that ignore the consequences of the adversarial approach on society.⁶¹

In addition to the traditional use of mediation, arbitration has expanded rapidly in China largely in business settings. The arbitration system in international contexts was formalized in the International Economic and Trade Arbitration Commission (“CIETAC”).⁶² CIETAC, also known as the “Oriental Model”, accounts for settlement efforts by allowing arbitrators to act as a neutral once the formal proceedings commence. Under the CIETAC rules, no express agreement by the parties is needed for the neutral to work as a mediator during the arbitration proceeding. Unlike the U.S. where express agreement is needed for med-arb, the combined process of med-arb has become a part of the Chinese resolution procedure as an informal cultural practice.⁶³ The goal of these settlement meetings is to promote mutual cooperation and understanding. Similar to mediation in the U.S., if an agreement is reached the arbitral award is based on the parties’ terms. If no settlement is found, an arbitrator gives an award.⁶⁴

What distinguishes the Chinese approach from the United States is that mediation occurs *throughout* the arbitration proceedings. The arbitrator after receiving evidence and listening to witnesses’ testimony can try to settle the case, and if they are unsuccessful, return to the hearing. Then after more evidence is presented, the arbitrator can attempt more settlements efforts later in the proceedings.⁶⁵ This approach is not only permissible in China, but also prevalent in more

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² CIETAC is only growing in popularity. In 2013, CIETAC accepted 1256 cases. That is close to double the amount of cases in 2000. Weixia *supra* note 21, at 98. Of those cases, 20–30% were settled using a form of med-arb. *Id.* While CIETAC was an effort to harmonize the Chinese arbitration system with other international approaches it still remains a useful example of how Chinese culture influences their dispute resolution philosophy.

⁶³ Donahey, *supra* note 55, at 74.

⁶⁴ *Id.* at 76.

⁶⁵ *Id.*

formal litigation proceedings with a judge.⁶⁶ These *ex parte* discussions can be disclosed to the other party, but is not a requirement.⁶⁷ Ambiguous language in the Beijing Arbitration Commission (“BAC”) rules only reinforces this approach.⁶⁸ The BAC language allows the parties in dispute to mediate the case “in a manner they see appropriate.”⁶⁹ The CIETAC provides a small safeguard by forbidding the parties from referencing or utilizing any statements or opinions by the other party or neutral from the mediation phase in arbitration.⁷⁰ However, nothing forbids the arbitrator using the information from the mediation in the final arbitration decision.⁷¹

Despite the due process concerns, the Chinese system frequently employs caucusing in med-arb. They view the ability to have *ex parte* communications through caucusing with individual parties as a way to help influence the process of the arbitration.⁷² While there is concern for how these private conversations impact the med-arbiter’s decision-making there are no serious efforts to address this problem.⁷³ The BAC Rules Article 56(2) allows the parties to request a new med-arbiter if they have significant concerns of bias, however this is only a suitable remedy if both parties consent.⁷⁴ The result of this provision is if one party identifies that

⁶⁶ Catherine A. Rogers, *The Ethics of Advocacy in International Arbitration*, Penn State Univ., Dickinson Sch. Of Law, Legal Studies Research Paper No. 18-2010, at 2-3 (2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1559012.

⁶⁷ Comparatively, Japan, unlike China, has adopted a similar procedure to the United States conducting the arbitration only after the parties have exhausted all efforts to find a resolution through mediation. *Id.* While Japan and the U.S. seem concerned with the dual role of the neutral, the Chinese system embraces it.

⁶⁸ China has a bifurcated system of arbitration where the BAC is used for domestic disputes and the CIETAC largely controls in international contexts. Both systems reflect the intermingled nature of the mediation and arbitration processes with few exceptions that are detailed in the text of the paper.

⁶⁹ Beijing Arbitration Commission Rules Article 38(1).

⁷⁰ “Where conciliation fails, any opinion, view or statement . . . 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, defense or counterclaim in the subsequent arbitration proceedings.” CIETAC Article 45(9).

⁷¹ Weixia, *supra* note 21, at 105.

⁷² Ali, *supra* note 58, at 817.

⁷³ *Id.* at 107.

⁷⁴ Beijing Arbitration Commission Article 56(2), available at <http://www.intracen.org/Beijing-Arbitration-Commission-Arbitration-Rules/>.

the neutral has a bias or coercive there is no suitable remedy to end the arbitration.⁷⁵ Unlike other jurisdictions, discussed later in this paper, the CIETAC rules did not adopt the requirement to disclose material information before arbitration. There is also no China Arbitration Law or rule from the arbitration commission on confidentiality in the med-arb process.⁷⁶

The Chinese philosophy on the role of a mediator was evident in the discussions when creating the UNCITRAL Model Conciliation Law. The United Nations established the Commission on International Trade Law (“UNITRAL”). The goal of the assembly was to recognize and resolve the disparities in national laws on arbitration involving international trade law. The Chinese representative noted during the discussion that the joint role of mediator and arbitrator in countries like the United States is distinct from eastern philosophies.⁷⁷ As a result, when creating CIETAC, the Chinese representatives chose to not incorporate aspects of the Model Rules that restricted the arbitrator’s power to work as a mediator during the same session.⁷⁸ The efforts by the Chinese to include many aspects of other countries’ approaches reflect the need for some harmony in international arbitration. However, the noticeable distinctions between CIETAC and UNCITRAL-based approaches demonstrate how deep these cultural beliefs of reconciliation run.⁷⁹

These distinctions in the Chinese approach fuel several commentators’ doubts about submitting disputes to CIETAC neutrals based on their perceived lack of independence and

⁷⁵ See *Gao Haiyan v. Keeneye Holdings Ltd.*, [2011] 3 H.K.C. 157 (C.F.I.) (upholding an arbitration decision where the award was 1/5 of what was proposed in mediation).

⁷⁶ Weixia, *supra* note 21, at 105.

⁷⁷ Ali, *supra* note 58, at 805–806.

⁷⁸ *Id.*

⁷⁹ *Id.* at 831. Ali also notes that eastern approaches have a higher regard for the need for amicability in arbitration compared to western methods. *Id.* at 833.

impartiality.⁸⁰ In contrast, other Asian nations have adopted varying levels of due process protections that are considered more impartial systems for resolving disputes.⁸¹ Hong Kong Arbitration Ordinance Section 2A(2) provides a process that is similar to med-arb already utilized in the United States.⁸² However, 2B(3) requires that information from the mediation that is relevant must be disclosed to the other party if no settlement is reached.⁸³

Similar to Hong Kong, Singapore has made substantial legislative changes to regulate med-arb. This is evidenced in The Singapore International Arbitration Act § 63 that requires a materiality disclosure comparable to Hong Kong Ordinance 2B(3).⁸⁴ Both Hong Kong and Singapore's due process protections try to combat the deficiencies evident in China.⁸⁵ Similar to China, the Japanese arbitration law does not require the disclosure requirements in caucusing when shifting systems. While the Japanese system approaches med-arb in a two-stage system like the United States the cultural importance of conciliation is still highly prevalent. Like China, the Japanese system considers the concern over due process violations in caucus second to an efficient settlement.⁸⁶ While China's effective use of hybrid approaches provide an interesting method, the lack of procedural safeguards only exacerbate the due process deficiencies in the U.S. med-arb system.

⁸⁰ Michael I. Kaplan, *Solving the Pitfalls of Impartiality When Arbitrating in China: How the Lessons of the Soviet Union and Iran Can Provide Solutions to Western Parties Arbitrating in China*, 110 PENN ST. L. REV. 769, 787 (2006).

⁸¹ *Id.*

⁸² "Where an arbitration agreement provides for the appointment of a conciliator and . . . that the person . . . shall act as an arbitrator in the event of the conciliation proceedings failing to produce a settlement acceptable to the parties- (a) no objection shall be taken to the appointment of such person as an arbitrator." Hong Kong Arbitration Ordinance Section 2A(2).

⁸³ Weixia, *supra* note 21, at 111 *citing* Section 33(4)(b) of Hong Kong Arbitration Ordinance (Cap 609). "If an arbitrator obtains information from a party during mediation proceedings . . . the arbitrator is required to disclose to all other parties the information that he or she considers material to the arbitral proceedings before resuming them."

⁸⁴ "Where confidential information is obtained by an arbitrator" the arbitrator prior to beginning the arbitral portion of the proceeding must disclose to both parties "as much of that information as he considers material to the arbitral proceedings." Singapore International Arbitration Act 17(3).

⁸⁵ *Id.* at 111.

⁸⁶ Interestingly, based largely off the Asian trade influence, the British International Commercial Arbitration Act in Canada allows neutrals to act as a mediator during a stage of an arbitration proceeding. *Id.* at 76.

B. *Germany*

While Germany has many clear cultural differences from China, both countries have recognized the utility of med-arb.⁸⁷ Unlike other countries in Europe, med-arb is well established in Germany based largely on the country's predilections for efficiency in their dispute resolution systems. While not couched as med-arb, the arbitration process in Germany allows for settlement in the middle of the arbitration.

In Germany, both judges and arbitrators are authorized to use settlement proceedings at any time. The German Code of Civil Procedure 1053(1) states that settlements are classified as "arbitral award on agreed terms."⁸⁸ The German process is also less formal and codified than other countries. This gives a great deal of discretion to the arbitrator. While early resolution is encouraged, the primary focus of a German neutral is to arbitrate the dispute, not to settle it. As a result, arbitrators see settlement discussions, or the mediation phase of med-arb, as an evaluative aspect of their job. While the U.S. emphasizes the mediation aspect of settlement first, the arbitrator in Germany considers this a secondary focus, but necessary as part of their "noble office."⁸⁹ The mediation phase is used primarily to inform the parties of the law at issue and the parties' options going forward. While this is more of an evaluative mediation approach, the technique encompasses many of the same principles used in med-arb.⁹⁰

While there are limited sources on the subject, caucusing between parties is not typical for German arbitrators.⁹¹ The lack of caucusing is not exclusive to Germany. The CEDR Commission on Settlement in International Arbitration, which drafted advisory guidelines for

⁸⁷ Germany and Switzerland do not formally utilize med-arb as the Chinese, but the frequency of settlement conference prior to arbitration effectively gives the same dealings with the neutral. Peter, *supra* note 7, at 109.

⁸⁸ ALEXANDER TRUNK & VALERII A. MUSIN, INTERNATIONAL COMMERCIAL ARBITRATION AND INTERNATIONAL MARITIME LAW FROM A GERMAN AND RUSSIAN PERSPECTIVE 42 *available at* <https://books.google.com/books>.

⁸⁹ *Id.* at 113.

⁹⁰ *Id.* at 111.

⁹¹ Peter, *supra* note 7, at 109.

improvements in drafting settlements, also discourages caucusing when using med-arb.⁹²

Additionally, information that is discussed without the other party is *not* considered confidential.⁹³

The German approach of not caucusing or maintaining confidentiality between processes helps avoid the due process issue all together.⁹⁴ The de-emphasis of the mediation stage leaves many to claim that U.S. med-arb not a fair comparison,⁹⁵ however the German approach seems to limit some of the problems evident in U.S. system. While the German med-arb process provides the valuable advantages of avoiding the due process issue entirely, the inability to conduct two full dispute resolution processes is too great of a shift from our current system and would not provide the most optimal remedy.

C. *Australia*

Australia is unique to many other countries in their widespread enthusiasm for alternative dispute resolution. In Australia, some form of ADR process exists in every court or judicial setting in the country.⁹⁶ Unlike other nations that have failed to codify a med-arb provision, Australia has created specific language in their arbitration laws that govern med-arb. The Commercial Arbitration Act of Australia (“CAA”),⁹⁷ which governs domestic arbitration,

⁹² The Center for Effective Dispute Resolution (CEDR) Commission on Settlement in International Arbitration, Final Report, *available at* http://www.cedr.com/about_us/arbitration_commission/Arbitration_Commission_Doc_Final.pdf. The CEDR is an independent international provider in Europe. For more information *see* http://www.cedr.com/about_us/.

⁹³ *Id.*

⁹⁴ *Peter*, *supra* note 7, at 113.

⁹⁵ *Peter* finds that the de-emphasis of mediation is “evaluative.” However, in business settings mediation is often conducted using evaluative approaches instead of a facilitative process. *Id.* at 114.

⁹⁶ Nadja Alexander, *What's Law Got To Do with It: Mapping Modern Mediation Movements in Civil and Common Law Jurisdictions*, 13 BOND L. REV. 335, 340 (2001).

⁹⁷ Australia has a bifurcated system, similar to China, which govern arbitration issues. The International Arbitration Act of 1974 (“IAA”) is utilized in international commercial arbitration disputes. This generally recognizes that Australia will enforce international arbitration agreements. IAA is also the body of law that promotes the execution of UNCITRAL Model Law. For domestic issues submitted to arbitrations the Commercial Arbitration Act typically governs. Since the IAA is more of a reflection of international approaches the remainder of this section focuses on the CAA as a more representative of Australian ideals in arbitration. Albert Monichino, *Arbitration Reform in*

addresses the dual roles of the med-arbiter and includes language to protect confidential information disclosed in caucus.⁹⁸

First, Article 27(D)(1) of CAA requires the arbitrator, acting as mediator, to have the consent of the parties and have the arrangement explicitly detailed in the contract.⁹⁹ Most importantly, the statute addresses confidentiality by requiring that the parties consent to how the arbitrator treats confidential communications. If the parties want to agree to disclose all information they revealed in caucuses once the mediation is complete they may do so. The statute itself provides confidentiality protection for “material” information. While CAA 27(D)(a) expressly allows for caucusing during mediation, the CAA provides an additional protection that the neutral, prior to the start of the arbitration proceeding, must disclose to both parties any confidential information that was learned during the mediation that is deemed “material.”¹⁰⁰ This safeguard against *ex parte* communications is comparable to materiality provisions in other countries like Hong Kong and Singapore.¹⁰¹

An additional protection allows for the parties, if they feel uncomfortable with the med-arbiter after the mediation phase, to opt-out for a second neutral to conduct the arbitration.¹⁰²

Australia: Striving for International Best Practice, The Arbitrator & Mediator (2010), [http://www.mtecc.com.au/uploads/papers/ Albert_Monichino_SC% 282010%29_Arbitrator__Mediator_29.pdf](http://www.mtecc.com.au/uploads/papers/Albert_Monichino_SC%202010%29_Arbitrator__Mediator_29.pdf). For an expansive discussion on the current CAA and proposed changes through the Model Commercial Arbitration Bill see Cameron Miles et al, *Understanding Australia’s New Domestic regime: A Comparison of the Australian State Commercial Arbitration Acts and the New Model Commercial Arbitration Bill*, Chartered Institute of Arbitrators of Australia, <https://www.ciarb.net.au/resources/domestic-arbitration/understanding-australias-new-domestic-arbitration-regime-a-comparison-of-the-australian-state-commercial-arbitration-acts-and-the-new-model-commercial-arbitration-bill>.

⁹⁸ Weixia, *supra* note 21, at 115. The CAA was adopted individually by each state and territory. The Model Commercial Bill is sometimes cited with the CAA. It appears that the model bill was adopted by the states individually similar to the way states in the U.S. have adopted the U.C.C in specific jurisdictions.

⁹⁹ *Id.* at 116.

¹⁰⁰ Commercial Arbitration Act 2010 (NSW) s. 27(D)(7); Monichino, *supra*, note 97, at 17. Monichino also writes that this protection is derived from Section 17 of the Singapore International Arbitration Act. *Id.* at 17 n. 73.

¹⁰¹ Alan L. Limbury, *Med-Arb: Getting the Best of Both Worlds*, available at <https://imimmediation.org/cache/downloads/30zzdkccd4skgw80c8swwc0/hybrid-processes-2010---article-by-alan-limbury.pdf>. (citing both 2A-2C of the Arbitration Ordinance and Section 17 of the International Arbitration Act for Hong Kong and Singapore respectively).

¹⁰² C.A.A. 27(D)(3).

While this remedy limits the efficiency of the process it protects any due process concerns exposed when transitioning to arbitration.

When shifting processes the Australian system relies on consent and transparency prior to continuing with the arbitration. This idea is evident in the *Duke Group v. Alamain Investments Ltd & Ors.*, where the arbitrator withdrew from his position after realizing he had previously meditated the parties. “[T]here should be no communication or association between a(n) (arbitrator) and one of the parties (or the legal advisors or witnesses of such a party) otherwise than in the presence of or with the previous knowledge or consent of the other party.”¹⁰³ This language demonstrates the Australian focus on transparency between the parties. The ability to consent or opt-out of entering arbitration once all the material communications are disclosed is a useful protection that makes Australia’s med-arb system unique.

The drafters of the CAA recognized that the previously discussed provisions limit the efficiency of the med-arb process. This is partially remedied under CAA 27(D)(5) where the parties may not object to the resolution of the dispute on the basis of bias solely because the arbitrator was previously the mediator.¹⁰⁴ This offers some finality to the arbitration award to compliment some of the other due process protections in the rest of the statute.

While the CAA is utilized for domestic arbitration disputes, the IAA is used for international commercial arbitration in Australia. After recent reform, the IAA was amended to conform to more uniform international approaches. Unlike the CAA, the IAA does not contain a med-arb provision.¹⁰⁵ This was an interesting development given major competitors like Hong Kong and Singapore have these protections. Several authors cited this as a disappointing

¹⁰³ *The Duke Group Ltd. (In Liq.) v. Alamain Investments Ltd & Ors.*, (2003) SASC 272, available at <http://www.austlii.edu.au/au/cases/sa/SASC/2003/272.html>.

¹⁰⁴ C.A.A. 27(D)(5).

¹⁰⁵ Monichino, *supra* note 97, at 12.

omission from the IAA, but could reflect Australia's need for a universal approach in international commercial arbitration instead of the country's preference for progressive dispute resolution reform.¹⁰⁶ The extensive amount of statutory protections in Australia's CAA is an excellent model for the U.S. to consider to going forward.

IV. REMEDIES

The due process deficiencies in the U.S. med-arb system leave a serious gap in the fundamental protections of the parties. However, employing remedies used in international systems can help reduce this risk. While strong contractual language is always beneficial for parties, the United States is best served by adopting a med-arb provision in the FAA, similar to Australia, which gives the parties adequate due process protections.

First, the provision should require parties to include explicit language in their agreement to demonstrate that both sides consent to using med-arb. Comparable language to 27(D)(1) of Australia's CAA would provide the most guidance on this issue.¹⁰⁷ This provision could also include a notice requirement, similar to the one recommended by the CEDR, which explains the risks of adopting med-arb to resolve their dispute.¹⁰⁸ This will give the parties adequate notice and allows them to consider including language that details how best to conduct a med-arb session, how the mediator will act during the initial proceeding, and if they can make any mediation efforts once the arbitration has started.

Additionally, the language of the statutory provision should define confidential statements, and describe the arbitrator's responsibilities for disclosing admissions that are deemed material. Currently, some parties already include these materiality disclosures in

¹⁰⁶ *Id.*

¹⁰⁷ *See e.g.* C.A.A. 27(D)(1). "[T]he arbitration agreement provides for the arbitrator to act as mediator in mediation proceedings (whether before or after proceeding to arbitration, and whether or not continuing with the arbitration); or (b) each party has consented in writing to the arbitrator so acting."

¹⁰⁸ CEDR, *supra* note 92, at 16.

contracts, but adding this statutory protection will ensure this disclosure requirement is included in all med-arb agreements.¹⁰⁹ Language from the Hong Kong or Singapore statutes would offer some tested standards to include in the new provision.¹¹⁰ At the very least, these statutes would provide some guidance on what is considered a “material” communication in this context.

Another section of the med-arb provision should contain a clear statement that protects the confidentiality of non-material communications during caucus. “Like the domestic U.S. rules applicable in court, a number of foreign arbitration statutes erect an evidentiary barrier that prohibits parties from referring, during arbitral proceedings, to any statement made during mediation.”¹¹¹ Including explicit language that protects the confidentiality of non-material information still allows the med-arbiter to maintain other confidential communication disclosed privately, which could embarrass or harm the disclosing party. This would inform the parties that they can feel comfortable speaking openly with the mediator in caucus about their feelings and concerns as long as it does not unduly hinder the excluded party’s due process rights. This provision would complement the materiality disclosure requirement that ensures both parties are privy to the relevant information.¹¹²

The main criticism of the statutory disclosure requirement is it disrupts the confidential nature of mediation, which is recognized as a fundamental part of the resolution process. Without confidentiality, the freedom to communicate in the mediation process is greatly hampered.¹¹³ However, the structural limitations of med-arb require the due process rights of the parties to trump any lesser interest in efficiency. Even with the disclosure requirement, several

¹⁰⁹ Bartel, *supra* note 8, at 686.

¹¹⁰ See e.g. *supra* notes 89 and 90.

¹¹¹ Deason, *supra* note 28, at 227.

¹¹² Peter, *supra* note 7, at 109.

¹¹³ Deason, Ellen, *The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?*, 85 MARQ. L. REV. 79, 85 (2001).

confidentiality protections are still available to the parties. The med-arbiter will maintain confidentiality of non-material information with an individual party, as well as all information that arises during entire proceeding from outside parties. If no disclosure requirement is put into place, the party that was not present for the caucus is excluded them from material information that could jeopardize the integrity of the arbitration award. Creating a statutory requirement for material information and requiring the med-arbiter to notify the parties of this requirement will serve as strong due process protections.

One final safeguard is to have a double consent requirement included in the statute similar provision to Australia's CAA Article 27(D)(4). The provision requires the parties give written consent that the med-arbiter will continue his role as the arbitrator if settlement talks in mediation are unsuccessful. This allows the parties to choose another neutral after the mediation is complete if they feel that the mediator cannot give an unbiased decision. Including this option in the statute would offer more party autonomy and control over their due process rights. This final consent requirement does hinder the efficiency of med-arb, but due process concerns are a far more fundamental protection in the United States. For example, the exclusionary rule in a criminal context is highly inefficient for criminal convictions, but the courts have found that evidence that is "poisoned" from improper actions by law enforcement should not be considered. Similarly, binding parties to a process that does not allow them a fair resolution or opportunity to defend themselves is not worth any ancillary benefits like an expedited resolution. While the double consent requirement does limit the efficiency and finality of med-arb, the due process concerns trump any benefit of early resolution to an agreement.¹¹⁴

To create this significant of a transformation of our med-arb process will take a concerted effort by the federal legislature. The Australian government has redefined their conception of the

¹¹⁴ Weixia, *supra* note 21, at 119.

judiciary to include a more expansive ADR system. This has incentivized their legislature to focus reform efforts on ADR processes.¹¹⁵ However, given the current stalemate in Washington it is unlikely for any substantive legislative remedies to occur in the near future. Given this political reality creating a persuasive authority comparable to the Uniform Commercial Code (U.C.C.) is a strong secondary objective. The development of a non-binding series of acts and procedures that harmonizes the med-arb laws across the country would provide a valuable resource that states could adopt going forward. This would provide a useful workaround to going through Congress and incentivize states to openly address these deficient procedures.

While adopting a similar approach to the Australian CAA would offer some needed safeguards for the parties it does create two new problems. One, parties are less likely to caucus effectively with the understanding that if the mediation fails the arbitrator will disclose that private information. Second, the parties could be sensitive to any hint of bias and favoritism. While these are genuine concerns, the benefit of protecting the parties due process interests greatly out way any enhanced sensitivities by the parties. By the time arbitration begins the med-arbiter has transformed into the role of an arbitrator and is chiefly concerned with a just resolution of the dispute. The materiality disclosure requirements provide a protection for the parties more than the med-arbiter who is already aware of this material information. Ensuring that the process is fair and transparent are more fundamental interests in the U.S. system than any risk of enhanced party sensitivities.

One possible alternative to protect against due process discrepancies would be to adopt a similar approach to the German model and exclude caucusing altogether. While this creates a simple remedy to the due process problems, it deprives the parties of a major part of mediation, and denies the med-arbiter a useful tool when facilitating a resolution. The use of caucusing is

¹¹⁵ Tania Sourdin, *International Dispatch: Adr Trends Down Under*, DISP. RESOL. MAG., 30, 31 (2014).

incredibly valuable for the mediator to recognize the core interests of the parties. This denies all parties involved of a major benefit of the hybrid approach. Removing this as an option, while protecting the due process concerns from manifesting, does not give the parties the best chance for a settlement.

There is also the added concern that removing caucusing from mediation is too significant a departure from common mediation approaches in the United States. By adding statutory disclosure requirements, mediators are required to communicate material information and receive clear consent from the parties. While the German approach gives little due process or confidentiality issues, it hinders the core interest of alternative dispute resolution, which is to give the parties the best chance for an equitable settlement.

Several highly respected scholars on med-arb have called for informed consent to the process as a suitable remedy. However, informed consent alone does not go far enough to ensure adequate due process protections.¹¹⁶ In the United States, med-arb agreements can often include waivers that require the parties to forfeit their right to terminate the process or challenge the award. For example, the California ADR Practice Guide recommends a waiver that states, “[t]he parties understand that this process will likely cause the arbitrator to receive information that might not otherwise have been received as evidence in the arbitration and to receive information confidentially from each of the parties that may not be disclosed to the other side.”¹¹⁷ While waiver and consent agreements are positive steps to ensure both parties understand the process, these protections should be codified in a statutory provision to complement mandatory disclosure requirements.

¹¹⁶ See Edna Sussman, *Developing an Effective Med-Arb/Arb-Med Process*, 2 N.Y. Disp. Res. L. 71(2009); see also Deason, *supra*, note 28, at 227.

¹¹⁷ Vorys, *supra* note 4, at n. 117 citing the California ADR Practice Guide.

The goals of giving the parties adequate notice and consent to the process are consistent with how some courts have already interpreted med-arb provisions. In *U.S. Steel Mining Company v. Wilson Downhole Services*, the parties consented to the use of a single neutral to facilitate both the mediation and the arbitration.¹¹⁸ The contract allowed the neutral to consider confidential disclosures in mediation when reaching the arbitration award. The arbitrator's ruling was challenged for fraud, but the court upheld the award finding there no such evidence that the terms of the contract conflicted with the parties' consent for this process.¹¹⁹ The addition of a new section of the FAA that governs med-arb, or a persuasive authority for states to adopt would add significant protections for parties that are currently missing in our med-arb procedure.

V. CONCLUSION

How countries conduct dispute resolution reflects their cultural norms and values. With the continued growth of med-arb in the United States, a significant shift is needed to ensure due process for the parties. While several countries have created statutes that solve many of these issues, adopting a statutory provision in the FAA, similar to Australia, provides the best model going forward. The exchange of "material" information and allowing parties to opt-out prior to the start of arbitration will protect against arbitration awards based on confidential communications. While a statutory remedy is ideal, a uniform act, similar to the U.C.C. that states can adopt would provide guidance on how to handle due process issues in hybrid dispute resolution systems. If these statutory safeguards are adopted in the United States the benefits of the med-arb like efficiency and flexibility, with added due process protections, can offer a strong method of dispute resolution for years to come.

¹¹⁸ *U.S. Steel Mining Company v. Wilson Downhole Services*, No 02:00CV1758, 2006 WL 2869535 (W.D. Pa., 2006).

¹¹⁹ *Id.* at 5.