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How Can An Arbitrator Switch To Mediator And Back?

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1. Some thoughts.

> "Litigation. A machine which you go into as a pig and come out of as a sausage."[1]
>
> "Justice is a machine that, when someone has once given it the starting push, rolls on of itself."[2]
>
> "As a litigant, I should dread a lawsuit beyond almost anything short of sickness and death."[3]

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1 Ambrose Bierce, The Devil's Dictionary, 1911.

2 Attributed to John Galsworthy in The Lawyer's Quotation Book, 1992.

3 Attributed to Learned Hand in Henry and Lieberman, The Manager's Guide To Resolving Legal Disputes, 1985

2. What is an arbitrator's responsibility?

To assure the process yields an enforceable, durable award?

Efficiently
Equitably
Effectively

To inquire as to whether or not the parties would like a settlement facilitator?

May I inquire as to whether or not the parties have discussed settlement?
If "yes", have the parties discussed settlement?
If "yes", may I inquire as to the status of the discussions?
If "yes", please summarize.
Would the parties be interested in exploring the pros and cons of engaging a neutral to facilitate the discussions?
If "yes", what are the parties views on that score?
If "no", would the parties be interested in exploring the pros and cons of engaging a neutral to facilitate the discussions.?
If "yes", what are the parties views on that score?

To assist parties to arrive at the most equitable resolution of their differences at the earliest practicable time in the most efficient and effective way?

To provide the parties a menu of processes that may assist them in resolving their dispute?

To work out with the parties ground rules as to the appropriate degree of participation by the arbitrator as settlement facilitator?

3. Some issues re arbitrator as settlement facilitator

Integrity of the arbitration process.

Preserve arbitrator's independence and impartiality.
Assure due process for the parties
Avoid infecting arbitrator with information not in the record, currently or in the future.
Avoid compromising "mediator's" duty to preserve confidentiality.

Semantics.

Mediation
Conciliation (Cf. Asia, Europe, U.S.)
Facilitation (may be a better understood term)

Relevant rules.

Applicable arbitral law.
Applicable arbitral rules.
Parties' rules.
Applicable mediation/conciliation rules or procedures.

Culture and custom.

Jurisdictions where judges and arbitrators customarily participate in settlement talks.
Jurisdictions where judges and arbitrators do NOT customarily participate in settlement talks.
One or more parties' predispositions.
Counsel's predisposition.
Arbitrator's predisposition.

Precedent

Award may be needed re the other party in this arbitration.
Award may be needed re others in the industry.
Need for an award may vary as circumstances change
Market, technology, financial needs, other party's claims, management changes.
As evidence is adduced in arbitration.

Bet the company relief – same as "Precedent" above.

3. Some issues (continued)

Timing.

Prospect of arbitrator serving as settlement facilitator is not likely to be subject of pre-dispute clause or arbitration agreement.
Prospect is more likely to mature as arbitration proceeds.
As relevant information is disclosed and evidence is adduced.
With time, parties develop confidence in arbitrator.
Settlement discussions may be expense driven.
Circumstances change
Market, technology, financial needs, other parties' claims, management changes.

Will arbitrator as settlement facilitator become privy to information that would never be disclosed or admitted into evidence?

"Confidential" information may be disclosed during settlement talks.
Joint sessions.
Private caucuses.
Information disclosed may not be in the record of the arbitration proceedings.
Cf. Information from publicly available sources known to arbitrator.
Information re publicly held company v. private enterprise or individual.
Information disclosed during settlement discussions may contradict the record.
Perjury.
Fraud.
Documents withheld or objected to.
Cf. *In camera* review by arbitrator of attorney-client privilege documents and other "confidential" information.

Informal evaluation during settlement discussions.

Will this affect impartiality of the arbitrator?
Will this affect the appearance of impartiality of the arbitrator?
Will this signal the ultimate award?
Cf. Award prepared and placed in sealed envelop before settlement facilitation.
In joint session or private caucus?

3. Some issues (continued)

Fees

Settlement facilitator's fees separate from arbitrator's fees?
Hourly/per diem standard for settlement facilitator's fees, if separate.
Never value of the matter – not even as originally pleaded.

Who?

Sole arbitrator or Chair.
Party appointed arbitrator.
All three arbitrators.

Preservation of integrity.

Arbitration process, *supra*.
Settlement facilitation process.
Arbitrator/settlement facilitator.

4. Some situations.

Both arbitration and settlement discussions look backward.

Who did what to whom; who owes what to whom?
One-off; no prior relationship.
Relationship derailed; parties polarized.
Difficult for arbitrator to facilitate settlement AND preserve integrity.

Arbitration looks backward; settlement discussions look forward.

Relief resulting from breach
Injunction, specific performance, instalment payments, running royalty, best efforts required.
Restructure relationship going forward – e.g.
Duties and responsibilities.
Players.
Rights.
Schedules
To facilitate settlement AND preserve integrity, arbitrator/settlement facilitator must find a way to take into account *real interests and needs* of all concerned – especially all parties and their business representatives.
Easiest for arbitrator to facilitate settlement discussion AND preserve integrity IF arbitration looks backward and settlement looks forward.

Does an arbitrator ever hear the full story?

Seldom, if ever, does arbitrator have full information as to each party's real interests and needs from the record of the arbitration proceedings. Restricted by pleadings, law, rules, evidence, and arguments.

What if there is no winner?

At end of day, after substantial expense (monetary and emotional), no party to an arbitration may emerge a winner – even when arbitrator does not split the baby.

Cost v. rewards.

Arbitrator may serve as settlement facilitator relatively inexpensively.
Fully informed and has earned trust of parties.
A new, non-arbitrator settlement facilitator will be more expensive.
In large stakes disputes, this cost may be warranted.

4. Some ground rules.

Arbitrator as settlement facilitator before arbitration has concluded and with prospect of arbitrator resuming role of arbitrator.

Express agreement among all concerned, especially the parties.

In writing or on the record.
Full detail.
Signed by senior management, counsel, and the arbitrator.
Query administering institution?

Arbitrator is to participate only in accordance with specific terms of the agreement.

As facilitator.
As arbitrator.

Arbitrator who must resume role as arbitrator after facilitation has failed will decide only on the merits and only on the record.

No off the record information.
Confidential or otherwise.
Written, oral, conduct (body language).
If unalterably prejudiced against a party, arbitrator must withdraw.
Arbitrator may prepare decision, seal it, and then facilitate.
Arbitrator is not likely to learn any thing materially important or dispositive off the record – absent perjury on the record.

No grounds for disqualifying arbitrator or challenging award.

Arbitrator's participation as facilitator will not be grounds for challenge.
Must be express exception to rules that forbid or discourage arbitrator from facilitating settlement.

Settlement discussions will be confidential and without prejudice.

5. Ground rules (continued)

No hint as to arbitrator's views of the merits.

Parties may agree to the contrary.

Parties must be fully informed as to consequences or learning arbitrator's views on the merits.

Parties must not be, and must not appear to be, coerced.

Must be express agreement re circumstances for expressing arbitrator's views.

Joint v. private sessions

Same assessment to each party, or different.

In writing or oral.

This is different from a proposed basis for settlement.

Arbitrator is not to judge credibility of any witness as a result of settlement discussions.

Whether witness testifies before or after facilitation.

Regardless of what witness says or does.

Regardless of what is attributed to witness by others.

If arbitrator is unalterably biased against a party, arbitrator must withdraw.

Arbitrator is not to judge a party's case in light of an intractable position taken during settlement discussions.

Arbitrator/facilitator may envision objectively fair and practicable solution.

Arbitrator/facilitator may inquire as to pros and cons of what arbitrator/facilitator envisions, but at the end of the day, it must be parties' solution.

If arbitrator is unalterably biased by intractable position or conduct, arbitrator must withdraw.

5. More thoughts.

Knotty issues.

The pathology of the process.

The $20 bill auction.

In cross-cultural negotiation courses I have led, I have auctioned a US$20 bill.
Highest bidder wins.
Next highest bidder pays auctioneer amount of bidder's bid.
In each of ten or more auctions, the US$20 bill has been sold for MORE than US$20!
The bidders have been swept along by the pathology of the process.
Polarization and vindictiveness displace reason and objectivity.

Similarly, in arbitration the process often drives the parties.

The parties do not drive the process.
The parties often cede control to counsel and the process.

Business people should take charge of their disputes.

Business people should craft their own resolutions to their own disputes.

Arbitrator as a facilitator can, in appropriate circumstances, assist the parties in finding a way to satisfy each party's needs and interests.

7. Some Examples

JV claims and counterclaims.

ICC arbitration.
US and German parties.
Damages, lost profits, injunction, specific performance.,
All three arbitrators participated as facilitators; chair played prominent role.
Facilitation was forward looking; arbitration was backward looking.
No settlement; arbitrators resumed their roles as arbitrators and rendered award.

JV claims and counterclaims

ICC arbitration.
US and French parties.
Damages, lost profits, injunction, specific performance.
Two awards on liability issues; evidence in on damages, etc.
All three arbitrators participated.
Chair led and met jointly with all parties, counsel and other arbitrators.
At outset, each party-appointed arbitrators met preliminarily with his appointing party.
Settlement discussions on damages.
Settled.

JV claims and counterclaims.

UNCITRAL arbitration.
US and Canadian parties.
Complex technology; significant future work to be done.
Arbitrators facilitated narrowing of issues to be arbitrated.
Met jointly and privately with parties and their counsel.
Arbitration resumed.

Licensing dispute.

ICC arbitration.
UK and US parties.
Construction of most favored licensee clause dispositive.
After evidentiary hearing and oral submissions, arbitrators facilitated rephrasing of clause.
Parties continued discussions and settled.
No award necessary.

7. Some examples (continued)

JV claims and counterclaims.

AAA arbitration.
US parties.
Multiple parties to JV arrangement.
Only two parties before Tribunal.
Market collapsed, technology disappointing, financial difficulties, other arrangements proposed.
No helpful testimony re who or what failed re technology, market, or financial situation.
AAA had inquired of parties and reported to arbitrators no interest in mediation.
Award to be issued.
Based on limited record.
Will the award meet the real interests and needs of the parties?

ICC arbitration.

French and US parties.
After six frustrating months of failed attempts to agree on a chair, the two party appointed arbitrators mediated with counsel the selection of the chair of the tribunal.