

Paper to be published by the New York State Bar Association in 2009

Med-Arb – an English Perspective

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January 2009

Med-Arb is one of those hybrid processes that is often talked about in England but little practised. Given the issues raised, its lack of use is perhaps not surprising. This paper looks at some of these issues from a legal and practical perspective

A brief outline

Broadly speaking a judge or arbitrator must be seen to be unbiased and each party to a dispute must be given a fair opportunity to present his case and answer that of his opponent. In *Glencot Development and Design v Ben Barrett & Son*², a case referred to throughout this paper, Judge Humphrey Lloyd QC, in contrasting the mediation process with that of adjudication and pointing out the dangers of one person wearing both hats, said:

'The process [mediation] will also be concerned with the commercial interests of the parties which may not be synonymous with their legal rights and obligations. Thus such a person [the adjudicator/mediator] will or may have to listen to arguments and hear things which may be completely irrelevant to the dispute in the adjudication but which might be prejudicial to its determination. Discussions or a mediation of the kind which apparently took place on 29 September are or may be at variance with adjudication. Thus Mr Talbot was correct in making it clear to parties that what he might be doing was a departure from adjudication and in getting their agreement to it. Such agreement was essential. Of course an agreement in advance, even if a formal written agreement, may not be effective in depriving a party of its right to question a later decision on the grounds of apparent or actual bias. There are clearly risks to all when an adjudicator steps down from that role and enters a different arena and is to perform a different function. If a binding settlement of the whole or part of the dispute results, then the risk will prove to be worth taking.'

Can Med-Arb always be relied on to deliver its key perceived benefit of finality?

An obvious risk that parties face in allowing their mediator to render an award following a failed mediation is that the losing party may challenge the award alleging actual or apparent bias. As mentioned later, actual bias is rarely alleged. When it is, the court will need to establish whether there is in fact bias. Usually however the allegation is one of apparent bias. In other words, circumstances exist which raise a suspicion or suggestion that bias could exist. The person making the challenge does not need to go on to allege that the person being challenged is in fact biased. But a successful challenge based on apparent bias is enough!

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² [2001] All ER (D) 384 (Feb)

Section 1 of The Arbitration Act 1996 provides that the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal. It also provides that the parties should be free to agree how their disputes are to be resolved (subject only to public interest safeguards). Section 24(1) of the Act provides that a party may apply to the court to remove any arbitrator if '(a)...circumstances exist that gives rise to justifiable doubts as to his impartiality'. Section 33 of the Act (general duty of the tribunal), provides that the tribunal should act fairly and impartially and give each party a reasonable opportunity of putting his case and dealing with that of his opponent. Section 73 provides that a party can lose its right to object to an irregularity if he doesn't object straight away or within such other time as may be allowed.

In *Glencot Development and Design* Judge Humphrey Lloyd QC set out a test for determining whether an adjudicator should continue to act as such having, half way through the adjudication, donned a mediator hat to try and broker a settlement. The mediation phase of the process failed to produce a settlement and the adjudication resumed. However the defendant indicated to the adjudicator that he should withdraw. The adjudicator took counsel's advice and decided not to. The defendant then sent a formal notice saying '

"Having considered the matter of impartiality extremely carefully and taken appropriate legal advice, we regret to inform you that we consider your capacity to make an impartial decision in the Adjudication has indeed been compromised by your presence at the partners settlement negotiations".

The claimant wanted the adjudicator to continue and he did so, ultimately giving a decision in its favour. The claimant sought to enforce the award by way of summary judgment but the application was successfully resisted on grounds of impartiality on the part of the adjudicator. Much of Judge Humphrey Lloyd QC's decision was given over to a discussion of impartiality and the test for apparent bias. The judge referred extensively to the House of Lords decision in *R v Gough*³ and, in particular, to the judgment of Lord Goff who, at the end of his (Lord Goff's) judgment summarised his understanding of the law in this area.

'In conclusion, I wish to express my understanding of the law as follows. I think it possible, and desirable, that the same test should be applicable in all cases of apparent bias, whether concerned with justices or members of other inferior tribunals, or with jurors, or with arbitrators.

Furthermore, I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time. Finally, for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to

³ [1993] UKHL 1 (20 May 1993)

ensure that the court is thinking in terms of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him;

Earlier in his judgment, it was noted by Lord Goff that *'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...'* This is a point also made by Lord Woolf (in *R v Gough*). Judge Humphrey Lloyd, in *Glencot*, in referring to these comments of Lords Goff and Woolf, stated that this is why it is necessary for there to be an objective test for apparent bias, the views of the person involved (the med-arbitrator) being either irrelevant or not determinative. He went to say that *'The test is whether the "circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility or a real danger, the two being the same, that the tribunal was biased"'*

It is important to appreciate that in *Glencot* the court was dealing with a case of apparent rather than actual bias, Lord Woolf commenting (in *R v Gough*) that *'...except in the rare case where actual bias is alleged, the court is not concerned to investigate whether or not bias has been established.'*

No absolute prohibition

In *Specialist Ceiling Services Northern Limited v ZVI Constuction (UK) Limited*⁴ a case in which an adjudicator had knowledge of without prejudice negotiations, the Judge appeared to have had little difficulty in finding that there was *'no objective indication of bias or unfairness in this adjudication'*. However, this was a case where the adjudicator merely had knowledge of negotiations; he had not actively participated in such negotiations. Nevertheless, it cannot be said that *Glencot* lays down any absolute prohibition on Med-Arb but perhaps more a 'marker' for the risks that exist and an illustration of how it can all go wrong.

There is no shortage of English cases arising out of arbitral awards where the losing party takes the view that the decision should be challenged. Such challenges have included cases of alleged apparent bias e.g. *ASM Shipping Ltd of India v TTMI ltd of England*⁵ referred to below. Whilst the court has generally been supportive of the arbitral process and upheld awards, where parties are looking for a speedy conclusion to their dispute, who needs the distraction?

Given the risks involved in a Med-Arb process, two questions arise. First can those risks be mitigated and secondly, are the risks, whether or not mitigated to extinction, worth

⁴ [200]4 BLR 403

⁵ [2005] EWHC 2238 (Comm)

running? Before considering these two questions, perhaps we should consider the nature of the risk in a little more detail

The nature of the risk

The discussion can perhaps best be put in context by again quoting from Judge Humphrey Lloyd QC's judgment in *Glencot* '*...such a person [the adjudicator/mediator] will or may have to listen to arguments and hear things which may be completely irrelevant to the dispute in the adjudication but which might be prejudicial to its determination.*

Mediators work in secret. We hear things from one party, sometimes designed to prejudice us against the other party, which that other party is blissfully unaware of. 'They have done this before you know?' 'They are in dispute with XYZ limited who they also tried to rip-off' 'They have had several judgments against them all arising in similar circumstances' 'They are serial copyists'. This isn't particularly exceptional behaviour. It's all part of the rough and tumble of mediation. Gone are the days (if they ever existed) of parties suffering outbreaks of common sense, reasonableness and benevolence on hearing folksy stories from the mediator about the last orange in the fruit bowl, increasing the pie and win-win situations. It gets nasty sometimes. People are bad-tempered. Mediators soak up a lot of anger, bile and vitriol directed against the 'other party' – some of it real, some of it for 'the gallery'. Who knows, who cares because, at the end of the day, we are not (usually) going to be making a decision that permanently affects the parties' rights. Unless of course it is a Med-Arb!

So, to cut to the chase, can I say, hand on heart, that what I have been told in private about the 'other side' or their case during the mediation phase of a Med-Arb, which they (the 'other side') have not had an opportunity to respond to (indeed they are likely to be unaware of what I have been told), would not or could not influence my views as to either party's case and, ultimately, my decision when it comes to the arbitration phase of the process? I think it would be arrogant of me in the extreme to suggest that there isn't a chance that I could be so influenced. And it is that chance, however remote, that has always led me to say 'No' when asked if I would be willing to undertake a Med-Arb.

And for all those mediators out there who feel able to brush off whatever irrelevancies they might be told in private and remain totally unbiased in rendering their decision, I would remind them of the words of Lord Goff in *R v Gough*, that '*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...*'

The mediator, who goes on to act as arbitrator, really shouldn't be the one deciding if there is or isn't a danger of bias.

Mitigation of risk (waiver)

How can the winning party prevent the losing party challenging the award arising from a Med-Arb? By agreement perhaps?

Before exploring this further, I should mention in the interests of balance that some jurisdictions and institutional rules expressly provide for Med-Arb, with the parties consent. And generally, shouldn't consenting adults be free to choose how their own disputes are to be resolved? If they sign a Med-Arb agreement, surely that's enough to waive their rights to later object to an award based on apparent bias. After all, they know broadly the way the mediation will work – private meetings, fluidity of process etc.

In *Glencot* although a waiver argument was run against the defendant and failed (the judge, noting that a challenge to an adjudicator on the grounds of apparent bias was such a serious matter that it would be 'extreme' to elevate a failure to comply with a request of the adjudicator, to notify him immediately if it was thought his position was compromised, to an affirmation of jurisdiction), it seems clear that in some circumstances parties can be held to have waived their right to challenge on grounds of apparent bias.

Waiver

In *Smith v Kvaerner Cementation*⁶ the Court of Appeal, in a case arising out of a judge who had acted for a group of companies of which one was a party in a case he was deciding, Lord Phillips CJ said:

"The basic principle is that waiver requires that the person who is said to have waived "has acted freely and in full knowledge of the facts" – per Lord Browne-Wilkinson in R v Bow Street Magistrate, ex parte Pinochet (No 2) [2000] 1 AC 119 at 137. In Locabail (UK)Ltd v Bayfield Properties Ltd [2000] QB 431 at p. 475 this court commented: "a party with an irresistible right to object to a judge hearing or continuing to hear a case may...waive his right to object. It is however clear that any waiver must be clear and unequivocal, and made with full knowledge of all the facts relevant to the decision whether to waive or not."

In Millar v Dickson [2001] 1 WLR 1615 at 1629 Lord Bingham of Cornhill observed: "In most litigious situations the expression "waiver" is used to describe voluntary, informed and unequivocal election by a party not to claim a right or raise an objection which it is open to that party to claim or raise. In the context of entitlement to a fair hearing by an independent and impartial tribunal, such is in my opinion the meaning to be given to the expression."

So any waiver must be informed and clear.

But, a party is not permitted to hedge, to hang on to a possible challenge on grounds of bias pending the award, only to complain if they lose but not if they win.

⁶ [2006] EWCA Civ 242

Thus in *ASM Shipping Ltd of India v TTMI Ltd of England*⁷ Morison J said:

'In my judgment, by taking up the award, at the very least, the owners had lost any right they may have had to object to X QC's continued involvement in that part of the arbitral process. It is unacceptable to write making further objections after the hearing was concluded. X QC had made his decision not to recuse himself, rightly or wrongly, at the beginning of the third day. Owners were faced with a straight choice: come to the court and complain and seek his removal as a decision maker or let the matter drop. They could not get themselves into a position whereby if the award was in their favour they would drop their objection but make it in the event that the award went against them. A 'heads we win and tails you lose' position is not permissible in law as section 73 makes clear. The threat of objection cannot be held over the head of the tribunal until they make their decision and could be seen as an attempt to put unfair and undue pressure upon them.'

Would a Med-Arb agreement constitute an informed waiver to object on grounds of apparent bias? The court will apply an objective test. Are there circumstances that *'would lead a fair-minded and informed observer to conclude that there was a real possibility or a real danger..... that the tribunal was biased'*

A judge, considering an allegation of apparent bias, might consider what the challenging party could tell him of the mediation process that raises a suggestion of impartiality at the arbitration stage. Thus, he might be told that the mediator continually stopped him from interrupting the other side when in joint session even though his opponent was talking absolute nonsense. He might be told that, in private session, the mediator embarked on some strenuous reality testing which, despite the usual health warnings, gave the challenging party the distinct impression that the mediator believed everything he was being told by the other side. He might be told that the mediator expressed concern that the challenging party was making such a low (or high) offer which indicated an unhealthy attraction to the other side's case. He might be told that the challenging party's overall impression was that the mediator was pushing him (the challenging party) more than the other side. He might be told that the mediator always appeared more relaxed with the other party, often chatting to them by the coffee machine. He might be told that the mediator spent far too much time with the other side. He might be told that the other side had a key witness in their team who the mediator would have spoken to at length, even though there was no opportunity to challenge what that witness was saying. The possibilities are endless.

Even if the mediator, at the point of switching roles and becoming an arbitrator, asks the parties to re-confirm their willingness for him to act as arbitrator, any waiver will only bind the parties if it is on a fully informed basis. If something emerges during the course of the arbitration stage that raises fresh doubt as to bias, it might be that such re-confirmation of the waiver becomes ineffective. For instance, one party may know something about the mediation stage of the process which they share subsequently with

⁷ [2005] EWHC 2238 (Comm)

the other party which makes them wonder about the impartiality of the mediator turned arbitrator. Or it may come out that the mediator, in private session took, part in a conference call to certain employees of a party who the other side assumed would not be involved in the mediation.

Is the risk worth running?

Despite the risks, as Judge Humphrey Lloyd QC said in *Glencot*, ‘*If a binding settlement of the whole or part of the dispute results, then the risk will prove to be worth taking*’. I would substitute ‘*might*’ for ‘*will*’ in that sentence.

Maybe some will say the risk *is* worth taking. But before they do they should consider a few other more practical issues, the most important of which is the possibility of reducing the chances of the mediation working by having agreed a Med-Arb process.

Self fulfilling prophecies.

Two issues arise. First, will the parties really be as open with the mediator if they know he may go on to render a decision based on the merits. Won’t they be a little more guarded in their dealings with him? Might they be concerned not to be seen to be too keen to settle, not wishing to give away any possible sign of lack of faith in their own case? Knowing the mediator may soon wear another hat could affect that all important dialogue and rapport that needs to be established quickly if he his to be effective. Secondly, if the parties know there is an easy and available alternative option of achieving finality, namely have the mediator (as arbitrator) make a decision for them, they may not work as hard at the mediation phase as they otherwise might do.

Other considerations

There are of course several other considerations in this debate but let me mention one or two of the most important. When I was in private practice I used to appoint both arbitrators and mediators. But the considerations would be very different. For instance, in a mediator I might want someone who I thought could engage on a human level with my clients or, just as importantly, those on the other side. Could he bend elbows at the bar? Would he be robust enough to deal with stroppy clients in a commercial (as opposed to a more formal) setting? These are not considerations that would be at the forefront of my mind in the appointment of an arbitrator.

Moreover, I would prepare very differently for the two processes. I would prepare clients very differently. Everything about the two processes is so different that parties really should think twice, particularly given the inherent risks of challenge to any award, about giving over absolute primacy to efficiency and having the same person do both jobs.

Conclusion

I am not a fan of Med-Arb but that doesn't mean that the two processes should not be used together. Very recently I spoke to an arbitrator about having one aspect of the dispute he was arbitrating mediated. Indeed I think mediation should be used much more in international arbitration cases. But I also believe that one person should not do both jobs!