**MED-ARB: HOW TO MITIGATE THE RISK OF SETTING ASIDE OR REFUSAL OF RECOGNITION AND ENFORCEMENT OF A MED-ARB AWARD**

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# Introduction

Albert Einstein reportedly said: “The true sign of intelligence is not knowledge but imagination.”[[1]](#footnote-1) One field in which we can observe the human imagination is the field of dispute resolution mechanisms. Parties can choose among litigation, arbitration, mediation, negotiation, parenting cooperation, early neutral evaluation, mini-trial, settlement conference, and referral to the expert, and this enumeration is not even exhaustive.

One of the numerous options available to parties to solve their disputes is a process called med-arb. Although advantageous in many respects, this fairly recent alternative dispute resolution mechanism is not without its problems. Can those problems be overcome? This is what this paper seeks to examine.

The paper will be divided in three main parts. In the first part (II), we will issue a brief reminder about what med-arb is (A and B) and look at the reasons why med-arb has been developed in recent decades (C).

The second part of this paper (III) will be dedicated to an analysis of the issues raised by the hybrid nature of med-arb. Emphasis will be placed on four specific issues that might have a direct impact on the viability of an arbitral award rendered in the context of a med-arb. Those issues are the rule of confidentiality (A), the right to know of and to confront the other side's arguments (B), impartiality (C) and independence (D).

Finally, we will assess med-arb and its potential benefits in light of the four analyzed issues. Has our imagination gone too far? Or is this innovative form of ADR worth keeping, and if so, under what conditions? Is it possible to mitigate the risk of setting aside or refusal of recognition and enforcement of a med-arb award? This will be the subject of the last part of this paper (IV).

# Med-arb: a hybrid form of ADR

## Definition of med-arb

As the word indicates, med-arb is an alternative dispute resolution mechanism that combines mediation and arbitration in sequence in a single case. Mediation is a “voluntary, confidential process in which a third-party neutral intervenes to assist the disputants to negotiate a mutually acceptable resolution.”[[2]](#footnote-2) Arbitration is“the most formal alternative to court adjudication wherein disputing parties present their case to one or more impartial third person who are empowered to render a binding decision.” Med-arb, then, refers to “the hybrid process in which mediation is combined with arbitration*.*”[[3]](#footnote-3)

Med-arb is a two-stage dispute resolution mechanism. In the first stage, parties try to come to an agreement with the help of a third-party neutral called a med-arbiter, who first assumes the role of a mediator. If the parties do not solve their dispute during this first stage, they enter the second stage of the process, the arbitration phase, in which the med-arbiter switches roles from mediator to arbitrator. In that second stage, the parties relinquish control over decision making to the arbitrator, who conducts an adjudicative hearing to decide either the entirety of the dispute or the outstanding issues, if the parties reached a partial agreement in the mediation phase.[[4]](#footnote-4)

The parties may also choose two different neutrals to serve as the mediator and the arbitrator in their dispute. However, this paper will focus on the situation, sometimes referred to as “same-neutral med-arb,” where the parties appoint the same neutral to serve both functions.[[5]](#footnote-5)

Finally, it should be stressed that med-arb is a voluntary process. There can be no med-arb without an agreement of the parties to use this type of dispute resolution mechanism.[[6]](#footnote-6)

## How does it work in practice?

Both the mediation phase and the arbitration phase of a med-arb are closed to the public. It is therefore difficult to know what exactly goes on behind the closed doors of a med-arb.[[7]](#footnote-7) Beyond the fact that all med-arb proceedings combine mediation and arbitration, the process may differ considerably from one med-arb to another. The overall structure and conduct of a med-arb proceeding will ultimately depend on the parties (including the specifications they have made in their dispute resolution clause or contract) and on the med-arbiter (her education, her experience, and her preferred approaches, which may vary based on the specific circumstances of each case). For instance, the usual definitions of “med-arb” imply that the mediation phase and the arbitration phase are separated, but with the agreement of the parties, the med-arbiter could also move back and forth between mediation and arbitration.[[8]](#footnote-8)

Med-arb should be distinguished from other alternative dispute resolution mechanisms like early neutral evaluation[[9]](#footnote-9) or, in the context of family law, parenting coordination.[[10]](#footnote-10) It also ought not to be confused with arb-med, in which the arbitral hearing occurs before the mediation session. In an arb-med, the arbitrator will usually issue an award and put it in a sealed envelope before the parties start mediating. If the parties reach an agreement, the neutral tears up the envelope and the decision will never be revealed. If they do not, the arbitrator reveals the award.[[11]](#footnote-11) Arb-med does not raise the same issues as those created by med-arb. However, it can be more time-consuming and more expensive.

## Why was med-arb developed?

### General context

In recent years, the ADR community has seen increasing experimentation with med-arb, noting that med-arb proceedings are a “frequent feature in many mass-tort settlement ADR programs that have been reviewed and approved by the courts in recent years.”[[12]](#footnote-12) As early as 1997, a survey indicated that med-arb was the preferred ADR procedure for 23% of the survey's respondents in the service industry, and 13% in the transportation, communications, and utilities group.



*Source: see footnote [[13]](#footnote-13)*

More recently, Robert N. Dobbins noted that hybrid processes, particularly med-arb, were “growing in popularity.”[[14]](#footnote-14) And a 2008 survey among practitioners indicated that process concerns about med-arb were decreasing.[[15]](#footnote-15)

How can we explain the growing interest in med-arb? The process first arose in the public sector[[16]](#footnote-16) before gaining popularity in the private sector. According to Brian A. Pappas, interest in med-arb is rising among professionals who provide both mediation and arbitration services, because of the increasing legalization of ADRs: “Mediation is becoming more evaluative and adversarial, arbitration and litigation are increasingly similar, and arbitration is viewed as too costly, too inefficient, and effectively, the ‘new litigation.’” [[17]](#footnote-17)Med-arb seems to offer a process combining the best of mediation and arbitration: it guarantees a final resolution of the conflict (“finality”) but leaves some room for settlement (“flexibility”), which promotes “efficiency and cost-savings over the use of arbitration.”[[18]](#footnote-18) In short, med-arb proponents consider that it resolves the problems of mediation and arbitration: “The Med-Arb ‘solution’ is to combine arbitration’s finality with mediation’s flexibility in order to gain efficiency and the best of both processes.”[[19]](#footnote-19)

### Med-arb’s appealing features

Features contributing to the appeal of med-arb are many and, as mentioned, include finality, efficiency and flexibility.

A med-arb process offers the parties greater flexibility when compared to pure arbitration, because the parties can try to resolve their dispute by themselves in a first step, which is especially valuable if the parties want to preserve their relationship. Therefore, they have more control over the overall dispute resolution process.

Parties are also sure to find a solution to their dispute, either by their amicable agreement or by the arbitral award. Med-arb’s finality guarantees the parties that a decision will be made if they cannot settle by themselves. This guarantee does not exist in a pure mediation, where the parties who do not reach an agreement will have to incur the expenses of a new process (e.g., arbitration, litigation).

Relatedly, med-arb is also generally regarded as an efficient dispute resolution mechanism. Once the parties recognize that no agreement can be reached, the arbitration phase can go relatively fast. The med-arbiter will already know the issue, the facts, and the positions of the parties upon entering the second phase of the med-arb. Contrary to a “pure arbitrator,” the med-arbiter will be able to carry out her mission without having to study the case from scratch. The med-arbiter may thus not need as much time to decide the case as a judge or an arbitrator would.[[20]](#footnote-20)

Since the parties are supposed to try to find a solution by themselves in the presence of the potential arbitrator of their case, the parties to a med-arb may be incentivized to be more reasonable.[[21]](#footnote-21) For instance, “research in commercial uses of med-arb suggests that clients tend to be more conciliatory and less hostile in med-arb as compared to pure mediation (…) Clients know that they mediate in the shadow of arbitration; accordingly, they may be more likely to reach a decision.”[[22]](#footnote-22) Hence, med-arb may be useful in a particularly high-conflict situation where the parties (or at least one of them) tend to be unreasonable. This latter aspect may have the effect of encouraging the parties to resolve their dispute more rapidly, which can have a positive impact on the overall cost of the process.

As just mentioned, cost might be an appealing factor too. A med-arb proceeding will likely be less expensive than litigating the dispute in court. By opting for a “same-neutral med-arb,” the parties will contract with one person to deliver two services and will thus most likely pay less than if they had to appoint two different persons to fill the roles of mediator and arbitrator.[[23]](#footnote-23)

Another advantage of combining mediation and arbitration is that it may allow the parties to substantially narrow their dispute during the mediation phase, leaving only the outstanding issues for the arbitration stage. In some cases, it may be useful to the parties for the arbitration of the outstanding issues to take place “as soon as possible following the narrowing of the dispute accomplished during the mediation phase. (…) If the mediator has earned their confidence, the parties may prefer to have the mediator decide the remaining issues over any other neutral*.*”[[24]](#footnote-24) Parties could also ask the med-arbiter to decide between the parties’ last best offers, or within the range bounded by those offers.[[25]](#footnote-25)

These factors may make med-arb particularly attractive for parties involved in small cases that do not warrant big dispute-resolution costs. Parties also might be willing to use med-arb in bigger disputes that they would like to solve in a fast, efficient and cost-effective manner over which they would like to retain relative control.[[26]](#footnote-26)

# Four potentially problematic issues regarding med-arb

Despite all the advantages to parties, in allowing the same neutral to play the role of mediator and arbitrator in the same case, med-arb raises important practical, ethical, and legal issues.

The choice of a med-arbiter might present a practical difficulty. Although one might think that the parties can save time in the appointment process, since they only need to find one person instead of two to intervene as a mediator and arbitrator – which may be true in some cases – the parties might actually have trouble finding and agreeing on the choice of a neutral who has the (very unique) skills required to assume both functions. If the med-arb is not properly conducted, it might also be difficult for the parties to know exactly when the mediation phase has ended and when the arbitration phase has begun. Who should decide that the mediation has failed and that it is time for the parties to enter arbitration? When should such a decision intervene? Also, efficiency – in theory one of med-arb’s advantages – might not be achieved if the set of facts relevant to mediation differs from the facts pertinent to the arbitration.[[27]](#footnote-27)

The hybrid nature of med-arb may also alter the behavior that parties would have in a “pure” mediation. Because they know that their mediator can potentially become their arbitrator, parties may be reluctant to fully participate in the mediation process and may avoid talking openly from fear that what they would say during the mediation could be used against them in the arbitration phase.[[28]](#footnote-28) The parties may also seek to ingratiate themselves with the neutral during the mediation phase: “Perhaps this could manifest itself in the parties acting as if they are on their ‘best behavior,’ but it could also involve deception or trying to paint the opposing party in a negative light.”[[29]](#footnote-29)

Last but not least, med-arb raises the risk, analyzed in detail below, of the neutral using confidential information disclosed in the mediation (particularly in caucus) in fashioning the arbitration award. Furthermore, the right to be heard and the med-arbiter’s independence and impartiality may also be at risk, as explained in the next sections of this paper.

Those reasons explain why acceptance of the “same-neutral med-arb” system is not universal. For instance, the American Arbitration Association recommends that the same person not serve as both mediator and arbitrator in the same case: “Except in unusual circumstances, a procedure whereby the same individual who has been serving as a mediator becomes an arbitrator when the mediation fails is not recommended, because it could inhibit the candor which should characterize the mediation process and/or it could convey evidence, legal points or settlement positions ex parte, improperly influencing the arbitrator*.*”[[30]](#footnote-30) The AAA nevertheless offers a sample med-arb clause to those parties who would like to use med-arb to resolve their disputes: “If all parties to the dispute agree, a mediator involved in the parties' mediation may be asked to serve as the arbitrator.”[[31]](#footnote-31)

This chapter will focus on four major issues that may hinder the process of the execution and recognition of the arbitral award rendered at the end of a med-arb. They include: (A) the rule of confidentiality in mediation, (B) the right to know of and to confront the other side’s argument, (C) the rule of impartiality, and (D) the rule of independence. In the last chapter (IV), we will discuss whether these issues can be addressed in such a way that the risk of challenging med-arb awards may be reduced.

## Med-Arb and Confidentiality

### Presentation of the Issue

The Uniform Mediation Act (UMA), which has been adopted in twelve jurisdictions and introduced in another two,[[32]](#footnote-32) provides parties to a mediation with a general privilege[[33]](#footnote-33) protecting the mediation communications from involuntary disclosure in later proceedings,[[34]](#footnote-34) explicitly including the arbitral proceedings.[[35]](#footnote-35) The privilege may be waived, but if fewer than all parties waive the privilege, the non-waiving party will be able to prevent the use of mediation communications in the subsequent procedure.[[36]](#footnote-36) Moreover, even the states that have not adopted the UMA may also prohibit the use of mediation communications in other proceedings. And further complicating the situation, some states may regulate the mediation communications within a specific subject area (such as labor law in Massachusetts).[[37]](#footnote-37)

The confidentiality of mediation communications functions on two levels. First, this rule applies to the joint sessions held during a mediation and thus binds all the mediation participants (the parties and the mediator). This is what I call the first level of confidentiality. But this rule also operates at a second level, by protecting the information communicated by one party to the mediator during what are called “caucuses.” A caucus is a “private meeting between mediator and one party to explore new options, to clarify proposals, to allow the parties to cool down, to gather facts for the mediator’s use or to give the parties a break from negotiations.”[[38]](#footnote-38) This private session, requested by either the mediator or one of the parties, also allows the other party to meet with his/her own party members, make the necessary phone calls, and rest.[[39]](#footnote-39) Caucuses can be very useful to the mediator to facilitate agreement when the conversations in the joint sessions are not constructive anymore: each party has the opportunity to talk in private to the mediator with the assurance that all the information she does not want to share with the other party will remain confidential. This is what I call the second level of confidentiality.

In mediation, it is thus perfectly conceivable that the process ends with some information disclosed to the mediator but still withheld from the other parties. This asymmetry is not problematic because the mediator does not have any decision-making power—her role is to help the parties to find a solution to their dispute, not to arbitrate the conflict.

By contrast, this unilateral exchange of information from one party to the neutral, to the exclusion of the other parties, is far more problematic when the neutral is invested with a decision-making mandate, as in the case of the arbitrator. Most ethical rules governing arbitrations expressly forbid *ex parte* contacts with the arbitrator, i.e. in the absence of the other parties to the arbitrated dispute. For instance, the American Arbitration Association’s Commercial Arbitration Rules provide that “No party and no one acting on behalf of any party shall communicate ex parte with an arbitrator or a candidate for arbitrator concerning the arbitration,” except for the purpose of selecting a candidate arbitrator.[[40]](#footnote-40)

If information in a mediation can be communicated exclusively to the mediator during caucuses, and if such unilateral communication of information is strictly forbidden in an arbitration, what is the correct rule in med-arb, which is supposed to combine the characteristics of mediation and arbitration?

### Confidentiality Issue In Caucuses

There are different ways to address the question of the communication of confidential information during caucuses.

*Option 1: Confidential information can be communicated during caucus but cannot be used in the arbitration phase*

A first way to address that question would be to allow the med-arbiter to hold caucuses during which confidential information can be communicated to her by one party, but to prohibit the med-arbiter from using that confidential information in her arbitral deliberations. This option would both preserve the confidentiality of caucuses and respect the rule preventing the arbitrator from deciding based on *ex parte* communication. Hence, this option seeks to maintain the specific features of, respectively, mediation and arbitration, making med-arb a simple juxtaposition of a “pure” mediation and a “pure” arbitration.

Martin C. Weisman has adopted this position, arguing that the med-arbiter must be able to disregard mediation communications during the arbitration phase and that nothing disclosed in caucus can be considered in the arbitration phase unless introduced by either party independently during the arbitration.[[41]](#footnote-41) The med-arbiter should thus “forget” about all the confidential information she was told in private sessions.[[42]](#footnote-42)

Is that solution realistic? Studies show that “judges frequently cannot ‘close the valves of (their) attention.’ The presumption that people can ignore what they know, or use it for some purposes but not for other purposes, may sometimes be true, but often is little more than a convenient fiction.”[[43]](#footnote-43) This is why the authors of those studies, Wistrich, Guthrie and Rachlinski, recommend, for instance, that a judge who supervises settlement discussions not serve as the fact finder in the same case.[[44]](#footnote-44) Further, research has shown that judges are less able to ignore inadmissible information when making determinations that they consider less amenable to judicial review.[[45]](#footnote-45) Those findings have led Brian A. Pappas to write, in response to Martin C. Weisman: “If judges are unable to reliably disregard information, how can we expect arbitrators (who face little risk of review) to not consider mediation communications during the arbitration phase? (…) Being human means that we are not completely in control of our thought processes*.*”[[46]](#footnote-46) Accordingly, even the most ethical med-arbiter may be challenged by a solution of “deliberate amnesia.”

*Option 2: Confidential information may be communicated during caucus but has to be disclosed to the other parties later on in the mediation*

In a second option, a med-arbiter would be permitted to hold caucuses during the mediation stage, but everything said during those private sessions would have to be disclosed to the other parties at some point during the mediation.[[47]](#footnote-47) In this second option, the parties would know that anything they tell to the med-arbiter during caucuses would have to be communicated to the other party later on in the mediation phase. In such a framework, the purpose of caucusing would be limited to facilitating the dialogue between the parties. Because it might be difficult to reveal some things in front of all of the participants of the mediation, caucuses as described here would enable a party to reveal some information to the mediator first, and then, as a second step, disclose that information to the other parties, with the help of the mediator, if necessary.

However, this option is not satisfactory either, because it does not guarantee the appearance of impartiality. A party could be legitimately concerned that not all of the information that has been communicated to the med-arbiter during caucuses will be disclosed later in the mediation. Moreover, this option could end up working against the parties, because mediation is supposed to be a safe place for discussion and open dialogue between the parties and also between the parties and the mediator. Consider the situation in which one party feels comfortable enough to start telling the med-arbiter confidential things that she does not want to be known by the other parties. That party would have no other choice than to disclose that confidential information to the other parties. However, it would be contrary to the spirit of mediation in my view to “punish” the party for being “too ready” to talk openly to the mediator.

*Option 3: No caucus can be held in a med-arb*

The third option would consist of preventing the med-arbiter from holding caucuses. In this scenario, all the information disclosed by one party would be communicated to the mediator, as well as the other parties, at the same time, during the joint sessions.

This third option is the only one that, from a strictly legal perspective, does not raise any issue. It is true that option 3 is tantamount to depriving the med-arbiter of a powerful tool in the mediation phase. Many praise the efficiency of caucusing in mediation.[[48]](#footnote-48) However, one should not forget about the specificities of med-arb. It is quite common that a mediator decides to caucus when she feels that the tension between the parties is too important to generate constructive discussions. But we have already seen that parties may be incentivized to be more reasonable in a med-arb than in a “pure” mediation because they know that the med-arbiter is empowered to decide the final outcome of their case if they cannot find an agreement (see *supra*, p. 9). We can thus assume that the situations where caucuses would be necessary or useful would be less likely to occur in a med-arb than in a pure mediation. Of course, caucuses are not limited to situations where the parties are being unreasonable. There are other reasons why a mediator might want to caucus, for instance, when a party seems a bit lost or feels pressured in the process. In those cases, unfortunately, the inability of the med-arbiter to ask for a private session with a party might be a real disadvantage. Nevertheless, this disadvantage compared to a pure mediation is, in my opinion, acceptable, because med-arb offers a guarantee that a pure mediation does not: the parties are certain that their dispute will be solved at the end of the process (through the mediation phase or if not, through the arbitration phase). Of course, this third option reinforces the counsels’ and the med-arbiter’s duty to provide accurate information to the parties before the med-arb starts. In such a scenario, the parties’ counsels and the med-arbiter should ensure that the parties have a clear understanding of what a caucus is, and what its advantages are, and that they would be deprived of private sessions with the neutral if they opted for a med-arb rather than for a pure mediation.

### Confidentiality Issue in Joint Sessions

We have addressed the issue of confidentiality in the context of caucus (what I called the second level of confidentiality in mediation, which binds one party and the mediator). What about the confidentiality issues raised by the general mediation process (what I called the first level of confidentiality in mediation, which binds all the participants in a mediation – the parties and the mediator), beyond the confidentiality issues specific to private sessions?

According to some authors, the confidentiality protecting mediation implies that the med-arbiter in the arbitration phase can only use the pieces of information that a “pure arbitrator” would have at her disposal: namely the elements contained in the file of the case or the elements that would be exposed by the parties during the arbitral hearings.[[49]](#footnote-49) This position results from a strict interpretation of the different acts (such as the Uniform Mediation Act), statutes or guidelines providing that the mediation communications cannot be used in other proceedings, including arbitral proceedings, with no exception for med-arb.

When taking over the role of the arbitrator, the med-arbiter obviously knows already the facts of the case and, depending on how far the mediation process went, potentially knows more than what a “pure arbiter” could find in the file of the case, including the feelings of the parties, their personal past, the history of their personal relationship, their underlying conflicts, and more. Should the med-arbiter forget about everything she heard while acting as a mediator that has not been formally discussed in the arbitration phase? Does the first level of confidentiality in mediation prevent the med-arbiter from making use of that additional information in her arbitral deliberations?

I do not think so. We have already seen that “deliberate amnesia” is not a reliable solution, since human beings struggle to ignore information of which they are aware. More importantly, “deliberate amnesia” would not be consistent with the decision of the parties to opt for med-arb. Med-arb is a voluntary process: the parties to a med-arb have chosen, among a broad variety of dispute resolution mechanisms, a kind of ADR precisely characterized by the fact that the mediator is supposed to turn into an arbitrator should the parties reach an impasse in the mediation phase.[[50]](#footnote-50) As explained above (see pp. 8-9), one of the reasons why parties might choose med-arb over pure arbitration is that they wish to avoid having to re-explain the case from scratch to a new arbitrator, in the interest of economy and/or efficiency. Moreover, the parties have chosen the specific track of mediation to start their dispute resolution process. They have thus chosen a form of ADR centered on discussions that are generally more focused on the parties’ interests than on their positions, which is a kind of discussion normally not held during arbitration proceedings. Is the choice of med-arb not an indication that the parties actually wish the med-arbiter to rely on the in-depth knowledge of the case she acquired during the mediation phase? If not, what would be the point of appointing the same neutral to perform as mediator and arbitrator in the same dispute?

The different regulations prohibiting the use of mediation communications in subsequent arbitration proceedings do not account for the situation where the parties have deliberately chosen the same person to be the mediator and the arbitrator of their dispute. I think that those rules should be adapted to take into account the specific situation of a “same-neutral med-arb.”

Currently, the med-arbiter is only allowed to take into account mediation communications in fashioning her award if the parties have expressly consented to it in writing. The case law demonstrates that without such an express consent, a losing party who can prove the use of mediation information by the med-arbiter during the arbitration phase can successfully challenge the med-arb award.

In *Bowden v. Weickert*, for instance, the Ohio Court of Appeals vacated a med-arb award because the med-arbiter clearly used mediation communications to fashion it. The court reasoned: “the arbitrator had a duty to remain impartial (…) and to protect the confidentiality of all mediation communications.”[[51]](#footnote-51) Hence, the med-arbiter could only rely upon evidence presented at the arbitral hearing when crafting his arbitration award. Because he failed to do so, the Court concluded that he had exceeded his authority. The Court nevertheless recognized the parties’ right to engage in med-arb, but some rules had to be respected “at the outset:”

At a minimum, the record must include clear evidence that the parties have agreed to engage in a med-arb process, by allowing a court-appointed arbitrator to function as the mediator of their dispute. The record must also contain: (1) evidence that the parties are aware that the mediator will function as an arbitrator if the mediation attempt fails; (2) a written stipulation as to the agreed method of submitting their disputed factual issues to an arbitrator if the mediation fails; and (3) evidence of whether the parties agree to waive the confidentiality requirements imposed on the mediation process by (the Ohio law) in the event that their disputes are later arbitrated.[[52]](#footnote-52)

The same year, the Texas First District Court of Appeals concluded that: “Just as it would be improper for a mediator to disclose any confidential information to another arbitrator of the parties' dispute, it is also improper for the mediator to act as the arbitrator in the same or a related dispute without the express consent of the parties*.*”[[53]](#footnote-53) Three years later, a Massachusetts Superior Court ruled that any waiver of the mediation privilege had to be clear and explicit by the parties holding the privilege, even in the med-arb context.[[54]](#footnote-54)

In summary, according to current doctrine, med-arb awards rendered based on mediation communications, as opposed to arbitration evidence, may be subject to being vacated under the Federal Arbitration Act or a similar state statute without a proper waiver by the parties allowing the med-arbiter to use mediation communications in the arbitration phase.[[55]](#footnote-55)

Given the very nature of the “same-neutral med-arb,” I think that the various statutes, acts and guidelines governing arbitration in the United States should be adapted to take into account the specificities of med-arb. It would be much more consistent with both the characteristics of med-arb and with the choice made by the parties to opt for med-arb rather than for “pure” mediation followed by “pure” arbitration, that the default rule allow the med-arbiter to use mediation information in the arbitration phase, including in fashioning her award. I thus think that in the specific circumstances where the parties have agreed to appoint, in the same dispute, the same person as a mediator and arbitrator, the confidentiality imposed on the mediator should be attached only to the *person* of the mediator and not to the *function* of the mediator. In other words, if the mediator is the same *person* as the arbitrator in the same case, she should not be prevented upon assuming the different *function* of arbitrator from making use of the additional knowledge she acquired during the mediation phase, even if that information would not be provided to a “pure arbitrator” in a typical case.[[56]](#footnote-56)

Two clarifications must be made. First, here I am only considering the mediation information communicated during the joint sessions, as opposed to caucus, which I think should be avoided in med-arb for the different reasons explained in this paper.[[57]](#footnote-57) Second, of course, the parties should remain able to prevent the med-arbiter from using mediation information in the arbitration phase (despite the risks that this artificial solution presents)[[58]](#footnote-58) but, in order to do so, their written agreement should be required. My suggestion is thus to reverse the current default rule: under the rule proposed here, a waiver by the parties would no longer be required to *authorize* the use of mediation communications in crafting the award. Instead, a written agreement of the parties would be necessary to *prevent* such use.

## The right to know of and confront the other side's arguments

The second issue raised by the hybrid nature of med-arb concerns the right to know of and confront the other side’s arguments.

“It is a firmly established rule of common law that a judge or anyone exercising a judicial function must hear both sides of every case: not only the plaintiff or prosecutor, but also the defendant must be heard.”[[59]](#footnote-59) In the United States, this principle is part of the broader concept of “due process.”

Due process also applies to arbitration. Indeed, despite the private nature of arbitration:

Making certain the award is enforceable is one of the most central duties of the arbitral tribunal. If the arbitral tribunal wants to issue an enforceable award, the process has to meet certain quality standards. These minimum quality standards are, of course, procedural. They can be called due process requirements just like the minimum standards in ordinary court procedure. In the same way, they establish the minimum procedural safeguards necessary for someone to be deprived of his property or other rights. As such, they can be considered aspects of such elements as procedural fairness, *opportunity to be heard, and equal treatment* as well as access to justice.[[60]](#footnote-60)

Due process in arbitration thus encompasses the right of the parties to equal treatment[[61]](#footnote-61) and the right to be heard (on a claim or on a fact alleged or on some evidence presented by the other party). The right to be heard in arbitration,[[62]](#footnote-62) or at least the right to “have a meaningful opportunity to be heard”[[63]](#footnote-63) in arbitration proceedings, has been upheld by the American courts on several occasions. Failure to respect those minimum procedural standards would constitute a ground for successfully challenging the award.

Those principles imply that, similar to a judge, an arbitrator can normally make a decision only on the basis of elements that are known by all the parties and on which all parties have been given the opportunity to comment. This is partly why an arbitrator, once appointed, cannot have a private meeting with one party in the absence of the other parties.[[64]](#footnote-64)

Again we see the clash between the core procedural requirements applicable to arbitration and the common practice of caucusing in mediation. The right to be heard and the right to equal treatment in arbitration constitute additional reasons as to why caucuses should be avoided during the mediation phase. By authorizing the use of caucuses in the first part of a med-arb process, the risk is created that the med-arbiter will take into account some information provided by one party without giving the other parties a fair chance to confront that information during the arbitration phase, which constitutes a blatant violation of due process requirements.

What if the parties want to be able to caucus with the med-arbiter during the mediation phase? Given the rights at stake, a simple agreement of the parties to maintain the use of caucus in med-arb is not satisfactory. The parties should at least *expressly* agree, *in writing and in advance*, that the med-arbiter can hold caucuses *and* that the med-arbiter can use the information received during those caucuses in fashioning the award. However, even this precaution might not be sufficient to remove any risk of annulment of the award by court. I am not aware of cases that have addressed that question under US law, but the risk does exist that a court will refuse to enforce an agreement by which the parties actually agree to waive in advance (without any exact knowledge regarding what they are renouncing) their right to confront the arguments made by the other parties during caucuses. The courts could indeed consider that there is more at stake than the sole *private* dispute of the parties and that such agreement might undermine the confidence of the public in the arbitrators’ integrity, for instance. The same is true in an international context. Some jurisdictions are likely to consider for public policy reasons that a party cannot waive in advance his or her rights to due process, or some aspects of due process such as the right to confront the other parties’ arguments.[[65]](#footnote-65)

Therefore, and in addition to the previous developments regarding the confidentiality issue (see *supra*, pp. 15-18), it is safer not to hold caucus in a med-arb, in order to obtain the execution and recognition of med-arb awards.

## Med-arb and Impartiality

We have already seen that the confidentiality rule in mediation and the right to know of and to confront the other parties’ arguments are an obstacle to the use of caucus in med-arb. So is the principle of impartiality, defined as the absence of any inclination or disinclination towards the parties. Indeed, case law indicates that the execution and the recognition of awards rendered in “pure arbitration” are declined for breach of impartiality when it is proven that the arbitrator has had unilateral contacts with one party while the dispute was ongoing.[[66]](#footnote-66) Therefore, the holding of caucus meetings during the mediation phase of a med-arb is likely to lead to the same outcome.

A judge ispresumed to be“impartial until proven otherwise. However, subjective impartiality requires a very delicate effort in judging; judges should endeavor not to have any bias, prejudice, or precondition, and should avoid the *appearance* of favoring or hindering any party to a case*.*”[[67]](#footnote-67) No matter how righteous the med-arbiter is, the simple fact that a party meets the arbitrator of their case in the absence of the other parties is enough to make those parties fear that the med-arbiter is no longer impartial.[[68]](#footnote-68)

The style adopted by the med-arbiter in the mediation phase may also cause the parties to question the fairness of the med-arb in its arbitration phase. Mediators can use a variety of different styles and approaches. Generally, styles range from purely facilitative to purely evaluative. In a purely facilitative approach, a mediator will assist the parties in “identifying and exploring interests, concerns, motivations, goals, common ground and possible resolutions. However, the mediator will avoid drawing conclusions for the parties or offering opinions as to value, legal positions, rights, merits of the case or potential litigation outcome.”[[69]](#footnote-69) In sum, such a mediator does not evaluate the case. By contrast, in using an evaluative style, “a mediator is likely to offer opinions on strengths and weaknesses of a case, to predict the outcome at trial and to initiate proposals for settlement*.*”[[70]](#footnote-70) Evaluative mediations focus more on the merits of the parties’ legal positions, which is why not everyone in the mediation community is in favor of evaluative mediation. Some even view it as an oxymoron.[[71]](#footnote-71) In any case, even the proponents of this style of mediation stress the importance for the mediator to be cautious because “once an evaluation is made, the mediator’s appearance of impartiality may be impaired.”[[72]](#footnote-72) This risk is even greater in med-arb. Could a party sincerely believe that she will benefit from a fair, comprehensive, and equal examination of her file if she is told by the med-arbiter during the mediation phase that her claim is excessive and that she is unlikely to get what she demands in court?

In short, the evaluative approach, whose use is already criticized by some in a “pure mediation,” increases the risk that a party who received a negative evaluation of her position during the mediation phase will ultimately challenge the award rendered at the end of the med-arb process. To avoid any suspicion of impartiality, the med-arbiter should thus refrain from providing the parties with an evaluation of their case.

Finally, and more generally, a med-arbiter might have to pay more attention to deciding the case impartially compared to a judge or an arbitrator. Indeed, unlike a judge or an arbitrator, the med-arbiter will have spent a couple of hours with the parties (listening to their stories, witnessing their feelings, and trying to discover their interests), before starting the arbitration phase. However, mediators, like arbitrators, are already subject to the duty of being impartial. Med-arbiters should thus be properly acquainted with dealing with that imperative.

## Med-arb and Independence

It is another fundamental principle in arbitration that an arbitrator must be and remain independent throughout the whole arbitration process. By independence, I refer to the absence of personal, professional or financial interests and ties with one party, whether direct or indirect.[[73]](#footnote-73) Such ties could influence the arbitrator in her decision-making process. A lack of independence may be a ground to challenge an award. Hence, it must be guarded against from the outset.

 Again, this core principle of arbitration may be at risk in the context of med-arb. The mediator will probably learn the potential settlement range of the parties during the mediation phase. “Once in arbitration, however, the neutral is charged with impartially rendering the award according to the evidence, and decisions falling outside the settlement range will naturally be met with displeasure by the disadvantaged party*.”* [[74]](#footnote-74) The fact that an arbitrator may arrive at a decision through objective and legal assessment that does not fall into the settlement range reached by the parties at the end of the mediation phase may create a fear of appearing partial, and thus potentially impede the med-arbiter’s independence. “In sum, the Med-Arb hybrid provides additional pressure for the arbitrator to issue a compromised award that ‘splits the baby,’ a common critique of arbitration.”[[75]](#footnote-75)

Is this challenge insurmountable? I do not think so, but the responsibility of the med-arbiter in this respect is even greater than in a “pure” arbitration.

First of all, the med-arbiter should pay special attention to the necessity of rendering an award by reference to legal principles. Of course, we have seen that the parties could limit the med-arbiter’s discretion (to the settlement range reached by the parties during the mediation phase for instance), and the med-arbiter should respect the parties’ intent. But in doing so, the med-arbiter should still abide by the law[[76]](#footnote-76) unless otherwise agreed by the parties.[[77]](#footnote-77)

Second, the parties should be explicitly informed that if they do not find an amicable settlement to their dispute, the med-arbiter will have to decide the case *by reference to legal principles* (again, unless otherwise agreed by the parties). The med-arbiter should specifically insist on the fact that the application of the legal principles to the facts of the case could lead her to render an award that may or may not correspond to the position of a party, or that might potentially not be within the range of settlement the parties reached in the mediation phase.

Furthermore, the duty to motivate the award should be enhanced, out of respect for the parties who have trusted the med-arbiter enough to appoint her as med-arbiter but also, much more pragmatically, to decrease the risk of a party challenging the award.

# Conclusion

It is time now to make a final assessment of the “single-neutral med-arb.” Among other drawbacks, I have focused on four issues. Those issues pertain to the core principles of mediation (the confidentiality rule) or of the judicial function (the right of the parties to know of and confront the other side's arguments, and impartiality and independence of the med-arbiter). Does that mean that there should be no place for med-arb among the dispute resolution mechanisms? It all depends on how we envisage med-arb.

If we see med-arb as a simple sequence of a classic mediation and a classic arbitration, then we must conclude that med-arb fails to respect the basic procedural rights of the parties and, therefore, should not be granted the same value as other dispute resolution mechanisms.

In contrast, if we accept that med-arb is a dispute resolution mechanism *as such*, that it is a real hybrid figure, a real product that combines mediation and arbitration in a unique synthesis, rather than the result of a simple addition of mediation and arbitration, if we recognize, in other words, that med-arb is called “med-arb” and not “mediation-arbitration,” then there is no reason to deprive ourselves of this original type of ADR, which can be both effective and cost-efficient.

In my view, med-arb deserves to be regulated as a full-fledged dispute resolution mechanism. The current regimes respectively applicable to mediation and arbitration do not fit the med-arb model. They have proven unable to meet med-arb’s features, which, I think, explains why some are reluctant to use it.

The current acts, statutes, rules or guidelines regulating mediation and/or arbitration in the United States and also internationally, such as the ICC rules, should incorporate a section dedicated to med-arb that includes the following points:

* They should define med-arb as an alternative dispute resolution mechanism characterized by the existence of two distinct phases – the mediation phase and the arbitration phase should the parties fail to reach an amicable agreement by themselves in the mediation phase – in which the mediator and the arbitrator appointed by the parties would be the same person. The word “med-arb” would thus be limited to the “same-neutral med-arb.” By contrast, “mediation-arbitration” would refer to a mediation followed by an arbitration proceeding with two different neutrals assuming the roles of mediator and arbitrator. Indeed, the word “med-arb” indicates that it is a dispute resolution mechanism governed by its own regime (such as the one proposed below). Some adjustments to the rules governing mediation and arbitration are necessary precisely because the mediator and the arbitrator are the same person. By contrast, no adjustments are required if the mediator and the arbitrator are two different persons, which is why the words “mediation-arbitration” are adequate, and that there is no need to atrophy them.
* The regulations should make clear that they apply only to med-arb as defined in the previous point (same-neutral med-arb) and not to mediation-arbitration.
* They should also state that the rules normally applicable to mediation and arbitration, respectively, apply to med-arb, subject to the following adjustments.

	+ Contrary to “pure” mediation, the default rule should be that the med-arbiter would be allowed to use the information received during the joint sessions of the mediation in the arbitration phase. Parties could agree to derogate from this default rule, by explicitly and in writing, preventing the med-arbiter from using mediation information in the arbitration phase, after having been warned by the med-arbiter that studies demonstrate that people can hardly ignore what they know (which of course is not a reason for the med-arbiter not to make the best efforts to disregard mediation communications).
	+ Unless otherwise agreed by the parties, the med-arbiter should be prevented from caucusing during the mediation phase, because of the legal and ethical issues those private sessions raise. The parties that would nonetheless agree to maintain caucus should sign a written agreement explicitly allowing the med-arbiter to caucus with the parties separately and to make use of the information communicated by them to the med-arbiter during those caucuses. However, the med-arbiter should draw the attention of the parties to the risk that such an agreement might not be enforced by the courts, whether in the United States or abroad, for public policy reasons and that consequently, the courts might refuse to execute or recognize a med-arb award if one party can prove that the med-arbiter actually used information received during caucuses in fashioning the award.
	+ The med-arbiter should adopt a facilitative approach and avoid an evaluative one, unless expressly and clearly required by the parties in writing. In practice, it might be hard to draw a line between the respective spectrums of the evaluative and the facilitative approaches, but in essence, the med-arbiter should refrain from giving one party the impression that she has already made up her mind on the dispute and that there is no point in presenting his or her case in the arbitration phase. An evaluative approach should also be avoided in mediation because there is no certainty that the med-arbiter will reach the same conclusion based on the evidence that is presented later on during

the arbitration phase.

* The parties should be required to expressly agree, in clear and unambiguous terms, to opt for med-arb as defined above, with a same neutral designated as the mediator and the arbitrator of their dispute. This agreement would count as recognition that they are subject to all of the above rules.

* Finally, parties should be allowed to appoint only neutrals who can demonstrate that they are accomplished and experienced in both mediation and arbitration.

There is much more to say about med-arb. For instance, the question of evidence in med-arb and the question of the necessity of specific training to perform as med-arbiter[[78]](#footnote-78) could each be the subject of an entire paper. However, the rules that I propose in this paper have the merit of clarifying the framework of med-arb and securing to the maximum extent possible the viability of med-arb awards.

 Some might think that the idea of regulating med-arb runs counter to the flexibility supposed to characterize alternative dispute resolution mechanisms and that the use of med-arb should not be constrained by rules. I disagree. The rules that I propose are only a default regime. Parties would remain able to derogate from those rules (true, with certain formalities to be respected but parties would still be free to choose the kind of med-arb that they think is best suited for them). Moreover, flexibility must not be granted at the expense of elementary procedural rights. There is no point in refusing to regulate med-arb in order to preserve flexibility if the courts can refuse to recognize or execute the med-arb award because minimum safeguards have not been respected in the
med-arb proceeding.

To conclude, the rules that I propose require from med-arbiters as well as the parties’ counsels an enhanced duty to provide information to the parties. Parties cannot opt for a med-arb process if they do not know what mediation is, what arbitration is, what a caucus is, what the (truly powerful) advantages of caucusing are, and what the difference between an evaluative and a facilitative approach is, etc. This enhanced duty to inform the parties may seem like a heavy burden, but this obligation provides an opportunity to educate the parties about the countless ways to resolve a dispute, and that will only benefit the realm of ADR.

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1. Actually, this quote would not be entirely correct and would be constructed from this sentence: “Imagination is more important than knowledge” (interview of Albert Einstein by George Sylvester Viereck in the October 26, 1929 issue of the Saturday Evening Post). [↑](#footnote-ref-1)
2. Alternative Dispute Resolution in State and Local Governments: Analysis and Case Studies at 8 (Otto J. Hetzel & Steven Gonzales eds., ABA Book Publishing, 2015). [↑](#footnote-ref-2)
3. Gu Weixia, *The Delicate Art of Med-Arb and its Future Institutionalisation in China*, 31(2) Pac. Basin L. J. 97, 97 (2014). [↑](#footnote-ref-3)
4. Allan Barsky, “*Med-Arb”: Behind the Closed Doors of a Hybrid Process*, 51 Fam. Ct. Rev. 637, 637-638 (2013). This author notes that the parties are free to “agree in advance whether the arbitrated decisions will be binding or nonbinding (sometimes called “recommendatory”). Most arbitrators and theorists favor binding arbitration so the process necessarily results in a definite outcome.” [↑](#footnote-ref-4)
5. Kristen M. 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, 320 (2011). [↑](#footnote-ref-5)
6. *Id*. at 323. [↑](#footnote-ref-6)
7. Allan Barsky, *supra* note 4, at 638. [↑](#footnote-ref-7)
8. Allan Barsky, *supra* note 4, at 638. Please note that this paper focuses on med-arb as defined as a process composed of a mediation phase chronologically followed by an arbitration phase. [↑](#footnote-ref-8)
9. Like the med-arbiter, the early neutral evaluator may use techniques related to mediation and arbitration. However, her role is primarily to provide the parties with an evaluation of the case, based on the evidence and the arguments presented to her by each party. She might help the parties to reach an agreement but only after rendering an evaluation report, which is never binding (contrary to the arbitral decision rendered by the med-arbiter) (Allan Barsky, *supra* note 4, at 639). See also, on this topic, Alternative Dispute Resolution in State and Local Governments: Analysis and Case Studies at 28 (Otto J. Hetzel & Steven Gonzales eds., ABA Book Publishing, 2015). [↑](#footnote-ref-9)
10. A parenting coordinator will use methods similar to mediation and arbitration but also akin to evaluation, parenting education, co-parent counseling, monitoring or enforcement. The scope of the techniques used by a parenting coordinator is thus broader than that of a med-arbiter. Moreover, the parenting coordination usually is less formal than med-arb, especially in its second stage (for instance, the parenting coordinator may decide on certain issues without “conducting a court-like hearing for each issue to be decided”). Also, parenting coordination will usually occur after a judicial decision has been rendered and is supposed to help the parents to implement the order, whereas med-arb is usually used by the parties with the hope of avoiding going to court (Allan Barsky, *supra* note 4, at 638-639). [↑](#footnote-ref-10)
11. Kristen M. Blankley, *supra* note 5 at 335 (footnote 63). [↑](#footnote-ref-11)
12. Thomas J. Brewer & Lawrence R. Mills, *Combining mediation & arbitration*, 54(4) Disp. Res. J. 32, 34 (1999). [↑](#footnote-ref-12)
13. David B. Lipsky & Ronald L. Seeber, The Appropriate Resolution of Corporate Disputes – A Report on the Growing Use of ADR by U.S. Corporations at 12 (Cornell/PERC Inst. on Conflict Res., 1998). More than 600 companies responded to the survey. [↑](#footnote-ref-13)
14. Robert N. Dobbins, *Practice Guide: The Layered Dispute Resolution Clause: From Boilerplate to Business Opportunity*, 1 Hastings Bus. L.J. 161, 162 (2005). See also Martin C. Weisman, *Med-Arb: The Best of Both Worlds,* 19 DISP. RESOL. MAG. 40, 40 (2013). [↑](#footnote-ref-14)
15. Questionnaires were sent to about 100 commercial arbitrators and mediators in the country. 68% of those answering agreed that an arbitrator “may serve” as both mediator and arbitrator. “The percentage, noted Phillips, may have been even higher, because in retrospect, the question may have been misleading—some who answered ‘should not serve’ likely answered based on their own risk-benefit analysis, rather than based on the facts that persuade parties to want an opportunity to have a conflict mediated and then, if necessary, arbitrated by the same neutral.” (Gerald F. Phillips, *Back to Med-Arb: Survey Indicates Process Concerns Are Decreasing*, 26 Alternatives to High Cost Litig. 73, 78 (2008)). [↑](#footnote-ref-15)
16. “In order to reach a collective bargaining agreement, particularly in important industries in which striking is not a viable option for the public good” (Kristen M. Blankley, *supra* note 5, at 323-324). For more details about the historical development of the med-arb process, see Barry C. Bartel, *Med-Arb as a Distinct Method of Dispute Resolution: History, Analysis, and Potential*, 27 Willamette L. Rev. 661, 665 (1991). [↑](#footnote-ref-16)
17. Brian A. Pappas, *Med-Arb and the Legalization of Alternative Dispute Resolution*, 20 Harv. Negot. L. Rev. 157, 159 (2015). [↑](#footnote-ref-17)
18. *Id.* at 159. [↑](#footnote-ref-18)
19. *Id*. at 166-167. [↑](#footnote-ref-19)
20. Patrick Van Leynseele, *Med-Arb et tierce décision obligatoire: les enjeux, les écueils, les solutions et les précautions à prendre*, 1 Jurim Pratique, 104-105 (2014); Jacqueline M. Nolan-Haley, Alternative Dispute Resolution in a Nutshell at 229-230 (West group, 2nd edition 2001). [↑](#footnote-ref-20)
21. *Id.* at 106. See also Brian A. Pappas, supra note 17 at 159 (the“*finality of arbitration is utilized as the stick to promote good behavior in mediation*”); Jacqueline M. Nolan-Haley, *supra* note 20 at 229; Bette J. Roth, Med-arb, Arb-med, Binding Mediation, Mediator’s Proposal, and other Hybrid Processes, 2 (American Arbitration Association Advanced Mediator Training, November 6, 2009, available online at <http://www.rothadr.com/pages/publications/aaa%20medarb.pdf> (later visited April 20, 2017). [↑](#footnote-ref-21)
22. Allan Barsky, *supra* note 4, at 640. See also John T. Blankenship, *Developing your ADR attitude: Med-Arb, a template for adaptive ADR*, 42 Tenn. B.J. 28 (2006). Some studies also demonstrate that parties were substantially more motivated to settle during the mediation phase to avoid the loss of control that would come in the arbitration phase (Martin C. Weisman, *Med-Arb: The Best of Both Worlds,* 19 DISP. RESOL. MAG. 40 (2013)). [↑](#footnote-ref-22)
23. For different tips about how to reduce the cost of a med-arb process, see Kristen M. Blankley, *supra* note 5 at 326-327. [↑](#footnote-ref-23)
24. Thomas J. Brewer & Lawrence R. Mills, *supra* note 12 at 35. [↑](#footnote-ref-24)
25. *Id*. at 35. [↑](#footnote-ref-25)
26. *Id*. at 34-35; Patrick Van Leynseele, *supra* note 20 at 104. [↑](#footnote-ref-26)
27. Kristen M. Blankley, *supra* note 5 at 336-337. [↑](#footnote-ref-27)
28. *Id.* at 325; Patrick Van Leynseele, *supra* note 20 at 106; Handbook on Mediation at 175 (Thomas E. Carbonneau & Jeanette A. Jaeggi eds., American Arbitration Association, 2006). [↑](#footnote-ref-28)
29. *Id*. at 336. [↑](#footnote-ref-29)
30. American Arbitration Association, *Drafting Dispute Resolution Clauses – A practical Guide*, 33 (2013), available online at https://www.adr.org/aaa/ShowPDF?doc=ADRSTG\_002540 (last visited April 18, 2017). [↑](#footnote-ref-30)
31. *Id*. at 34. [↑](#footnote-ref-31)
32. See the enactment status map on the Uniform Law Commission’s website http://www.uniformlaws.org/Act.aspx?title=mediation%20Act (last visited April 12, 2017). [↑](#footnote-ref-32)
33. The UMA distinguishes between the privilege (Sections 4-6) and the confidentiality (Section 8). “The evidentiary privilege granted in Sections 4-6 assures party expectations regarding the confidentiality of mediation communications against disclosures in subsequent legal proceedings. However, it is also possible for mediation communications to be disclosed outside of proceedings, for example to family members, friends, business associates and the general public. Section 8 focuses on such disclosures.” (UMA, Comment on Section 8). It would thus be more accurate to use the word “privilege” rather than “confidentiality” in the present paper. However, I use the term “confidentiality” since this is the word systematically used in the doctrine. [↑](#footnote-ref-33)
34. “(a) Except as otherwise provided in Section 6, a mediation communication is privileged as provided in subsection (b) and is not subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided by Section 5.

(b) In a proceeding, the following privileges apply:
(1) A mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.
(2) A mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator.

(3) A nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant.
(c) Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation” (UMA, Section 4). [↑](#footnote-ref-34)
35. “Proceeding means: (A) a judicial, administrative, arbitral, or other adjudicative process, including related pre-hearing and post-hearing motions, conferences, and discovery; or (B) a legislative hearing or similar process” (UMA, Section 2(7)). [↑](#footnote-ref-35)
36. “(a) A privilege under Section 4 may be waived in a record or orally during a proceeding if it is expressly waived by all parties to the mediation and:

(1) in the case of the privilege of a mediator, it is expressly waived by the mediator; and

(2) in the case of the privilege of a nonparty participant, it is expressly waived by the nonparty participant.” (UMA, Section 5). [↑](#footnote-ref-36)
37. See Mass. Ann. Laws ch. 150, § 10A (1999). [↑](#footnote-ref-37)
38. Abraham P. Ordover with G. Michael Flores and Andrea Doneff, Alternatives to Litigation: Mediation, Arbitration, and the Art of Dispute Resolution at 54 (Notre Dame, Ind.: NITA, 2nd ed. 1993). [↑](#footnote-ref-38)
39. *Id.* at 54. [↑](#footnote-ref-39)
40. American Commercial Association Commercial Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Commercial Disputes), Rules Amended and Effective October 1, 2013 Fee Schedule Amended and Effective July 1, 2016, R.19. Available online at https://www.adr.org/aaa/ShowPDF?doc=ADRSTG\_004130 (last visited April 18, 2017). [↑](#footnote-ref-40)
41. Martin C. Weisman, *Med-Arb: The Best of Both Worlds,* 19 DISP. RESOL. MAG. 40, 40 (2013). [↑](#footnote-ref-41)
42. This solution is also the one proposed by PatrickVan Leynseele: “the mediator cannot incorporate in his/her final decision elements that he or she is aware of thanks to the caucus if these elements have not been debated before him during the arbitration phase. He must, in some way, *repress them (‘forget them’)* so that they do not influence his sentence either explicitly or implicitly” (Patrick Van Leynseele, *supra* note 20 at 127) (free translation from French; emphasis added). [↑](#footnote-ref-42)
43. Andrew J. Wistrich, Chris Guthrie & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, Cornell Law Faculty Publications, Paper 20, at 1330-1331 (2005). Available online at <http://scholarship.law.cornell.edu/lsrp_papers/20> (last visited April 12, 2017). [↑](#footnote-ref-43)
44. *Id.* at1259. [↑](#footnote-ref-44)
45. *Id.* at 1259. [↑](#footnote-ref-45)
46. Brian A. Pappas, *Med-Arb: the best of both worlds may be too good to be true: a response to Weisman*, 19.3 Disp. Res. Mag. 42, 42 (2013). [↑](#footnote-ref-46)
47. And in any case, before the beginning of the arbitration phase (for the same reasons why a judge or a “pure” arbitrator should not start the proceedings knowing some information that a party would have communicated to her outside the presence of the other parties). [↑](#footnote-ref-47)
48. See for instance Patrick Van Leynseele, *supra* note 20 at 105. However, several authors underline the dangers of caucusing (see for instance Jacqueline M. Nolan-Haley, *supra* note 20 at 124-126). [↑](#footnote-ref-48)
49. Patrick Van Leynseele, *supra* note 20 at 127-128. [↑](#footnote-ref-49)
50. We assume that the parties were well aware of the fact that one same neutral could successively be the mediator and the arbitrator. In any case, the med-arbiter should ensure that the parties have clearly understood that before starting the med-arb. [↑](#footnote-ref-50)
51. Bowden v. Weickert, 2003-Ohio-3223, ¶ 36 (Ct. App.). [↑](#footnote-ref-51)
52. Bowden v. Weickert, 2003-Ohio-3223, ¶ 35 (Ct. App.). [↑](#footnote-ref-52)
53. *In re* Cartwright, 104 S.W.3d 706, 714 (Tex. App. 2003). [↑](#footnote-ref-53)
54. Town of Clinton v. Geological Servs. Corp., 21 Mass. L. Rep. 609 (2006), summarized by Kristen M. Blankley, *supra* note 5 at 353. See also Twp. of Aberdeen v. Patrolmen's Benev. Ass'n, Local 163, 286 N.J. Super. 372, 669 A.2d 291 (Super. Ct. App. Div. 1996) where the Superior Court of New Jersey held that mediation communications cannot form the basis for an arbitration award. In this case, though, the Court did not answer the question as to whether a waiver by the parties would make the use of mediation communications by the med-arbiter in the arbitration phase valid. [↑](#footnote-ref-54)
55. Kristen M. Blankley, *supra* note 5 at 322. [↑](#footnote-ref-55)
56. And provided that this additional information is shared by all the parties involved in the med-arb (see the following developments). [↑](#footnote-ref-56)
57. See *supra* pp. 15-18 and the sections B, C and D *infra*. [↑](#footnote-ref-57)
58. See *supra* p. 17. [↑](#footnote-ref-58)
59. John M. Kelly, *Audi Alteram Partem; Note*, Natural Law Forum. Paper 84, 103 (1964). [↑](#footnote-ref-59)
60. Matti S. Kurkela & Santtu Turunen, Due Process in International Commercial Arbitration at 1-2 (Oxford Univ. Press, 2nd ed. 2010) (emphasize added). [↑](#footnote-ref-60)
61. Tibor Várady, John J. Barceló III, Stefan Kröll & Arthur T. von Mehren, International Commercial Arbitration – A Transnational Perspective at 649 (St. Paul, MN: West Academic Publishing, 6th ed. 2015). [↑](#footnote-ref-61)
62. See for instance *Township of Montclair v. Montclair PBA Local No. 53*, Superior Court of New Jersey -- Appellate Division (May 22, 2012), Case No. A-0657-1154, 2012 N.J. Super. Unpub. LEXIS 1122 (Sup. Ct. N.J. 2012) (unpublished opinion quoted by Christian P. Alberti & David M. Bigge, *Ascertaining the content of the applicable law and iura novit tribunus: approaches in commercial and investment arbitration*, 70(2) Disp. Res. J. 1-20 (2015)). [↑](#footnote-ref-62)
63. Ewing v. Act Catastrophe-Tex. L.C., 375 S.W.3d 545, 551-52 (Tex. App. 2012); Univ. of Tex. Med. Sch. v. Than, 901 S.W.2d 926, 928 (Tex. 1995). [↑](#footnote-ref-63)
64. This rule can also be explained by the necessary independence and impartiality of the arbitrator (which is why even the contacts between the arbitrator and one of the parties that took place prior to the arbitrator’s appointment must be disclosed). [↑](#footnote-ref-64)
65. This might be the case in Europe for instance. According to the jurisprudence of the European Court of Human Rights, a waiver “must be supported by minimum procedural guarantees commensurate to the importance of the rights waived” (*Nordstrom-Janzon and Nordstrom-Lehtinen* v. *Netherlands*, Application No. 28101/95, 22 November 1996). “Therefore, for a waiver to be valid, it must be clear and unambiguous, as well as express and informed, and must not run counter to an important public interest. This latter requirement suggests that not all rights can be completely waived (e.g. such as the rule against partiality), but this is a question on which there is no authority and which, ultimately, is not clear” (Julia Hörnle, Cross-border Internet Dispute Resolution at 107 (Cambridge University Press, 2009)). [↑](#footnote-ref-65)
66. See for instance Nolan v. Colorado Cent. Consol. Min. Co., 63 F. 930, 1894 U.S. App. LEXIS 2460 (8th Cir. Colo. 1894). [↑](#footnote-ref-66)
67. Kemal Sahin, *Impartiality of the Judiciary*, 1 Ankara bar rev. 17, 17 (2008). Also available online at <http://www.ankarabarosu.org.tr/siteler/AnkaraBarReview/tekmakale/2008-1/3.pdf> (last visited April 11, 2017) (emphasis added). [↑](#footnote-ref-67)
68. See *supra*, p. 18. [↑](#footnote-ref-68)
69. Bennett G. Picker, Mediation Practice Guide, A Handbook for Resolving Business Disputes at 38 (Bethesda, Md.: Pike & Fischer, Inc., 1998). [↑](#footnote-ref-69)
70. *Id*. at 39. [↑](#footnote-ref-70)
71. *Id.* at 38. [↑](#footnote-ref-71)
72. *Id.* at 40. [↑](#footnote-ref-72)
73. Tibor Várady, John J. Barceló III, Stefan Kröll & Arthur T. von Mehren, *supra* note 62 at 383. [↑](#footnote-ref-73)
74. Brian A. Pappas, *Med-Arb: the best of both worlds may be too good to be true: a response to Weisman*, 19.3 Disp. Res. Mag. 42, 42 (2013). [↑](#footnote-ref-74)
75. *Id*. at 42. [↑](#footnote-ref-75)
76. So in the two examples, the med-arbiter should choose, between the options allowed by the parties, the one that is the closest to what the law dictates. [↑](#footnote-ref-76)
77. For instance, in a commercial dispute, parties could agree to ask the arbitrator to decide their dispute by reference to commercial practices or customs (via “honorable engagement clause”, also referred to as “equity clause”). [↑](#footnote-ref-77)
78. As underlined by Martin C. Weisman, “There are mediation and arbitration protocols governing the ethical standards in each process, but none of the standards encompasses their combination” (Martin C. Weisman, *Med-Arb: The Best of Both Worlds,* 19 DISP. RESOL. MAG. 40 (2013)). [↑](#footnote-ref-78)