

TWO-HAT STRATEGY?

Use caution when asking a neutral to take on both mediating and arbitrating roles

By Jack Boos

No good deed goes unpunished and, while a well-orchestrated mediation can resolve disputes quickly, creatively and cheaply, taking a strategic “time out” during an arbitration proceeding can be problematic for the unwary.

More businesses and individuals are resorting to alternative dispute resolution in lieu of litigation. In turn, they are increasingly utilizing neutral arbitrators in more creative ways. One strategy is to deploy arbitrators as mediators, creating a two-hat professional in a single conflict. This typically occurs in one of two ways: First, parties may agree, contractually or later, to take a good faith whirl at mediation before commencing arbitration. Alternatively, they may come to believe that an interruption of the arbitration to allow for ad hoc mediation would be a good idea and prevail upon the arbitrator to take on the mediator’s role as well.

Of course, using two separate neutrals – one as mediator and one as arbitrator – would be tidier. But that approach seldom happens. Engaging two neutrals can be perceived as doubling the hassle. It can increase the cost and time required for vetting, mutual selection, conflict-clearance, scheduling, getting up to speed and possible loss of settlement momentum. And, in the case of mediating during a short arbitration hiatus where time can be of the essence, the perceived efficiency of one person personally handling both roles seems to make it a must.

But these two-hat endeavors raise questions of efficacy, posing problems that seem to arise more often in the ad hoc context than during pre-arbitration procedures. One immediate question is whether using the same person provides the best chance of a resolution. There are indications that it makes the mediation effort more difficult and less productive than if a different person were engaged. The rub lies in the stark differences between the roles of arbitrator and mediator and the nature of mediation itself.

As the judge agreed to by the parties, an arbitrator is both the authority figure and the decision maker. In contrast, much of the benefit of mediation lies in the fact that the mediator is perceived as a free

agent, has no power over anyone, decides nothing and simply facilitates resolution by the parties themselves. These are substantially different roles that require discrete and unique talents. Many veterans of the process will attest that it is the unusual person who is polished in both roles.

Moreover, for mediation to be most productive, both parties must be comfortable with strategically confiding in the mediator. This is the time to candidly discuss a case’s strengths and weaknesses, assess the practical difficulties ahead such as costs, witness availability or business disruption and identify the need for creative solutions. Indeed, this is also the time to discuss whether the party wants to do business with the adversary again in the future. A classic mediation setting promotes this confidence. The parties do not have to deal with the specter of the arbitration hat making a later appearance as decider.

A mediator must have the freedom to probe. An effective mediator must express her views about the issues, offer novel approaches and demonstrate why prompt settlement can be in a party’s best interests. The information freely imparted by the parties can be extremely useful to the mediator in the delicate process of divining and harmonizing the parties’ objectives and bringing them together. However, when a mediator knows that he may well revert to being the arbitrator, the relationship may become cautiously neutered and arms-length. Surely, when a mediator, implicitly or explicitly, says, “I won’t say much to you, please don’t say much to me,” the proverbial hand-tied-behind-the-back can seriously compromise the prospects for effectiveness.

There are potential ethical and practical issues as well in a two-hat approach.

If the mediation fails, the neutral, now having donned an arbitrator’s hat, may be saddled going forward with those intimate details that parties presumably would never have conveyed to a decision-maker. Think of it as a bell that cannot be unrung even for the most conscientious neutral. Worse, that bell can provide the grist for attacking the award as being the product of arbitrator bias, including alleged misuse of confidential information conveyed during the mediation phase, and even attacking the neutral.

This could be a particular problem in the international sphere. For example, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards provides for a “public policy” exception and, in locations where a legal system is inclined to look

for non-enforcement rationales to protect its nationals, can be exploited to the detriment of the prevailing party.

The major arbitral institutions have expressed ambivalence about the two-hat procedure. The American Arbitration Association/American Bar Association Code of Ethics for Commercial Arbitrators provides in Canon I D that "...an arbitrator should avoid conduct and statements that give the impression of partiality toward or against any party." It then states in Canon III B that "...an arbitrator should not discuss a proceeding with any party in the absence of any other party..." However, the code goes on to conditionally tolerate the two-hat procedure, providing in Canon IV that "...an arbitrator should not... act as a mediator unless requested to by all the parties...."

Conversely, the American Arbitration Association Rules for Commercial Arbitration

also provides: "At any stage of the proceedings, the parties may agree to conduct a mediation conference under the Commercial Mediation Procedures in order to facilitate settlement. The mediator shall not be an arbitrator appointed to the case...."

Left unsaid in the Code of Ethics is just what kind of "request" would pass muster; what sort of disclosures and consents would be required to reasonably protect the two-hatted neutral against subsequent charges of bias.

In order to attempt to inoculate oneself against such a charge, the wise two-hatted person would present the parties an exquisitely-worded disclosure and consent form prior to agreeing to serve as a mediator. This would describe the freewheeling nature and candid give and take of mediation. It would also offer assurances that comments made in the mediation would not be taken into consideration for use as a basis for making an

award, to the extent reasonably possible. The parties would be asked to waive the confidentiality of mediation and not challenge an award on the basis of the arbitrator also having served as mediator. Such a disclosure and consent form would go a long way toward promoting the integrity of the arbitration process, both in fact and perception.

This sort of inoculation, of course, does not resolve internal quandaries on the part of the neutral. The conscientious neutral will be at pains to compartmentalize what has been said and done in the mediation context and not allow it to impede a fair arbitration and award.

Whether the two-hat approach can work depends on specific circumstances, including who the neutral is and the degree of optimism that a quick mediation effort would pay off. All in all, parties would be better off engaging a separate skilled mediator. ❖