Chapter 13

WHY DON'T WE TAKE FIVE MINUTES?

I. Med-Arb After 40: More Viable Than Ever

John Kagel[1]

Forty years after the initial article popularizing the name "med-arb," co-authored by Sam Kagel and myself,[2] the term has been adopted all over the world, mostly in its English version.[3] Med-arb has been adopted as a means of resolving disputes in many different fields.[4] We only put a descriptive tag on the process, noting it had long been used in selected situations. We described the process:

> In this process, the mediator-arbiter has a dual role. When acting as a mediator, he has in reserve the authority of an arbitrator. This gives the med-arbiter "muscle," which is not available to him if he acts solely as a mediator. It places the med-arbiter in a position where he does far more than transmit messages between labor and management. He, in effect, becomes a party to the negotiations in the sense that, while negotiating, each of the contending parties must necessarily seek to convince him that their position is reasonable and acceptable. In so doing, the parties no longer maintain the arm's length attitude normally assumed in orthodox mediation nor the semi-legal stance assumed in an arbitration.
>
> The important fact in med-arb is that it is voluntarily accepted, even though in this two-level technique the parties agree to be bound by the med-arbiter's decision if a direct settlement is not made. This technique avoids legislative compulsion, generally abhorred by labor-management negotiators. The parties are not fooled by the fact that they know that the med-arbiter has the authority to make the decision

[1]Past President (2000–2001), National Academy of Arbitrators, Palo Alto, CA.

[2]Sam Kagel & John Kagel, *Using Two New Arbitration Techniques,* 95 Monthly Lab. Rev. 11 (1972).

[3]Google search: Canada, Australia, Denmark, Brazil, Nigeria, UK, Czech Republic (partial list).

[4]Google search, in addition to labor relations: Construction, trusts, family law, commercial contract disputes.

if the parties fail to work out their own arrangement. It is precisely that knowledge, however, that is the incentive for the parties to reach their own agreement. It is that knowledge which is the incentive to reasonableness.[5]

Unknown to us then, a year earlier, Howard Block described the same process to the Academy, to the same effect, in the context of public sector fact-finding:

The Combination Mediator/Fact-Finder

Early in my remarks, the point was made that where the right to strike is legally proscribed or effectively inhibited, arbitration and fact-finding will inevitably become more frequently resorted to by the parties to resolve impasses rather than seldom-used emergency measures. A close observation of Professor Aaron's role in the Los Angeles teachers' strike suggests another type of impasse procedure that merits serious consideration as a standard technique.

Descriptively, the role calls for a person to begin as a mediator, to function entirely as an intermediary, a go-between, exploring the issues in depth as a confidant of both parties. It should be reiterated: He is at this stage a mediator, no more and no less. If the parties are responsive to his efforts, as they often are to those of any competent mediator, all well and good. He will have enabled them to bridge the gap and effect a settlement.

If the deadlock cannot be resolved by his role as an intermediary, he is still in a position to make another effective move with the consent of the parties. Possessing an insider's knowledge obtained as an intermediary, he is in a peculiarly advantageous position to make fact-finding recommendations which should encompass both the equities and the realistic expectancies of the parties.

The objection will probably be raised that the parties will be less than cooperative with a mediator who has the reserved powers to make a finding of fact. The parties will not level with a mediator, they will argue, because to make premature disclosures of areas of compromise may prejudice the outcome of his fact-finding if mediation fails. Even if that assumption were valid (which I do not concede), the reticence of the parties to cooperate with a mediator often results from the fact that his role and function are terminated if the talks are unproductive. Not so with a mediator/fact-finder. It has been demonstrated on many occasions that the parties are highly motivated to cooperate with him precisely because he combines both functions in one person. They tend to respond positively to his mediation efforts if for no other reason than because of a desire to influence his findings should

[5]Kagel & Kagel, *supra* note 2, at 12–13.

> he assume his ultimate role as a fact-finder. I do not advocate the use of a mediator/fact-finder as a solution for any and all disputes in the public sector. I would stress only that there are situations where it is workable, and that alternatives to strikes in the public sector are not in such abundance that we can afford to ignore any technique which offers promise.[6]

The initial descriptions of med-arb were in the context of interest disputes and, to the extent parties are voluntarily willing, or are required to arbitrate by legislation,[7] it has continued to be used in adapted variations to resolve such disputes. Those variations have expanded its voluntary use, in lieu of a strike or lockout, to include public sector arbitration, including mandated issue-by-issue or whole contract "baseball salary" choice arbitration. In that process, either party's last offer is to be selected by the arbitrator or an arbitration panel. In some med-arbs, the parties have agreed to many contract terms, and then turned to med-arb to resolve remaining issues. They may agree to med-arb to end a strike or lockout. In some cases, mediation occurs at the outset. In others, evidence may be presented as in a normal interest arbitration hearing to provide bases for discussion, with mediation then occurring, and an arbitration decision ultimately being rendered, if necessary. Further, in the event that the parties do reach a full agreement in mediation, their agreement can be cast in the form of an arbitration award, not requiring ratification, in accordance with the parties' initial agreement to arbitrate.

As Howard Block has shown, the process can work, even if there is no binding decision that finally resolves the dispute. Fact-finding is popular, and may even be mandatory by legislation in public sector disputes,[8] and can, depending on the parties' fear of a fact-finding report being made public, have a similar effect, as has med-arb, to resolve the dispute.

Med-arb is adaptable to grievances scheduled for arbitration. But, it is my experience that when parties reach that stage, they typically are not asking the arbitrator to mediate, but to listen to the evidence and make the decision. There may be some *ad hoc* requests where the parties themselves agree to the process, or an arbitrator who knows the parties may recommend the process

---

[6]Howard S. Block, *Criteria in Public Sector Interest Disputes,* in Arbitration and the Public Interest: Proceedings of the twenty-fourth Annual Meeting, National Academy of Arbitrators 161, 178–79 (1971).

[7]*See, e.g.,* City and County of San Francisco Charter and various provisions in the California Government Code governing some transit districts.

[8]*See, e.g.*, Cal. Gov't Code §3505.4(a).

after listening to at least part of the case. In at least one collective bargaining agreement, the parties and the arbitrator can unanimously agree to try med-arb after the presentation of the evidence.[9]

Equally applicable to interest and grievance disputes is *the major goal of med-arb: A final and binding result the parties themselves would have reached had they been able to resolve their dispute without the intervention of a third party.*

Parties' Trust

Four particular points require further focus, and they are interrelated. The first, identified 40 years ago, is that of the trust needed by the parties in the med-arbiter. Such trust is gained, presumably, by the parties' experience with the individual, either directly, by reputation, or by the urging of third persons or institutions that have a stake in the resolution of the dispute, even if those entities are not direct participants in it.

The parties must recognize that they need a third party to help them reach an agreement if they cannot do that by themselves, to achieve a final resolution to their dispute that emulates what they would have agreed to had they been able to reach agreement. To do that, they need a third party who is, or can become, knowledgeable of their separate and mutual interests, and who has the sensitivity to adapt to them in any ultimate award. If they can find someone who can do that, experience has shown they will be willing to deal in confidence with that third party.

Parties' Positions Exposed

The second point is that the med-arbiter will learn, through the mediation process—meeting with parties and/or counsel separately, or even together—where parties are willing to settle. That vital information might not be presented, or even be admissible, in a traditional interest arbitration hearing. Similarly, much might be learned of the politics of the issues as the bases of the parties' positions, even though, again, such political considerations might not be admissible in normal interest arbitration. The lesson of 40 years ago still applies: Once the parties' confidence is gained, they will level frankly with the med-arbiter.

---

[9]Association of Western Pulp and Paper Workers and Georgia-Pacific, Toledo, Oregon.

Indeed, they may level more than in regular mediation on two grounds: first, they have engaged in a process to reach an agreement and know that one will be reached, so that they want to try to shape the result as much as they can to achieve their desired goals. Second, they will also listen to the med-arbiter—with more attentiveness than to a mediator—for clues as to how she or he reacts to their interactions, to develop their proposals not only to respond to proposals from the other side, but also to the clues the med-arbiter may be expressing as to what the ultimate outcome might be. As noted, the parties, in effect, have to bargain with the med-arbiter at the same time they are bargaining with the other side.

Parties' Pressure

The third point involves what the med-arbitrator is to do. As in normal mediation or arbitration, the med-arbiter needs knowledge of what the dispute is all about. As noted, this can be gained by typical interaction with the parties in mediation, by presentation of evidence before mediation, or a combination of the two. But even as a mediator might be seeking to have the parties reach agreement with this knowledge, the parties in med-arb know that they will have an agreement at the end, either by agreement or by an arbitration award. The med-arbiter can work towards that end, pulling it together piece by piece through the normal exchange of proposals and consideration of alternatives. Simultaneously, he or she is able to steer the parties towards their solution, again given that the parties are, in essence, required to react to any guidance the med-arbiter may provide.

This does not necessarily always work, for if mediation breaks down the arbitrator is required to issue a decision. If there are no constraints on what the med-arbiter can decide, and if she or he decides soundly, then a reasonable approximation of what the parties' agreement would have looked like without the med-arbiter's interference should be the award. If, however, the med-arbiter is constrained as, for example, in choosing from last-best offers, the parties might revert to their political stances notwithstanding what the med-arbiter was seeking them to agree to, requiring the med-arbiter to decide within those constraints. Such a constrained award limits the full beneficial impact that med-arb could have had.

In reaching an ultimate arbitration decision, the med-arbiter has to be sensitive as to how to use, or if to use at all, the knowledge that he or she may have gained in confidence during the mediation phase of the process. It is important to let the parties know at the outset that particularly sensitive information, which they might identify in their deliberations with the med-arbiter as to matters not to be shared with the opposition, would be used only in mediation and would be ignored in arbitration.

Can this be done? Notwithstanding literature concerning unconscious bias on the part of arbitrators affecting their decisions,[10] experienced med-arbiters can successfully do that. The med-arbiter can, and should, have a transcribed record of any evidence presented in formal arbitration as may be required after (or before) mediation to support the ultimate decision, for the transcribed record can provide the underlying basis for any arbitration decision not reached in the mediation phase of the process. She or he will, further, have an arbitrator's common experience to disregard irrelevant or objectionable evidence that comes up in presiding over normal arbitration. And, ultimately, the med-arbiter should have an overriding sensitivity to the process itself to not betray such confidences by the award.

Parties' Eyes Wide Open

The fourth point, actually the first in time, is to assure that each party knows what it is committing to by agreeing to med-arb, or to med-factfinding. To make these processes work, the parties, and their constituents, have to know of the power of the med-arbiter and the finality of the outcome. They have to know that they will be asked to delve deeply into their "heart-of-hearts" as to the issues in making their proposals, and to be able to freely relay what they have communed about in that process to the med-arbiter. Unlike normal arbitration, they have to know, and to release, the med-arbiter from the normal restraints of an arbitrator's prohibitions of *ex parte* contacts.[11] They have to know that person will seek to utilize parties' positions to craft an agreement that both

[10] *See, e.g.,* R.A. Giacalone et al., *Ethical Concerns in Grievance Arbitration,*11 J. BUS. ETHICS 267 (1992); R. Fullerton, *Med-Arb and its Variants: Ethical Issues for Parties and Neutrals*, DISP. RESOL. J. 52 (May–Oct. 2010).

[11] For a formal agreement to mediate-arbitrate, *see* J.E. Sands, *Should Arbitrators Mediate? Yes, No, and Maybe,* in ARBITRATION 2012: OUTSIDE IN: HOW THE EXTERNAL ENVIRONMENT IS SHAPING ARBITRATION, PROCEEDINGS OF THE 65TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 306 (2013).

parties will agree to. For, if they will not, or they cannot, there is no escaping the finality of an arbitation award or a public fact-finding recommendation. There is no ratification by either party. In short, the parties need to enter the process with their eyes, and, as noted, their hearts, open.

This is hard to do for adversaries, even for adversaries who might normally get along. No party wants to give up any power it has, or thinks it has. In labor relations, med-arb is for those situations where economic power to force an agreement does not exist, such as mandatory arbitration, a grievance bound for arbitration, or, to a lesser degree, issues going to mandatory fact-finding. Med-arb is also voluntarily available in those occasional intractable instances where strikes, lockouts, or other economic pressures are either mutually inappropriate, impractical, or seemingly hopelessly stalemated. For med-arb, in the proper hands, still offers the parties the best way to reach a result that the parties could not reach themselves. It can reach the result they would have reached had they been able to do so.

II. Panel Discussion

Moderator: **Jack Clarke,** National Academy of Arbitrators, Montgomery, AL

Panelists: **Christopher James Albertyn,** National Academy of Arbitrators, Toronto, ON

John Kagel, National Academy of Arbitrators, Palo Alto, CA

Kathy Peters, FMCS Canada, Vancouver, BC

Homer Larue: Kathy, you say the grievant is usually not in the grievance mediation. What's the risk of both the union and the employer viewing the grievant as a bad actor and saying, we've got to get rid of him? There's not really an adversarial relationship going on with regard to this person. Is there a risk and do you handle that?

Kathy Peters: There could be. It doesn't happen often, but it has occurred. Often it's that the union is in front of us for political reasons. The case is a loser. Everyone knows it. Don't need to pay an arbitrator $5,000 a day to be told that it's a loser.

So, the union is possibly facing failure of fair representation charges in front of our Canada Industrial Relations Board. So,