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# HYBRID DISPUTE RESOLUTION PROCESSES AND DUE PROCESS CONCERNS

YUYING ZHANG <sup>◇</sup> AND ANGELA RAY T ABALA <sup>\*</sup>

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## Abstract

Despite arbitration being identified as the de facto mode of dispute resolution for cross-border disputes by the Singapore International Dispute Resolution Academy (SIDRA) International Dispute Resolution Survey: 2022 Final Report, mediation has quickly risen as the second option chosen by parties. With the rapid development of alternative dispute resolution in various jurisdictions, many have sought to support parties in the curation of their dispute resolution mechanism. This has then led to the development of hybrid dispute resolution processes, for example, arbitration-mediation ('arb-med'), arbitration-mediation-arbitration ('arb-med-arb'), and mediation-arbitration ('med-arb'). Parties generally have the autonomy to decide upon the type of hybrid dispute resolution process they prefer in their commercial contracts, although some jurisdictions go a step further and seek to regulate or even codify such choices.

However, the nuances of the hybrid processes across various jurisdictions have been a cause for concern. Differences in cultures and other related issues have impacted the manner of regulation. For example, some jurisdictions allow for the arbitrator to wear the same hat as a mediator (such as China, Hong Kong and Japan); however, others frown upon or even forbid such practices (such as the US and the UK). Singapore is of particular interest, where the local arbitration legislation not only allows for the arbitrator to operate as a mediator (assuming that the parties have consented to this), but parties can also opt for the unique arb-med-arb protocol if they have concerns, for example, about impartiality. This allows parties to choose a separate mediator from the Singapore International

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Mediation Centre, as opposed to requesting the arbitrator(s) to mediate their dispute.

For jurisdictions without such protocols in place, having the same third-party neutral act as arbitrator and mediator may give rise to due process concerns, where the neutral might be reluctant to act decisively in situations or be aggressive with procedural decisions for fear of having the award challenged on the ground of a party not having been able to present their case fully. This could then lead to excessive costs and delays, which are the main concerns for the respondents of the SIDRA Survey 2022 Final Report.

This article considers hybrid processes in different jurisdictions, where the third-party neutral can act both as arbitrator and mediator. The article also seeks to determine whether due process issues are a concern in these processes and what safeguards should be put in place, especially for jurisdictions without hybrid protocols in place.

## I INTRODUCTION

Hybrid dispute resolution generally encompasses a mixture of different types of dispute resolution processes, such as litigation, arbitration and mediation. There are assorted combinations of dispute resolution, such as (i) the litigation-mediation-litigation ('LML') framework;<sup>1</sup> (ii) the practice of mediation-arbitration ('med-arb');<sup>2</sup> or (iii) the arbitration-mediation-arbitration ('arb-med-arb') mechanism adopted by institutions across jurisdictions.<sup>3</sup> Hybrid processes are nuanced, with the third-party intervenor assuming 'multiple roles that have incompatible aims and serv[ing] contradictory functions'.<sup>4</sup> This opens the mechanism to pitfalls that may render the process problematic.

This article focuses on the issues that may arise during instances of mediator-turned-arbitrator, and apprehensions over hybrid processes such as

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<sup>1</sup> *Memorandum of Understanding between the Supreme Court of Singapore and the Supreme People's Court of The People's Republic of China on Cooperation on the Management of International Commercial Disputes in the Context of the Belt and Road Initiative through a Litigation-Mediation-Litigation Framework*, signed 1 April 2023 (Web Page) <<https://www.judiciary.gov.sg/docs/default-source/sicc-docs/announcements/lml-mou-factsheet-and-details.pdf>>.

<sup>2</sup> Law Council of Australia, *Med-Arb Commentary: A Guide for Legal and ADR Practitioners* (Commentary, 2022) <<https://lawcouncil.au/publicassets/19429bd2-68f3-ed11-9482-005056be13b5/2023%2005%2015%20-%20Med-Arb%20Commentary%20v2.pdf>>.

<sup>3</sup> 'The Singapore Arb-Med-Arb Clause', *Singapore International Arbitration Centre* (Web Page) <<https://siac.org.sg/the-singapore-arb-med-arb-clause>>. See also 'Arb-Med-Arb Protocol', *Vietnam International Arbitration Center* (Web Page) <<https://www.viac.vn/en/arb-med-arb-protocol>>.

<sup>4</sup> Weixia Gu, 'Hybrid Dispute Resolution Beyond the Belt and Road: Toward a New Design of Chinese Arb-Med(-Arb) and Its Global Implications' (2019) 29(1) *Washington International Law Journal* 117, 118.

confidentiality and due process concerns. Informed consent as to having the same intervenor act as mediator and arbitrator in a dispute and as to the treatment of confidential information obtained during the mediation stage of the process may then help to address these concerns. For the purposes of this article, references to processes of mediation-arbitration and arbitration-mediation-arbitration will be labelled as med-arb unless otherwise indicated.

## II DIFFERENT ROLES OF ARBITRATORS AND MEDIATORS

Arbitration is considered a legal process, and mediation a communications and negotiation one.<sup>5</sup> As such, the roles of arbitrators and mediators are vastly dissimilar from each other.

Arbitrators are expected to 'give equal consideration to the claims and defences of the parties and to arrive at a decision on the dispute pursuant to the applicable legal framework'.<sup>6</sup> Arbitrators have the power to decide disputes and to reduce their decision in writing in the form of legally binding awards.<sup>7</sup> Accordingly, effective arbitrators are individuals who are independent and impartial and well-suited to the resolution of the particular dispute because of their dispute resolution experience, their legal or cultural background, or their language abilities or technical knowledge.<sup>8</sup>

Mediators, on the other hand, assist parties to reach an amicable settlement of their dispute by studying the relevant documents and actively listening to the parties' underlying concerns and interests.<sup>9</sup> Mediators help parties zero in on 'their real commercial interests, rather than on what they perceive to be their legal entitlement'.<sup>10</sup> Mediators do not decide the dispute and do not issue binding awards. As such, mediators are process facilitators who help the parties find common ground. Effective mediators possess skills relevant to interpersonal awareness and dynamics.<sup>11</sup> As such, mediators may take a more involved and personal approach in order to broker an acceptable agreement.<sup>12</sup>

## III THE GROWING POPULARITY OF HYBRID DISPUTE RESOLUTION PROCESSES

While at first glance arbitration and mediation have different goals and procedures, the core of these dispute resolution methods is to help parties achieve justice. Interest in hybrid dispute resolution processes has grown significantly over the years as relevant stakeholders (for example, arbitral and

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<sup>5</sup> Paul E Mason, 'The Arbitrator as Mediator, and Mediator as Arbitrator' (2011) 28(6) *Journal of International Arbitration* 541.

<sup>6</sup> Nigel Blackaby, Constantine Partasides and Alan Redfern, *Redfern and Hunter on International Arbitration* (Oxford University Press, 7<sup>th</sup> ed, 2022) 1.04.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid* [1.31].

<sup>9</sup> Nadja Alexander and Shouyu Chong, *The Singapore Convention on Mediation: A Commentary* (Kluwer Law International, 2019) 53.

<sup>10</sup> Blackaby, Partasides and Redfern (n 6) [1.114].

<sup>11</sup> Mason (n 5) 543.

<sup>12</sup> Gu (n 4) 133.

mediation institutions, and even parties) seek to create the most suitable dispute resolution mechanism for different disputes. As such, an increasing number of jurisdictions are beginning to regulate hybrid dispute resolution mechanisms, albeit to varying degrees.<sup>13</sup> Different mediation and arbitration institutions have also enacted rules for hybrid dispute resolution mechanisms.

Some corporate executives, in-house counsel, corporate lawyers and dispute resolution lawyers have also indicated a preference for hybrid dispute resolution mechanisms. Not only is it a speedy and impartial process, it also helps in preserving business relationships as parties can utilise mediation as part of the adversarial arbitration process.<sup>14</sup> It also provides finality for the eventual decisions and awards.<sup>15</sup> Hybrid dispute resolution processes tend to be convenient for disputing parties in the sense that they need only appoint one intervenor to act as mediator and arbitrator, and do not have to look into the professional qualifications of several dispute resolution professionals. In addition, should the mediation fail and proceed to arbitration, the same intervenor would already be familiar with the case, allowing for a quicker resolution of the arbitration case.

#### IV DUE PROCESS ISSUES PLAGUING HYBRID DISPUTE RESOLUTION PROCESSES

Given the different aims of arbitration and mediation, as well as the diverging traits and skills that arbitrators and mediators should apply, a single third-party intervenor performing the roles of both arbitrator and mediator may give rise to due process concerns. Scholars and practitioners have identified procedural defects associated with hybrid processes.<sup>16</sup> The main concern with med-arb is the conflict of interest that plagues the third-party intervenor when assuming both the mediator and arbitral roles, that is, whether the third-party intervenor can truly remain impartial despite the different goals of the two mechanisms.<sup>17</sup> This is especially so if confidential information has been shared by the parties with the mediator during caucuses and the mediation subsequently fails, which triggers the (re-)commencement of

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<sup>13</sup> *Arbitration Ordinance* (Hong Kong) cap 609, s 33 ('HKAO'). See also *International Arbitration Act 1994* (Singapore, rev ed, 2020) s 17 ('IAA'); *Arbitration Law* (Japan) Law No 138 of 2003, Article 38 ('Japan Arbitration Law'); *Bundesgesetzblatt* [Code of Civil Procedure] (Germany) s 1053(1) ('German Code of Civil Procedure'); *Arbitration Act 1996* (UK), which does not expressly govern the use of med-arb, but case law has considered various implications of such hybrid processes (see eg *Glencot Development & Design v Ben Barrett & Son* [2001] BLR 207).

<sup>14</sup> Michael Peer, Dmitry Kosarev and Christine Soon, 'Trending in International Dispute Resolution: Hybrid Dispute Resolution Delivers the Best of Both Worlds' (Report, 2021) <<https://www.pwc.com/sg/en/publications/assets/page/hybrid-dispute-resolution-delivers-the-best-of-both-worlds.pdf>>.

<sup>15</sup> Nadja Alexander et al, *SIDRA International Dispute Resolution Survey: 2022 Final Report* (Singapore International Dispute Resolution Academy Report, 2022) 71 (Web Page) <<https://sidra.smu.edu.sg/research-program/appropriate-dispute-resolution-empirical-research/sidra-survey-2022>>.

<sup>16</sup> Gu (n 4) 132.

<sup>17</sup> Ibid 133.

arbitral proceedings with the same intervenor. Such a conflict can also trigger a third-party intervenor's 'due process paranoia'.<sup>18</sup>

### A *Private Sessions and Confidentiality*

Compared to arbitration, it is very common for mediators to speak with parties separately. Private sessions or caucus are 'generally confidential to those present in the session'.<sup>19</sup> Such sessions are resorted to in mediation for a variety of reasons. In a private session, mediators can check in with the parties separately. Parties can use the time to reflect, vent feelings, and deal with strong emotions. More importantly, private sessions 'provide a safe and confidential environment for parties to share information they did not feel comfortable revealing in joint session'.<sup>20</sup>

The issue of confidentiality comes up when the same third-party intervenor acting as a mediator switches to becoming an arbitrator.<sup>21</sup> Should mediation be unsuccessful, there is a risk that 'the mediator-turned-arbitrator's view of the issues has been affected by information'<sup>22</sup> obtained during a private session. This risk has been described as 'one of the biggest drawbacks' of a hybrid procedure as the confidential information might colour the third-party intervenor's views during the arbitration stage.<sup>23</sup> Improper use of information obtained during mediation is concerning since (i) parties to mediation expect the process to be confidential, especially for private sessions; (ii) laws regulating mediation in different jurisdictions may require the information to remain confidential, even during the arbitration stage, if the parties do not execute waivers of confidentiality; and (iii) arbitral awards based on confidential information may be challenged on due process grounds.<sup>24</sup>

Some jurisdictions have attempted to address this issue by having the mediator-turned arbitrator disclose all material information before continuing with the arbitral proceedings. The *Hong Kong Arbitration Ordinance (Cap 609)* ('HKAO')<sup>25</sup> and the *Singapore International Arbitration Act 1994* ('IAA')<sup>26</sup> both require the third-party intervenor to do this. In situations where the mediator

<sup>18</sup> The term 'due process paranoia' is commonly used in the arbitration community and has been used in other publications, see Remy Gerbay, 'Kluwer Arbitration Blog', *Due Process Paranoia* (Blog Post, 6 June 2016) <<https://arbitrationblog.kluwerarbitration.com/2016/06/06/due-process-paranoia/>>.

<sup>19</sup> Nadja Alexander, Joel Lee and Kit-Wye Lum, *Singapore Mediation Handbook* (LexisNexis Singapore, 2019) 268.

<sup>20</sup> Ibid.

<sup>21</sup> Gu (n 4) 135.

<sup>22</sup> Thomas J Stipanowich, 'Arbitration, Mediation, and Mixed Modes: Seeking Workable Solutions and Common Ground on Med-Arb, Arb-Med, and Settlement-Oriented Activities by Arbitrators' (2021) 26(2) *Harvard Negotiation Law Review* 263, 291.

<sup>23</sup> Kristen Blankley, 'Keeping a Secret from Yourself? Confidentiality When the Same Neutral Serves Both as Mediator and as Arbitrator in the Same Case' (2011) 63(2) *Baylor Law Review* 317, 321.

<sup>24</sup> Ibid 321–322.

<sup>25</sup> HKAO (n 13) s 33(4).

<sup>26</sup> IAA (n 13) s 17(3).

has attempted to mediate the dispute, but the parties failed to settle, the mediator-turned-arbitrator is then obliged to disclose 'to all other parties as much of that information as the arbitrator considers is material to the arbitral proceedings'<sup>27</sup> before resuming.

For parties who are uncomfortable with this, Singapore has developed the arb-med-arb protocol ('AMA Protocol') as an alternative. Under this framework, the arbitrator(s) and mediator(s) are appointed separately and independently by the Singapore International Arbitration Centre ('SIAC') and the Singapore International Mediation Centre ('SIMC') respectively, and are usually different individuals.<sup>28</sup> This ensures that the information disclosed is not shared across the different stages of proceedings. However, the AMA Protocol was specifically structured to 'solve the problem of unenforceable mediation settlements'.<sup>29</sup> The decision to start with arbitration is to circumvent any inability to record the settlement agreement as an award as parties need a 'real dispute to begin with'. The arbitral proceedings are stayed almost immediately after commencement with the parties being referred to mediation. Given that the focus of the SIAC-SIMC AMA Protocol is on mediation, concerns relating to caucuses and confidentiality might not be as magnified.

Courts have been rather strict about the misuse of confidential information in hybrid dispute resolution processes. In *Bowden v Weickert*,<sup>30</sup> a decision of the Ohio Court of Appeal, the parties started off with mediation despite the agreement to arbitrate in their contract. Although they had signed off on certain settlement terms and conditions, the mediation ultimately failed, and arbitration proceedings were initiated with the same third-party intervenor. The award issued contained some of the terms found in the draft mediation settlement agreement, as well as other terms considered by parties during the mediation and unrelated terms. The applicant sought to have the award vacated, arguing that the intervenor exceeded their authority 'by attempting to modify the settlement agreement entered into by the parties, which is beyond the scope of the instructions given by this Court and beyond the scope of the arbitration agreement'.<sup>31</sup> In deciding this case, the Court said that 'when the case was referred back to arbitration after the parties' attempt

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<sup>27</sup> HKAO (n 13) s 33(4). See also IAA (n 13) s 17(3).

<sup>28</sup> Paul Tan and Kevin Tan, 'Kinks in the SIAC-SIMC Arb-Med-Arb Protocol' *Law Gazette* (Web Page, January 2018) <<https://lawgazette.com.sg/feature/kinks-in-the-siac-simc-arb-med-arb-protocol/>>.

<sup>29</sup> Interview with Ms Eunice Chua, Deputy CEO of the Singapore International Mediation Centre (Herbert Smith Freehills, ADR in Asia Pacific: Spotlight on Singapore, 29 February 2016) 8. It would be interesting to see whether parties continue to utilise this AMA protocol in light of the United Nations Convention on International Settlement Agreements Resulting from Mediation (opened for signature 7 August 2019, 3369 UNTS, entered into force 12 September 2020) ('*Singapore Convention on Mediation*') given that parties can now rely on this Convention to enforce their settlement agreements directly, instead of having to convert their settlement agreements into consent awards.

<sup>30</sup> *Bowden v Weickert* (Ohio Ct App, No. S-02-017, 2003); *Bowden v Weickert* (Ohio Ct App, No. S-05-009, 2006) ('*Bowden*').

<sup>31</sup> *Ibid* [22].

to reach a settlement through mediation failed, the arbitrator had a duty to remain impartial, and to protect the confidentiality of all mediation communications'.<sup>32</sup> Thus, the Court vacated the arbitral award on the ground that the third-party intervenor used confidential information obtained during mediation to fashion the arbitration award.<sup>33</sup>

Courts have also discussed instances of private sessions casting doubt on a third-party intervenor's independence and impartiality. The Hong Kong case of *Gao Haiyan v Keeneye Holdings*<sup>34</sup> shows the potential dangers of private sessions in creating bias, actual or apparent, on the part of the third-party intervenor.<sup>35</sup> In this case, a three-member tribunal of the Xi'an Arbitration Commission ('XAC') suggested mediation to the disputing parties.<sup>36</sup> The claimant-appointed arbitrator and the Secretary-General of the XAC acted as mediators. The Secretary-General and the claimant-appointed arbitrator then got in touch with an individual described as being affiliated with the respondents and invited him to a private dinner meeting at the Xi'an Shangri-La hotel. At the meeting, the Secretary-General asked the respondents' associate to convince the respondents to accept the settlement proposal. The respondents refused to do so, and the case continued on to arbitration. The arbitral tribunal reconvened and issued an arbitral award. The award was challenged before the Xi'an Intermediate People's Court. The award was upheld. Enforcement of the award was then challenged in Hong Kong. The Hong Kong Court of First Instance ('CFI') denied enforcement, finding that the dinner meeting that the Secretary-General and the claimant-appointed arbitrator had with the respondents' associate would 'cause a fair-minded observer to apprehend a real possibility of bias on the part of the Arbitration Tribunal'.<sup>37</sup> The CFI also found that apparent bias existed based on the interactions at the Shangri-La hotel and the differences between the proposed settlement agreement and the eventual arbitral award. It bears noting that the CFI said that '[t]he risk of a mediator turned arbitrator appearing to be biased will always be great'.<sup>38</sup> In any event, the Court of Appeal of Hong Kong overturned the decision of the CFI and said that it should have given more weight to the decision of the Xi'an Intermediate People's Court, finding no apparent bias. The Court of Appeal's decision has been the focus of much discourse given the striking facts of the case.<sup>39</sup>

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<sup>32</sup> Ibid [30].

<sup>33</sup> Ibid [36].

<sup>34</sup> *Gao Haiyan and Xie Heping v Keeneye Holdings Ltd and New Purple Golden Resources Development Ltd* [2011] HKCFI 240 ('*Gao Haiyan*').

<sup>35</sup> Gu (n 4) 136.

<sup>36</sup> *Gao Haiyan* (n 34) [42].

<sup>37</sup> Ibid [16].

<sup>38</sup> Ibid [72].

<sup>39</sup> 'Hong Kong Court of Appeal Allows Enforcement of PRC Arbitral Award and Provides Important Guidance on Objections to Arbitral Procedure and 'Arb-Med'' *Herbert Smith Freehills* (Blog Post, 8 Dec 2011) <<https://www.herbertsmithfreehills.com/notes/arbitration/2011-12/hong-kong-court-of-appeal-allows-enforcement-of-prc-arbitral-award-and-provides-important-guidance-on-objections-to-arbitral-procedure-and-arb-med>>.

It is clear from these two cases that triggering a hybrid dispute resolution process does not mean that intervenors are free to proceed as they wish. Observing due process and ethical considerations are of utmost importance to ensure that the process is conducted effectively and appropriately.

## B *Due Process Paranoia and Hybrid Dispute Resolution Processes*

Another possible concern is known as ‘due process paranoia’; a phenomenon associated with arbitration that can be described as a ‘perceived reluctance by [arbitral] tribunals to act decisively in certain situations for fear of the [arbitral] award being challenged on the basis of a party not having had the chance to present its case fully’.<sup>40</sup>

There are three components to due process paranoia: (i) case management decisions by an arbitral tribunal that seem overly attentive to due process considerations; (ii) a belief on the part of the arbitral tribunal that such cautiousness is necessary because of the risk that the award may be set aside and/or refused enforcement; and (iii) (without which there would be no paranoia) the erroneous character of the tribunal’s belief that the high level of cautiousness is warranted.<sup>41</sup> Examples of overly cautious case management decisions include granting several requests for extensions of time, acceding to belated introduction of a party’s new defences/claims or of fresh evidence, granting generous disclosure orders, and granting last minute requests to reschedule oral hearings.<sup>42</sup> Arbitrators have been criticised as contributing to the delay and cost of arbitration because of these supposed inefficient procedural decisions.<sup>43</sup>

One of the reasons that due process paranoia emerged is the belief that a successful challenge to the arbitral award on the ground of due process violation would harm the arbitrator’s reputation.<sup>44</sup> This can be seen as ‘a source of professional embarrassment’ and may hurt an arbitrator’s chances of future appointments.<sup>45</sup>

Due process paranoia can also arise in med-arb. Third-party intervenors acting as both mediator and arbitrator may take more cautious case

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<sup>40</sup> Queen Mary University of London, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration* (Report, 2015) 5-10 <[https://arbitration.qmul.ac.uk/media/arbitration/docs/2015\\_International\\_Arbitration\\_Survey.pdf](https://arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf)>.

<sup>41</sup> Gerbay (n 18).

<sup>42</sup> Ibid. See also Rutger Metsch and Remy Gerbay, ‘Prospect Theory and Due Process Paranoia: What Behavioural Models Say About Arbitrators’ Assessment of Risk and Uncertainty’ (2020) 36(2) *Arbitration International* 233, 235; Robin Oldenstam, ‘Due Process Paranoia or Prudence?’ in Axel Calissendorff and Patrik Scholdstrom (eds), *Stockholm Arbitration Yearbook 2019* (Kluwer Law International, 2019) 121, 122.

<sup>43</sup> Oldenstam (n 42) 121–122; Metsch and Gerbay (n 42) 237.

<sup>44</sup> Metsch and Remy Gerbay (n 42) 243; Soumyajit Saha and Smriti Shukla, ‘Resurrecting the Debate on “Due Process Paranoia” in *Centrottrade*: Paranoia or Judiciousness?’ (2020) 36(4) *Arbitration International* 521, 527.

<sup>45</sup> Erika Williams, Hannah Fas and Tom Hannah, ‘Due Process Paranoia and its Role in the Future of International Commercial Arbitration’ (2018) 37(1) *The Arbitrator and Mediator* 43, 44; Metsch and Gerbay (n 42) 236.

management decisions during the arbitration stage, believing that doing so would make any eventual arbitral award less susceptible to challenge. Apart from taking more careful case management decisions, third-party intervenors may experience another form of due process paranoia if they have obtained confidential information from one party during the mediation stage without the other party having had an opportunity to be heard on it. Such information may influence the third-party intervenor when drafting the arbitration award. One author has described this as a question of whether the third-party intervenor can keep a secret from him or herself.<sup>46</sup> Private sessions in mediation can be later perceived in the arbitration stage as meetings that create bias, apparent or real, on the part of the third-party intervenor. This, again, can lead to due process concerns that may affect the validity of any eventual arbitral award.

Several commentators and practitioners have said that due process paranoia is largely unfounded.<sup>47</sup> Some third-party intervenors who have experience in med-arb have also said that due process concerns when mediators switch to an arbitrator role is 'overblown'.<sup>48</sup> Jurisdictions like China and Germany are very much used to the tribunal mediating in the midst of arbitral proceedings. While this practice has not been expressly codified in these jurisdictions,<sup>49</sup> practitioners continue to conduct proceedings in this way.<sup>50</sup> In fact, arbitral tribunals in Germany frequently express their preliminary opinions of the dispute during the mediation session.<sup>51</sup> This may seem problematic in common law jurisdictions,<sup>52</sup> but historically, judges have frequently double-hatted as mediators in both China and Germany as part of their duty to settle the dispute.<sup>53</sup> This may have contributed to the perspective that due process concerns may be somewhat exaggerated or unfounded.

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<sup>46</sup> Blankley (n 23) 321–322.

<sup>47</sup> Williams, Fas and Hannah (n 45).

<sup>48</sup> Stipanowich (n 22) 297.

<sup>49</sup> See *Beijing Arbitration Commission Rules* (People's Republic of China) (revised and adopted at the First Meeting of the Fifth Session of the Beijing Arbitration Commission on 9 July 2014, in effect as from 1 April 2015) Article 67(1). The Article suggests that the tribunal can mediate the dispute with the parties' consent. See also the *German Code of Civil Procedure* (n 13) s 1053(1). This provision allows the arbitral tribunal to record the settlement agreement as a consent award if so requested.

<sup>50</sup> Weixia Gu, 'When Local Meets International: Mediation Combined with Arbitration in China and its Prospective Reform in a Comparative Context' (2016) 10(2) *Journal of Comparative Law* 84, 89, 97. While Article 67(1) of the *Beijing Arbitration Commission Rules* does not explicitly advise against having another intervenor to mediate the dispute, in reality parties are unlikely to appoint another individual. This is a result of the wording of Article 67(1). The practice in Germany is similar, given that they are used to judges also mediating their disputes, they accept the same for arbitrators.

<sup>51</sup> Paul Eric Mason, 'Follow-Up Note to "The Arbitrator as Mediator, and Mediator as Arbitrator"' (2012) 29(2) *Journal of International Arbitration* 225.

<sup>52</sup> Mark Goodrich, 'Arb-Med: Ideal Solution or Dangerous Heresy?' (2012) 15(1) *International Arbitration Law Review* 12.

<sup>53</sup> Gu (n 4) 97.

In several jurisdictions, there are stringent standards that need to be overcome to successfully challenge an arbitral award based on a violation of due process. However, the cases cited above illustrate that there is a risk that an arbitral award may be set aside because of procedural irregularities in a med-arb process. Should a third-party intervenor use confidential information obtained through mediation in drafting an arbitral award, the award may later be vacated on the ground that the third-party intervenor used information learned outside of an arbitral hearing.<sup>54</sup> Private sessions may also be seen as situations that create actual or apparent bias, compromising the third-party intervenor's ability to stay independent and impartial during the arbitration stage. These all feed into the phenomenon of due process paranoia, creating one more thing that third-party intervenors might overanalyse in order to make sure that any eventual arbitral award will not be challenged.

It has been observed that:

[t]heoretically, an arbitration can suffer no irregularities or biases, actual or apparent, when the same person switches between arbitrator and mediator if she can maintain the standards required of her in arbitration and mediation respectively. Due process concerns do not arise from hybrid resolutions per se but from the very human difficulty of partitioning information obtained in the two stages to ensure impartiality.<sup>55</sup>

The fact that there are drawbacks with respect to confidentiality and actual or apparent bias on the part of the third-party intervenor who acts as both mediator and arbitrator in a particular dispute, shows that proper steps need to be taken in order to uphold the integrity of hybrid processes.

## V NECESSITY OF WRITTEN AGREEMENTS COVERING INFORMED CONSENT AND CONFIDENTIALITY ISSUES

Hybrid mechanisms have been described as 'innovative and creative ways to further the purpose of alternative dispute resolution' when done properly.<sup>56</sup> But some courts have cautioned that:

...given the confidential nature of mediation, the high degree of deference enjoyed by an arbitrator, and the high probability that both proceedings are likely to be employed before their disputes are resolved, it is essential that the parties agree to certain ground rules at the outset.<sup>57</sup>

In *Bowden*, the court ruled that certain requirements must be complied with in a hybrid dispute resolution process in order to uphold its integrity. At a minimum, there must be 'clear evidence that the parties have agreed to engage in a [hybrid] process, by allowing [an] arbitrator to function as the

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<sup>54</sup> Blankley (n 23) 334.

<sup>55</sup> Gu (n 4) 133–134.

<sup>56</sup> *Bowden* (n 30) [35].

<sup>57</sup> *Ibid.*

mediator of the dispute.’<sup>58</sup> In order to provide informed consent, the parties and their counsel must consider ‘the concerns associated with mixed roles and [how] to employ the process in the most effective, mutually acceptable manner.’<sup>59</sup>

The *Bowden* court also said that:

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 ... in the event that their disputes are later arbitrated.<sup>60</sup>

Written consent is important. In *Ku-ring-gai Council v Ichor Constructions Pty Ltd*,<sup>61</sup> the Supreme Court of New South Wales ruled that implied consent from both parties that the third-party intervenor who served as mediator can later act as arbitrator was not enough. Citing the *New South Wales Commercial Arbitration Act 2010*, written consent from the parties is necessary for the previous third-party intervenor to resume arbitration and act as an arbitrator when mediation efforts fail.<sup>62</sup> The previous arbitrator is not allowed to continue the arbitration without consent from all parties.

In Japan, arbitrators may also act as mediators in the course of arbitral proceedings so long as the parties give consent in writing. Any withdrawal of such consent must also be in writing.<sup>63</sup>

A written agreement about how the parties want the confidential information learned through mediation to be treated should the third-party intervenor render an arbitral award is likewise essential.<sup>64</sup> Parties may opt to waive confidentiality or keep mediation communications confidential. Waiving confidentiality requirements may help in making sure that any arbitration award issued by the third-party intervenor will not be challenged on due process grounds.<sup>65</sup> Parties who choose to maintain confidentiality ‘will have to rely on the ability of the third-party intervenor (whom they presumably chose) to be able to disregard mediation communications, particularly caucus communications, if any, that the parties divulged during the process’.<sup>66</sup> While this may sound simple in theory, in practice it may be difficult for the intervenor to truly disregard the information shared during caucus, especially if it directly impacts the outcome of the dispute.

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<sup>58</sup> Ibid.

<sup>59</sup> Stipanowich (n 22) 342.

<sup>60</sup> *Bowden* (n 30) [35].

<sup>61</sup> *Ku-ring-gai Council v Ichor Constructions Pty Ltd* [2018] NSWSC 610.

<sup>62</sup> *Commercial Arbitration Act 2010* (NSW) s 27D(5).

<sup>63</sup> *Japan Arbitration Law* (n 13) Article 38.

<sup>64</sup> Blankley (n 23) 363.

<sup>65</sup> Stipanowich (n 22) 352.

<sup>66</sup> Blankley (n 23) 365.

Another way to deal with such confidential information is to have the intervenor disclose to all other parties the information that they think is material to the arbitral proceedings. This is the practice in Singapore and Hong Kong where disclosure of material information is mandatory<sup>67</sup> and the intervenor is not prohibited from using that information during the arbitral proceedings or when rendering an arbitral award.

Thus, it is important for parties to provide clear evidence in the form of written consent that they agree to have the very same third-party intervenor act as both arbitrator and mediator. The same goes for whether they consent to the use of confidential information obtained in mediation during the arbitration stage, or whether they would require the intervenor to disclose material information should the mediation fail and proceed to arbitration. This is to safeguard against possible due process violations.

## VI CONCLUSION

Hybrid dispute resolution mechanisms exist in different jurisdictions, with varying degrees of regulation. Med-arb procedures allow parties to benefit from the flexibility of mediation and the finality of arbitration.<sup>68</sup> Having one intervenor navigate both the mediation and arbitration stages of a dispute helps in making the process more efficient and encourages the preservation of business relationships. But hybrid dispute resolution mechanisms are not without drawbacks. Due process concerns may arise at any stage of the med-arb process, such as when the intervenor has been exposed to confidential information in mediation. Private sessions in the mediation stage may also create apparent or actual bias that may affect the impartiality of an intervenor during the arbitration. These concerns may later be used as grounds to challenge an arbitral award rendered by the intervenor.

An approach to deal with this procedural issue is to ensure that parties to a hybrid dispute resolution mechanism provide their informed written consent. Parties should consent to having the very same intervenor act as both arbitrator and mediator. Parties should also provide clear information as to how the intervenor should handle confidential information obtained during the mediation stage and whether such information that the intervenor deems material should be disclosed to all parties. Doing so may alleviate the risk of having an arbitral award successfully challenged. Ultimately, having parties come into a hybrid dispute resolution process with informed consent will help in addressing due process concerns and maintaining the integrity of the proceedings.

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<sup>67</sup> See Section IV(A) above.

<sup>68</sup> Blankley (n 23) 366.