Mediation – Arbitration, Expedited Hearings,

and Consolidated Claims Dispute Resolution Models

Brian Clauss and Emily Jackson Hall

Dispute resolution responded to the pandemic like other aspects of business and the economy – it moved online. Online allowed for greater efficiency for mediation and arbitration hearings because witness availability was increased and travel times eliminated. Similar considerations also increased parties' use of expedited and consolidated claims arbitration procedures and mediation-arbitration processes during the pandemic.

Expedited and Consolidated Claims Arbitration

Expedited and Consolidated Claims Arbitration is as the names suggest – an abbreviated process from the formal, and time-consuming, arbitration process of the agreement. Some grievances lend themselves to expedited processes because there are not many facts in dispute and few witnesses. Expedited and consolidated arbitration can involve whatever aspects of arbitration to which the parties agree: specific types of grievances such as Overtime, Bid, Attendance, and minor discipline; abbreviated selection of a neutral or a panel of neutrals; limitations on time, witnesses, exhibits, and opening/closing statements; no court reporters; no written briefs; and bench decisions.

The number of hearings heard in a day can be addressed. It is common for expedited hearings to include many hearings in a single day – thereby addressing both backlog, cost, and efficiency.

Form and timing of the arbitrator's award can also be addressed. For example, an Agreement provision provides for expedited, one-day duration hearings:

> Both parties shall waive their rights to submission of any briefs and stenographic recordings. The arbitration proceedings must be continuous to a conclusion. The arbitrator must render a bench decision within twenty-four (24) hours following the close of the hearing followed by a written decision within seven (7) calendar days of the close of the hearing.

In addition to a negotiated expedited procedure, procedures develop ad hoc or organically. The common elements are usually a significant backlog of grievances and advocates with a professional working relationship. For example, your authors have been involved in developing new, expedited processes when: pandemic changes to excused absence and leave policies generated a significant number of backpay grievances, changes to FMLA leave eligibility generated many

unexcused-absence grievances, discipline moving from a statutory scheme to arbitration under a CBA transformed hundreds of disciplinary matters into grievances, and changes to the labor-management relationship resulted in many grievances.

The savings and increased efficiency of consolidated claims and/or expedited procedures can be significant. For example, the parties to a recently agreed-upon expedited grievance docket estimated that cost savings in arbitrator fees exceeded $200,000 from the cost of the matters separately being heard in arbitration. The advocates saved weeks of preparation for dozens of separate hearings in favor of an expedited and consolidated hearing over three days. The advocates received short-form awards in days, instead of months, after the hearing.

Mediation - Arbitration

Arbitration is a process that provides a decision of which party is a winner and which is a loser. As one agreement describes mediation – arbitrations as "intended to be an expedited, informal dispute resolution forum." Mediation allows for a deeper understanding of underlying issues through guided discussion with the goal of reaching a solution. Med-Arb combines the mediation process and the arbitration process to reach a solution when possible or a decision when necessary. Just as there is no universal Expedited Arbitration process, there is no universal approach to Med-Arb. Med–Arb is a process between the parties and the parties dictate the rules and procedure.

Med-Arb is popular among labor-management relationships for obvious reasons beyond the standard "saves time and money" basis. Workplace disputes can affect efficiency, employee income, morale, and productivity. Workplace disputes involve parties that have a continuing workplace relationship and resolving those disputes is critically important to maintaining the relationship. Med-Arb is used to increase the efficiency of dispute resolution with a faster and shorter process, to allow a greater depth of inquiry into the dispute, to allow for a multifaceted solution to a dispute rather than a binary Right/Wrong approach, and to streamline the process for dispute resolution.

Two common approaches to the Med-Arb process:

Mediation Arbitration: The parties mediate and, if no settlement, the parties proceed to arbitration. There are many variations of this approach. The neutral arbitrator–mediator that presides over the mediation may be the same person who hears the dispute in arbitration - but may not. The parties may arbitrate first or mediate first. The process may have organically originated or may have rigid, negotiated rules. There may be an opt-out provision. The arbitrator may issue a decision based on what was heard in mediation.

Arbitration Mediation: The parties arbitrate the dispute and proceed to mediation following the hearing. Like Med–Arb, there are variations to this approach. The arbitrator may also be the mediator, but may not. A party may opt out of the mediation in favor of an arbitration decision. The arbitrator hearing the matter in mediation may use an evaluative mediation approach. There are endless variables to the parties' agreed procedure in Arb-Med.

There are various Med-Arb models developed by the parties. The common element is that the parties agree to submit the dispute to the Med-Arb process and agree upon the process and the neutral or method of selecting the neutral. An added benefit to Med-Arb is the finality of resolution. If mediation is unsuccessful in the Med-Arb process, a decision will be issued and that decision is an enforceable arbitration decision.

Mediation training and certification programs are available from various providers. Arbitration training is available at a few law schools or graduate programs, the non-profit American Arbitration Association, and the Federal Mediation and Conciliation Service. Med–Arb training and certification is not available in the United States but is available in Canada. Canadian dispute resolution has been using Med-Arb for a variety of disputes, including labor management, employment, consumer, commercial, construction, and family law.

Med-Arb in the United States is growing in popularity. Currently, Med-Arb is mostly done by seasoned neutrals with expertise in both mediation and arbitration. Of note, experience suggests that vesting the neutral with the authority to determine the open issues remaining after mediation results in more settlements in mediation. Knowing the dispute will be decided in arbitration if mediation is unsuccessful is a motivation to resolve the dispute through the solutions-based mediation and not answer-based arbitration.

Parties unsure or unfamiliar with this process may express concerns about the same neutral presiding over both the mediation and arbitration phases of a dispute. How can the neutral cleanse their mind of information privately shared in caucus, if the case goes to arbitration? The answer lies in the professionalism of the neutral and adherence to the principles of Med-Arb. A seasoned neutral knows how to separate relevant and irrelevant information and evidence offered during both mediation and arbitration.

EXPEDITED AND MED–ARB CHECKLIST

- Assess the advocates' relationship. Will the other side be interested in discussing new dispute resolution procedures?
- Assess the need. Do the parties have a backlog or frequently have the same type of disputes?

- Assess the disputed matters. Will the disputes lend themselves to new resolution procedures?
    - Expedited: Are there discrete disputes that would benefit from an expedited procedure such as minor discipline, bids, staffing, OT assignment?
    - Med-Arb: Are there matters that would benefit from a discussion and solution-based approach versus a winner/loser approach?
- Assess the possible agreement. What would the agreement do and who develops it – are the parties experienced in these types of agreements, is the neutral involved in developing the agreement, is it ad-hoc, agreed selection, or certain types of disputes?
    - Expedited: Limit timelines, witnesses, evidence, written submissions, form of award?
    - Med-Arb: Med-Arb, Arb-Med or a hybrid? Same neutral hearing both? Any limitations similar to expedited?
- Trial period of implementation and assessment of success?

A successful Expedited Procedure or Med–Arb Agreement starts with a discussion between advocates. Many parties involve an experienced neutral in the discussion and development of the Med-Arb Agreement. Whether an expedited or med-arb procedure, the agreement minimally should include: a memorialized provision on procedure and methodology; a provision on discovery, a provision that addresses what evidence the neutral can consider in the Med-Arb, a provision that includes the involved disputes or disputes; the selection, role of the neutral, and the authority of the neutral; a provision for the timelines for proceeding from mediation to arbitration or arbitration to mediation, and whether an opt-out option is needed.

Med-Arb, Expedited, and Consolidated Claim procedures may be right for some of your disputes.

Brian Clauss is a licensed attorney with a national practice as a full-time neutral in alternative dispute resolution. He has resolved thousands of disputes through arbitration, mediation, med-arb, consolidated, and expedited dispute resolution procedures. He has published more than two dozen books, chapters, and articles, and is also a frequent lecturer in the U.S. and abroad on a variety of legal topics. Admitted to the National Academy of Arbitrators in 2010, he also trains arbitrators, mediators, and advocates in skills-based programs, and recently co-developed a law school ADR concentration. Additional information available at www.claussadr.com

Emily Jackson Hall is a licensed attorney with a dispute resolution practice in the Pacific Northwest, the Midwest, and Canada. Before starting her dispute resolution practice, she was Lieutenant Colonel Jackson Hall in the United States Marine Corps and deployed to Afghanistan. Among the various duties during her career, which included serving as an aircraft maintenance officer and Deputy Circuit Judge of the Navy-Marine Corps Eastern Judicial Circuit, LtCol Jackson Hall represented the United States Navy in labor and employment matters. Additional information available at www.adrhall.com