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Flexibility in International Commercial Dispute Resolution

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FLEXIBILITY IN INTERNATIONAL COMMERCIAL DISPUTE RESOLUTION

Professor Doug Jones AO[1]

I *Introduction*

International commercial dispute resolution has a number of forms which can be broadly categorised into binding: (i) court proceedings; (ii) international arbitration; (iii) adjudication, statutory and contractual; and non-binding (iv) forms of alternative dispute resolution (ADR) including, importantly, mediation and conciliation.

It is a feature of domestic and international court processes in most, if not all, jurisdictions, that the way in which proceedings can be commenced and then proceeded with is set out in detail in rules of court. By way of example, the Singapore International Commercial Court (SICC) has well-established rules of court (SICC Rules) which seek to provide ways in which matters brought to that court can be resolved.[2] Of necessity, and in order to satisfy the lawyers' need for predictability, these rules create strictures within which proceedings must be commenced and brought to fruition, and as a consequence, there is potentially less flexibility of procedure in domestic and international courts than is available in arbitration on the one hand, and forms of non-binding ADR such as mediation and conciliation on the other.

In this paper, it is proposed to examine ways in which arbitration, and other non-binding forms of ADR, can take advantage of flexibility of process to provide a wide variety of options for parties and tribunals to devise ways to ensure the fair, economic, expeditious, and ultimately satisfactory, resolution of international disputes. This flexibility will be compared with that available in the SICC.

At the outset, it should be recognised that lawyers like predicable structure. This is not just an outcome of the legal training process, but represents an element of fairness which must characterise dispute resolution: fairness designed for parties involved in dispute resolution to understand what it is they are involved in, so that they can make a choice as to which method

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[1] International arbitrator and International Judge of the Singapore International Commercial Court (www.dougjones.info) The author acknowledges with the thanks the assistance provided in the preparation of this paper of Caroline Xu and Peter Taurian, Legal Assistants, Sydney Arbitration Chambers.

[2] *Singapore International Commercial Court Rules 2021* (Singapore) (available at https://www.sicc.gov.sg/legislation-rules-pd/sicc-rules-2021) (*SICC Rules 2021*).

of dispute resolution they might choose, and, having chosen a method of dispute resolution, predict how that chosen method will proceed to a conclusion. To an extent, predictability and fairness provide a necessary constraint upon, and indeed are the enemy of, flexibility. But the converse is also true: establishing clear mechanisms by which parties might alternate between various forms of ADR or various procedures, by way of court rules or procedural orders, is an important means of facilitating parties to take advantage of that flexibility. Having laid down that marker, it is now proposed to examine permissible areas of flexibility that can be used in order to promote efficiency, speed, and fairness of binding and non-binding means of dispute resolution.

II *Binding ADR: Arbitration and the SICC*

In keeping with the lawyer's genetic desire for predictability, and in recognition of the fact that in arbitration there are no constraints similar to those in court rules and procedure, a procedural order is one of the first things which is agreed or promulgated in an arbitration. The question of whether tribunals should adopt standard procedural orders was the subject of a chapter jointly authored by Professor Janet Walker CM and this author for the purpose of the *liber amicorum* of Pierre Karrer.[3] Critical to this consideration was the issue of flexibility during the arbitral process and the need to adjust the process within the bounds of predictability and fairness so as to handle the exigencies inevitably arising in any arbitration.

It is useful to identify some of the areas of procedural flexibility for the purpose of recognising how case management techniques can be deployed in each arbitration in order to handle both the needs of the individual dispute, and the exigencies of the arbitration process. Some of the key areas in which different approaches can be flexibly applied include: (a) exchanges of case; (b) disclosure of documents; (c) preparation of witness evidence; (d) deployment of party, and tribunal, experts; (e) exploration by a tribunal of the issues in a case well before the main evidentiary hearing; (f) the main evidentiary hearing; and (g) the finalisation of the award.

For the purpose of comparison, the position in the SICC in respect of each of these key areas will also be examined.

(a) Exchanges of Case

SICC Rules

The SICC offers procedural flexibility in allowing the SICC to order that a contested claim or counterclaim be decided by either (i) pleadings, (ii) statements, or (iii) memorials.[4] In making a selection, the SICC may have regard to any agreement between the parties, and may modify the relevant adjudication track to be applied in such manner and to such extent as it considers

[3] Janet Walker & Doug Jones AO, 'Procedural Order No 1: From Swiss Watch to Arbitrators' Toolkit', in Patricia Shaughnessy & Sherlin Tung (eds), *The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A Karrer* (Wolters Kluwer, 2017) 393–401 (available at https://dougjones.info/content/uploads/2022/11/639-Procedural-Order-No-1-From-Swiss-Watch.pdf). In this, the concept of a standard procedural order, likened to a Swiss watch for reasons that are not unrelated to the level of predictability of Swiss arbitrations, was discussed and there was identified a need to carefully consider the extent to which the entire arbitral process should be set out in the initial procedural order, otherwise commonly referred to as 'PO1'.

[4] *SICC Rules 2021* (n 2) O 4 r 6(1).

appropriate.[5] However, notably, proceedings under the *International Arbitration Act 1994* (Singapore) must be decided by the 'statements' adjudication track (O 7) as modified by the provisions in SICC Rules O 23, unless the Court otherwise directs.[6]

Each adjudication track is subject to separate rules, and if the SICC does not specify any modifications, the Orders relating to the other adjudication tracks will not apply. Orders 6, 7 and 8 prescribe substantive and procedural requirements for the respective adjudication tracks. Notably, in relation to memorials, unless the Court orders or directs otherwise, the claimant's and defendant's memorials must contain (a) a statement of facts supporting the claim or defence/counterclaim, (b) the supporting legal grounds or arguments, and (c) the relief claimed together with the amount of all quantifiable claims.[7] The statements track involves the filing of witness statements by the claimant, and any counter by the defendant.[8]

Therefore, the approach under the SICC Rules is to provide three discrete options for exchanges of case, with procedural flexibility in the form of modifications to a base framework. This flexibility is intended to allow parties to choose a litigation approach with which they are more familiar and comfortable, and which is best suited to the particular dispute.[9]

International Arbitration

Broadly, there are two principal approaches to the preparation of exchanges of case: the memorial and the pleading approaches. The memorial approach, originating in the civil law, involves the presentation of all documentary and witness evidence, alongside legal submissions, to the tribunal in a single submission. The pleading approach, originating in the common law, sees parties establishing their factual standpoint in written pleadings, followed sequentially by disclosure, witness statements, expert reports (if necessary), and written opening submissions before the oral hearing.

However, in arbitration, the debate of 'pleadings vs memorials' is in many instances a barren one, because the processes that can be used in each case do not necessarily involve the adoption of a process that can be easily fitted into and described as traditional pleadings or memorials. These are not so much polar opposites; rather, points on a spectrum. The inherent

[5] Ibid, O 4 r 6(2).
[6] Ibid, O 23 r 2(2).
[7] Ibid, O 8 rr 2(1)–(2).
[8] Ibid, O 7 rr 3–4.
[9] See further Anselmo Reyes, 'Choice of Court: Considering an International Commercial Court for the Resolution of Contractual Disputes', in Michael J Moser & Chiann Bao (eds), *Managing 'Belt and Road' Business Disputes: A Case Study of Legal Problems and Solutions* (Wolters Kluwer, 2021) 105, 110.

flexibility of international arbitration, in fact, facilitates the design of a procedure which incorporates elements of both so as best to resolve the specific dispute in an efficient and just manner, facilitating the customisation of a procedure that is more tailored to the parties' needs and the particular dispute than might be the case under the SICC Rules.

For example, the memorial approach may be adopted insofar as parties exchange memorials containing lay witness statements, documents being relied upon, and any legal submissions. Those legal submissions may then adopt the pleading approach insofar as they set out the factual and legal matters the party is alleging in the dispute, and advance a legal argument based on the cases, legal authorities, and facts extracted from the documents and witness statements. Following this, the procedure can then revert back to the exchange of responsive memorials, containing the same types of documents. The combination of these two approaches allows the tribunal to strike the right balance between compelling parties to focus on the issues in dispute early on, and allowing parties to adapt to contemporaneous documents or witness statements as the case develops.[10]

However, the best combination of the pleadings and memorial approaches will depend on the needs of each case, and with the increased flexibility of process, comes the need for tribunals to carefully and proactively assess the case to ensure the suitability of the chosen procedure. This is a matter best settled at the outset of the arbitration, in Procedural Order No 1.[11]

(b) Disclosure of Documents

SICC Rules

The SICC Rules provide for a simplified disclosure process,[12] as parties are only required to produce documents they intend to rely on,[13] and may serve a request to produce specific categories of documents on any person, which must state, among other things, how the

[10] See Doug Jones AO, 'Complex Construction Arbitration' (Conference Paper, Society of Construction Law Vietnam, 17 April 2023) 33–4 (available at https://dougjones.info/content/uploads/2023/04/Complex-Construction-Arbitration-SCL-Vietnam-final.pdf), published in Doug Jones AO, 'Complex Construction Disputes: Progression and Regression in Arbitral Procedure' [2023] (3) *International Construction Law Review* 257–83.
[11] Jones & Walker, 'Procedural Order No 1' (n 3) 393–6.
[12] See the comments of Thorley IJ in *B2C2 Ltd v Quoine Pte Ltd* [2018] SGHC(I) 04; [2018] 4 SLR 67: '[t]he discovery process under O 110 [applicable to the SICC] is intended to institute a simplified process compared to O 24 [applicable to the SGHC]. Disclosure is only required of documents that are relevant and material and there is no general discovery': at [32].
[13] *SICC Rules 2021* (n 2) O 12 r 1.

requested documents are relevant and material to the requesting party's case.[14] A party who objects to a document production request must serve a notice of objection on the requesting party stating the reasons for the objection,[15] after which the requesting party may, apply to the SICC by summons for an order to produce the documents objected to.[16] By default, the discovery regime applicable to domestic High Court cases does not apply absent a contrary court order.[17] However, the SICC may dispense with the disclosure of documents altogether or order additional or alternative modes of disclosure.[18] Parties may also apply to the SICC for the production of documents before the commencement of proceedings.[19]

Annex F to the SICC Procedural Guide[20] also sets out a Summary Table for Applications for Further and Better Particulars, Production of Documents or Interrogatories, which applies, unless otherwise directed, to any application where more than 5 categories or sub-categories of particulars, documents or interrogatories are sought, or the parties agree that the Annex applies, and that application is contested.[21] It follows a format similar to a Redfern Schedule.

Therefore, the SICC Rules provide for a relatively predictable process of disclosure, though the court has the flexibility to amend the process as it sees fit.

Arbitration

Tribunals may also use the flexibility of arbitration to streamline the process of disclosure of documents. Standard procedural orders normally provide for the deployment of the IBA Rules on the Taking of Evidence[22] with requests for disclosure (if allowed) made on the basis of the criteria set out in these rules and with disputes about production being ruled upon by tribunals presented with Redfern Schedules. However, while the IBA Rules and Redfern Schedules have been developed and deployed as a response to the costs and delays attributable to disclosure processes, they have themselves become a source of ire due to abuse by parties who conduct

[14] Ibid, O 12 r 2.
[15] Ibid, O 12 r 3.
[16] Ibid, O 12 r 4.
[17] See *Rules of Court 2021* (Singapore) O 1 r 2(10).
[18] *SICC Rules 2021* (n 2) O 12 r 5.
[19] Ibid, O 12 r 6.
[20] Singapore International Commercial Court (SICC), *SICC Procedural Guide* (1 March 2023) (available at https://www.sicc.gov.sg/legislation-rules-pd/sicc-procedural-guide) (*SICC Procedural Guide*).
[21] The SICC may also direct that the Annex has any other application.
[22] International Bar Association (IBA), *IBA Rules on the Taking of Evidence in International Arbitration* (adopted 17 December 2020).

fishing expeditions. Tribunals thus also have limited opportunity to engage with the parties on disclosure issues beyond the summarised material in the Redfern Schedule.

The cost of document disclosure proportionate to the total cost of arbitration is significant.[23] There is general dissatisfaction with how the disclosure process works in international (and domestic) arbitrations. Despite this, there are tools available to remedy the present position, albeit deployed less often than they should be. They include those discussed below.

Parties should be encouraged to meet and confer to reduce contested issues. Tribunals should thereafter take advantage of the option to conduct short, focused procedural virtual case management conferences, allowing lead counsel to explain key issues of principle underlying disputed document requests, and, if necessary, particular contested requests. This allows parties to elaborate on these requests, including the reasons underpinning the parties' remaining disputes as to their production, assisting to clarify issues, eliminate irrelevant requests and highlight methods to address concerns relating to production.

Where experts are responsible for disclosure requests, they should be asked in the first instance to seek common positions within each discipline before such requests are made and, if they disagree, to identify with the request why they disagree. In the case of disagreement, proportionality, not just materiality, should be established. Experts should also be present at case management hearings to explain their needs (proportionately) for contested production requests.

These steps allow the tribunal to rule on issues of principle, thereby minimising large areas of disputed requests which would otherwise add significant complexity and cost for the parties. Tribunals should retain, and exercise, flexibility by allowing in Procedural Order No 1 for the possibility to revisit the process should further disclosure issues emerge, since the nature of disclosure issues and the best manner to resolve them may not be evident at the outset of the arbitration.

[23] See Australian Centre for International Commercial Arbitration (ACICA), *2023 Evidence in International Arbitration Report* (6 September 2023) 30 (available at https://acica.org.au/wp-content/uploads/2023/09/Arbitration-Report-2023-FINAL-WEB-compressed.pdf).

Adopting these flexible arrangements, and adapting the typical process under the IBA Rules of Evidence and Redfern Schedules, allows tribunals to engage more fully with, and better understand, disclosure issues from the outset.

(c) Witness Evidence

SICC Rules

Evidence in trials must generally be adduced by way of witness statements, cross-examination and re-examination.[24] A witness' evidence-in-chief must be given by witness statement, unless the SICC orders otherwise, and must contain all material facts which must not be departed from or supplemented by new facts in oral evidence without the permission of the SICC.[25] However, affidavits are required in certain situations, such as where sworn evidence is required by law, or where an order is made by the SICC.[26] As the evidence sought to be adduced by each witness would already be contained in a witness statement, the examination-in-chief of each witness is generally short and brief.[27] The SICC may also make an order for pre-trial examination of a witness where it is necessary in the interests of justice.[28] With the consent of the parties, the SICC may also order that any rule of evidence under Singapore law not apply, and that other rules of evidence (including under foreign law or otherwise) apply.[29]

Therefore, the SICC again follows a default procedure, unless the Court orders otherwise.

Arbitration

Arbitral tribunals have greater scope to use the flexibility of process in arbitration to shape the extent and form of witness evidence.

Extent of witness evidence

After an initial exchange of case in which parties present the documentary and witness evidence relied upon, it may be possible to identify what is really in issue between them and to narrow the witness evidence needed to resolve the issues. It may be the case that certain evidence will have ceased to be necessary once the issues are joined. This provides the opportunity for a

[24] *SICC Rules 2021* (n 2) O 13 r 1(1).
[25] Ibid, O 13 rr 1(2)–(3).
[26] Ibid, O 13 rr 3(2)–(3).
[27] See *SICC Procedural Guide* (n 20) [14.3.1].
[28] *SICC Rules 2021* (n 2) O 13 r 13(1).
[29] Ibid, O 13 r 15.

further, more detailed exchange between the parties and the tribunal on each party's case at a second case management conference. This may also serve as an opportunity for the tribunal to indicate to the parties, without prejudging the case, some areas and issues that seem to it to require particular attention in the presentation of evidence.[30]

Options at this point could include: (1) limiting by agreement the further evidence required; (2) identifying preliminary issues that can be ventilated prior to the evidentiary hearing, and that might provide the opportunity to limit what needs to be addressed at a full evidentiary hearing; and (3) resolving the detail of what might be the subject of expert evidence.

Form of witness evidence

The flexibility of the arbitration process also allows parties to streamline the witness evidence through the use of witness statements, being the document through which a witness gives his or her evidence-in-chief about the factual issues in dispute in an arbitration. Currently witness statements suffer problems of inefficiency, often devolving into overly legally manufactured documents which simply become a vehicle to deliver legal submissions.

However, the full potential of witness statements can be realised by a greater adoption of the memorial approach,[31] accompanied by a joint chronology and dramatis personae, as this compels parties to review the documentary record before committing their case to paper, allows cross-referencing across documents, and avoids witness statements having to cite or recite contemporaneous documents. Confining witness statements to purely factual matters allows for the key issues in dispute to be clarified and narrowed down earlier on, and facilitates comprehension by the tribunal of the factual background. This significantly reduces costs and time spent on case preparation, and reduces delays caused by oral examination-in-chief during the main evidentiary hearing, and particularly non-leading (open) questions, and debate and objection regarding leading questions in examination-in-chief.[32] Where cross-examination does not take place, the whole evidence of the witness will be contained in the witness statement alongside any responsive witness statement, providing clarity prior to the hearing and enabling cross-examining counsel to be more focused and direct in their questions, as they are informed in advance of the witness' views. The organisation of witness evidence in written

[30] See further below at **Section II(e)**.
[31] See further above at **Section II(a)**.
[32] Doug Jones AO & Robert D Turnbull, 'Memorials and Witness Statements: The Need for Reform' (2022) 88(3) *Arbitration* 339, 343.

form also establishes the evidence-in-chief as a coherent narrative, which is easier to comprehend than an unstructured transcript.

Tribunals should assist in this process to the greatest extent possible by providing proactive and detailed guidance through procedural directions or orders regarding the preparation of witness statements. The author has previously devised a list of instructions tribunals may provide to guide the development of witness statements by parties.[33]

(d) Experts

Expert evidence is of critical importance in many arbitrations. However, the potential complexity of such evidence, if not properly managed, may lead to substantial wastage of time and resources, and exorbitant costs.

SICC rules

By default, no expert evidence may be adduced unless the SICC grants permission.[34] The Court must consider (i) whether the evidence will contribute materially to the resolution of an issue, and (ii) whether the issue may be resolved by other means, such as an agreed statement of facts or submissions on mutually agreed materials.[35]

The parties must attempt to agree on (a) the list of issues to be referred for expert evidence, which must as far as possible be expressed in the form of questions which can be answered with 'yes' or 'no', and (b) the common set of agreed or assumed facts that the experts are to rely on,[36] both of which are subject to the SICC's approval.[37] Absent the parties' agreement, the Court must decide the issues and the common set of agreed or assumed facts.[38] The expert evidence must then be confined to the approved issues and rely only on the approved common set of agreed or assumed facts.[39] When permitted, expert witnesses are generally engaged and appointed by the respective parties in the dispute. Expert evidence must be given in a report signed by the expert and exhibited in a witness statement made by that expert.[40] The SICC may direct the evidence of several experts to be taken concurrently (this is also

[33] See ibid, 352–5 ('Appendix').
[34] *SICC Rules 2021* (n 2) O 14 r 2(1).
[35] Ibid, O 14 rr 2(2)–(3).
[36] Ibid, O 14 rr 3(1)(a)–(b).
[37] Ibid, O 14 r 3(2).
[38] Ibid, O 14 r 3(3).
[39] Ibid, O 14 r 3(4).
[40] Ibid, O 14 r 4(1).

sometimes referred to as 'hot tubbing' or 'witness conferencing'). The manner in which concurrent expert evidence is to be taken is at the SICC's discretion.[41]

The Court may order the experts to meet at any time to try to narrow any dispute and so that the experts can agree in writing on all or some of the conclusions on the issues referred to the experts.[42] The SICC may also order that all or some of the experts testify as a panel,[43] and that they give their views on the issues referred to them and comment on one another's views.[44]

Finally, the SICC may at any time, whether on its own motion or upon a party's application, make any orders or directions in relation to the use of expert evidence, including as to: (a) the appointment of Court or common experts; (b) the sequential or simultaneous exchange of experts' witness statements; (c) the method of questioning of any expert, including by any order made pursuant to Rule 6 ('panel of experts'); (d) the remuneration to be paid to Court experts or common experts; and (e) the disallowance or rejection of any expert evidence.[45]

The SICC Rules therefore provide for a variety of flexible tools in the taking of expert evidence, comparable to the array of options available to arbitral tribunals.

Arbitration

Arbitral tribunals may deploy a variety of solutions so as best to deal with expert evidence according to the circumstances of the case, and to make best use of the flexibility inherent in arbitration.

At the most basic level, parties can choose the IBA Rules on the Taking of Evidence,[46] or the Prague Rules on Efficient Conduct of Proceedings,[47] to govern the conduct of proceedings in international arbitrations. The former provides for party and tribunal appointment of experts and creates a hybrid civil-common law approach, while the latter

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[41] Cf Singapore International Commercial Court (SICC), *Singapore International Commercial Court Practice Directions* (1 July 2023) para 90 (available at https://www.sicc.gov.sg/legislation-rules-pd/practice-directions) (*SICC Practice Directions*).
[42] *SICC Rules 2021* (n 2) O 14 r 5(1).
[43] Ibid, O 14 r 6(1).
[44] Ibid, O 14 r 6(4).
[45] Ibid, O 14 r 2(4).
[46] International Bar Association (IBA), *IBA Rules on the Taking of Evidence in International Arbitration* (adopted 17 December 2020).
[47] *Rules on the Efficient Conduct of Proceedings in international Arbitration (Prague Rules)* (adopted 14 December 2018) (*Prague Rules*).

favours tribunal-appointed experts and centres civil law procedures. Additionally, most institutional rules provide for both party and tribunal-appointed experts.

The most common form of expert evidence is that of party appointed experts the management of which is key to an effective process. In this respect a good starting point is the CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration.[48]

However, the devil is in the detail of how these options are provided for and actually deployed in practice.

Early-stage procedure

The author has adopted in many arbitrations a proactive protocol for the effective management of party appointed expert evidence at the early stages of the arbitration, and the enshrining of distinct expert-related procedural steps in early procedural orders:[49]

(1) First, tribunals and parties need to determine the matters on which experts of like discipline will opine, which forces the parties to consider whether particular issues in fact need expert evidence. At this stage, experts may be split into their respective disciplines and be given directions, while the tribunal can hear any conflict or competency challenges before they have the opportunity to seriously disrupt the flow of proceedings.
(2) Secondly, the experts, with the tribunal's assistance, should formulate within each discipline a draft common list of questions which the experts will seek to answer.
(3) Thirdly, the production of all expert reports should be deferred until common factual evidence (documentary and witness) is available and the experts may opine on a common data set. This ensures experts from opposing sides collaborate productively and meaningfully.
(4) Fourthly, the experts within each discipline should produce a joint expert report identifying areas of agreement and disagreement, prepared by way of informal discussion with the opposing experts and the exchange of 'without prejudice' drafts.

[48] Chartered Institute of Arbitrators (CIArb), *Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration* (adopted September 2007) (available at https://www.ciarb.org/media/6824/partyappointedexpertsinternationalarbitration.pdf).
[49] See, most relevantly, Doug Jones, 'Redefining the Role and Value of Expert Evidence', in Bernardo M Cremades & Patricia Peterson (eds), *Rethinking the Paradigms of International Arbitration* (ICC Institute of World Business Law, Dossier XX, 2023) 142, 162–5. This reflects similar practices as in the SICC Rules, the IBA Rules, and the CIArb Protocol.

(5) Fifthly, the experts within each discipline produce individual expert reports on areas on disagreement only.
(6) Finally, the experts produce 'reply' expert reports containing views in the alternative showing what their conclusions would be if the other expert's assumptions and methodologies were accepted by the tribunal.

Hot-tubbing

The early procedure protocol allows tribunals to maximise the benefits 'hot-tubbing', or expert witness conferencing, which involves the concurrent taking of evidence from experts of similar disciplines who engage with the other experts' analysis and conclusions in conference at the hearing with counsel and the tribunal. This strategy facilitates efficient engagement between experts and the tribunal, distilling the key issues and areas of difference, and is particularly suited to arbitrations with complex technical facts and numerous experts, as it allows experts to directly engage with each other's evidence, and to hold each other accountable for potentially partisan or unnecessarily complicated views.

However, the outcome of this strategy can vary considerably depending on the level of earlier engagement by the tribunal. When left until just before the evidentiary hearing, it can come as 'too little too late'.[50] In the author's practice as an arbitrator, best practice involves meeting with the experts several times in case management conferences to settle the issues on which they will opine well before the main evidentiary hearing, and review and discuss with them the development of their joint and individual reports. This permits the tribunal also to make clear its expectations of the experts and the nature of their role, thus enabling the evidence they produce to be most useful. Despite adopting a protocol such as that proposed above, experts rarely hit the mark with their first joint report. They often require further guidance as to what the tribunal requires from them, particularly with regard to explaining areas of agreement and disagreement more explicitly in a joint expert report before producing individual reports. Regular case management conferences assist greatly in providing this guidance. This ongoing engagement by the tribunal also improves their understanding of the expert issues by the time of the evidentiary hearing.

[50] See further Jones, 'Complex Construction Disputes' (n 10) 273–5.

Tribunal-appointed expert

Alternatively, tribunals may consider appointing an expert instead of the parties, to address the concerns of bias and complexity affecting party-appointed experts, and provide for easier case management and clarity. This is not likely to be a popular option, however, as the vast majority of arbitrations involve party-appointed experts, in line with the principle of party autonomy. Critics of tribunal-appointed experts also remain hesitant regarding the loss of competing expert perspectives, which creates the risk that the tribunal merely accepts the expert's opinion at face value, especially for complex, technical matters. Parties may also view the ability to present expert evidence in the manner they wish to be a critical part of the right to present their case in the manner they wish, among other criticisms.

One area potentially of great value in respect of legal experts would be the adoption in arbitration of the SICC option of the appointment of one legal expert referred to by the SICC as an *amicus curiae*.[51]

(e) Pre-Hearing Engagement (Midstream CMCs)

SICC rules

Case Management Conferences (CMCs) are a key feature of SICC proceedings. The SICC will hold CMCs as provided in the SICC Rules, or at any time the SICC thinks appropriate.[52] For example, where necessary or appropriate, the SICC may fix CMCs subsequent to a preliminary CMC to monitor the progress of the case.[53] A party may also apply to the SICC for a CMC to be convened,[54] or in the case of a scheduled CMC, both parties may apply to the Court to dispense with attendance of that CMC.[55] At a case management conference, the SICC may make such order or give any direction to achieve the General Principles.[56] Unless the Court otherwise directs, a CMC must be conducted as an oral hearing, lead counsel or counsel fully instructed on the matter must attend, and the parties represented by counsel are not required to attend.[57]

[51] Cf *SICC Rules 2021* (n 2) O 14 r 8 ('Independent counsel').
[52] *SICC Rules 2021* (n 2) O 9 r (1).
[53] Cf *SICC Practice Directions* (n 41) para 83(1).
[54] *SICC Rules 2021* (n 2) O 9 r 2(3).
[55] Ibid, O 9 r 2(4).
[56] Ibid, O 9 r 1(3). The General Principles are outlined in O 1 r 3, and include: (a) the expeditious and efficient administration of justice according to law; (b) procedural flexibility; (c) fair, impartial and practical processes; and (d) procedures compatible wit and responsive to the needs and realities of international commerce.
[57] Ibid, O 9 r 2(1).

Prior to a case management conference, parties must: (a) attempt to agree on the matters to be discussed at that CMC, including but not limited to the adjudication track for the determination of the dispute and any proposed modifications to the track; (b) attempt to identify the real issues in dispute, and any preliminary issues; (c) consider the possibility of alternative dispute resolution, and be prepared to inform the SICC of the suitability of the case for alternative dispute resolution; and (d) unless the SICC otherwise directs, submit a Case Management Bundle or updated Case Management Bundle (as the case may be) at least 7 working days prior to the CMC.[58]

The Court has the flexibility to amend any directions on the management of the case, on application by one party and with the consent of both parties.[59]

The SICC Rules also strongly encourage the parties to pursue ADR. Where the parties are agreeable to ADR, the SICC may make directions to facilitate the parties' attempt at ADR.[60] Where the parties are not agreeable, the SICC may direct that ADR be reconsidered at a subsequent time,[61] or make any order necessary to facilitate the amicable resolution of the dispute.[62]

Arbitration

Tribunals can use the flexibility of the arbitral process to allow for substantial pre-hearing engagement with the parties. Engagement between tribunals and parties in international arbitration, prior to the evidentiary hearing, particularly in the common law tradition, has in the past been limited to dealing with procedural differences between the parties, experts, issues of disclosure, and preparing for the main evidentiary hearing.

However, after the first exchange of parties' statements of case, most usefully when they are in a memorial form, the tribunal has an opportunity to distil the issues revealed to be in contention between the parties. This does, of course, require the tribunal to read and analyse the parties' cases and to summarise for the parties what it understands to be the issues and the parties' contentions in respect of them.

[58] Ibid, O 9 r 3.
[59] Ibid, O 9 r 6
[60] Ibid, O 9 r 5(1).
[61] Ibid, O 9 r 5(2)(a).
[62] Ibid, O 9 r 5(2)(b).

Midstream CMCs

Analysis of the issues in dispute can best be made after the initial exchanges of case, rather than in Procedural Order No 1 or the Terms of Reference (if applicable), and it is helpful to have intermediate CMCs at which sensible further directions can be developed, contributing to the process of educating the tribunal iteratively.

As a general proposition, significant value can be added to the process of international arbitration through engagement between the tribunal and the parties during the process well before any evidentiary hearing. An effective means of doing this is by means of one or more 'midstream' CMCs. Through these midstream CMCs, the key issues emerging from exchanges of case will be ventilated, leading to the identification of necessary reply factual witness evidence, preparation of focused expert testimony, as well as identifying of key issues that can usefully be the subject of ventilation and potential preliminary decision. They also greatly assist with the design of the evidentiary hearing.

In both complex and relatively simple cases, these CMCs add real value, not least in the following respects:

(a) The tribunal is educated by undertaking this process;
(b) The parties can clarify whether or not the tribunal has properly understood the issues;
(c) The issues can be presented often in a tabular format, to which can be connected as the case subsequently proceeds, the factual and witness evidence replied upon in respect of each of the competing contentions, all available at a glance on an issue-by-issue basis;
(d) The tribunal is certain to be better informed as to the relevance in materiality of documents sought to be disclosed for the purpose of a Redfern Schedule or equivalent process;
(e) There can be helpful engagement between the parties and tribunal on what further evidence is needed by way of reply submissions, perhaps avoiding the removal of all the trees in order to ensure the 'wood' is dealt with; and
(f) Often at the stage at which a midstream CMC is held, there are other case management issues that can be dealt with, including engagement with experts.

It must, however, be acknowledged that a midstream CMC represents a substantial investment of time and cost for the tribunal (which must read and summarise its understanding of the issues and provide this to the parties prior to the CMC) and for the parties, and thus needs to be

deployed in a manner consistent with the needs of the particular dispute rather than undertaken for the sake of doing it.

(f) Main Evidentiary Hearing

SICC Rules

The SICC retains ultimate control over the conduct of all trials, and may give directions before or during the trial, including but not limited to: (a) identifying or limiting the issues to which factual evidence may be directed; (b) identifying the witnesses who may be called or whose evidence may be read; (c) the exchange of written closing submissions; and (d) the making of oral closing submissions.[63]

Unless otherwise directed, the SICC will require written closing submissions from the parties,[64] which will generally be filed and exchanged between the parties simultaneously and, unless otherwise directed, will be followed by the filing and exchange of written reply submissions.[65] After all written closing submissions have been filed and exchanged, the parties will be allowed to make oral submissions if so directed by the SICC, on which the SICC may impose time limits.[66]

Arbitration

Detail of evidentiary hearing

Tribunals should also take the opportunity to set the timing of evidentiary hearings as soon as is feasibly possible. A pre-hearing CMC should be set sufficiently in advance of the main evidentiary hearing, dealing with critical issues such as:

(a) The electronic and hard copy format of hearing bundles;
(b) The preparation of agreed chronologies and dramatis personae;
(c) Decision on which witnesses need not be called for cross examination;
(d) If needed, the manner of interpretation and the identity of the interpreters; and
(e) The real issues in dispute upon which decisions are required by the tribunal.

It is suggested that earlier pre-hearing conferences than are usually provided for in Procedural Order No 1 may improve the cost effectiveness and efficiency of evidentiary hearings. Thus,

[63] *SICC Rules 2021* (n 2) O 20 r 5(1).
[64] Ibid, Appendix C para 51 (read with O 20 r1(5)).
[65] Ibid, Appendix C para 52 (read with O 20 r1(5)).
[66] Ibid, Appendix C para 53 (read with O 20 r1(5)).

flexibility for much earlier development of these matters needs to be preserved. However, tribunals may wish to schedule the length or date of the main evidentiary hearing well in advance in Procedural Order No 1, to make it more difficult for parties to delay or postpone the hearing, though tribunals must obviously retain flexibility where necessary.

Time management strategies

Tribunals can also adopt innovative strategies to promote efficiency during hearings, to minimise the costs and delays caused by long and protracted hearings. Principal among these is a 'chess clock' approach.

The chess clock procedure is a time management method involving the prior agreement of the parties and tribunal to allocate a specific amount of time to each party for the oral hearing. The time allocations and rules should be discussed at a pre-hearing conference between the tribunal and the parties. The parties should also agree on when certain activities should be debited against their time allocations: for example, late arrivals, setting up of equipment, unjustified objections, or where a witness engages in time-wasting behaviour. The parties and tribunal should also decide on administrative matters, such as the method of time-keeping throughout the proceedings (eg, by the tribunal secretary, or by representatives of each party). Finally, it is critical in chess clock proceedings, especially those making use of extensive witness evidence, to include a procedural direction that a failure to cross-examine a witness on a particular matter does not constitute acceptance of their evidence, given the time constraints on cross-examination.

There is no one-size-fits-all procedure, and the tribunal should develop a procedure which is tailored to the parties and the specific dispute. Relevant considerations include the number and type of witnesses, as well as the method of taking evidence (eg, witness conferencing). Furthermore, though the division of time between parties is usually equal, the tribunal may assign different time limits, for example, where the parties must cross-examine different numbers of witnesses, or more extensive cross-examination of some witnesses is required.

This strategy directs the parties, including in their examination of witnesses and experts, to focus on the key issues in dispute in the limited time available to them, and creates certainty for the arbitrators and parties, through an accurate and early estimate of the time required for the hearing. The parties place greater focus on comprehensive but concise written submissions which sets out the key issues and arguments prior to the hearing, which the arbitrators are

expected to have read and synthesised prior to the hearing. Additionally, the strategy shares the onus of efficiency more equally between the tribunal and the parties, as parties bear the burden of effective time allocation. Counsel must also be extremely organised as time is usually deducted for delays in arrival and searching for relevant documents.

However, tribunals must still remain proactive in controlling the evidence of witnesses and dismissing strategic or dilatory objections by counsel. For example, the tribunal should encourage efficient behaviour in counsel and witnesses (eg, reminding rambling witnesses to answer questions directly) and by themselves avoiding unnecessary questions to stay within the allocated time for questioning. Tribunals should also remain alert to the need to give due weight to parties' right to present their case, by cooperating with counsel and listening carefully to each party's time needs, and guide the parties both to a suitable agreement and throughout the proceeding. Additionally, chess clock procedures need not be adopted in every case. Where the parties are staunchly opposed to the procedure, it should not be forced on them. Lastly, in some cases, parties may not be able accurately to estimate how much time will be required during the hearing, such as where one party is unfamiliar with arbitration.

(g) Finalisation of the Award

SICC Rules

The SICC may pronounce judgment immediately after the parties' closing oral submissions (where oral submissions are required by the SICC).[67] Alternatively, it may reserve judgment and adjourn the case to consider the evidence and arguments. In such an instance, the SICC may inform the parties on a later date to attend before the court for the delivery of judgment. Where a written judgment is to be delivered, the SICC may direct that copies of the written judgment be handed to the parties or their counsel without requiring their attendance in court.

In certain cases, the SICC may grant judgment only on the issue of liability and defer its ruling on the precise quantum of damages that is owed to the winning party.[68] In such situations, the quantum of damages to be awarded is to be assessed by the same Judge(s) who gave judgment for damages to be assessed, unless the Judge(s) orders the Registrar to assess the damages. The SICC may also order the taking of accounts whereby the court determines the quantum involved in a dispute. The SICC may make such order on an application made by

[67] See ibid, O 20 r 10.
[68] Ibid, O 20 r 17.

summons at any stage of the proceedings. The SICC may also make such order after determining the liability of a party or parties to an action.

Arbitration

Unique to arbitration, the author has also proposed a Post-Hearing Expert Access Protocol, a tripartite agreement between the tribunal, parties, and relevant experts, to facilitate assistance by experts to the tribunal in calculating amounts to be awarded in the final award *after* the hearing.[69] The tribunal may have confidential access to the experts, on agreement by the parties, strictly for the performance of calculations (as opposed to the provision of any further opinions), which is particularly useful in cases with complex factual matrices. The tribunal does not meet with the experts during this process but rather provides them with clear written instructions to complete the calculations. Both the instructions given by the tribunal and the resulting calculations are then provided to the parties in conjunction with the final award. This gives parties the opportunity to apply for corrections under the applicable slip provisions if there are any computational errors, and further ensures transparency and accountability between the tribunal and the parties.

This has the benefit of ensuring that parties and their counsel are simultaneously provided with a final statement of both their rights and liabilities, and is particularly relevant in cases where asset preservation is a concern, as it would be beneficial to limit the period of time during which parties can infer the outcome of the arbitration. Further, in arbitrations involving publicly listed corporations, parties may be subject to continuous disclosure obligations relating to share market issues. If information is provided which can be translated into potential outcomes, a dispute may arise as to whether there has been a failure for one party or the other to meet those disclosure requirements. Overall, the assistance of experts with the award can ensure that tribunal decisions on quantum are made efficiently and accurately.

[69] See Jones, 'Redefining the Role and Value of Expert Evidence' (n 49) 174–5 (Annex 2). These directions should be adjusted for the needs of the case and the parties, subject also to whether there is a memorial style exchanges of case or more traditional pleadings.

III *Non-Binding ADR: Mediation*

Mediation is a form of non-binding alternative dispute resolution (ADR) in which parties negotiate a settlement to their dispute with the aid of a neutral third party: the mediator. The role that the mediator is to play depends fundamentally on their own preferred methods, the nature of the dispute and their mandate as granted by the parties. In general, the role of the mediator is often described as either 'facilitative', whereby they seek to foster a spirit of collaboration between the parties and encourage attempts at compromise, or 'evaluative', whereby they evaluate the strength of the parties' respective legal positions from a neutral perspective with a view to encouraging the parties to giving the parties the confidence to settle in light of those positions; although obviously a combination of these and other approaches is possible.[70]

The following section considers how mediation and other forms of non-binding ADR fit within the schema of international dispute resolution, and in particular how mediation both lends itself to and relies upon the flexibility of parties who seek to resolve their disputes.

(a) Mediation & Arbitration

Whereas all forms of ADR refer, definitionally, to an attempt to 'resolve' disputes, what is meant by 'resolution' may change depending on the context and the parties' desires — resolution may refer to the vindication of a party's legal rights, or may alternatively refer to the repairing of the fractured relationship of the parties and the ability to resume the legal relationship or project as originally contemplated.[71] The dispute in both cases comes to an end, although the manner of its resolution is entirely different.

Arbitration is traditionally regarded as a form of ADR: 'alternative' in that it provides an 'alternative' to litigation in the courts of a state. However, the process by which arbitration proceedings are conducted, while inherently and essentially distinct from that in court proceedings, in no sense goes so far as other forms of ADR to distance itself from the standard set by court proceedings. This is because arbitrations, in all but the rarest cases,[72] involve the

[70] For a brief, recent discussion of the role of the mediator, see Robert Butlien, 'The Singapore Convention on Mediation: A Brave New World for International Commercial Mediation' (2020) 46(1) *Brooklyn Journal of International Law* 183, 183–4.
[71] See ibid 202.
[72] Such as, for instance, matters to be determined by an arbitration *ex aequo et bono*: see, eg, United Nations Commission in International Trade Law, *UNCITRAL Arbitration Rules (with article 1, paragraph 4, as adopted in 2013 and article 1, paragraph 5, as adopted in 2021)* (adopted 9 December 2021) art 35(2).

final determination of parties' rights *according to law*, being the law or laws that the parties have explicitly or implicitly deemed applicable to the resolution of their dispute. Adversarial advocacy of a type similar to that deployed in litigation is in practice the only way that parties engage in arbitration proceedings. Importantly, while it shares the promise of ADR being quicker and cheaper than traditional litigation, the arbitration of complex disputes inevitably requires an enormous contribution of time and resources; and it is, unfortunately, commonplace for arbitrations to be merely a prelude to inevitable litigation before the courts seeking to enforce the outcome of the arbitration. By contrast, in mediation or conciliation, whereas parties' legal rights and liabilities no doubt contribute to the context in which any agreement is reached, the determination of the dispute is left entirely to the parties' decision of what is advantageous to themselves or, more productively, the relationship or project in question.

Mediation has historically not enjoyed the same level of widespread adoption as arbitration. A 2016 survey of the Singapore Academy of Law found that, of 500 respondent public legal personnel and private practitioners, only 5% considered mediation their preferred form of ADR, as opposed to 71% favouring arbitration, and the enforceability of arbitral awards was cited as the overwhelming reason for this preference.[73]

The relationship of mediation with the concept of 'flexibility' on which this paper has focused is worth considering. It might be thought that mediation, by virtue of its atmosphere of cooperation and its party-led structure, is an almost infinitely malleable, even formless, kind of ADR.[74] Even the term, 'mediation', itself defies exhaustive definition, being defined, for example, in the *United Nations Convention on International Settlement Agreements Resulting from Mediation* (*Singapore Convention*)[75] as:

> *[A] process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute*

[73] See Singapore Academy of Law, *Study on Governing Law and Jurisdictional Choices in Cross-Border Transactions* (Survey, 11 January 2016), discussed in Eunice Chua, 'The Singapore Convention on Mediation: A Brighter Future for Asian Dispute Resolution' (2019) 9 *Asian Journal of International Law* 195, 204.

[74] See generally Nadja Alexander and Shouyu Chong, 'Leading the Way for the Recognition and Enforcement of International Mediated Settlement Agreements: The Singapore Convention on Mediation Act 2020' (2022) 34 *Singapore Academy of Law Journal* 1, 9–11 [16]–[17].

[75] *United Nations Convention on International Settlement Agreements Resulting from Mediation*, opened for signature 7 August 2019 (entered into force 12 September 2020) ('*Singapore Convention*').

with the assistance of a third person or persons ('the mediator') lacking the authority to impose a solution upon the parties to the dispute.[76]

However, as this paper has demonstrated, flexibility and structure are not antagonistic to one another — disputes that proceed without structure and without clear procedural avenues by which to proceed can lead to inevitable complications that in no real sense vindicate parties' right to adopt a flexible form of dispute resolution. In the context of mediation, parties that approach the task without a clear sense of the value that earnest engagement with the process can bring — and mediators that fail to impress this upon the parties — will not successfully resolve a dispute. Indeed, it is the very purpose of the 'mediator' that they give structure to what could otherwise be an unstructured and unproductive negotiation.

(b) Combining Mediation with Other Forms of ADR

Binding and non-binding forms of dispute resolution both have a role to play. The hallmark of a robust and effective system of international dispute resolution is its ability to accommodate parties' desires to resolve their disputes in the manner that suits them and that suits the dispute in question. Allowing parties, therefore, to transition between binding and non-binding forms of dispute resolution, is a kind of flexibility that is potentially extremely valuable.[77]

The SICC provides a notable example of how mediation can effectively be interwoven in the procedures of a court via its Litigation-Mediation-Litigation (LML) Framework.[78] Should parties agree to the LML Protocol, there is appended to the procedure for their chosen method of dispute resolution a mechanism for easy referral of disputes to the Singapore International Mediation Centre (SIMC), with the SICC retaining supervisory jurisdiction to make supplementary or interim orders, and to enter any agreed settlement as an order of the court.[79] Providing for procedures such as these is necessary to give form and structure to

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[76] Ibid, art 2(3). Another notable expression of the fluidity of the notion of 'mediation' may be found in *Ku-ring-gai Council v Ichor Constructions Pty Ltd* [2018] NSWSC 610, [31]–[34], [46] (McDougall J), affd (2019) 99 NSWLR 260; [2019] NSWCA 2, the leading Australian case on the arb-med legislation. Note also the very faint terminological distinction between 'mediation' and 'conciliation': Laurence Boulle, *Mediation: Principles, Process, Practice* (LexisNexis, 3rd ed, 2011) 148 [5.15]; Leah Musenero, Bassam Baroudi and Indra Gunawan, 'Critical Issues Affecting Dispute Resolution Practice in Infrastructure Public-Private Partnerships' (2023) 149(3) *Journal of Construction Engineering and Management* 040230011, 2.

[77] See Butlien (n 70) 198–9.

[78] Available at https://www.sicc.gov.sg/litigation-mediation-litigation-framework. See also Singapore International Arbitration Centre, *SIAC Rules* (6th ed, 1 August 2016) Schedule 1 ('SIAC-SIMC Arb-Med-Arb Protocol'), providing also for easy communication and devolution of disputes as between the SIAC and the SIMC (Singapore International Mediation Centre).

[79] See Singapore International Commercial Court, *Litigation-Mediation-Litigation Protocol* (2023) cls 5–6.

mediation proceedings, and make them an attractive and viable means of ADR. Allowing for parties to eschew court proceedings while still maintaining the supervisory jurisdiction of the court and the enforceability of a court order is an example of an approach that respects flexibility and party autonomy without sacrificing structure and formality of procedure. Consideration should be given to the possibility of providing, at an appropriate stage of the arbitration, for a 'pause' in the timeline of the proceedings, during which the parties might be able to turn to mediation or some other form of ADR to settle the dispute before it progresses; provided, of course, that the parties consent to the 'pause' and that the timelines are not unduly prescriptive.

Somewhat different considerations arise when considering whether the arbitrator or judge may *themselves* encourage settlement of the dispute. A recent report of the ICC Commission on Arbitration and ADR observed changes in the international perspective on this question, with trends, including trends in the ICC Rules, indicating a burgeoning acceptance of arbitral procedures designed to facilitate settlement.[80] While it noted that many practitioners continue to consider it inappropriate for the arbitrator to raise the idea of settlement or mediation, it drew illuminating parallels between this practice and procedures already commonplace in civil law countries, such as the technique in German arbitral and judicial proceedings of holding 'preliminary views' CMCs, in which the tribunal provides a 'non-binding and preliminary assessment' of the issues in dispute.[81]

Arb-med,[82] a hybrid form of dispute resolution in which arbitrator and mediator are combined into one, is a more advanced permutation of this kind of flexibility. In arb-med, the parties to a dispute may, typically only with explicit unanimous consent, enable their chosen arbitrator to function also as mediator in certain circumstances, and vice versa.

Naturally, there are ways in which the roles of the arbitrator and the mediator are irreconcilably different. For instance, a mediator might highlight certain difficulties with a party's case, or strongly advise that parties retract certain arguments or settle certain points of contention — an arbitrator who makes any such comment, or advises that parties terminate proceedings, may face recourse for serious misconduct. These differences are, to some extent,

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[80] ICC Commission on Arbitration and ADR, *Facilitating Settlement in International Arbitration* (July 2023) 4–6 (available at https://iccwbo.org/wp-content/uploads/sites/3/2023/07/2023-ICC-Facilitating-Settlement-in-International-Arbitration.pdf).

[81] See ibid 9, 13–16, referring also to *Prague Rules* (n 47) art 2.4(e).

[82] The discussion that follows praetermits the distinction between arb-med, med-arb and arb-med-arb, which are all considered together for brevity.

obvious, but should be at the forefront of parties' minds as they consider the merits and consequences of arbitration and mediation. However, there is a reason why arb-med exists, and why it is contemplated that a good arbitrator might also make a good mediator, even in respect of the same proceedings. This is because an arbitrator who has been immersed in the parties' dispute — the evidence and submissions advanced by both sides — and who is tasked with applying his or her wisdom to the facts and the legal submissions to determine the outcome of the dispute, possesses such a unique degree of insight into and understanding of the entire dispute and its context. Should the parties have the inclination to resolve their dispute via negotiation, wholly or in part, there is arguably no better candidate to guide those attempts at negotiation. China is an example of a jurisdiction in which arb-med has been adopted with great success. Since even the 1990s, support for arb-med has been widespread in the arbitration community in China,[83] and, although data is lacking, approximately a quarter of arbitrations at the China International Economic and Trade Arbitration Commission (CIETAC) are brought to an end through mediated settlement agreements.[84]

However, arb-med can be a risky manoeuvre. Whereas it is generally not problematic for an arbitrator to transition into a mediator, should attempts at mediation fail, there may be complications in resuming the original arbitration, as the arbitrator may have expressed certain views or been exposed to certain positions of the parties that would not have been acceptable in the arbitration proper.[85] However, it is a feature of the primacy placed on party autonomy and flexibility that it be left to the parties to decide whether, in light of this risk, they would like to proceed. Certain procedural safeguards may also help to alleviate any dangers and make the process more attractive, such as, to draw examples from the Australian legislation, the requirement of all parties' written consent before a mediator resumes acting as an arbitrator,[86]

[83] See Kun Fan, 'Can You Leave Your Hat On? An Empirical Study of Med-Arb/Arb-Med in China', in Christian Campbell (ed), *International Mediation* (Comparative Law Yearbook of International Business Volume 41a, Wolters Kluwer, 2020) 129, 139, 142.

[84] Or consent awards determined through mediation: Weixia Gu, 'Hybrid Dispute Resolution beyond the Belt and Road: Toward a New Design of Chinese Arb-Med(-Arb) and Its Global Implications' (2020) 29(1) *Washington International Law Journal* 117, 123–4. Gu argues that China's support for arb-med is only due to increase following the founding of the CICC, which was itself catalysed by the One Belt One Road initiative: at 167–9.

[85] See, eg, Butlien (n 70) 204–5.

[86] See *Commercial Arbitration Act 2010* (NSW) s 27D(4). The provisions of the Act are based on the *UNCITRAL Model Law on International Commercial Arbitration* (1985, with amendments as adopted in 2006) ('*Model Law*'), and were enacted uniformly across the States and Territories of Australia: *Commercial Arbitration Act 2011* (NT); *Commercial Arbitration Act 2011* (SA); *Commercial Arbitration Act 2011* (Tas); *Commercial Arbitration Act 2011* (Vic); *Commercial Arbitration Act 2012* (WA); *Commercial Arbitration Act 2013* (Qld); *Commercial Arbitration Act 2017* (ACT).

and the requirement that the reconstituted arbitrator disclose all such information acquired during the mediation proceedings as is deemed relevant.[87]

(c) Enforceability

Enhancing the enforceability of mediated settlement agreements is a key step to promoting its use as an option in the arsenal of tools available to parties to resolve their disputes in a flexible and effective manner.[88]

The most significant international development in the enforcement of mediated settlement agreements consists in the *Singapore Convention*, which aims broadly to recreate the international enforceability of arbitral awards via the *New York Convention*[89] in respect of mediated settlement agreements.[90] Like the *New York Convention*, the *Singapore Convention* provides for the prompt[91] enforcement internationally of mediated settlement agreements, regardless of the jurisdiction in which they were entered. The party seeking enforcement need only establish that the agreement was signed by the parties[92] and emerged as a result of mediation[93] (for which the mediator's signature is explicitly described as pertinent evidence),[94] and digital forms of 'signature' are sufficient for both criteria.[95] Notably, the Convention does not circumscribe all possible examples of evidence that might satisfy the requirement that a party furnish proof of the involvement of a mediator, which reflects and preserves the flexible nature of mediation.[96] It does, however, note that evidence may be furnished by an institution that administered the mediation,[97] which is a welcome addition bearing in mind the increasing

[87] See *Commercial Arbitration Act 2010* (NSW) s 27D(7).
[88] Recall that enforceability issues were a primary reason for the preference described above for arbitration over mediation. See also Alexander and Chong (n 74) 2–3 [4]; Butlien (n 70) 186; David Tan, 'The Singapore Convention on Mediation to Reinforce the Status of International Mediated Settlement Agreement: Breakthrough or Redundancy?' (2023) 40 *Conflict Resolution Quarterly* 467, 468.
[89] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959) ('*New York Convention*').
[90] See United Nations Commission on International Trade Law (UNCITRAL), *Planned and Possible Future Work: Part III: Proposal by the Government of the United States of America: Future Work for Working Group II: Note by the Secretariat*, UN Doc A/CN.9/822 (2 June 2014) 3 (Annex), discussed in Chua (n 73) 195–6. See also Alexander and Chong (n 74) 2 [2]–[3].
[91] See *Singapore Convention* (n 75) art 4(5): '[w]hen considering the request for [enforcement of the mediated settlement agreement], the competent authority shall act expeditiously'.
[92] Ibid, art 4(1)(a).
[93] Ibid, art 4(1)(b).
[94] Ibid, art 4(1)(b)(i).
[95] Ibid, art 4(2).
[96] Chua (n 73) 199.
[97] *Singapore Convention* (n 75) art 4(1)(b)(iii).

trend towards the institutionalisation of mediation proceedings.[98] If a party should resist enforcement, it can do so only[99] under the limited grounds that:

(a) party consent was impaired in respect of the settlement agreement, whether by incapacity or any other vitiating factor;[100]
(b) the terms of the settlement agreement are not deemed final or binding, or have subsequently been modified.[101]
(c) the obligations in the agreement have already been performed, are not clear or comprehensible, or cannot be given effect to without violating the terms of the settlement agreement;[102]
(d) there was a serious breach of standards of conduct applicable to the mediator and the mediation, including a failure to disclose factors that go to the mediator's impartiality and independence.[103] This is narrower than the equivalent laws in respect of arbitration that govern the grounds by which an arbitrator's appointment may be challenged,[104] as the requisite breach must have been 'serious' or 'material', such that the 'party would not [otherwise] have entered into the settlement agreement'.[105]
(e) Enforcing the mediation agreement would be contrary to the public policy of the state in which enforcement is sought, or the subject matter of the dispute is not capable of settlement by mediation under the law of that state.[106]

The *Singapore Convention* is designed to avoid the pleonasm whereby parties who currently wish to obtain a final and internationally enforceable representation of their mediated settlement must commence an arbitration, and proceed immediately to consent award.[107] This was described by the proposers of the *Singapore Convention* as a 'legal fiction' that brings with it unnecessary risks, delays and costs.[108]

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[98] Chua (n 73) 199. For a topical example in the Indian context, see below.
[99] See *Singapore Convention* (n 75) art 5(1): '[t]he competent authority of the Party to the Convention where relief is sought under article 4 may refuse to grant relief at the request of the party against whom the relief is sought only if that party furnishes to the competent authority proof…' (emphasis added).
[100] Ibid, arts 5(1)(a)–(b)(i).
[101] Ibid, arts 5(1)(b)(ii)–(iii).
[102] Ibid, arts 5(1)(c)–(d).
[103] Ibid, arts 5(1)(e)–(f).
[104] See *Model Law* (n 86) art 13.
[105] See *Singapore Convention* (n 75) arts 5(1)(e)–(f), discussed in Chua (n 73) 202.
[106] Ibid, arts 5(2)(a)–(b).
[107] The Convention expressly does not apply to settlement agreements recorded as a judgment or award and enforceable as such: ibid, art 1(3).
[108] UNCITRAL (n 90) 4 (Annex). See also Tan (n 86) 476.

The *Singapore Convention* is itself emblematic of the synthesis between flexibility and structure discussed above: rather than proceeding at once to create model (and therefore optional) legislative provisions to encourage the adoption of uniform mediation procedures internationally, the UNCITRAL Working Group opted instead for a binding convention that would have the effect of immediately bringing mediation on par with other forms of dispute resolution as a process with 'teeth' that can have legal force internationally.[109] This is to be contrasted with, for example, the ambiguous terms of the 2008 European Union Directive on Mediation,[110] whose terms could be satisfied simply by providing for the 'enforcement' of a settlement agreement by permitting parties to sue in contract for breach of the agreement.[111]

The *Singapore Convention*, with its 56 signatories, and other similar national developments, such as India's recently passed *Mediation Act 2023*, are contributing to an uptick in interest in mediation as a supplementary means by which parties consider resolving their disputes.[112] Once it becomes a fully normalised fixture of international dispute resolution, the benefit to parties will lie in the additional option that they will have available to them to obtain a swift and enforceable resolution to their dispute.

[109] Chua (n 73) 196; Tan (n 86) 474–5.
[110] *Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters* [2008] OJ L 136/3, art 6(1).
[111] Chua (n 73) 198.
[112] See generally SI Strong, 'The Preamble to the Singapore Convention on Mediation: Identifying the Object and Purpose of the Treaty through Text, Context and Intent', in Guillermo Palao, *The Singapore Convention on Mediation: A Commentary on the United Nations Convention on International Settlement Agreements Resulting from Mediation* (Elgar, 2022) 41, 49–51 [P.22]–[P.28].

IV *Conclusion*

Deploying a flexible approach to international dispute resolution is key to effective, economical, and timely resolution of international commercial disputes. The challenge of doing so in arbitration and court proceedings remains a continuing challenge for arbitrators and judges, and counsel alike, given legal cultures where familiar predictable processes restrain lateral thinking. As can be seen from this paper, the potential flexibility afford to court processes by the SICC Rules creates a very desirable competitive tension between arbitration and court. This can also be seen in the English Commercial Court and in commercial lists in some states of Australia and in the Federal Court of Australia.

It is clear that combining binding dispute process with non-binding ADR can add considerable value for parties to commercial disputes thus adding to the challenges facing all of those in the international commercial dispute process. Understanding, and deploying, options is critical in this respect, and it is hoped that this paper can contribute to doing so.