Marquette Sports Law Review

Volume 29
Issue 2 *Spring*

Article 7

Med-Arb and Professional Sports: Could Med-Arb Work as an Effective Dispute Resolution Process in Professional Sports?

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COMMENTS

MED-ARB AND PROFESSIONAL SPORTS: COULD MED-ARB WORK AS AN EFFECTIVE DISPUTE RESOLUTION PROCESS IN PROFESSIONAL SPORTS?

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I. INTRODUCTION

A prominent National Hockey League (NHL) player wants $20 million for the next season. The NHL team wants to give the hockey player $10 million for the next season because of the player's history of injuries and his lack of effort during practice and in games. The player and the NHL team cannot come to an agreement on the player's salary for the next season. As such, a disagreement has formed. With the season quickly approaching, the player and the team want the dispute resolved as soon as possible.[1] Should the player and

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1. The fact-pattern is based on the salary dispute between Tomas Tatar and the Detroit Red Wings. *See* Scott DeCamp, *Red Wings' Tomas Tatar 'Excited,' Relieved To Get Deal Done*, MLIVE MEDIA GROUP (July 21, 2017), http://www.mlive.com/redwings/index.ssf/2017/07/red_wings_tomas_tatar_excited.html. Note

team go through negotiation to resolve their dispute? Is mediation a better option? What about arbitration?

A National Football League (NFL) running back is seeking to appeal a six-game suspension for "conduct detrimental"[2] to the game. The NFL Commissioner decides to "rule" on this matter due to being allowed to hear disputes of this nature based on terms within the Collective Bargaining Agreement (CBA) between the NFL and the NFL Players Association (NFLPA). Furthermore, the Commissioner has investigated disputes of this nature (i.e., personal conduct),[3] decided the outcome of those disputes, and has served as the sole arbitrator when the initial decision of the dispute is appealed.[4] With that information in mind, should the NFL's Commissioner act as an arbitrator? Should the NFL appoint professional arbitrators or mediators to help resolve all disputes in the league? What if both an arbitrator and a mediator were utilized to resolve disputes?

It has been argued that neutral third-parties should hear disputes involving players and teams or leagues so that potential bias issues are mitigated.[5] The argument behind neutral third-parties being appointed to handle disputes has gained more interest as commissioners in professional sports continue to use their broad authority to enforce decisions that the commissioner initially created.[6] What if commissioners were able to impose penalties and suspensions, but did not have complete control over the hearing process of disputes? What if a policy was put in place that requires an appointed and neutral third-party to

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that Tomas Tatar is no longer with the Detroit Red Wings. After being traded twice within a six-month time-frame, Tatar is now with the Montreal Canadiens. *See generally* Stu Cowan, *Tomas Tatar Joins Canadiens After Second Trade in Just Over Six Months*, MONTREAL GAZETTE, Sept. 12, 2018, https://montrealgazette.com/sports/hockey/nhl/hockey-inside-out/tomas-tatar-joins-canadiens-after-second-trade-in-just-over-six-months.

2. "Conduct Detrimental" refers to conduct of anyone part of the NFL who engages in "'conduct detrimental to the integrity of and public confidence in' the NFL." *Personal Conduct Policy: League Policies for Players*, NFL (Aug. 11, 2017), https://static.nfl.com/static/content/public/photo/2017/08/11/0ap3000000828506.pdf. Conduct is further defined as "conduct by anyone in the league that is illegal, violent, dangerous, or irresponsible [and] puts innocent victims at risk, damages the reputation of others in the game, and undercuts public respect and support for the NFL." *Id.*

3. *Id.* For information about the NFL personal conduct policy in a flow-chart format, see *The New NFL Personal Conduct Policy*, NFL, https://www.cbsnews.com/htdocs/pdf/NFL_domestic_violence_policy.pdf (last visited May 9, 2019).

4. The fact-pattern is based on Dallas Cowboys' running back Ezekiel Elliot's six-game suspension and his subsequent appeals. A.J. Perez, *Dallas Cowboys' RB Ezekiel Elliot: What Happens Next If He Appeals?*, USA TODAY, August 15, 2017, https://www.usatoday.com/story/sports/nfl/cowboys/2017/08/14/ezekiel-elliotts-appeal-process-roger-goodell/564601001/.

5. *Neutral Arbitrators in Sports: What Makes It Fair?*, LAW360 (July 23, 2015), https://www.law360.com/articles/680682.

6. *Id.*

hear and decide various disputes in professional sports? Furthermore, what if this neutral third-party was able to act as a mediator and then as an arbitrator?

Having a neutral third-party act as a mediator and then as an arbitrator could provide an efficient process that may reduce cost and time. This process is known as med-arb. The purpose of this Comment is to demonstrate how beneficial med-arb could be in professional sports, and why med-arb should be implemented in professional sports as a dispute resolution process. Section II of this Comment provides a definition of mediation and arbitration so that the med-arb concept can be better understood in the context of professional sports. Section III brings mediation and arbitration together (i.e., med-arb) and explains the benefits as well as the negatives of the process. Section IV applies med-arb to two major professional sports in the United States. Section V briefly discusses med-arb from an international perspective, and Section VI concludes this Comment. It should be noted that med-arb is consistently changing and gaining popularity. Thus, it is my hope that in writing this Comment, some insight can be gained in to how med-arb, specifically single-neutral med-arb, can evolve into a method—and perhaps a preferred method—in professional sports for certain disputes that may arise.

II. MEDIATION AND ARBITRATION DEFINED

Mediation and arbitration are one of the many dispute resolution methods that provide parties with an alternative to resolve disagreements.[7] These dispute resolution methods are alternatives to resolving disputes through litigation in court.[8] This section provides a brief overview of mediation and arbitration while discussing a few benefits and negatives of both dispute resolution methods.

A. Mediation

By definition, mediation is "a private, voluntary dispute resolution process in which a third-party neutral invited by all parties, assists . . . in identifying issues of mutual concern, developing options for resolving those issues, and finding resolutions acceptable by all parties."[9] Some of the core principles of mediation is that it is a *voluntary*, *collaborative* process in a *controlled*

7. *Dispute Resolution Processes*, A.B.A., https://www.americanbar.org/groups/dispute_resolution/resources/DisputeResolutionProcesses/ (last visited May 9, 2019).

8. *Id.*

9. *See* CARRIE J. MENKEL-MEADOW ET AL., MEDIATION: PRACTICE, POLICY, AND ETHICS 14 (2013).

environment in which the conversation between those involved is *confidential*.[10] Also, mediation is grounded on the principle of the parties being informed, meaning that the parties have the ability to retain "legal and other expert information and advice," but that expert advice and information is "never determinative in mediation."[11] And finally, the principles of "self-responsibility" and "satisfaction" are part of the overall foundation of mediation due to the idea that parties "having actively participated in voluntarily resolving issues" will be more likely to comply with the terms of the agreement "compared to court options."[12] Now that a definition of mediation has been presented, it is important to discuss some of the benefits and negatives of this dispute resolution method.

1. A Few Benefits

Mediation is an attractive dispute resolution process because of its party-focused approach. Essentially, the parties have control over the process and the mediator is there to simply guide the parties throughout the process and facilitate the discussion between them.[13] Parties are able to converse about not only the facts, from their respective points of view, that led them to engage in mediation, but also the emotions behind the actions of the parties that gave rise to the dispute. As such, mediation fosters an open discussion. And, as a result of this open discussion notion, parties may be willing to show each other evidence and discuss that evidence. In other dispute resolution methods, and particularly in litigation, that evidence would likely not be shown until a hearing or trial.

Another benefit of mediation is that it is a confidential process.[14] Therefore, what the parties discuss during the mediation session is typically not admissible in a court of law.[15] Additionally, a mediator can help parties set ground rules for the discussion so that the process goes as smooth as possible with limited to no interruptions when each party is speaking. Moreover, mediation can provide

10. Jim Melamed, *What Is Mediation?*, MEDIATE, https://www.mediate.com/articles/what.cfm (last visited May 9, 2019) (emphasis added).

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *See* Rachel Ehrlich, *Shhhh! The Big Risk Associated With Mediation Confidentiality Nobody Talks About*, MEDIATE (Sept. 2014), https://www.mediate.com//articles/EhrlichR1.cfm; *see also* National Conference of Commissioners on Uniform State Laws, *Uniform Mediation Act*, MEDIATE (Oct. 3, 2001), https://www.mediate.com/articles/umafinalstyled.cfm ("[e]xcept as otherwise provided in Section 6, a mediation communication is privileged as provided in subsection (b) and is not subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided in Section 5.").

parties with the ability to create an agreement that may be enforceable in a court of law.[16] Furthermore, with mediation, parties have a greater chance of preserving an existing or ongoing relationship due to the party-centered and collaborative approach of mediation compared to the adversarial aspects of arbitration—and litigation.[17]

2. A Few Negatives

Despite the many benefits of mediation, there are also a few negatives that are worth mentioning. Mediation does not allow for precedent to be established due to a judge not ruling on the outcome of the dispute. Therefore, a judgment is not entered, and guidance in how a mediator should go about guiding the parties throughout a mediation session of similar facts from previously mediated disputes is not necessarily given.

Another negative, is that almost anyone can claim to be a mediator. A legal degree is not required to mediate a dispute, and in some instances, a mediator may not have a legal background, but rather a background in psychology, psychiatry, or social work, for example.[18] Furthermore, mediation may prove to not be suitable in situations when the parties do not come to the table with an open-mind, are not willing to have a discussion about the issue that has brought them to the table, or have little to no interest in reaching a resolution that both parties can live with long-term. Also, emotions of the parties may hinder the process and prevent them from reaching an agreement, especially considering there are no formal rules for the mediation session.[19] Like mediation, arbitration, another dispute resolution process, has its fair share of benefits and negatives.

B. Arbitration

Arbitration is defined as "a private, voluntary dispute resolution process where the parties . . . agree in writing to submit the dispute for binding resolution to a third-party neutral chosen pursuant to the agreement of the

16. Michael P. Carbone, *Enforcing Agreements Made At Mediation*, MEDIATE (Dec. 2001), https://www.mediate.com/articles/carbone5.cfm.

17. MENKEL-MEADOW ET AL., *supra* note 9.

18. *See generally Court-Certified Mediator Qualification Requirements in the US By State*, LEGAL STUD., https://legalstudiesms.com/learning/court-certified-mediator-qualification-requirements/ (last visited May 9, 2019) ("[f]ew states require a law degree to be recognized as a court-approved mediator"); *Mediator Careers*, PRINCETON REV., https://www.princetonreview.com/careers/204/mediator (last visited May 9, 2019) ("[t]he educational background of a professional mediator varies widely").

19. *What Are the Disadvantages of Mediation?*, FINDL., https://adr.findlaw.com/mediation/what-are-the-disadvantages-of-mediation.html (last visited May 9, 2019).

parties."[20] Arbitration involves a neutral arbitrator or arbitrators who have the "authority to make a decision about the dispute."[21] Generally, the arbitration process is similar to a trial in terms of the parties being adversarial, presenting evidence to the decision-maker, making opening statements, and eliciting testimony.[22] And, a decision reached in arbitration can be binding or non-binding.[23] When the decision is binding, then it is final and "can be enforced by a court, and can only be appealed on very narrow grounds. When [the] [decision] is non-binding, the arbitrator's award is advisory and can be final *only if accepted* by the parties."[24] With the definition of arbitration and its nuances in mind, an overview of some of the benefits and negatives is offered below.

1. A Few Benefits

Arbitration is an attractive dispute resolution process because it creates binding resolutions.[25] In addition, the process is confidential, and parties can select an arbitrator or panel of arbitrators that have expertise in the subject-matter that is related to the dispute.[26] As a result, there can be more confidence in the award that is generated because the arbitrators have a background in the nature of the dispute, which can make the parties accept the award that has been rendered compared to if the decision-maker is not knowledgeable about the subject-matter of the dispute. Arbitration also provides a win-lose situation that can be appealing to parties. There is typically more of a formal process in arbitration so parties generally have an idea of what is involved in each step of the process, and what the next steps are in the

20. MENKEL-MEADOW ET AL., *supra* note 9. Note, that the voluntariness aspect of arbitration has been argued when a contract has an arbitration clause. *See* David Horton, *Infinite Arbitration Clauses*, 168 U. PA. L. REV. (forthcoming 2019); *Fight Forced Arbitration*, NAT'L ASS'N CONSUMER ADVOCS., https://www.consumeradvocates.org/for-consumers/arbitration (last visited May 9, 2019).

21. *Arbitration*, A.B.A. (Oct. 11, 2018), https://www.americanbar.org/groups/dispute_resolution/resources/DisputeResolutionProcesses/arbitration/.

22. *Id.* However, unlike trial, "parties do not have to follow state or federal rules of evidence and, in some cases, the arbitrator is not required to apply the governing law." *Id.*

23. *Id.*

24. *Id.* (emphasis added).

25. MENKEL-MEADOW ET AL., *supra* note 9, at 15.

26. *Id.* at 14. The three main resources that parties can utilize in order to find an arbitrator or panel of arbitrators is the American Arbitration Association (AAA); International Institute for Conflict Prevention & Resolution (CPR); and the Judicial Arbitration and Mediation Services, Inc. (JAMS). *See ADR.org*, AM. ARB. ASS'N, https://www.adr.org (last visited May 9, 2019); *CPR International Institute for Conflict Prevention & Resolution*, CPR, https://www.cpradr.org (last visited May 9, 2019); *JAMS Mediation, Arbitration, ADR Services*, JAMS, https://www.jamsadr.com (last visited May 9, 2019).

process.[27] And finally, there is a federal act that governs arbitration at the state and federal level within the United States.[28] As such, it can be said that there is a law in place that can further provide notice and set expectations for all parties who undergo the arbitration process.[29] As with any process that provides benefits to those who use it, there are also negatives to the process that must be mentioned.

2. A Few Negatives

Despite the positives of arbitration, there are many negatives that may influence a party to choose a different dispute resolution process or go through litigation. Arbitration is a formal process within the many dispute resolution options that exist.[30] And because of the formal nature that the process brings, parties may be intimidated. As a result, parties may want to avoid arbitration and use mediation, for example, because it brings a more collaborative approach to resolving disputes as mentioned above. Or, parties may want to skip arbitration and head for litigation because the judge will decide the outcome of the dispute and provide the highest level of formality available.

The setting of an arbitration hearing can be a negative. Despite the fact that an arbitration hearing can vary in terms of location, the set-up of the arbitration hearing generally has the arbitrator or panel of arbitrators located at the front of the room with the parties located on opposing sides similar to a typical court room set-up. Another disadvantage of arbitration is that the outcome of the dispute will not establish precedent; similar to precedent not established in mediation.[31] One of the main negatives of arbitration is that the arbitrator's award can only be appealed in extreme circumstances.[32] Because of the extreme

27. *Stages of the Arbitration Process*, AM. ARB. ASS'N, https://www.adr.org/sites/default/files/document_repository/AAA_Stages_of_the_Arbitration_Process.pdf (last visited May 9, 2019). The general stages of the arbitration process include the following: (1) Case Initiation; (2) Arbitrator Invitation; (3) Arbitrator Appointment; (4) Preliminary Hearing and Information Exchange; (5) Hearing; and (6) the Award stage. *Id.*

28. *See* 9 U.S.C. §§ 1–307 (2019). The full text of the Federal Arbitration Act is available at: https://www.govinfo.gov/content/pkg/USCODE-2011-title9/pdf/USCODE-2011-title9.pdf.

29. *Id.*

30. *Dispute Resolution Processes*, *supra* note 7.

31. Barbara Kate Repa, *Arbitration Basics*, NOLO, http://www.nolo.com/legal-encyclopedia/arbitration-basics-29947.html (last visited May 9, 2019).

32. *Id.*

> A written provision . . . or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal,

circumstances aspect, most arbitration awards are upheld. And finally, some parties may not know that arbitration awaits them when a dispute arises due to an arbitration clause within a contract.[33] As a result, some parties may have lack of knowledge, resources, etc. to prevail in an arbitration proceeding against a major corporation, for example. Courts have typically upheld contractual arbitration clauses when citizens have tried to argue the validity and enforceability of the arbitration clause.[34]

C. In Sum

Every dispute resolution method has its positives and negatives. In the context of this Comment, there could be a dispute resolution method that may limit the negatives of mediation and those negatives of arbitration in terms of resolving disputes within professional sports. This method could be cost-effective, involve less time, give parties more options in resolving their dispute, and provide parties with some level of certainty that the dispute will be resolved. The method that could bring about the aforementioned benefits is known as single-neutral med-arb, and the benefits of single-neutral med-arb may prove to be what the professional sports world needs in resolving its vast and complex disputes.

III. MED-ARB AND THE CONTROVERSY

Generally, med-arb is a dispute resolution process that involves the combination of mediation and arbitration.[35] Single-neutral med-arb centers on

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> *shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract*.

9 U.S.C. § 2 (emphasis added). In other words, the italicized text reinforces the idea that arbitration awards are binding and enforceable unless an extreme circumstance occurred. An example of an extreme circumstance under law is if the arbitrator exceeds his or her powers. Repa, *supra* note 31. When an arbitrator exceeds his or her powers, a court can vacate the arbitral award as a remedy under law. *Id.*

33. *See generally AAA-ICDR® Clause Drafting*, AM. ARB. ASS'N, https://www.adr.org/Clauses (last visited May 9, 2019).

34. *See* Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006). The Court stated that when "regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as whole, and not specifically to the arbitration clause, must go to the arbitrator." *Id.* at 449. Therefore, the validity of a contract that as an arbitration clause is not automatically void for the mere fact that one of the parties was not aware that the contract had an arbitration clause. *See generally* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967) (establishing the rule of severability for arbitration clauses and contracts that contain them, which is what the Court in *Buckeye Check Cashing, Inc.*, 546 U.S. 400, relied on when reaching its decision); Jose Rivera, *When Will a Court Enforce an Arbitration Agreement?*, LEGAL MATCH (June 26, 2018), https://www.legalmatch.com/law-library/article/when-will-a-court-enforce-an-arbitration-agreement.html.

35. Mark Batson Baril & Donald Dickey, *MED-ARB: The Best of Both Worlds or Just A Limited ADR Option?*, MEDIATE, https://www.mediate.com/pdf/V2%20MED-

the fact that the "same third-party neutral plays the role of both mediator and arbitrator."[36] Med-Arb is when the mediator "changes hats" and becomes an arbitrator if mediation is unsuccessful.[37] When the third-party neutral changes the role from mediator to that of being the arbitrator, any decision that is reached—by the now arbitrator—is binding.[38] Before the move is made, parties typically agree that the mediator will become an arbitrator if the mediation session(s) does not result in a resolution.[39]

Med-arb may seem as though it is an unknown dispute resolution process. However, as interest in mediation grew, so did the interest in arbitration.[40] And as interest in arbitration grew, dispute resolution centers began to realize how effective mediation and arbitration, can be as a dispute resolution method.[41] Additionally, with dispute resolution centers such as the American Arbitration Association, offering both mediation and arbitration, "[a]n increasing number of commercial industries concluded that 'combining mediation and arbitration in sequence can be a fair, efficient, and cost-effective process for resolving disputes.'"[42] Instances of combining mediation and arbitration are shown when there is a mention in an arbitration clause that mediation can continue to occur throughout the arbitration process,[43] when parties come to an agreement that arbitration should follow if mediation fails,[44] and when parties want to use the same third-party neutral to help guide them throughout the duration of resolving their dispute.[45]

ARB%20The%20Best%20of%20Both%20Worlds%20or%20Just%20a%20Limited%20ADR%20Option.pdf (last visited May 9, 2019).

36. *Id.*

37. THOMAS J. STIPANOWICH & VÉRONIQUE FRASER, INTERNATIONAL TASK FORCE ON MIXED MODE DISPUTE RESOLUTION SUMMIT 36-37 (2016) (discussing that "med-arb" is known to refer to a single-neutral playing both roles of a mediator and an arbitrator; however, "med-arb" has also been known to refer to the more general process of using both mediation and arbitration with different neutral third-party individuals in their respective roles. But for purposes of this Comment, "med-arb" takes the position as referring to a single-neutral playing both roles of a mediator and an arbitrator).

38. *Id.*; *see also* Brian A. Pappas, *Med-Arb and the Legalization of Alternative Dispute Resolution*, 20 HARV. NEGOT. L. REV. 157 (2015)).

39. STIPANOWICH & FRASER, *supra* note 37.

40. Baril & Dickey, *supra* note 35, at 3.

41. *Id.*; *see also* Thomas J. Stipanowich & Zachary P. Ulrich, *Commercial Arbitration and Settlement: Empirical Insights into the Roles Arbitrators Play*, 6 Y.B. ARB. & MEDIATION 1, 8-10, 25-28 (2014).

42. Baril & Dickey, *supra* note 35, at 3 (quoting Thomas J. Brewer & Lawrence R. Mills, *Combining Mediation and Arbitration*, 54 DISP. RESOL. J. 4, 32-39 (1999)).

43. *Id.*

44. *See* Stipanowich & Ulrich, *supra* note 41, at 10.

45. *Id.* This instance is the single-neutral med-arb situation that is the focus of this Comment. This method of med-arb is still an unusual concept in the United States compared to other parts of the world. *Id.*

A. The Benefits

Med-Arb can be effective when parties are informed of the process and are able to decide on their own if it is the best choice in resolving their dispute.[46] Additionally, med-arb can be effective when the neutral third-party has the skills and experience necessary to be an arbitrator and render a binding decision.[47] If there is an understanding of the process, and the neutral third-party has the experience necessary to wear both hats, then the advantages of med-arb can outweigh the perceived disadvantages of the process. Many of the advantages relate to time and cost, but another advantage is flexibility.[48]

Flexibility relates to the parties choosing when to go to arbitration. Furthermore, if the parties do decide to go that route, there is an understanding that the neutral third-party has a workable amount of facts to render a decision. The facts learned in mediation will be expounded through evidence and witness testimony in arbitration, but the neutral third-party already has a foundation for the dispute since the mediation process was done before arbitration. The flexibility of the process can be beneficial in disputes between parties that have an ongoing relationship or a vested interest in resolving the dispute as soon as possible. Ongoing relationships can be preserved through med-arb because the parties agreed beforehand to go through mediation, and then arbitration if the dispute is not resolved. Parties are able to preserve ongoing relationships because they are presumably will not have to endure litigation. The adversarial nature of litigation, compared to arbitration, coupled with the cost and time to have a case heard in court may cause great stress on the parties, which could impact any ongoing relationship. If arbitration is the next step, then it is known that a binding resolution will result so that aspect of arbitration is likely to not be a surprise.[49]

For all the benefits med-arb brings to the table, there are still concerns. The concerns of the process deal with possible "coercion and the risk that confidential information gained during mediation may taint the [neutral third-party's] final decision."[50]

(citing *Reflections on Med-Arb and Arb-Med: Around the World*, 2 N.Y. DISP. RESOL. L. 71-119 (Spring 2009) (collection of articles highlighting use of med-arb and variants)).

46. Baril & Dickey, *supra* note 35, at 3.

47. *Id.*

48. *Id.* at 4.

49. *Id.*

50. *Id.*

B. The Negatives

Coercion in med-arb is when the neutral third-party pressures the parties to reach a settlement.[51] The underlying idea behind coercion is that "what appears to be a negotiated resolution may be perceived by the parties as an imposed one, thus diminishing the degree of satisfaction and commitment."[52] But, the concern of coercion can be found in traditional mediation. The mediator could pressure the parties to reach a settlement for various reasons. Because of this, coercion in this context is not a concern that is inherent to med-arb. To compensate for this concern, it is important that the neutral third-party fully explain and inform the parties of med-arb so they can make a "free and informed choice" to go through the process.[53] Additionally, it is important that neutral third-party act as an mediator during mediation; meaning, the mediator should guide the parties through the process and not coerce them into an agreement.

The other concern of med-arb is confidentiality. In this context, confidentiality relates to "confidential information gained during mediation [being used to] inappropriately influence . . . the neutral during arbitration."[54] This issue is of particular concern when there are caucuses during mediation because the neutral third-party gains information from the parties that the parties do not want to share in joint-session. The parties are sharing this information typically in confidence that it will not be told to the other party and in trusting the neutral third-party to keep the information confidential. Also, the sharing of information is to provide more knowledge to the neutral third-party. As a result, the parties do not want the information to go against them if the dispute is moved to arbitration. Like the coercion concern, the confidentiality concern can be mitigated as well. The confidentiality concern can be mitigated by having the parties only discuss the dispute in joint-session.[55] Doing so will allow information to be placed in front of the parties. So, if the dispute is moved to arbitration, the parties can feel confident that any unfavorable information told in trusting the neutral third-party will not hurt them in arbitration because it will not exist. The neutral third-party should seek approval from the parties for a joint-session mediation. If the parties agree then expectations can be met and trust in the neutral third-party has a chance to begin.[56]

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51. *Id.* at 5.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*

Similarly, it is imperative that the neutral third-party understands the roles and differences between mediation and arbitration. When the neutral third-party understands the differences, then he will be able to compartmentalize his role as the mediator and then his role as the arbitrator. Understanding the differences between mediation and arbitration, will not impede on either process, but will rather ensure that mediation and arbitration is executed in an impartial way that works in the best interest of the parties.

Med-Arb can be an effective tool in resolving disputes in professional sports compared to mediation or arbitration as a stand-alone procedure. The med-arb process in professional sports can ensure fairness, effectiveness in both time and cost, and flexibility. Therefore, med-arb should be considered as a viable option in resolving professional sports disputes.

IV. APPLICABILITY OF MED-ARB IN AMERICAN PROFESSIONAL SPORTS

To provide an explanation of why med-arb could—and should—be applied in disputes involving professional sports, it is perhaps useful to show the applicability of the process to notable disputes within two American professional sports leagues: Major League Baseball (MLB) and the NFL.

A. Med-Arb and Major League Baseball

In 2017, the Arizona Diamondbacks, an MLB team, sued Maricopa County ("the County") so that the team could break its lease at Chase Field in Phoenix, Arizona, due to repairs and renovations that were needed at the nineteen-year-old ballpark that were not given for the team to continue playing at the ballpark.[57] Representatives of the County stated that the alleged $187 million in renovations and repairs were the responsibility of the Diamondbacks.[58] Whereas, the MLB team claimed that it is the County's responsibility because of the severity of the repairs.[59] The dispute stemmed from two situations in June: (1) a sanitation pipe burst in an office, and (2) the air-conditioning system failing after a downtown-wide power surge.[60] The

57. Rebekah L. Sanders, *Arizona Diamondbacks Sue Maricopa County to Explore Leaving Chase Field*, AZCENTRAL, Jan. 5, 2017, https://www.azcentral.com/story/news/local/phoenix/2017/01/03/arizona-diamondbacks-sue-maricopa-county-chase-field/96129136/. The team was in a lease with the County because the County owned the ballpark. *Id.* One of the terms in the lease "prevent[ed] the team from talking with outside groups until 2024, and require[d] the team to play in its current home until 2028." *Id.*

58. *Id.*

59. *Id.*

60. Rebekah L. Sanders, *Could MLB Move Diamondbacks Over Stadium Conditions?*, AZCENTRAL, Aug. 2, 2017, http://www.azcentral.com/story/news/local/phoenix/2017/08/02/arizona-diamondbacks-chase-field-mlb-move-stadium-conditions-repairs/527199001/.

County relied heavily on an arbitration clause in the lease between the County, who owns Chase Field, and the MLB team to force the dispute to arbitration.[61] The parties went to court to determine whether the dispute will be decided through litigation or arbitration as outlined in the lease.[62]

A couple weeks later, a judge ruled that the dispute will go to arbitration.[63] Additionally, the judge decided that the dispute would go through mediation first and asked Arizona Court of Appeals Judge Peter Swann to act as a mediator so that a conversation could occur between the Diamondbacks and the County to decide the structure of the arbitration process.[64] But, "[w]ith the consent of both parties, Judge Swann suggested an effort to mediate the larger issues in dispute."[65] As a result, the County reached a deal with the Diamondbacks.[66] The team agreed to terms that "allows the[m] . . . to immediately begin looking for another home if [the Diamondbacks] drop[] [the] lawsuit."[67] The team can leave Chase Field starting in 2022, which is five years earlier than what the Diamondbacks were allowed under their current contract with the County.[68] Although it appears that the team and the County reached a resolution to their long-standing dispute, what if the lease had a clause that could have possibly resolved their dispute in more timely manner? What if the team and the County had a lease that contained a med-arb clause?

If there was a med-arb clause in the lease agreement, then the dispute may have been resolved before resorting to any court action.[69] Mediation would have

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61. *Id.*

62. *Id.*

63. Mike Sunnucks, *Judge Sends Chase Field Fight Between Diamondbacks, County to Arbitration*, PHX. BUS. J., August 17, 2017, https://www.bizjournals.com/phoenix/news/2017/08/17/judge-sends-chase-field-fight-between-diamondbacks.html.

64. Rebekah L. Sanders, *Arizona Diamondbacks Strike Deal with County Over Chase Field*, AZCENTRAL, May 9, 2018, https://www.azcentral.com/story/news/local/phoenix/2018/05/02/arizona-diamondbacks-strike-deal-maricopa-county-over-chase-field/574593002/.

65. Memorandum from Gammage & Burnham, P.L.C. to Maricopa Stadium District Bd. of Dirs. (May 2, 2018), https://drive.google.com/viewerng/viewer?url=https://www.maricopa.gov/DocumentCenter/View/37915/Chase-Field-Settlement-Proposal-05022018.

66. *Id.*

67. Sanders*, supra* note 64.

68. Rebekah L. Sanders, *Arizona Diamondbacks Stadium: County Approves Chase Field Out Clause*, AZCENTRAL, May 9, 2018, https://www.azcentral.com/story/news/local/phoenix/2018/05/09/arizona-diamondbacks-stadium-county-approves-chase-field-deal/594820002/.

69. It should be noted that construction disputes, similar to the Diamondbacks dispute, are usually resolved through a combination of dispute resolution methods, such as mediation with either arbitration or litigation. *See* Robert J. Miletsky, *Choose the Right Construction Dispute Resolution Method*, INT'L RISK MGMT. INST., INC. (IRMI) (Dec. 2015), https://www.irmi.com/articles/expert-commentary/construction-dispute-resolution; *see also* Thomas Stipanowich, *Beyond Arbitration: Innovation and Evolution in the United States Construction Industry*, 31 WAKE FOREST L. REV. 65, 69 (1996).

provided the parties with an informal setting to discuss any and all issues related or unrelated to the dispute that could be causing tension.

In this situation, the neutral third-party would begin the discussion with an opening statement, which would set the stage for mediation. In the opening statement, it would be wise for the neutral third-party to have both parties agree that all discussion of the dispute(s) will be held in joint-session. There will not be a caucus or privately-held meetings during mediation with the neutral third-party. Thus, not invoking any confidentiality issues in terms of private information being held against one party over the other party if the dispute advances to arbitration. After the opening statement, information about the process, and discussion of any mediation rules, the neutral third-party will accumulate information by hearing each party's concerns. From there, the neutral third-party will set an agenda and tackle each issue that is raised by the parties so there is no issue left untouched. Even though the neutral third-party has set the agenda, he will not force the parties to reach an agreement. The neutral third-party will simply guide the discussion along while trying to follow the agenda. If the parties want to speak on an issue that is not within the order of the agenda, then there is flexibility in the process for the parties to do so.

If the parties are able to resolve the dispute(s), then there will be no need for arbitration. If that is the case, then the neutral third-party will close the mediation session and draft an agreement to the disputed issue(s). But in the situation between the Diamondbacks and the County, the need for arbitration may be necessary so that there is a binding agreement that can be enforced. However, mediation is still useful in this situation because it allows the parties to generate discussion and lay out all the issues they have in an informal process.

The arbitration hearing will be more formal and will have witness testimony as well as prehearing procedures that the arbitrator deems necessary for the hearing. The hearing may take days or months, but with the issue of repairs and renovations, it may be an expedited process. So, the dispute will be resolved sooner than in a typical arbitration. The parties will present their case, similar to litigation, and the neutral third-party will deliberate and provide an award. The benefit of the neutral third-party serving as the mediator in mediation is that the he already has the foundation for understanding the dispute. This is a benefit because the neutral third-party may not need as much pre-hearing procedures to declare an award. Therefore, time and cost will decrease because the neutral third-party does not need to gather as much independent information or research to reach an understanding of the facts in the dispute and to provide an award.

In the interest of time, cost, and flexibility, med-arb could provide the parties with a faster way to reach a resolution because the process is already outlined for the parties. This means that the parties know what the next step is if mediation does not provide a resolution. Also, the "arbitrator" is known to

the parties because the "arbitrator" will be the same neutral third-party that was used in mediation. As a result, the parties will not need to dedicate time and additional expenses to find a knowledgeable, experienced arbitrator to make a final decision. Med-arb could provide the parties with an expedited process that can cut the cost and time in reaching a resolution while still preserving the parties' ongoing relationship.

B. Med-Arb and the National Football League

On Sunday, January 18, 2015, the New England Patriots won the AFC Championship game against the Indianapolis Colts.[70] The Patriots, led by quarterback Tom Brady, defeated the Colts in a final score of forty-five to seven.[71] In the second quarter of the game, Colts linebacker D'Qwell Jackson found the football that he intercepted "unusual."[72] Jackson gave the football to a Colts equipment staff member.[73] The staff member told the Colts head coach that the football appeared to be underinflated.[74] For the second half, officials replaced the twelve first half footballs with twelve backup footballs that were approved before the game started.[75] Two days later, an ESPN reporter issued a statement that eleven out of the twelve footballs used in the first half were "significantly underinflated."[76] Patriots head coach and owner addressed the media on several occasions and repeatedly declared that they nor the team had anything to do with possible deflated footballs. Less than a month later, the Patriots won Super Bowl XLIX.

The Wells report was released on May 6, 2015.[77] The findings from the report showed that it was "more probable than not" that the Patriots "deliberately deflated footballs during the AFC Championship Game, and that

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70. *Timeline of Events for Deflategate, New England Patriots QB Tom Brady*, ESPN (July 15, 2016), http://www.espn.com/blog/new-england-patriots/post/_/id/4782561/timeline-of-events-for-deflategate-tom-brady [hereinafter *Deflategate Timeline*].

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *See* THEODORE V. WELLS, JR. ET AL., INVESTIGATIVE REPORT CONCERNING FOOTBALLS USED DURING THE AFC CHAMPIONSHIP GAME ON JANUARY 18, 2015 (2015), https://www.documentcloud.org/documents/2073728-ted-wells-report-deflategate.html; *see also* Around the NFL Staff, *Key Takeaways from Ted Wells Report*, NFL (May 6, 2015), http://www.nfl.com/news/story/0ap3000000491524/article/key-takeaways-from-ted-wells-report. *But see The Background and Myths of "Deflategate" – Separating Fact from Fiction*, WELLS REP. CONTEXT, https://wellsreportcontext.com (last visited May 9, 2019); John Breech, *Patriots Bash NFL, Tear Apart Wells Report with 15 'Myths' of Deflategate*, CBS SPORTS (Mar. 12, 2016), https://www.cbssports.com/nfl/news/patriots-bash-nfl-tear-apart-wells-report-with-15-myths-of-deflategate/.

Brady was probably 'at least generally aware' of the . . . violations."[78] Evidence was found that verified suspicions that Brady was involved in the scheme to deflate footballs. Several days later, NFL Commissioner Roger Goodell suspended Brady for four games.[79] Brady appealed his suspension and wanted a neutral arbitrator to hear the appeal. But, the Commissioner decided that he would hear the appeal, which sparked controversy because Goodell decided the outcome of Brady's involvement in "deflategate." Goodell cited his authority to hear the appeal based on language in the collective bargaining agreement.[80] In a letter to the National Football League's Players Association, Goodell said that he can "serve as [a] hearing officer in any appeal involving conduct detrimental to the integrity of the game."[81] Goodell upheld the suspension, but a U.S. District Judge ruled that Goodell overstepped his authority. The judge's ruling effectively vacated Goodell's decision, which caused Brady's suspension to no longer exist.[82] The NFL appealed the court's decision and the United States Court of Appeals reinstated the suspension.[83] Brady appealed the decision, but it was denied by the Court of Appeals.[84] And so, Brady's four game suspension was reinstated.[85]

The major controversy from the arbitration process of Brady's appeal stems from the fact that Goodell heard an appeal of a suspension he created. Goodell would not recuse himself as an arbitrator despite efforts to influence him to hire a neutral third-party to hear the appeal.

Assuming that Goodell cannot be a mediator and the language of Goodell being able "to serve as a hearing officer" does not apply to mediation, then med-arb could have been the better dispute resolution process. Mediation would have been the first step in the process to resolve the issue of Brady's suspension in addition to any other issues that may have been present at the time. Other issues could have been heard because mediation is a flexible approach that is not confined to demands or joint submissions nor answers. So, if Brady had an issue with the way "evidence" was found that implicated him, he could have addressed that in mediation. The mediation process would follow the same general progression described above. Comparable to the above MLB

78. *Deflategate Timeline*, *supra* note 70.
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*

dispute, this dispute may not be resolved in mediation. With that said, the next step would be arbitration.

In arbitration, Goodell would not be the arbitrator. The neutral third-party that acted as the mediator would serve as the arbitrator. This characteristic of med-arb would diminish concerns over any bias in the process, especially if the neutral third-party was approved by both Brady and the NFL. The arbitrator would hear both parties speak about the issue and examine all the presented evidence. The neutral third-party would then deliberate and come to a decision. The final action from the arbitrator would be to render an award that can be enforceable in court. This process would have been beneficial for the "deflategate" situation because Goodell would most likely not serve as a mediator. So, a neutral third-party would have to be appointed. Additionally, this neutral party would be agreed upon by both parties. Furthermore, the neutral third-party would presumably have the knowledge and experience necessary to not only render an award on Brady's suspension, but also the knowledge and experience necessary to compartmentalize the role as a mediator and then as an arbitrator.

Med-arb also would have been beneficial in the "deflategate" situation because there would not have been a need to go to court after the award was rendered. The reason the U.S. District Court judge ruled in favor of Brady was because the judge found that Goodell exceeded his powers as an arbitrator. If med-arb was the dispute resolution process and Goodell could not serve as the mediator, then there would not have been a need to get the courts involved. Assuming the neutral third-party acted in a manner that was ethical, listened to each party's argument, and viewed presented evidence, then it can be inferred that the neutral third-party would not have exceeded his powers. Thus, going to court would not have been necessary unless there was a need to enforce the arbitration award.

By implementing med-arb in this dispute, time would have been saved in rendering a decision on the appeal and in not going to court. Monetary costs would not have been as great because the neutral third-party would have been appointed before mediation would have begun. Finally, the flexibility in med-arb would have been beneficial because the parties would have had the ability the decide when it was the appropriate time to go to arbitration if the dispute was not resolved in mediation. The flexibility in the approach may have preserved the existing and ongoing relationship between Brady and Goodell. Both parties had an interest in resolving the dispute as quick as possible and based on the timeline of events, med-arb could have been the best process if it was implemented instead of only arbitration.

V. MED-ARB AND THE INTERNATIONAL APPROACH

Professional sports organizations can use the Court of Arbitration for Sport as a resource for arbitration and mediation. "The Court of Arbitration for Sport (CAS) is an institution independent of any sports organization which provides for services in order to facilitate the settlement of sports-related disputes through arbitration or mediation by means of procedural rules adapted to the specific needs of the sports world."[86] The CAS has about 300 arbitrators across the globe that can resolve sports-related disputes.[87] Additionally, the CAS arbitrators have knowledge and expertise in sports law and arbitration.[88] So, the general concern of whether an arbitrator is qualified to hear a specific sports dispute may not be at issue if the CAS arbitrators are employed. There is not a limit on what kind of sports disputes can be submitted to the CAS nor who can submit a dispute to CAS.[89]

An issue professional sports organizations may have in using the CAS, as it applies to implementing med-arb, is the fact that CAS generally hears disputes "only if there is an arbitration agreement between the parties [that] specifies recourse to the CAS."[90] Moreover, the CAS hears disputes related to two main categories of "those of a commercial nature, and those of a disciplinary nature."[91] Therefore, if a professional sports dispute does not fall under one of those two categories, then the CAS may reject the submission of the dispute.

An additional issue could be buy-in for both American professional sports organizations and the CAS. American sports organizations may not be willing to implement a med-arb provision that has CAS as the primary resource to resolve specific disputes. In comparison, the CAS may not be willing to be that

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86. *Frequently Asked Questions*, TAS/CAS TRIBUNAL ARBITRAL DU SPORT, COURT ARB. SPORT, http://www.tas-cas.org/en/general-information/frequently-asked-questions.html (last visited May 9, 2019).

87. *Id.*

88. *Id.*

89. *Id.*

90. *History of the CAS*, TAS/CAS TRIBUNAL ARBITRAL DU SPORT, COURT ARB. SPORT, https://www.tas-cas.org/en/general-information/history-of-the-cas.html (last visited May 9, 2019).

91. *Id.* The first category of disputes that deal with issues of a "commercial nature" covers a broad range of disputes such as:

> [T]hose relating to sponsorship, the sale of television rights, the staging of sports events, player transfers and relations between players or coaches and clubs and/or agents (employment contracts and agency contracts). Disputes relating to civil liability issues also come under this category (e.g. an accident to an athlete during a sports competition).

Id. The second category of disputes that deal with issues of a disciplinary nature covers drug-related disciplinary matters such as doping and other disciplinary matters such as "violence on the field of play, [and] abuse of a referee." *Id.* Disputes within the second category "are generally dealt with in the first instance by the . . . sports authorit[y], and subsequently become the subject of an appeal to CAS, which then acts as a court of last instance." *Id.*

primary resource due to the intricacies within American professional sports leagues CBAs and the fact that implementing this change could be a slow-moving process that may not be worth the investment in the long-run. Also, typically the CAS uses a panel of three arbitrators.[92] Professional sports organizations may have an issue with the three arbitrator panel because mediation is the first step of med-arb and more times than not, mediation involves only one neutral third-party. However, the CAS does allow for a single arbitrator to be appointed "[i]f the parties agree, or if the CAS deems [it] appropriate . . . depending on the nature and importance of the case."[93]

An additional issue that professional sports organizations may have in using the CAS for med-arb is that disputes in appealing a disciplinary ruling from a league do not have the same specific confidentiality rules as "ordinary arbitration procedures" (e.g. contract disputes).[94] Because of this, the CAS can publish the arbitral award unless the parties state that they want all matters of the arbitration confidential, including the award.[95]

The benefit in using the CAS is that the neutral third-party will be independent.[96] This means that the neutral third-party does not have an existing relationship with the parties who are involved in the dispute.[97] The independent arbitrator aspect of the CAS limits some apprehension in an arbitrator being bias because he was appointed by a party or has an existing or past relationship with one of the parties, which could sway his decision in favor of that one party over the other.

Another positive of the CAS is the arbitration or mediation procedure is governed by CAS rules and procedures. As a result, the parties involved do not have to do any additional work like appointing an arbitrator or figuring out which set of laws apply to the dispute. Also, the CAS has an expedited process for arbitration, which can accelerate the hearing and rendering of an award, if necessary.[98]

Overall, the CAS is equipped to handle sports-related disputes. In possibly implementing med-arb, the CAS may be a good option to handle the dispute. However, it is unclear whether the CAS would agree to appoint a neutral third-party that could serve as both a mediator and arbitrator. Moreover, it is unclear whether the nearly 300 neutrals have a background in both arbitration

92. *Frequently Asked Questions*, *supra* note 86.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

and mediation.[99] Even if one of the neutrals does have a background in both mediation and arbitration, it is not known if the neutral would be able to transition to an arbitrator if the dispute makes it to that stage. The unknowns of the CAS, as it relates to med-arb, might make parties decide to appoint their own neutral third-party who has the reputation of competently being able to engage in both dispute resolution processes. If parties decide to go their own route, then bias, confidentiality, etc. have a greater risk of concern. Also, parties would be responsible in deciding the procedural and administrative aspects of med-arb and rules that will govern. If the CAS is not used, then parties may have to dedicate more time, resources, and effort in resolving their despite. Whereas, the CAS is prepared and equipped to resolve the dispute only if the CAS can expand its use and facilitate a med-arb process.

VI. CONCLUSION

The two situations described above in professional sports were provided as examples to show how single-neutral med-arb could be a beneficial tool for professional sports disputes. The situations were provided to illustrate how single-neutral med-arb can apply in professional sports despite the unique nature of the dispute. In some cases, the arbitration part of single-neutral med-arb will not be utilized because the dispute will be resolved in mediation based on the fact that in some situations, disputes are matters of misunderstanding between the parties. On the other hand, some disputes will be resolved in the next phase of the process—arbitration. In either situation, the dispute will be resolved through a process that is arguably more efficient in terms of cost and time and provides flexibility for the parties. For that reason, a process that provides for both mediation and arbitration is needed.

Those against implementing single-neutral med-arb in professional sports might argue that the process is not efficient and may take longer because it is two processes wrapped in to one. Depending on the nature and complexity of the dispute, single-neutral med-arb could be a more effective process. Essentially, single-neutral med-arb may prove to reduce time in the dispute resolution process in professional sports because if the dispute can be resolved in mediation, then the process is completed. If the dispute is not resolved in mediation, and another method of dispute resolution is needed; then, arbitration—along with the arbitrator—is immediately available. And if the dispute does go to arbitration, the arbitrator has the basic information as to the

99. *Id.*

series of events that gave rise to a dispute between the parties.[100] As such, if the same mediator is used as an arbitrator, then the arbitration process can perhaps be expedited as there could be little to no information gathering during the arbitration. Another point of opposition may be that there is not an appeals process in med-arb if it goes to arbitration. Although this is true, the parties might have more of an incentive to reach a resolution in mediation due to the emphasis in mediation on the *parties* reaching an agreement through a discussion and coming to an understanding of the dispute. Another point is that the parties will be informed and will have consented to arbitration being the next step in the dispute resolution process if an agreement is not reached in mediation. With that said, the parties know that a binding agreement will likely result in an arbitration hearing; so, any potential surprise in arbitration resulting in a binding award is mitigated. Likewise, potential surprises that an arbitration award is final and enforceable is likely to be mitigated too.

In sum, med-arb should be considered for implementation in professional sports because the process may fit the interests of all parties involved in the dispute. The fast-paced nature of professional sports fits the quick and efficient nature of med-arb as a dispute resolution process. Issues of buy-in, implementation concerns because of the CBA in each respective sport, and concerns about experienced mediators/arbitrators are likely to exist at the inception of implementing single-neutral med-arb. But, as long as players and respective leagues agree on the implementation of med-arb, and the process does not conflict with policies provided for in respective CBAs, then single-neutral med-arb should be implemented and may be the preferred dispute resolution process depending on the nature and complexity of the specific dispute.

By no means is single-neutral med-arb the one-stop shop in a dispute resolution process for professional sports teams. Single-neutral med-arb is instead a possible effective and efficient method that professional sports teams should consider in resolving various disputes. Parties may feel more comfortable knowing that a flexible and efficient dispute resolution process, which may limit confidentiality and coercion, awaits them.

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100. In single-neutral med-arb, this point of the arbitrator knowing the basic information of the dispute is an area of issue if the arbitrator, while acting in the role as a mediator, was able to learn confidential information during a caucus. By learning this confidential information, the arbitrator could have formed a bias against one of the parties, know too much about the dispute to render an objective award, or may have determined the "winner" of the dispute solely based on what happened in mediation. As such, it is important that if single-neutral med-arb is used, that the parties agree before mediation that the use of a caucus will not be allowed. In sum, the parties will have to agree to certain aspects of mediation so that the mediator-turned-arbitrator will not have ex parte communications with either party.