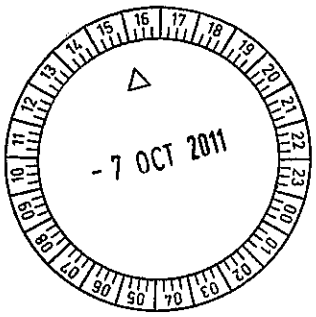
Jewell, Renae

Submission 7

From: Philip Evans [P.Evans@murdoch.edu.au]
Sent: Friday, 7 October 2011 2:53 PM
To: Jewell, Renae
Cc: Gabriel Moens
Attachments: MJBLV6_265.pdf

PUBLIC
upon tabling of Committee's Report

Dear Ms Jewel
I refer to the letter dated 23 September 2011 from the Hon Adele Farina MLC inviting comments on section 27D of the *Commercial Arbitration Bill* 2011. Professor Gabriel Moens, the Pro Vice Chancellor of the Faculty of Law, Business and IT, and I have previously written on the operation of and issues arising from section 27 of the *Commercial Arbitration Act 1985* (WA). Our comments are still relevant in the context of the new section 27 (including section 27D(7)) and I have attached a copy of a journal article written in 2009 by Professor Moens and myself on the section.



Kind Regards

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REFLECTIONS ON THE ROLE OF MEDIATORS AND ARBITRATORS CAN A GOOD MEDIATOR ALSO BE A GOOD ARBITRATOR?

PHILIP EVANS AND GABRIËL MOENS*

I INTRODUCTION

On 1 January 2008, a National Mediator Accreditation System (NMAS) came into operation in Australia. (1) Mediators can now apply to be accredited by a Recognised Mediation Accreditation Body (RMAB) which will assess applicants under uniform Practice and Approval Standards in relation to mediator competence, including education, training, experience and insurance, as well as a commitment to continuing training. (2)

However, NMAS does not apply to international commercial mediations. It is for this reason that Australia's pre-eminent international arbitration centre, the Australian Centre for International Commercial Arbitration (ACICA), need not be accredited as an RMAB. Indeed, in accordance with its recently adopted Mediation Rules, ACICA is only involved in international commercial mediation. Nevertheless, ACICA is considering a number of recommendations prepared by its Director for Arbitration, with respect to the development of a Mediation Panel. The recommendations deal, among other things, with accreditation standards for mediators and the training required for accreditation of aspiring mediators. These recommendations generated a number of interesting and controversial comments. For example, a reputable arbitrator stated: "I believe that the mediator accreditation system is generally speaking nonsense and simply an excuse for various organisations to make money by training mediators." Importantly, he added: "I know that my views will be regarded by many as heretical if not outrageous, but I imagine that a number of others can confirm that they have experienced quite

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1. NMAS is described on the website of the National Alternative Dispute Resolution Advisory Council (NADRAC) as "an industry based scheme which relies on voluntary compliance by mediator organisations that agree to accredit mediators in accordance with the requisite standards." (www.nadrac.gov.au accessed on Sunday, 5 April 2009).
2. Hong Kong is considering the introduction of an accreditation system similar to the Australian system.

hopeless accredited mediators, while there are others without accreditations that are very helpful to parties seeking to resolve disputes." [3]

This view, supported by many commentators, suggests that any technical mediation training could only have a limited impact on a mediator's performance and that a person without appropriate *personal* qualities is unlikely to be a good mediator. These qualities presumably include, but are not limited to, an ability to facilitate a discussion between the parties that leads to an amicable resolution of the dispute. In contrast, it is generally accepted that specialised training and knowledge about arbitration law as well as relevant arbitration experience and practice are essential to becoming a good arbitrator who is able to render a binding and enforceable award.

Although it is theoretically possible for a good mediator to also be a good arbitrator, the question should be asked whether it is appropriate to perform both roles in the same dispute or even to act as a mediator in some disputes and as an arbitrator in other cases. In answering this question, we will argue that mediators cannot realistically respect the rules of natural justice when seeking a settlement by mediation (or conciliation) because these rules are largely incompatible with the efficient conduct of mediation. In contrast, arbitrators are expected to rigidly adhere to these rules because their breach would invariably result in the setting aside of the arbitral award. Section 42(1)(a) of the *Uniform Commercial Arbitration Act* 1985 (the Act) provides the Supreme Court with the power to set aside an award where there has been misconduct on the part of the arbitrator. Section 4 of the Act includes a breach of the rules of natural justice in the definition of misconduct.

In the development of this argument, this paper provides examples of domestic legislation which indicate that, at law, there are no obvious impediments to a person performing the dual role of mediator and arbitrator in the same dispute. Next, the effect of requirements of natural justice in arbitration and mediation hearings will be considered. This will be followed by a discussion of two cases which illustrate the dangers involved in dispute resolution professionals providing mediation and arbitration services. Finally, it will be argued that the clearly distinct roles of mediators and arbitrators, as reflected in their attitudes to rules of natural justice, militate against a combination of these roles.

II THE LEGAL SITUATION

Section 27(1) of the Uniform Australian *Commercial Arbitration Act* 1985 stipulates, in part, that (i) parties to an arbitration agreement "may seek settlement of a dispute between them by mediation, conciliation [4] or similar means" and (ii) may authorise an arbitrator to act as a mediator or conciliator "whether before or

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3 Personal communication. Contained in an email message of 4 February 2009 sent to Professor Gabriël Moens and ACICA Members.

4. It has been suggested that under the *Commercial Arbitration Act*, there is no difference between 'mediation' and 'conciliation'. See Sir Laurence Street, "Commercial Mediator" (1993) 12(1) *The Arbitrator* 7.

after proceeding to arbitration, and whether or not continuing with the arbitration". In addition, if an arbitrator acts as a mediator and the mediation fails to produce a settlement of the dispute acceptable to the parties, "no objection shall be taken to the conduct by the arbitrator ... of the subsequent arbitration proceedings solely on the ground that the arbitrator" had previously acted as a mediator in the dispute.[5] This section of the Act recognises that, although the arbitrator is permitted to conduct arbitral proceedings under the agreement "in such manner as the arbitrator ... thinks fit" [6], the parties may request a more expeditious or alternative settlement procedure, unless the arbitration agreement states otherwise. Consequently section 27 of the Act provides a legitimate alternative to achieve a resolution to the dispute.

Similarly, in Singapore, s 62(3) of the *Arbitration Act* (Cap. 10) states that, "Where an arbitration agreement provides for the appointment of a mediator and further provides that the person so appointed shall act as an arbitrator in the event of the mediation proceedings failing to produce a settlement acceptable to the parties – (a) no objection shall be taken to the appointment of such person as an arbitrator, or to this conduct of the arbitral proceedings solely on the ground that he had acted previously as a mediator in connection with some or all of the matters referred to arbitration." This provision is based on s 16 of the Singaporean *International Arbitration Act* (CAP 143A, 2002 ed) but the corresponding reference in that Act is to a 'conciliator'. However, s 16(5) indicates that "any reference to 'conciliator' shall include a reference to any person who acts a mediator."

In addition, the *Arbitration Act* (Cap. 10) stipulates in s 63 that, "If all parties to any arbitral proceedings consent in writing ... an arbitrator may act as a mediator." It also states that, "No objection shall be taken to the conduct of arbitration proceedings by a person solely on the ground that that person had acted previously as a mediator in accordance with this section." In accordance with s 63(3) the mediator-turned-arbitrator must nevertheless be careful to balance disclosure of confidential information, obtained during the mediation, with materiality in the arbitration proceedings.

The Hong Kong *Arbitration Ordinance*, Section 2B similarly stipulates that an arbitrator may act as a conciliator, provided all parties to the reference consent in writing and for so long as no party withdraws in writing his consent. When acting as a conciliator, an arbitrator may communicate with the parties to the reference collectively or separately and shall treat information obtained by him from a party in confidence. However, if the conciliation fails and it is terminated, the arbitrator shall before resuming arbitration proceedings disclose to all other parties to the reference as much of the information as he considers is material to the arbitration

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5. *Commercial Arbitration Act* 1985, s. 27(2).
6. *Ibid.*, Section 14. It should be noted however that in conducting the arbitration in the manner the arbitrator thinks fit, the arbitrator is still bound by the rules of natural justice. See *Oldfield Knott Architects Pty Ltd v Ortiz Investments Pty Ltd* [2000] WASCA 225

proceedings. In addition, no objection shall be taken to the conduct of arbitration proceedings by an arbitrator solely on the ground that he had acted previously as a conciliator.

Interestingly, the Australian, Singaporean and Hong Kong law shares the common rule that a person cannot be precluded from acting as an arbitrator on the sole ground of his having previously mediated in the dispute. Of course, these domestic provisions still leave it to the parties to the dispute to allow a mediator or conciliator to act as an arbitrator and, hence, this rule does not constitute a mandatory provision. As such, it does not answer the question of whether there are any arguments which militate against a person embracing this dual role of mediator and arbitrator. As is argued later in this paper, the extent to which rules of natural justice are adhered to by mediators and arbitrators points to the existence of two distinct professions. In particular, this paper focuses on two rules of natural justice which arbitrators are expected to respect (and which mediators cannot realistically respect) in order to avoid the appearance of bias or partiality. In addition, this paper also provides an example of how a combining of the function of mediator and arbitrator could result in an abuse of the doctrine of arbitral immunity. These issues are illustrated by reference to two recent cases which were decided in California in 2006. However, before discussing these cases, the legal concepts and application of natural justice in the context of arbitration and mediation proceedings will be discussed.

III WHAT IS NATURAL JUSTICE?

By way of example, section 4 of the *Commercial Arbitration Act* 1985 refers to natural justice in the definition of misconduct. Misconduct includes "corruption, fraud, partiality, bias and a breach of the rules of natural justice" rather than any concept of personal or moral turpitude on the part of the arbitrator. The term appears to be in effect a term of art and one which the inclusive definition of section 4 does not succinctly define. As Brooking J commented in *Stannard v Sperway Constructions Pty Ltd* [7]: "It is rather like an elephant, we know it when we see it. If we are in doubt we may gain assistance from the books, where we will however, find no rigid definition of the species".

Natural justice consequently is a term loosely used, and not all that well understood, by arbitrators and mediators. The rationale for the rules of natural justice is to ensure that procedures used by dispute resolvers are fair and impartial. A breach of the rules of natural justice in arbitrations will generally lead to the invalidity of that decision, resulting in the arbitral award being either overturned or remitted back to the arbitrator. By comparison the effect of a breach of the rules of natural justice in mediation is far from clear, if in fact even relevant.

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7. [1990] VR 673

A *When do the Rules of Natural Justice Apply?*

Clearly the rules will apply where an Act or arbitration agreement includes an express provision for their application. Some assistance regarding whether the rules of natural justice need to be applied, in the absence of an express statutory requirement, can be found in Mason J's judgement in the High Court of Australia in *Kioa v West*: [8] "[t]he law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness [that is, natural justice], in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of contrary statutory intention." While this statement undoubtedly relates to administrative decision making generally, it may be inferred that the rules of natural justice not only apply to arbitral proceedings but also to mediation hearings where clearly the parties' interests are at stake.

B *What are the Rules of Natural Justice?*

Common law courts have developed two rules of natural justice to ensure the fairness and impartiality of the decision making process. These rules are known as the hearing rule and the rule against bias. The bias rule is discussed below in this paper in the case of *Guseinov v Burns*. [9] Essentially, the rule requires that not only should a decision-maker act impartially, but that the decision-maker should appear to be acting impartially. Therefore, arbitrators should disqualify themselves if they have an *actual* interest in the decision they are charged with making; or where a fair minded and objective bystander would entertain a "reasonable apprehension" that the decision-maker would not bring an impartial and unprejudiced mind to the decision. [10]

In the context of commercial arbitrations the hearing rule requires that a person whose legal rights will be affected by the decision be given an opportunity to be heard during the arbitration hearing. Alternately, if agreed by the parties, the arbitration hearing could be dispensed with and the award could be rendered by the arbitrator relying on documents tendered by the parties. What exactly is required of an arbitrator to comply with this rule will vary depending on the provisions of the relevant arbitration statute or the respective arbitration agreement. For example, the parties to the arbitration agreement could agree that the arbitrator may determine any issue that arises as *amiable compositeur* or *ex aqueo et bono*; that is by general justice and fairness, rather than according to law.[11] In this case the strict requirement to observe the rules relating to natural justice will be relaxed.

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8. (1985) 159 CLR 550 at 584.
9. 145 Cal. App. 4th 944, Dec. 15, 2006.
10. The rationale for the 'reasonable apprehension' limb of this rule is explained in *R v Sussex Justices; ex parte McCarthy* [1924] 1 KB 256 at 259 as follows: '[it] is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.'
11. See section 22(1) of the *Uniform Commercial Arbitration Act* (1985)

Further, the arbitral process involves the reception of evidence by way of hearing or on the documents by the neutral third party who proceeds to hand down a binding award on the basis of the evidence presented during the proceedings. The decision is based entirely on the legal rights and obligations of the parties arising from their contractual relationship. Put simply, it is rights-based unless the parties chose to have the issues determined on the basis of general justice and fairness. The process involves the strict application of the rules of natural justice.

C *Natural justice and the conduct of arbitrations*

In the conduct of arbitration, the principles regarding the application of natural justice have been well established. [12] They include:

- Never communicate with only one party;
- Never hear objections to submissions or arguments unless both parties are present;
- Never receive a submission, objection or argument without immediately seeking the response of the other party.

In essence, the arbitration process is rights-based because arbitrators, as decision-makers, make decisions which are based on the rights of the parties. This is so even if, at times, arbitrators are also permitted to make decisions as an *amiable compositeur*, hence, on the basis of 'justice' or 'fairness', however defined. Australian courts have rigidly applied these criteria and have shown a willingness to overturn arbitrator's awards for what we might describe as minor or technical breaches of the above principles.

A typical example occurred in the Western Australian case of *Shirley Sloan Pty Ltd v Merril Holdings t/a Airen Constructions* [13]. The parties agreed that the arbitrator should determine the issue on the documents without the need for oral submissions. In his award the arbitrator referred to the expert evidence reports and made his award predominantly of the basis of this evidence. However, as an aside, in his reasons for his determination he referred briefly to a technical document which had not been referred to by either party. The Claimant successfully appealed against the award on the basis that in referring to the document there had been a breach of the rules of natural justice by the arbitrator. [14]

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12. For example, see Standen, D., "Ethics and Professional Conduct in the Practice of Commercial Arbitrations" (1995) 13 (4) *The Arbitrator* 241.
13. [2000] WASC 99.
14. See also *Guistiniano Nominees Pty Ltd v Minister for Works* (1995) 16 WAR 87; *Du Toit* v Vale (1993) 9 WAR 138.

D *Natural justice and the conduct of mediations*

The conduct of mediation involves a process which significantly differs from that of arbitration. The essential features include:

- The use of a mediator, that is a neutral third party, who will not only meet with the parties jointly during the mediation but will also confer with the parties privately;
- An understanding by both the mediator and parties that the process is essentially "interest" based rather than "rights" based as is the case with arbitrations;
- The mediator assists the parties to achieve a legally enforceable settlement based on consensus and agreement generally without reference to legal rights or obligations by the parties.
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Comparing the two procedures further, the fundamental premise of arbitration is based on a process that rigidly adheres to the rules of natural justice and the legal rights of the parties in the determination of who will be the successful party. By comparison, if the mediator attempted to apply the rules of natural justice in assisting the parties reach a mutually agreed upon settlement, the process would and could not work. As the processes are so fundamentally different, they cannot be amalgamated.

The following cases illustrate some of the problems arising from situations where arbitrators have previously acted as a mediator for one of the parties in an earlier matter and where an arbitrator has attempted to seek a mediated settlement after an arbitration hearing has commenced.

IV NATURAL JUSTICE: THE NEED TO AVOID THE APPEARANCE OF BIAS OR PARTIALITY

Guseinov v Burns [15] dealt with a challenge arising out of an arbitration conducted under the *California Arbitration Act* (CAA). [16] The material facts were that the arbitrator had previously served as a volunteer mediator in an unrelated case in which counsel for the Claimant had acted for a party. The Appellant challenged the arbitrator's award on the ground that this previous service had not been disclosed by the arbitrator. This challenge, which was dismissed by the lower court, was appealed to the California Court of Appeals. The Court was required to address the threshold questions of what matters an arbitrator is compelled to disclose under the CAA and whether there were grounds for disqualifying the arbitrator for non-

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15. 145 Cal. App. 4th 944, Dec. 15, 2006. See Samuel Ross Luttrell, "Bias Challenges in International Commercial Arbitration: The Need for a 'Real Danger' Test", PhD thesis, Murdoch University, 19 September 2008, 184-186.
16. The CAA is comprised of s 1280 and following of the California Code of Civil Procedure (CCCP). In *Guseinov v Burns* the claims in the underlying dispute were based on both contract and tort.

disclosure. The Appellant asserted that the lower court should have vacated the award because the arbitrator did not disclose his professional relationship with the Claimant's counsel or his record of service as a dispute resolution neutral. The Appellant argued that non-disclosure of either fact would cause a reasonable person to doubt the arbitrator's impartiality.

The Court of Appeals rejected the Appellant's arguments. It held that the test for impartiality is objective, and is to be framed as a question of "whether the relationship would create an impression of bias in the mind of a reasonable person." [17] The Court applied a deferential standard in determining whether the arbitrator had a duty to disclose the particulars of his record as a mediator and his professional relationship with Claimant's counsel. [18] The Court applied these standards to each of the Appellant's contentions individually, finding that none were grounds for annulment of the arbitral award. The Court's decision was based on the fact that the arbitrator had not received any form of compensation for his work as a mediator and that he lacked the pecuniary interest necessary for disqualification. The Court of Appeals cited *Commonwealth Coatings Corp. v Continental Casualty Co* [19] as authority for the proposition that "ordinary and insubstantial business dealings do not necessarily require disclosure". [20]

The Court decided that the single prior contact (namely the uncompensated mediation) did not create a 'professional relationship' within the meaning of s.1297 of the CAA. There were no facts that would cause a reasonable person to entertain a doubt whether the arbitrator was impartial because (i) the arbitrator had not been paid for his prior services as a volunteer mediator, (ii) he had no independent recollection of the mediation proceedings, (iii) the mediation had occurred one year prior to the existing arbitration, and (iv) the mediation was the only previous contact between the arbitrator and the Claimant's attorney (there was no ongoing professional relationship).

Guseinov v Burns reveals that, although in this case the challenge to the award was unsuccessful, important issues relating to impartiality and bias are likely to be raised whenever a mediator, who has mediated a dispute in the past, is professionally acquainted with any of the parties (or their representatives) in arbitration. This certainly points to the incompatibility of the same person acting as a mediator and arbitrator.

17. *Guseinov v Burns*, 957.
18. *Ibid.*
19. 393 U.S.145 (1968).
20. *Guseinov v Burns*, 957.

V COMBINING THE FUNCTIONS OF ARBITRATOR AND MEDIATOR: THE NEED TO AVOID ABUSES OF THE DOCTRINE OF ARBITRAL IMMUNITY

Morgan Phillips, Inc v JAMS/Endispute, L.L.C. [21] also decided by the Californian Court of Appeals is an equally interesting case. Morgan Phillips had contracted with two suppliers of mattresses and box springs which were expected to be manufactured in accordance with Morgan Phillips's specifications. JAMS and Bates agreed to conduct a binding arbitration when it was alleged that the goods were not in conformity with these specifications. Bates was specifically informed that there was likelihood that Morgan Phillips would be unable to continue in business if the dispute was not settled expeditiously by arbitration. However, when all evidence had been presented Bates refused to render an award and proposed to continue his involvement in the dispute as a mediator. The Court stated that, "Bates acted with malice, oppression and specific intent to injure Morgan Phillips" because, in continuing as a mediator, Bates effectively coerced Morgan Phillips into settling the dispute. [22]

The claimant had previously argued in the Superior Court of Los Angeles County that Bates's refusal to render an award violated the arbitration contract. But the Superior Court had dismissed this argument on the ground that decisions made by an arbitrator are protected by the doctrine of arbitral immunity. However, the Court of Appeals decided that the doctrine of arbitral immunity does not apply in circumstances where the arbitrator fails to render an award at all. Indeed, the Court stated that although "The purpose of arbitral immunity is to encourage fair and independent decisionmaking by immunizing arbitrators from lawsuits arising from conduct in their decisionmaking role ... California common law has recognised a narrow exception to arbitral immunity: the immunity does not apply to the arbitrator's breach of contract by failing to make any decision at all." [23] The Court justified its decision by pointing out that "The failure to render an arbitration award is not integral to the arbitration process; it is, rather, a breakdown of that process." [24]

This case aptly alerts us to the dangers of allowing an arbitrator to assume the role of a mediator at will, thereby violating the arbitrator's obligation to render an enforceable award. As the Court decided, this violation cannot be cured by reliance on the doctrine of arbitral immunity. Commenting on this case, Mitchell Zimmerman states that, "in any case in which the neutral's role shifts between mediation and arbitration, the risks of misunderstanding, coercion and challenge may be reduced if the neutral and the parties explicitly define the neutral's intended

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21. 140 Cal. App. 4th 795, June 20, 2006; 44 Cal. Rptr. 3d 782. .
22. *Morgan Phillips, Inc. v JAMS/Endispute*, 798.
23. *Id.*, 800-801. The Court also criticized JAMS for advertising "to the general public that it employs arbitrators who make decisions in a timely and cost-effective manner. JAMS fails to disclose, however, that its arbitrators 'secretly retain the right' to abandon the arbitration 'for no lawful reason' without rendering an award": at 799.
24. *Id.*, 801.

role and put in writing any agreement to change that role." But even if the parties agree to the role change, "any shift from one role to the other will almost certainly generate not only power dynamics that are suspect, but also nontrivial ethical concerns", including perceived coercion and breaches of confidentiality. [25]

VI THE DISTINCT ROLE OF MEDIATORS AND ARBITRATORS

The importance of *Guseinov* and *Morgan Phillips, Inc.* is the assumption, underlying the reasoning of the Court, that the role of mediators and arbitrators is distinct and incompatible. The mediator's role, in essence, is to assess the demands of the parties to the dispute. If the demands of the parties are outrageous, a mediator will communicate that view to the parties. He will ensure that both sides understand the other side's case. Mediators must say what they think about each party's case (this might be done in camera or in a plenary session), but they still communicate their views to the parties without imposing a solution upon them. In a sense, the role of a mediator is not unlike that of a go-between, or to use an Indian analogy, as a 'bichola' (i.e. a person who fixes marriages between the parties).

In contrast, arbitrators cannot really perform the role of a mediator. Indeed, if arbitrators were to indicate how they feel about a party's case, they could, in most jurisdictions, be challenged for bias and partiality. This is because there will be an appearance of ultimate issue prejudgment if the arbitrator were to say, for example: "The Claimant has been very reasonable in mediation, and the Respondent rejected numerous good faith offers to settle, etc...". This would constitute a violation of the rules of natural justice. This is well illustrated in the Australian case of *Pindan Pty Ltd v Uniseal Pty Ltd* [26]. Uniseal wrote to the arbitrator during the course of the arbitration advising that they were in financial difficulties and would have problems in paying the arbitrator's fees. The arbitrator replied in part, that he "sincerely sympathised with Uniseal's position." This resulted in an application by Pindan to have the arbitrator removed for a reasonable apprehension of the possibility of bias.

Further, where a party's arguments, positions, personal or financial interests are revealed to the arbitrator while acting as mediator, the arbitrator when resuming the arbitration in the event of the mediation failing to result in settlement, could well be perceived to have been influenced by, or have some sympathy with, a party's situation. The arbitrator must really behave like a judge, who may be equally disliked but is impartial and unbiased, whereas the mediator is deemed to be a mutual friend of the parties. Hence, it may be concluded that a good mediator should not really act as an arbitrator, both in sequence or at once.

In Australia, the argument that mediators cannot really adhere to the rules of natural justice is complicated by s. 27(3) of the *Commercial Arbitration Act* 1985 which stipulates that, unless the parties otherwise agree in writing "an arbitrator ... is

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25. Mitchell Zimmerman, Beware the Dangers of Arbitrators Morphing Into Mediators, *San Francisco/Los Angeles Daily Journal*, 27 July 2006.
26. [2003] WASC 168

bound by the rules of natural justice when seeking a settlement" by mediation or conciliation. Additionally, s. 27(2) stipulates that, if an arbitrator acts as a mediator and the mediation fails to produce a settlement of the dispute acceptable to the parties, "no objection shall be taken to the conduct by the arbitrator ... of the subsequent arbitration proceedings solely on the ground that the arbitrator ... had previously taken that action in relation to the dispute." However, this wording does not imply that the rules of natural justice can be displaced. Natural justice is inherent in any process which affects one's rights, interests and legitimate expectations and can only be dispensed with in any legislation if expressly included.[27] No express wording, voiding the requirement of natural justice, is featured in the respective provisions of the Australian Act.

Also, if one considers the use of the word "solely' in s. 27(2) of the Act, it only suggests that no objection can be taken if the arbitrator subsequently resumes the arbitration in the event that the mediation fails. It does not expressly preclude objection on other grounds such as a breach of the rules of natural justice. [28] If this conclusion is correct, domestic arbitration law should be changed by making it clear that the roles of the mediator and arbitrator are largely incompatible with each other. Indeed, if the arbitrator does not strictly follow the rules of natural justice the rendered award will be subject to appeal. In contrast, if the mediator attempts to apply the rules of natural justice in mediation his role will be ineffective.

The role of the mediator is inconsistent with that of the arbitrator and if "mediation within arbitration" is to be contemplated, despite the current provisions in the Australian, Singaporean and Hong Kong Acts, the Acts should be amended to require different persons to carry out the separate functions. That this has not happened may be explained by the fact that the law assumes, perhaps correctly, that most disputes are amenable to settlement by mediation and that very few disputes will proceed to litigation or arbitration. This assumption is actually supported by a recent American survey which suggests that "In just 15 percent of all cases, both sides better their position at trial – that is, the plaintiff is awarded more than the defendant offered and the defendant paid less than the plaintiff demanded. In 85 percent of all cases that went to trial, one or both parties were worse off by rejecting the last settlement proposal."[29]

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27. See *Annetts v McCann* (1990) 170 CLR 596, 598
28. See A. Bradbook, Section 27 of the Uniform Commercial Arbitration Acts - A New Proposal for Reform (1990) 9 (3) *The Arbitrator* 107
29. Susan M. Hammer, Advising Clients on the Value of a Case: Let's *Not* Make a Deal, *Oregon State Bar Bulletin*, February/March 2009, 46-47.

VII CONCLUSION

The argument developed in this paper is that the roles of the mediator and arbitrator are distinct. While the rules of natural justice are integral to the arbitration process, they are largely obstructive and ineffective in the mediation process. Although a good mediator can theoretically be a good arbitrator, the ineffectiveness of the application of the rules of natural justice in the mediation process indicates that the roles of mediators and arbitrators are distinct and incompatible. Hence, domestic arbitration statutes should be amended to reflect this reality.